3) Adopt a resolution making findings supporting the use of an alternative means of compliance with the inclusionary housing ordinance and approving the affordable housing implementation agreement for the Jones Hamilton Project;

RESOLUTION NO.

RESOLUTION OF THE NEWARK CITY COUNCIL MAKING FINDINGS SUPPORTING THE USE OF AN ALTERMATIVE MEANS OF COMPLIANCE WITH THE INCLUSIONARY HOUSING ORDINANCE AND APPROVING THE AFFORDABLE HOUSING IMPLEMENTATION AGREEMENT FOR THE JONES HAMILTON PROJECT

WHEREAS, the Jones Hamilton Project includes a condition that the project comply with the City's Inclusionary Housing Ordinance (Municipal Code Section 17.18); and

WHEREAS, the Inclusionary Housing Ordinance includes provisions for the application of an alternative means of compliance; and

WHEREAS, the payment of a $25,000 Affordable Housing Fee per housing unit completed in the Jones Hamilton project would provide funds to develop or preserve affordable housing in Newark and would be an alternative means of compliance with the Inclusionary Housing Ordinance; and

WHEREAS, the flexibly provided by the payment of the Affordable Housing Fee will allow the City to leverage funds with State and Federal programs to better address the needs of the Newark Community for affordable housing; and

WHEREAS, the funds from the Affordable Housing Fee will allow the City to target investment so that the achievement of affordable housing objectives can be coupled with the achievement of other Community objectives; and

WHEREAS, the issue of concentration of future development of affordable housing is addressed because projects developed using the funds from the Affordable Housing Fee will be consistent with the General Plan and will require Planning Commission review and City Council approval.

WHEREAS, the Planning Commission recommended that the City Council approve the Affordable Housing Implementation Agreement and made findings in support of the alternative means of compliance with the Inclusionary Housing Ordinance.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Newark:

a. The Affordable Housing Implementation Agreement for the Jones Hamilton project, said agreement being on file with the City Clerk is approved and the Mayor is authorized to sign the Agreement.

b. That the City Council does find that:

i) The proposed alternative means of compliance fulfills the purposes of this, the Inclusionary Housing Ordinance, as set forth in Section 17.18.010; and

ii) The proposed alternative means of compliance will further affordable housing opportunities in the City to an equal or greater extent than compliance with the requirements of Section 17.18.030; and

iii) The proposed alternative means of compliance would better address the City's needs than compliance with the requirements of Section 17.18.030; and

iv) The proposed alternative means of compliance will not unduly concentrate below market rate housing in one geographic area.

AFFORDABLE HOUSING IMPLEMENTATION AGREEMENT

THIS AFFORDABLE HOUSING IMPLEMENTATION AGREEMENT ("**Agreement**") is made as of _____, 2014, by and between the CITY OF NEWARK, a California municipal corporation (the "**City**"), and NEWARK ENTERPRISE JOINT VENTURE LLC, a California limited liability company (the "**Developer**"). The City and Developer may be referred to herein individually as the "Party" or collectively as the "Parties." This Agreement shall become operative and commence upon the date on which this Agreement has been both (i) executed by Developer, and (ii) signed by the Mayor or his or her designee (the "**Effective Date**").

RECITALS

A. Developer is the owner of an approximately 21.4-acre site that is located at 8400 Enterprise Drive, comprised of three parcels (APNs 092-116-060, -058 and -059), and commonly referred to as the Jones-Hamilton site and more particularly described in the legal description attached hereto as Exhibit A and incorporated herein by this reference (the "**Properties**").

B. On _____, the City Council of the City (the "**City Council**") approved or certified the following land use approvals and entitlements to construct 217 single family homes on the Properties, subject to conditions of approval, including (without limitation) conditions requiring compliance with the City's Affordable Housing Program: Supplemental Environmental Impact Report for the Trumark Dumbarton Transit Oriented Development Residential Project ("**SEIR**") under the California Environmental Quality Act ("**CEQA**"); a Zoning Amendment zoning the Properties as Medium Density Residential; a Vesting Tentative Tract Map; and Architectural and Site Plan Review (collectively, the "**Previous Approvals**").

