

This is the Development Agreement as recommended by the Planning Commission PLUS staff recommended additions and clarifications (Shown in underline/strikethrough)

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Anne E. Mudge
Cox, Castle & Nicholson, LLP
555 California Street
10th Floor
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(Space Above This Line Reserved For Recorder's Use)

**DEVELOPMENT AGREEMENT
BY AND BETWEEN
CITY OF NEWARK
AND
NEWARK PARTNERS, LLC**

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "Agreement") is entered into as of [date] by and between NEWARK PARTNERS, LLC, a California limited liability corporation ("Developer"), and the CITY OF NEWARK ("City"), pursuant to California Government Code § 65864 *et seq.*

RECITALS

A. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California enacted California Government Code § 65864 *et seq.* (the "Development Agreement Statute"), which authorizes City to enter into an agreement with any person having a legal or equitable interest in real property regarding the development of such property.

B. Pursuant to California Government Code § 65865, City has adopted procedures and requirements for the consideration of development agreements (City Ordinance No. 338). This Development Agreement has been processed, considered and executed in accordance with such procedures and requirements.

C. Developer has a legal and/or equitable interest in certain real property consisting of approximately 583 acres located in the southwest corner of the City, as more particularly described in **Exhibit A** and as diagrammed in Exhibit A (the "Project Site"), which comprises a portion of the Newark Area 3 and 4 Specific Plan, as defined below. This Agreement applies to and is binding on the owners of the Project site only and not to all of the parcels included within the Specific Plan.

D. City has taken several actions to review and plan for the future development of the Project. These include, without limitation, the following:

1. Environmental Impact Report. The environmental impacts of the Project, including the Project Approvals and the Subsequent Approvals, and numerous alternatives to the Project and its location, have properly been reviewed and assessed by City pursuant to the California Environmental Quality Act, Public Resources Code Section 21000 *et seq.*; and California Code of Regulations Title 14, Section 15000 *et seq.* (the "CEQA Guidelines"). On [], 2010, pursuant to CEQA and in accordance with the recommendation of the Planning Commission for the City of Newark (the "Planning Commission"), the City Council certified a final environmental impact report covering the Project (the "EIR"). As required by CEQA, the City adopted written findings and a mitigation monitoring program (the "Mitigation Monitoring Program") prior to approving the Project Approvals.

2. General Plan Amendment. Following review and recommendation by the Planning Commission and after a duly noticed public hearing and certification of the EIR, the City Council, by Resolution [REDACTED], approved amendments to the Newark General Plan (the “General Plan Amendment”).

3. Specific Plan. Following review and recommendation by the City Planning Commission, City Council certification of the EIR, and adoption of the General Plan Amendment, the City Council at a duly noticed public hearing, adopted Resolution No. [REDACTED], approving the Newark Area 3 and 4 Specific Plan (“Specific Plan”).

4. Rezoning. Following City Planning Commission review and recommendation, certification of the EIR and adoption of the General Plan Amendment at a duly noticed public hearing, the City Council adopted City Ordinance No. [REDACTED], rezoning portions of the Project Site to City’s Residential District R-6000.

The approvals and development policies described in this Recital E are collectively referred to herein as the “Project Approvals.”

E. City has determined that the Project presents certain public benefits and opportunities which are advanced by City and Developer entering into this Agreement. This Agreement will, among other things, (1) reduce uncertainties in planning and provide for the orderly development of the Project; (2) mitigate many significant environmental impacts; (3) provide public services and infrastructure; (4) provide for and generate substantial revenues for the City in the form of one time and annual fees and exactions and other fiscal benefits; (5) provide a variety of needed housing, including affordable housing and/or funds in furtherance of affordable housing opportunities; and (6) otherwise achieve the goals and purposes for which the Development Agreement Statute was enacted.

F. In exchange for the benefits to City described in the preceding Recital, together with the other public benefits that will result from the development of the Project, Developer will receive by this Agreement assurance that it has vested rights to proceed with the Project (including the development of a maximum of 1260 housing units on Developer’s property with all but the fifteen percent affordable units being detached housing units) in accordance with the “Applicable Law” (defined below), and therefore desires to enter into this Agreement.

G. On [REDACTED], 2010 following a duly noticed public hearing, the Planning Commission adopted Resolution No. [REDACTED], recommending that the City Council approve this Agreement. Following City Council certification of the EIR, adoption or approval of the General Plan Amendment, adoption of the Newark Area 3 and 4 Specific Plan, and the rezoning, the City Council at a duly noticed public hearing adopted Ordinance No. [REDACTED], approving and authorizing the execution of this Agreement.

H. The City Council, after conducting a duly noticed public hearing, has found that this Agreement is consistent with the General Plan and with the Specific Plan and

has conducted all necessary proceedings in accordance with the City's rules and regulations for the approval of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the promises, covenants and provisions set forth herein, the receipt and adequacy of which is hereby acknowledged, the parties agree as follows:

ARTICLE 1. DEFINITIONS

“Administrative Project Amendment” shall have that meaning set forth in Section 7.01(a) of this Agreement.

“Administrative Agreement Amendment” shall have that meaning set forth in Section 7.02(a) of this Agreement.

“Affiliate” shall mean, with respect to any Person, (i) any Person directly or indirectly controlling, controlled by or under common control with such Person, (ii) any Person owning or controlling ten percent or more of the outstanding voting securities of such Person, (iii) any officer, director, manager or general partner of such Person, or (iv) any Person who is an officer, director, manager, general partner, trustee or holder of ten percent or more of the voting securities of any Person described in clauses (i) through (iii) of this sentence.

“Agreement” refers to this Development Agreement and all its exhibits and attachments.

“Applicable Law” shall have that meaning set forth in Section 6.08 of this Agreement.

“Assessed Property” shall have that meaning set forth in Section 5.07(c) of this Agreement.

“Changes in the Law” shall have that meaning set forth in Section 6.09 of this Agreement.

“City” is the City of Newark, California.

“City Law” shall have that meaning set forth in Section 6.05 of this Agreement.

“Default Notice” shall have that meaning set forth in Section 10.01 of this Agreement.

“Deficiencies” shall have that meaning set forth in Section 9.02(a) of this Agreement.

“Developer” refers to Newark Partners, LLC and successors or assigns.

“Development Agreement Statute” shall have that meaning set forth in Recital A of this Agreement.

“Effective Date” shall have that meaning set forth in Section 2.01 of this Agreement.

“Judgment” shall have that meaning set forth in Section 9.02(a) of this Agreement.

“Mitigation Monitoring Program” shall have that meaning set forth in Recital D(1) of this Agreement.

“Moderate Income Households” means households with incomes no greater than the maximum income for moderate income households, as annually defined by the California Department of Housing and Community Development for each household size.

“Mortgagee” shall mean the beneficiary of any deed of trust relating to the Project.

“Non-Assuming Transferee” shall have that meaning set forth in Section 8.03 of this Agreement.

“Notice of Compliance” shall have that meaning set forth in Section 8.04 of this Agreement.

“Periodic Review” shall have that meaning set forth in Section 10.03(a) of this Agreement.

“Person” shall mean any individual, any partnership, limited liability company, corporation, trust or other entity.

“Project” shall mean the improvements to the Project Site and associated off-site improvements, as particularly described by the Project Approvals, subject to any modifications or amendments that may be agreed upon by the City and Developer pursuant to Section 7 of this Agreement.

“Project Approvals” shall have that meaning set forth in Recital D of this Agreement.

“Project Site” shall have that meaning set forth in Recital C and Exhibit A of this Agreement.

“Subsequent Approvals” shall mean those certain other land use approvals, entitlements, and permits other than the Project Approvals that are necessary or desirable for the development of the Project. The Subsequent Approvals may also include, without limitation, the following: amendments of the Project Approvals, planned unit development permits, conditional use permits, subdivision maps, design review

approvals, improvement agreements, use permits, grading permits, building permits, lot line adjustments, sewer and water connection permits, certificates of occupancy, subdivision maps, preliminary and final development plans, rezonings, development agreements, permits, resubdivisions, and any amendments to, or repealing of, any of the foregoing.

