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APNs: 233-142-01-00, 233-142-02-00, 233-142-03-00, and 233-142-04-00

Recording Fees Exempt Per Government Code Section 27383

DEVELOPMENT AGREEMENT
for
55-unit Residential Rental and Mixed Use Project
At
328 S. Escondido Blvd.
2007-11-PD SP DA

between

CITY OF ESCONDIDO

and

CITY PLAZA AT ESCONDIDO, LLC,
a California limited liability company

Sept. 15, 2007

DEVELOPMENT AGREEMENT

This Development Agreement ("Agreement") is entered into by and between the CITY OF ESCONDIDO, a municipal corporation ("City"), and CITY PLAZA AT ESCONDIDO, LLC, a California limited liability company ("Owner").

ARTICLE I

Recitals

The Agreement is entered into on the basis of the following facts, understanding and intentions of the Parties:

1. **Code Authorization.** Government Code Sections 65864 through 65869.5, Article 58 of City's Zoning Code (the "Development Agreement Legislation") and Article 68 of the City's Zoning Code (Growth Management Ordinance) authorize City to enter into binding development agreements with persons or entities having legal or equitable interests in real property for the purpose of establishing certainty in the development process for both the City and the property owner, and to enable specific terms regarding property development, to be negotiated and agreed.
2. **Interest of Owner.** Owner is the legal and/or equitable owner of certain real property totalling approximately .80 acres, presently known as APNs 233-142-01-00, 233-142-02-00, 233-142-03-00, and 233-142-04-00, located in the County of San Diego, State of California (the "Property"), and as further described in Attachment A attached hereto. Pursuant to the City's Downtown Specific Planning Area, the City has determined that Owner's proposed development of the Property requires a specific plan amendment, a master and precise development plan, and a development agreement. Owner intends to construct a mixed-use project with four stories above ground (56 feet in height), and one story of subterranean parking, to accommodate 55

market-rate rental apartments, 5,198 SF of commercial space, 4,158 of office space, and a parking garage for 126 vehicles, and to construct such other improvements as are required by the conditions of approval of the Entitlements, Future Entitlements and the Agreement (collectively, the "Project").

3. **Intent of Parties.** By the Agreement, the City and Owner intend to accomplish the following:

a. Eliminate uncertainty in the planning and development of the Project by assuring the Owner that it may develop the Property, in accordance with Existing Laws, subject to the terms and conditions contained in the Agreement;

b. Assure the orderly installation of necessary improvements and the provision for public services appropriate for the development of the Project;

c. Enable the City to obtain certain public benefits by virtue of the Agreement; and

d. Allow the Owner to develop the Project in advance of the City's completion of an Environmental Impact Report for the Downtown Specific Planning Area, which is scheduled for commencement sometime in 2007 or 2008.

4. **Execution.** The execution of the Agreement by the City and Owner shall constitute conclusive evidence that duly noticed public hearings before the Planning Commission and the City Council required by the Development Agreement Legislation have been held, and that the City Council has introduced (first reading) and adopted (second reading) an Ordinance approving the Agreement and containing the findings required by the Development Agreement Legislation.

5. **Effective Date.** The effective date ("Effective Date") of the Agreement shall be Sept. 15, 2007, which is the date of adoption of the development agreement ordinance.

- a. A "Specific Plan Amendment," by City Council Resolution No. 2007-70 (R) on July 11, 2007;
- b. A "Master and Precise Development Plan," by City Council Resolution No. 2007-70 (R) on July 11, 2007;
- c. Negative Declaration for the Project, ER2007-08, certified by City Council Resolution No. 2007-70 (R) on July 11, 2007.

NOW THEREFORE, in consideration of the Recitals and the mutual covenants conditions set forth herein, the Parties agree as follows:

ARTICLE II

Definitions

1. "**City Engineering Standards**" refers to those standards described in the Design Standards for the Design of Public Works Improvements Under the Authority of the City of Escondido, Effective Date: June 23, 1999 (Resolution 99-123).
2. "**Entitlements**" refers to all approvals and permits necessary or incidental to the development of the Project or any portion thereof, whether discretionary or ministerial, including but not limited to, those listed in Article I Section 6 above, project plans, grading permits, building permits, and the Agreement.

3. **"Exaction"** refers to any fee, tax, requirement, condition, dedication, restriction, or limitation imposed by the City upon the development of the Property at any time in accordance with the Existing Laws.
4. **"Existing Laws"** refers to the ordinances, resolutions, codes, rules, regulations and official policies of City governing the development of the Property, including, but not limited to the permitted uses of the Property, the density or intensity of use, the design, improvement and construction standards and specifications for the Project, including the maximum height and size of proposed buildings, and the provisions for reservation and dedication of land for public purposes, in effect on the Effective Date.
5. **"Future Exaction"** refers to Exactions imposed after the Effective Date, whether by ordinance, initiative, resolution, rule, regulation, policy, order or otherwise.
6. **"Future Laws"** refers to all ordinances, resolutions, codes, rules, regulations, and official policies implemented by City after the Effective Date, whether by ordinance, initiative, resolution, rule, regulation, policy, order or otherwise. "Future Laws" includes changes to the Existing Laws.
7. **"Future Entitlements"** refers to all Entitlements approved or adopted by the City after the Effective Date.
8. **"General Fees"** refers to all general development fees which City may levy pursuant to the Government Code Sections 66000 et seq. ("the Mitigation Fee Act"), including, but not limited to, application fees, processing fees, utility connection fees, inspection fees, capital facilities fees, development impact fees, traffic impact fees, park fees and such other similar fees as may be enacted from time to time and generally applied throughout the City.
9. **"General Plan"** refers to the City's General Plan in effect on the Effective Date.

10. **"Project"** shall mean and refer to all improvements described in the Entitlements, Future Entitlements, and the Agreement.

11. **"Public Benefits"** shall refer to the consideration given by Owner to City, as described in Attachment C attached hereto, in return for the City's good faith performance of all applicable terms and conditions in the Agreement.

ARTICLE III

General Provisions

1. **Term of Agreement.** The term of the Agreement (the "Term") shall commence on the Effective Date and shall continue until the fifth (5th) anniversary thereof, unless terminated, modified, or extended as permitted by the Agreement.

Following the expiration of the Term, the Agreement shall be deemed terminated and of no further force or effect; provided, however, such termination shall not affect any right or duty arising from City approvals, including, without limitation, the Entitlements, the Future Entitlements and any reimbursement agreement that may be entered into pursuant to the terms of the Existing Laws or the Agreement.

To the extent applicable, the Agreement shall terminate with respect to any lot and such lot shall be released and no longer is subject to the Agreement, without the execution or recordation of any further document, when a certificate of occupancy has been issued for the building(s) on the lot.