C. Developer plans to develop up to 217 dwelling units on the Properties, consisting of single family homes (the "**Project**"), as depicted on the Site Plan attached hereto as Exhibit B and incorporated herein by this reference ("**Site Plan**").

D. The City's approvals of the Previous Approvals included a condition of approval that "Payment by developer to the City of an in-lieu fee for each residential unit within the project at the time of issuance of a certificate of occupancy in the amount shown on Exhibit B to these conditions will constitute the project's compliance with the City's Affordable Housing Program as set forth in Chapter 17.18 of the Newark Municipal Code" and the Developer voluntarily accepted those conditions and freely agreed to comply with the City's Affordable Housing Program, and to waive any right to protest or challenge such conditions, requirements, fees, or exactions pursuant to the City's Affordable Housing Program.

E. Chapter 17.18 of the Newark Municipal Code (the "**Code**") generally requires developers to set-aside a minimum of 15% of the total number of dwelling units in a project as inclusionary units for very low, low, and moderate income households. The Code also authorizes alternative means of compliance with the City's Affordable Housing Program, including land dedication, payment of in-lieu fees, or approval of an alternative housing program consisting of any combination of alternative means of compliance, set forth and confirmed in a

binding and written agreement and recordable instrument in a form acceptable to the City Attorney.

F. The Parties have freely negotiated and the Developer has voluntarily proposed and intends to comply with the City's Affordable Housing Program and to satisfy the agreed affordable housing obligations for the Project and Properties by entering into this "Affordable Housing Implementation Agreement" which is intended as the binding and written agreement and recordable instrument providing for alternative means of compliance with the Affordable Housing Program contemplated by the Code, pursuant to which it is proposed that the Developer agree to pay to the City, an in-lieu fee in the amount of Twenty-Five Thousand Dollars ($25,000.00) for each dwelling unit within the Project (the "**Fee**"), which shall be payable to the City no later than issuance of the certificate of occupancy for each dwelling unit (the "**Alternative Means of Compliance**"), and that the City agree to allow and accept such payment as compliance with the Code.

G. On March 11, 2014, the Planning Commission of the City (the "**Planning Commission**") reviewed the Alternative Means of Compliance for consistency with the Code. The Planning Commission made the following findings and recommended approval of the Alternative Means of Compliance to the City Council: (i) the Alternative Means of Compliance fulfills the purposes of Chapter 17.18 as set forth in Code Section 17.18.010; (ii) the Alternative Means of Compliance will further affordable housing opportunities in the City to an equal or greater extent than other potential forms of compliance with the requirements of Code Section 17.18.030; (iii) the Alternative Means of Compliance would better address the City's needs than compliance with the requirements of Code Section 17.18.030; (iv) the Alternative Means of Compliance will not unduly concentrate below market rate housing in one geographic area; and (v) the Alternative Means of Compliance meets the conditions set forth in Code Section 17.18.050(D).

H. On _____ , the City Council reviewed the Alternative Means of Compliance, considered the Planning Commission recommendation, and approved the Alternative Means of Compliance based on the following findings: (i) the Alternative Means of Compliance fulfills the purposes of Chapter 17.18 as set forth in Code Section 17.18.010; (ii) the Alternative Means of Compliance will further affordable housing opportunities in the City to an equal or greater extent than compliance with the requirements of Code Section 17.18.030; (iii) the Alternative Means of Compliance would better address the City's needs than compliance with the requirements of Code Section 17.18.030; (iv) the Alternative Means of Compliance will not unduly concentrate below market rate housing in one geographic area; and (v) the Alternative Means of Compliance meets the conditions set forth in Section 17.18.050(D).

I. The City and Developer now desire to set forth the specific terms and conditions of the Alternative Means of Compliance, the timely and complete performance of which without reservation or objection will be deemed to fully satisfy the Project's and Properties' inclusionary housing obligations under the Code and in connection with development of the Project.