“Term” shall have that meaning set forth in Section 2.02 of this Agreement.

“Transfer Agreement” shall have that meaning set forth in Section 8.02 of this Agreement.

“Transferee” shall mean the recipient of a transfer or assignment by Developer as set forth in Section 8.02 of this Agreement.

ARTICLE 2. EFFECTIVE DATE AND TERM

Section 2.01. Effective Date. This Agreement shall become effective upon the date the ordinance approving this Agreement becomes effective (the “Effective Date”).

Section 2.02. Term. The term of this Agreement (the “Term”) shall commence upon the Effective Date and continue for a period of 25 years.

ARTICLE 3. OBLIGATIONS OF DEVELOPER

Section 3.01. Obligations of Developer Generally. The parties acknowledge and agree that the City’s agreement to perform and abide by the covenants and obligations of City set forth in this Agreement is a material consideration for Developer’s agreement to perform and abide by its long term covenants and obligations, as set forth herein. The parties acknowledge that many of Developer’s long term obligations set forth in this Agreement are in addition to Developer’s agreement to perform all the mitigation measures identified in the Mitigation Monitoring Program.

Section 3.02. Fees Paid by Developer. As a material consideration for the long term assurances and vested rights provided by this Agreement, Developer shall pay certain fees and exactions to City all as described below. No other fees shall be imposed during the term of this Agreement except as set forth in this Section of this Agreement.

- (a) Except as otherwise provided in this Agreement, only those fees and charges of City in effect as of the Effective Date and as described on attached **Exhibit B** (the “Existing Project Impact Fees”) may be applied to the Project or the Project Site. The Existing Project Fees may be increased in rate by the City, if at all, only after eight (8) years after the Effective Date of the Agreement, at which time the fees may be increased by City during the Term but only in a manner consistent with this Agreement and California law concerning development fees (Gov. Code § 66000 *et seq.* or a successor

statute) and only to the extent that fees are imposed on a City-wide basis and are at identical levels as imposed against other Projects. No new category of fee other than these listed on Exhibit B shall be imposed on the project for any purpose. All Project Fees shall be paid on a per unit basis at the time City issues certificates of occupancy for the Project.

- (b) With respect to residential development in Area 4, Developer agrees to pay, at the issuance of each building permit for each residential unit in Area 4, a project-specific Community Benefit Fee of \$24,500 per housing unit in addition to Existing Project Impact Fees as set forth above. This amount shall not increase by more than the Consumer Price Index or 2 % (two percent), whichever is less, for 8 (eight) years following the Effective Date of this Agreement, and, at the end of this period, to the extent not yet paid on any unit, the City may increase this fee on an annual basis based on the Consumer Price Index.. No other fees for parks, recreation, or community benefit, or land dedication for such purposes shall be required except as set forth in Section 3.02 of this Agreement.

Section 3.03. Dedications by Developer

- (a) No other land dedication shall be required except as set forth in this Section.
- (b) In lieu of payment of park fees for development in Area 3 and Area 4 as set forth in Chapter 16.30 of the Subdivision Title (Title 16) of the Newark Municipal Code, Developer shall dedicate to the City an approximately sixty-six (66) acre parcel along Mowry Avenue in Area 4, as such parcel is more particularly described as parcels 4 and 5 in attached **Exhibit C** (the “Recreational Parcel”). Such dedication shall be subject to a forty foot (40’) reserved easement for ingress and egress for construction, pedestrian and emergency vehicle access use along the western edge of the parcel parallel to the Union Pacific line as shown on Exhibit C. This dedication shall occur upon the issuance of the first residential building permit for Area 3, and the City shall accept dedication of the property in its entirety subject to all vested rights. Upon dedication, the City shall assume all obligations related to the Recreational Parcel, including maintenance and management of the Parcel, and including all monitoring and reporting obligations related to the six (6) groundwater monitoring wells located on the ten-acre portion of the Recreational Parcel identified in Exhibit C. The location of the wells and the precise monitoring and reporting obligations are described in the approved Work Plan for the monitoring activities, a copy of which has been provided to the City. Following dedication of the Recreational Parcel, Developer shall have no further obligations or liability with respect to the Parcel, and the City shall defend, indemnify, and hold harmless the Developer from all actions, claims, costs, liabilities, proceedings and/or requirements relating to or arising in connection with the Recreational Parcel.

- (c) Also, in lieu of the payment of park fees for development in Area 3 as set forth in Chapter 16.30 of the Subdivision Title (Title 16) of the Newark Municipal Code, Developer shall improve and dedicate a three (3)-acre shared use (neighborhood/school) park in Area 3 (“Park Parcel”) upon the issuance of the 250th building permit in Area 3. The City and Developer shall mutually agree upon the exact location of the Park Parcel and the improvements to be constructed, but, in any event, the Park Parcel must be located adjacent to the acreage offered for donation as a school site in Section 3.03(e). The Developer’s cost to improve the Park Parcel shall not exceed \$6.50 (six dollars and fifty cents) per square foot. The City shall promptly accept the dedication of the Park Parcel, including all responsibility for on-going maintenance of the park and any improvements therein.
- (d) Upon issuance of the 150th building permit for residential construction in Area 4, Developer shall improve and dedicate to the City, in lieu of the payment of park fees for development in Area 4 as set forth in Chapter 16.30 of the Subdivision Title (Title 16) of the Newark Municipal Code, the “Sub Area C Park,” a linear park, which shall be no less than two acres and no greater than four acres in size and which may include portions of wetland, and similar in improvements to the conceptual Sub Area C Park plan depicted in the Specific Plan upon completion of the improvements. The City shall accept the dedication of the Park Parcel, including all responsibility for on-going maintenance of the park and any improvements therein.
- (e) Developer shall offer for dedication to the City, in an “as is” unimproved condition, six (6) acres of land for the construction of an elementary school adjacent to the Park Parcel. The school site will be located with the cooperation of the Newark Unified School District (“School District”), City, and Developer on land unimpacted by residual pesticides or other constituents of concern for school use. The City and Developer shall mutually agree upon the exact location of the land to be offered for dedication, but, in any event, it must be located along Cherry Avenue and must allow for shared use of the improvements on the Park Parcel by the elementary school. This offer of dedication shall be made upon the City’s issuance of first building permit for Area 3, and shall not be rescinded for 7 years. In the event that the City accepts the dedication and transfers the land to the Newark Unified School District (~~“School District”~~), the City must impose a deed restriction on the land limiting its use to public educational purposes, and providing that should the School District dispose of the land, it must first offer to dedicate-sell the land, at the appraised value described in Section 3.03(f) below, back to the City or the Developer, and, if declined, next to the City. The Developer shall not market the Project to any party as including the development of an elementary school until such time as the construction of the school is assured.

- (f) At the City's sole option, during that 7 year period, and in lieu of the dedication described in this section, the City may elect to receive a monetary payment from the Developer in an amount equivalent to the fair market value of the six (6) acre parcel in 2010 as raw unimproved land zoned for High-Tech development, without interest, as that value is established according to a written appraisal prepared by an MAI appraiser of the City and Developer's mutual selection ("School Land Payment"). The appraisal must be prepared and delivered to the City within 60 (sixty) days of the effective date of this Agreement. The City must review and issue its concurrence with the appraisal, or provide an alternate written appraisal prepared by a MAI appraiser, within 60 (sixty) days of receipt of the Developer's appraisal. If City and Developer cannot agree on which appraisal to follow, each party's appraiser will select a third, mutually agreed-upon, MAI appraiser to prepare a final, binding written appraisal. The cost of preparation of such an appraisal shall be shared equally between the parties. If construction of a permanent elementary school campus (not portable buildings) does not commence within this 7 year period, the offer of dedication shall terminate and the Developer shall make the School Land Payment to the City.

Section 3.04. Golf Course. Other than those facilities and parcels described herein, Developer is not responsible for additional land assemblage, design, construction, operation, or maintenance of any golf course or community facilities that the City may pursue in the future. Developer shall not market the Project to any party as including the development of a golf course unless the City agrees in writing to such marketing.