2. **Assignment.** The rights and obligations of Owner under the Agreement may be assigned by Owner as part of an assignment of all or a portion of the Property. No assignment shall be effective unless (1) such assignment is in writing and expressly provides that the assignment shall be subject to this Development Agreement; (2) the Assignee assumes all of Owner's rights

and obligations with respect to the Property, or portion thereof, assigned; and (3) the City has determined that the assignment will not affect the timely completion or fulfillment of any requirements in the Entitlements, the Future Entitlements or the Agreement relating to the Public Benefits. Owner shall provide Thirty (30) days advance written notice to the City of any assignment. In determining whether an assignment will affect the timely completion or fulfillment of any requirements relating to the Public Benefits, City agrees (a) not to unreasonably withhold its determination that the assignment will not affect the timely completion or fulfillment of requirements relating to the Public Benefits and (b) to approve any assignment where it can reasonably be demonstrated that the proposed assignee has the financial capability to complete in a timely fashion and fulfill any uncompleted requirements relating to the Public Benefits, including a commitment for construction and take-out financing from a United States lender.

During the Term, any assignee shall have all rights, benefits, and obligations of Owner under the Agreement with respect to the portion of the Property assigned. Following an assignment, Owner shall be released from its obligations with respect to the Property which has been assigned. Upon any transfer of any portion of the Property and the express assumption of Owner's obligations under the Agreement by such transferee, City agrees to look solely to the transferee for compliance by such transferee with the provisions of the Agreement as such provisions relate to the portion of the Property acquired by such transferee. A default by any transferee shall only affect that portion of the Property owned by such transferee and shall not cancel or diminish in any way Owner's rights hereunder with respect to any portion of the Property not owned by such transferee. The transferee shall be responsible for the reporting and annual review requirements relating to the portion of the Property owned by such transferee, and

any amendment to the Agreement between City and a transferee shall only affect the portion of the Property owned by such transferee.

3. **Amendment of Agreement.** The Agreement may be amended by the mutual consent of the Parties in the manner provided by the Development Agreement Legislation. The Agreement shall include any amendment properly approved and executed. Minor modifications in the manner of performance, including, but not limited to changes which relate to the form or timing of payment of Public Benefits or the design of the Project shall not constitute an Amendment to the Agreement but may be accomplished through an "Operating Memorandum" subject to Article IV, Section 9 of the Agreement.

4. **Enforcement.** Unless amended or terminated as provided herein, the Agreement is enforceable by either Party or its successors and assigns, notwithstanding any Future Laws, which alter or amend the Existing Laws.

5. **Hold Harmless.**

a. Owner agrees to indemnify, hold harmless, and provide and pay all costs for a defense for the City in any legal action filed in a court of competent jurisdiction by a third party challenging the validity of the Agreement. The provisions of this Section shall not apply to the extent such damage, liability, or claim is proximately caused by the intentional or negligent act of the City, its officers, agents, employees, or representatives.

b. Owner shall further indemnify, defend and hold harmless City and its officers, employees and agents from and against any and all liabilities, claims, actions, causes of action, proceedings, suits, administrative proceedings, damages, fines, penalties, judgments, orders, liens, levies, costs and expenses of whatever nature, including reasonable attorneys' fees and disbursements, arising out of any violation, or claim of violation of the San Diego Municipal

Storm Water Permit (Order No. R9-2007-0001) of the California Regional Water Quality Control Board Region 9, San Diego, as amended or extended, which City might suffer, incur, or become subject by reason of or occurring as a result of or allegedly caused by the construction of the Project or the Improvements.

6. **Third Party Challenges.** In the event the validity, applicability, or implementation of the Agreement is challenged by means of legal proceedings by any party other than the City and Owner, it shall be the City's option, at its sole and absolute discretion, whether to undertake the defense of such challenge. If the City determines not to defend such challenge, it shall be the option of Owner, at its sole and absolute discretion, to defend the validity, applicability, or implementation of the Agreement in the proceeding at Owner's expense. If City opts to defend a challenge against the validity, applicability, or implementation of the Agreement, Owner shall not be responsible for the defense of any of the City's actions brought in such a challenge or for the expense of defending such City actions. City and Owner agree to cooperate in the defense of any such challenges.

7. **Notices.** All notices or communication between the City and Owner pursuant to the Agreement shall be in writing and shall be given by personal delivery (including commercial express delivery services providing acknowledgments of receipt), registered, certified, express mail, facsimile or telecopy, or telegram to the addresses set forth below. Receipt shall be deemed complete as follows:

- b. For personal delivery, upon actual receipt;
- c. For registered, certified, or express mail, upon the delivery date or attempted delivery date as shown on the return receipt; and

d. For facsimile, upon transmission of the facsimile or, if transmitted after business hours, then the next business day.

Notices shall be addressed as follows:

To the City: City Clerk
City of Escondido
201 N. Broadway
Escondido, CA 92025
FAX (760) 741-7541

To the Owner: City Plaza at Escondido, LLC
12463 Rancho Bernardo Road #164
San Diego, CA 92128
Attn: Nathan Adler
(858) 487-8111
FAX (858) 487-8140

With copy to: E. Elliot Adler, Esq.
City Plaza at Escondido, LLC
12463 Rancho Bernardo Road #164
San Diego, CA 92128
(877) 777-9LAW
FAX (858) 412-4512

The addresses to which notices shall be sent may be changed by giving Ten (10) days written notice of change of address in the manner set forth above.

8. **Conflict of State or Federal Laws.** If state or federal laws or regulations enacted after the Effective Date prevent compliance with any provision of the Agreement or require changes in the Entitlements or any Future Entitlements, those laws or regulations shall be controlling and the Parties shall make a good faith, reasonable attempt to modify the Agreement to comply both with the intent of the Agreement and with the new laws or regulations.

The City shall timely assist Owner in securing any permits, including permits from other public agencies, which may be required as a result of the modifications, suspensions, or alternate course of action.

ARTICLE IV

Development of the Property

1. **Applicable Rules, Regulations, and Policies.** Owner shall have the vested right, to the fullest extent allowed under the Development Agreement Legislation, to develop the Property in accordance with the Entitlements, Future Entitlements and the Existing Laws. During the Term, the Entitlements, Future Entitlements, Existing Laws and the Agreement shall control the overall design, development and construction of the Project. Notwithstanding the foregoing, nothing in the Agreement shall preclude City from applying changes occurring from time to time in the Uniform Building Code, Uniform Electrical Code, Uniform Fire Code, Uniform Mechanical Code, or Uniform Plumbing Code, provided that such changes (i) are found by City to be necessary to the health or safety of the citizens of City, (ii) are generally applicable to all similar types of property in City, and (iii) do not prevent or unreasonably delay development of the Project in accordance with the Agreement. In the event of any inconsistency between the Existing Laws and the Agreement, the provisions of the Agreement shall control.

