Sunnyvale

Memorandum

Date: 6/7/2021

To: Honorable Mayor and City Councilmembers

From: Trudi Ryan, Director of Community Development through, Kent Steffens, City Manager

Subject: RTC 21-0617 Related Actions: Lakeside Specific Plan - Updated Ordinance and Post Entitlement Development Agreement (Attachment 6)

After the Planning Commission hearing on the subject actions, the applicant reviewed the schedule for construction of improvements adjacent to the lake and interim improvements on the hotel site. The applicant has expressed concerns with meeting the September 15, 2021 deadline in the Draft Post Entitlement Development Agreement (PEDA). A major issue that many construction projects are facing at the moment is uncertainty in the supply chain of construction materials; therefore, the applicant is requesting an October 31, 2021 deadline for the lakeside park improvements and the interim hotel site improvements. Staff is supportive of this request as the delay is relatively minor in duration, the supply chain is a known issue for many construction projects and two aspects of the site construction are proceeding more quickly than anticipated. The applicant is no longer requesting a deferring of the decorative paving between the lake and the hotel construction site and the residential units are progressing more quickly than anticipated. The attached revised Attachment 6 includes modifications, which are also outlined below.

3.2.4 The Hotel Site shall have interim improvements as outlined below and as generally depicted in Exhibit B ("Interim Improvements"). The Interim Improvements shall be completed prior to ~~the issuance of a certificate of occupancy for Phase 1 of the Apartments~~ October 31, 2021. Furthermore, the Landowner agrees to provide either a performance bond or other type of surety acceptable to the City prior to the issuance of the first certificate of occupancy for the Apartments to guarantee satisfactory completion of these improvements. The amount of security shall be sufficient to complete the unfinished work as determined by the Director.

…

~~(d) The improvements required for the publicly accessible park space adjacent to the hotel site may be deferred until vertical construction begins on the hotel.~~

3.2.5 Landowner acknowledges that the improvements in a portion of the required publicly accessible park space south of the EVA, that is not adjacent to the hotel site, will not be completed prior to the issuance of the certificates of occupancy. Landowner agrees to complete these improvements no later than ~~September 15~~October 31, 2021. Furthermore, the Landowner agrees to provide either a performance bond or other type of surety acceptable to the City prior to the issuance of the first certificate of occupancy for the Apartments to guarantee satisfactory completion of these improvements. The amount of security shall be sufficient to complete the unfinished work as determined by the Director.

DRAFT 6/7/2021 ***JAN***

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF SUNNYVALE APPROVING AND ADOPTING A DEVELOPMENT AGREEMENT BETWEEN SUNNYVALE PARTNERS, LTD. AND THE CITY OF SUNNYVALE FOR THE DEVELOPMENT OF PROPERTY COMMONLY KNOWN AS 1250 LAKESIDE DRIVE.

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, the City Council adopted the Lakeside Specific Plan (LSP) in 2005 to facilitate the development of a specific mixed-use hotel and residential project for the 8.83-acre property at 1250 Lakeside Drive; and

WHEREAS, the development project approved in 2005 was never built and the entitlements for the project expired; and

WHEREAS, the City Council amended the LSP in 2016 (Resolution No. 802-16) to switch the location of the hotel and residential land uses on the project site as well as make other changes to the architecture, design, and building height; and

WHEREAS, the hospitality industry suffered severe financial losses throughout 2020 and continues to suffer such losses into 2021 as a result of the global COVID-19 pandemic, which restricted “non-essential” travel and gatherings and caused Silicon Valley businesses to shift to remote work and virtual meetings; and

WHEREAS, the Bay Area is experiencing a severe housing shortage making the residential component of the project essential to the City’s effort to meet its share of regional housing needs; and;

WHEREAS, construction of the residential component of the project will be substantially completed and the first phase of 125 apartments ready to occupy by the end of June 2021, but initiation of the construction of the hotel has been delayed as a result of the financial impact of the COVID-19 pandemic as noted above; and

WHEREAS, the City Council, in return for the Developer’s offer of other community benefits to be memorialized in a Post Entitlement Development Agreement (“Development

Agreement"), wishes to allow the apartments to be occupied in order to provide critically needed housing for residents of the City of Sunnyvale and surrounding community; and

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

WHEREAS, in 2016, the City Council certified the 1250 Lakeside Hotel and Residential Project Final Supplement Environmental Impact Report (2016 Final SEIR, SCH# 2016022035), adopted findings, adopted a Mitigation Monitoring and Reporting Program, and adopted a Statement of Overriding Considerations for the amendments to the LSP and the specific development project at 1250 Lakeside Drive (collectively, "the Project"); and

WHEREAS, the LSP and the Project's Conditions of Approval required that the Hotel and Apartments be constructed at substantially the same time; and

WHEREAS, on June 8, 2021, the City Council adopted Resolution No. _____ accepting an Addendum to the 2016 Final SEIR and approving an amendment to the LSP to authorize the City Council to approve changes in the timing of the completion of the hotel in return for the community benefits specified in the Development Agreement; and

WHEREAS, pursuant to the Development Agreement Statute and City regulations, the Planning Commission held a duly noticed public hearing on May 24, 2021, 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 meets the requirements of the Development Agreement Statute and City regulations; and

WHEREAS, the City Council, after proper published notice, held a public hearing on June 8, 2021, concerning the proposed Project, and has considered the Development Agreement and reports and related documents presented by City staff, the Planning Commission's recommendation, and the written and oral comments presented at or before 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 that the provisions of the Development Agreement are consistent with the City's General Plan and the LSP as they will exist on the effective date of this Ordinance, and hereby incorporates the findings regarding General Plan and LSP conformity contained in the Planning Commission findings dated May 24, 2021. 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 requirements of

the Development Agreement Statute and of Resolution No. 371-81. The City Council finds that the Developer is providing a public benefit to the City by offering the community benefits described in the proposed Development Agreement 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 Lakeside Specific Plan, as 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 Development Agreement on behalf of the City of Sunnyvale.