Section 3.05. Affordable Housing. Developer shall provide for the development of 15% of the total number of dwelling units within the residential development as Moderate Income Household units anywhere within Areas 3 or 4. These units may be provided in phases as senior ownership or rental, multifamily ownership or rental, or single family ownership or rental at the developer's discretion, or any combination of the above. Completion of construction of all Moderate Income Household units must occur before the completion of construction of the last market-rate unit in Area 3 or the 500th market-rate unit constructed anywhere in the Specific Plan Area, whichever comes first. These units shall be consistent with the Specific Plan design guidelines for on-site development. In the alternative, and in the sole discretion of the Developer, the City shall allow off-site construction of all or a portion of the required units in any location in the City of Newark zoned for residential use, provided the units are of the same quality as those that would be constructed on site. Any off-site units shall be subject to the City's design review requirements.

Alternately, the Developer may, in its sole discretion, opt to pay an affordable housing in-lieu fee to the City in the amount of three million dollars (\$3,000,000.00). Under this alternative, the Developer shall make an initial

lump sum payment of one and a half million dollars (\$1, 500,000.00) within 10 days of the City's issuance of the 50th building permit for residential construction or sooner at the Developer's sole discretion, followed by a per lot payment of fifteen hundred dollars (\$1,500.00) for each of the next one thousand (1,000) residential lots.

Section 3.06. First Right of Donation.

- (a) If Developer decides in its sole discretion to make a charitable contribution of the land it owns in Sub-Areas B, C and E of Area 4, and has been issued a building permit and commenced construction of the first residential unit in Area 3, Developer (or its transferee) shall first offer to donate the Developer-owned areas of Sub-Areas B, C and E of Area 4 to the City or the City's designee, which designee must be an organization for which the donation by Developer will qualify as a charitable contribution under Internal Revenue Code Section 170. The City or the City's designee shall have up to thirty (30) days from Developer's offer to accept the donation. If the City or the City's designee reject the offer, or fail to respond in writing within thirty (30) days, Developer has fulfilled its obligation to first offer to donate the land to the City or its designee and will not be obligated to offer the land for donation again. Once the Developer has commenced filling pursuant to a City grading permit of Area 4, Sub-Areas B and C, Developer shall have no obligation to first offer to donate Sub-Area E of Area 4 to the City or the City's designee. Once the Developer has substantially completed construction of the overpass to Area 4, Developer shall have no obligation to first offer to donate the Developer-owned areas of Sub-Areas B, C and E of Area 4 to the City or the City's designee. For purposes of Section 3.06 "substantially completed construction" shall mean that Developer shall have expended sixty percent (60%) of the structural construction budget of the overpass.
- (b) If, at the end of the term of the Agreement, the Developer has not substantially completed construction of the overpass to Area 4, Developer shall offer to donate the Developer-owned areas of Sub-Areas B, C of Area 4 to the City or the City's designee. In that event, Developer shall also offer to donate the Developer-owned areas Sub-Area E, but only if during the term of the Agreement, the Developer has not commenced filling pursuant to a City grading permit of Area 4, Sub-Areas B and C. The City or the City's designee shall have up to thirty (30) days from Developer's offer to accept the donation. If the City or the City's designee reject the offer or fail to respond in writing within thirty (30) days, Developer has fulfilled its obligation to first offer to donate the land to the City or its designee and will not be obligated to offer the land for donation again. However, if, at the end of the term of the Agreement, the Developer has substantially completed construction of the overpass to Area 4 and the Developer has not made a first offer to donate the Developer-owned Sub-Areas B, C and E of Area 4 to the

City or the City's designee, the Developer shall have no further obligation to make this offer.

- (c) In the event the City or its designee elects to accept the gift described above, the City (or its designee) shall enter into a Donation Agreement with Developer in substantially the same form as the attached **Exhibit D**.
- (d) Following donation and acceptance of Developer's land in Sub-Areas B, C and E of Area 4 by the City pursuant to this Section, Developer shall have no further obligations or liability with respect to those areas, and the City shall defend, indemnify, and hold harmless the Developer from all actions, claims, costs, liabilities, proceedings and/or requirements relating to or arising in connection with those area claims, with the exception of any claims, costs, liabilities, proceedings and/or requirements arising from Developer's State or Federal tax liability concerning the donation.

ARTICLE 4. OBLIGATIONS OF CITY

Section 4.01. Obligations of City Generally. The parties acknowledge and agree that Developer's agreement to perform and abide by its covenants and obligations set forth in this Agreement, including Developer's decision to develop the Project in the City, is a material consideration for City's agreement to perform and abide by the long term covenants and obligations of City, as set forth herein.

Section 4.02. Protection of Vested Rights. To the maximum extent permitted by law, City shall take any and all actions as may be necessary or appropriate to ensure that the vested rights provided by this Agreement can be enjoyed by Developer and to prevent any City Law, as defined below, from invalidating or prevailing over all or any part of this Agreement. City shall cooperate with Developer and shall undertake such actions as may be necessary to ensure this Agreement remains in full force and effect. City shall not support, adopt, or enact any City Law, or take any other action which would violate the express provisions or intent of the Project Approvals or the Subsequent Approvals.

Section 4.03. Issuance of Grading Permits. Subject to the City's ministerial review process, the City shall issue all grading and fill permits, necessary to fill the land in Area 3 and 4 to prepare it for residential development upon approval of the EIR, Specific Plan, and this Agreement.

Section 4.04. Availability of Public Services. To the maximum extent permitted by law and consistent with its authority, City shall assist Developer in reserving such capacity for sewer and water services as may be necessary to serve the Project.

Section 4.05. Overpass Right of Way. Upon Developer's written request, the City shall acquire sufficient right of way for the overpass, at a location

mutually agreed upon by City and Developer, to provide vehicular access into Area 4 in the most legally expeditious manner available to the City, including the use of eminent domain. Developer shall reimburse City for all expenses related to the acquisition of the right of way, including but not limited to acquisition through eminent domain, provided such expenses, including all appraisals, offers, engineers, consultants, and legal contracts and agreements, are pre-approved by Developer in writing. Developer may make improvements in Area 4 prior to the City's acquisition or possession of the overpass right of way, but in no event may seek more than ten (10) building permits for the construction in Area 4 prior to that acquisition or possession.

Section 4.06. Developer's Right to Rebuild. Developer shall have the right to renovate or rebuild the Project within the Term of this Agreement should it become necessary due to natural disaster, changes in seismic requirements, or should the buildings located within the Project become functionally outdated, within Developer's sole discretion, due to changes in technology. Any such renovation or rebuilding shall be subject to the square footage and height limitations vested by this Agreement, and shall comply with the Project Approvals, the building codes existing at the time of such rebuilding or reconstruction, and the requirements of CEQA.

Section 4.07. Additional Development. Within sixty (60) days of approval of this Agreement, the City shall consider adoption of an ordinance imposing a Project Planning Fee on all land in Area 4 not owned by Developer that allocates the costs of development of the Specific Plan to land not covered by this Agreement in accordance with Government Code section 65456. To the extent additional development within the Specific Plan area has or will benefit from the Specific Plan, the ordinance shall provide that the City shall collect from future developments fees reflecting that development's fair share of the cost of specific plan preparation, environmental review, impact fees, and dedication of land associated with the Specific Plan. – Such reimbursed costs shall include but not be limited to the Developer's purchase, acquisition, and improvement costs (in excess of Quimby Act requirements) associated with the dedication of the 66-acre Recreational Parcel, the Park Parcels, and the School Site; as well as the overpass acquisition costs and design costs. The ordinance shall provide that the City shall pay such fees to Developer as such fees are collected.

ARTICLE 5. COOPERATION - IMPLEMENTATION

Section 5.01. Processing Application for Subsequent Approvals. By approving the Project Approvals, City has made a final policy decision that the Project is in the best interests of the public health, safety and general welfare. Accordingly, City shall not use its discretionary authority in considering any application for a Subsequent Approval, including, but not limited to, the City's administrative consideration of planned unit development permits, conditional use permits and subdivision maps, within the Project Site to

change the policy decisions reflected by the Project Approvals or otherwise to prevent or delay development of the Project as set forth in the Project Approvals. Instead, the Subsequent Approvals shall be deemed to be tools to implement those final policy decisions and shall be issued by City so long as they comply with this Agreement and Applicable Law and are not inconsistent with the Project Approvals as set forth above.