AGREEMENT:

NOW, THEREFORE, in consideration of the foregoing Recitals, which are hereby incorporated into the operative provisions of this Agreement by this reference as covenants, and for other good and valuable consideration, including without limitation the City's consent to the Previous Approvals and agreement to accept alternative means of compliance with its Affordable Housing Program, the receipt and adequacy of which is hereby acknowledged, the City and the Developer agree as follows:

1. **Development of the Properties**. Notwithstanding anything set forth in this Agreement to the contrary, unless the Project is developed on the Properties, as evidenced by the issuance of the first building permit for one or more dwelling unit(s) and commencement of construction of such dwelling unit, the Developer is not obligated by the terms of this Agreement to affirmatively act to develop all or any portion of the Project, proceed with the Alternative Means of Compliance (including but not limited to payment of the Fee), pay any sums of money, indemnify any Party, or to otherwise meet or perform any obligation with respect to the Project and the Alternative Means of Compliance.

2. **Alternative Means of Compliance**. Developer's inclusionary housing obligations for the Project and the Properties shall be fully satisfied by timely and full payment to the City of the agreed in-lieu fees to the City, in the amount of Twenty-Five Thousand Dollars ($25,000.00) per Project dwelling unit for which a building permit is sought by Developer. The Developer's obligation to pay the Fee for each Project dwelling unit shall arise upon the issuance of a building permit for that Project dwelling unit. However, Developer is not obligated to pay such Project unit Fee until the time for issuance of certificates of occupancy for that Project dwelling unit. In no event shall the Fee be paid more than once for any Project dwelling unit.

3. **Voluntary Agreement for Compliance and Waiver of Protest or Rights to Challenge the Agreed In-Lieu Fees.** The Developer affirms and agrees that this Agreement represents the Developer's proposal to pay affordable housing in lieu fees as an Alternative Means of Compliance with the City's Affordable Housing Program and for satisfaction in part of conditions included in the Previous Approvals, and that the amount of the fees as well as the basis for determining the amount of the fees provided by this Agreement is the result of voluntary agreement and negotiation. The Developer, for itself and its successors or assigns, hereby waives and disclaims any right to contest, protest, or challenge the fees and obligations to pay the fees as provided by this Agreement, including any rights or remedies that might otherwise by claimed under Sections 66020 or 66021 of the California Government Code.

4. **Modification, Amendment, Cancellation or Termination**.

4.1 **Amendment and Cancellation**. This Agreement may be amended or canceled, in whole or in part, by mutual written consent of the City, exercised by the duly-authorized representative of the City, and the Developer or their successors in interest, exercised by the duly-authorized representative of the Developer or its successor.

4.2 **Modification**. The City Planning Director, with the written consent of the Developer, may make minor written modifications to the Agreement without the need for formal action by the City's Planning Commission or City Council.

4.3 Any changes, amendments or modifications to this Agreement must be in writing and must be signed by authorized representative of the Parties to be effective.

5. **Defaults, Notice and Cure Periods, Events of Default and Remedies**.

5.1 **Default By the Developer**.

5.1.1 **Default**. If the Developer fails to pay the agreed fees in full and timely manner when due, or delays, protests or contests its fee payment obligations, then the City shall have no obligation to issue certificates of occupancy or other approvals for development, use, or occupancy of the Project, unless and until such payment default or dispute is cured. If the Developer does not perform its payment obligations or any other obligations under this Agreement in a timely manner, the City may exercise all other rights and remedies provided in this Agreement, provided the City complies with the notice and cure provisions in this Agreement.