SECTION 3. CEQA. The environmental effects of the Project subject to the proposed Development Agreement were analyzed in the 2016 Final SEIR for the 1250 Lakeside Hotel and Residential Project, SCH# 2016022035 and the Addendum to the 2016 Final EIR prepared in connection with the amendment of the LSP and related Project approvals considered by the City Council on June 8, 2021. The City Council found that the Addendum was prepared for the Project in compliance with the requirements of CEQA and the CEQA Guidelines and is adequate for the City's use as the Lead Agency under CEQA. The City Council finds in accordance with CEQA that none of the conditions described in Section 15162 or 15163 of the CEQA Guidelines calling for preparation of a subsequent or supplemental EIR have occurred and, accordingly, under CEQA Guidelines Section 15164 an addendum is required. The City Council incorporates by this reference the findings and mitigation measures contained in the 2016 Final EIR and Addendum as to the environmental effects of the Development Agreement, together with the additional findings contained in this Ordinance. The Council hereby directs the Planning Division to file a Notice of Determination regarding the approval of the Project within five business days of adoption of this Ordinance.

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, phrase, or word 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 Sunnyvale 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 8, 2021, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2021, by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:
RECUSAL:

ATTEST:

DAVID CARNAHAN
City Clerk
Date of Attestation: _____

APPROVED:

LARRY KLEIN
Mayor

(SEAL)

APPROVED AS TO FORM:

JOHN A. NAGEL
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 section 6103 [Space above this line for Recorder's use only]

POST ENTITLEMENT DEVELOPMENT AGREEMENT

by and between

SUNNYVALE PARTNERS LTD and CITY OF SUNNYVALE

Project name: 1250 Lakeside Drive

THIS POST ENTITLEMENT DEVELOPMENT AGREEMENT, dated for convenience _____ ___, 2021, at Sunnyvale, California ("**Agreement**") is entered into by and between Sunnyvale Partners LTD, a California corporation ("**Sunnyvale Partners" or "Landowner**"), and the CITY OF SUNNYVALE, a California chartered municipal corporation ("**City**"), with respect to the property located at 1250 Lakeside Drive in Sunnyvale. Sunnyvale Partners and the City may each be referred to herein as a "**Party**" and collectively as the "**Parties**."

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 Government Code sections 65864 *et seq.* ("**Development Agreement Statute**"), which authorizes the City to enter into a binding 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 that is the subject of the development project application.

B. City Procedure and Requirements. The City has implemented the provisions of the Development Agreement Statute and adopted certain development agreement procedures and requirements through the enactment of Resolution No. 371-81, adopted on December 15, 1981 ("**Development Agreement Resolution**").

C. Landowner. The Landowner is a corporation operating and existing pursuant to the laws of the State of California.

D. Property. The subject of this Agreement is the development of that certain real property located at 1250 Lakeside Drive in the city of Sunnyvale, California, County of Santa Clara, Accessor's Parcel Numbers 216-43-037, 038, 039, and 040, consisting of approximately 8.83-acres, as described in Exhibit A-1 and depicted in Exhibit A-2 ("**1250 Lakeside Drive**" or "**Property**"), attached hereto and incorporated herein by reference. The Landowner owns the Property in fee. Subject to the terms of Section 6.5 and Section 9.2 hereof, all persons holding legal or equitable interests in the Property are bound by this Agreement.

E. Lakeside Specific Plan. The subject Property is located within the area subject to the Lakeside Specific Plan ("**Specific Plan**" or "**LSP**"). The LSP was originally adopted by the City Council in 2005 to facilitate the development of a mixed-use, 244-unit residential condominium and 263-room hotel project at 1250 Lakeside Drive. The original 2005 project, entitled with residential on east side of the Property and hotel on west side, was never built and the project entitlements expired.

F. On December 13, 2016, the City Council approved a Specific Plan Amendment (RTC No. 16-1094) for the Property that changed the land use configuration by placing each use adjacent to similar nearby uses (residential on west side of the Property, hotel on east side). The approval also increased the allowable height for the residential component and included a 3.44-acre publicly accessible park area adjacent to the lake.

G. On June 8, 2021, the City Council approved a second Specific Plan Amendment (RTC No. 21-XXXX) that allows a modification to the hotel construction timing, subject to City Council approval and provision of community benefits described in this Agreement.

F. Project. As approved by the City Council, the project consists of the following:

"**Hotel**" consisting of:

- 263 rooms;
- Six stories and 85 feet in height (with elements to 100 feet in height);
- Three-level above-grade parking garage and small surface parking lot for a total of 255 parking spaces on the hotel site;
- Attached 3,000 square foot restaurant (open to the public);
- Indoor meeting and banquet space, a fitness room, bar and lounges; and outdoor dining, meeting, and function space including a pool area, dining patios, and a rooftop garden and bar.

"**Apartments**" consisting of:

- 250 market-rate apartment units consisting of two phases of 125 units each ("Phase I" and "Phase II");
- Unit mix is 70 studio units, 110 one-bedroom and 70 two-bedroom units ranging from 443 to 1,417 square feet in size;
- Seven stories and 82 feet in height (with elements to 88 feet in height);

- Podium parking structure with 439 spaces (429 standard spaces and 10 tandem spaces) and three surface parking spaces
- Each unit has 300 cubic feet of lockable storage within the building;
- Residential amenities include a community room (beyond the minimum size required), lounges, fitness rooms, a pool, and outdoor recreation and lounge space.