Section 5.02. Timely Submittals By Developer. Developer acknowledges that City cannot expedite processing Subsequent Approvals until Developer submits complete applications on a timely basis. Developer shall use its best efforts to (i) provide to City in a timely manner any and all documents, applications, plans, and other information necessary for City to carry out its obligations hereunder; and (ii) cause Developer's planners, engineers, and all other consultants to provide to City in a timely manner all such documents, applications, plans and other necessary required materials as set forth in the Applicable Law. It is the express intent of Developer and City to cooperate and diligently work to obtain any and all Subsequent Approvals.

Section 5.03. Timely Processing By City. Upon submission by Developer of all appropriate applications and payment of the then current City-wide processing fees for any Subsequent Approval, City shall promptly and diligently commence and complete all steps necessary to act on the Subsequent Approval application including, without limitation, (i) providing at Developer's expense and subject to Developer's request and prior approval, reasonable overtime staff assistance and/or staff consultants for planning and processing of each Subsequent Approval application; (ii) if legally required, providing notice and holding public hearings; and (iii) acting on any such Subsequent Approval application. City shall ensure that adequate staff is available, and shall authorize overtime staff assistance as may be necessary, to timely process such Subsequent Approval application.

Section 5.04. Review of Subsequent Approvals. City may deny an application for a Subsequent Approval only if such application does not comply with this Agreement or Applicable Law, defined below, or does not substantially comply with the Project Approvals (provided, however, that inconsistency with the Project Approvals shall not constitute grounds for denial of a Subsequent Approval which is requested by Developer as an amendment to that Project Approval). City may approve an application for such a Subsequent Approval subject to any conditions necessary to bring the Subsequent Approval into compliance with this Agreement or Applicable Law, or is necessary to make this Subsequent Approval consistent with the Project Approvals. If City denies any application for a Subsequent Approval, City must specify in writing the reasons for such denial and may suggest a modification which would be approved. Any such specified modifications must be consistent with this Agreement, Applicable Law and the Project Approval, and City shall approve the application if it is subsequently

resubmitted for City review and addresses the reason for the denial in a manner that is consistent with this Agreement, Applicable Law and the Project Approvals.

Section 5.05. Specific Subsequent Approvals. City acknowledges that timing and financial constraints preclude City from acting on certain Subsequent Approvals as of the Effective Date, including but not limited to tentative and final maps. In addition to the other general covenants concerning processing of Subsequent Approvals set forth in this Agreement, City shall, to the maximum extent permitted by law, promptly and diligently commence and complete all steps (including noticing and public hearings) necessary to act on these contemplated Subsequent Approval applications. City shall, to the maximum extent permitted by law, not use its discretionary authority in considering these Subsequent Approval applications to revisit or frustrate the policy decisions or material terms reflected by the Project Approvals.

Section 5.06. Other Government Permits. At Developer's sole discretion and in accordance with Developer's construction schedule, Developer shall apply for such other permits and approvals as may be required by other governmental or quasi-governmental entities in connection with the development of, or the provision of services to, the Project. City shall cooperate with Developer in its efforts to obtain such permits and approvals and shall, from time to time at the request of Developer, use its best efforts to enter into binding agreements with any such entity as may be necessary to ensure the timely availability of such permits and approvals.

Section 5.07. Assessment Districts or Other Funding Mechanisms.

- (a) The parties understand and agree that as of the Effective Date there are no City assessments applicable to the Project Site. City is unaware of any pending efforts to initiate, or consider applications for new or increased assessments covering the Project Site, or any portion thereof.
- (b) City understands that long term assurances by City concerning fees, taxes and assessments were a material consideration for Developer agreeing to process the siting of the Project in its present location and to pay long term fees, taxes and assessments described in this Agreement. City shall retain the ability to initiate or process applications for the formation of new assessment districts covering all or any portion of the Project site. Notwithstanding the foregoing, Developer retains all its rights to oppose the formation or proposed assessment of any new assessment district or increased assessment. In the event as assessment district is lawfully formed to provide funding for services, improvements, maintenance or facilities which are substantially the same as those services, improvements, maintenance or facilities being funded by the fees or assessments to be paid by Developer under the Project Approvals or this Agreement, such fees or assessments to be paid by Developer shall be subject to reduction/credit in

an amount equal to Developer's new or increased assessment under the assessment district. Alternatively, the new assessment district shall reduce/credit Developer's new assessment in an amount equal to such fees or assessments to be paid by Developer under the Project Approvals or this Agreement.

- (c) At the request of Developer, City shall cooperate in the formation of assessment districts, community facilities districts, tax-exempt financing mechanisms, or other funding mechanisms related to traffic, sewer, water or other infrastructure improvements (including, without limitation, design, acquisition and construction costs) within the Project Site. City shall diligently and expeditiously process applications by Developer necessary to establish funding mechanisms so long as (i) the application complies with law, (ii) is consistent with City's standards, and (iii) provides for a lien to value ratio and other financial terms that are standard in the industry and reasonably acceptable to City, and which will result in no commitment of City funds. Developer may initiate improvement and assessment proceedings utilizing assessment mechanisms authorized under the law of the State of California where the property subject to assessment (the "Assessed Property") provides primary security for payment of the assessments. Developer may initiate such assessment proceedings with respect to a portion of the Assessed Property to provide financing for design or construction of improvements for such portion. City shall allocate shortfalls or cost overruns in the same manner as the special taxes or assessments for construction of improvements (as opposed to assessments for maintenance) are allocated in the community facilities district or other financing mechanism so that each lot and/or parcel within the benefited area shall bear its appropriate share of the burden thereof as determined by City and construction or acquisition of needed improvements shall not be prevented or delayed.

ARTICLE 6. STANDARDS, LAWS AND PROCEDURES GOVERNING THE PROJECT

Section 6.01. Vested Right to Develop. Developer shall have a vested right to develop the Project on the Project Site in accordance with the terms and conditions of this Agreement. Nothing in this section shall be deemed to eliminate or diminish the requirement of Developer to obtain any required Subsequent Approvals.

Section 6.02. Permitted Uses Vested by This Agreement. The permitted uses of the Project Site; the density and intensity of use of the Project Site; the maximum height, bulk and size of proposed buildings; provisions for reservation or dedication of land for public purposes and the location of public improvements; the general location of public utilities; and other terms and conditions of development applicable to the Project, shall be as set forth in the Project Approvals, including the development of a maximum of 1260

housing units on Developer's property with all but the fifteen percent affordable units being detached housing units, and, as and when they are issued (but not in limitation of any right to develop as set forth in the Project Approvals), the Subsequent Approvals. Permitted uses shall include, without limitation, residential, agricultural, recreational, open space, industrial, and technology park.

Section 6.03. Applicable Law. The rules, regulations, official policies, standards and specifications applicable to the Project (the "Applicable Law") shall be those set forth in this Agreement and the Project Approvals, and, with respect to matters not addressed by this Agreement or the Project Approvals, those rules, regulations, official policies, standards and specifications (including City ordinances and resolutions) governing permitted uses, building locations, timing of construction, densities, design, heights, fees, exactions, and taxes in force and effect on the Effective Date of this Agreement, as long as such rules are consistent with this Agreement and Project.

