

ORDINANCE NO. 2022-04R

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ESCONDIDO, CALIFORNIA, APPROVING A DEVELOPMENT AGREEMENT FOR A MULTI-FAMILY RESIDENTIAL PROJECT WITHIN THE SOUTH CENTRE CITY SPECIFIC PLAN

The City Council of the City of Escondido, California does ordain as follows:

SECTION 1. The City Council makes the following findings:

a) Portofino Holdings I, LLC (“Applicant”), filed a land use development application (Planning Case Nos. ADM18-0225 & PL22-0021) with the City of Escondido constituting a request for a Major Plot Plan and Development Agreement for the construction of a two, two-story multi-family residential buildings, consisting of 15 apartment units in the Southern Entry District of the Southern Centre city Specific Plan (“Project”).

b) The Planning Division of the Community Development Department completed its review of the Project and scheduled a duly noticed public hearing regarding the application before the Planning Commission on January 25, 2022. Following the public hearing on January 25, 2022, the Planning Commission adopted Planning Commission Resolution No. 2022-01, which recommended that the City Council, among other things, approve the Project's proposed Development Agreement.

SECTION 2. The City Council held a duly noticed public hearing regarding the application on March 2, 2022. At said hearing, the City Council reviewed and considered all evidence submitted at said hearings, including, without limitation:

- a) Written information;
- b) Oral testimony from city staff, interested parties, and the public;

- c) The staff report, dated March 2, 2022, which along with its attachments is incorporated herein by this reference as though fully set forth herein, including the Planning Commission recommendation on the request, and
- d) Additional information submitted during the Public Hearing

SECTION 3. That upon consideration of the staff report; Planning Division and Planning Commission recommendations; Findings of Fact, attached as Exhibit "A" to this Ordinance and incorporated herein by this reference as though fully set forth herein; and all public testimony presented at the hearing held on this project, the City Council does hereby adopt the Development Agreement for the project as set forth in Exhibit "B" to this Ordinance and incorporated by reference as though fully set forth herein.

SECTION 4. ENVIRONMENTAL REVIEW. This action is categorically exempt from environmental review under the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15332, "In-Fill Development Projects." The City has determined that all environmental issues have been addressed and finds that no significant environmental impact will result from approving the major plot plan and development agreement.

SECTION 5. SEVERABILITY. If any section, subsection sentence, clause, phrase, or portion of this ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions.

SECTION 6. This Ordinance shall become effective on the 30th day following the date of its adoption.

SECTION 7. The City Clerk is hereby directed to certify to the passage of this ordinance and to cause the same or a summary to be published one time within 15 days of its passage in a newspaper of general circulation for the City of Escondido.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Escondido at a regular meeting thereof this 16<sup>th</sup> day of March, 2022 by the following vote to wit:

AYES : Councilmembers: GARCIA, INSCOE, MORASCO

NOES : Councilmembers: MARTINEZ, MCNAMARA

ABSENT : Councilmembers: NONE

APPROVED:

DocuSigned by:

*Paul McNamara*

PAUL MCNAMARA, Mayor of the City of Escondido, California

ATTEST:

DocuSigned by:

*Zack Beck*

ZACK BECK, City Clerk of the City of Escondido, California

\*\*\*\*\*

STATE OF CALIFORNIA )  
COUNTY OF SAN DIEGO : ss.  
CITY OF ESCONDIDO )

I, Zack Beck, City Clerk of the City of Escondido, hereby certify that the foregoing ORDINANCE NO. 2022-04R passed at a regular meeting of the City Council of the City of Escondido held on the 2<sup>nd</sup> day of March, 2022, after having been read at the regular meeting of said City Council held on the 16<sup>th</sup> day of March, 2022.

DocuSigned by:

*Zack Beck*

ZACK BECK, City Clerk of the City of Escondido, California

ORDINANCE NO. 2022-04R

## FINDINGS OF FACT

### **Environmental Determinations:**

1. Pursuant to the California Environmental Quality Act (Public Resources Code section 21000 et. seq.) ("CEQA"), and its implementing regulations (14 C.C.R. § 15000 et seq.) ("CEQA Guidelines"), the City of Escondido ("City") is the Lead Agency for the Project, as the public agency with the principal responsibility for approving the Project.
2. The Project qualifies for an exemption from further environmental review pursuant to CEQA Guidelines section 15332 (In-Fill Development Projects) because the Project is consistent with applicable provisions of the Escondido General Plan and South Centre City Specific Plan; is on a site within city limits that is of no more than five acres and is substantially surrounded by urban uses; is on a site that has no habitat value for special status species; can be adequately served by all required utilities and public services; and would not result in any significant effects relating to traffic, noise, air quality, or water quality. The Project also does not trigger any exceptions to the categorical exemption as listed in CEQA Guidelines section 15300.2. Technical studies were requested by the Planning Division to substantiate the categorical exemption as applied to the Project.
3. The City Council has independently considered the full administrative record before it, which includes but is not limited to the January 25, 2022, Planning Commission staff report; the March 2, 2022, City Council staff report; testimony by staff and the public; and other materials and evidence submitted or provided to it. The administrative record demonstrates that each of the above requirements have been satisfied. No substantial evidence has been submitted that would support a finding that any of the above-described exemption requirements has not been satisfied. The Project will not have a significant effect on the environment, and all of the requirements of CEQA have been met.

### **Development Agreement Determination:**

1. The proposed Development Agreement is consistent with the objectives, polices, general land uses, and programs specified in the General Plan since there are no changes to the General Plan land use designations or polices that effect development of the site, a Citywide Facilities Plan has been adopted to address infrastructure deficiencies on a citywide basis, and the agreement has a provision for a community benefit that could not otherwise be required of the developer.
2. The proposed Development Agreement is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the property is located, because the General Plan land use designation of this site is Specific Plan Area, which allows the number of dwelling units approved for the development in conformance with the South Center City Specific Plan, Southern Entry District.
3. The proposed Development Agreement conforms to the public convenience and general welfare because the proposed agreement provides a reduction in the required open space requirements and

a payment per-square-foot in lieu fee that would contribute toward the cost of installing, improving, and/or expanding parkland or facilities in the South Centre City area.

4. The proposed Development Agreement will not adversely affect the orderly development of property or the preservation of property values because the Project will be developed with multi-family residences, in conformance with the existing General Plan designation on the property.
5. The Development Agreement is consistent with the provisions of State law (Government Code sections 65864-65869.5) to develop in accordance with project approvals and existing laws. These Government Code sections outline requirements related to the contents of agreements, the applicability of an agreement and on the public hearing and approval process. The proposed Development Agreement is consistent with Government Code section 65864, which states that the lack of certainty in the approval of development projects can result in a waste of resources and escalated housing costs while discouraging comprehensive planning, because the proposed Development Agreement provides certainty to the Applicant regarding fees required and construction obligations for associated public improvements for a period of five years. In addition, the agreement complies with Article 58 of the Escondido Zoning Code, which outlines the procedures and requirements for the review, approval and amendment of development agreements.

**EXEMPT FROM FEES** pursuant to  
Gov't Code §§ 6103, 27383, and 27388.1  
(filing requested/executed by municipality)

RECORDING REQUESTED BY, AND  
WHEN RECORDED RETURN TO:

CITY CLERK  
CITY OF ESCONDIDO  
201 N. BROADWAY  
ESCONDIDO, CA 92025

*THIS SPACE FOR RECORDER'S USE ONLY*

APN: 238-152-16-00

**DEVELOPMENT AGREEMENT  
for Villa Portofino (2690 S. Escondido Blvd.)**

**between**

**City of Escondido**

**and**

**Portofino Holdings I, LLC**

**, 2022**

## DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT (“**Agreement**”) is entered into by and between the City of Escondido, a California municipal corporation (“**City**”), and Portofino Holdings I, LLC, a California limited liability company (“**Owner**”). (The City and Owner each may be referred to herein as a “**Party**” and collectively as the “**Parties.**”)

### RECITALS

WHEREAS, Government Code sections 65864 through 65869.5 and Article 58 of the City's Zoning Code authorize the 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 upon; and

WHEREAS, this Agreement concerns the Villa Portofino Apartment Project, which comprises two two-story, multi-family residential apartment buildings consisting of 15 total units and on-site parking, and further related improvements and components described in the Entitlements and this Agreement (“**Project**”); and

WHEREAS, the Project is located on that certain real property located in the County of San Diego, State of California, having assessor’s parcel number (APN) 238-152-1600, and as more particularly described in Exhibit A, attached hereto and incorporated herein by this reference (“**Property**”); and

WHEREAS, Owner is the fee simple owner of the Property; and

WHEREAS, the purposes of the Agreement are to eliminate uncertainty in the planning and development for the Project by assuring Owner that it may develop the Property in accordance with existing laws, subject to the terms and conditions contained in this Agreement; assure the

orderly installation of necessary improvements and the provision for public services appropriate for the development of the Project; and enable the City to obtain substantial public benefits by virtue of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, promises, terms, and conditions set forth herein, and the mutual benefits derived therefrom, the Parties agree as follows:

## ARTICLE I

### Definitions

1. **“Annual Review”** shall mean the Owner’s demonstration of compliance with the terms of this Agreement provided to the City at least once every 12 months throughout the duration of the Term, as further described in Article V of this Agreement.
2. **“Development Fees”** shall mean any development-related fees as provided in the City’s Fee Guide and referred to as development fees.
3. **“Effective Date”** shall mean the effective date of this Agreement, which shall be the later of (i) the date that is 30 days after the City Council’s adoption of an ordinance approving this Agreement; or (ii) the date that Owner becomes the owner of the Property in fee simple.
4. **“Entitlements”** shall mean 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 specific plans and amendments; tentative or final tract map approvals, whether standard or vesting; project plans; grading permits; building permits; demolition permits; specific alignment plans; planned development permits; and this Agreement, and includes all conditions of approval for all Entitlements.



5. **“Exaction”** shall mean 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.
6. **“Existing Laws”** shall mean the ordinances, resolutions, codes, rules, regulations, general plan, stormwater regulations, and official policies of the City governing the development of the Property in effect on the Effective Date, 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.
7. **“Fee Guide”** shall mean the Escondido Fee Guide for Developments, attached hereto as Exhibit C.
8. **“Future Exaction”** shall mean any Exaction imposed after the Effective Date, whether by ordinance, initiative, resolution, rule, regulation, policy, order, or otherwise.
9. **“Future Laws”** shall mean all ordinances, resolutions, codes, rules, regulations, and official policies implemented by the City after the Effective Date, whether by ordinance, initiative, resolution, rule, regulation, policy, order, or otherwise. Future Laws includes changes to the Existing Laws.
10. **“General Fees”** shall mean all general development fees that the City may levy pursuant to the Mitigation Fee Act, Government Code section 66000 et seq., 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, excluding Development Fees.

11. **“Minor Modifications”** shall mean minor modifications regarding the performance of this Agreement that are consistent with the Entitlements and have minimal impacts to the City's operations in terms of timing, performance, or value.
12. **“Operating Memorandum”** shall mean an addendum to this Agreement to document changes or adjustments in the performance of this Agreement, as further described in Article III, Section 7.
13. **“Public Benefits”** shall mean the consideration given by Owner to the City in return for the City's performance of all applicable terms and conditions of this Agreement, as further described in Exhibit B, attached hereto and incorporated herein by this reference.
14. **“State or Federal Law”** shall mean any state or federal law enacted after the Effective Date of this Agreement.

## ARTICLE II

### General Provisions

1. **Term of Agreement**. The term of this Agreement shall commence on the Effective Date and shall continue for five years (“**Term**”). After the expiration of the Term, this Agreement shall be deemed terminated and of no further force or effect. Owner shall have 30 days from the Effective Date to sign this Agreement or this Agreement shall automatically terminate. This Agreement shall terminate with respect to any lot when a certificate of occupancy has been issued for all buildings on the lot, and such lot shall be released and no longer subject to the Agreement without requiring the execution or recordation of any further document. In the event of litigation challenging this Agreement or the Project, the Term is automatically extended for the duration of such litigation and resumes upon final disposition of such challenge and any appeal thereof upholding the validity of this Agreement or the Project. In the event that a referendum petition

concerning this Agreement or Project is duly filed in such a manner that the ordinance approving this Agreement or the Project is suspended, then the Term is deemed to commence upon City Council's certification of the results of the referendum election affirming this Agreement or the Project.

2. **Assignment**. The rights and obligations of Owner under this Agreement may be assigned by Owner, in whole or in part, to any party acquiring an interest in the Property, after receiving written approval from the City, which shall not be unreasonably withheld, conditioned, or delayed ("**Assignment**"). Owner shall provide 30 days' advance written notice to the City of any requested Assignment, and the City shall respond or execute any written consent requested by Owner within said 30-day period.

Any Assignment must be in writing and expressly provide that (1) the Assignment shall be subject to this Agreement, and (2) the assignee assumes all of Owner's rights and obligations with respect to the Property, or portion thereof, assigned. The City shall have the right to ensure that the proposed assignee has the financial capability to complete and fulfill any outstanding requirements relating to the Public Benefits. Owner and the assignee shall execute an Assignment and Assumption of Development Agreement, which shall be in a form approved by the City Attorney and which shall be recorded against the Property in the Official Records of San Diego County.

During the Term, any assignee shall have all rights, benefits, and obligations of Owner under this Agreement with respect to the portion of the Property assigned. Following an Assignment, Owner shall be released from its obligations with respect to the assigned Property unless otherwise agreed to in writing.

