

**DEVELOPMENT AND OWNER PARTICIPATION AGREEMENT
FOR THE
HILL TOWN REDEVELOPMENT PROJECT (OPDA 07-01)**

By and between the

**REDEVELOPMENT AGENCY OF THE CITY OF HERCULES,
THE CITY OF HERCULES,
and
SANTA CLARA VALLEY HOUSING GROUP, INC.**

DEVELOPMENT AND OWNER PARTICIPATION AGREEMENT

THIS DEVELOPMENT AND OWNER PARTICIPATION AGREEMENT ("Agreement") is entered into as of the Effective Date by and between the CITY OF HERCULES, a municipal corporation of the State of California ("City"), the REDEVELOPMENT AGENCY OF THE CITY OF HERCULES ("Agency"), a public body corporate and politic existing and organized under the Community Redevelopment Law of the State of California (Health & Safety Code Section 33000 et seq.), and SANTA CLARA HOUSING VALLEY GROUP, INC., a California corporation ("Owner"). The City, Agency and Owner may be referred to individually as a "Party" and collectively as the "Parties".

RECITALS

This Agreement is entered into on the basis of the following facts, understandings and intention of the parties:

A. Owner qualifies as an "owner participant" as that term is defined in the Redevelopment Plan and the Community Redevelopment Law. The purpose of this Agreement is to provide for the improvement of certain real property comprising the "Project Site" in the City as described in Exhibit A (the "Project Site Legal Description") and depicted on Exhibit B (the "Project Site Parcel Map"), which is within the area governed or anticipated to be governed by the Project Area 3 Redevelopment Plan. The improvement of the Project Site pursuant to this Agreement and the fulfillment generally of this Agreement are in the vital and best interests of the City and Agency and the health, safety, morals and welfare of its residents, and in accordance with the public purposes and provisions of applicable federal, state and local laws and requirements. Implementation of this Agreement will further the goals and objectives of the Redevelopment Plan.

B. The Agency is authorized pursuant to Sections 33334.2, 33334.3, and 33449 of the Community Redevelopment Law to assist with the development of housing available at affordable housing cost to persons and families of low and moderate income, as defined by the Community Redevelopment Law. The Agency is further authorized pursuant to Section 33445 of the Community Redevelopment Law to pay all or a part of the value of land for and the cost of the installation and construction of public improvements within the community, subject to the provisions set forth therein.

C. The City has enacted a development agreement ordinance establishing the procedures and requirements for the consideration of development agreements thereunder pursuant to California Government Code Section 65864 et seq. (Hercules Municipal Code, Title 10, Section 8, commencing with Section 10-8.10 1, the "Development Agreement Ordinance".)

D. Owner is a corporation duly organized and existing under the laws of the

State of California, in good standing thereunder, and qualified to conduct business in California. Owner has a legal and equitable interest in the Project Site, which consists of approximately 44 acres within the City of Hercules, Contra Costa County, State of California, and which is more particularly described in Exhibit A. Owner represents that the nature of its property interest is accurately set forth in Exhibit A, and that any other persons or entities holding legal or equitable interests in the Project Site are bound by this Agreement.

E. The Project Site is located within an area the City and Agency plan to designate as Redevelopment Project Area No. 3 of the Agency. The Agency is evaluating the environmental impacts associated with redeveloping the Project Site as provided for in this Agreement and will prepare and certify an Environmental Impact Report pursuant to the requirements of the California Environmental Quality Act (“CEQA”, California Resources Code sections 2 1000 et seq.), and is anticipated to adopt a Redevelopment Plan that encompasses the Project Site and provides for its redevelopment as provided for in this Agreement. In approving the Redevelopment Plan, and in certifying an Environmental Impact Report for that Redevelopment Plan, the Agency is anticipated to determine that redevelopment will remove blighting conditions, facilitate the development of residential, retail and industrial land uses, and provide revenues and jobs to the community and provide a catalyst for the City's economic development needs by permitting the use of redevelopment tools to address problem properties impaired by physical and economic conditions that have impeded private sector investment.

F. The Project is the proposed development of the Project Site that includes a mixed-use development consisting of approximately 640 residential dwelling units, a neighborhood retail facility, a series of public and private open space amenities and a network of new roadways, all of which will be collectively referred to as the “Project.” The configuration of these uses on the Project Site is more particularly depicted in the Initial Plan, or such other configuration as in the future may be proposed by Owner and approved by City and Agency in accordance with this Agreement.

G: The Project Site is developed with a number of large petroleum storage tanks, gas transmission pipelines, roadways, and other infrastructure that is no longer in use. The buildings and other improvements remaining on the Project Site are deteriorated, physically obsolete, and incompatible with the residential and commercial uses that now surround the Project Site. The Project will result in the removal of all such deteriorated, obsolete and incompatible uses.

H. The Project has been analyzed and reviewed by City and Agency under all applicable legal requirements, including land use standards and policies. Future City and Agency approvals for the Project will include but not be limited to consideration and approval of a final planned development plan, tentative tract maps, subdivision map approvals for individual lots, design review for architecture and landscaping, building and grading permits, certificates of occupancy and ministerial actions.

I. Owner, the City and the Agency desire to establish the conditions governing

the City's and Agency's issuance of the Project Approvals, and the standards within which the obligations of Owner for public and other improvements will be met, and otherwise to provide the criteria for the development of the Project. This Agreement is intended to grant Owner a fully vested right to develop the Project as provided herein, and to provide the City and the Agency with certain binding assurances with respect to the nature and scope of such development and related public improvements.

J. Development of the Project in a comprehensive and orderly fashion as contemplated in this Agreement will result in substantial public benefits to the City, its residents and surrounding communities. Among other public benefits, the Project will be revenue-neutral for the City, and will create new housing and jobs, promote economic development, and provide public infrastructure. In exchange for these benefits to the City, Owner desires to receive the assurance that it may proceed with the Project in accordance with the Governing Ordinances, subject to the terms and conditions contained in this Agreement.

K. For these reasons, the City and the Agency have determined that the Project is a development for which a development agreement and owner-participation agreement is appropriate in order to achieve the goals and objectives of the City's land use planning policies and to provide appropriate assurances to Owner regarding its ability to develop the Project. This will in turn eliminate uncertainty in planning for and securing orderly development of the Project, assure construction and installation of necessary public improvements and provision of public services appropriate to development of the Project, assure attainment of the maximum effective utilization of resources within the City at the least economic cost to its citizens, and otherwise achieve the goals and purposes for which the Development Agreement Ordinance was enacted by the City.

L. On _____, 2008, after consideration of the staff report and all other documentary and oral evidence submitted at a duly noticed public hearing pursuant to the Development Agreement Ordinance, the Planning Commission recommended that the City Council find and determine that this Agreement is consistent with the objectives, policies, land uses and programs specified in the Hercules General Plan and planned Hercules Redevelopment Plan; is compatible with the uses authorized in and the regulations prescribed for the zoning district in which the Project Site is located; is in conformity with and will promote public convenience, general welfare and good land use practices; will not be detrimental to the health, safety and general welfare of the City or the region surrounding the City; will not adversely affect the orderly development of property in general or the Project Site; and will promote and encourage the development of the Project by providing a greater degree of requisite certainty with respect thereto.

M. On _____, 2008, the Hercules Redevelopment Agency held a duly noticed public hearing and adopted a resolution approving this Agreement. A copy of said Resolution is attached as Exhibit C hereto. On _____, 2008, the City Council held a duly noticed public hearing on this Agreement and introduced the Enacting Ordinance approving this Agreement. Thereafter, on _____, 2008, the City Council adopted the Enacting Ordinance approving this Agreement. A copy of the Enacting Ordinance is

attached as Exhibit D hereto. According to law, the Enacting Ordinance took effect thirty (30) days after adoption.

AGREEMENT

In consideration of the mutual covenants contained in this Agreement, City, Agency and Owner agree as follows:

Section 1. Definitions.

Each capitalized reference in this Agreement to any of the following terms shall have the meaning set forth below:

1.1 “Affiliate.” With respect to Owner, “Affiliate” means (1) any entity which has the power to direct Owner’s management and operation, or any entity whose management and operation is controlled by Owner; or (2) any entity in which an entity described in (1) has a controlling interest; or (3) any entity a majority of whose voting equity is owned by Owner, or for which Owner serves as the managing member or general partner; or (4) any entity in which, or with which, Owner, its successors or assigns, is merged or consolidated, in accordance with applicable statutory provisions for merger or consolidation, as long as the liabilities of the entities participating in such merger or consolidation are assumed by the entity surviving such merger or created by such consolidation. “Affiliate” means, with respect to the Agency, an entity a majority of whose directors are appointed by the Agency or serve *ex officio* on behalf of the Agency.