Prior to the Effective Date, City and Owner shall use reasonable efforts to identify two identical sets of the Existing Laws, one set for City and one set for Owner, so that if it becomes necessary in the future to refer to any of the Existing Laws, there will be a common set of the Existing Laws available to both parties.

2. **Future Laws.** Future Laws shall not apply to the Project except as expressly provided in the Agreement. Owner may give City written notice of its election to have any Future Law applied to the Property, in which case such Future Law shall be deemed to be an Existing Law.
3. **Future Discretionary Reviews.** Except as set forth in the Agreement, the City shall retain its discretionary rights in reviewing applications for Future Entitlements. Owner's applications for Future Entitlements and City's review thereof, must comply with the Existing Laws and with the terms and conditions of the Agreement. Upon granting any Future Entitlement, such Future Entitlement shall become part of the Existing Laws. City shall not impose any conditions upon any Existing Entitlements that are more restrictive than or inconsistent with the terms of this Agreement or the Existing Laws, except as expressly required (as opposed to permitted) by state or federal law. City may conduct, in accordance with CEQA and the Existing Laws, an environmental review for Future Entitlements. City may impose, if required by CEQA, additional mitigation measures to mitigate significant adverse environmental effects that were not previously considered, or were found to be infeasible, to mitigate at the time of approval of this Agreement.
4. **Permitted Uses and Density.** The Agreement shall vest the right to develop the Property to the fullest extent allowed under the Development Agreement Legislation with respect to the permitted uses of land, density and intensity of uses, and timing and phasing of development as described in the Entitlements and Future Entitlements. The permitted uses, density, and intensity of use of the Project, the maximum height and size of proposed buildings and provisions for reservation or dedication of land for public purposes, shall substantially conform to those specified in the Entitlement and Future Entitlement conditions of approval, Existing Laws and the Agreement. All other aspects of the Project that are not specified in the

Entitlement or Future Entitlement conditions of approval shall be determined by the Existing Laws, except as expressly provided herein.

To the extent the City retains discretion in the Future Entitlements concerning future permitted land uses, density, and intensity of use(s), City agrees, absent conditions that the City determines are dangerous to the health or safety of the residents of the City, not to exercise that discretion in such a way as to reduce the allowed number of residential units, alter the timing of development or modify the height and design features of the Project as described in the Entitlements, Future Entitlements and the Agreement.

5. **Application of Future Laws.** Subject to Article V of the Agreement, Future Laws may be applied to the Project if they are not in conflict with the Existing Laws and will not prevent, hinder, delay, or adversely economically impact the Project.

6. **Permitted Fees.** Except as otherwise provided in the Agreement, and specifically excluding fees set by entities not controlled by City that are collected by City, City shall charge and impose those General Fees and Exactions described as "Processing Fees," "Permit/Inspection Fees," "Connection Fees," "Plan Check Fees" and "Development Fees" in the amounts and of the type which are in effect on the day that the Foundation Building Permit is issued (as described in paragraph IV. 16., below).

In return for Owner's construction of certain water- and wastewater-related Public Benefits in the Downtown Specific Planning Area, as further described in Attachment C, the City will participate in a small portion of the cost of such Public Benefits. At the time that general building permit fees are due, City will either: a) refund EIGHTY-NINE THOUSAND DOLLARS (\$89,000.00) by check within five business days following Owner's payment of all fees that are due prior to issuance of the first certificate of occupancy for the Project, as

described in paragraph IV. 7., below; or b) waive EIGHTY-NINE THOUSAND DOLLARS (\$89,000.00) in General Fees and Exactions, including a portion of any processing, permitting, inspection, connection, development, plan check and similar fees described in the Fee Guide, and as specified by City at the time.

The City's credit toward the above-described fees is contingent upon Owner having first executed the City's standard Agreement for Completion of Improvements ("Public Improvement Agreement") (sample found at Attachment D), and having provided faithful performance, labor and materials, guaranty and warranty, and any other bonds required (collectively, the "Bonds") commensurate with the execution of the Improvement Agreement.

7. **Deferral of Payment of Certain Fees.** Owner shall be required to pay all "Processing Fees," prior to the City's issuance of the first building permit for the Project. All remaining "Development Fees" shall be deferred, and shall be due prior to the City's issuance of the first certificate of occupancy for the Project. A schedule of the "Processing Fees" and "Development Fees" is found at Attachment E, which is incorporated by reference.

8. **Moratorium.** No City-imposed moratorium or other limitation (whether relating to the rate, timing or sequencing of the development or construction of all or any part of the Property, whether imposed by ordinance, initiative, resolution, policy, order or otherwise, and whether enacted by the City Council, an agency of City, the electorate, or otherwise) affecting parcel or subdivision maps (whether tentative, vesting tentative, or final), building permits, occupancy certificates or other entitlements to use or service (including, without limitation, water and sewer) approved, issued or granted within City, or portions of City, shall apply to the Property to the extent such moratorium or other limitation is in conflict with the Agreement; provided, however, the provisions of this Section shall not affect City's compliance with moratoria or other

limitations mandated by other governmental agencies or court-imposed moratoria or other limitations.

9. **Operating Memoranda.** The Parties acknowledge that the provisions of the Agreement require cooperation between City and Owner, and that the refinements and further development of the Project hereunder may demonstrate that changes are appropriate with respect to the details of performance of the Parties hereunder. The Parties desire, therefore, to retain a certain degree of flexibility with respect to those items covered in general terms under the Agreement. If and when, from time to time during the Term, the Parties find that such changes or adjustments are necessary or appropriate, they shall effectuate such changes or adjustments through Operating Memoranda approved by the Parties, which, after execution, shall be attached hereto as addenda and become a part hereof, and may be further changed and amended from time to time as necessary with further approval by City and Owner. No such Operating Memoranda shall require prior notice or hearing, or constitute an amendment to the Agreement; and in the case of City, such Operating Memoranda may be acted upon by City's Planning Director. Failure of the Parties to enter into any such Operating Memoranda shall not affect or abrogate any of the rights, duties or obligations of the Parties hereunder or the provisions of the Agreement.

10. **Infrastructure Capacity.** Subject to Owner's proportionate contribution to infrastructure and the Public Benefits provided by Owner, in accordance with the requirements of the Entitlements and Future Entitlements, City hereby acknowledges that it will have sufficient capacity in its infrastructure services and utility systems, including, without limitation, traffic circulation, flood control, sewer collection, sewer treatment, sanitation service and, except for reasons beyond City's control, water supply, treatment, distribution and service, to accommodate the Project. To the extent that City renders such services or provides such utilities, City hereby

agrees that it will serve the Project and that there shall be no restriction on connections or service for the Project except for reasons beyond City's control.