3. **Amendment of Agreement.** This Agreement may be amended, or canceled in whole or in part, by mutual written consent of the Parties in accordance with Article 58, Chapter 33 of the Escondido Municipal Code; Government Code sections 65867 – 65868.5, and any other applicable law. Any amendment to this Agreement must be recorded in the Official Records of San Diego County. Minor Modifications in the manner of performance, including but not limited to changes that relate to the form or timing of payment of Public Benefits or the design of the Project, shall not constitute an amendment to this Agreement and may be accomplished through an Operating Memorandum.

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

5. **Indemnification, Hold Harmless, Duty to Defend.**

a. Owner (including Owner's agents, employees, contractors, and subcontractors, if any) shall indemnify, hold harmless, and defend (with counsel reasonably acceptable to the City) the City, its Councilmembers, Planning Commissioners, boards, commissions, departments, officials, officers, agents, employees, and volunteers (collectively, "**Indemnified Parties**") from and against any and all claims, demands, actions, causes of action, proceedings (including but not limited to legal and administrative proceedings of any kind), suits, fines, penalties, judgments, orders, liens, levies, costs, expenses, liabilities, losses, damages, or injuries, at law or in equity, including without limitation the payment of all consequential damages and attorney's fees and other related litigation costs and expenses (collectively, "**Claims**"), of every nature caused by, arising out of, or in connection with (i) any business, work, conduct, act, omission, or negligence of the Owner (including the Owner's contractors, subcontractors, licensees, sublessees, invitees,

agents, consultants, employees, or volunteers), or such activity of any other person that is permitted by the Owner, occurring in, on, about, or adjacent to the Property; (ii) any use of the Property, or any accident, injury, death, or damage to any person or property occurring in, on, or about the Property; or (iii) any default in the performance of any obligation of the Owner to be performed pursuant to any condition of approval for the Project or agreement related to the Project, or any such claim, action, or proceeding brought thereon. Provided, however, that the Owner shall have no obligation to indemnify, hold harmless, or defend the City as to any Claims that arise from the sole negligence or willful misconduct of the City. In the event any such Claims are brought against the City, the Owner, upon receiving notice from the City, shall defend the same at its sole expense by counsel reasonably acceptable to the City and shall indemnify the City for any and all administrative and litigation costs incurred by the City itself, the costs for staff time expended, and reasonable attorney's fees (including the full reimbursement of any such fees incurred by the City's outside counsel, who may be selected by the City at its sole and absolute discretion and who may defend the City against any Claims in the manner the City deems to be in the best interests of the City).

b. The Owner further and separately agrees to and shall indemnify, hold harmless, and defend the City (including all Indemnified Parties) from and against any and all Claims brought by any third party to challenge the Project or its approval by the City, including but not limited to any Claims related to the Project's environmental determinations or environmental review documents, or any other action taken by the City regarding environmental clearance for the Project or any of the Entitlements, including this Agreement. Such indemnification shall include the Owner's payment for any and all administrative and litigation costs and expenses incurred by the City in defending against any such Claims, including payment for all administrative and

litigation costs incurred by the City itself, the costs for staff time expended, and reasonable attorney's fees (including the full reimbursement of any such fees incurred by the City's outside counsel, who may be selected by the City at its sole and absolute discretion and who may defend the City against any Claims in the manner the City deems to be in the best interests of the City and the Project).

c. The City, in its sole discretion and upon providing notice to the Owner, may require the Owner to deposit with the City an amount estimated to cover costs, expenses, and fees (including attorney's fees) required to be paid by the Owner in relation to any Claims referenced herein, which shall be placed into a deposit account from which the City may draw as such costs, expenses, and fees are incurred. Within 14 days after receiving written notice from the City, the Owner shall replenish the deposit account in the amount the City determines is necessary in the context of the further defense of such Claims. To the extent such deposit is required by the City, the amount of such deposit and related terms and obligations shall be expressed in a written Deposit Account Agreement, which shall be subject to the City Attorney's approval as to form. The City, in its sole and reasonable discretion, shall determine the amount of any initial deposits or subsequent deposits of funds, and the Owner may provide documentation or information for the City to consider in making its determinations. Nothing within this subsection shall be construed as to relieve the Owner's obligations to indemnify, hold harmless, or defend the City as otherwise stated herein.

6. **Notices.** All notices or communication between the Parties pursuant to this Agreement shall be in writing and shall be given by personal delivery, overnight delivery service, or certified or registered mail to the addresses set forth below. The addresses may be changed by giving 10 days' written notice.