"**On-site Improvements**" consisting of:

- Open space on the man-made lake-facing side of the project with a lakeside promenade;
- Passive recreational space, and outdoor spaces for meetings and special events;
- Improvements to the existing open space area and pathway system along the entire man-made lake;
- On-site improvements include frontage enhancements along Lakeside Drive;
- Subdivision of the Property into two lots, one for each land use, consistent with the LSP.

The Hotel, Apartments, and On-site Improvements are collectively referred to herein as the "**Project**." The Hotel and Apartments are each located on separate legal parcels (respectively, "Hotel Site" and "Apartment Site").

The LSP states that the City's goals for this site, as elaborated by both the City Council and Sunnyvale's General Plan, can be summarized by the following:

- Create a landmark project that showcases the City at this important gateway site.
- Maintain a successful hotel that is an important part of the City's economy and business environment.
- Increase the City's supply of housing stock and improve the jobs/housing ratio.
- Residential should only be allowed if a high quality residential project is created.

G. Environmental Review. The City examined the environmental effects of the Project in a Supplemental Environmental Impact Report (State Clearinghouse No. 2016022035) ("**SEIR**") prepared pursuant to the California Environmental Quality Act (Cal. Code Pub. Res. § 21000 *et seq*. and 14 Cal. Code Regs. § 15000 *et seq*. (together, "**CEQA**")). On December 13, 2016, by Resolution No. 801-16, the City Council reviewed and certified the SEIR as adequate and complete, adopted written findings, approved a Mitigation Monitoring and Reporting Program, and approved a Statement of Overriding Considerations pursuant to Section 15093 of Title 14 of the CEQA Guidelines.

The City prepared and considered an Addendum to the SEIR prior to approval of this Agreement pursuant to sections 15062 and 15064 of the CEQA Guidelines. The Addendum determines that the proposed changes to Project only affect the timing of construction of the Hotel. The construction of the Hotel and Apartments will not occur substantially at the same time, as described in the SEIR. Rather, the Hotel will be constructed after the completion and occupancy of the Apartments. All mitigation measures required by the SEIR will remain in effect and no other changes to the Project described in the SEIR are proposed. As a result, the conclusions of the SEIR remain valid and approval of this Agreement would not result in new or substantially more severe significant impacts to the environment than those noted in the SEIR.

Upon certifying the SEIR, the City Council adopted a Statement of Overriding Considerations pursuant to Section 15093 of the CEQA Guidelines, finding that specific economic, fiscal, social, housing, and other overriding considerations outweighed the Project's unavoidable adverse environmental effects. The Statement of Overriding Considerations remains valid to support the approval of the Project because the construction of the Hotel will only be delayed and it remains as a component of the Project. In addition, the Statement of Overriding Considerations includes a statement that each one of the ten considerations listed was sufficient on a "a separate and independent basis" upon which to approve the Project. Therefore, the other factors listed in the Statement of Overriding Considerations justify the approval of the Project even if the construction of the Hotel is delayed.

H. Purposes. The Landowner and City desire to enter into an agreement for the purpose of implementing the plan for the occupancy of the Apartments and the construction of the Hotel as set forth herein, and in the Specific Plan and Development Approvals. The City has an expressed interest in ensuring the timely occupancy of the Apartments and construction of the Hotel, and entering into a development agreement is a method whereby a level of assurance can be achieved to meet those interests. The City has determined that the development of the Project pursuant to the Specific Plan and the Development Approvals, including the occupancy of the Apartments and the construction of the Hotel, 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 in accordance with the policies and goals set forth in the Specific Plan, and will otherwise achieve the goals and purposes of the Development Agreement Statute and Development Agreement Resolution. The Landowner has incurred substantial costs in the construction of the Apartments and will incur substantial costs in the construction of the Hotel in accordance with this Agreement. In exchange for these benefits to the City and the public, the Landowner desires to receive assurance that the City will timely grant permits and approvals, including but not limited to certificates of occupancy, required for the occupancy of the Apartments and for construction of the Hotel in accordance with City Laws (as defined in Section 1.2.3), 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 entity 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 Planning Commission considered the application for approval of this Agreement on _____, 2021. After conducting a duly noticed public hearing the Commission recommended the adoption of this Agreement to the City Council.

K. Development Agreement Adoption. After conducting a duly noticed public hearing and making the requisite findings, the City Council approved and introduced this Agreement by the first reading of Ordinance No. _____-21 on _____, 2021. On _____ 2021, the City Council adopted this Agreement by the second reading of Ordinance No._____-21 ("**Adoption Date**"), and authorized its execution.

L. 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, Specific Plan and with the Development Approvals. This Agreement satisfies the requirements of Government Code section 65867.5.

M. Development Approvals. The following approvals, entitlements, and findings have been adopted by the City with respect to the Property, and constitute the "**Development Approvals**":

i. The SEIR, adopted by Resolution No. 801-16, on December 13, 2016 and the Addendum, accepted on June 8, 2021.

ii. This Agreement, adopted by Ordinance No. _____-21, on _____, 2021.

iii. The Specific Plan, adopted by Resolution No. 802-16, on December 13, 2016 and amended on June 8, 2021 by Resolution No. XXX-21

iv. The Special Development Permit, approved on December 13, 2016.

v. The Tentative Parcel Map, approved on December 13, 2016, and Parcel Map approved by the Director of Public Works on May 16, 2019.

v. The Special Development Permit amended Condition of Approval GC-11, approved on June 8, 2021.

vi. The Building Permit for the Apartments, approved on July 23, 2019.

N. Project Construction. The City issued Construction Permit No. 2018-2964 for the Apartments on July 23, 2019, authorizing all of the following work: Building, Energy, Electrical, Fire, Grading, Mechanical, Plumbing, Landscaping, public park improvements and other on-site amenities. The Apartments have been under construction pursuant to the Construction Permit since August 1, 2019. The first phase of 125 units will be ready for occupancy by June of 2021 and the second phase of 125 units will be ready for occupancy by the end of the summer of 2021. Substantial site work for the Hotel portion of the Property has been completed under other permits, but vertical construction has not commenced as required by the Lakeside Specific Plan, delayed

in part due to the negative effects of the Coronavirus pandemic on the hospitality industry globally, in California, and in the Bay Area.

