(5) Adopt a resolution authorizing the Mayor to sign a Park Agreement with Newark Enterprise Joint Venture, LLC;

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWARK AUTHORIZING THE MAYOR TO SIGN A PARK AGREEMENT WITH NEWARK ENTERPRISE JOINT VENTURE LLC

BE IT RESOLVED by the City Council of the City of Newark that the Mayor of the City of Newark be and is hereby authorized to sign a Park Agreement with Newark Enterprise Joint Venture, LLC., said agreement on file in the Office of the City Clerk.

(Parkres)

PARK FUNDING AGREEMENT
BY AND AMONG THE CITY OF NEWARK AND
NEWARK ENTERPRISE JOINT VENTURE LLC,

This Park Funding Agreement ("Agreement") dated _____, 2014, (the "**Effective Date**") is entered into by and among the CITY OF NEWARK, a California municipal corporation (hereinafter "**City**") and NEWARK ENTERPRISE JOINT VENTURE LLC, a California limited liability company (**"Developer"**). City and Developer are, from time to time, hereinafter referred to individually as a "**Party**" and collectively as the "**Parties**."

RECITALS

This Agreement is entered upon the basis of the following facts, understandings and intentions of City and Developer.

A. Developer is the owner of an approximately 21-acre parcel of real property that is located in the City at 8400 Enterprise Way, comprised of three assessor parcels (APNs 092-116-060, -058 and -059), and commonly referred to as the Jones-Hamilton site (the **"Property"**). Developer intends to develop the Property as a residential community of 217 detached single-family residential units (the **"Project"**). Toward that objective, Developer has submitted various application materials of which this Agreement is a part.

B. Through and since its September, 2011, adoption of the Dumbarton Transit Oriented Development (**"TOD"**) Specific Plan ("**Specific Plan**"), the City has been working toward the creation of an approximately two-acre public park on a site located at 8333 Enterprise Way (the **"Park Site"**) and depicted in Figure 8.3 of the Dumbarton TOD Specific Plan. The Park Site is currently owned by a third party (**"Gallade"**), and it is the subject of an ongoing environmental cleanup process that is being supervised by the Regional Water Quality Control Board, San Francisco Bay Region (the **"Regional Board"**). The Regional Board has, among other things, issued Site Cleanup Requirements Order R2-2007-0005 (the **"SCR Order"**) to Honeywell International Inc. (**"Honeywell"**) requiring Honeywell to take various actions to clean up and abate contamination at and emanating from the Park Site.

C. Prior to executing this Agreement, and in connection with the City's consideration of the Developer's application for the Project, the Parties entered into a February 27, 2014, Cost Reimbursement and Initial Deposit Agreement For The Proposed Trumark Development Agreement/Project – City of Newark, California (the **"Cost Payment Agreement"**) to fund needed studies and actions prior to the City's consideration or approval of entitlements for the Project. The Initial Deposit Agreement anticipated that if the Developer received its approvals for the Project, the Parties would consider extending the funding mechanism provide through the Initial Deposit Agreement to advance additional funds to the City for its use in connection with the Park.

D. On April 22, 2014, the City's Planning Commission reviewed and recommended approval of the Project. On May 8, 2014, and subject to specified conditions (collectively, the "**Conditions of Approval**" or individually a "**Condition**"), the City Council, by Resolution No. _____, approved the Project including Vesting Tentative Map No. 8098 (the "**Vesting Tentative Map**"). All references herein to alphabetically designated Conditions shall be understood to refer to the similarly designated Condition in the Conditions Of Approval approved with Resolution No. _____.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other consideration, the value, legality, and adequacy of which are hereby acknowledged, the Parties agree as follows:

1.01 Recitals Incorporated Herein. Recitals A through D above are material provisions in this Agreement and are of equal standing with the remainder of this Agreement in determining the Parties intentions in entering into this Agreement.

1.02 No Commitment To Condemn.

(1) Except to the extent expressly provided in this Agreement, nothing in this Agreement in any way limits or controls the Planning Commission's or the City Council's discretion as to any matter(s) reserved to them, whether under Vesting Tentative Map 8098 and the Conditions of Approval or otherwise.

(2) Except to the extent expressly provided in this Agreement, nothing in this Agreement obligates the City to take any particular action(s) or make any particular decision(s) regarding acquisition of the Park Site (whether by eminent domain or otherwise), or regarding any issues raised by the City's consideration of possible acquisition of the Park Site, whether such action(s) or decision(s) would customarily be made by the City Council, the Planning Commission or any department of the City. Nor shall this Agreement be deemed to constitute any prejudgment or predetermination of any matters required or permitted to be considered as part of the City's determination whether to acquire the Park Site, or whether to take any related discretionary action(s).