5.1.2 **Notice of Default**. If the Developer does not perform its obligations under this Agreement in a timely manner, the City through the City Manager may submit to the Developer a written notice of default in the manner prescribed in Section 8(a) identifying with specificity those obligations of the Developer under this Agreement which have not been timely performed. Upon receipt of any such written notice of default, the Developer shall promptly commence to cure the identified default(s) at the earliest reasonable time after receipt of any such written notice of default and shall complete the cure of any such default(s) no later than sixty (60) days after receipt of any such written notice of default, or if such default(s) is not capable of being cured within sixty (60) days, no later than one hundred twenty (120) days after receipt of any such written notice of default, provided the Developer commences the cure of any such default(s) within such sixty (60) day period and thereafter diligently pursues such cure at all times until any such default(s) is cured.

5.1.3 **Failure to Cure Default Procedure**. If after the cure period provided in Section 4.1.2 has elapsed, the City Manager finds and determines the Developer, or its successors, transferees and/or assignees, as the case may be, remains in default and that the City intends to terminate or modify this Agreement, or those transferred or assigned rights and obligations, as the case may be, the City's Planning and Building Director shall make a report to the Planning Commission and then set a public hearing before the Planning Commission. If after public hearing, the Planning Commission finds and determines, on the basis of substantial evidence, that the Developer, or its successors, transferees and/or assigns, as the case may be, has not cured a default under this Agreement, and that the City shall terminate or modify this Agreement, or those transferred or assigned rights and obligations, as the case may be, the Developer, and its successors, transferees and/or assigns, shall be entitled to appeal that finding and determination to the City Council. Such right of appeal shall include, but not be limited to, an objection to the manner in which the City intends to modify this Agreement if the City intends as a result of a default of the Developer, or one of its successors or assigns, to modify this Agreement. In the event of a finding and determination that all defaults are cured, there shall be no appeal by any person or entity.

5.1.4 **Termination or Modification of Agreements**. The City may terminate or modify this Agreement, or those transferred or assigned rights and obligations, as the case may be, after such final determination of the City Council, where no appeal is taken, after the expiration of the applicable appeal periods described herein.

5.1.5 **Lender Protection Provisions**.

5.1.5.1 **Notice of Default**. In addition to the notice provisions set forth in Section 4.1.2, the City shall send a copy of any notice of default sent to the Developer or any of its successors or assigns to any lender that has made a loan then secured by a deed of trust against the Properties, or a portion thereof, provided such lender shall have (a) delivered to the City written notice in the manner provided in Section 8(a) of such lender's election to receive a copy of any such written notice of default and (b) provided to the City a recorded copy of any such deed of trust. Any such lender that makes a loan secured by a deed of trust against the Properties, or a portion thereof, and delivers a written notice to the City and provides the City with a recorded copy of any such deed of trust in accordance with the provisions of this Section 4.1.5.1 is herein referred to as a "**Qualified Lender.**"

5.1.5.2 **Right of a Qualified Lender to Cure a Default**. The City shall send a written notice of any Developer default to each Qualified Lender. From and after receipt of any such written notice of default, each Qualified Lender shall have the right to cure any such default within the same cure periods as provided to the Developer hereunder. If the nature of any such default is such that a Qualified Lender cannot reasonably cure any such default without being the fee owner of the Properties, or the applicable portion thereof, (as reasonably determined by the City), then so long as the Qualified Lender(s) is (are) diligently proceeding (as reasonably determined by the City) to foreclose the lien of its deed of trust against the fee owner of the Properties, or the applicable portion thereof, and after completing any such foreclosure promptly commences the cure of any such default and thereafter diligently pursues the cure of such default to completion, then such Qualified Lender shall have any additional sixty (60) days following such foreclosure to cure any such default.

4.1.6 **Exercise of City's Remedies**. Notwithstanding any other provision of this Agreement, and other than the City's right to suspend or withhold the issuance of occupancy certificates or other development permits for non-payment or dispute of the agreed fees, the City shall not exercise any right or remedy to cancel or amend this Agreement during any cure period.

5.2 **Default by the City**.

5.2.1 **Default**. In the event the City does not perform any obligations under this Agreement, the Developer shall have all rights and remedies provided herein or by applicable law, which shall include compelling the specific performance of the City's obligations under this Agreement provided the Developer has first complied with the procedures in Section 4.2.2.