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 the Development Agreement Statute and Development Agreement Resolution, and in consideration of the mutual covenants and promises contained herein, the adequacy and sufficiency of which are hereby acknowledged, Landowner and City agree as follows:

AGREEMENT

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, excluding its conflict of laws provisions, the laws and Constitution of the United States and any codes, statutes, or executive mandates in any applicable court decision, state or federal, thereunder.

1.2.2 Assignee. Any person, business entity, association, organization, or other similar entity succeeding to some or all of Landowners' rights and obligations under this Agreement by sale, transfer, or otherwise, including, but not limited to, purchasers, mortgagees, or long term ground lessees of individual lots, parcels, or of any of the buildings located within the Property.

1.2.3 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 as of the Effective Date ("**City Laws**"). Specifically, but without limiting the generality of the foregoing, City Laws shall include the City's General Plan, the Specific Plan, the Zoning Code (Title 19 of the Sunnyvale Municipal Code), and the Subdivision Code (Title 18 of the Sunnyvale Municipal Code).

1.2.4 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 City Laws.

1.2.5 Development Agreement Resolution. 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.

1.2.6 Director. The Director of the Community Development Department.

1.2.7 Enacting Ordinance. Ordinance No. _____-21, introduced by the City Council on _____, 2021, and adopted by the City Council on _____, 2021 approving this Agreement.

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

1.2.9 Property. That property described and shown on Exhibits A-1 and A-2.

1.3 Effective Date; Recordation. The Enacting Ordinance became effective on _____, 2021. The obligations of the Parties under this Agreement shall be effective as of the effective date of the Enacting Ordinance ("**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 the Development Agreement Resolution. 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 six (6) years thereafter ("**Term**"). Following the expiration of the Term, this Agreement shall be deemed terminated and of no further force and effect; provided, however, termination of the Agreement shall not affect any right or duty emanating from Development Approvals that are vested under Applicable Laws in the absence of this Agreement. Landowner shall thereafter comply with the provisions of all Applicable Laws and City Laws then in effect or subsequently adopted with respect to the Property and the Project.

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
GENERAL DEVELOPMENT

2. Project; Vested Entitlements.

2.1 Project Development. Landowner shall have a vested right to occupy the Apartments, subject to obtaining certificates of occupancy or such other approvals consistent with City Laws, necessary for occupancy of the completed Apartments, and construct the Hotel on the Property in accordance with the Vested Entitlements (defined in Section 2.2) in effect as of the Effective Date and pursuant to all the terms of this Agreement.

2.2 Vested Entitlements. The Landowner has certain vested entitlements, including the certified SEIR, the General Plan, the Specific Plan, the Development Approvals, and the approval of this Agreement (collectively, "**Vested Entitlements**"). Any other conditions of development applicable to the Property are as set forth in the applicable provisions of the General Plan, the Specific Plan, the Zoning Code, the Subdivision Code, and City Laws, in effect on the

Effective Date of the Agreement ("**Applicable Rules**"). The Landowner shall have the vested right to occupy the Apartments, subject to obtaining certificates of occupancy or such other approvals consistent with City Laws necessary for occupancy of the completed Apartments, and to construct the Hotel on the Property in accordance with the terms and conditions of this Agreement, the Vested Entitlements and the Applicable Rules for the Project, as the same may be amended from time to time upon application by the Landowner and good faith consideration and decision by the City. Except as otherwise specified herein, this Agreement, the Applicable Rules, the Development Approvals, and 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, and the maximum height and sizes of buildings.

2.2.1 Except as provided herein, development of the Property shall be governed by this Agreement, and Vested Entitlements, the Applicable Rules, and City Laws. To the extent the provisions of this Agreement conflict with the applicable zoning provisions of the LSP, this Agreement shall take precedence.

2.2.2 Except as set forth in Section 3.2.2, this Agreement does not impose affirmative obligations on the Landowner to commence construction of the Hotel, or any phase thereof, in advance of its decision to do so, which decision shall be in Landowner's sole and absolute discretion.

2.2.3 City agrees that it will accept for processing, review, and action all applications for use, occupancy, and construction of the Property, including the Apartments, Hotel, and On-site Improvements, in accordance with the Vested Entitlements, and shall act upon such applications, including any application to amend or modify the design of the Hotel, in good faith and in a diligent and timely manner. The Parties agree that the City has no obligation to approve any amendment to the Special Development Permit, 2015-7656 approved on December 13, 2016, to permit any amendment or modification to the design of the Hotel.

2.2.4 The environmental effects of the Project and this Agreement (including, but not limited to, the rights and obligations vested hereby) have been thoroughly and fully examined in the SEIR and the Addendum.

2.3 Timing of Development. The Parties acknowledge and agree that presently the Landowner cannot predict the timing of the construction of the Hotel. Subject to Section 3.2.2 below, the timing, sequencing, and phasing of the Hotel are solely the right and responsibility of Landowner in the exercise of its business judgment so long as it is consistent with the Vested Entitlements, Applicable Rules, and this Agreement. Because the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984) 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 Hotel in such order, at such rate, and at such time as Landowner deems appropriate within the exercise of its sole subjective business judgment and the provisions of this Agreement.

2.4 Compliance with Requirements of Other Government Entities.

2.4.1 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 federal, state, regional, or local agencies having jurisdiction over Landowner's activities in furtherance of this Agreement. Landowner shall pay all required fees, if any, when due to federal, state, regional, or other local governmental agencies and acknowledges that City does not control the amount of any such fees.