11. **Termination or Modification.** Notwithstanding the provisions of Section 33-1149 of City's Zoning Code, City's right to terminate or modify the Agreement may be exercised pursuant to the terms of Section 33-1149 after a public hearing only if City determines that the failure of City to terminate or modify the Agreement would place the residents of City in an immediate condition dangerous to their health or safety.

12. **Easements.** Easements dedicated for pedestrian use shall be permitted to include easements for underground drainage, water, sewer, gas, electricity, telephone, cable and other utilities and facilities so long as they do not unreasonably interfere with pedestrian use.

13. **Use of Alley Dedication.** The "Easements and Dedications" section of the Project conditions of approval requires Owner to dedicate 2 feet of right-of-way along the Project frontage in the alley, concurrent with the City's issuance of the first building permit for the Project. City agrees that when Owner obtains an encroachment permit from the City for construction and removal of utilities in the alley, this encroachment permit shall include the 2 feet of right-of-way that Owner will have dedicated to the City, plus temporary access to 5 additional feet of the alley required for construction of Project improvements.

14. **Build to Planning Commission-Approved Design.** Owner agrees to construct the Project such that the exterior design and elevations of the structures conform substantially to the project design considered by the City's Planning Commission on May 22, 2007.

15. **Multiple Building Permits.** City acknowledges that Owner will submit plans to secure building permits for the Project in at least two separate phases. The first building permit will be for construction of the podium, foundation and subterranean parking structures, and related

utilities (the "Foundation Building Permit"). The second building permit will be for construction of the habitable structures of the Project, including its commercial and residential components (the "Vertical Building Permit"). Owner acknowledges that any change to building-related or health and safety codes that become effective on a City-wide basis (as described in Article II, Paragraph 1) may be applicable to the design of the Project, at the discretion of the City's Building Director, even if the Foundation Building Permit has been issued, and the Vertical Building Permit has not yet been issued.

16. **Priority Processing.** Subject to applicable laws regulating the processing time frames for Future Entitlements, plan check of the Project, the engineering plans, grading plans, street plans, storm drains, signalization plans, and improvement plans will be expedited by City. City shall retain qualified consultants as an extension of staff at Owner's expense to perform priority processing of all necessary applications if requested by Owner. To further expedite processing, Owner may request overtime and remit advance payment to City for overtime work by said qualified consultant in the event that it is feasible for said consultant to perform such overtime work. Additionally, City shall use its best efforts to expeditiously process Owner's applications for amendments and modifications to the Project or Specific Plan, and to expeditiously process and conclude any necessary proceedings in eminent domain and obtain orders of immediate possession.

ARTICLE V

Provision of Public Benefits

1. **Description of Public Benefits.** Owner or its assignees shall compensate City with the following Public Benefits, as further described in Attachment C, as consideration for the City's good faith performance of all applicable terms and conditions in the Agreement:

a. Fulfilling long-term economic goals for City.

b. Providing fiscal benefits to City.

c. Providing short-term construction employment within the City.

d. Providing housing which will help to satisfy City's obligation to meet City's share of regional housing needs.

e. Advancement of the City's planned construction of water and wastewater service infrastructure needed in the future to serve areas near and surrounding the Property.

f. Payment of Downtown Specific Planning Area Future EIR Fee. Payment of Two Hundred Fifty Dollars (\$250.00) per each of the equivalent dwelling units ("EDU's") to be constructed as part of the Project. At the time of approval of this Agreement, City and Owner anticipate that the Project will have 55.975 EDU's, and therefore Owner will pay a total of \$13,993.75 toward the City's future cost of preparing an Environmental Impact Report for the Downtown Specific Planning Area. This sum shall be due at the same time as the "Future Infrastructure Fee," pursuant to the terms of paragraph V.2.b. and V.2.c., below.

g. Payment of Downtown Specific Planning Area Future Infrastructure Fee. Owner shall pay Thirty Thousand Dollars (\$30,000.00) per each of the residential dwelling units to be constructed as part of the Project which is above the Property's allowable density of 36 units. At the time of approval of this Agreement, City and Owner anticipate that the Project will have 55 residential units, or 19 units above allowable density, and therefore Owner will pay a total of \$570,000 toward the City's future cost of upgrading public infrastructure in the Downtown Specific Planning Area. This sum shall be due before the City issues the first certificate of occupancy for the Project, or six months thereafter, pursuant to all of the terms described in paragraph V. 2.b., below.

2. Owner to Pay Downtown Specific Planning Area Future Infrastructure Fee.

a. **Description of Fee.** When the City Council approved the Interim Specific Plan for the Downtown Specific Planning Area in November 2006, the City Council directed that the City's staff continue processing development applications for certain projects proposing residential units in the downtown. Owner's Project is one such application, and has qualified for approval by the City in advance of the City's forthcoming completion of the EIR for the Downtown Specific Planning Area. Since the Project has been approved in advance of the EIR, the Owner has agreed to pay certain fees to the City for the purpose of constructing future public infrastructure that will serve the downtown area. Owner and City agree that the amount of this fee has been set at \$30,000 for every residential unit in the Project that is in excess of the allowable density for the Property before approval of this Agreement. Since the Property allowed construction of 36 residential units, and Owner proposes to construct up to 55 residential units, Owner will pay \$30,000 for each of the up to 19 units in excess of the allowable density. (For example, construction of all 55 units will result in payment of a fee of \$570,000.)

b. **Timing of Payment.** Owner has two options to determine the timing of payment of the fee described in this paragraph V.2.:

i) Before the City issues the building permit for the residential or commercial portion of the proposed structure (hereafter called the "Vertical Building Permit") (which Owner will request following conclusion of construction of the podium and subterranean parking garage), Owner must post a public improvement bond and complete a Public Improvement Agreement in substantially the form found at Attachment D to secure payment. The terms of this bond shall

allow Owner to defer payment of the fee until six months after the first certificate of occupancy is issued for the Project, and shall allow City to enforce payment of the fee if payment is not made before six months after the first certificate of occupancy. The terms of the Public Improvement bond shall be subject to the approval of the City Attorney; or

ii) If the Owner notifies the City in writing before the City issues the Vertical Building Permit that Owner will not be providing a public improvement bond to secure this fee, the Owner may elect to pay cash in lieu of posting the bond to secure payment of the fee, and in such event, the entire sum shall be due and must be paid any time before the City issues the first certificate of occupancy for the Project.

c. Fee Includes the Downtown Specific Planning Area Future EIR Fee. For purposes of providing a round number of \$30,000 per additional dwelling unit, Owner's payment of the fee described in this paragraph V.2. includes the amount required for the Downtown Specific Planning Area Future EIR Fee, described in paragraph V.1.f., above, and no further payment from Owner shall be required for the Downtown Specific Planning Area Future EIR Fee.