1.03 Relation To Resolution No. _____ and Cost Payment Agreement. Upon execution by the Parties, this Agreement implements, fulfills and satisfies Condition uuuu in Resolution No. _____. Consistent with Condition uuuu, this Agreement supersedes Conditions aa, cc, and ffff in Resolution ____, and any other Condition(s) accompanying that Resolution that pertain to the acquisition and/or development of the Park Site. In the event of any conflict between this Agreement and any Park-related Condition(s), this Agreement shall control. This Agreement confirms that the Parties have performed to their mutual satisfaction under the Cost Payment Agreement and provides the extension of the Cost Payment Agreement anticipated in the Cost Payment Agreement (i.e., the payment for **"Subsequent Phases of Work"** as that term is defined in the Cost Payment Agreement). The Cost Payment Agreement is incorporated into this Agreement by this reference; provided, however that in event of any conflict between the two agreements, the terms in this Agreement shall control.

1.04 Actions To Be Taken By City In Connection With The Park Site

(1) CEQA and Zoning. The City shall comply with the requirements of the California Environmental Quality Act (Pub. Res. Code Sections 21000 *et seq.*) and its Guidelines (Cal. Code Reg. Title 14, Sections 15000 *et seq.*), as each is amended from time to time (collectively **"CEQA"**) as it applies to the possible acquisition and development of the Park Site. Any discretionary actions, obligations, or covenants of the City provided for in this Agreement that require CEQA compliance (i.e., excluding the engagement of appraisers and consultants and similar precondemnation activities) are conditioned upon the City's determination of compliance with CEQA, and the expiration of time for challenge to that determination or the final termination of any judicial action challenging that determination. In addition, the City staff shall prepared appropriate resolutions, staff reports and related documentation necessary or appropriate for the Planning Commission and the City Council to conform the zoning designation for the Park Site to the land use designation in the TOD Specific Plan.

(2) Relocation. Subject to Developer meeting its obligation to provide the funding anticipated in this Agreement, City will continue its efforts to evaluate the cost and logistics of relocating the business now operating on the Park Parcel, and take the steps necessary to relocate the business now operating on the Park Parcel if the City chooses to exercise its eminent domain authority to acquire the Park Site. In taking such steps, the City shall comply with applicable sections of the Government Code (e.g., Section 7260 *et seq.*) and applicable regulations (e.g., Title 25 of the California Code of Regulations, Section 6000 *et seq*).

(3) Appraisal. Subject to Developer meeting its obligation to provide the funding anticipated in this Agreement, City will direct its appraiser(s) to conduct appraisal(s) concerning the Park Site, and will use its best efforts to have its appraisers complete their work by April 30, 2014. City and Developer will meet and confer as soon as the appraisers have reached their conclusions as to fair market value and just compensation to evaluate whether the appraisers' anticipated opinions of fair market value and just compensation indicate likely acquisition costs consistent with the budgetary expectations discussed prior to entering into this Agreement. Developer shall have five (5) **"Business Days"** (Monday through Friday, state and federal holidays excepted) after the meet and confer meeting to advise the City whether Developer remains willing to fund the City's acquisition and development of the Park Site. If the Developer elects to terminate this Agreement, the Developer shall remain liable for the reasonable costs invoiced to the City by its appraisers, relocation consultant, and the outside counsel for their work to that point.

(4) Offer, Negotiation And Acquisition. Provided that the Developer has not exercised its termination right pursuant to Section 1.04(3), above, City shall make a written offer to purchase the Park Site, and shall use its best efforts to make the offer no later than June 2, 2014. In making its offer, the City shall comply with all applicable legal requirements (e.g., Government Code Section 7260 *et seq.*). Thereafter, City shall use diligent efforts to achieve a negotiated acquisition of the Park Site, and as part of that effort will confer periodically with Developer to keep Developer apprised of the status of negotiations, including but not limited to all cost and timing issues associated with the acquisition process. If those negotiations result in a negotiated purchase and sale agreement agreeable to the seller, the City, and Developer, City shall complete the complete the close of escrow by the date agreed to by the City and the seller.

