

v

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN
TO:

City of Hercules
City Clerk's Office
111 Civic Drive
Hercules, CA 94547



CONTRA COSTA Co Recorder Office
STEPHEN L. WEIR, Clerk-Recorder
DOC- 2012-0142851-00
Friday, JUN 15, 2012 14:51:00
FRE \$0.0011
Ttl Pd \$0.00 Rcpt # 0001304149
rrc/R9/1-22

Record for the Benefit of
The City of Hercules
Pursuant to Government Code
§6301

Space Above Reserved for Recorder's Use Only

VESTING DEVELOPMENT AGREEMENT

BY AND BETWEEN

THE CITY OF HERCULES

and

HERCULES BAYFRONT, LLC

for

HERCULES BAYFRONT PROJECT

DEVELOPMENT AGREEMENT

THIS VESTING DEVELOPMENT AGREEMENT ("**Development Agreement**") is made and entered into by the City of Hercules ("**City**"), and Hercules Bayfront, LLC, a Delaware limited liability company, the holders of legal or equitable interests in certain lands located within the incorporated area of City ("**Owner**"), pursuant to the authority of California Government Code §§ 65864 *et seq.* and Hercules Municipal Code, Title 10, Chapter 8.

RECITALS

A. Owner is the owner of certain real property consisting of approximately 90.29 acres, which is generally depicted and described on Exhibit A attached hereto ("**Project Site**").

B. City is a general law city and municipal corporation of the State of California and is duly organized, existing and authorized to exercise powers under the laws of the State of California and City Municipal Code. City has enacted a development agreement ordinance establishing the procedures and requirements for consideration of development agreements (Hercules Municipal Code, Title 10, Section A, commencing with Section 10-A.101, the "**Development Agreement Ordinance**"). This Development Agreement is a statutory development agreement and includes conditions and requirements for the development of the Project Site.

C. To strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic risk of development, the legislature of the State of California adopted §65864 *et seq.* of the Government Code ("**Development Agreement Statute**") which authorizes a city to enter into an agreement with any person having a legal or equitable interest in real property, providing for the development of such property and establishing certain development rights therein.

D. On July 22, 2008, the City Council of the City of Hercules ("**City Council**") adopted citizen's initiative entitled the Hercules Waterfront Initiative (the "**Initiative**") which was enacted to promote and enhance the unique waterfront character and scenic resources of the City's Waterfront District through development of a transit-oriented neighborhood that includes walkable streets that serve a variety of dwelling types and businesses, and public plazas with views of San Francisco Bay; implement the final stages of the Hercules Waterfront District Master Plan through adoption of design and development guidelines for the Historic Town Center, Transit Village, and Hercules Point Sub-Districts that encourage a transit-oriented, and pedestrian-oriented mix of uses along the bayfront in the City of Hercules; and, implement the goals and objectives of the Waterfront District Master Plan by providing for the location of a Multi-Modal Transit System linking together rail service, a connection to downtown San Francisco via a ferry terminal, and bus service via WestCAT, making Hercules home to the first train, ferry, and bus center in California. The Initiative implemented its purpose by and through the following complimentary mechanisms: 1) amendments to the City's General Plan (the "**2008 General Plan Amendments**"); 2) amendments to the City's Zoning Ordinance and Municipal Code (the "**2008 Code Amendments**"); 3) amendments to the Waterfront District Master Plan

(the “**2008 Master Plan Amendments**”); and 4) adoption of a Development Agreement (the “**Initiative Development Agreement**”) (collectively, the “**2008 Legislative Approvals**”).

E. Consistent with the Initiative, the Original Agreement became effective on July 22, 2008, and was recorded on September 10, 2008 in the official records of the County of Contra Costa as Instrument No. 0004199831.

F. To implement the **Hercules Bayfront Project**, Owner submitted the following applications for consideration by the City: a General Plan Amendment (No. 09-02), Zoning Designation Change (No. 09-01), amendments to the Hercules Waterfront District Master Plan referred to as “**Zoning Text Amendment**” (No. 09-03), Vesting Tentative Map Plan (No. 9290) (collectively, “**2011 Project Approvals**”).

G. On September 19, 2011, the City Council certified the Hercules Bayfront Project EIR. The Hercules Bayfront Project EIR analyzes the environmental impacts of, among other things, the 2011 Project Approvals

H. On January 10, 2012 and on March 13, 2012, City approved the 2011 Project Approvals.

I. Collectively, the 2008 Legislative Approvals as amended by the 2011 Project Approvals shall be referred to as the “**Project Approvals**,” and the development of the Project Site, defined below, consistent with these Project Approvals shall be referred to as the “**Project**.”

J. Owner and City now desire to amend the Original Agreement with this Development Agreement to reflect and incorporate the 2011 Project Approvals into Owner’s vested rights, and to make other changes to the Original Agreement.

K. On November 28, 2011, after a duly noticed public hearing, the Planning Commission recommended that the City Council approve this Development Agreement. On February 28, 2012 the City Council after a duly noticed public hearing on this Development Agreement introduced Ordinance No. 468 approving this Agreement. According to law, Ordinance No. 468 took affect thirty (30) days after adoption.

L. This Development Agreement is consistent with the City’s General Plan, Waterfront District Master Plan, Zoning Ordinance, and Municipal Code as amended by the Project Approvals. The terms of this Development Agreement are in conformity with public convenience, general welfare and good land use practice. The terms of this Development Agreement will not be detrimental to health, safety, or general welfare. The terms of this Development Agreement will not adversely affect the orderly development of property or the preservation of property values.

M. Consistent with the Project Approvals, the parties anticipate that during the Term of this Development Agreement, Owner may seek from City approvals and entitlements that are consistent with and necessary or desirable to implement the Project Approvals (“**Subsequent Approvals**”). The Subsequent Approvals may include, without limitation, project-level plans, planned development plans, design review permits, vesting tentative subdivision maps in

compliance with California Government Code § 66473.7, final subdivision maps, improvement agreements, development permits, lot line adjustments, use permits, building permits and any amendments to the foregoing.

NOW, THEREFORE, with reference to the foregoing recitals and in consideration of the mutual promises, obligations and covenants herein contained, City and Owner agree as follows:

AGREEMENT

Article I. Description of Project Site, Effective Date, and Term, and Implementing Development Agreement.

Section 1.01. Description of Project Site. The real properties that are the subject of this Vesting DA comprise City's Waterfront District Area and are depicted and described on Exhibit A, and are referred to herein as the "**Project Site**," provided, however, that this Development Agreement shall only be effective as to those properties described in Exhibit A for which parties with a legal or equitable interest in the property become signatories to this Development Agreement. If, due to approval of a lot line adjustment, parcel map, final map, or discovery of a clerical error, a portion of the legal description within Exhibit A needs to be corrected or revised, Owner shall, at the time of execution of this Development Agreement, present the City with the revised legal description and Exhibit A shall be amended, accordingly.

Section 1.02. Effective Date; Recordation. The "**Effective Date**" of this Development Agreement shall be thirty (30) days after adoption of the ordinance approving this Development Agreement. Not later than ten (10) days after the Effective Date, the City Clerk shall cause this Development Agreement to be recorded in the Official Records of Contra Costa County.

Section 1.03. Term. The term of this Development Agreement shall commence on the Effective Date of the Initiative Development Agreement, which was July 22, 2008, and extend fifteen (15) years thereafter unless sooner terminated or extended as herein provided (the "**Term**"). The Term shall automatically extend an additional five (5) years unless the City Council determines in accordance with Article V that Owner is not compliance with the terms of this Development Agreement.

Section 1.04. Effect of a Challenge. If a referendum or third-party action or legal action is instituted which might affect or challenge the validity or enforceability of the enacting ordinance or this Development Agreement including its Exhibits, or any provision thereof, or any document implementing the provisions contained in this Development Agreement including its Exhibits ("**Third-Party Legal Challenge**"), this Development Agreement shall remain in full force and effect subject to (i) any injunction issued by a court of competent jurisdiction, and/or (ii) the legal effect of any voter initiated legislative action. If a Third-Party Legal Challenge results in a temporary or preliminary order enjoining the enforcement of or performance of all or any provision under this Development Agreement, or an adverse final adjudication or legislative action concerning the validity or enforceability of all or any portion of this Development Agreement, and such portion of this Development Agreement is not severable under Section 6.10, the Original Agreement shall remain in full force and effect, and nothing shall impair the rights accorded and vested by the Original Agreement.

Section 1.05. Implementing Development Agreement. The parties have entered into the Implementing Development Agreement which also sets forth requirements and conditions for development of the Project Site. The Implementing Development Agreement shall govern development of the Project Site and this Development Agreement will only become operative if the Implementing Development Agreement is for any reason terminated and this Development Agreement is still in effect.

Article II. Standards, Laws, and Procedures Governing the Project.

Section 2.01. Vested Right to Develop. Owner shall have a vested right to develop the Project on the Project Site in substantial conformance with the terms and conditions of this Development Agreement, the Project Approvals, the Subsequent Approvals (as and when issued), the Applicable Law (defined below) and amendments as shall, from time to time, be approved pursuant to this Development Agreement. Owner's vested right to develop the Project shall be subject to compliance with the California Environmental Quality Act (Public Resources Code, §§21000 et seq.) ("*CEQA*") as it may apply to the Subsequent Approvals, and City's remaining discretion in connection with the Subsequent Approvals.

City shall have the right to regulate development and use of the Project Site in accordance with the terms and conditions of this Development Agreement, the Project Approvals, the Applicable Law, as defined below, and the Subsequent Approvals. City shall not apply new City rules, regulations or official policies that conflict with the Project Approvals or the Applicable Law. Notwithstanding anything in this Vesting Development Agreement to the contrary, City shall not be precluded from applying laws, rules and regulations to the extent that such are specifically mandated and required by regional, state or federal agencies.

Section 2.02. Permitted Uses. The permitted uses of the Project Site; the density and intensity of use on the Project Site; the maximum height, bulk and size of the proposed buildings; provisions for reservation or dedication of land for public purposes and the location of public improvements; the general location of public utilities; and other terms and conditions of development applicable to the Project, shall be as set forth in the Project Approvals and, as and when they are issued, the Subsequent Approvals. The issuance of a Subsequent Project Approval shall not divest Owner of the right, after submittal and approval of further entitlement applications, to develop as set forth in the Project Approvals.

Section 2.03. Applicable Law. "*Applicable Law*" shall mean the existing rules, regulations, official policies, standards and specifications, in force and effect on the Effective Date, governing permitted uses of the Project Site, governing density, and governing the design, improvements, and construction standards and specifications applicable to the Project and Project Site, including those set forth in this Development Agreement and the Project Approvals and those set forth in the City's ordinances and resolutions. Nothing in this Development Agreement is intended to increase or decrease the amount of any applicable impact fees, connection fees, pass-through fees, processing fees, or any other fees, taxes, or assessments in effect at the time of any Subsequent Approval. Notwithstanding anything in this Development Agreement to the contrary, City may apply the then-current California Building Standards Code and other uniform construction codes to any Subsequent Approval, provided such standards are

applied consistent with the standards applied to other comparable New-Urbanist, transit oriented developments in the San Francisco Bay Area. In addition, any tentative map approved for any subdivision of land within the Project Site shall comply with the provisions of Government Code §66473.7.

Section 2.04. Moratorium, Initiatives and Conflicting Enactments. To the extent consistent with state law (and excepting a declaration of a local emergency or state emergency as defined in Government Code § 8558), if any ordinance, resolution or other measure is enacted subsequent to the Effective Date, whether by action of City, by initiative, referendum, or otherwise, that imposes a building moratorium, a limit on the rate of development, or a voter-approval requirement that would otherwise create an additional procedural requirement or affect the timely development for the Project on all or any part of the Project Site, City agrees that such ordinance, resolution, or other measure shall not apply to the Project, the Project Site, this Development Agreement, the Project Approvals, or the Subsequent Approvals, if any, during the Term.

Section 2.05. Life of Project Approvals or Subsequent Approvals. The term of any Project Approval and any Subsequent Approval shall be automatically extended for the longer of the Term or the term otherwise applicable to such Project Approval or Subsequent Approval if this Development Agreement is no longer in effect. The Term of this Development Agreement, any other Project Approval, or any Subsequent Approval shall not include any period of time during which any applicable development or utility moratorium, lawsuit, or actions by other public agencies that regulate land use, delays development of the Project Site. Given Owner's vesting of its right to the development of the Project Site in accordance with the Project Approvals, the Subsequent Approvals (as and when issued), the Applicable Law, any General Plan amendments or zone changes or any other future legislative or nonlegislative regulatory approvals with respect to development of the Project Site will not become effective as to the Project Site unless consented to in writing by Owner or its successors-in-interest as to their respective portions of the Project Site. Nothing in this Vesting DA shall prevent the City from imposing upon Owner laws, rules, or regulations that are required by state, federal, or regional authorities to be imposed by City on Owner

Section 2.06. Development Timing. Subject to the Applicable Law, Owner shall have the right to develop the Project in such order and at such rate and at such times as Owner deems appropriate in the exercise of its subjective business judgment. Prior to the commencement of grading, construction or any work related thereto upon the Project Site, Owner shall secure, or cause to be secured, any and all Subsequent Approvals that may be required by City, as well as any permits and approvals required by any governmental agency with regulatory authority over such activities.

Article III. Obligations of Owner.

Section 3.01. Funding of Environmental Review. Owner agrees, to the extent permitted by law, that prior to the City's approval of any discretionary Subsequent Approval, it will fund completion of the level of environmental review required under CEQA associated with the requested Subsequent Approval.

Section 3.02. Bodily Injury and Property Damage Insurance. Prior to the commencement of construction (or any work related thereto) upon the Project Site, Owner shall furnish, or cause to be furnished, to City duplicate originals or appropriate certificates of bodily injury and property damage insurance policies in the amount of at least \$1,000,000 for any person, \$1,000,000 for any occurrence and \$1,000,000 for property damage, naming City as an additional insured. Such insurance policies shall contain such other and further endorsements, terms, conditions and coverages as may reasonably be deemed necessary by City. Such insurance policies shall be maintained and kept in force during periods of construction.

Article IV. Obligations of City.

Section 4.01. Processing Subsequent Approvals. Subsequent Approvals shall be deemed mechanisms to implement those final policy decisions reflected by the Project Approvals and shall be issued by City so long as they comply with this Development Agreement and Applicable Law and are not inconsistent with the Project Approvals. Consistent with the Initiative, unless agreed to by the Owner, the City shall not require any further legislative acts to enable the Owner to develop the Project Site. Upon submission by Owner of any application, City shall promptly commence and diligently complete all steps necessary to review and approve the requested Subsequent Approvals so long as such Subsequent Approvals are consistent with this Agreement.

Article V. Periodic Review of Compliance.

Section 5.01. Annual Review. Pursuant to Government Code Section 65865.1, on or before December 1 of each year during the Term, City shall annually review this Development Agreement and all actions taken pursuant to the terms of this Development Agreement to determine Owner's good faith compliance with this Agreement. On or before October 15 of each year, Owner shall submit to the City Manager a report demonstrating the good faith compliance with this Development Agreement. Failure of City to perform the annual review shall not affect the validity or enforceability of this Development Agreement. Such annual review may be consolidated with the annual review of compliance under the Implementing Development Agreement.

Section 5.02. Finding of Compliance. City staff shall review the Owner's demonstration of good faith compliance to ascertain whether the Owner has complied in good faith with the terms of this Development Agreement. Upon request of City, Owner shall furnish such additional documents or information as may be reasonably required and available to the Owner to enable City staff to make and complete their review hereunder. The City Council shall then consider the staff's recommendation and make a final determination by December 1 of the year the Owner's demonstration of good faith compliance. Unless City notifies Owner otherwise, the annual review shall be presumed complete and satisfactory as of January 1 of the year after the submission by the Owner of the demonstration of good faith compliance. If the City Council finds good faith compliance by Owner with the terms of this Development Agreement, City shall issue a certificate of compliance, certifying such good faith compliance with the terms of this Development 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 ten (10) days prior to making their determination hereunder, City staff shall provide to Owner copies of all staff reports and other information not subject to legal privileges concerning the Owner's compliance and the determination proposed by City staff. In the event the noncompliance is incapable of cure within such ninety (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

Section 5.03. Finding of Noncompliance. Owner shall be permitted an opportunity to be heard orally or in writing before the City Council regarding such performance and before the City Council makes a non-compliance determination. If the City Council, on the basis of substantial evidence, finds that Owner has not complied in good faith with the terms of this Vesting DA, he or she shall specify in writing to Owner the respects in which Owner has failed to comply. The City Council 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 Development Agreement because of Owner's noncompliance. In the event the noncompliance is incapable of cure within such ninety (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.

Section 5.04. Review by City Council. Before this Development Agreement is modified or terminated on grounds of noncompliance by Owner, the City Council of the City shall hold a public hearing no earlier than thirty (30) days following the expiration of the cure period identified in Section 6.07. 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 Development 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 Development Agreement needed to correct the non-compliance, after permitting Owner a reasonable opportunity to present evidence (orally or in writing as determined by City), as to whether or not the areas of noncompliance have been perfected.

Article VI. Miscellaneous.

Section 6.01. Vested Rights to Subsequent Approvals. Any Subsequent Approval or amendment to a Subsequent Approval shall, upon approval or issuance, be automatically vested and incorporated into this Development Agreement.

Section 6.02. Amendment. Any amendment to the Development Agreement shall require giving of notice and public hearings before the Planning Commission and City Council. The City Council, in its sole discretion, shall make the final decision on whether to approve, conditionally approve, or deny an amendment.

Section 6.03. Cooperation in the Event of Third-Party Legal Challenge. In the event of any legal or equitable action or proceeding instituted by a third party challenging the validity of any provision of this Development Agreement or the procedures leading to its adoption or the issuance of any or all of the Project Approvals or Subsequent Approvals, the parties hereby agree to cooperate in defending said action or proceeding. Owner shall diligently defend any such action or proceeding and shall bear the litigation expenses of defense, including attorney's fees. City shall retain the option to employ independent defense counsel at Owner's expense. Owner further agrees to hold City harmless from all claims for recovery of the third party's litigation expenses, including attorney's fees and damages.

Section 6.04. Challenge to Development Agreement. If there is a successful third party challenge to this Development Agreement, the Initiative Development Agreement shall apply to the Project site.

Section 6.05. Indemnification; Hold Harmless. Except for claims, costs and liabilities caused by the active negligence or intentionally wrongful conduct of City, its elected and appointed representatives, officers, agents and employees, Owner hereby agrees to defend, indemnify, save and hold City and its elected and appointed representatives, officers, agents and employees harmless from claims, costs and liabilities for any personal injury, death or property damage which arises, directly or indirectly, from operations performed under this Development Agreement by Owner or its contractors, subcontractors, agents or employees, whether such operations were performed by Owner or by any of its contractors, subcontractors, by any one or more persons directly or indirectly employed by, or acting as agent for, Owner or any of its contractors or subcontractors. Owner shall defend City and its elected and appointed representatives, officers, agents and employees from actions for such personal injury, death or property damage which is caused, or alleged to have been caused, by reason of Owner's activities in connection with the Project.

Section 6.06. Estoppel Certificates. Either party or the holder or prospective holder of a mortgage or deed of trust secured by an interest in any portion of the property may at any time during the Term of this Agreement deliver written notice to the other party requesting an estoppel certificate stating: (i) this Development Agreement is in full force and effect and is a binding obligation of the parties; (ii) Development Agreement has not been amended or modified either orally or in writing or, if so amended, identifying the amendments; (iii) no default exists hereunder, nor would any default exist with the passage of time or the giving of notice, or both, or, if a default or failure does exist, the nature thereof and the actions required to be taken by the non-performing party to cure the default or prevent the same from occurring; and (iv) any other matter affecting the status of the rights and obligations of the parties hereunder as to which the requesting party, or the holder of the mortgage or deed of trust, may inquire. A party receiving a request for an estoppel certificate shall provide a signed certificate to the requesting party, or holder of a mortgage or deed of trust, within thirty (30) days after receipt of the request. The

City Manager or any person designated by the City Manager may sign estoppel certificates on behalf of City. The managing member or other authorized representative of Owner may sign on behalf of any Owner. An estoppel certificate may be relied on by the holder of a mortgage or deed of trust, and by Transferees. If one party requests an estoppel certificate from the other party, the requesting party shall reimburse the other party for all reasonable and direct costs and fees incurred by such party with respect thereto.

Section 6.07. Initiative Development Agreement. This Development Agreement does not change Owner's or Voter's rights under §§13, 14, 15 and 16 of the Initiative.

Section 6.08. Negation of Partnership, Agency, and Joint Venture. The Project is a private development. No party is acting as the agent of the other in any respect hereunder. Each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Development Agreement. None of the provisions of this Development 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.

Section 6.09. No Third Party Beneficiary Rights. This Development 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 Development Agreement.

Section 6.10. Default; Termination. Failure or unreasonable delay by either party to perform any obligation under this Development Agreement for a period of ninety (90) days after written notice thereof from the other party shall constitute an event of default under this Development 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 Development Agreement, at its option, may institute legal proceedings pursuant to this Development Agreement and/or give notice of intent to terminate the Development Agreement pursuant to Government Code §65868 and the City's Development Agreement enabling ordinance and consistent with the Hercules Municipal Code, Title 10, Chapter 8. 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 §§ 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 Development Agreement to the other party. The waiver by either party of any event of default under this Development Agreement shall not operate as a waiver of any subsequent breach of the same or any other provision of this Development Agreement.

Section 6.11. Legal Actions; Remedies; Attorney's Fees. In addition to any other rights

and remedies, either party may institute legal action to cure, correct, enjoin, or remedy any default, enforce any covenant or agreement herein. Neither party or its officers, agents or employees shall be liable in monetary damages for any breach or violation of this Development Agreement; instead, the sole legal or equitable remedy available to either party for a breach or violation of this Development Agreement shall be an action in mandamus, specific performance, injunctive or declaratory relief to specifically enforce the provisions of this Development Agreement. In any such legal action, the Prevailing Party shall be entitled to recover all litigation expenses, including reasonable attorney's fees and court costs. For purposes of this Section 6.08, "Prevailing Party" means the Party determined by a court to have most nearly prevailed in a dispute between the Parties, even if such Party did not prevail in all matters, not necessarily the one in whose favor a judgment is rendered. If the court fails or refuses to make a determination of the Prevailing Party, the party who is awarded costs of suit shall also be deemed the Prevailing Party for purposes of awarding attorneys' fees. The parties acknowledge that neither City nor Owner would not have entered into this Agreement had they been exposed to damage claims from the other party for any breach thereof. As such, the parties agree that in no event shall either party be entitled to recover damages against the other party for breach of this Agreement.

Section 6.12. Governing Law; Interpretation of Agreement. This Development 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.

Section 6.13. Severability. If any term or provision of this Development Agreement, or the application of any term or provision of this Development Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining terms and provisions of this Development Agreement, or the application of this Development Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the parties.

Section 6.14. Right to Assign. Owner shall have the right to sell, assign or transfer this Development Agreement, and all of its rights, duties and obligations hereunder, to any person at any time during the Term, subject to the prior written approval of the City Council. Such approval shall be granted where the buyer, assignee or transferee has demonstrated the experience, qualifications and financial resources to complete and operate the Project, or applicable portions thereof, to the reasonable satisfaction of the City Council. Owner shall remain liable for all obligations hereunder, and no assignment or transfer of this Development Agreement shall be valid unless Owner obtains the prior approval of the City Council.

Section 6.15. Supersedure by Subsequent Laws. If any state or federal law made or enacted after the Effective Date of this Development Agreement prevents or precludes compliance with one or more provisions of this Development Agreement, then the provisions of this Development Agreement shall, to the extent feasible, be modified, extended, or suspended as may be necessary to comply with such new law.

Section 6.16. Covenants Running with the Land. All of the provisions contained in this Development Agreement shall be binding upon the parties and their respective heirs, successors,

and assigns, representatives, lessees, and all other persons acquiring all or a portion of the Project Site, or any interest therein, whether by operation of law or in any manner whatsoever. All of the provisions contained in this Development Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to California law including, without limitation, California Civil Code § 1468.

Section 6.17. Further Documents. Each party shall execute and deliver such further documents as may be reasonably necessary to achieve the objectives of this Development Agreement.

Section 6.18. Notices. Any notice or communication required hereunder between the City and the Owner must be in writing, and may be given personally, by facsimile (with original forwarded by regular U.S. Mail), by registered or certified mail (return receipt requested), or by a reputable courier promising overnight delivery to the respective addresses specified by each party. Any party hereto may at any time, by giving ten (10) days' written notice to the other party hereto, designate any other address in substitution of the address to which such notice or communication shall be given.

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

If to City: 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
111 Civic Drive
Hercules, CA 94547
Telephone: (510) 332-5001
Facsimile: (510) 238-1404

If to Owner: Hercules Bayfront, LLC
c/o AndersonPacific, LLC
Attn: James R. Anderson
6701 Center Drive West, Suite 710
Los Angeles, CA 90045
Facsimile: (310) 689-2305
Email: jra@andersonpacificllc.com

With copy to: Hercules Bayfront, LLC
c/o AndersonPacific, LLC
Attn: Ethan Sischo
6701 Center Drive West, Suite 710

Los Angeles, CA 90045
Facsimile: (310) 689-2305
Email: esischo@andersonpacificllc.com

With copy to:

Rutan & Tucker, LLP
Attn: Dan Slater and Jeffrey Melching
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
Facsimile: (714) 546-9035
Email: dslater@rutan.com and
jmelching@rutan.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 parties in the manner provided herein at least ten (10) days prior to the date such change is effective.

Section 6.19. Exhibits. The following exhibit is attached to this Development Agreement and incorporated herein for all purposes:

[TEXT AND SIGNATURES CONTINUE ON FOLLOWING PAGE]

EXHIBIT A - Map & Legal Description of the

IN WITNESS WHEREOF, this Development Agreement has been entered into by and between Owner and City as of the Effective Date.

CITY:

City of Hercules,
a California municipal corporation

By: _____

Name: _____

Title: _____



MAYOR

OWNER:

Hercules Bayfront, LLC, a Delaware limited liability company

By: APL-Hercules, LLC

a Delaware limited liability Company

Its: Manager

By: Anderson Pacific, LLC

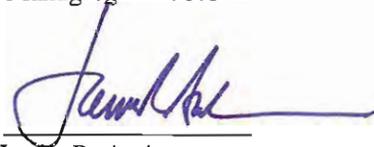
a Delaware limited liability Company

Its: Managing Member

By: _____

James R. Anderson

Managing Member



CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

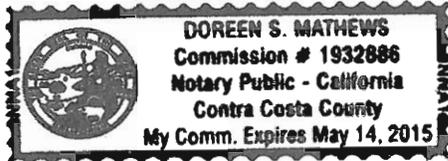
CIVIL CODE § 1189

State of California

County of Contra Costa }

On 3-14-12 before me, Doreen S. Mathews Notary Public
Date Here Insert Name and Title of the Officer

personally appeared James R. Anderson
Name(s) of Signer(s)



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: Doreen S. Mathews
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Resting Development Agreement

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

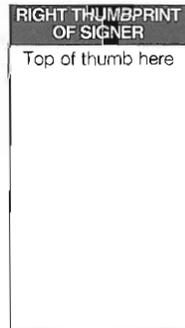
- Corporate Officer — Title(s): _____
- Individual
- Partner — Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____



Signer Is Representing: _____

Signer's Name: _____

- Corporate Officer — Title(s): _____
- Individual
- Partner — Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____



Signer Is Representing: _____

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

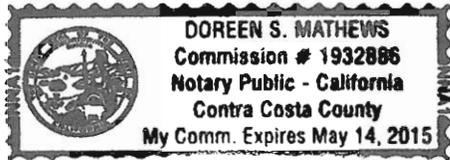
CIVIL CODE § 1189

State of California

County of Contra Costa

On 3-15-12 before me, Doreen S. Mathews Notary Public

personally appeared Dan Romero



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: Doreen S. Mathews

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Vesting New Agmt - Neveles Bayfront

Document Date: Number of Pages:

Signer(s) Other Than Named Above:

Capacity(ies) Claimed by Signer(s)

Signer's Name:

- Corporate Officer - Title(s):
Individual
Partner - Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer Is Representing:

Signer's Name:

- Corporate Officer - Title(s):
Individual
Partner - Limited General
Attorney in Fact
Trustee
Guardian or Conservator
Other:

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer Is Representing:

DA EXHIBIT A

HERCULES BAYFRONT, LLC

LEGAL DESCRIPTION

Real property in the City of Hercules, County of Contra Costa, State of California, described as follows:

PARCELS B, C AND D, AS SHOWN ON THE PARCEL MAP MS 491-03, FILED MARCH 10, 2004 IN BOOK 189 OF PARCEL MAPS, AT PAGE 40, OFFICIAL RECORDS.

PARCEL D AND LOT 200, AS SHOWN ON THE MAP OF SUBDIVISION 8407, FILED DECEMBER 19, 2001, IN BOOK 437 OF MAPS, PAGE 31, AND AS AMENDED BY AMENDED SUBDIVISION MAP 8407, FILED JANUARY 27, 2003, IN BOOK 451 OF MAPS, PAGE 14, AND AS CORRECTED BY CERTIFICATES OF CORRECTION RECORDED DECEMBER 11, 2002 AS INSTRUMENT NO. 2002-471412, AND RECORDED DECEMBER 9, 2003 AS INSTRUMENT NO. 2003-594591, CONTRA COSTA COUNTY RECORDS.

LOT 16, AND PARCELS .A. & .B., AS SHOWN ON THE MAP OF SUBDIVISION 8644 FILED FEBRUARY 25, 2004, IN BOOK 461 OF MAPS, PAGE 24, CONTRA COSTA COUNTY RECORDS.

PARCEL D, AS SHOWN ON M.S. 476-00, FILED OCTOBER 12, 2000, BOOK 179 OF PARCEL MAPS, AT PAGE 38, CONTRA COSTA COUNTY RECORDS.

PARCELS SEVEN AND EIGHT, AS SHOWN ON THE PARCEL MAP MSH-1, FILED APRIL 22, 1974, BOOK 33 OF PARCEL MAPS, PAGE 16, CONTRA COSTA COUNTY RECORDS.

PARCEL FIVE, AS SHOWN ON THE PARCEL MAP MSH-1, FILED APRIL 22, 1974, BOOK 33 OF PARCEL MAPS, PAGE 16, CONTRA COSTA COUNTY RECORDS.

PARCELS FOUR AND SIX AS SHOWN ON PARCEL MAP MSH-1 FILED APRIL 22, 1974, IN BOOK 33 OF PARCEL MAPS AT PAGE 16, CONTRA COSTA COUNTY RECORDS, DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHERLY CORNER OF SAID PARCEL 4 (33 PM 16): THENCE FROM SAID POINT OF BEGINNING ALONG THE EXTERIOR LINES OF SAID PARCEL 4, THE FOLLOWING COURSES:

SOUTH 37° 46' 59" EAST 317.38 FEET TO THE BEGINNING OF A NON-TANGENT CURVE CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 1,710.68 FEET, A RADIAL LINE TO THE BEGINNING OF SAID CURVE BEARS SOUTH 49° 34' 15" EAST; THENCE FROM SAID POINT OF BEGINNING SOUTHWESTERLY 328.46 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 11° 00' 04"; THENCE SOUTH 51° 25' 49" WEST 341.51 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 1,190.19 FEET; THENCE SOUTHWESTERLY 77.35 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 03° 43' 25" THENCE NORTH 49° 30' 00" WEST 27.37 FEET; THENCE NORTH 17° 28' 00" WEST 56.60 FEET; THENCE NORTH 73° 18' 00" WEST 20.90 FEET; THENCE SOUTH 15° 04' 00" WEST 26.90 FEET; THENCE SOUTH 51° 20' 00" WEST 12.80 FEET; THENCE SOUTH 15° 57' 00" WEST 58.20 FEET; THENCE SOUTH 58° 24' 00" WEST 15.30 FEET; THENCE SOUTH 19° 32' 00" EAST 32.90 FEET; THENCE SOUTH 01° 22' 40" WEST 44.45 FEET TO THE BEGINNING OF A NON-TANGENT CURVE CONCAVE TO THE EAST, HAVING A RADIUS OF 1,190.19 FEET, A RADIAL LINE TO THE BEGINNING OF SAID CURVE BEARS NORTH 48° 44' 56" WEST; THENCE SOUTHWESTERLY 411.81 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 19° 49' 29"; THENCE SOUTH 21° 25' 35" WEST 369.99 FEET TO THE BEGINNING A TANGENT CURVE CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 3,393.16 FEET, THENCE SOUTHWESTERLY 429.44 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 07° 15' 05" TO THE EXTERIOR LINE OF SAID PARCEL SIX BEING THE

BEGINNING OF A COMPOUND CURVE HAVING A RADIUS OF 3,393.16 FEET, A RADIAL LINE TO THE BEGINNING OF SAID CURVE BEARS SOUTH 61° 19' 20" EAST; THENCE LEAVING SAID EXTERIOR LINE OF PARCEL 4 ALONG SAID EXTERIOR LINE OF PARCEL SIX, THE FOLLOWING COURSES:

SOUTHWESTERLY 439.57 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 07° 25' 21" TO THE BEGINNING OF A COMPOUND CURVE CONCAVE TO THE NORTHWEST HAVING A RADIUS OF 1,101.50 FEET, A RADIAL LINE TO THE BEGINNING OF SAID CURVE BEARS SOUTH 53° 53' 59" EAST; THENCE SOUTHWESTERLY 673.63 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 35° 02' 23"; THENCE SOUTH 71° 08' 24" WEST 558.13 FEET; THENCE NORTH 47° 01' 00" WEST 10.32 FEET; THENCE NORTH 76° 06' 00" WEST 108.21 FEET; THENCE SOUTH 87° 00' 00" WEST 114.21 FEET; THENCE SOUTH 81° 00' 00" WEST 160.01 FEET; THENCE NORTH 77° 24' 00" WEST 87.11 FEET; THENCE NORTH 49° 11' 00" WEST 87.21 FEET; THENCE NORTH 56° 59' 00" WEST 47.70 FEET; THENCE NORTH 43° 31' 00" WEST 164.11 FEET; THENCE NORTH 67° 10' 00" WEST 103.11 FEET; THENCE NORTH 26° 34' 00" WEST 80.51 FEET; THENCE NORTH 61° 05' 00" WEST 76.51 FEET; THENCE SOUTH 82° 37' 00" WEST 108.91 FEET; THENCE NORTH 66° 48' 00" WEST 38.10 FEET; THENCE NORTH 85° 11' 00" WEST 95.31 FEET; THENCE NORTH 48° 16' 00" WEST 49.60 FEET; THENCE NORTH 63° 20' 00" EAST 76.01 FEET; THENCE NORTH 86° 45' 00" EAST 89.01 FEET; THENCE SOUTH 83° 55' 00" EAST 85.01 FEET; THENCE SOUTH 67° 10' 00" EAST 152.01 FEET; THENCE SOUTH 78° 00' 00" EAST 116.01 FEET; THENCE SOUTH 87° 35' 00" EAST 71.00 FEET; THENCE NORTH 73° 35' 00" EAST 329.02 FEET; THENCE NORTH 70° 20' 00" EAST 149.01 FEET; THENCE NORTH 59° 35' 00" EAST 516.04 FEET; THENCE NORTH 55° 10' 00" EAST 436.03 FEET; THENCE NORTH 51° 15' 00" EAST 291.02 FEET; THENCE NORTH 41° 55' 10" EAST 172.25 FEET TO SAID EXTERIOR LINE OF SAID PARCEL FOUR; THENCE LEAVING SAID EXTERIOR LINE OF SAID PARCEL SIX ALONG THE EXTERIOR LINES OF SAID PARCEL FOUR THE FOLLOWING COURSES:

NORTH 35° 49' 50" EAST 127.73 FEET; THENCE NORTH 28° 40' 00" EAST 231.02 FEET; THENCE NORTH 37° 15' 00" EAST 58.00 FEET; THENCE NORTH 43° 10' 00" EAST 221.02 FEET; THENCE NORTH 33° 40' 00" EAST 119.01 FEET; THENCE NORTH 22° 40' 00" EAST 86.01 FEET; THENCE NORTH 30° 45' 00" EAST 158.01 FEET; THENCE NORTH 27° 40' 00" EAST 136.01 FEET; THENCE NORTH 30° 45' 00" EAST 158.01 FEET; THENCE NORTH 27° 40' 00" EAST 136.01 FEET; THENCE NORTH 35° 35' 00" EAST 91.01 FEET; THENCE NORTH 52° 10' 00" EAST 62.00 FEET; THENCE NORTH 56° 55' 00" EAST 345.02 FEET; THENCE NORTH 48° 42' 00" EAST 142.01 FEET; THENCE NORTH 37° 55' 00" EAST 182.01 FEET; THENCE NORTH 45° 35' 00" EAST 82.39 FEET TO THE POINT OF BEGINNING.

Exhibit C(2)

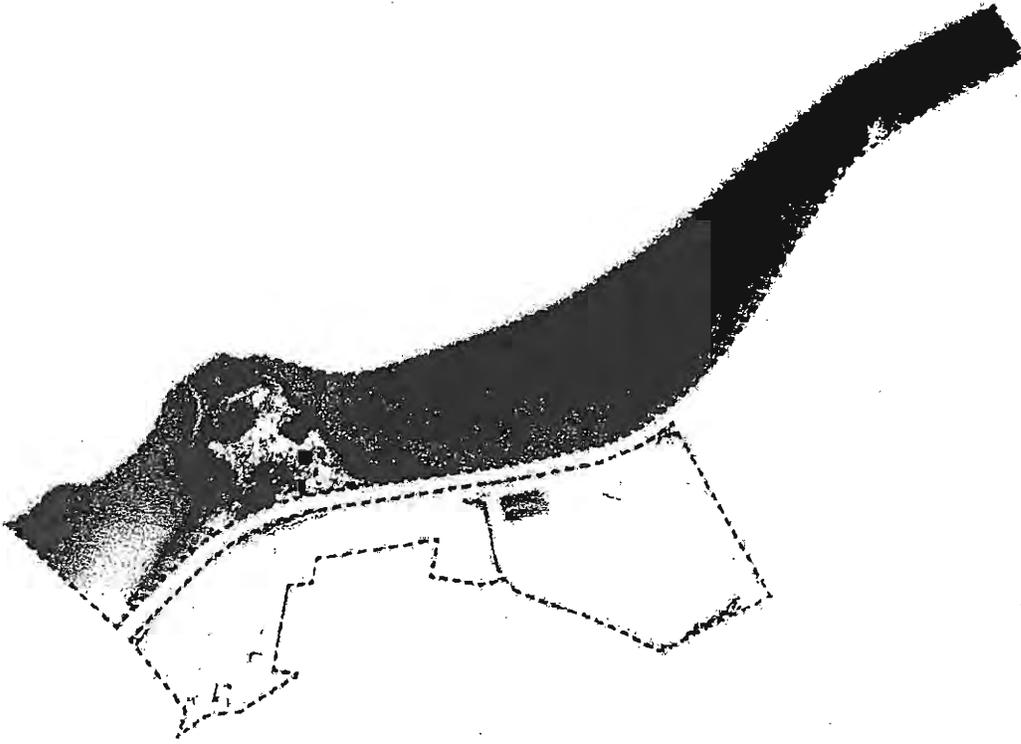


Exhibit C(2)

ORDINANCE NO. 468

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HERCULES APPROVING THE VESTING DEVELOPMENT AGREEMENT FOR THE HERCULES BAYFRONT PROJECT BETWEEN THE CITY OF HERCULES AND HERCULES BAYFRONT, LLC AND THEREBY AMENDING THE ORIGINAL DEVELOPMENT AGREEMENT BETWEEN THE SAME PARTIES

RECITALS

This Ordinance is adopted with regard to the following facts, all of which are hereby found and determined to be true and correct and are incorporated herein:

WHEREAS, state law (Government Code Section 65864 et seq.) allows a city to enter into a development agreement or amend an existing development agreement with any person or entity having a legal or equitable interest in real property for the development of that property; and

WHEREAS, the City of Hercules adopted regulations establishing procedures and requirements for consideration of development agreements pursuant to state law which are set forth in the City's Municipal Code at Sections 10-8.101 – 10.8.702; and

WHEREAS, Hercules Bayfront, LLC is the owner of certain real property located in the City's waterfront area and governed by the Hercules Waterfront District Master Plan (WDMP); and

WHEREAS, on July 22, 2008, the City Council adopted the Hercules Waterfront Initiative (Initiative) which included the original development agreement between Hercules Bayfront, LLC and Hercules; this original development agreement was recorded on September 10, 2008, in the official records of the County of Contra Costa as Instrument No. 0004199831; and

WHEREAS, in 2009 Hercules Bayfront, LLC submitted applications for a general plan amendment (No. 09-02), zoning designation change (No. 09-01), amendments to the WDMP (No. 09-03), Vesting Tentative Map (No. 9290) and a development agreement relating to the Hercules Bayfront Project; and

WHEREAS, on October 11, 2011, at a public hearing, the City Council certified the Hercules Bayfront Project Environmental Impact Report (EIR) that analyzed the potential environmental impacts of the Hercules Bayfront Project as reflected by the above applications; on December 13, 2011, at a public hearing, the City Council approved the applications for a general plan amendment (No. 09-02), zoning designation change (No. 09-01) and amendments to the WDMP (No. 09-03); and on February 28, 2012, at a public hearing, the City Council considered and approved the vesting tentative map (No. 9290) and the Implementing Development Agreement, the latter pursuant to Ordinance No. 467; and

WHEREAS, the purpose of the Vesting Development Agreement is to preserve Hercules Bayfront, LLC's rights vested in the original development agreement and to reflect and incorporate the project approvals above; and

WHEREAS, the term of the Vesting Development Agreement is 15 years, with an automatic 5 year renewal subject to Hercules Bayfront, LLC being in good faith compliance with the Agreement; and

WHEREAS, the Vesting Development Agreement shall only become operative if the Implementing Development Agreement between Hercules Bayfront, LLC and Hercules is for any reason terminated and the Vesting Development Agreement is still in effect; and

WHEREAS, the Vesting Development Agreement for the Hercules Bayfront Project is an amendment to the original development agreement and has been processed consistent with state law and the Hercules Municipal Code; and

WHEREAS, on November 28, 2011, the Planning Commission held a public hearing on the Vesting Development Agreement and recommended approval of the Agreement to the City Council; and

WHEREAS, on February 28, 2012, after due notice was given, the City Council conducted a public hearing to consider the Planning Commission's recommendation and take public testimony on the Vesting Development Agreement; and

WHEREAS, the City Council finds that the Hercules Bayfront EIR adequately analyzed the potential environmental impacts that may result from the Vesting Development Agreement and determined that no additional review under the California Environmental Quality Act (CEQA) is required before approving the Agreement; and

WHEREAS, on February 28, 2012, the City Council determined in accordance with state law and Hercules Municipal Code Sections 10-8.101 – 10.8.702 that the Vesting Development Agreement (1) is consistent with Hercules's General Plan, (2) is compatible with the uses authorized in the WDMP, (3) is in conformity with public convenience, general welfare and good land use practice, and (4) will promote the health, safety and general welfare of Hercules.

ORDINANCE

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF HERCULES DOES ORDAIN AS FOLLOWS:

SECTION 1. The foregoing Recitals are true and correct statements of fact and are incorporated into this Ordinance by this reference.

SECTION 2. Based on substantial evidence in the record before it, consistent with its mandatory duty to protect the interests of the City and in accordance with (1) state law and, in particular, Government Sections 65864 et seq., and (2) Hercules Municipal Code Sections 10-

8.101 - 10-8.702, the City Council hereby exercises its discretion to approve and hereby approves the Vesting Development Agreement.

SECTION 3. Publication and Effective Date.

(a) This Ordinance shall be published in accordance with applicable law, by one or more of the following methods:

(1) Posting the entire Ordinance in at least three (3) public places in the City of Hercules, within fifteen (15) days after its passage and adoption; or

(2) Publishing the entire Ordinance at least once in the West County Times, a newspaper of general circulation published in the County of Contra Costa and circulated in the City of Hercules, within fifteen (15) days after its passage and adopting; or

(3) Publishing a summary of the Ordinance prepared by the City Attorney in the West County Times and posting a certified copy of the entire Ordinance in the office of the City Clerk at least five (5) days prior to the passage and adoption, and a second time within fifteen (15) days after its passage and adoption, along with the names of those City Councilmembers voting for and against the Ordinance.

(b) This Ordinance shall go into effect thirty (30) days after the date of its passage and adoption.

(c) After this Ordinance becomes effective, consistent with Municipal Code Section 10-8.303, the Mayor shall execute the Vesting Development Agreement and as required by Municipal Code Section 10-8.501 within ten days after the Agreement has been fully executed, the City Clerk shall cause the Agreement to be recorded with the County Recorder.

THE FOREGOING ORDINANCE was first read at a regular meeting of the Hercules City Council on the 28th day of February, 2012 and was passed and adopted at a regular meeting of the Hercules City Council held on the 13th day of March 2012, by the following vote:

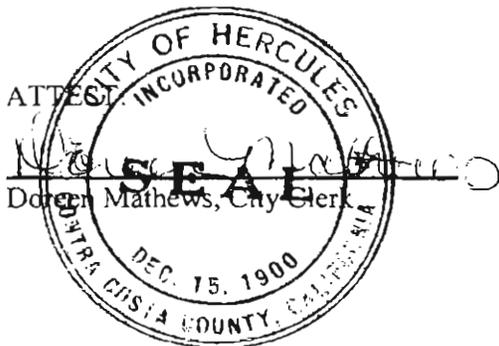
AYES: Delgado, de Vera, Romero

NOES: None

ABSENT: None

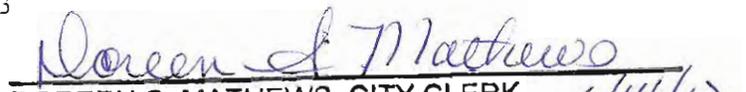
END OF DOCUMENT


Dan Romero, Mayor



ATTEST: 
Doreen Mathews, City Clerk

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT ON FILE IN THE CITY CLERK'S OFFICE, CITY OF HERCULES, CONTRA COSTA COUNTY, STATE OF CALIFORNIA


DOREEN S. MATHEWS, CITY CLERK 6/14/12