If to the City

City of Escondido  
Attn: Adam Finestone, Interim Director of Community Development  
201 N. Broadway  
Escondido, CA 92025

with a copy to:

City of Escondido  
Attn: Office of the City Attorney  
201 N. Broadway  
Escondido, CA 92025

If to Owner

Portofino Holdings I, LLC  
Attn: Frank Giordano Jr.  
2510 Lund St.  
El Cajon, CA 92020

with a copy to:

Lounsbery Ferguson Altona & Peak  
Attn: Catherine Ferguson  
960 Canterbury Place, Suite 300  
Escondido, CA 92025

7. **Conflict with State or Federal Laws.** If any State or Federal Law prevents or precludes compliance with any provision of this Agreement or requires changes to any Entitlements, such State or Federal Law shall be controlling and the Parties shall make a good faith, reasonable attempt to modify this Agreement to comply both with the intent of the Agreement and with the State or Federal Law.

The City shall cooperate with Owner in securing any permits, including permits from other public agencies that may be required as a result of any modifications, suspensions, or alternate courses of action necessary for compliance with any State or Federal Law.

## ARTICLE III

### Development of the Property

1. **Applicable Rules, Regulations, and Policies.** Owner shall have the vested right, to the fullest extent allowed by law, to develop the Property in accordance with the Entitlements, Existing Laws, and this Agreement. During the Term, the Entitlements, Existing Laws, and this Agreement shall control the overall design, development, and construction of the Project. Notwithstanding the foregoing, nothing in this Agreement shall preclude the City from applying changes occurring from time to time in the uniform codes published in Title 24 of the California Code of Regulations and adopted by the City, including local amendments, in effect when the building permits are issued.
2. **Future Laws.** Future Laws shall not apply to the Project except as expressly provided in this Agreement. Future Laws shall apply to the Project if they are not in conflict with the Existing Laws. However, Owner may give the City written notice of its election to have any conflicting Future Law applied to the Project, in which case such Future Law will be considered an Existing Law for purposes of this Agreement.
3. **Future Discretionary Reviews.** Except as set forth in this Agreement, the City shall retain its discretionary rights in reviewing applications for Entitlements. Owner's applications for Entitlements, and the City's review thereof, must comply with Existing Laws and with the terms and conditions of this Agreement. The City shall not impose any conditions upon Entitlements that are more restrictive than or inconsistent with the terms of this Agreement or Existing Laws, except as required by state or federal law. The City may conduct an environmental review for any Entitlements in accordance with the California Environmental Quality Act, California Public



Resources Code section 21000 et seq. (“CEQA”) and the State CEQA Guidelines, Title 14 of the California Code of Regulations, section 15000 et seq., or other Existing Laws. The 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. Nothing herein is intended to require or authorize additional CEQA environmental review or mitigation measures beyond that otherwise required by CEQA.

4. **Permitted Uses and Density.** This Agreement shall vest the right to develop the Property to the fullest extent allowed by law with respect to the permitted uses of land, density and intensity of uses, and timing and phasing of development as described in the Entitlements, which are hereby incorporated as if fully set forth in this Agreement. 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 Entitlements, Existing Laws, and this Agreement.

5. **Time for Construction and Completion of the Project.** Any phasing of development of the Property shall occur in conformance with the adopted Entitlements.

6. **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 the 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 the City, or portions of the City, shall apply to the Property to

the extent such moratorium or other limitation is in conflict with this Agreement; provided, however, the provisions of this Section shall not affect the City's compliance with moratoria or other limitations mandated by other governmental agencies or court-imposed moratoria.

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

8. **Term of Maps and Other Project Approvals.** Pursuant to California Government Code section 66452.6(a), the term of each subdivision map that is processed on all or any portion of the Property and the term of each of the Entitlements shall be extended for a period of time through the Term of this Agreement. Should this Agreement be terminated prior to the expiration of the Term, the Owner shall have 30 days to submit an application for the extension of the term

applicable to any portion of an approved tentative map, pursuant to Chapter 32 of the Escondido Municipal Code.

9. **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, the City hereby acknowledges it will have sufficient capacity in its infrastructure services and utility systems, including, without limitation, traffic circulation, flood control, sanitation service, and, except for reasons beyond the City's control, sewer collection; sewer treatment; and water supply, treatment, distribution, and service, to accommodate the Project. To the extent the City renders such services or provides such utilities, the City hereby agrees it will serve the Project and there shall be no restriction on connections or service for the Project except for reasons beyond the City's control.

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

11. **Public Improvements.** Owner agrees to construct any public improvements as required and described in any conditions of approval for the Entitlements or in this Agreement ("**Public Improvements**"). Owner shall construct the Public Improvements within any applicable timeframes set forth in the conditions of approval for the Entitlements or this Agreement.