(5) Resolution of Necessity. If the City makes the offer contemplated in Section 1.04 (4), above, but negotiations thereafter do not result in a purchase and sale agreement for the Park Site that is agreeable to the seller, the City, and Developer, (by the deadline for the notice contemplated in this Section 1.04(5), below), then the City shall take all steps required to prepare and publish a notice of its intention to consider the adoption of a Resolution of Necessity (**"RON"**) to acquire the Park Site through the exercise of eminent domain authority. The notice shall indicate that the RON will be considered at the City Council's June 12, 2014, meeting unless the Parties agree to a later date. If during the period between the publication of that notice and the hearing on the RON, further negotiations do not result in a negotiated purchase and sale agreement agreeable to the seller, the City, and Developer, the RON shall be scheduled for consideration and/or approval by the City Council at its June 12, 2014, meeting, or at such later City Council meeting as the Parties may select.

(6) Complaint In Eminent Domain. If City adopts a RON, and provided the Developer confirms that it will continue to meet the funding obligations provided in this Agreement, the City will direct its counsel to prepare and file a complaint in eminent domain to acquire the Park Parcel as expeditiously as reasonably practicable, and to proceed diligently under Section 1255.410 *et seq.* of the Code of Civil Procedure to obtain an order for prejudgment possession of the Park Site so as to facilitate environmental remediation and development of the Park Site. In that event, the Developer shall be responsible to secure such funds as may be required for (a) a litigation guarantee of title, and (b) a deposit of probable just compensation as provided by Section 1.05(2) below.

(7) Completion of Acquisition; Waiver of Park-related Obligations. If the City has not obtained possession of the Park Site by either negotiated purchase, an order for prejudgment possession, or otherwise by June 30, 2015, any Park-related limitations on the Project (whether contained in the Conditions of Approval or otherwise) shall be waived and Developer's only Park-related obligation shall be to pay the City's generally applicable park impact fee then in effect (currently at the rate of $7,460 per dwelling unit) less the funds advanced pursuant to the Cost Payment Agreement and this Agreement. If the City has filed and diligently pursued a motion seeking prejudgment possession, and the court has not decided the matter, the deadline provided in this Section 1.04(7) shall be extended until the court rules on the matter. If at any time, a RON is voted on and not adopted, any Park-related limitations on the Project (whether contained in the Conditions of Approval or otherwise) shall be waived and Developer's only Park-related obligation shall be to pay the City's generally applicable park impact fee then in effect (currently at the rate of $7,460 per dwelling unit) less the funds advanced pursuant to the Cost Payment Agreement and this Agreement.

(8) Remediation Plan, Demolition and Remediation. The City shall continue to work with the Regional Board with the objective of assuring that Honeywell and/or Gallade promptly complete the preparation and implementation of demolition and remediation measures sufficient (A) to render the Park Site suitable for development and use as a public park and (B) to allow the Regional Board to issue a "no further action" letter or similar document confirming that in the Regional Board's judgment the Park Site has been fully remediated such that park development can proceed without Developer needing to employ contractors with specialized training or health and safety plans, or other similar measures necessitated by residual

contamination that would substantially increase the cost of developing the Park Site relative to an uncontaminated site.

1.05 Actions By Developer in Connection With The Park Site

(1) Cost Payment Agreement – Subsequent Phases of Work. Developer will within five (5) Business Days of the date this Agreement has been executed by both Parties deposit the sum estimated by the Parties to be required to pay the costs that are (A) incurred by City's professionals and consultants pursuant to the agreements entered into by the City in connection Cost Payment Agreement through June 15, 2014 and (B) not covered by the Initial Deposit made by the Developer pursuant to the Cost Payment Agreement. The invoicing, review of invoicing, and other accounting procedures for the Subsequent Phases of Work shall be managed by the Parties as provided in the Cost Payment Agreement, which is incorporated here.

(2) Land Acquisition. If the City adopts a RON and seeks prejudgment possession of the Park Site such that a deposit with the State Treasury must be made, Developer shall advance the deposit required to support the application for prejudgment possession. Thereafter, Developer shall advance (A) the remainder of the purchase price (in the event of a negotiated resolution of the eminent domain proceeding), or (B) the remainder of the award of just compensation for the fee to the Park Site as determined at trial.

(3) Relocation and Other Costs. Developer shall similarly advance (A) those relocation costs provided for under the applicable statues and regulations as either (i) agreed upon by Gallade and the City (which will in good faith consider the Developer's input as to required relocation costs) or (ii) as determined by the City; and (B) compensation, if any, for furniture, fixtures and equipment compensation that is (i) agreed upon by Gallade and the City (which will in good faith consider the Developer's input as to required compensation) or (ii) ordered by a court.