Section 6.04. No Conflicting Enactments. City shall not impose on the Project (whether by action of the City Council or by initiative, referendum or other means) any ordinance, resolution, rule, regulation, standard, directive, condition or other measure (each individually, a "City Law") that is in conflict with Applicable Law or this Agreement or that reduces the development rights or assurances provided by this Agreement. Without limiting the generality of the foregoing, any City Law shall be deemed to conflict with Applicable Law or this Agreement or reduce the development rights provided hereby if it would accomplish any of the following results by specific reference to the Project, as part of a general enactment which applies to or affects the Project, by application of any City Law otherwise allowed by this Agreement that is not uniformly applied on a City-wide basis to all substantially similar types of development projects and project sites:

- (a) Change any land use designation or permitted use of the Project Site;
- (b) Limit or control the availability of public utilities, services or facilities or any privileges or rights to public utilities, services, or facilities (for example, water rights, water connections or sewage capacity rights, sewer connections, etc. or, for further example, the enactment of a City-wide Utility Users Tax shall not be deemed a limitation or control of public utilities, service, or facilities) for the Project;
- (c) Limit or control the location of buildings, structures, grading, or other improvements of the Project in a manner that is inconsistent with or more restrictive than the limitations included in the Project Approvals or the Subsequent Approvals (as and when they are issued);
- (d) Limit or control the rate, timing, phasing or sequencing of the approval, development or construction of all or any part of the Project in any manner;

- (e) Result in Developer having to substantially delay construction of the Project or require the issuance of additional permits or approvals by the City other than those required by Applicable Law;
- (f) Substantially increase the cost of constructing or developing the Project or any portion thereof;
- (g) Establish, enact, increase, or impose against the Project or Project Site any fees, taxes (including without limitation general, special and excise taxes with the express exception of a City-wide Utility Users Tax), assessments, liens or other monetary obligations (including generating demolition permit fees, encroachment permit and grading permit fees) other than those specifically permitted by this Agreement or other connection fees imposed by third party utilities;
- (h) Impose against the Project any condition, dedication or other exaction not specifically authorized by Applicable Law; or
- (i) Limit the processing or procuring of applications and approvals of Subsequent Approvals.

Section 6.05. Initiatives and Referenda.

- (a) If any City Law is enacted or imposed by initiative or referendum, or by the City Council directly or indirectly in connection with any proposed initiative or referendum, which City Law would conflict with Applicable Law or this Agreement or reduce the development rights provided by this Agreement, such Law shall not apply to the Project.
- (b) Without limiting the generality of any of the foregoing, no moratorium or other limitation (whether relating to the rate, timing, phasing or sequencing of development) affecting subdivision maps, building permits or other entitlements to use that are approved or to be approved, issued or granted within the City, or portions of the City, shall apply to the Project.
- (c) To the maximum extent permitted by law, City shall prevent any City Law from invalidating or prevailing over all or any part of this Agreement, and City shall cooperate with Developer and shall undertake such actions as may be necessary to ensure this Agreement remains in full force and effect.
- (d) City shall not support, adopt or enact any City Law, or take any other action which would violate the provisions of this Agreement, the Project Approvals or the Subsequent Approvals.
- (e) Developer reserves the right to challenge in court any City Law that would conflict with Applicable Law or this Agreement or reduce the development rights provided by this Agreement.

Section 6.06. Environmental Mitigation. The parties understand that the EIR was intended to be used in connection with each of the Project Approvals and Subsequent Approvals needed for the Project. Consistent with the CEQA policies and requirements applicable to the EIR, City agrees to use the EIR in connection with the processing of any Subsequent Approval to the maximum extent allowed by law and not to impose on the Project any mitigation measures or other conditions of approval other than those specifically imposed by the Project Approvals and the Mitigation Monitoring Program or specifically required by Applicable law. In addition, to the extent consistent with CEQA's policies and requirements applicable to either Master EIRs or tiered EIRs, the City agrees to use the EIR in connection with the processing of approvals related to future expansion to the maximum extent allowed by law.

Section 6.07. Life of Subdivision Maps, Development Approvals, and Permits. The term of any subdivision map or any other map, permit, rezoning or other land use entitlement approved as a Project Approval or Subsequent Approval shall automatically be extended for 25 years, the longer of the duration of this Agreement (including any extensions) or the term otherwise applicable to such Project Approval or Subsequent Approval if this Agreement is no longer in effect. The term of this Agreement and any subdivision map or other Project Approval or Subsequent Approval shall not include any period of time during which a development moratorium (including, but not limited to, a water or sewer moratorium or water and sewer moratorium) or the actions of other public agencies that regulate land use, development or the provision of services to the land, prevents, prohibits or delays the construction of the Project or a lawsuit involving any such development approvals or permits is pending.

Section 6.08. State and Federal Law. As provided in California Government Code § 65869.5, this Agreement shall not preclude the application to the Project of changes in laws, regulations, plans or policies, to the extent that such changes are specifically mandated and required by changes in state or federal laws or regulations ("Changes in the Law"). In the event Changes in the Law prevent or preclude compliance with one or more provisions of this Agreement, such provisions of the Agreement shall be modified or suspended, or performance thereof delayed, as may be necessary to comply with Changes in the Law, and City and Developer shall take such action as may be required pursuant to this Agreement including, without limitation, Article 9 (Cooperation-Implementation) and Section 10.05 (Excusable Delays; Extension of Time of Performance). Not in limitation of the foregoing, nothing in this Agreement shall preclude City from imposing on Developer any fee specifically mandated and required by state or federal laws and regulations.

Section 6.09. Timing of Project Construction and Completion.

- (a) Timing of Development. Developer shall diligently pursue the development of Area 3 and Area 4. Notwithstanding the foregoing, or any other provision of this Agreement, City and Developer expressly agree that there is no requirement that Developer initiate or complete development of the Project or any particular phase of the Project within any particular period of time, and City shall not impose such a requirement on any Project Approval. The parties acknowledge that Developer cannot at this time predict when or the rate at which or the order in which phases will be developed. Such decisions depend upon numerous factors which are not within the control of Developer, such as market orientation and demand, interest rates, financial markets, competition, and other similar factors.
- (b) In light of the foregoing and except as set forth in subsection (c) below, the parties agree that Developer shall be able to develop in accordance with Developer's own time schedule as such schedule may exist from time to time, and Developer shall determine which part of the Project Site to develop first, and at Developer's chosen schedule. In particular, and not in limitation of any of the foregoing, since the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the parties therein to consider and expressly provide for the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the parties' desire to avoid that result by acknowledging that Developer shall have the right to develop the Project in such order and at such rate and at such times as Developer deems appropriate within the exercise of its subjective business judgment.
- (c) Nothing in this Agreement shall exempt Developer from completing work required by a subdivision agreement, road improvement agreement or similar agreement for public improvements or similar agreements in accordance with the terms thereof.

Section 6.10. Exempting Fees Imposed by Outside Agencies. The City agrees to exclude Developer from any and all collection agreements regarding fees, including, but not limited to, development impact fees, which other public agencies request the City to impose at City's discretion on the Project or the Project Site after the Effective Date through the Term of this Agreement. This section shall not prohibit the City from imposing on Developer any fee or obligation that is imposed by a regional agency in accordance with state or federal obligations and implemented by the City in cooperation with such regional agency.

Section 6.11. Fee Reductions or Credits. The parties intend that the fees described in Article 3 will be in lieu of any exactions, taxes or assessments generally intended to address similar uses or purposes, and that Developer shall not be required to pay two times for any such exaction, fee or assessment. Accordingly, the fees described in Article 3 shall be subject to

reductions/credits in an amount equal to Developer's actual cost of complying with any such lawfully imposed exaction, tax, or assessment generally intended to address similar uses or purposes, whether imposed on the Project, the Project Site, the Project Approvals or the Subsequent Approvals. Notwithstanding the foregoing, no such reduction/credit shall be provided as a result of any assessment that arises from an assessment district requested by Developer under Section 3.05.

Section 6.12. Written Verification of Sufficient Water Supply. Any and all tentative subdivision maps approved for the Project shall comply with Government Code 66473.7, if, and to the extent, required by Government Code 66473.7.

Section 6.13. Design. Within the limitations and parameters of the design guidelines and product types described in the Newark Specific Plan, Developer shall have the discretion to select the product mix and final locations of the 1,260 units allowed under this Agreement.