5.2.2 **Notice of Default**. Prior to the exercise of any other right or remedy arising out of a default by the City under this Agreement, the Developer shall first

submit to the City a written notice of default stating with specificity those obligations which have not been performed under this Agreement. Upon receipt of the notice of default, the City shall promptly commence to cure the identified default(s) at the earliest reasonable time after receipt of the notice of default and shall complete the cure of such default(s) no later than thirty (30) days after receipt of the notice of default, or such longer period as is reasonably necessary to remedy such default(s), provided the City shall continuously and diligently pursue each remedy at all times until such default(s) is cured. In the case of a dispute as to whether the City is in default under this Agreement or whether the City has cured the default, or to seek the enforcement of this Agreement, the City and the Developer may submit the matter to negotiation/mediation pursuant to Section 8(n) of this Agreement.

5.3 **Monetary Damages**. The Developer and City acknowledge that neither the City nor the Developer would have entered into this Agreement if either were liable for monetary damages under or with respect to this Agreement or the application thereof. Both the City and the Developer agree and recognize that, as a practical matter, it may not be possible to determine an amount of monetary damages which would adequately compensate the Developer for its investment of time and financial resources in planning to arrive at the kind, location, intensity of use, and improvements for the Project, nor to calculate the consideration the City would require to enter into this Agreement to justify such exposure. Therefore, the City and the Developer agree that neither shall be liable for monetary damages under or with respect to this Agreement or the application thereof and the City and the Developer covenant not to sue for or claim any monetary damages for the breach of any provision of this Agreement. This foregoing waiver shall not be deemed to apply to any fees or other monetary amounts specifically required to be paid by the Developer to the City or to be paid by the City to the Developer pursuant to this Agreement, including, but not limited to, any amounts due pursuant to Section 8(g). This foregoing waiver is not intended to prohibit Developer from bringing any legal claim that Developer otherwise would have against City in the absence of this Agreement (i.e., non-contract claims and causes of action), nor to prevent the City from exercising any of its other remedies, authority, or police power under California law.

6. **Administration of Agreement and Resolution of Disputes**. The Developer shall at all times have the right to appeal to the City Council any decision or determination made by any employee, agent or other representative of the City concerning the Project, the Alternative Means of Compliance or the interpretation and administration of this Agreement. All City Council decisions or determinations regarding the Project, the Alternative Means of Compliance or the administration of this Agreement shall also be subject to judicial review pursuant to Code of Civil Procedure section 1094.5, provided that, pursuant to Code of Civil Procedure section 1094.6, any such action must be filed in a court of competent jurisdiction not later than ninety (90) days after the date on which the City Council's decision becomes final. In addition, in the event the Developer and the City cannot agree whether a default on the part of the Developer, or any of its successors or assigns, under this Agreement exists or whether or not any such default has been cured, then the City or the Developer may submit the matter to negotiation/mediation pursuant to Section 8(n).

7. **Constructive Notice, Recordation, and Acceptance**. This Agreement, or a Memorandum thereof in form acceptable to the City Attorney, may be recorded in the public records of Alameda County against the Properties described herein, at the election of the City.

Every person or entity who now or hereafter owns or acquires any right, title or interest in or to any portion of the Properties is, and shall be, conclusively deemed to have consented and agreed to every provision contained herein, whether or not any reference to this Agreement is contained in the instrument by which such person acquired an interest in the Properties.

8. **No Third Party Beneficiaries**. This Agreement is made and entered into for the sole protection and benefit of the City, the Developer, and their respective successors and assigns. No other person or entity shall have any right of action based upon any provision of this Agreement.

9. **Miscellaneous**.

(a) Notices. All notices which are allowed or required to be given hereunder shall be in writing and (1) shall be deemed given and received when personally delivered or (2) shall be sent by registered or certified mail or overnight mail service, addressed to the applicable designated person by one Party to the other in writing, and shall be deemed received on the second business day after such mailing.

If to City:	City of Newark 37101 Newark Blvd. Newark, CA 94560 Attn: City Manager Tel. No.: (510) 578-4000 Fax No.: _____
If to Developer:	Newark Enterprise Joint Venture LLC c/o Trumark Homes LLC 4185 Blackhawk Plaza Circle, Suite 200 Danville, CA 94506 Attn: Veronica Vargas Tel. No.: (925) 309-2514 Fax No.: (925) 648-3130
Copy to:	Cox Castle & Nicholson Attn: Clark Morrison 555 California Street, 10th Floor San Francisco, CA 94104 Tel. No.: (415) 262-5113 Fax. No.: (415) 262-5199

(b) Severability. If any part of this Agreement is declared invalid for any reason, such invalidity shall not affect the validity of the remainder of the Agreement unless the invalid provision is a material part of the Agreement. The other parts of this Agreement shall remain in effect as if this Agreement had been executed without the invalid part.

(c) Entire Agreement. This Agreement represents the entire agreement between the City and the Developer with respect to the subject matter hereof and supersedes all

prior agreements and understandings, whether oral or written, between the City and the Developer with respect to the matters contained in this Agreement.

(d) Further Assurances. The City and the Developer agree to perform, from time to time, such further acts and to execute and deliver such further instruments reasonably to effect the intents and purposes of this Agreement, provided that the intended obligations of the City and the Developer are not thereby modified.

(e) Assignment. This Agreement shall inure to the benefit of and bind the successors and assigns of the City and the Developer, and may be assigned by either the City or the Developer to any party or parties purchasing all or any part of the fee interest in the Properties. The provisions of this Section 7(e) shall be self-executing and shall not require the execution or recordation of any further document or instrument. Upon the conveyance, transfer or assignment of all or a portion of the Properties to a party that acquires fee title to the Properties or any portion thereof, Developer shall be released of all obligations under this Agreement as to such portion of the Properties transferred or assigned; provided, however, that Developer shall not be released from any obligation incurred or liability for any default of Developer committed prior to the date of the transfer.

(f) Negation of Agency. The City and the Developer acknowledge that, in entering into and performing under this Agreement, each is acting as an independent entity and not as an agent of the other in any respect. Nothing contained herein or in any document executed in connection herewith shall be construed as making the City and the Developer a joint venture, partners or employer/employee.

(g) Attorney's Fees. In the event of any claim, dispute or controversy arising out of or relating to this Agreement, including an action for declaratory relief or other litigation, the prevailing Party in such action or proceeding shall be entitled to recover its reasonable legal fees and reasonable court costs.

(h) Waiver. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought.

(i) Authority. Each of the individuals executing this Agreement verifies that each of them has the authority to enter into this Agreement, that the necessary resolutions or other consents have been passed or obtained, and that this Agreement shall be binding on the Parties for whom each of them is signing.

(j) Force Majeure. Performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to one or more of the following events, providing that anyone or more of such event(s) actually delays or interferes with the timely performance of the matter to which it would apply and despite the exercise of diligence and good business practices and such event(s) are beyond the reasonable control of the Party claiming such interference: war, terrorism, terrorist acts, insurrection, strikes, lock-outs, unavailability in the marketplace of essential labor, tools, materials or supplies, failure of any contractor, subcontractor, or consultant to timely perform (so long as Developer is not otherwise in default

of any obligation under this Agreement and is exercising commercially reasonable diligence of such contractor, subcontractor or consultant to perform), riots, floods, earthquakes, fires, casualties, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priority, or unusually severe weather. An extension of time for any such cause (a "**Force Majeure Delay**") shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the Party claiming such extension is sent to the other Party within thirty (30) days of actual knowledge of the commencement of the cause. Notwithstanding the foregoing, none of the foregoing events shall constitute a Force Majeure Delay unless and until the Party claiming such delay and interference delivers to the other Party written notice describing the event, its cause, when and how such Party obtained knowledge, the date and the event commenced, and the estimated delay resulting therefrom.