12. **Fees.** Owner shall pay the Development Fees and General Fees in the amounts in effect at the time Owner submits payment of such fees unless otherwise explicitly provided in this Agreement. The payment of Development Fees and General Fees may be deferred in accordance with City requirements and memorialized in a writing separate from this Agreement.

## ARTICLE IV

### Provision of Public Benefits

1. **Description of Public Benefits.** Owner shall provide the City with the Public Benefits, as further described in Exhibit B, as consideration for the City's good faith performance of all applicable terms and conditions in this Agreement.
2. **Occupancy Contingent on Public Improvements and Benefits.** Owner acknowledges that the City shall not grant a certificate of occupancy for the first residential or commercial unit on the Property prior to construction of all Public Improvements and construction and provision of all Public Benefits. This contingency for occupancy shall survive the termination of this Agreement.
3. **Recordation of Final Map Contingent on Security for Public Improvements and Benefits.** Prior to recordation of the Final Map, Owner must enter into one or more subdivision improvement agreements that will detail Owner's construction obligations for any Public Improvements and Public Benefits, and will require Owner to provide financial security for completion of construction, in a form or forms approved by the City Attorney.
4. **Processing During Litigation.** The filing of any third-party lawsuit against the City or Owner relating to this Agreement, any 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 Entitlements, unless the third party obtains a court order preventing the activity or as otherwise required by law. This provision shall not apply to any third-party lawsuit related to the demolition of any building on the Property based on a challenge to the determination of said building's historical significance.

## ARTICLE V

## Annual Review

1. **Owner Responsibilities.** At least once every 12 months, continuing through the duration of the Term, Owner shall demonstrate good faith substantial compliance with the major provisions of this Agreement and provide, to the best extent possible, the status and timing of development of the Project, including construction of Public Improvements and provision of Public Benefits, to the City for an Annual Review. If requested by the City, Owner shall provide any additional detail or information necessary to demonstrate good faith compliance with any particular provision of this Agreement identified by the City.
2. **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 this 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 this Agreement. Notwithstanding the foregoing, Owner acknowledges that the opportunity to be heard may be affected by a change in the City's procedures as to public meetings in relation to the current ongoing COVID-19 pandemic or other future pandemic or similar event.
3. **Information to Be Provided to Owner.** At least 10 days prior to the City Council's consideration and review of Owner's performance under this Agreement, the City shall mail to Owner a copy of any applicable staff reports and related exhibits.
4. **Annual Review Letter.** If in connection with the Annual Review, the City Council determines that Owner is found to be in substantial compliance with this Agreement, upon written request by Owner, the City shall issue a letter to Owner stating that, based upon information known or made known to the City Council, the City Planning Commission, and/or the City Manager, this

Agreement remains in effect and Owner is in compliance (“**Annual Review Letter**”). Owner may record the Annual Review Letter in the Official Records of the County of San Diego.

5. **Lack of Annual Review.** The City’s lack of performing an Annual Review of Owner’s substantial compliance with the terms and conditions of this Agreement shall not constitute or be asserted as a default by Owner so long as Owner is otherwise in compliance with this Article V, nor shall it constitute or be asserted as the City’s waiver of any failure of Owner to perform or otherwise comply with the terms of this Agreement.

## ARTICLE VI

### Delay, Default, Remedies, and Termination

1. **Notice and Cure of Default.** In the event of a material default of this Agreement, the Party alleging a default shall give the defaulting Party a notice of default (“**Notice of Default**”) in writing. The Notice of Default shall specify the period of time in which the default may be cured, which shall be at least 30 days (“**Cure Period**”). Any Notice of Default shall specify the nature of the alleged failure and, where appropriate, the manner in which such alleged failure satisfactorily may be cured. If the nature of the alleged failure is such that it cannot be reasonably cured within the Cure Period, then the commencement of the cure within the Cure Period, and the diligent prosecution to completion of the cure thereafter, shall be deemed to be a cure completed within the Cure Period. During the Cure Period, the Party charged shall not be considered in breach. If the default is cured within the Cure Period, then no breach shall be deemed to exist.

2. **Waiver.** Except as otherwise expressly provided in this Agreement, a failure or delay in asserting any rights or remedies as to any default, including the failure or delay in giving a Notice of 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 action or proceeding that it may deem necessary to protect, assert, or enforce any rights or remedies it may have.

3. **Default by Owner.** The City's Director of Community Development may recommend the review and termination of this Agreement to the City Council upon an occurrence of a material default that is not cured within the Cure Period. The foregoing does not limit any of the City's other remedies upon a material breach of this Agreement by the Owner.

4. **Default by the City.** Upon a material default by the City that is not cured within the Cure Period, Owner, without limiting any of its other remedies, shall not be obligated to complete any of its obligations under this Agreement, and 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 the City.

## ARTICLE VII

### Encumbrances and Releases on Property

1. **Discretion to Encumber.** This Agreement shall not prevent or limit Owner from encumbering the Property, or any portion of or improvement on the Property, by any mortgage. The City acknowledges that lenders providing financing may require modifications to this Agreement, and the City agrees, upon request from Owner, to meet with Owner and/or representatives of lenders to negotiate in good faith any lender request for modification to this Agreement, provided that any modification will not affect the timely completion or fulfillment of any requirements in the Entitlements or this Agreement relating to the Public Benefits.

## ARTICLE VIII

### Miscellaneous Provisions

1. **Recitals**. The Recitals set forth above are included herein by this reference as part of this Agreement and the Parties agree that said Recitals are essential facts to this Agreement.
2. **Severability**. This Agreement shall be performed and shall be enforceable to the full extent allowed by applicable law, and the illegality, invalidity, waiver, or unenforceability of any provision of this Agreement shall not affect the legality, validity, applicability, or enforceability of the remaining provisions of this 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.
3. **Entire Agreement**. This Agreement, together with its attachments or other documents described or incorporated herein, contains the entire agreement and understanding of the Parties concerning the subject matter of this Agreement and supersedes and replaces all prior negotiations, understandings, or proposed agreements, written or oral, except as otherwise provided herein. The Parties acknowledge that (i) no other Party, nor the agents nor the attorneys for any Party, has made any promise, representation, or warranty whatsoever, express or implied, not contained herein, to induce the execution of this Agreement, and (ii) this Agreement has not been executed in reliance upon any promise, representation, or warranty not contained herein.
4. **Waivers**. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate agents of the City or Owner.
5. **Recording**. This Agreement shall be recorded in the Official Records of the County of San Diego within 30 days following the later of (i) the Effective Date, or (ii) the Parties' execution of the Agreement.



6. **Project as a Private Undertaking.** It is specifically understood by the Parties that the Project is a private development and Owner shall have the full power and exclusive control of the Property subject to the provisions of this Agreement. Any improvements completed remain the property of the Owner unless the City has explicitly accepted any improvement or as otherwise provided herein.

7. **Headings.** Section and paragraph headings within this Agreement are for reference purposes only and shall not be used for interpreting the meaning of any provisions of this Agreement.

8. **The 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 or authority otherwise afforded the City under state or federal law.

9. **Covenant of Cooperation.** The Parties shall cooperate with and assist each other in the performance of the provisions of this Agreement including assistance in obtaining permits for the development of the Property that may be required from public agencies other than the City. The covenant of cooperation shall include, to the maximum extent permitted by law, that the 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 this Agreement, and the City shall cooperate with Owner to keep this 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 this Agreement.

10. **Successors and Assigns; Covenants Run with the Land.** So long as this Agreement remains in effect, the obligations and benefits provided for in this Agreement shall run with the land obligated and benefited, respectively, and shall be binding on all parties having or acquiring any right, title, or interest in the Property or Project, or any part thereof. As such, it is the intent of the Parties that this Agreement and the promises, covenants, rights, and obligations set forth herein (i) shall be and are covenants running with the Property, encumbering the Property for the term of this Agreement and binding upon Owner's successors in title and all subsequent owners and operators of the Property; (ii) are not merely personal covenants of the Owner; and (iii) shall bind Owner and its respective successors and assigns during the term of this Agreement. Further, Owner shall ensure that any future transfer of interest in the Property is made subject to the terms of this Agreement, such that any future successor in title or owner or operator of the Property or Project shall be bound by the terms herein.

11. **Time of the Essence.** Time is of the essence for each term and condition of this Agreement.

12. **Governing Law.** This Agreement and all rights and obligations arising out of it shall be construed and enforced in accordance with the laws of the State of California. Any litigation arising out of this Agreement shall be conducted only in the state or federal courts of San Diego County, California. All statutory references are to California statutes.

13. **No Waiver of Owner's Existing Rights Under Applicable Laws.** This Agreement shall not constitute a waiver of any of Owner's existing rights under applicable laws, nor shall it limit or expand Owner's right to challenge any General Fee, Exaction, or Future Exaction as being contrary to applicable law or in excess of the City's legal authority.

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

15. **Counterparts.** This Agreement may be executed on separate counterparts, each of which shall be an original and all of which taken together shall constitute one and the same instrument.

16. **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, except as set forth herein.