ARTICLE 7. AMENDMENT

Section 7.01. To the extent permitted by state and federal law, any Project Approval or Subsequent Approval may, from time to time, be amended or modified in the following manner:

- (a) Administrative Project Amendments. Upon the written request of Developer for an amendment or modification to a Project Approval or Subsequent Approval, the Community Development Director or his/her designee shall determine: (i) whether the requested amendment or modification is minor when considered in light of the Project as a whole; and (ii) whether the requested amendment or modification is consistent with this Agreement and Applicable Law. If the Community Development Director or his/her designee finds that the proposed amendment or modification is minor, consistent with this Agreement and Applicable Law, and will result in no new significant impacts not addressed and mitigated in the EIR, the amendment shall be determined to be an "Administrative Project Amendment" and the Community Development Director or his designee may, except to the extent otherwise required by law, approve the Administrative Project Amendment without notice and public hearing. Without limiting the generality of the foregoing, lot line adjustments, reductions in the density, intensity, scale or scope of the Project, minor alterations in vehicle circulation patterns or vehicle access points, changes in trail alignments, substitutions of comparable landscaping for any landscaping shown on any final development plan or landscape plan, variations in the location of structures that do not substantially alter the design concepts of the Project, variations in the location or installation of utilities and other infrastructure connections or facilities that do not substantially alter the design concepts of the Project, and minor adjustments

to the Project Site diagram or Project Site legal description shall be treated as Administrative Project Amendments.

- (b) Non-Administrative Project Amendments. Any request of Developer for an amendment or modification to a Project Approval or Subsequent Approval which is determined not to be an Administrative Project Amendment as set forth above shall be subject to review, consideration and action pursuant to the Applicable Law and this Agreement.

Section 7.02. Amendment of This Agreement. This Agreement may be amended from time to time, in whole or in part, by mutual written consent of the parties hereto or their successors in interest, as follows:

- (a) Administrative Agreement Amendments. Any amendment to this Agreement which does not substantially affect (i) the Term of this Agreement, (ii) permitted uses of the Project Site, (iii) provisions for the reservation or dedication of land, (iv) conditions, terms, restrictions or requirements for subsequent discretionary actions, (v) the density or intensity of use of the Project Site or the maximum height or size of proposed buildings or (vi) monetary contributions by Developer, shall not, except to the extent otherwise required by law, require notice or public hearing before the parties may execute an amendment hereto. Such amendment may be approved by City resolution.
- (b) Amendment Exemptions. No amendment of a Project Approval or Subsequent Approval, or a Subsequent Approval shall require an amendment to this Agreement. Instead, any such matter automatically shall be deemed to be incorporated into the Project and vested under this Agreement.

ARTICLE 8. ASSIGNMENT, TRANSFER AND NOTICE

Section 8.01. Assignment of Interests, Rights and Obligations. Developer may transfer or assign all or any portion of its interests, rights or obligations under this Agreement, the Project Approvals or Subsequent Approvals to third parties acquiring an interest or estate in the Project or any portion thereof including, without limitation, purchasers or ground lessees of lots, parcels or facilities.

Section 8.02. Transfer Agreements.

- (a) In connection with the transfer or assignment by Developer of all or any portion of the Project (other than a transfer or assignment by Developer to an affiliated party, a "Mortgagee" or a "Non-Assuming Transferee" (as defined in Section 8.03)), Developer and the Transferee shall enter into a written agreement (a "Transfer Agreement") regarding the respective interests, rights and obligations of Developer and the Transferee in and under the Agreement, the Project Approvals, and the Subsequent Approvals. Such Transfer Agreement may (i) release Developer from obligations under the

Agreement, the Project Approvals, or the Subsequent Approvals that pertain to that portion of the Project being transferred, as described in the Transfer Agreement, provided that the Transferee expressly assumes such obligations, (ii) transfer to the Transferee vested rights to improve that portion of the Project being transferred and (iii) address any other matter deemed by Developer to be necessary or appropriate in connection with the transfer or assignment.

- (b) Developer shall seek City's prior written consent to any Transfer Agreement, which consent shall not be unreasonably withheld or delayed. Failure by City to respond within thirty (30) days to any request made by Developer for such consent shall be deemed to be City's approval of the Transfer Agreement in question. City may refuse to give its consent only if, in light of the proposed Transferee's reputation and financial resources, such Transferee would not in City's reasonable opinion be able to perform the obligations proposed to be assumed by such Transferee. Such determination shall be made by the Community Development Director, and is appealable by Developer to the City Council.
- (c) Any Transfer Agreement shall be binding on Developer, City and the Transferee. Upon recordation of any Transfer Agreement in the Official Records of the City of Newark, Developer shall automatically be released from those obligations assumed by the Transferee therein.
- (d) Developer shall be free from any and all liabilities accruing on or after the date of any assignment or transfer with respect to those obligations assumed by a Transferee pursuant to a Transfer Agreement. No breach or default hereunder by any person succeeding to any portion of Developer's obligations under this Agreement shall be attributed to Developer, nor may Developer's rights hereunder be canceled or diminished in any way by any breach or default by any such person.

Section 8.03. Nonassuming Transferees. Except as otherwise required by Developer in Developer's sole discretion, the burdens, obligations and duties of Developer under this Agreement shall terminate with respect to Non-Assuming Transferees, and neither a Transfer Agreement nor City's consent shall be required in connection with (i) any single residential parcel conveyed to a purchaser, (ii) any property transferred as fewer than 10 lots to a single retail builder or (iii) any property that has been established as one or more separate legal parcels for office, commercial, industrial, open space, park, school or other nonresidential uses. For the purposes of this Section, a "single retail builder" shall mean a retail builder that is not an Affiliate of any other retail builder to which property is transferred under this Agreement. The transferee in such a transaction and its successors ("Non-Assuming Transferees") shall be deemed to have no obligations under this Agreement, but shall continue to benefit from the vested rights provided by this Agreement for the duration of the Term. Nothing in this section shall

exempt any property transferred to a Non-Assuming Transferee from payment of applicable fees per this Agreement and assessments or compliance with applicable conditions of approval.

Section 8.04. Notice of Compliance Generally. Within thirty (30) days following any written request which Developer may make from time to time, City shall execute and deliver to Developer (or to any party requested by Developer) a written “Notice of Compliance,” in recordable form, duly executed and acknowledged by City, that certifies:

- (a) This Agreement is unmodified and in full force and effect, or if there have been modifications hereto, that this Agreement is in full force and effect as modified and stating the date and nature of such modifications;
- (b) There are no current uncured defaults under this Agreement or specifying the dates and nature of any such default;
- (c) Any other information reasonably requested by Developer. The failure to deliver such a statement within such time shall constitute a conclusive presumption against City that this Agreement is in full force and effect without modification except as may be represented by the Developer and that there are no uncured defaults in the performance of the Developer, except as may be represented by the Developer. Developer shall have the right at Developer's sole discretion, to record the Notice of Compliance.

ARTICLE 9. COOPERATION IN THE EVENT OF LEGAL CHALLENGE

Section 9.01. Cooperation.

- (a) In the event of any administrative, legal or equitable action or other proceeding instituted by any person not a party to this Agreement challenging the validity of any provision of the Agreement or any Project Approval or Subsequent Approval, the parties shall cooperate in defending such action or proceeding. The parties shall use best efforts to select mutually agreeable legal counsel to defend such action, and Developer shall pay compensation for such legal counsel; provided, however, that such compensation shall include only compensation paid to counsel not otherwise employed as City staff and shall exclude, without limitation, City Attorney time and overhead costs and other City staff overhead costs and normal day-to-day business expenses incurred by City. Developer's obligation to pay for legal counsel shall not extend to fees incurred on appeal unless otherwise authorized by Developer. In the event City and Developer are unable to select mutually agreeable legal counsel to defend such action or proceeding, each party may select its own legal counsel at its own expense.
- (b) The parties agree that this Section 9.01 shall constitute a separate agreement entered into concurrently, and that if any other provision of this Agreement, or the Agreement as a whole, is invalidated, rendered null, or set aside by a

court of competent jurisdiction, the parties agree to be bound by the terms of this section, which shall survive such invalidation, nullification or setting aside.

Section 9.02. Cure; Reapproval.