3. **Occupancy Contingent on Construction of Public Benefits.** Owner acknowledges that the City shall not grant a certificate of occupancy for any tenant space constructed on the Property until Owner completes the Public Benefits listed in Attachment C, pursuant to the schedule and conditions set forth in the Conditions of Approval adopted by the City Council in conjunction with approval of the Project.

This contingency for occupancy shall survive the termination of the Agreement.

4. **Issuance of Building Permits Contingent on Security for Public Benefits.** Before the City issues the first building permit for the Project, Owner must enter into an Agreement for

Completion of Improvements , which will detail Owner's construction obligations for project-required improvements and the Public Benefits, as outlined in the Project's conditions of approval, and will require Owner to provide financial security for completion of construction. The agreement shall be in substantially the form found at Attachment D, and shall be subject to the approval of the City Attorney.

5. **Other Governmental Bodies.** To the extent that City, the City Council, the Planning Commission or any other City board, agency or commission that constitutes and sits as any other board, agency or commission, it shall not take any action that conflicts with City's obligations under the Agreement.

6. **Processing During Third Party Litigation.** The filing of any third party lawsuit(s) against City or Owner relating to the Agreement, the Entitlements, any Future Entitlements or to other development issues affecting the Property shall not delay or stop the development, processing or construction of the Project or approval of Future Entitlements, unless the third party obtains a court order preventing the activity. City shall not stipulate to or cooperate in the issuance of any such order.

ARTICLE VI

Annual Review

1. **City Responsibilities.** At least every twelve (12) months during the Term, City shall review the extent of good faith substantial compliance by Owner with the terms of the Agreement (the "Annual Review"). At the conclusion of the Annual Review, the City's finding of good faith substantial compliance by Owner with the terms of the Agreement shall be conclusive up to the date of such finding for the purposes of future Annual Reviews or legal action between the Parties.

2. **Owner Responsibilities.** At the annual review, it shall be the responsibility of Owner to demonstrate good faith substantial compliance with the major provisions of the Agreement and to provide, to the best extent possible, the status and timing of development of the Project and related public improvements. If requested by City, Owner shall provide any additional detail or information necessary to demonstrate good faith compliance with any particular provision of the Agreement identified by the City.
3. **Opportunity to be Heard.** Owner shall be permitted an opportunity to be heard orally and in writing at any noticed public hearing regarding its performance under the Agreement. Owner shall be heard before each appropriate board agency or commission and the City Council at any required public hearing concerning a review of performance under the Agreement.
4. **Information to be Provided to Owner.** City shall mail to Owner a copy of staff reports and related Attachments concerning Agreement performance, a minimum of ten (10) calendar days prior to consideration and review by the City Council as required by the Development Agreement Legislation.
5. **Annual Review Letter.** If Owner is found to be in substantial compliance with the Agreement after the Annual Review, City shall issue, upon written request by Owner, a letter to Owner (the "Review Letter") stating that, based upon information known or made known to the City Council, the City Planning Commission, and/or the City Manager, the Agreement remains in effect and Owner is in compliance. Owner may record the Review Letter in the Official Records of the County of San Diego.
6. **Estoppel Certificates.** Either Party may at any time, and from time to time, deliver written notice to the other Party requesting that the other Party certify in writing that to the knowledge of the certifying Party:

- a. The Agreement is in full force and effect and is a binding obligation of the Parties.
- b. The Agreement has not been amended or modified orally or in writing or, if so amended, identifying the amendments.
- c. There exists no material default in the performance of the requesting Party's obligations under the Agreement or, if in default, the nature and amount of any material default.

A Party receiving a request under this Section shall execute and return a certificate within Thirty (30) days following receipt of the request. The failure to deliver such certificate within such time shall be conclusive upon the party which fails to deliver such certificate that the Agreement is in full force and effect without modification and that there are no uncured defaults in the performance of the requesting party. A certificate given pursuant to this Section may be relied upon by assignees and mortgagees.

7. **Failure of Annual Review.** City's failure to perform the Annual Review of Owner's substantial compliance with the terms and conditions of the Agreement shall not constitute or be asserted as a default by Owner.

ARTICLE VII

Delay, Default, Remedies, and Termination

1. **Notice and Cure of Default.** In the event of a material default, the Party alleging a default shall give the defaulting Party a notice of default in writing. The notice of default shall specify the nature of the alleged material default, and the manner and period of time of not less than thirty (30) days in which the default must be cured (the "Cure Period"). The Cure Period must provide sufficient and reasonable time for the default to be cured. During the Cure Period,

the Party charged shall not be considered in default. If the default is cured within the Cure Period, then no default shall be deemed to exist.

2. **Option to Institute Legal Proceedings or to Terminate.** If a material default is not cured within the Cure Period, the noticing Party may institute legal proceedings as provided in Article VII Section 8 and/or give to the defaulting Party a notice of intent to terminate the Agreement. If a notice of intent to terminate the Agreement is given, the City Council, within thirty (30) days after the giving of the Notice, shall hold a public hearing in the manner set forth in the Development Agreement Legislation, as amended, to consider and review the matter.

3. **Notice of Termination.** Following consideration of the evidence presented before the City Council and its determination that a default exists, the Party alleging a material default by the other Party, at its option, may give written notice of termination of the Agreement to the other Party and the Agreement shall be terminated immediately upon the giving of the Notice. The validity of the basis for such a termination may be challenged pursuant to Article VII Section 8 by the Party alleged to be in default.

4. **Waiver.** Failure or delay in giving notice of default pursuant to Article VII Section 1 shall not constitute a waiver of any other material default. Except as otherwise expressly provided in the Agreement, a failure or delay in asserting any rights or remedies as to any default shall not operate as a waiver of any default or of any rights or remedies otherwise available to a Party or deprive a Party of the right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any rights or remedies it may have.

5. **Default by Owner.** An Annual Review may result in amendment or termination of the Agreement provided a material default has been established by substantial evidence and such default has not been cured within the Cure Period.

6. **Default by City.** Upon a material default by City, Owner, without limiting any of its other remedies, shall not be obligated to complete any of its obligations under the Agreement. Upon a City default, any resulting delays in Owner's performance shall neither be construed as a material default by Owner nor constitute grounds for termination or cancellation of this Agreement by City and the Term shall be extended for the period of any such delay.

7. **Enforced Delay, Extension of Time of Performance.** Neither Party shall be deemed to be in default where delays or defaults are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, casualties, acts of nature, unavailability of materials, governmental restrictions imposed or mandated by other applicable governmental entities, suspension of rights in accordance with the existence of unforeseen circumstances, litigation, or similar bases for excused performance. If written notice of such delay is given to the other Party following the commencement of such delay, an extension of time for performance shall be granted in writing for the period of the delay, or longer as may be mutually agreed upon. An extension shall commence to run from time of commencement of the cause of delay.