2.4.2 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 ("**Federal or State Law**"). In the event changes in Federal or State Law prevent or preclude compliance with one or more provisions of this Agreement, this Agreement shall be modified or suspended as may be necessary to comply with such Federal or State Law. 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 Federal or State Law. 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 Federal or State Law.

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

2.5.1 Processing fees and, subject to the terms of Section __ of this Agreement, charges of every kind and nature imposed by the City, including application, inspection, and monitoring fees, that are in force and effect within the jurisdiction of the City for the class of Subsequent Approvals being applied for on an City-wide basis, which shall be paid at the rate then in effect City-wide.

2.5.2 All taxes, assessments, impact fees of any type, inclusionary including housing in-lieu impact fees and transportation impact fees, other fees, or other monetary and non-monetary exactions imposed by the City, that 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, existing as of the Effective Date. For a six (6) year period commencing on the Effective Date, the City shall not impose any new taxes, assessments, impact fees or other fees, or other monetary and non-monetary exactions, that were not in effect within the jurisdiction and applicable to the Project and Subsequent Approvals on the Effective Date (this does not include increases or adjustments to existing fees, taxes, etc.). Nothing herein shall prevent the City from imposing on the Project new City-wide general and City-wide special taxes adopted in accordance with California Const. Art. XIII C and D *et seq.,* otherwise known as Proposition 218. After the six (6) year period has run, the City may impose all taxes, assessments, impact fees of any type, other fees, or other monetary and non-monetary exactions, that 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.

2.5.3 If the City forms an assessment district including the Property and the assessment district is City-wide, as defined in Section __, 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. Any subsequently created assessment district is subject to collection solely based on the special assessment statute and shall not affect the development rights for the Project.

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

2.5.5 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, that 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.

2.5.6 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 occupy the Apartments after the City's Building Official inspects the Apartments and finds no violations of the provisions of Sunnyvale Municipal Code Chapter 16.16, other laws that are enforced by the Building Safety Division, and the Conditions of Approval printed on the building permit plan set for the Project, and construct the Hotel pursuant to specified and known criteria and rules, and that the City receives the benefits that 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. subject to the provisions of this Agreement.

2.6 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 that 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.

2.7 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, sequencing or permission of development or construction of all or any part of the Property, whether imposed by ordinance, resolution, policy, order or otherwise, and whether enacted by the City Council, an agency of City, or otherwise) affecting parcel or subdivision maps (tentative, vesting tentative or final), building permits, or any other Approvals (including entitlements to use or service, such as water, sewer and/or storm drains) 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.

2.8 Initiatives. If any City Laws are enacted or imposed by a citizen-sponsored initiative or by the City Council directly or indirectly in connection with any proposed initiative, 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 and the Specific Plan Amendment are legislative actions subject to referendum.

2.9 Mutual Obligations of the Parties. City has agreed to provide Landowner with the long term assurances, Vested Entitlements, 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.

2.10 Landowner's Right to Rebuild. Landowner may rebuild the Project or any element of the Project should it become necessary due to damage from any event, natural disaster, or change in seismic requirements during the Term of this Agreement, notwithstanding the provisions of the City of Sunnyvale Municipal Code Section 19.50.030. Landowner may renovate the Project at any time within the Term of this Agreement as long as such renovation does not cause a change of use to a use not allowed by this Agreement or the LSP. Any such rebuilding or renovation shall be subject to the Vested Entitlements, shall comply with the Subsequent Approvals and the building regulations existing at the time of such rebuilding or reconstruction, as well as the requirements of CEQA.

ARTICLE 3
SPECIFIC CRITERIA OF THE PROJECT

3.1 Permitted Square Footage. Notwithstanding anything to the contrary herein, the Landowner is allowed to develop the Project consistent with the Development Approvals

3.2 Landowner Obligations. As a material consideration for the long term assurances, Vested Entitlements, and other City obligations provided by this Agreement, including the City's agreement to timely issue certificates of occupancy for the Apartments after the City's Building Official inspects the Apartments and finds no violations of the provisions of Sunnyvale Municipal Code Chapter 16.16, other laws that are enforced by the Building Safety Division, and the Conditions of Approval printed on the building permit plan set for the Project and diligently and in good faith process any application to amend or modify the design of the Hotel, as set forth in Section 4.5, 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 3.2.

3.2.1 Guaranteed Payment. Landowner shall pay to City a total of seven hundred fifty thousand dollars ($750,000) as a "Guaranteed Payment." The first four hundred fifty thousand dollars ($450,000) of the Guaranteed Payment shall be made prior to issuance of the first certificate of occupancy for the Apartments. The second three hundred thousand dollars ($300,000) of the Guaranteed Payment shall be made in full no later than January 1, 2023.

3.2.2 Contingent Payments. Landowner shall pay to City certain "Contingent Payments" in the event the milestones in Hotel construction specified in this Section 3.2.2 are not achieved: (1) Landowner shall pay to City on December 31, 2022 a total of five hundred thousand dollars ($500,000) if Hotel building permit(s) are not issued by December 31, 2022; (2) Landowner shall pay to City on June 30, 2024 a total of seven hundred fifty thousand dollars ($750,000) if Hotel infrastructure and foundation are not complete by that date; (3) Landowner shall pay to City a total of one million dollars ($1,000,000) on June 30, 2025 if Hotel vertical construction has not commenced by that date; (4) Landowner shall pay to City on June 30, 2026 a total of one million two hundred fifty thousand dollars ($1,250,000) unless Landowner demonstrates diligent and

continuous construction of the Hotel as of that date; and (5) Landowner shall pay to City on June 30, 2027 a total of one million five hundred thousand dollars ($1,500,000) if Hotel construction is not complete and the Hotel is not open for business as of that date.