- (a) If, as a result of any administrative, legal or equitable action or other proceeding as described in Section 9.01, all or any portion of this Agreement, Project Approvals, or Subsequent Approvals are set aside or otherwise made ineffective by any judgment (a “Judgment”) in such action or proceeding (based on procedural, substantive or other deficiencies, hereinafter “Deficiencies”), the parties agree to use their respective best efforts to sustain and reenact or readopt this Agreement, Project Approvals, and/or Subsequent Approvals that the Deficiencies related to, as follows, unless the Parties mutually agree in writing to act otherwise:
 - (i) If any Judgment requires reconsideration or consideration by City of this Agreement, Project Approval, or Subsequent Approval, then the City shall consider or reconsider that matter in a manner consistent with the intent of this Agreement. If any such Judgment invalidates or otherwise makes ineffective all or any portion of this Agreement, Project Approval, or Subsequent Approval, then the Parties shall cooperate and shall cure any Deficiencies identified in the Judgment or upon which the Judgment is based in a manner consistent with the intent of this Agreement. City shall then readopt or reenact this Agreement, Project Approval, Subsequent Approval, or any portion thereof, for which the Deficiencies have now been cured.
 - (ii) Acting in a manner consistent with the intent of this Agreement includes, but is not limited to, recognizing that the Parties intend that Developer may develop the project consistent with the Project Approvals, and adopting such ordinances, resolutions, and other enactments, as are necessary to readopt or reenact all or any portion of this Agreement, Project Approvals, and/or Subsequent Approvals without contravening the Judgment.
- (b) The parties agree that this Section 9.02 shall constitute a separate agreement entered into concurrently, and that if any other provision of this Agreement, or the Agreement as a whole, is invalidated, rendered null, or set aside by a court of competent jurisdiction, the parties agree to be bound by the terms of this section, which shall survive such invalidation, nullification or setting aside.

ARTICLE 10. DEFAULT; REMEDIES; TERMINATION

Section 10.01. Defaults. Any failure by either party to perform any term or provision of this Agreement, which failure continues uncured for a period of

thirty (30) days following written notice of such failure from the other party (unless such period is extended by mutual written consent), shall constitute a default under this Agreement. Any notice given pursuant to the preceding sentence (“Default Notice”) shall specify the nature of the alleged failure and, where appropriate, the manner in which said failure satisfactorily may be cured. If the nature of the alleged failure is such that it cannot reasonably be cured within such 30-day period, then the commencement of the cure within such time period, and the diligent prosecution to completion of the cure thereafter, shall be deemed to be a cure within such 30-day period. Upon the occurrence of a default under this Agreement, the non-defaulting party may institute legal proceedings to enforce the terms of this Agreement or, in the event of a material default, terminate this Agreement. If the default is cured, then no default shall exist and the noticing party shall take no further action.

Section 10.02. Termination.

- (a) If City elects to consider terminating this Agreement due to a material default of Developer, then City shall give a notice of intent to terminate this Agreement and the matter shall be scheduled for consideration and review by the City Council at a public hearing duly noticed in the manner set forth in Government Code section 65867. Developer shall have the right to offer written and oral evidence prior to or at the time of said public hearings. If the City Council determines that a material default has occurred and is continuing, and elects to terminate this Agreement, City shall give written notice of termination of this Agreement to Developer by certified mail and this Agreement shall thereby be terminated sixty (60) days thereafter; provided, however, that if Developer files an action to challenge City’s termination of this Agreement within such sixty-day period, then this Agreement shall remain in full force and effect until a trial court has affirmed City’s termination of this Agreement and all appeals have been exhausted (or the time for requesting any and all appellate review has expired).
- (b) At any time prior to the issuance of the first Subsequent Approval the Developer may, upon provision of written notice to the City by certified mail, elect to terminate the Agreement. No obligations of the Developer or City under this Agreement shall survive such a termination.
- (c) If, prior to the City’s issuance of the first Subsequent Approval, the Developer donates any Developer-owned lands in Area 4 to any entity other than the City, or the City’s designee, this Agreement shall terminate unless the City elects, within thirty (30) days of receiving written notice from the Developer of the donation, to continue to honor the terms of the Agreement.

Section 10.03. Periodic Review.

- (a) Conducting the Periodic Review. Throughout the Term of this Agreement, at least once every twelve (12) months following the execution of this Agreement, City shall review the extent of good-faith compliance by Developer with the terms of this Agreement. This review (the “Periodic Review”) shall be conducted by the Community Development Director or his/her designee and shall be limited in scope to compliance with the terms of this Agreement pursuant to California Government Code Section 65865.1.
- (b) Notice. At least ten (10) days prior to the Periodic Review, and in the manner prescribed in Article 10 of this Agreement, City shall deposit in the mail to Developer a copy of any staff reports and documents to be used or relied upon in conducting the review and, to the extent practical, related exhibits concerning Developer’s performance hereunder. Developer shall be permitted an opportunity to respond to City’s evaluation of Developer’s performance, either orally at a public hearing or in a written statement, at Developer’s election. Such response shall be made to the Community Development Director.
- (c) Good Faith Compliance. During the Periodic Review, the Community Development Director shall review Developer’s good-faith compliance with the terms of this Agreement. At the conclusion of the Periodic Review, the Community Development Director shall make written findings and determinations, on the basis of substantial evidence, as to whether or not Developer has complied in good faith with the terms and conditions of this Agreement. The decision of the Community Development Director shall be appealable to the City Council. If the Community Development Director finds and determines that Developer has not complied with such terms and conditions, the Community Development Director may recommend to the City Council that it terminate or modify this Agreement by giving notice of its intention to do so, in the manner set forth in California Government Code Sections 65867 and 65868, after providing an opportunity to cure pursuant to Section 10.01 of this Agreement.
- (d) Failure to Properly Conduct Periodic Review. If City fails, during any calendar year, to either (i) conduct the Periodic Review or (ii) notify Developer in writing of City’s determination, pursuant to a Periodic Review, as to Developer’s compliance with the terms of this Agreement and such failure remains uncured as of December 31 of any year during the term of this Agreement, such failure shall be conclusively deemed an approval by City of Developer’s compliance with the terms of this Agreement.
- (e) Written Notice of Compliance. With respect to any year for which Developer has been determined or deemed to have complied with this Agreement, City shall, within thirty (30) days following request by Developer, provide Developer with a written notice of compliance, in recordable form, duly executed and acknowledged by City. Developer shall

have the right, in Developer's sole discretion, to record such notice of compliance.

Section 10.04. Default by City or Developer. In the event City or Developer defaults under the terms of this Agreement, City or Developer shall have all rights and remedies provided herein or under law.

Section 10.05. Enforced Delay; Extension of Time of Performance. In addition to specific provisions of this Agreement, neither party shall be deemed to be in default where delays in performance or failures to perform are due to, and a necessary outcome of, war, insurrection, strikes or other labor disturbances, walk-outs, riots, floods, earthquakes, fires, casualties, acts of God, restrictions imposed or mandated by other governmental entities (including new or supplemental environmental regulations), enactment of conflicting state or federal laws or regulations, judicial decisions, or similar basis for excused performance which is not within the reasonable control of the party to be excused. Litigation attacking the validity of this Agreement or any of the Project Approvals or Subsequent Approvals, or any permit, ordinance, entitlement or other action of a governmental agency other than City necessary for the development of the Project pursuant to this Agreement, or Developer's inability to obtain materials, power or public facilities (such as water or sewer service) to the Project, shall be deemed to create an excusable delay as to Developer. Upon the request of either party hereto, an extension of time for the performance of any obligation whose performance has been so prevented or delayed will be memorialized in writing. The term of any such extension shall be equal to the period of the excusable delay, or longer, as may be mutually agreed upon in writing by Developer and the Community Development Director.

Section 10.06. Legal Action. Either party may, in addition to any other rights or remedies, institute legal action to cure, correct, or remedy any default, enforce any covenant or agreement herein, enjoin any threatened or attempted violation thereof, recover damages for any default, enforce by specific performance the obligations and rights of the parties hereto, or to obtain any remedies consistent with the purpose of this Agreement.