(SIGNATURE PAGE FOLLOWS)

DRAFT

This Agreement is executed by the Parties or their duly authorized representatives:

**CITY OF ESCONDIDO,**  
a California municipal corporation

By: \_\_\_\_\_  
Paul McNamara  
Its: Mayor

**PORTOFINO HOLDINGS I, LLC**  
a California limited liability company

By: \_\_\_\_\_  
\_\_\_\_\_  
Its: \_\_\_\_\_

(Above Signatures Must Be Notarized; Acknowledgment Pages Follow)

APPROVED AS TO FORM:

OFFICE OF THE CITY ATTORNEY  
Michael R. McGuinness, City Attorney

By: \_\_\_\_\_  
Kurt Whitman, Senior Deputy City Attorney

ACKNOWLEDGMENT

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: \_\_\_\_\_ (Seal)

City

ACKNOWLEDGMENT

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: \_\_\_\_\_ (Seal)

**Owner**

**EXHIBIT A**

Legal Description of Property

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

PARCEL C OF PARCEL MAP NO. 129, IN THE CITY OF ESCONDIDO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAID SAN DIEGO COUNTY, AUGUST 11, 1969.

EXCEPTING THE INTEREST CONVEYED TO THE CITY OF ESCONDIDO IN AND TO THAT PORTION LYING SOUTHWESTERLY OF THE LOCATION AND PROLONGATION OF A LINE DRAWN PARALLEL WITH AND 11.00 FEET NORTHEASTERLY AT RIGHT ANGLES TO THAT CERTAIN COURSE IN THE SOUTHWESTERLY LINE OF SAID PARCEL C DESIGNATED AS "NORTH 22° 55' 00" WEST, 109.48 FEET.

EXCEPTING THEREFROM ALL WATER THAT MAY NOW OR AT ANY TIME HEREAFTER BE LOCATED OR CONTAINED UNDER SAID LAND, OR THAT MAY NOW OR AT ANY TIME HEREAFTER BE DEVELOPED OR TAKEN UPON SAID LAND, TOGETHER WITH ALL WATER AND WATER RIGHTS BELONGING OR APPURTENANT TO SAID LAND, INCLUDING THE RIGHT TO BUILD AND MAINTAIN DAMS AND TO DIG WELLS ON SAID LAND, AS GRANTED TO GREEN MUTUAL WATER COMPANY OF SAN DIEGO BY DEED RECORDED DECEMBER 12, 1952 IN BOOK 4685 PAGE 51 OF OFFICIAL RECORDS.

ALSO EXCEPTING THEREFROM, ALL OIL, PETROLEUM, NATURAL GAS, MINERAL RIGHTS AND OTHER HYDROCARBON SUBSTANCES LYING BELOW A DEPTH OF 500 VERTICAL FEET FROM THE SURFACE OF SAID LAND, FOR THE PURPOSE OF EXPLORING FOR, EXTRACTING, MINING, BORING, REMOVING, OR MARKETING SAID SUBSTANCES, HOWEVER, WITHOUT ANY RIGHT OF ANY ENTRY UPON THE SURFACE OF SAID LAND, AS RESERVED BY GULF OIL CORPORATION IN DEED RECORDED JULY 5, 1979 AS DOCUMENT NO. 79-278133 OF OFFICIAL RECORDS.

APN: 238-152-16-00



**EXHIBIT B**

## Public Benefits

**I. PUBLIC BENEFITS AND IMPROVEMENTS**

**A. PUBLIC ART.** Owner reserves the right to implement, construct, or install public art in lieu of paying the fee required for the Project associated with public art, defined as “art in public places” in Escondido Municipal Code section 33-731 (“**Public Art**”). Any Public Art proposed to be implemented, constructed, or installed shall be subject to the review and approval of the Director of Community Development, which shall occur prior to the issuance of the first building permit for the Project. If any proposed Public Art is not approved by the Director of Community Development, or a request for such Public Art is not submitted by Owner, at the time the City is otherwise prepared to issue the first building permit for the Project, then the otherwise applicable public art fee shall be paid prior to the issuance of the first building permit for the Project. The cost involved with the implementation, construction, or installation of any Public Art shall be comparable to that which would otherwise have been assessed as the public art fee for the Project.

**B. PARKLAND IN-LIEU FEE.** Pursuant to Section 5.3.12.3(1) of the South Centre City Specific Plan, and in addition to the Parkland Impact Fee otherwise required for the Project, Owner shall contribute a payment of \$12,762.50 as an in-lieu fee, for the purpose of installing, improving, and/or expanding parkland facilities in the South Centre City Area.



**EXHIBIT C**

Fee Guide for Developments

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