8. **Institution of Legal Action.** In addition to any other rights or remedies, either Party may institute legal action to cure, correct, or remedy any default, to enforce any provision of the Agreement, to enjoin any threatened or attempted violation of the Agreement, to recover damages for any default, or to obtain any remedies consistent with the purpose of the Agreement. Legal actions shall be instituted in the Superior Court of the County of San Diego, North County Branch, State of California, or in the Federal District Court in the Southern District of California. Pursuant to Code of Civil Procedure Section 638, et seq., all legal actions shall be heard by a referee who shall be a retired judge from either the San Diego County Superior Court, the California Court of Appeal, the United States District Court or the United States Court of

Appeals, provided that the selected referee shall have experience in resolving land use and real property disputes. Owner and City shall agree upon a single referee who shall then try all issues, whether fact or law, and report a finding and judgment thereon and issue all legal and equitable relief appropriate under the circumstances of the controversy before such referee. If Owner and City are unable to agree upon a referee within ten (10) days of a written request to do so by either party hereto, it will not be considered a material default by Owner nor constitute grounds for termination or cancellation of the Agreement by City and the Term shall be extended for the period of any such delay, and either party may seek to have a referee appointed pursuant to Code of Civil Procedure Section 640. The cost of such proceeding shall initially be borne equally by the parties. Any referee selected pursuant to this Article VII Section 8. shall be considered a temporary judge appointed pursuant to Article 6, Section 21 of the California Constitution. Notwithstanding the provisions of this Article VII Section 8, either party shall be entitled to seek declaratory and injunctive relief in any court of competent jurisdiction to enforce the terms of the Agreement, or to enjoin the other party from an asserted breach thereof, pending the selection of a referee as provided in this Article VII Section 8, on a showing that the moving party would otherwise suffer irreparable harm.

9. **Future Litigation Expenses.**

a. **Payment to prevailing party.** If City or Owner brings an action or proceeding (including, without limitation, any motion, order to show cause, cross-complaint, counterclaim, or third-party claim) by reason of default, breach, tortious acts, or otherwise arising out of the Agreement, the prevailing party in such action or proceeding shall be entitled to its costs and expenses of suit including, but not limited to, reasonable attorneys' fees and expert witness fees.

b. **Scope of fees.** Attorneys' fees under this Section shall include attorneys' fees on any appeal and, in addition, a party entitled to attorneys' fees shall be entitled to all other reasonable costs and expenses incurred in connection with such action. In addition to the foregoing award of attorneys' fees to the prevailing party, the prevailing party in any lawsuit shall be entitled to its attorneys' fees incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of the Agreement into any judgment on the Agreement.

ARTICLE VIII

Encumbrances and Releases on Property

1. **Discretion to Encumber.** The Agreement shall not prevent or limit Owner, in any manner, from encumbering the Property or any portion of the Property or any improvement on the Property by any mortgage. City acknowledges that lenders providing financing may require modifications to the Agreement and City agrees, upon request, from time to time, to meet with Owner and/or representatives of lenders to negotiate in good faith any lender request for modification. City agrees that it will not unreasonably withhold its consent to any lender requested modification to the Agreement.
2. **Entitlement to Written Notice of Default.** Any mortgagee and its successors and assigns, upon written request to City, shall be entitled to receive from City written notice of any Owner default at the same time Owner is provided with such notice pursuant to Article VII Section 1 above.
3. **Additional Mortgagee Protection.** Any mortgagee of a mortgage or a beneficiary of a deed of trust of the Property shall be entitled to the following rights and privileges:

a. Neither entering into the Agreement nor a breach of the Agreement shall defeat, render invalid, diminish, or impair the lien of any mortgage or deed of trust on the Property made in good faith and for value.

b. Any mortgagee receiving the notice referred to in Article VIII Section 2 above shall have the right, but not the obligation, to cure the default during the remaining cure period allowed such party under the Agreement. If the default is of a nature which can only be remedied or cured by such mortgagee upon obtaining possession, such mortgagee shall seek to obtain possession with diligence and continuity through foreclosure, a receiver or otherwise, and shall thereafter remedy or cure the default or noncompliance within thirty (30) days after obtaining possession. If any such default or noncompliance cannot, with diligence be remedied or cured within such 30-day period, then such mortgagee shall have such additional time as may be reasonably necessary to remedy or cure such default or noncompliance if such mortgagee commences cure during such 30-day period, and thereafter diligently pursues and completes such cure.

ARTICLE IX

Miscellaneous Provisions

1. **Rules of Construction.** The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory; "may" is permissive.
2. **Severability.** If any non-material provision of the Agreement shall be adjudged by a court of competent jurisdiction to be invalid, void, or illegal, it shall in no way affect, impair, or invalidate any other provision of the Agreement. If any material part of the Agreement is adjudged by a court of competent jurisdiction to be invalid, void, or illegal, the Parties shall take all steps necessary to modify the Agreement to implement the original intent of the Parties in a

valid and binding manner. These steps may include the waiver by either of the Parties of their right under the unenforceable provision. If, however, the Agreement objectively cannot be modified to implement the original intent of the Parties and the Party substantially benefited by the material provision does not waive its rights under the unenforceable provision, the entire Agreement shall become void.

3. **Entire Agreement.** Except as the Agreement expressly refers to and/or incorporates other agreements between the City and Owner, the Agreement constitutes the entire understanding and agreement of the Parties with respect to the subject matter of the Agreement. The Agreement supersedes all other negotiations and previous agreements between the Parties with respect to that subject matter.

4. **Waivers.** All waivers of the provisions of the Agreement must be in writing and signed by the appropriate agents of City or of Owner.

5. **Amendments.** All amendments to the Agreement must be in writing signed by the appropriate agents of City and Owner, in a form suitable for recording in the Official Records of San Diego County, California.

6. **Recording.** The City Clerk shall cause a copy of the Agreement to be recorded with the Office of the County Recorder of San Diego County, California within Ten (10) days following the Effective Date. Upon the completion of performance of the Agreement or its revocation or termination, a statement evidencing completion, revocation, or termination signed by the appropriate agents of Owner and City shall be recorded in the Official Records of San Diego County, California.