Section 10.07. California Law and Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of California and venue with regard to any legal proceedings arising out of this Agreement shall be in Alameda County.

Section 10.08. Resolution of Disputes. With regard to any dispute involving development of the Project, the resolution of which is not provided for by this Agreement or Applicable Law, either party may elect to submit the dispute to final and binding arbitration in Alameda County, California before a JAMS arbitrator or other mutually agreeable retired judge.

Section 10.09. Attorneys' Fees. In any legal action or other proceeding brought by either party to enforce or interpret a provision of this Agreement, the prevailing party is entitled to reasonable attorneys' fees and any other reasonable litigation costs incurred in that proceeding in addition to any other relief to which it is entitled.

Section 10.10. Hold Harmless. Developer shall hold City and its elected and appointed officers, agents, employees, and representatives harmless from claims, costs, and liabilities for any personal injury, death, or property damage which is a result of the construction of the Project, or of operations performed under this Agreement by Developer or by Developer's contractors, subcontractors, agents or employees, whether such operations were performed by Developer or any of Developer's contractors, subcontractors, agents or employees. Nothing in this section shall be construed to mean that Developer shall hold City harmless from any claims of personal injury, death or property damage arising from, or alleged to arise from, any act, failure to act, on the part of City, its elected and appointed representatives, offices, agents and employees.

ARTICLE 11. NO AGENCY, JOINT VENTURE OR PARTNERSHIP

It is specifically understood and agreed to by and between the parties hereto that: (i) the subject development is a private development; (ii) City has no interest or responsibilities for, or duty to, third parties concerning any improvements until such time, and only until such time, that City accepts the same pursuant to the provisions of this Agreement or in connection with the various Project Approvals or Subsequent Approvals; (iii) Developer shall have full power over and exclusive control of the Project herein described, subject only to the limitations and obligations of Developer under this Agreement, the Project Approvals, Subsequent Approvals, and Applicable Law; and (iv) City and Developer hereby renounce the existence of any form of agency relationship, joint venture or partnership between City and Developer and agree that nothing contained herein or in any document executed in connection herewith shall be construed as creating any such relationship between City and Developer.

ARTICLE 12. MISCELLANEOUS

Section 12.01. Incorporation of Recitals and Introductory Paragraph. The Recitals contained in this Agreement, and the introductory paragraph preceding the Recitals, are hereby incorporated into this Agreement as if fully set forth herein.

Section 12.02. Enforceability. City and Developer agree that unless this Agreement is amended or terminated pursuant to the provisions of this Agreement, this Agreement shall be enforceable by any party hereto notwithstanding any change hereafter enacted or adopted (whether by ordinance, resolution, initiative, or any other means) in any applicable

general plan, specific plan, zoning ordinance, subdivision ordinance, or any other land use ordinance or building ordinance, resolution or other rule, regulation or policy adopted by City that changes, alters or amends the rules, regulations and policies applicable to the development of the Project Site at the time of the approval of this Agreement as provided by California Government Code Section 65866.

Section 12.03. Findings. City hereby finds and determines that execution of this Agreement furthers public health, safety and general welfare and that the provisions of this Agreement are consistent with the General Plan.

Section 12.04. Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, either City or Developer may (in their sole and absolute discretion) terminate this Agreement by providing written notice of such termination to the other party.

Section 12.05. Other Necessary Acts. Each party shall execute and deliver to the other all such other further instruments and documents as may be reasonably necessary to carry out the Project Approvals, Subsequent Approvals and this Agreement and to provide and secure to the other party the full and complete enjoyment of its rights and privileges hereunder.

Section 12.06. Construction. Each reference in this Agreement to this Agreement or any of the Project Approvals or Subsequent Approvals shall be deemed to refer to the Agreement, Project Approval or Subsequent Approval as it may be amended from time to time, whether or not the particular reference refers to such possible amendment. This Agreement has been reviewed and revised by legal counsel for both City and Developer, and no presumption or rule that ambiguities shall be construed against the drafting party shall apply to the interpretation or enforcement of this Agreement.

Section 12.07. Other Miscellaneous Terms. The singular shall include the plural; the masculine gender shall include the feminine; “shall” is mandatory; “may” is permissive. If there is more than one signer of this Agreement, the signer obligations are joint and several.

Section 12.08. Covenants Running with the Land. All of the provisions contained in this Agreement shall be binding upon the parties and their respective heirs, successors and assigns, representatives, lessees, and all other persons acquiring all or a portion of the Project, or any interest therein, whether by

operation of law or in any manner whatsoever. All of the provisions contained in this Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to California law including, without limitation, Civil Code Section 1468. Each covenant herein to act or refrain from acting is for the benefit of or a burden upon the Project, as appropriate, runs with the Project Site and is binding upon the owner of all or a portion of the Project Site and each successive owner during its ownership of such property.

Section 12.09. Notices. Any notice or communication required hereunder between City or Developer must be in writing, and may be given either personally, by telefacsimile (with original forwarded by regular U.S. Mail) by registered or certified mail (return receipt requested), or by Federal or other similar courier promising overnight delivery. If personally delivered, a notice shall be deemed to have been given when delivered to the party to whom it is addressed. If given by facsimile transmission, a notice or communication shall be deemed to have been given and received upon actual physical receipt of the entire document by the receiving party's facsimile machine. Notices transmitted by facsimile after 5:00 p.m. on a normal business day or on a Saturday, Sunday or holiday shall be deemed to have been given and received on the next normal business day. If given by registered or certified mail, such notice or communication shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addressees designated below as the party to whom notices are to be sent, or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If given by Federal Express or similar courier, a notice or communication shall be deemed to have been given and received on the date delivered as shown on a receipt issued by the courier. Any party hereto may at any time, by giving ten (10) days written notice to the other party hereto, designate any other address in substitution of the address to which such notice or communication shall be given. Such notices or communications shall be given to the parties at their addresses set forth below:

If to City, to: Terrence Grindall
Community Development Director
City of Newark
City Administration Building
37101 Newark Blvd.
Newark, CA 94560

With Copies to: City Clerk
City of Newark
City Administration Building
37101 Newark Blvd.

Newark, CA 94560

If to Developer, to: Tim Steele
Newark Partners, LLC
10600 North De Anza Blvd.
Suite 200
Cupertino, CA 95014

With Copies to: Anne E. Mudge
Cox, Castle & Nicholson, LLP
555 California Street
10th Floor
San Francisco, CA 94104

Section 12.10. Entire Agreement, Counterparts And Exhibits. This Agreement is executed in two (2) duplicate counterparts, each of which is deemed to be an original. This Agreement consists of [____] pages and [____] exhibits which constitute in full, the final and exclusive understanding and agreement of the parties and supersedes all negotiations or previous agreements of the parties with respect to all or any part of the subject matter hereof. All waivers of the provisions of this Agreement shall be in writing and signed by the appropriate authorities of City and the Developer. The following exhibits are attached to this Agreement and incorporated herein for all purposes:

Section 12.11. Recordation Of Development Agreement. Pursuant to California Government Code § 65868.5, no later than ten (10) days after City enters into this Agreement, the City Clerk shall record an executed copy of this Agreement in the Official Records of the City of Newark.

IN WITNESS WHEREOF, this Agreement has been entered into by and between Developer and City as of the day and year first above written.

**CITY OF NEWARK,
a municipal corporation**

By _____
Mayor
City of Newark
Date _____

Attest:

By: _____
City Clerk

Date _____

**Approved as to form:
City Attorney**

By _____
Gary Galliano

Date _____

**Manager
Newark Partners**

By _____
(Title)

Date _____

EXHIBIT A

Project Site Diagram and Parcel Numbers

EXHIBIT B

Existing Project Impact Fees

	Per Unit Fee
Art in Public Places	\$270
Community Facilities	\$1,942
Community Development Maintenance Fee	0.5% of construction value
Public Safety	\$1,989
Transportation	\$801

EXHIBIT C

Diagram of Recreational Parcel

EXHIBIT D
Donation Agreement Form