3.2.3 Notwithstanding the remedies available to City under Article 6 of this Agreement, the Landowner understands, acknowledges and agrees that City may file a lien on the Hotel parcel if any Contingent Payment owed is not timely paid as set forth in Section 3.2.2 above.

3.2.4 The Hotel Site shall have interim improvements as outlined below and as generally depicted in Exhibit B ("Interim Improvements"). The Interim Improvements shall be completed prior to October 31, 2021. Furthermore, the Landowner agrees to provide either a performance bond or other type of surety acceptable to the City prior to the issuance of the first certificate of occupancy for the Apartments to guarantee satisfactory completion of these improvements. The amount of security shall be sufficient to complete the unfinished work as determined by the Director.

Detailed fencing and landscaping plans shall be submitted to the Planning Division with an application for a Miscellaneous Plan Permit and are subject to review and approval by the Director of Community Development, whose decision is final.

The Developer shall provide interim stormwater treatment (i.e., treatment consistent with the requirements for a construction site) for the Hotel Site, which is subject to approval of the City's Chief Building Official.

The Hotel Site shall be maintained free of debris, graffiti, and any other property damage and shall be attended to promptly, typically within 48 hours.

A portion of the Hotel Site shall be fenced at a location to be approved by the Santa Clara County Public Health Department. The fence shall be chain link with screening or may be chain link with black vinyl cladding without screening and shall be constructed to a height that may be required by the Santa Clara County Public Health Department or the City's Chief Building Official. The fence shall be constructed in the same manner as a permanent fence (i.e., shall not have moveable panels) and shall meet all City requirements as determined by the City's Chief Building Official. The interior area of the fenced area shall be grass or other ground cover, have appropriate irrigation systems installed, and shall be maintained in a healthy condition. The portion of the hotel site outside of fenced area shall include at locations generally depicted in Exhibit B:

(a) An Access driveway from Lakeside Drive, public parking area and turn-around area.
(b) An Emergency Vehicle Access (EVA), which shall be constructed with decomposed granite.
(c) Landscaping consisting of at least shrubs and groundcover on all areas outside the fence that are not required for vehicle circulation and shall have appropriate irrigation systems installed and shall be maintained in a healthy condition.

Landowner shall obtain building permits for any interim improvement construction that requires a building permit.

3.2.5 Landowner acknowledges that the improvements in a portion of the required publicly accessible park space south of the EVA, that is not adjacent to the hotel site, will not be completed prior to the issuance of the certificates of occupancy. Landowner agrees to

complete these improvements no later than October 31, 2021. Furthermore, the Landowner agrees to provide either a performance bond or other type of surety acceptable to the City prior to the issuance of the first certificate of occupancy for the Apartments to guarantee satisfactory completion of these improvements. The amount of security shall be sufficient to complete the unfinished work as determined by the Director.

ARTICLE 4
AMENDMENT OF AGREEMENT AND DEVELOPMENT APPROVALS

4.1 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 the Development Agreement Resolution. No amendment to or cancellation of this Agreement or any provision hereof shall be effective for any purpose unless adopted pursuant to the procedures included in the Development Agreement Resolution and specifically set forth in a writing, which refers expressly to this Agreement and is signed by duly authorized representatives of the Parties.

4.2 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.

4.3 Amendments to Development Agreement Statute. 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 that 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 allow such applicability.

4.4 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.

4.5 Potential Amendment of Hotel. City understands that Landowner anticipates that it may seek to amend or modify the design of the Hotel. In the event Landowner elects to pursue such amendment or modification to the design of the Hotel, City agrees to diligently and expeditiously process and consider Landowner's application therefor in good faith. The Parties agree that the City has no obligation to approve any amendment to the Special Development Permit, approved on December 13, 2016, to permit any amendment or modification to the design of the Hotel. Amendment of the Special Development Permit is agreed to be a discretionary action and the City can exercise its sole subjective judgement to approve or deny any application to amend the Special Development Permit.

ARTICLE 5
ANNUAL REVIEW

5.1 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 approximately 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 Director and by the affirmative vote of the majority of the Planning Commission. This obligation for annual review shall expire upon Hotel occupancy.

Consistent with the Development Agreement Resolution, or its successor provision, the Director or 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.

5.2 Determination of Good Faith Compliance. Such annual review shall be limited in scope to compliance with the terms of this Agreement pursuant to Government Code section 65865.1. The Planning Commission shall conduct a public hearing. If the Planning Commission determines that, based upon substantial evidence in the record, 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. If the Planning Commission determines that, 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, 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 6.2) and exercise the remedies set forth in Section 6.1.

5.3 No Waiver. Failure of City to conduct an annual review shall not constitute a default by Landowner under this Agreement or a waiver by City of its rights to otherwise enforce the provisions of this Agreement nor shall Landowner 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 Landowner if, following periodic review pursuant to this Article 5, City does not propose to modify or terminate this Agreement.

ARTICLE 6
DEFAULT. REMEDIES AND TERMINATION

6.1 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 that would adequately compensate either Party for choices they have made that 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, and/or 1094.5, 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.

6.2 Notice of Breach. Prior to the initiation of any action for relief specified in Section 6.1 above because of an alleged breach of this Agreement, the Party claiming breach ("**Complaining Party**") shall deliver to the other Party ("**Defaulting Party**") a written notice of breach ("**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 and diligently complete such cure; 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 6.

6.2.1 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 6.

6.3 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 it may deem necessary to protect, assert, or enforce any such rights or remedies, nor constitute a waiver of a Complaining 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.

6.4 Termination by Mutual Consent. This Agreement may be voluntarily terminated in whole or in part by the mutual consent of the Parties or their successors in interest, in the sole

and absolute discretion of each as to its consent, in accordance with the provisions of the Development Agreement and the Development Agreement Resolution.

6.5 Effect of Termination on Landowner's Obligations.

6.5.1 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 Vested Entitlements 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 6.5.2 below, to continue after the termination or cancellation of this Agreement, nor shall termination of this Agreement as to all or any portion of the Property result in termination of Subsequent Approvals that would not otherwise have expired pursuant to the City Laws.

6.5.2 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 6.1 (Remedies; limitation on damages and exceptions thereto; accrued obligations);

(b) Section 6.5.1 (Landowner's obligations upon termination or cancellation);

(c) Section 10.2 (Indemnification); and

(d) Section 12.1 and 12.1.1 (Third Party Challenges; Indemnification).

ARTICLE 7
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 (c) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, to describe the nature of any defaults, and (d) such other information as the other Party may reasonably request. The Party receiving a request under Article 7 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, tenants, investors, partners, bond counsel, underwriters, and Mortgagees. The request shall clearly indicate that failure of the receiving Party to respond within the thirty (30) day period will lead to a second and final request. Failure to respond to the second and final request within fifteen (15) days following receipt of the second request shall be deemed approval of the estoppel certificate.

ARTICLE 8
TRANSFERS. ASSIGNMENTS

8.1 Agreement Runs with the Land.

8.1.1 This Agreement and all of its provisions, agreements, rights, powers, standards, terms, covenants and obligations, shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation, 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.

8.1.2 All of the provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including, but not limited to section 1468 of the California Civil Code. 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 9.2 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.

8.2 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 Project to any person, business entity, association, organization, or other similar entity who acquires an interest in the Property ("**Assignee**"). Landowner's right to assign shall not be subject to City's approval.

8.3 Release Upon Assignment. Upon the express written assumption by the Assignee of Landowner's rights and interests under this Agreement ("**Assignment Agreement**"), and Landowner's delivery of a conformed copy of the recorded Assignment Agreement to City, 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 9
MORTGAGEE PROTECTION

9.1 Mortgage Protection. This Agreement shall be superior and senior to any lien placed upon the Property or any portion of the Property after the date of recording of this Agreement, including the lien of any deed of trust or mortgage ("**Mortgage**"). Notwithstanding the foregoing, no breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement (including but not limited to City's remedies to terminate the rights of 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.

9.2 Mortgagee Not Obligated. Notwithstanding the provisions of Section 9.1 above, no Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements on the Property, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property to any uses or

to construct any improvements on the Property other than those uses or improvements provided for or authorized by this Agreement, City Law, or otherwise under Applicable Law.

9.3 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.

9.4 No Supersedure. Nothing in Article 9 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 Article 9 constitute an obligation of City to the Mortgagee, except as to the notice requirements of Section 9.3.

ARTICLE 10
INDEMNIFICATION

10.1 No Duty of City; Hold Harmless. It is specifically understood and agreed by the Parties that the development contemplated by this Agreement 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.

10.2 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 that may arise from Landowner's operations under this Agreement, excepting suits and actions brought by Landowner for breach 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 ("**Indemnified 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 of City's sole choosing 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 11
NOTICES

11.1 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.

11.2 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 Sunnyvale, CA 94088
With a copy to:	City Attorney City of Sunnyvale 456 W. Olive Avenue Sunnyvale, CA 94088
Landowner:	Sunnyvale Partners LTD Millennium Hotels & Resorts 145 West 44th Street New York, NY 10036 Attn: Edward Rohling
With a copy to:	Miller Starr Regalia 1331 N. California Blvd., 5th Floor Walnut Creek, CA 94596 Attn: Bryan W. Wenter

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 12
MISCELLANEOUS

12.1 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, or the Vested Entitlements or a CEQA challenge related to the Project ("**Third Party Challenge**"), the responsibilities of the Parties shall be as follows.

12.1.1 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 Vested 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 Landowner 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. The Landowner shall reimburse the City for City's actual costs in defense of any Third Party Challenge, including but not limited to the time and expenses of the City Attorney's Office and any consultants.

(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.

12.1.2 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.

12.2 Applicable Law/Venue/Attorneys' Fees and Costs. This Agreement shall be construed and enforced in accordance with the laws of the State of California, excluding its conflict of laws provisions. 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 reasonable attorney's fees and such other costs as may be found by the court.

12.3 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.

12.4 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.

12.5 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.

12.6 Excuse for Nonperformance. Notwithstanding anything to the contrary in this Agreement, Landowner and City shall be excused from performing any obligation or undertaking provided in this Agreement, in the event and so long as the performance of any such obligation is prevented or delayed, by acts of nature, fire, earthquake, flood, explosion, severe weather, war, invasion, insurrection, riot or civil disturbances, mob violence, sabotage, terrorist actions, inability to procure or general shortage of labor, equipment, facilities, materials or supplies in the open market, failure of transportation, strikes, lockouts, condemnation, requisition, laws, Third Party Challenges, orders of governmental, civil, military, or naval authority, acts or omissions of the other Party, epidemic or pandemic beyond the control of the Party claiming the extension of time. (a "**Permitted Delay**"). The Term of this Agreement shall be extended by a period of time equal to the number of days during which a Permitted Delay existed, provided that the Party claiming such extension shall send written notice of the claimed extension to the other Party within sixty (60) days from the commencement of the cause entitling the Party to the extension. An extension of time for a Permitted Delay shall be deemed granted if the Party receiving notice of the Permitted Delay does not object to such extension in writing within fifteen (15) days of receiving the notice of Permitted Delay. Upon such objection, the Parties shall meet and confer within thirty (30) days after the date of objection in a good faith effort to resolve their disagreement as to the existence of the Permitted Delay. Times for performance under this Agreement may be extended by mutual written agreement of the City Manager and Landowner.

12.7 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, excluding its conflict of laws provisions.

12.8 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 or any provision herein.

12.9 Time. Time is of the essence of this Agreement and of each and every term and condition hereof.

12.10 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 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.

12.11 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.

12.12 Form of Agreement; Exhibits. This Agreement is executed in ___ duplicate originals, each of which is deemed to be an original. This Agreement, including its exhibits, constitutes the entire understanding and agreement of the Parties. The exhibits are identified as follows:

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

Exhibit B: Hotel Site Interim Improvements

12.13 No Third Party Beneficiary. This Agreement and all of its terms, conditions, and provisions are entered into only for the benefit of the Parties executing this Agreement (and any successors in interest thereto) and not for the benefit of any other individual or entity.

12.14 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.

12.15 Counterpart Signatures. This Agreement may be executed in counterparts, each of which shall be an original, but all of which shall constitute one and the same Agreement.

(SIGNATURES ARE ON THE FOLLOWING PAGE)

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

"City"

CITY OF SUNNYVALE,
A California chartered municipal corporation

By:_____
Kent Steffens
City Manager

Date:_____

Attest:

_____
David Carnahan, City Clerk

Approved as to Form:

_____
John A. Nagel
City Attorney

"Sunnyvale Partners"

SUNNYVALE PARTNERS LTD,
a California corporation

By:_____

Date:_____

By:_____

Date:_____

By:_____

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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 _____

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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 _____

EXHIBIT “A-1”
Legal Description

For APN/Parcel ID(s): _____

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

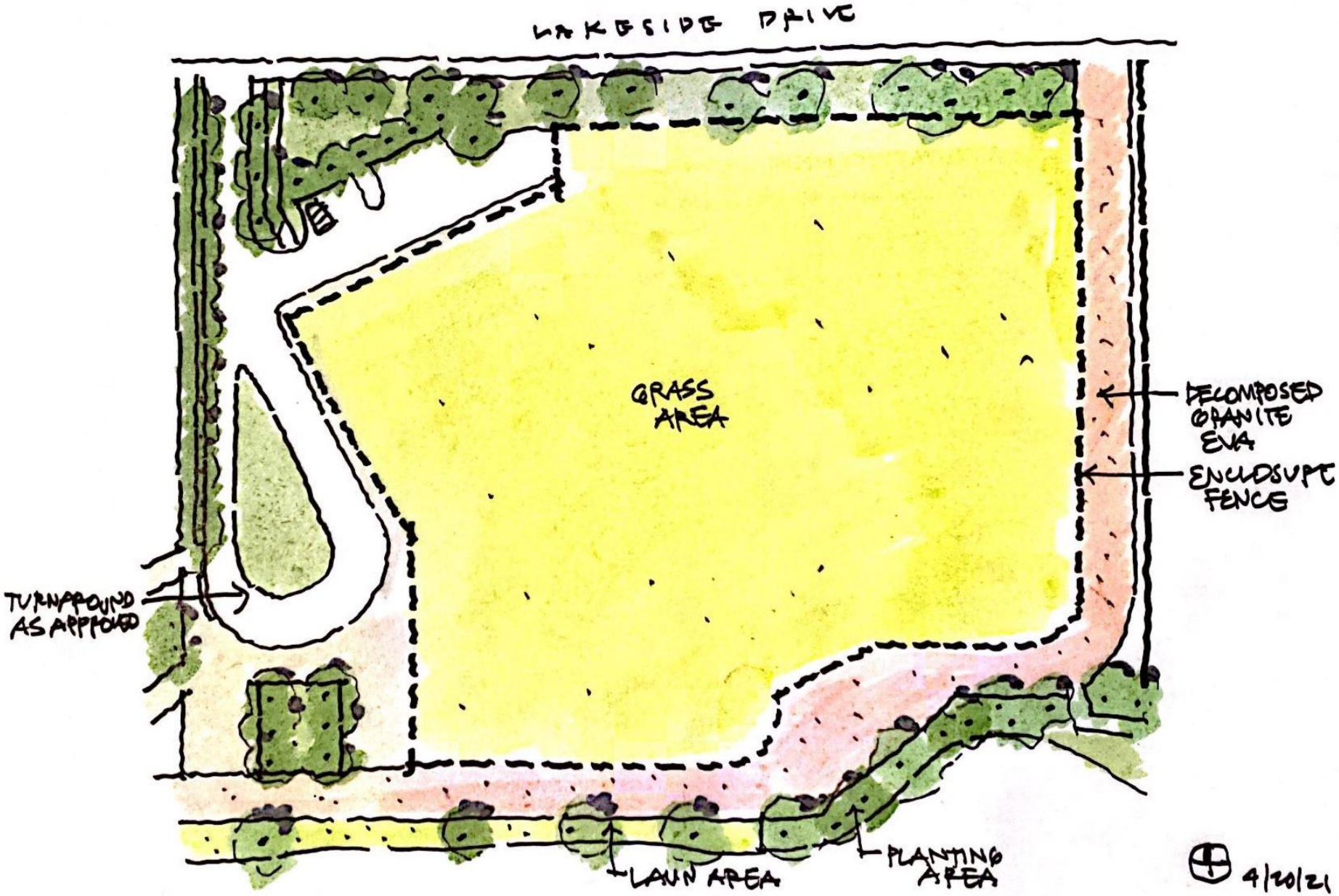
[LEGAL DESCRIPTION TO BE INSERTED BEFORE RECORDING]

EXHIBIT “A-2”
Site Map

[TO BE INSERTED BEFORE RECORDING]

EXHIBIT “B”
Hotel Site Interim Improvements

[SEE ATTACHED]


LAKESIDE DRIVE
GRASS AREA
DECOMPOSED GRANITE EVA
ENCLOSURE FENCE
TURNAROUND AS APPROVED
LAWN AREA
PLANTING AREA
4/20/21