7. **Project as a Private Undertaking.** It is specifically understood by the Parties that the Project is a private development and that Owner shall have the full power and exclusive control of the Property subject to the provisions of the Agreement.
8. **Incorporation of Recitals.** The Recitals set forth in Article I of the Agreement are part of the Agreement.
9. **Captions.** The captions of the Agreement are for convenience and reference only and shall not define, explain, modify, construe, limit, amplify or aid in the interpretation, construction or meaning of any of the provisions of the Agreement.
10. **Consent.** Where the consent or approval of a Party is required or necessary under the Agreement, the consent or approval shall not be withheld unreasonably.
11. **City's Ongoing Statutory Authority.** Except as expressly stated, nothing in this Agreement shall limit the City's authority and responsibility under the California Constitution and applicable California statutes to act in the best interests of the public health, safety, and welfare, and nothing in this Agreement is intended to limit in any way the legislative discretion otherwise afforded the Escondido City Council under state or federal law, as amended.
12. **Covenant of Cooperation.** The Parties shall cooperate with and assist each other in the performance of the provisions of the Agreement including assistance in obtaining permits for the development of the Property which may be required from public agencies other than City. The covenant of cooperation shall include, to the maximum extent permitted by law, that City shall use its best efforts to prevent any ordinance, measure, moratorium or other limitation from invalidating, prevailing over or making impossible any provision of the Agreement, and City shall cooperate with Owner to keep the Agreement in full force and effect. Owner reserves the right to challenge any such ordinance, measure, moratorium, or other limitation in a court of law.

if it becomes necessary to protect the development rights vested in the Property pursuant to the Agreement.

13. **Further Actions and Instruments.** Each of the Parties shall cooperate with and provide reasonable assistance to the other in the performance of all obligations under the Agreement and the satisfaction of the conditions of the Agreement. Upon the request of either Party, the other Party shall promptly execute, with acknowledgment or affidavit if reasonably required, and file or record such required instruments and writings and take any actions as may be reasonably necessary under the terms of the Agreement to carry out the intent and to fulfill the provisions of the Agreement or to evidence or consummate the transactions contemplated by the Agreement.

14. **Successors and Assigns.** Subject to Article III Section 2 above, the burdens of the Agreement shall be binding upon, and the benefits of the Agreement inure to, all successors-in-interest and assigns of the Parties.

15. **Time of the Essence.** Time is of the essence of the Agreement and of each and every term and condition hereof.

16. **Applicable Laws.** The Agreement shall be construed and enforced in accordance with the laws of the State of California, with venue in North San Diego County. All statutory references are to California statutes.

17. **No Waiver of Existing Rights or Applicable Laws.** The Agreement shall not constitute a waiver of any of Owner's existing rights or applicable laws, nor shall it limit or expand Owner's right to challenge any General Fee as being contrary to applicable law or to challenge any existing or Future Exaction as being in excess of Exactions permitted by applicable law.

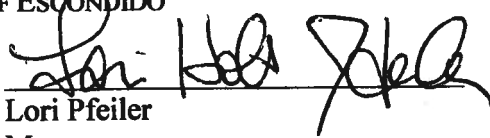
18. **Authorization.** Each person executing this Agreement hereby warrants and represents that he/she has the authority to enter into this Agreement and to bind his/her respective entity to the provisions hereof.

19. **No Third Party Beneficiaries.** This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party.

The Agreement has been executed by the Parties as of the dates set forth below:

CITY OF ESCONDIDO

By:


Lori Pfeiler

Its: Mayor

CITY OF ESCONDIDO

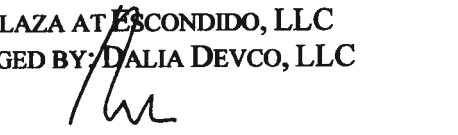
By:


Marsha Whalen

Its: City Clerk

CITY PLAZA AT ESCONDIDO, LLC
MANAGED BY DALIA DEVCO, LLC

By:


Nathan Adler, Manager of Dalia Devco, LLC

APPROVED AS TO FORM AND CONTENT:

CITY OF ESCONDIDO

By:


Steve Nelson, Assistant City Attorney

For: Jeffrey R. Epp, Esq.

Its: City Attorney

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of

San Diego

} ss.

On

Aug 8, 2007

Date

before me,

Liane Uhl, Notary Public

Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared

Nathan Adler

Name(s) of Signer(s)

☐ personally known to me

☒ 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.

WITNESS my hand and official seal.

Liane Uhl

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer

Signer's Name: _____

☐ Individual

☐ Corporate Officer — Title(s): _____

☐ Partner — ☐ Limited ☐ General

☐ Attorney-in-Fact

☐ Trustee

☐ Guardian or Conservator

☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of

San Diego

ss.

On

Aug. 29, 2007

Date

before me,

Liane Uhl, Notary Public

Name and Title of Officer (e.g., "Jane Doe, Notary Public")

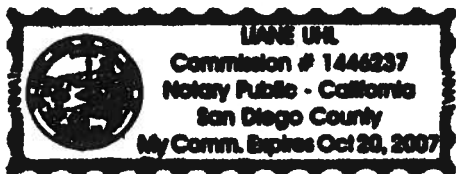
personally appeared

Lori Holt Pfeiler and Marsha Whalen

Name(s) of Signer(s)

☒ personally known to me

☐ 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.

WITNESS my hand and official seal.

Liane Uhl

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____

Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer

Signer's Name: _____

☐ Individual

☐ Corporate Officer — Title(s): _____

☐ Partner — ☐ Limited ☐ General

☐ Attorney-in-Fact

☐ Trustee

☐ Guardian or Conservator

☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

ATTACHMENT A

LEGAL DESCRIPTION

Lots 12 through 16, inclusive, in Block 96 of Escondido, in the City of Escondido, County of San Diego, State of California, according to Map thereof No. 336, filed in the Office of the County Recorder of San Diego County, July 10, 1886.

ATTACHMENT B

ENTITLEMENTS

1. A "Specific Plan Amendment," by City Council Resolution No. 2007-70 (R) on July 11, 2007;
2. A "Master and Precise Development Plan," by City Council Resolution No. 2007-70(R) on July 11, 2007;
3. Negative Declaration for the Project, ER 2007-08, certified by City Council Resolution No. 2007-70 (R) on July 11, 2007.

ATTACHMENT C

PUBLIC BENEFITS

1. **Payment of Downtown Specific Planning Area Future Infrastructure Fee.** Owner shall pay Thirty Thousand Dollars (\$30,000.00) per each of the residential dwelling units to be constructed as part of the Project which is above the Property's allowable density of 36 units, paid toward the City's future cost of upgrading public infrastructure in the Downtown Specific Planning Area pursuant to the terms of paragraph V.2.b of this Agreement.
2. **Utilities Improvements.**
 - a. Improve and upgrade the sewer service in the alley adjacent to the Project, pursuant to construction plans in excess of those required for traditional frontage improvements.
 - b. Relocate and improve water service in Escondido Boulevard, Third Avenue, and Maple Street adjacent to the Project, pursuant to construction plans in excess of those required for traditional frontage improvements.