1.2 “Affordable Housing Assumptions” shall have the meaning ascribed to it in Section 3.6.1.6.

1.3 “Affordable Housing Funds” means and refers to that portion of the tax increment revenues generated from the implementation of the Project which may be set aside by the Agency in its discretion for the production or improvement of affordable housing as required by the California Redevelopment Law.

1.4 “Affordable Housing In-Lieu Fee” shall have the meaning ascribed to it in Section 3.6.1.6.

1.5 “Agency Board” means and refers to the Board of Directors of the Agency.

1.6 “City Council” means and refers to the City Council of the City of Hercules.

1.7 “Community Redevelopment Law” means and refers to California Health and Safety Code Section 33000 et seq.

1.8 “Conditions of Approval” means and refers to the Conditions of Approval for the Project.

1.9 “Development Component.” The Project is planned to consist of an Agency Predevelopment Component, a City Predevelopment Component, an Owner Predevelopment Component, a Residential Development Component, and a Retail Development Component. Such components will be referred to individually as a “Development Component” and collectively, “Development Components”. All details of the Project as set forth in this Agreement are, however, subject to further plan development and may be changed by mutual agreement of the parties.

1.10 “Development Phase” means and refers to any distinct portion of any Development Component of the Project.

1.11 “Effective Date.” The Effective Date of this Agreement shall be the thirtieth day following the adoption of the Enacting Ordinance by the City Council.

1.12 “Enacting Ordinance.” The Ordinance adopted by the City Council on _____, 2008, approving this Agreement, a copy of which is attached as Exhibit D hereto. This Agreement shall constitute a part of the Enacting Ordinance as if incorporated therein in full.

1.13 “Environmental Law” means any present or future federal, State or local law, ordinance, rule, regulation, permit, license or binding determination of any governmental Agency relating to, imposing liability or standards concerning, or otherwise addressing the environment, health or safety, including, but not limited to: the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. (“CERCLA”); the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq. (“RCRA”); the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq. (“TOSCA”); the Clean Air Act, 42 U.S.C. Section 7401 et seq.; and the Clean Water Act, 33 U.S.C. Section 1251 et seq. and any so-called “Superfund” or “Superlien” law; and the Occupational Safety and Health Act, 29 U.S.C. Section 651 et seq. (“OSHA”), as each is from time to time amended and hereafter in effect.

1.14 “Event of Default” means and refers to the failure or unreasonable delay by either party to perform any term, provision or condition of this Agreement as set forth in Section 12.1 of this Agreement.

1.15 “Exactions.” All exactions that will or may be imposed by the City as a condition of developing the Project, including but not limited to fees, in-lieu payments, other monetary payments, requirements for acquisition, dedication or reservation of land, obligations to construct on-site or off-site public or private improvements called for in connection with the development of the Project under this Agreement or otherwise, the Project Approvals, and the Governing Ordinances, whether such exactions constitute subdivision improvements, mitigation measures in connection with environmental review of the Project, impositions made under the Governing Ordinances or the City's General Plan.

1.16 “Existing Project Approvals” means and refers to the Initial Plan. True, correct and complete copies of the Existing Project Approvals are attached as Exhibit F hereto. [\[This probably needs to be expanded to include all existing project approvals.\]](#)

Do we want to attach IPDP & related documents as exhibit?

1.17 “Governing Ordinances.” The ordinances, resolutions, official policies, fees, rules and regulations of the City and Agency, governing the permitted uses of land, intensity of development, improvement and construction standards and requirements, specifications and conditions of approval applicable to the development of the Project as of the Effective Date including, but not limited to, the Hercules General Plan, Zoning Ordinance, the Enacting Ordinance, Subdivision Ordinance, Municipal Code, Redevelopment Plan and construction codes.

1.18 “Hazardous Materials” means:

- (a) "hazardous substances" as defined by CERCLA;
- (b) "hazardous wastes" as defined by RCRA;
- (c) any hazardous, dangerous or toxic chemical, waste, pollutant, contaminant or substance ("pollutant") within the meaning of any Environmental Law prohibiting, limited or otherwise regulating the use, exposure, release, emission, discharge, generation, manufacture, sale, transport, handling, storage, treatment, reuse, presence, disposal or recycling of such pollutant;
- (d) petroleum crude oil or fraction thereof;
- (e) any radioactive material, including any source, special nuclear or by-product material as defined in 42 U.S.C. Section 2011 et seq. and amendments thereto and reauthorizations thereof;
- (f) asbestos-containing materials in any form or condition; or
- (g) polychlorinated biphenyls in any form or condition.

1.19 “Initial Plan” means and refers to the Initial Planned Development Plan for the Hill Town Project reviewed and approved by the City’s Planning Commission on April 16, 2007, and by the City Council on May 8, 2007.

1.20 “Laws.” The constitutions and laws of the State of California, the United States, any political subdivision within the State of California, any codes, statutes, ordinances, resolutions, regulations, official policies, or rules of any of them, effective within the City or Agency and any court decision, state or federal, thereunder.

1.21 “Land Use Term.” The Land Use Term of this Agreement is provided in Section 2.2 below.

1.22 “Moderate Housing Formula” shall have the meaning ascribed to it in Section

3.6.1.6.

1.23 “Project” means and refers to the improvements to be constructed on the Project Site pursuant to this Agreement or, as the context may require, to those improvements to be constructed in a particular Development Phase, including housing units, infrastructure, and retail facilities, and may in either instance refer as well to the process of planning, financing and constructing such improvements.

1.24 “Project Approvals” means and refers to all City and Agency approvals, entitlements and permits required for the development of the Project, including but not limited to Existing Project Approvals and Subsequent Project Approvals. These approvals include but are not limited to a General Plan Amendment, rezoning, a final planned development plan, parcel maps, tentative and final subdivision maps, conditional use permits, design review approvals, grading and construction permits, building permits, encroachment permits, certificates of occupancy and all other approvals required to be obtained in order to construct the Project on the Project Site.

1.25 “Project Site.” That certain real property described in Exhibit A to this Agreement.

1.26 “Project Tax Increment.” That portion of ad valorem property taxes resulting from the increase in the assessed valuation of the property within the Project Site over the Base Year Assessed Valuation, which is allocated to and received by the Agency pursuant to Health and Safety Code Section 33670(b) or any successor Laws in accordance with the Redevelopment Plan (including any extension or modification thereof, or any new redevelopment plan which encompasses the Project Site), including amounts which Agency is required to deposit and hold in its Low and Moderate Income Housing Fund pursuant to Health and Safety Code Section 33334.3(a) or any successor Laws, but excluding amounts which Agency is required to pay to affected taxing entities, other than the City, pursuant to Health and Safety Code Section 33607.5 or any successor Laws. The Project Tax Increment consists of the “Housing Portion of the Project Tax Increment” and the “Unrestricted Portion of Project Tax Increments”. The Housing Portion of Project Tax Increment is the portion of the total Project Tax Increment that the Agency is required to deposit in its Low and Moderate Income Housing Fund and spend for the purposes of increasing, improving, and preserving the community’s supply of low and moderate income housing, and shall be based upon the same percentage of revenues (currently 20%) that the Agency is required to allocate to such purposes in the planned Project Area No. 3 as a whole. The Unrestricted Portion of Project Tax Increment is the total Project Tax Increment which does not include amounts which Agency is required to deposit and hold in its Low and Moderate Income Housing Fund pursuant to Health and Safety Code Section 33334.3(a) or any successor Laws less the Housing Portion of Tax Increment.

1.27 “Public Improvements.” Improvements to traffic, utility, park, and infrastructure systems, located on and off the Project Site.

1.28 “Redevelopment Plan” means and refers to the Redevelopment Plan for Project Area No. 3 that is anticipated will be approved by the City.

1.29 "Schedule of Performance" means and refers to the development schedule attached hereto as Exhibit G, as may be amended by the parties from time to time.

1.30 "Scope of Development" means and refers to the description of the improvements to be constructed as part of the Project attached hereto as Exhibit E as the Parties may revise from time to time.

1.31 "Subsequent Project Approvals." All Project Approvals to be issued by the City and Agency after the Effective Date of this Agreement, including, without limitation, a final planned development plan, tentative and final tract maps, parcel maps, conditional use permits, final subdivision maps, lot line adjustments, building permits, grading and construction permits, encroachment permits, certificates of occupancy, and other approvals reasonably necessary to implement the Project.

Section 2. Effective Date; Land Use Term.

2.1 Effective Date; Recordation. This Agreement shall be dated and the obligations of the City, Agency and Owner hereunder shall be effective as of the thirtieth (30th) day following the adoption of the Enacting Ordinance by the City Council, or the date upon which this Agreement is executed by both City and Owner, whichever is later. Not later than ten (10) days after the Enacting Ordinance takes effect, the City, Agency and Owner shall execute and acknowledge this Agreement. Thereafter the City Clerk shall cause this Agreement, including all Exhibits hereto, to be recorded in the Official Records of the County of Contra Costa, State of California.

2.2 Land Use Term. The Land Use Term of this Agreement shall commence on the Effective Date and shall expire ten (10) years thereafter unless extended as hereinafter provided in Sections 8.1 or 10.2 or as otherwise mutually agreed in writing. All Project Approvals shall be effective for the Land Use Term.

Section 3. General Development of the Project.

3.1 Vested Right to Develop the Project. Owner shall have the vested right to develop the Project on the Project Site and City shall have the right to regulate development of the Project and use of the Project Site in accordance with the terms and conditions of this Agreement, the Existing Project Approvals, the Subsequent Project Approvals and the Governing Ordinances. The City's and Agency's right to control development and use of the Project is subject to the provisions of this Agreement, the Existing Project Approvals, the Subsequent Project Approvals and the Governing Ordinances. Except as otherwise specified in this Agreement and the Existing Project Approvals, the Initial Plan and Governing Ordinances shall control the overall design, development and construction of the Project and the issuance of Subsequent Project Approvals. To the extent that the Governing Ordinances conflict with this Agreement or the Existing Project Approvals, including, but not limited to, new, conflicting or potentially conflicting design standards or regulations, this Agreement and the Existing Project Approvals shall take precedence.

- 3.1.1 Owner shall have the right to develop the Project in compliance with this Agreement, the Existing Project Approvals, the Subsequent Project Approvals and the Governing Ordinances, as depicted in the Initial Plan. The parties further acknowledge that Owner cannot at this time predict when or the order in which a Development Phase of the Project will be developed, but Owner agrees to complete or cause to be completed full development of the Project in accordance with the Schedule of Performance. Owner shall have the right to develop the Project in phases in such order and at such times as Owner deems appropriate within the exercise of its subjective business analysis of those factors determining the appropriate course of development of the Project, as long as such development is planned as an integrated development as contemplated by this Agreement. Owner agrees to provide the City with its current phasing plans on request to assist the City with its planning efforts, and to make commercially reasonable efforts to develop the Project. Since the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, 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 expressly acknowledging herewith that development of the Project Site shall proceed in such order and at such rate and at such times as Owner deems appropriate within the exercise of its business judgment pursuant to the terms of this Agreement.
- 3.1.2 With the exception of the Affordable Housing Component, the cost of developing the Project and constructing the related public and private improvements shall be borne solely by Owner.
- 3.1.3 Prior to the commencement of grading, construction or any work related thereto on any particular area of the Project Site, Owner shall secure, or cause to be secured, any and all Subsequent Project Approvals, as well as any permits and approvals required by other governmental agencies, as are required to develop that area. The City and Agency will timely issue such Subsequent Project Approvals as are needed for development and construction activities and are in compliance with this Agreement, the Project Approvals, and the Governing Ordinances.

3.2 Issuance of Subsequent Project Approvals. Owner shall timely submit complete applications for any and all Subsequent Project Approvals as necessary to develop the Project under this Agreement, the Existing Project Approvals, and the Governing Ordinances to the City and Agency. City and Agency shall issue such Subsequent Project Approvals as set forth in this Agreement; nothing in this Section shall obligate City and Agency to issue any Subsequent Project Approval that is not in compliance with this Agreement, the Existing Project Approvals, and the Governing Ordinances. Upon submission by Owner of any application, City and Agency shall promptly commence and diligently complete all steps

necessary to review and process the requested Subsequent Project Approvals, including, but not limited to, the granting of the requested Subsequent Project Approvals to the extent that they are consistent with the Project as described in this Agreement and as depicted in the Initial Plan, the terms and conditions of this Agreement, the Governing Ordinances, and state and federal law. The permitted uses of the Project Site, the type, density and intensity of use, the maximum height, bulk and size of proposed buildings, setbacks, provisions for the acquisition, reservation or dedication of land for public purposes, location of public improvements, location of public utilities, fees and Exactions, and other terms and conditions of development applicable to the Project Site shall be those set forth in the Existing Project Approvals, Governing Ordinances, and this Agreement. The City is not obligated to issue a Certificate of Occupancy for any part of the Project unless and until all fees and charges due and payable for that part of the Project have been received by the City.

3.3 Environmental Review. In connection with City's and Agency's Subsequent Project Approvals subject to the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) ("CEQA"):

3.3.1 The City acknowledges that the Project Approvals and this Agreement provide all appropriate environmental alternatives or mitigation measures (collectively, "Measures") and that the Project Approvals and this Agreement provide for specific economic, social and other benefits that outweigh, override and make infeasible additional Measures. The City further acknowledges that Government Code Section 65866 and this Agreement legally bar the imposition and implementation of additional Measures. On that basis, the City shall not require a supplemental or subsequent EIR or other form of subsequent Environmental CEQA documentation (other than Findings and the accompanying Notice of Determination) prior to considering or approving an application for a Subsequent Project Approval; provided, however, that the City may prepare such supplemental or subsequent EIR if the City is required to pursuant to either: (a) a judgment in a third-party legal challenge or (b) the requirements of CEQA Section 21166 and section 15162 of the current CEQA Guidelines, as they may be amended from time to time, which provides that the City shall not prepare a supplemental or subsequent EIR unless the City determines, based on substantial evidence in light of the whole record one or more of the following apply:

- (i) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (ii) Substantial changes occur with respect to the circumstances under which the project is

undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects; or

(iii) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

- (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
- (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
- (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but project proponents decline to adopt the mitigation measure or alternative; or
- (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

3.4 Other Governmental Permits. Owner shall apply for such other permits and approvals as may be required by other governmental or quasi-governmental agencies having

jurisdiction over the Project or Project Site as may be required for the development of, or provision of services to, the Project including, without limitation, public utilities or utility districts. City and Agency shall reasonably cooperate with Owner in its endeavors to obtain such permits and approvals in order to facilitate the availability of such permits and approvals or services, at each stage of the development of the Project, including as appropriate, in their discretion, to serve as a co-applicant with Owner for permits and approvals required from other public agencies.

3.5 Permitted Uses. The uses permitted on the Project Site are those as depicted in the Initial Plan and contained in the Existing Project Approvals. The Agency and the City have reviewed the Initial Plan and hereby agree that the land use designations, site layout, residential unit count and retail square footage described and depicted therein are consistent with the Agency's and the City's goals and objectives for the redevelopment of the Project Site. Unless otherwise agreed by the Parties, the basic site layout, land use designations, residential unit count, and retail square footage as depicted on the Initial Plan shall remain fixed. In the event that modifications to the Initial Plan are required by unforeseen circumstances, the Parties shall cooperate in efforts to modify the Initial Plan in a manner that accomplish the Parties' mutual objectives. Owner shall prepare for the Agency's review, approval and submission to the City, any proposed amendment or revision to the Initial Plan that may be necessitated by changed circumstances or as required by this Agreement.

3.6 Exactions. Owner shall pay and perform the following:

3.6.1 Fees and Charges.

3.6.1.1 Impact Fees. Owner shall pay prior to the issuance of any building permit all development impact fees, park and recreation facilities impact fees, general public facilities impact fees, police facilities impact fees, fire facilities impact fees, traffic facilities impact fees, community development taxes, stormwater assessments and other similar fees and charges applicable to the Project at the rates in effect on the date each building permit is issued by the City. Nothing in this Agreement shall preclude City or Agency from **imposing**, increasing or decreasing the amount of any such fees between the Effective Date and the dates upon which each Subsequent Project Approval is issued as long as the increases apply City-wide and are not unique to the Project. Owner shall timely pay all such increased fees.

3.6.1.2 Sewer Connection Fee. Owner shall pay prior to connection all sewer connection fees at the rate in effect on the date Owner lawfully connects to the public sewerage system serving the Project. Nothing in this Agreement shall preclude City or Agency from increasing or decreasing the amount of any such fees between the Effective Date and the dates upon which Owner lawfully connects to the public

sewerage system serving the Project as long as the increases apply City-wide and are not unique to the Project. Owner shall timely pay all such increased fees.

3.6.1.3 Fiscal Neutrality Fee. A Project-specific impact fee in the amount of **\$7,500** per residential unit shall be paid as of issuance of building permit(s) for such unit(s) to fully mitigate any adverse fiscal impacts to the City General Fund resulting from this Project. The Fiscal Neutrality Fee shall include the following elements: [This needs discussion; it can include the park/open space maintenance fee.] **“police service fee”, “community park/sports field fee”**

3.6.1.4 Third Party Fees Collected by the City. Owner shall pay in cash, at the time when normally due, all charges and fees (“Third Party Fees”) which the City is required by law or interagency agreement to collect on behalf of, and to pass through to, other public entities, assessed as of the Effective Date hereof, including, but not limited to: (i) the SMIP Seismic Fee and (ii) the Sub-Regional Transportation Mitigation Program Fee. Owner shall also pay in cash, at the time when normally due, School District fees which the City is required by law or interagency agreement to collect. Owner shall pay all such Third Party Fees at the rates in effect on the dates upon which such fees are paid notwithstanding any increases after the Effective Date. Owner agrees to pay all such increased amounts.

3.6.1.5 City Expense Charges. The City imposes a variety of fees and charges (“City Expense Charges”), which are not intended as a general revenue source, but instead are intended to reimburse the City for the cost of processing development applications. As of the Effective Date, such City Expense Charges include the following: building permit fees, plan check fees, mechanical permit fees, electrical permit fees, plumbing permit fees, insulation permit fees, use permit fees, design review fees, environmental review and engineering plan check, **data scan imaging fee, general plan update fee, filing fee, technology fee** and inspection fees. Owner shall pay such City Expense Charges to the City when due, assessed as the rates in effect on the date of payment.

3.6.1.6 Affordable Housing In Lieu Fee. Owner has not requested and will not receive any financial assistance or Project Tax Increment from the City or Agency for the Project. Owner shall pay prior to the issuance of the first building permit on the Project an Affordable Housing In Lieu Fee for 58 eligible moderate income housing units in the amount of \$3,453,030 calculated as follows and subject to adjustment as hereinafter provided. **As provided by Title 10, Section 19 of the Hercules Municipal Code and by Resolution Number**

__-06 dated May 9, 2006.

(a) Assumptions. Calculation of the Affordable Housing In-Lieu Fee is based on the following Assumptions (the “Affordable Housing Assumptions”):

Tax Increment Assumptions

Number of Units	640 Housing Units
Average Unit Sale Price	\$600,000
Total Sale Value	\$384,000,000
Project Tax Increment	\$384,000 per year (\$384,000,000 x 1%)
Housing Set Aside (20%)	\$76,800 per year (\$384,000 x 20%)

Affordable Housing Delivery Assumptions

Number Units	640 Housing Units
Affordable Units Required	96 units (640 x 15%)
Very Low Units Required	38 (96 x 40%, rounded)
Other Affordable Required	58 (58 + 38 = 96)
Income Category of 58 Units	Moderate
Eligible for In Lieu Fee	58

Determination of In Lieu Fee

Moderate Income Category	120% of area median
Unit size	3 bedroom, 2 bath ~1400 sq. ft. each
Household Size	4 (bedroom + 1)
Income/Payment Ratio	35%
Income Determination	Current California HCD income scale
Down Payment	5%
Interest Rate	6.25% for 30 year fixed rate Loan
Homeowner Assoc Fees	\$150 per month
Tax Rate Contra Costa Co.	Not to exceed 1.25%
Comparable Sales Price	Six month prior average based on Data Quick or similar index
Average Price West Contra Costa County	\$460,000

Maximum Moderate Income \$100,600 annually

Maximum Moderate Income
Buying Power \$400,465

(b) Calculation of In Lieu Fee for Moderate Income Units. Based on the foregoing assumptions, the Moderate Unit In-Lieu Fee is calculated as based on the following formula (the “Moderate Housing Formula”):

\$460,000	Average Price, West Contra Costa County
-\$400,465	Maximum Moderate Income Buying Power
<hr/>	
\$ 59,535	Difference
x 58	Moderate Units Eligible or In Lieu Fee
<hr/>	
\$3,453,030	In Lieu Fee For Moderate Units

(c) Payment of In Lieu Fee For Moderate Income Units. Owner shall pay Agency the Affordable Housing In Lieu Fee for the 58 moderate income units as follows:

- (i) On or before the thirtieth day after the Effective Date, Owner may pay Agency the Affordable Housing In Lieu Fee in the amount of \$3,453,030; or
- (ii) Owner may, in Owner’s discretion, elect to pay the Affordable Housing In Lieu Fee upon full entitlement (**describe event**) of the Project or upon issuance of the first building permit for the Project. If Owner elects to pay the Affordable Housing In Lieu Fee upon full entitlement of the Project or upon issuance of the first building permit for the Project, the Affordable Housing In Lieu Fee will be calculated based upon market conditions existing at the time of payment.

The variables in the Moderate Income Housing Formula may vary, but the calculation will nevertheless be based upon the difference between the average price for a comparable residential unit in Contra Costa County, California and the maximum moderate income buying power multiplied by the number of moderate units eligible for payment of an in lieu fee.

(d) Agency to Provide Moderate Affordable Housing Units. Upon timely receipt of Affordable Housing In Lieu Fee, the Agency shall

assume the responsibility of providing **the** Moderate Affordable

Housing Units as hereinafter provided

3.6.2 No Other Fees or Charges. Except as provided herein, no other fees or charges shall be imposed by the City or Agency upon the Project or Project Site.

3.6.3 Public Improvements. Owner shall, at owner's expense, design, construct, install, or repair, as appropriate, all on-site and off-site roads, streets, utility lines and conduits, sewers, parks, and other site improvements necessary to serve the Project including, without limitation, drainage improvements on the Project Site, traffic improvements to, domestic water service, storm drain facilities, public and private street improvements and utility improvements (including electric and natural gas service, telecommunications and other public utilities), sewage conveyance facilities, landscaping and other public facilities within the Project Site.

3.6.4 Hercules Municipal Utility. **To the extent feasible** All electrical utilities and services within the Project shall be provided by Hercules Municipal Utility Company.

3.6.5 Park Land Dedication and Improvements. Owner shall pay, and City shall accept, a fee in the amount of \$_____ per unit in lieu of requiring any park land dedication or improvements. **[Needs discussion. Nelson suggested \$250 per unit annually] Should be a "Community Park/Sports Field Maintenance Assessment District" maybe section 3.12**

3.7 Limit on Future Exactions. As a material part of the consideration for this Agreement, Owner has received the assurances of City and Agency that Owner shall not be subject to future Exactions established by City or Agency after the Effective Date that otherwise might be imposed on a discretionary basis as conditions to granting land use permits and approvals. Therefore, this Agreement fully sets forth all of Owner's obligations regarding Exactions that could be required for the Project, and City and Agency shall not require from Owner any additional Exactions in granting land use permits or approvals. Notwithstanding the foregoing prohibition on any future Exactions, after five years from the Effective Date, the City may impose additional Exactions, in the City's discretion. Notwithstanding the foregoing, any variation, modification, change or amendment to the Project, Project Approvals or this Agreement that under Section 10 of this Agreement that is determined to be a Major Amendment or inconsistent with this Agreement shall entitle City to impose new or increased Exactions on the Project.

3.8 Architectural Design Review. Nothing in this Agreement limits the right of the City

to conduct Design Review, Architectural Review or other review consistent with Existing Approvals or the Governing Ordinances prior to the issuance of a building permit for improvements on the Project Site.

3.9 Taxes and Assessments. Owner shall pay when due all ad valorem property taxes and special assessments imposed on the Project Site and the improvements thereon. In addition, Owner shall pay all other valid and applicable City taxes.

3.10 Obligations of Homeowners' Association. Any Homeowners' Association that is established for the Project shall assume all costs and obligations relating to the ownership and maintenance of the natural open space areas and any internal slope areas not in private or public ownership.

3.11 Participation in Landscaping and Lighting Assessment District. The Parties understand and acknowledge the necessity of participation in Landscaping and Lighting Assessment Districts (“LLA District”) to provide for the long-term operation and maintenance of the public landscaped parkways and recreational improvements on the Project Site. On behalf of itself and its successors and assigns, Owner hereby waives any and all rights which it may have to protest or oppose the use of the LLA District laws to fund such operation and maintenance activities. Owner shall cooperate with the City as requested by the City, from time to time, to form new LLA Districts or make changes to the existing and LLA District boundaries and to the amount of the assessments therein, and to take other actions reasonably necessary to implement this Section.

Section 4. Development Plan.

4.1 Redevelopment Objectives. The parties are entering into this Agreement in order to effect the Redevelopment of the Project Site. As of the date hereof, the term “Redevelopment” shall be defined as the totality of activities, tasks and other matters detailed or described in (1) the Redevelopment Plan for RDA-3 which, upon completion, shall be incorporated herein by reference as if attached as Exhibit H to this Agreement, (2) the Scope of Development, (3) the Schedule of Performance, and (4) any other plans or documents related to the proposed development of the Project.

4.2 Scope of Development and Development Components. The Project is currently planned to consist of an Agency Predevelopment Component, a City Predevelopment Component, an Owner Predevelopment Component, a Residential Development Component, and a Retail Development Component (collectively, “Development Components”). All details of the Hill Town Project as set forth in this Agreement are, however, subject to further plan development and may be changed by agreement of the parties as hereinafter provided.

4.2.1 Agency Predevelopment Component. The Agency Predevelopment Component shall consist of the completion of a Redevelopment Plan and related environmental studies, reports, and other documents for RDA-3 and include the Project within the boundaries of RDA-3. The Agency Predevelopment Component shall also

include (1) the allocation of sufficient Affordable Housing Funds or other City or Agency resources to ensure development of the Affordable Units; and (2) any actions deemed necessary or appropriate by the City or Agency, in their discretion, to assist Owner in its effort to secure land owner immunity for hazardous materials pursuant to the Polanco Redevelopment Act (Cal. Health & Safety Code Sections 33459-33459.8). The Agency Predevelopment Component will be implemented by and at the sole expense of the Agency.

4.2.1.1 Redevelopment Plan. Agency shall prepare and process all plans, studies, reports, agreements, and other documents required to formally adopt a Redevelopment Plan for RDA-3 which incorporates the Project and the Project Site into the Redevelopment Project Area for RDA-3. To the extent Agency's effort to adopt said Redevelopment Plan requires the preparation of environmental studies or reports pursuant to the California Environmental Quality Act, Agency shall be solely responsible for the cost of such studies and reports as they relate to formation of RDA-3. **(can we get partial fees for the costs, say \$100,000)**

4.2.1.2 Affordable Housing.

- (a) Owner's Obligation. Owner's sole obligation with respect to affordable or inclusionary housing for the Hill Town Project shall be the payment of an "in-lieu" fee to Agency or City, as appropriate, as provided in Section 3.6.1.6 of this Agreement.

- (b) Agency's Obligation. Agency shall be responsible for producing any affordable or inclusionary housing units that may be required in connection with the Project pursuant to the California Redevelopment Law or any local ordinance, policy, or mandate, whether or not adopted or contemplated as of the date of this Agreement. All such affordable housing units shall be developed by Agency at an offsite location within the boundaries of RDA-3. Agency shall bear the cost of producing all such affordable housing units using Project Tax Increment or other Agency resources in combination with in-lieu fees provided by Owner hereunder, along with any other public or private financing mechanisms deemed necessary or appropriate by Agency in its sole discretion.

4.2.2 City Predevelopment Component. The City Predevelopment Component shall consist of accepting, reviewing, and processing all complete applications for Subsequent Project Approvals. City shall review and process all complete applications for Subsequent Project Approvals necessary to enable the City's Planning Commission and City Council to review and, if appropriate, approve land use entitlements for the Project within the time periods set forth in the Schedule of Performance. The City Predevelopment

Component shall also include the preparation and processing of a Draft Environmental Impact Report, and certification of a Final Environmental Impact Report, that addresses the environmental impacts associated with the creation of RDA-3.

4.2.3 Owner Predevelopment Component. The Owner Predevelopment Component shall consist of master planning activities to establish the nature and feasibility of the Project Components, processing applications for Project Approvals through the City, completing any necessary environmental review for the Project, completing any necessary remediation of the Project Site, implementing further predevelopment and preconstruction activities, and construction of infrastructure and preliminary site improvements which may include certain roads and utilities. The Owner Predevelopment Component will be implemented by and at the sole expense of Owner or its Affiliates.

4.2.3.1 Owner Responsibility and Management. Owner shall conduct the Owner Predevelopment Component in compliance with the Schedule of Performance. Owner will ensure that work which it conducts is conducted in conformance with all applicable Laws and will obtain all necessary permits and approvals of third parties.

4.2.3.2 Master Planning. Owner shall conduct such master planning as is necessary and economically feasible, consistent with the approved Initial Plan, in order to obtain Subsequent Project Approvals. Within such responsibility:

- (a) Owner will conduct such design, planning, marketing, engineering and other studies as are necessary to obtain all Project Approvals. Owner and its consultants shall actively participate in the community meetings carried out by the Agency and/or the City.
- (b) Owner will identify and obtain issuance of all zoning, land planned unit development ("PUD") subdivision, street and alley closings and dedications, historic preservation approvals, environmental reviews, and other approvals and interpretations consistent with and necessary for the Development.
- (c) Owner shall propose a plan for inter-relating the various Development Components, which plan shall address cost-sharing arrangements, CC&Rs, reciprocal easement agreements and similar issues.

4.2.4 Residential Development Component. The Residential Development Component shall consist of the construction by Owner of an anticipated 640 residential dwelling units, community parks and open space, and infrastructure improvements on the Project Site, as follows, as more particularly described in the Scope of Development and as depicted in the Initial Plan: (a) Approximately 193 "Podium" condominium homes situated

within three adjacent multi-story buildings, each with structured parking facilities; (b) Approximately 209 “Courtyard” condominium homes situated within approximately 16 multi-story buildings. Each “Courtyard” home will have its own private garage served off a common motor-court; (c) Approximately 200 “Rowhouse” condominium homes situated in approximately 11 multi-story buildings. Each “Rowhouse” home will have its own private garage served off a common motor-court; and (d) Approximately 38 “Townhouse” condominium homes situated in approximately 6 multi-story buildings. Each “Townhouse” home will have its own private garage served off a common drive aisle.

4.2.4.1 Owner Commitment. Owner will work diligently to design and implement the Residential Development Component as depicted in the Initial Plan and in accordance with the Scope of Development, the Governing Ordinances and the Schedule of Performance. Owner will develop each Development Phase in its own name and for its own account, and not as agent or contractor of the Agency or the City.

Owner 4.2.4.2 Agency Commitment. Agency shall work diligently to complete the Agency Predevelopment Component in a timeframe that allows and the City to implement the Residential Development Component. Agency shall prepare, process, and execute all documents necessary to ensure that its obligations under this Agreement are satisfied.

all 4.2.4.3 City Commitment. City shall work diligently to review and process development applications related to the Residential Development Component, and shall process all development entitlements for the Residential Development Component in accordance with this Agreement, the Initial Plan, the Scope of Development, the Governing Ordinances and the Schedule of Performance.

4.2.5 Retail Development Component. The Retail Component shall consist of an approximately 4,000 square foot neighborhood retail facility located adjacent to the public plaza area situated near the three podium condominium buildings described above. To the extent necessary to achieve the residential density and yield desired by Owner, the Retail Development Component may be implemented as a ground floor facility with residential dwelling units located on the floor(s) above.

Section 5. Agency Assistance.

5.1 Contribution by Agency: The Agency and the City hereby acknowledge and agree that the Owner has neither sought nor received any direct or indirect subsidies from the Agency or the City that would otherwise require the payment of prevailing wages pursuant to Section 1770 et seq of the California Labor Code and its implementing regulations, as the same may be interpreted or modified by the California Department of Industrial Relations or any court of competent jurisdiction.

5.2 Representations and Warranties of Agency. In addition to any other representations

and warranties set forth in this Agreement, Agency hereby represents and warrants to Owner as follows:

and 5.2.1 The Agency is a redevelopment agency and public body, corporate politic, duly organized and existing, and authorized to transact business and exercise powers under the Community Redevelopment Law, and the Agency has the full lawful right, power, and authority to enter into, carry out, give effect to, and consummate the transactions contemplated by this Agreement, including without limitation the covenant to pay and the pledge of Owner's portion of Project Tax Increment.

by the 5.2.2 By official action of the Agency prior to or concurrently with the execution and delivery hereof, the Agency has duly authorized and approved the execution and delivery of, and the performance Agency of the obligations on its part contained herein, and has duly authorized and approved the consummation of all other transactions contemplated by this Agreement.

5.2.3 This Agreement has been duly executed by the Agency and constitutes the valid and binding agreement of the Agency enforceable against the Agency in accordance with its terms.

5.2.4 The individuals who have executed this Agreement on behalf of the Agency have the right, power, and authority to execute, deliver, and perform this Agreement on behalf of the Agency.

5.2.5 The Agency is not in breach of or default under any applicable law or administrative regulation of the State of California, the United States, or of any department, division, agency, or instrumentality of either thereof, or any applicable judgment or decree or any loan agreement, note, resolution, indenture, agreement, or other instrument to which the Agency is a party or is otherwise subject to or bound which would in any way materially impair the performance of the Agency's obligations hereunder or under any other applicable agreements relating hereto, and no event has occurred and is continuing which, with the passage of time or the giving of notice, or both, would constitute a default or event of default under any such agreement; and the execution and delivery of this Agreement by the Agency and compliance with the provisions hereof will not be prohibited by or constitute a breach of or default under any Laws.

5.2.6 All approvals, consents, and orders of any governmental authority, board, agency, or commission having jurisdiction which would constitute a condition precedent to the performance by the Agency of its obligations hereunder have been obtained.

5.2.7 There is no action, suit, proceeding, inquiry, or investigations, at law or in equity, before or by any court, public board, or body, that is pending or, to the best knowledge of the Agency, after due inquiry, threatened against the Agency contesting or affecting any of the matters referred to in this Agreement.

5.2.8 The Agency will not take any action to amend or modify the Redevelopment Plan in a manner that limits, restricts, or impairs the rights of Owner hereunder, including without limitation its rights in and to the pledged revenues described herein.

5.3 Subordination to Bonded Indebtedness. Notwithstanding anything in this Agreement to the contrary, the City and Agency shall have the right to issue any bonds, certificates of participation or other similar types of indebtedness and pledge as security therefore any tax increment received as a result of or related to the Project. If and when issued, the obligations of the City and/or Agency pursuant to this Agreement shall be subordinate to any such indebtedness and Owner shall sign all documents and do all other things reasonably necessary to subordinate this Agreement and the obligations of the City and Agency hereunder to all such indebtedness.

Section 6. Specific Criteria Applicable To Development Of The Project.

6.1 Applicable Ordinances And Approvals. This Agreement, the Existing Project Approvals, and the Governing Ordinances shall govern the development of the Project. In the event of any conflict between this Agreement, the Existing Project Approvals, and the Governing Ordinances, this Agreement and the Existing Project Approvals shall control.

6.1.1 Owner shall have the right to proceed with development of the Project in substantial compliance with this Agreement, the Existing Project Approvals, and the Governing Ordinances. Except as provided in Section 3.6, City shall not, in subsequent actions applicable to the Project Site or the Project, apply new rules, regulations or official policies that conflict with this Agreement, the Existing Project Approvals, or the Governing Ordinances. Any act or proceeding of City purporting to have any of the following effects shall be presumed to be in conflict with this Agreement, Project Approvals, and the Governing Ordinances, which presumption shall affect the burden of proof:

- (a) Limiting or reducing the density, intensity, setbacks, or other development standards as set forth in this Agreement or the Project Approvals for all or any part of the Project, or otherwise requiring any reduction in the square footage or total number of proposed improvements.
- (b) Limiting or reducing the transfer of density within the Project Site provided that the overall Project density is no greater than set forth in this Agreement or the Project Approvals.

- (c) Limiting the improvements on the Project Site in a manner which is inconsistent with or more restrictive than the limitations included in this Agreement and the Project Approvals.
- (d) Applying to the Project or the Project Site any new or amended health, safety, or other law, regulation, or rule enacted or amended after the Effective Date, except insofar as it is required under State or Federal law.
- (e) Except for the Uniform Codes governing construction, building, fire, plumbing, electrical and life safety, no amendment of the Governing Ordinances or new ordinance, rule, regulation or policy which is inconsistent with the terms of the Governing Ordinances, or which is inconsistent with any term or condition of this Agreement or the Project Approvals, shall apply to the Project.

Notwithstanding anything in this Agreement to the contrary, City may apply the then-current California Building Standards Code and other Uniform construction codes to any Subsequent Project Approval provided such standards are applied uniformly to all comparable development within the City.

6.2 Rights of Access During Construction. Representatives of City and Agency shall have the reasonable right of access to the Project Site without charges or fees, at normal construction hours during the period of construction for the purposes of this Agreement, including, but not limited to, the inspection of the work being performed in constructing the improvements.

6.3 Rights of Access in General. For the purposes of assuring compliance with this Agreement, representatives of City and Agency shall have the reasonable right of access to the Project Site without charges or fees for the purpose of inspection of the Project Site as to maintenance of the public improvements thereon. Representatives of City and Agency shall have the reasonable right of access to the Project Site for the purpose of inspection and repair of public utilities facilities; provided City shall repair any damage occasioned by such access and restore the Project Site to the condition which existed prior to the access so far as is reasonably practicable and to the extent such repair and restoration is not reasonably practicable City shall compensate Owner for all damages occasioned by such access.

Section 7. Periodic Review of Compliance.

7.1 Annual Review. City, Agency and Owner shall annually review this Agreement and all actions taken pursuant to the terms of this Agreement with respect to the development of the Project Site to determine good faith compliance with this Agreement. The City is

responsible for initiating this annual review process, and shall begin this process by providing Owner with a questionnaire in a format to be provided by the City. Owner shall return the completed Compliance Evaluation Form to the City within thirty (30) days. Thereafter, the City or Agency shall initiate such meetings as may be required to complete the annual review.

7.2 Finding of Compliance. The City/Agency staff shall review the Owner Compliance Evaluation Form to ascertain whether Owner has complied in good faith with the terms of this Agreement. Upon request of the City, Owner shall furnish such additional documents or information as may be reasonably required and available to Owner to enable the City staff to make and complete their review hereunder. The City staff's determination hereunder shall be made within sixty (60) days after the submission by Owner of the annual Compliance Evaluation Form. Unless the City notifies Owner otherwise, the annual review shall be presumed complete and satisfactory at the conclusion of this sixty (60) day period. If the City staff finds good faith compliance by Owner with the terms of this Agreement, the City shall issue a certificate of compliance, certifying such good faith compliance with the terms of this Agreement through the period of the applicable annual review. Such certificate of compliance shall, if Owner so requests, be in recordable form and shall contain such information as may be necessary in order to impart constructive record notice of the finding of good faith compliance hereunder. Owner shall have the right to record the certificate of compliance in the Official Records of Contra Costa County. At least (10) days prior to making their determination hereunder, the City staff shall provide to Owner copies of all staff reports and other information not subject to legal privileges concerning Owner's compliance and the determination proposed by the City staff. In the event the noncompliance is incapable of cure within such 90 day (or greater) period but Owner has commenced a cure of the noncompliance and diligently prosecutes such cure, Owner shall have such additional time as is reasonably necessary to cure such noncompliance. **(any maximum time to cure?)**

7.3 Finding of Noncompliance. Owner shall be permitted an opportunity to be heard orally or in writing before the City Manager regarding such performance and before the City staff makes a non-compliance determination. If the City Manager, on the basis of substantial evidence, finds that Owner has not complied in good faith with the terms of this Agreement, he or she shall specify in writing to Owner the respects in which Owner has failed to comply. The City staff shall also specify in writing a reasonable time for Owner to meet the terms of compliance, which time shall be not less than ninety (90) days, and any proposed modification or termination of this Agreement because of Owner's noncompliance. In the event the noncompliance is incapable of cure within such 90 day (or greater) period but Owner has commenced a cure of the noncompliance and diligently prosecutes such cure, Owner shall have such additional time as is reasonably necessary to cure such noncompliance.

7.4 Review by City Council. Before this Agreement is modified or terminated on grounds of noncompliance by Owner, the City Council shall hold a public hearing no earlier than thirty (30) days following the expiration of the cure period identified in Section 7.3. At such hearing, Owner shall be entitled to submit evidence and address all the issues raised in

the notice of noncompliance or otherwise. Owner may present evidence in writing or orally at the hearing before the City Council, or both. If, after receipt of any written response of Owner, and after considering the evidence at such public hearing, the City Council finds and determines on the basis of substantial evidence that Owner has not complied in good faith with the terms and conditions of this Agreement, then the City Council shall specify to Owner the respects in which Owner has failed to comply, and shall also specify a reasonable time for Owner to meet the terms of compliance, which time shall not be less than ninety (90) days. If the areas of noncompliance specified by the City Council are not perfected within such time limits prescribed, then the City Council may take action to terminate or modify any provision of this Agreement needed to correct the non-compliance, after permitting Owner a reasonable opportunity to present evidence (orally or in writing as determined by the City), as to whether or not the areas of noncompliance have been perfected.

Section 8. Permitted Delays; Supersedure by Subsequent Laws.

8.1 Permitted Delays. In addition to any specific provisions of this Agreement, performance by Owner of its obligations hereunder may be excused during any period of delay caused at any time by reason of (i) war or civil commotion, riots, strikes, picketing, or other labor disputes; (ii) shortage of materials or supplies, or damage to work in process by reason of fire, rains, floods, earthquake, or other casualties; (iii) restrictions or delays caused, imposed or mandated by governmental or quasi-governmental entities; (iv) enactment of conflicting Laws (including, without limitation, new or supplementary environmental regulations); (v) litigation, including that initiated by a nonparty challenging this Agreement or any Project Approval; (vi) failure of nonparty agencies to promptly process and grant a Project Application; (vii) any actions or inactions on the part of City or Agency, or any other governmental or quasi-governmental agency or entity (including without limitation utilities) having jurisdiction over the Project or the Project Site; or (viii) any other cause beyond the reasonable control of Owner. Owner shall promptly notify the City of any delay hereunder as soon as possible after the same has been ascertained. The Term of this Agreement shall be extended by the period of any approved delay.

8.2 Supersedure by Subsequent Laws. If any State or Federal Law made or enacted after the date of this Agreement prevents or precludes compliance with one or more provisions of this Agreement, then the provisions of this Agreement shall, to the extent feasible, be modified or suspended as may be necessary to comply with such new Law. Immediately after enactment of any such new Law, the City and Owner shall meet in good faith to determine the feasibility of any such modification or suspension based on the effect such modification or suspension would have on the purposes and intent of this Agreement. If such modification or suspension is infeasible in Owner's reasonable business judgment, then Owner shall have the right to terminate this Agreement by written notice to the City. In the alternative, at Owner's election and subject to approval by the City Council, the Term of this Agreement may be extended pursuant to Section 7.1 for the duration of the period during which such new Law precludes compliance with the provisions of this Agreement. In addition, Owner shall have the right to challenge the new Law preventing compliance with the terms of this Agreement, and, in the event such challenge is successful, this Agreement

shall remain unmodified and in full force and effect, except that the Land Use Term may be extended by such challenge pursuant to Section 8.1 above. Notwithstanding the foregoing, the City shall retain its right to enforce Owner's obligation to complete public improvements after construction has commenced, pursuant to applicable improvement agreements, performance bonds, and other comparable legal instruments.

Section 9. Transfers and Assignments.

9.1 Right to Assign

(a) Owner and its successors and assigns shall have the right, with the prior written approval of the City and Agency, to sell, assign or transfer this Agreement with respect to all or a portion of the Project Site, and all or a portion of its rights, duties and obligations hereunder, to any person or entity at any time during the Land Use Term. The City's and Agency's written approval shall not be unreasonably withheld.

(b) In no event shall the rights, duties and obligations conferred upon Owner pursuant to this Agreement be at any time transferred or assigned except in connection with a transfer of an ownership interest of Owner in the Project Site or portion thereof.

9.2 Release Upon Transfer. Upon a sale, transfer or assignment of all or some portion of Owner's rights, duties and obligations pursuant to Section 9. 1, Owner shall be released from its obligations under this Agreement with respect to the Project Site, or portion thereof, transferred and arising subsequent to the effective date of the transfer. Owner shall have no obligation to enforce the rights, duties or obligations of this Agreement with respect to the transferee. Upon such sale, transfer or assignment, the transferee shall assume all transferred rights, duties and obligations under this Agreement. Any findings of noncompliance, corrective measures, Events of Default, or other breaches or alleged breaches of any provisions of this Agreement applicable to portions of the Project Site which have been sold, assigned or transferred shall be the sole responsibility of the transferee, and shall not affect the rights, duties and obligations of Owner or any other unrelated transferee under this Agreement.

9.3 Agreement Binding on Successors. Except as otherwise provided in this Agreement, the burdens of this Agreement shall be binding on, and the benefits of this Agreement shall inure to, all successors-in-interest to City, the Agency and Owner pursuant to Government Code Section 65868.5 or any successor Laws.

9.4 Maintenance Obligations Transferred to Homeowners' Association. Owner, and its successors or transferees, may transfer maintenance obligations or other such obligations to any Homeowners' Association created for the Project. The transfer of such obligations to a Homeowners' Association shall be effective upon the City's receipt of notification of such transfer.

Section 10. Amendment and Termination.

10.1 In General. Except as provided in Section 7 relating to City's annual review and Section 12.1 relating to termination in the Event of Default, this Agreement may be canceled, modified or amended only by mutual written consent of the parties, in accordance with the provisions of Government Code Sections 65967, 65867.5 and 65868, and City's Development Agreement Ordinance.

10.2. Major Amendment. Any amendment to this Agreement which relates to the term, permitted uses, overall density requirements for acquisition, reservation or dedication of land for public improvements, configuration of the Project as depicted in the Initial Plan or which will cause a significant new or significantly worse unmitigated adverse environmental impact and thus requires a Subsequent or Supplemental Environmental Impact Report under the California Environmental Quality Act, shall require giving of notice and shall require a public hearing before the Planning Commission and City Council. The scope of any such hearing and amendment proceeding shall be limited to those provisions of the proposed amendment covered by this section 10.2 and minor amendments, if any, shall be subject only to the requirements of section 10.3

10.3 Minor Amendment. The City Manager/Agency Executive Director or his/her designee shall have the authority to review and approve amendments to this Agreement requested by Owner provided that such amendments are not Major Amendments. Owner shall have the right to appeal such City Manager approvals to the Planning Commission and City Council pursuant to the provisions of Section 10.1 above; provided that the scope of any such amendment proceeding shall be limited to the provisions of the proposed amendment.

10.4 Recordation of Amendment. The City Clerk shall record an appropriate notice of any major amendment, cancellation or termination with the Contra Costa County Recorder not later than ten (10) days after the effective date of the action effecting such amendment, cancellation or termination, accompanied by a legal description of the Project Site.

Section 11. Notices.

11.1 Procedure. Any notice or communication required pursuant to this Agreement by any party ("Notices") shall be in writing and shall be given either personally, by facsimile transmission, by Federal Express or other similar courier promising overnight delivery, or by regular U.S. mail.

(a) If given by Federal Express or similar courier, the Notice shall be deemed to have been given and received on the date delivered as shown on a receipt issued by the courier.

(b) If personally delivered, a Notice shall be deemed to have been given when actually delivered to the party to whom it is addressed. For purposes of this Agreement, personal delivery shall include, but not be limited to, transmission by electronic mail.

(c) If delivered by facsimile transmission, a Notice shall be deemed to have been given upon receipt of the entire document by the receiving party's facsimile machine as

shown by the transmission report issued by the transmitting facsimile machine. Notice transmitted after 5 p.m. or on Saturday or Sunday shall be deemed to have been given on the next business day.

(d) If delivered by regular U.S. mail, a Notice shall be deemed to have been given five (5) calendar days after deposit with the U.S. Postal Service.

Notices shall be given to the parties at their addresses set forth below:

City/ Agency: City Clerk
City of Hercules
111 Civic Drive
Hercules, California 94547
Telephone: (510) 799-8200
Facsimile: (510) 799-2521
Email: Doreen.mathews@ci.hercules.ca.us

With a
copy to: City Attorney, City of Hercules
Alfred A. Cabral
Pelletreau, Alderson & Cabral
3260 Blume Drive, Suite 410
Richmond, CA 94806
Telephone: (510) 262-2100
Facsimile: (510) 758-4921
Email: mcabral@pacbell.net

Owner: Charles G. McKeag
Vice President, Land Acquisition & Development
Santa Clara Valley Housing Group, Inc.
404 Saratoga Avenue, Suite 100
Santa Clara, CA 95050
Telephone:
Facsimile:
Email: charlesm@scsdevelopment.com

Any party may change its mailing address or contact person(s) at any time by giving written notice of such change to the other party in the manner provided herein at least ten (10) days prior to the date such change is effected.

11.2 Form and Effect of Notice. Every Notice (other than the giving or withholding of consent, approval or satisfaction under this Agreement but including requests therefor) given to a party shall comply with the following requirements. Each such Notice shall state: (i) the Section of this Agreement pursuant to which the Notice is given; (ii) the period of time within which the recipient of the notice must respond or if no response is required, a

statement to that effect; and (iii) if applicable, that the failure to respond to the notice within the stated time period shall be deemed to be the equivalent of the recipient's approval of or consent to the subject matter of the Notice. Each request for consent or approval shall contain reasonably sufficient data or documentation to enable the recipient to make an informed decision. In no event shall notice be deemed given nor shall a party's approval of, consent to, or satisfaction with, the subject matter of a notice be deemed given by such party's failure to object or respond thereto if such notice did not fully comply with the requirements of this Section. No waiver of this Section shall be inferred or implied from any act (including conditional approvals, if any) of a party, unless such waiver is in writing, specifying the nature and extent of the waiver.

Section 12. Miscellaneous Provisions.

12. 1. Default; Termination. Failure or unreasonable delay by either party to perform any obligation under this Agreement for a period of ninety (90) days after written notice thereof from the other party shall constitute an Event of Default under this Agreement, subject to extensions of time by mutual consent in writing or discretionary approval of extensions by the City Council. Said notice shall specify the nature of the alleged default and the manner in which said default may be satisfactorily cured. If the nature of the alleged default is such that it cannot reasonably be cured within such ninety (90) day period, the commencement of the cure within such time period and the subsequent diligent prosecution to completion of the cure shall be deemed a cure within such period. Subject to the foregoing, after notice and expiration of the ninety (90) day period without cure, if applicable, the other party to this Agreement, at its option, may institute legal proceedings pursuant to this Agreement and/or give notice of intent to terminate the Agreement pursuant to Government Code Section 65868 and the City's Development Agreement Ordinance. Following such notice of intent to terminate, the matter shall be scheduled for consideration and review by the City Council within thirty (30) calendar days in the manner set forth in Government Code Sections 65865.1, 65867 and 65868. Following consideration of the evidence presented in said review before the City Council, and a determination by the City Council based thereon, the party alleging the default by the other party may give written notice of termination of this Agreement to the other party. The waiver by either party of any Event of Default under this Agreement shall not operate as a waiver of any subsequent breach of the same or any other provision of this Agreement.

12.2 Cooperation in the Event of Third-Party Legal Challenge.

(a) Approval of Agreement and Initial Project Approval. In the event of any legal or equitable action or proceeding instituted by a third party challenging the validity of any provision of this Agreement or the procedures leading to its initial adoption or the initial issuance of any of the Project Approvals, Owner reserves the right to withdraw its application for the Project. However, in the event that Owner elects not to withdraw its application, the parties hereby agree to cooperate in defending said action or proceeding, and Owner agrees to diligently defend any such action or proceeding and to bear the litigation expenses of defense, including attorney's fees. City retains the option to employ independent defense counsel at Owner's expense unless Owner elects to withdraw its application. Owner

further agrees to hold City harmless from all claims for recovery of the third party's litigation expenses, including attorney's fees.

(b) Subsequent Project Approval(s). The Parties shall cooperate in any litigation challenging Subsequent Project Approval(s). To the extent that Owner determines to contest such litigation challenges, Owner shall reimburse the City for reasonable legal fees incurred in the defense of the litigation, provided that the City shall retain an experienced litigation attorney, require such attorney to prepare and comply with a litigation budget, present this litigation budget to Owner prior to incurring obligations to pay legal fees in excess of \$10,000, and Owner agrees to reimburse the City for its expenses as provided herein. If Owner elects not to contest such litigation challenges, the City shall have no obligation to contest such challenges and may require preparation of a Subsequent or Supplemental EIR, or negative declaration, prior to further review or approval of the challenged Subsequent Project Approval(s).

12.3 Actions; Remedies; Attorney's Fees. In addition to any other rights and remedies, either party may institute legal action to cure, correct or remedy any default, enforce any covenant or agreement herein, enjoin any threatened or attempted violation or enforce by specific performance the obligations and rights of the parties hereto. In no event shall either party or its officers, agents or employees be liable in monetary damages for any breach or violation of this Agreement, it being expressly understood and agreed that the sole legal or equitable remedy available to either party for a breach or violation of this Agreement by the other party shall be an action in mandamus, specific performance, injunctive or declaratory relief to enforce the provisions of this Agreement. Notwithstanding the foregoing, the City shall not be foreclosed from initiating an action to enforce Owner's obligations to make monetary payments under this Agreement as a condition for completing development authorized under this Agreement and the Project Approvals. In any such legal action, the prevailing party shall be entitled to recover all litigation expenses, including reasonable attorney's fees and court costs.

12.4 Effect of Termination. Termination of this Agreement shall not affect the parties' obligations to comply with the standards, terms and conditions of any land use approvals issued with respect to the Project Site or any portion thereof, nor shall it affect any covenants of any party which are specified in this Agreement to continue after termination or which must remain in effect to achieve their intended purpose.

12.5 Negation of Partnership, Agency and Joint Venture. The City and Owner specifically acknowledge that the Project is a private development, that no party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. None of the provisions of this Agreement shall be deemed to create a partnership between or among the parties in the businesses of Owner, or the affairs of City, or otherwise, nor shall it cause them to be considered joint venturers or members of any Joint enterprise. This Agreement is not intended nor shall it be construed to create any third party beneficiary rights in any person who is not expressly made a party and signatory to this Agreement.

12.6 Homeowners' Disclosure. Purchasers of residential properties within the Project Site shall be advised in writing that the Project Site may be developed with a range of residential product types including but not limited to higher density housing.

12.7 Severability. Invalidation of any provision of this Agreement, or of the application thereof to any person, by judgment or court order shall in no way affect any of the other provisions hereof or the application thereof to any other person or circumstances and the same shall remain in full force and effect, unless enforcement of this Agreement as so invalidated would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

12.8 Entire Agreement. This Agreement and the Exhibits hereto contain all the representations and the entire agreement between the parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, all prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and the Exhibits hereto.

12.9 Further Documents. Each party shall execute and deliver such further documents as may be reasonably necessary to achieve the objectives of this Agreement.

12. 10 Governing Law; Interpretation of Agreement. This Agreement shall be governed by and interpreted in accordance with the laws of the United States, the State of California and the City of Hercules.

12. 11 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original Agreement.

12. 12 Time of Essence. Time is of the essence of this Agreement and of each and every term and condition hereof.

12. 13 Notice of Termination. Upon the expiration of this Agreement, the parties hereto shall, if requested by another party, execute for recordation in the Official Records of Contra Costa County, a notice stating that this Agreement has expired, that the parties have performed all their duties and obligations hereunder and that this Agreement is no longer an encumbrance or servitude on the Project Site.

12. 14 Estoppel Certificate. Any party may, at any time, and from time to time, deliver written notice to the other party requesting such party to certify in writing to such requesting party that, to the knowledge of the certifying party, (i) this Agreement is in full force and effect and a binding obligation of the parties, (ii) this Agreement has not been modified either orally or in writing, or if modified, to describe the nature of the modifications; (iii) the requesting party is not in default in the performance of its obligations under this Agreement, or if in default, to describe therein the nature and amount of any such defaults; and (iv) the status of performance of the obligations of the parties to this Agreement. A party receiving a request hereunder shall execute and return such certificate within thirty (30) days following receipt thereof. The [City Manager] shall have the right to execute any certificate requested

by Owner hereunder. City acknowledges that a certificate hereunder may be relied upon by transferees and mortgagees.

12.15 Powers of Owner. Owner shall have full power over and exclusive control of development of the Project, subject only to the limitations and obligations of Owner under this Agreement.

12. 16 Exhibits. The following exhibits are attached to this Agreement and incorporated by reference herein:

- A. Project Site Legal Description
- B. Project Site Parcel Map
- C. Planning Commission Resolution Approving This Agreement
- D. Enacting Ordinance
- E. Scope Of Development
- F. Existing Project Approvals
- G. Schedule Of Performance
- H. Redevelopment Plan For Project Area 3

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

CITY:

CITY OF HERCULES, a California municipal corporation

By: _____
Joanne Ward, Mayor

AGENCY:

REDEVELOPMENT AGENCY OF THE CITY OF HERCULES,
A public body corporate and politic

By: _____
Nelson Oliva, Its Executive Director

Approved as to Form:

Alfred A. Cabral
City Attorney/Agency Counsel

OWNER:

Santa Clara Valley Housing Group, Inc
A California corporation

By:
Its:

Approved as to Form:

By: _____

Attorneys for Owner