(4) Legal Fees. Developer shall similarly advance to the City sums sufficient to pay the City's reasonable outside counsel costs to the extent not already provided for by the Initial Deposit under the Cost Payment Agreement or Section 1.06(1); provided, however, that Developer shall have no obligation to advance any sum to pay attorneys' fees incurred by Gallade, any costs of any proceeding in an appellate court unless Developer agrees to fund such proceeding, or any discovery sanction or other sum indicative of improper, bad faith or other sanctionable conduct by the City or any of its agents. City and Developer will meet periodically, but no less than quarterly to review anticipated legal fees and court-related disbursements such as expert witness.

(5) Park Design. Developer has submitted and the Planning Commission has conditionally approved a conceptual site plan for the Park Site. If the City Council has approved the conceptual site plan for the Park Site as part of approving the Vesting Tentative Map, Developer shall prepare and submit a master plan for the Park Site for review and consideration by the City Council when it considers Developer's final map application. The master plan submitted as part of the final map application package shall include turf, trees, shrubs, groundcover material, irrigation and other utility systems, storm water treatment

facilities, pathways, pay equipment, benches, picnic facilities and related improvements consistent with the conceptual site plan.

(6) Park Construction. Developer shall engage qualified engineers and contractors to construct the **"Initial Park Improvements,"** which shall consist of turf, trees, shrubs, groundcover material, irrigation and other utility systems, storm water treatment facilities, and pathways consistent with the conceptual site plan. Developer shall not be obligated to start construction until the Regional Water Quality Control Board has issued a "no further action" or similar letter for the Park indicating the remediation (other than maintenance of a deed restriction and compliance monitoring) is completed to the standard established in Section 1.04(8).

1.06 Partial Reimbursement Of Developer's Park-Related Costs

(1) Developer's Eligible Park-Related Costs. For purposes of this Agreement, Developer's **"Eligible Park-related Costs"** shall include all costs reasonably incurred by Developer in connection with the acquisition of the Park Site, planning for the development of improvements on the Park Site, and constructing improvements at or in conjunction with development of park improvements on the Park Site. The Eligible Park-related Costs shall include but are not necessarily limited to the costs incurred pursuant to Section 1.05(1) – (6), above, including the Initial Deposit required under the Cost Payment Agreement. From time to time, but no more frequently than quarterly, Developer will provide the City with a spreadsheet and reasonable supporting documentation indicating the Developer's Eligible Park-related Costs.

(2) Developer's Reimbursable Park-Related Costs. Developer shall be entitled to reimbursement for its Reimbursable Park-related Costs which shall be calculated by subtracting the following sums from Developer's Eligible Park-related Costs: (A) the park impact fees applicable to the Project, which are seven thousand four hundred and sixty dollars ($7,460) per residential unit; and (B) Developer's Fiscal Impact Fees for the Project, as referenced in Condition p, which are two thousand five hundred dollars ($2,500) per residential unit.

(3) Reimbursement Mechanism. Developer's Reimbursable Park-related Costs shall be reimbursed as other land owners within the TOD Specific Plan area pursue development approvals from the City, and pay park impact fees for their parcels within the Specific Plan area, and from the $2,500 per unit Fiscal Impact Fees paid in connection with Tract 8110. Until Developer's Reimbursable Park-related Costs have been paid in full, the City shall (A) condition the issuance of building permits for all other property owners within the TOD Specific Plan Area that seek approvals for residential development on payment to the City of park impact fees that are no less (on a per unit basis) than the fees applied to the Project; (B) require full payment of all such fees no later than the issuance of building permits; (C) grant no discounts, credits (except as provided below for land owners that develop park(s) on their property within the TOD Area), or offsets of any type against such fees; (D) account for such fees through unique account and/or project codes so that they can be easily distinguished; and

(E) promptly transfer all such fees to Developer. In regard to Tract 8110, but only that tract, the foregoing conditions A-E will also encompass the Fiscal Impact Fees for any development on Tract 8110. The City and Developer recognize that some of the property owners within the TOD Specific Plan area may satisfy some or all of their park impact obligation by constructing park space within the property they develop residentially, and in so doing satisfy some or all of their obligation to pay park impact fees. Nothing in this Agreement prevents such owners from satisfying their park impact obligation through the construction of park space within their development project(s) and under the City's generally applicable procedures, but any park impact fees paid by them will be used to reimburse Developer's Reimbursable Park-related Costs until those Costs are reimbursed in full.