ATTACHMENT D

AGREEMENT FOR COMPLETION OF IMPROVEMENTS

This Agreement is made and entered into this _____ day of _____, 20____, by and between CITY OF ESCONDIDO, a municipal corporation, hereinafter referred to as "CITY," and _____ a _____ hereinafter referred to as "APPLICANT";

WHEREAS, APPLICANT proposes to construct a building, structure or development at _____ in the City of Escondido, County of San Diego, State of California, the "Project"; and

WHEREAS, certain public improvements are required to be constructed and/or installed in the streets and/or easements adjacent to the lot or parcel upon which such the Project is to be constructed or erected; and

WHEREAS, pursuant to the provisions of Ordinance No. 93-2 of the Escondido Municipal Code, it is necessary that certain public improvements as detailed in the plans and specifications on file with the City Engineer of the City of Escondido, the "Improvements", be constructed and/or installed as a condition of and prerequisite to final inspection and acceptance of the Project.

NOW, THEREFORE, IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. APPLICANT hereby agrees, at its sole cost and expense, to furnish all labor, equipment and materials to construct the Improvements in a good workmanlike manner and in conformance with the approved plans and specifications on file with the City Engineer. APPLICANT agrees that the Improvements shall be completed within two years from the date of this Agreement. The Improvements shall be completed to the satisfaction of the City Engineer, and shall not be deemed complete until approved and accepted by CITY. The estimated cost of the Improvements is the sum of \$ _____

2. APPLICANT covenants that all Improvements shall be constructed in a manner that does not damage existing public property. Should any damage occur to public property, including, but not limited to, the Improvements in the public right-of-way as a result of APPLICANT or APPLICANT'S contractor performing construction, APPLICANT shall be responsible for repair or reconstruction of the public property. Such repair or reconstruction shall be at the APPLICANT'S sole expense and shall be completed to the satisfaction of the City Engineer.

3. CITY and its respective elected and appointed boards, officials, officers, agents, employees and volunteers (individually and collectively, "Indemnitees") shall have no liability to APPLICANT or any other person for, and APPLICANT shall indemnify, defend, protect and hold harmless Indemnitees from and against, any and all liabilities, claims, actions, causes of action, proceedings, suits, damages, judgments, liens, levies, costs and expenses of whatever

nature, including reasonable attorneys' fees and disbursements (collectively "Claims"), which Indemnitees may suffer or incur or to which Indemnitees may become subject by reason of or arising out of any injury to or death of any person(s), damage to property, loss of use of property, economic loss or otherwise occurring as a result of or allegedly caused by construction of the Improvements. CITY shall not by its approval of the Project, or any part of it, or by entering into this Agreement, or by granting any permits concerning this Project or Improvements, be deemed an insurer or surety for the design or construction of the Improvements.

If any action or proceeding is brought against Indemnitees by reason of any of the matters against which APPLICANT has agreed to indemnify Indemnitees as provided above, APPLICANT, upon notice from CITY, shall defend Indemnitees at APPLICANT'S expense by counsel acceptable to CITY, such acceptance not to be unreasonably withheld. Indemnitees need not have first paid for any of the matters to which Indemnitees are entitled to indemnification in order to be so indemnified. The provisions of this section shall survive the expiration or earlier termination of this Agreement.

If a court of competent jurisdiction determines that the CITY has acted with negligence with respect to anything covered in this Agreement, APPLICANT's obligation to indemnify CITY shall be limited by the provisions of California Civil Code Section 2782(b).

4. APPLICANT shall further indemnify, defend and hold harmless CITY and its officers, employees and agents from and against any and all liabilities, claims, actions, causes of action, proceedings, suits, administrative proceedings, damages, fines, penalties, judgments, orders, liens, levies, costs and expenses of whatever nature, including reasonable attorneys' fees and disbursements, arising out of any violation, or claim of violation of the San Diego Municipal Storm Water Permit (Order No. 2001-01) of the California Regional Water Quality Control Board Region 9, San Diego, which CITY might suffer, incur, or become subject by reason of or occurring as a result of or allegedly caused by the construction of the Project or the Improvements.

5. It is further agreed that APPLICANT will at all times, prior to CITY acceptance of the Improvements, give good and adequate warning to the traveling public of each and every defective and/or dangerous condition existing in the affected public rights-of-way and/or easements or any of them, and will protect the traveling public from such defective or dangerous conditions. It is understood and agreed that until acceptance of the Improvements, each of the affected public rights-of-way and/or easements not accepted as improved shall be under the charge of APPLICANT for the purposes of this Agreement. APPLICANT may, upon approval of the City Engineer, close all or a portion of any public right-of-way whenever it is reasonably necessary to protect the traveling public during construction of the Improvements. APPLICANT agrees that the provisions of Section nos. 3 and 4, respecting indemnification, are applicable to the obligations as set forth in this Section.

6. APPLICANT hereby agrees to pay for any inspection of streets and/or easements as may be required by CITY ordinances.

7. It is further agreed that APPLICANT shall file with the City Clerk at the time of signing this Agreement a good and sufficient bond or Instrument of Credit in an amount not less

than the estimated cost of the Improvements, as specified above, for the faithful performance of the terms and conditions of this Agreement, including payment for all labor and materials furnished in connection therewith and the guarantee and warranty of the Improvements for a period of two years against any defective work or labor or defective materials furnished, and that should the sureties on the bond or either of them become insufficient, APPLICANT agrees to renew the bond with good and sufficient sureties within 10 days after receiving notice that the sureties are insufficient.

8. In lieu of filing a bond as provided above, APPLICANT may deposit with the City Clerk or with a responsible escrow agent, bank, savings and loan or trust company, a sum of money or other form of security acceptable to the City Attorney, not less than the estimated cost of the Improvements as above specified, together with instructions to the escrow agent or bank, savings and loan or trust company for the payment of such money, which instructions shall be subject to the approval of the City Attorney.

9. Upon mutual consent of APPLICANT and the City Engineer, the City Engineer may make such changes, alterations or additions to the plans and specifications for the Improvements as may be determined necessary and desirable by the City Engineer for the proper completion of the Improvements and no such changes, alterations or additions shall relieve the surety or sureties on any bond given for the faithful performance of this Agreement.

10. It is further agreed by and between the parties hereto that, in the event it is deemed necessary to extend the time of completion of the Improvements required under this Agreement, the extension may be granted by CITY and shall in no way affect the validity of this Agreement, nor shall such extension release the surety or sureties on any bond given for the faithful performance of this Agreement. In accordance herewith, the surety waives the provisions of Section 2819 of the Civil Code of the State of California.

11. It is further agreed by and between the parties hereto that the terms of this Agreement shall run with the land and shall be binding on all parties having or acquiring any right, title, or interest in the above-described land or any part thereof.

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

CITY OF ESCONDIDO

Date: _____ By _____
City Manager

APPLICANT

Date: _____ By _____
Authorized Signature

Address:

(SIGNATURES MUST BE NOTARIZED)

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY

City Attorney