(k) Paragraph Headings. The paragraph and section headings contained in this Agreement are for convenience and identification only and shall not be deemed to limit or define the contents to which they relate.

(l) Time of Essence. Time is of the essence of this Agreement, and all performances required hereunder shall be completed within the time periods specified. Any failure of performance shall be deemed as a material breach of this Agreement.

(m) Counterparts. This Agreement and any modifications hereto may be executed in any number of counterparts with the same force and effect as if executed in the form of a single document.

(n) Alternative Dispute Resolution Procedure.

(1) Dispute. If a dispute arises concerning whether the City or the Developer or any of Developer's successors or assigns is in default under this Agreement or whether any such default has been cured or whether or not a dispute is subject to this Section (a "**Dispute**"), then such dispute shall be subject to negotiation between the Parties to this Agreement, and if then not resolved shall be subject to nonbinding mediation, both as set forth below, before either Party may institute legal proceedings.

(2) Negotiation. If a Dispute arises, the Parties agree to negotiate in good faith to resolve the Dispute. If the negotiations do not resolve the Dispute to the reasonable satisfaction of the Parties within 15 days from a written request for a negotiation, then each Party shall give notice to the other Party identifying an official or executive officer who has authority to resolve the Dispute to meet in person with the other Party's designated official or executive officer who is similarly authorized. The designated persons identified by each Party shall meet in person for one day within the 20-day period following the expiration of the IS-day period and the designated persons shall attempt in good faith to resolve the Dispute. If the designated persons are unable to resolve the Dispute, then the Dispute shall be submitted to non-binding mediation.

(3) Mediation.

(i) Within 15 days following the designated persons' meeting described in Section 8(n)(2), above, either Party may initiate non-binding mediation (the "**Mediation**"), conducted by Judicial Arbitration & Mediation Services, Inc. ("**JAMS**") or other agreed upon mediator. Either Party may initiate the Mediation by written notice to the other Party.

(ii) The mediator shall be a retired judge or other mediator, selected by mutual agreement of the Parties, and if they cannot agree within 15 days after the Mediation notice, the mediator shall be selected through the procedures regularly followed by JAMS. The Mediation shall be held within 15 days after the Mediator is selected, or a longer period as the Parties and the mediator mutually decide.

(iii) If the Dispute is not fully resolved by mutual agreement of the Parties within 15 days after completion of the Mediation, then either Party may institute legal proceedings.

(iv) The Parties shall bear equally the cost of the mediator's fees and expenses, but each Party shall pay its own attorneys' and expert witness fees and any other associated costs in connection with the mediation.

(4) Preservation of Rights. Nothing in this Section shall limit a Party's right to seek an injunction or restraining order from a court in circumstances where such equitable relief is deemed necessary by a Party to preserve such Party's rights.

(o) Governing Law. This Agreement and the rights and obligations of the Parties hereto shall be governed by and construed and enforced in accordance with the laws of the State of California.

(p) Legal Advice. Each party has received independent legal advice from its attorneys with respect to the advisability of executing this Agreement and the meaning of the provisions hereof.

(q) Interpretation. The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties hereto acknowledge and agree that this Agreement has been prepared jointly by the Parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each Party has independently reviewed this Agreement with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the Party preparing it, and instead other rules of interpretation and construction shall be utilized.

[signatures on next page]

IN WITNESS WHEREOF, the City and the Developer hereto have each executed this Agreement as of the date first written above.

"DEVELOPER"

NEWARK ENTERPRISE JOINT VENTURE LLC, a California limited liability company

By:

By:_____

Name: _____

Title:_____

"CITY"

CITY OF NEWARK,
a California municipal corporation

_____
Mayor, or his or her designee

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

EXHIBIT "A" TO AFFORDABLE HOUSING AGREEMENT

LEGAL DESCRIPTION OF PROPERTIES

[to be inserted]

EXHIBIT "B" TO AFFORDABLE HOUSING IMPLEMENTATION AGREEMENT

SITE PLAN

[to be inserted]