1.07 Cooperation On Other Actions Needed To Bring About Park Development. The Parties shall cooperate in good faith and take such other and further acts as may be reasonably necessary to fulfill the intent of this Agreement. In the event of any challenge or judicial action brought by a third party to set aside or invalidate this agreement, or any provision thereof, or any action taken by either of the Parties to implement the provisions of this Agreement, then the Parties shall cooperate in the response to or defense of such third parry action, and Developer shall defend, indemnity and hold the City harmless against any costs, damages, or attorneys fees incurred as a result of such third party actions.

1.08 Amendments of this Agreement. With the exception of notice of change of address, email, or phone number provided in Section 1.09, this Agreement may be modified only through a written amendment signed by the Parties.

1.09 Notices. Any formal notice or demand required or needed under this Agreement shall be sufficiently given if delivered personally (including delivery by private courier), by certified mail, postage prepaid and return receipt requested, or delivered by nationally recognized overnight courier service, or by electronically followed by delivery of a "hard" copy to the offices of City and Developer indicated below.

City:	City of Newark 37101 Newark Boulevard Newark, CA 94560 Attn: City Manager
with copies to:	City of Newark 37101 Newark Boulevard Newark, CA 94560 Attn: City Attorney
	City of Newark 37101 Newark Boulevard Newark, CA 94560 Attn: Planning Director

Developer:	Newark Enterprise Joint Venture LLC 4185 Blackhawk Plaza Circle Suite 200 Danville, CA 94506 Attn: General Counsel
with copies to:	Cox, Castle & Nicholson, LLP 555 California Street, 10th Floor San Francisco, CA 94104-1513 Attn: R. Clark Morrison

Notices personally delivered shall be deemed to have been received upon delivery. Notices delivered by certified mail, as provided above, shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addresses designated above as the Party to whom notices are to be sent, or (ii) within five (5) days after a certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. Notices delivered by overnight courier service as provided above shall be deemed to have been received twenty-four (24) hours after the date of deposit. Notices delivered electronically shall be deemed received upon receipt of sender of electronic confirmation of delivery, or if no such receipt is available on the Business Day after it was sent; provided, however, that all electronically delivered communications much be accompanies by a "hard" copy delivered as provided above.

1.10 Construction. As used in this Agreement, and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and neuter and vice versa.

1.11 Recordation. The Clerk of the City shall record, within ten (10) days after the Effective Date, a copy of this Agreement in the Official Records of the Recorder's Office of Alameda County. Developer shall be responsible for all recordation fees, if any.

1.12 Governing Law. The interpretation, validity, and enforcement of the Agreement shall be governed by and construed under the laws of the State of California, but in any dispute arising in connection with this Agreement, no presumption or rule that ambiguities shall be construed against the drafting party shall apply, because this Agreement has been reviewed by legal counsel for both the City and the Developer and both parties have participated in the drafting process.

1.13 Attorneys' Fees. Should any legal action be brought by either Party because of a breach of this Agreement or to interpret or enforce any provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and such other costs as may be found by the court. Attorneys' fees under this Section shall include attorneys' fees on any appeal and, in addition, a Party entitled to attorneys' fees shall be entitled to all other reasonable costs and expenses, including without limitation, expert witness fees, incurred in connection with such action. In addition to the foregoing award of attorneys' fees to the prevailing party, the

prevailing party in any lawsuit shall be entitled to its attorneys' fees incurred in any post-judgment proceedings to collect or enforce the judgment.

1.14 Entire Agreement. This Agreement may be executed in multiple originals, each of which is deemed to be an original. This Agreement, including these pages and all the exhibits (set forth below) inclusive, and all documents incorporated by reference herein, constitute the entire understanding and agreement of the Parties.

1.15 Authority To Execute; Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of Developer and City. This document may be executed in any number of counterparts, but all such counterparts shall constitute one and only one Agreement. Facsimile or PDF copies of signature pages shall be as valid as those on which a signature was manually placed.

1.16 Successors. This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns and shall run with the land. Upon transfer, any success-in-interest shall be deemed to have accepted the terms and conditions of this Agreement and shall be deemed the "Developer" and any transferring Developer shall be released under this Agreement for any obligations arising after the date of transfer.

1.17 Validation Action. In the event that Developer elects to file an action concerning this Agreement pursuant to the validating procedures provided in Sections 860-870.5 of the Code of Civil Procedure, the City's shall cooperate but all legal fees, court costs and associated expenses shall be Developer's responsibility.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first hereinabove written.

"City":

CITY OF NEWARK,
a municipal corporation

By: _____
Alan L. Nagy, Mayor City of Newark

"Developer":

NEWARK ENTERPRISE JOINT VENTURE LLC,
a California limited liability company
By: _____
Name: _____
Its: