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IMPLEMENTING DEVELOPMENT AGREEMENT
FOR THE
HERCULES BAYFRONT PROJECT

by and between the

CITY OF HERCULES,

and

HERCULES BAYFRONT, LLC

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IMPLEMENTING DEVELOPMENT AGREEMENT

This IMPLEMENTING DEVELOPMENT AGREEMENT is entered into as of March 14, 2012, by and between CITY OF HERCULES, a municipal corporation of the State of California and HERCULES BAYFRONT, LLC, a Delaware limited liability company.

RECITALS

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

B. The purpose of this Agreement is to set forth the Parties rights and obligations concerning the entitlement and improvement of Owner's private development project on certain real property found within the Project Site. The Project Site legal description is provided as EXHIBIT A(1) and the Project Site Map is provided as EXHIBIT B(1). Owner's development of its private project on the Project Site pursuant to this Agreement and the fulfillment generally of this Agreement are in the vital and best interests of City and the health, safety, and welfare of City's residents, and in accordance with the public purposes and provisions of applicable federal, state and local laws and requirements.

C. Owner is a limited liability company, organized and existing under the laws of the State of Delaware, in good standing thereunder, and qualified to conduct business in California. Owner has a legal and equitable interest in the certain property, which consists of approximately 103.9 acres within the City of Hercules, Contra Costa County, State of California, and which is more particularly described in EXHIBIT A(1).

D. City is a general law city and municipal corporation of the State of California and is duly organized and existing and authorized to exercise powers under the laws of the State of California and City Municipal Code.

E. City has enacted the Development Agreement Ordinance establishing the procedures and requirements for the consideration of development agreements pursuant to California Government Code Section 65864 et seq. This Agreement is a statutory development agreement and includes conditions and requirements for the implementation of the Owner's Project.

F. On July 22, 2008, the City Council of City adopted the Initiative, which, among other things, adopted the Initiative Development Agreement.

G. On September 19, 2011, the City Council certified the Hercules Bayfront Project EIR and thereafter approved certain Project Approvals, including without limitation General Plan Amendment No. 09-02, Zoning Designation Change No. 09-01, and amendments to the Hercules Waterfront District Master Plan referred to as "Zoning Text Amendment" (No. 09-03). Owner intends to develop the Project on the Project Site consistent with the General Plan (as amended by General Plan Amendment No. 09-02), and the Zoning Code (as amended by Zoning Designation Change 09-01 and by Zoning Designation Change 09-03).

H. Following the issuance of the Project Approvals, the City Council approved the Vesting DA. The Vesting DA was recorded on 6-15-12 in the Official Records of the County of Contra Costa as Instrument No. 2012-0142851-00

I. City intends to develop a separate and independent project – the ITC Project – on certain property within the Project Site. A draft Environmental Impact Report/Environmental Impact Statement was prepared for the ITC Project and on August 9, 2011 the City Council certified the Final EIR.

J. In order to build the ITC Project, City must acquire certain property within the Project Site from Owner and the conveyance of that land by Owner to City is one of the public benefits to be received by City under this Agreement. City and Owner have entered, or will enter, into the Landside PSA to facilitate City's ITC Project. If the Landside PSA is terminated or if escrow does not close on the Landside PSA, certain provisions of this Agreement will be modified, as set forth herein below. City also desires to acquire and Owner desires to transfer certain other property reflected in the Waterside PSA. The legal description of property to be owned by Owner assuming close of escrow on the Landside PSA and the Waterside PSA is attached hereto as EXHIBIT A(2). A depiction of the property to be owned by Owner assuming close of escrow on the Landside PSA and the Waterside PSA is attached hereto as EXHIBIT B(2).

K. City anticipates that development by Owner of the Project on the Project Site will remove blighting conditions, result in the development of residential, retail hotel and office land uses, and provide revenues and jobs to the community and provide a catalyst for City's economic development addressing problem properties impaired by physical and economic conditions that have impeded private sector investment.

L. Separate from and in addition to benefits from the conveyance of land by Owner to City for the ITC Project, development of the Project in a comprehensive and orderly fashion as contemplated in this Agreement will result in substantial additional public benefits to City, its residents and surrounding communities. Other public benefits created by the Project include new housing and jobs, affordable housing, and economic development. In exchange for these benefits to City, Owner desires to receive the assurance that it may proceed with the Project in accordance with the Governing Ordinances and the Project Approvals, subject to the terms and conditions contained in this Agreement.

M. The Project and this Agreement have been analyzed and reviewed by City under all applicable legal requirements, including land use standards and policies. Implementation of the Project will require City approval of Subsequent Project Approvals, including but not limited to tentative and final tract maps, subdivision maps for individual lots, design review for architecture and landscaping, building and grading permits, certificates of occupancy, and ministerial actions. Execution of this Agreement by the City does not constitute an approval of those Subsequent Project Approvals.

N. This Agreement is intended to grant Owner a fully vested right to develop the Project as provided herein, and to provide City with certain binding assurances with respect to the nature and scope of such development. This Agreement also establishes the conditions

governing City's issuance of Subsequent Project Approvals, and the standards within which the obligations of Owner for certain improvements will be met, and otherwise to provide the criteria for the development of the Project.

O. For these reasons, City has determined that the Project is a development for which a statutory development agreement pursuant to Government Code Section 65864 et seq. is appropriate in order to achieve the goals and objectives of 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 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 City.

P. It is the intent of the Parties that this Agreement will generally define the Parties rights and obligations with regard to the development of the Project Site and the Vesting DA will only apply to the Project Site (i) in the event of a Successful Third Party Legal Challenge, or (ii) if this Agreement is terminated by either Party, for any reason.

Q. City desires to encourage development of the Project, but in doing so does not commit to using any redevelopment or general funds or discretionary funds of City including but not limited to its general fund on the Project. City will use its best efforts to fund from outside funding sources the ITC Project and its related infrastructure, which includes the City Public Improvements as set forth in EXHIBIT G, and is pursuing grant funding and other funding for those improvements and the ITC Project. By entering into this Agreement, City is committing to spend identified outside funding grants, if obtained, on the construction of the City Public Infrastructure and the ITC Project. The Parties agree and acknowledge that the City's ability to complete some or all of the ITC Project, its related infrastructure, and/or the City Public Improvements is contingent on City receiving or obtaining adequate outside funding.

R. On November 28, 2011, 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, and uses and programs specified in the Hercules General 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 City or the region surrounding 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.

S. On February 28, 2012, the City Council held a duly noticed public hearing on this Agreement and introduced the Enacting Ordinance. Thereafter, on March 13, 2012, the City Council adopted the Enacting Ordinance. According to law, the Enacting Ordinance took effect thirty (30) days after adoption.

AGREEMENT:

In consideration of the foregoing Recitals which are incorporated herein and made a part hereof, and the mutual covenants contained in this Agreement, City and Owner agree as follows:

1. DEFINITIONS

In addition to the terms defined elsewhere in this Agreement, the following terms shall have the meaning set forth below:

“Affiliate” means and refers to, with respect to Owner, (i) 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 (ii) any entity in which an entity described in clause (i) has a controlling interest; (iii) 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 (iv) 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.

“Affordable Housing Program” means and refers to the plan for the development and funding of affordable housing units attendant to the Project, as forth in EXHIBIT E attached hereto and incorporated herein.

“Agreement” means and refers to this Implementing Development Agreement by and between City and Owner.

“Agreement Amendment” means and refers to an alteration to the terms of this Agreement through the adoption of an amendment in accordance with the requirements of Government Code section 65868.

“CEQA” means and refers to the California Environmental Quality Act, Public Resources Code Section 21000 *et seq.*, and its implementing Guidelines found in Title 14, Section 15000 *et seq.* of the California Code of Regulations.

“City” means and refers to the City of Hercules, a municipal corporation of the State of California.

“City Attorney” means and refers to the City Attorney of the City of Hercules.

“City Clerk” means and refers to the City Clerk of the City of Hercules.

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

“City Manager” means and refers to the City Manager of the City of Hercules.

“City Phase I Improvements” means and refers to those improvements to be constructed by City during its initial phase of development of the ITC Project, which improvements are

specified in Phasing Plan (EXHIBIT F) and further defined in the List of City Public Improvements (EXHIBIT G).

“City Public Improvements” means and refers to the public improvements identified in the EXHIBIT G which are City’s obligation to fund and construct in accordance with the Phasing Plan, subject to Section 4.12(b). These improvements include the improvements for the ITC Project.

“Conditions of Approval” means and refers to the conditions of approval attached to the approval of the Project and set forth in EXHIBIT L, together with those conditions that are in the future lawfully imposed in accordance with the terms and limitations set forth in this Agreement.

“Coordinated Project Management Plan” means and refers to the Coordinated Project Management Plan attached as EXHIBIT M hereto.

“Development Agreement Ordinance” means and refers to Hercules Municipal Code, Title 10, Section 8, commencing with Section 10-8.101.

“Effective Date” means and refers to the effective date of this Agreement which shall be the thirtieth (30th) day following the adoption of the Enacting Ordinance by the City Council, which date shall be inserted into the preamble to this Agreement.

“Enacting Ordinance” means and refers to the Ordinance No. 467, adopted by the City Council on March 13, 2012, approving this Agreement. This Agreement shall constitute a part of the Enacting Ordinance as if incorporated therein in full.

“Event of Default” means and refers to the failure or unreasonable delay by any Party to this Agreement to perform any term, provision or condition of this Agreement as set forth in Section 14 of this Agreement.

“Exactions” means and refers to all exactions, fees, in lieu payment, other monetary payments, conditions of approval, mitigation measures from the Hercules Bayfront Project EIR, requirements for acquisition, dedication, reservation or maintenance of land, obligations to construction site or off site public or private improvements called for in connection with the development of the Project under this Agreement or otherwise, that as of the Effective Date are controlled by and may be imposed by City as a condition of developing the Project. All of the monetary exactions for the Project are identified on EXHIBIT I. All remaining Exactions for the Project are identified as Conditions of Approval in EXHIBIT L. Nothing in this Agreement prevents the City from increasing administrative fees related to the processing of Subsequent Project Approvals. Increases in City administrative processing fees shall be applicable to the Project to the extent such increases are based solely on City cost-recovery for administrative time and overhead associated with processing Owner applications so long as the fees are imposed uniformly at the same rate City-wide and are in no event more than two percent (2%) per year greater than the fees existing as of the Effective Date.

“Excused Public Benefit Fee Amount” means and refers to an amount equal to one hundred fifty percent (150%) on the Public Benefit Fee Advance Amount.

“Existing Project Approvals” means and refers to the approvals and entitlements for the Project granted as of the Effective Date, including but not limited to, the CEQA Findings and Statement of Overriding Considerations and Mitigation Monitoring and Reporting Program relating to the Hercules Bayfront Project EIR, General Plan Amendment (No. 09-02), Zoning Designation Change (No. 09-01), the Initiative, Amendments to the Hercules Waterfront District Master Plan referred to as “Zoning Text Amendment” (No. 09-03), Vesting Tentative Map (No. 9290), and the Vesting DA.

“Governing Ordinances” means and refers to the ordinances, resolutions, official policies, rules and regulations of City governing the permitted uses of land, intensity of development, Exactions charged in connection with the development of land, 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 Initiative, Hercules General Plan, Zoning Ordinance, the Enacting Ordinance, Subdivision Ordinance, Municipal Code, Resolution No. 11-132 and building/construction codes.

“Hercules Bayfront Project EIR” means and refers to Environmental Impact Report No. 2009112058, prepared by City and Certified by City Council on October 11, 2011 by City Council Resolution 11-122.

“Initiative” means and refers to the Waterfront Now Initiative, adopted by the City Council on July 22, 2008, which among other things adopted the Initiative Development Agreement.

“Initiative Development Agreement” means and refers to that certain Development Agreement adopted by City through the Initiative, and recorded on September 8, 2010 in the Official Records of the County of Contra Costa as Instrument No. 004199831. The Initiative Development Agreement is attached as EXHIBIT C(1).

“Initial Entitlement” means and refers to Owner’s land use entitlement for the Project Site, as measured in dwelling units, hotel rooms, or square feet of office, retail, commercial and/or flex development, as the case may be, existing as of the Effective Date.

“Initial Vested Fee Period” means and refers to the longer of (i) five (5) years after the Effective Date and (ii) three (3) years after City’s completion of the City Phase I Improvements; provided, however, that if City and Owner do not close escrow on all or any portion of the property identified in the Landside PSA, or if the Landside PSA is terminated, then the “Initial Vested Fee Period” shall mean and refer to five (5) years after the Effective Date; provided further that, notwithstanding the foregoing, if the City does not initiate construction on the John Muir Parkway portion of the City Public Improvements by July 1, 2014, then the Initial Vesting Period shall expire no earlier than June 30, 2020 (the Parties agreeing that if the Initial Vesting Period would otherwise expire after June 30, 2020, then the Initial Vesting Period shall expire on such later date).

“TTC Project” means and refers to the Intermodal Transit Center Project and related improvements to support train, bus, and ferry service, to be developed as a project separate and

independent from the Project on portions of the Project Site that Owner anticipates conveying to City and City anticipates acquiring from Owner.

“Landside PSA” means and refers to that certain “Purchase and Sale Agreement and Escrow Instructions for Public Use Land, ITC Right of Way Expansion and ITC Station and Plaza,” attached as EXHIBIT J(1).

“Laws” means and refers to the constitutions and laws of the State of California and the United States, the laws of any political subdivision within the State of California with jurisdiction over or relating to the Project or the Project Site, any codes, statutes, ordinances, resolutions, regulations, official policies, or rules of any of them, effective within City and any court decision, state or federal, thereunder.

“Mortgagee” means and refers to the holder, including any affiliate of Owner, of any mortgage, the beneficiary of any deed of trust, or the holder or beneficiary of any other security device or instrument, in the Project Site or any portion thereof, including the purchaser of all or any portion of the Project Site at a judicial or non-judicial foreclosure sale and any person or entity who acquires title to all or any part of the Project Site by deed-in-lieu of foreclosure, and any of their respective heirs, successors, and assigns.

“Net Developable Land” means and refers to the portions of the Project Site, excluding those portions of the Project Site conveyed to the City under the Landside PSA and/or the Waterside PSA that are entitled for construction of buildings and associated improvements, including but not limited to, parking, landscaping, and setbacks. “Net Developable Land” does not include lands used for or reserved for use as public or private rights of way.

“New Law” means and refers to changes in or adoptions of new Laws, regulations, plans or policies, to the extent that such changes are specifically mandated and required by changes in state or federal laws or regulations.

“Notice” means and refers to any notice or communication required pursuant to this Agreement by any Party hereto.

“Notice of Default” means and refers to a Notice from one Party advising another Party that the Party receiving the Notice has, in the Party giving the Notice’s opinion, failed or unreasonably delayed in the performance of an obligation under this Agreement.

“Owner” means and refers to Hercules Bayfront, LLC a Delaware limited liability company.

“Owner’s Additional Work Exaction Credits” means and refers to the fair value of any funding or work provided by Owner to City under Section 3.6, plus reasonable overhead, profit, and interest thereon.

“Owner’s Exaction Credits” means and refers to the sum of Owner’s Landside PSA Exaction Credits, plus Owner’s Waterside PSA Exaction Credits (if any), plus Owner’s Reimbursement Exaction Credits, plus Owner’s Additional Work Exaction Credits (if any).

“Owner’s Laneside PSA Exaction Credits” means and refers to the five hundred twenty four thousand five hundred twenty dollars (\$524,520) in credits toward City-imposed fees and exactions that City will provide to Owner in partial fair value compensation to Owner for the provision of right of way land, upon close of escrow on the Laneside PSA. If the Parties fail to close escrow on the right of way land described in the Laneside PSA or the Laneside PSA is terminated prior to the transfer of any land thereunder, there shall be no Owner’s Laneside PSA Exaction Credits.

“Owner’s Public Benefit Fee Advance Exaction Credits” means and refers to an amount equal to the Public Benefit Fee Advance Amount.

“Owner’s Reimbursement Exaction Credits” means and refers to the three million two hundred sixty five thousand six hundred dollars (\$3,265,600) in credits toward City-imposed fees and exactions that City will provide to Owner as fair value reimbursement for prior expenses incurred by Owner for the benefit of City.

“Owner’s Reimbursement Exaction Credits Buyback Amount” means and refers to one million eight hundred ninety thousand six hundred dollars (\$1,890,600) of the Owner’s Reimbursement Exaction Credits.

“Owner’s Waterside PSA Exaction Credits” means and refers to the four hundred ninety three thousand two hundred dollars (\$493,200) in credits toward City-imposed fees and exactions that City will provide to Owner in partial fair value compensation to Owner for the provision of land, upon close of escrow on the Waterside PSA. If the Parties fail to close escrow on the land described in the Waterside PSA for which credits are paid as compensation, or the Waterside PSA is terminated prior to the transfer of any land thereunder, there shall be no Owner’s Waterside PSA Exaction Credits.

“Parties” means City and Owner collectively.

“Party” means and refers to City or Owner, as the context requires.

“Phase” means and refers to a defined phase of the development set forth in the Phasing Plan.

“Phasing Plan” means and refers to the Phasing Plan attached as EXHIBIT F hereto.

“Prevailing Party” means and refers to 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 to be the prevailing party for purposes of awarding attorneys’ fees.

“Project” means and refers to the improvements to be constructed on the Project Site for the development of Owner’s private project in any manner consistent with the General Plan and Zoning Code as they exist on the Effective Date.

“Project Approvals” means and refers to all City approvals, entitlements and permits required for the development of the Project, including but not limited to the Existing Project Approvals and the 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.

“Project Description and Scope of Development” means and refers to the description and scope of development for the implementation of Owner’s private project, as set forth in EXHIBIT D.

“Project Site” means and refers to that certain real property described in EXHIBIT A(1) to this Agreement.

“Project Site Map” means and refers to the map included as EXHIBIT B(1) to this Agreement.

“Pro-Rata Basis” means and refers to, in connection with a sale, transfer, or assignment of all or any portion of the Project Site to a buyer, transferee, or assignee, that portion of the economic security which (i) is reasonably related to the public improvement costs which are Owner’s obligation under this Agreement and which are associated with the portion of the Project Site sold, transferred, or assigned; (ii) is to be in lieu of and substituted for that portion of the economic security posted, pledged, or otherwise provided by Owner for benefit of City; and (iii) Owner has negotiated with the transferee to assume in writing (the “Substituted Security”). The amount and nature of the Substituted Security must be reasonably satisfactory to the City Manager, provided that if any of, or a combination of any of, the following is/are provided such form of Substituted Security shall be deemed acceptable to City: (A) an irrevocable standby letter of credit from an FDIC insured banking institution, (B) an irrevocable corporate surety bond issued by a licensed California surety, and/or (C) cash or cash equivalents such as obligations of the United States. The amount of the Substituted Security must reasonably relate to the projected cost to install and/or complete the public improvement(s) which is(are) Owner’s obligation under this Agreement, on the portion of the Project Site sold, transferred, or assigned, the obligation of which to install or complete is transferred to the buyer, transferee, or assignee.

“Public Benefit Fee” means and refers to the fees charged by City to Owner in the amounts specified under the line item “NEW PUBLIC BENEFIT FEE” on the Schedule of Exactions.

“Public Benefit Fee Advance Amount” means and refers to the amount that shall not exceed two million dollars (\$2,000,000) which Owner advances to City in accordance with Section 3 of this Agreement.

“Public Financing Plan” means and refers to that certain plan attached hereto as EXHIBIT H that sets forth the program agreed to by City and Owner for the implementation of one or more assessment districts, community facilities districts, and other measures for funding the public improvements required for the Project, or a specific Phase or portion thereof.

“Subsequent Project Approvals” means and refers to project approvals that occur after the Effective Date of this Agreement that are consistent with the General Plan and Zoning Code in existence as of the Effective Date and are necessary to implement the Project, including but not limited to tentative and final tract maps, subdivision maps for individual lots, design review for architecture and landscaping, building and grading permits, certificates of occupancy, and ministerial actions.

“Substituted Security” shall have the meaning ascribed in the definition of “Pro-Rata Basis” set forth hereinabove.

“Successful Third Party Legal Challenge” means and refers to a Third Party Legal Challenge that results in a temporary, preliminary, or permanent order, ruling, or judgment, or voter initiated legislative action that results in the inability to enforce all or any portion of this Agreement.

“Streamlined Approval Process” means and refers to the conditions, time frames, requirements, and obligations set forth in EXHIBIT K.

“Term” means and refers to the Term of this Agreement as provided in Section 2.2.

“Third Party Legal Challenge” means and refers to a referendum or third-party action or legal action that is instituted which might affect or challenge the validity or enforceability of the Enacting Ordinance or this Agreement including its Exhibits or any provision thereof, or any document implementing the provisions contained in this Agreement including its Exhibits, or the Existing Project Approvals, or the Subsequent Project Approvals.

“Transferee” means and refers to any entity or individual to which Owner and/or its successors and assigns sells, assigns or transfers this Agreement or any or all of the rights and/or obligations provided hereunder.

“Vested Exactions” means and refers to the following fee categories and rates, as set forth on the Schedule of Exactions: Parks and Recreation Facilities Fee, New Public Benefit Fee, General Public Facilities Fee, and Traffic Facilities (2) Fee.

“Vesting DA” means and refer to the Vesting Development Agreement on the Project Site approved by the City Council by Ordinance No. 468 on March 13, 2012. The Vesting DA is attached EXHIBIT C(2), and serves to amend and restate the Initiative Development Agreement in its entirety.

“Vested Fee Period” means the Initial Vested Fee Period plus two (2) years.

“Waterside PSA” means and refers to that certain “Purchase & Sale Agreement and Escrow Instructions For Hercules Point, Water Parcel North and Water Parcel South,” attached as EXHIBIT J(2).

“Zoning Code” means and refers to the City of Hercules Zoning Code, as amended by Zoning Designation Change No. 09-01, and the Hercules Waterfront District Master Plan, as amended by Zoning Text Amendment No. 09-03.

2. EFFECTIVE DATE; TERM

2.1 Effective Date; Recordation. This Agreement shall be dated and the obligations of City and Owner hereunder shall be effective as of the Effective Date. Not later than ten (10) days after the Enacting Ordinance takes effect, City 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 Term; Extension of Project Approvals for Term. The Term of this Agreement shall commence on the Effective Date and shall extend twenty (20) years thereafter unless extended as hereinafter provided, or as otherwise mutually agreed in writing. All Project Approvals, including but not limited to tentative maps pursuant to Government Code Section 66452.6, shall automatically be extended for the Term.

2.3 Extension of Term. The Term shall extend for an additional five (5) years if Owner has improved with buildings, parking, landscape or other improvements necessary to the Project, no less than fifty percent (50%) of the Net Developable Land. The Term shall extend for a second additional five (5) years following the expiration of the first extension if Owner has improved with buildings, parking, landscape or other improvements necessary to the Project, no less than sixty five percent (65%) of the Net Developable Land. At the time of its annual review under Section 8 of this Agreement for the year prior to the expiration of the initial term, the City Council will make the determination whether Owner has met this criterion for extensions.

2.4 Challenge to Agreement and Project Approvals. If there is a Successful Third Party Legal Challenge to this Agreement, the Vesting DA shall continue to apply to the Project Site.

3. PUBLIC BENEFIT FEE AND REIMBURSEMENTS

3.1 Public Benefit Fee. In addition to the other substantial public benefits provided by Owner to City under this Agreement, Owner shall pay to City the Public Benefit Fee at the time of issuance of certificates of occupancy for individual structures. Notwithstanding the foregoing, Owner shall not be required to pay the Public Benefit Fee to the extent addition of the Public Benefit Fee to the fees otherwise payable by Owner to the City under this Agreement create a greater fee burden on Owner than would be imposed on similar development in the City. For example, if (i) the total fees, including the Public Benefit Fee, payable by Owner under this Agreement for the development of a unit of multi-family development total five thousand seven hundred ninety six dollars (\$5,796), of which two thousand three hundred fifty dollars (\$2,350) is the Public Benefit Fee, and (ii) the total fees payable for a unit of multi-family development elsewhere in the City total five thousand dollars (\$5,000), then (iii) Owner shall be required to pay a Public Benefit Fee of one thousand five hundred fifty four (\$1,554) per multi family unit, so that Owner's total fee burden is five thousand dollars (\$5,000) per multi-family unit. The Public Benefit Fee shall be expended by City on the planning and development of the City Public Improvements, as set forth in Exhibit G.

3.2 Public Benefit Fee Advances.

(a) Upon City's request Owner shall advance to City the Public Benefit Fee Advance Amount, so long as all of the following conditions and requirements are satisfied.

3.2.a.1 All City Phase I Improvements must be fully completed and operational.

3.2.a.2 Owner must have refinanced its debt obligations for the Project and the Project Site such that all debt obligations of Owner with regard to the Project and the Project Site existing as of the Effective Date have been fully satisfied and/or replaced with new debt obligations.

3.2.a.3 The Public Benefit Fee Advance Amount must be restricted for use on physical improvements that have a demonstrated benefit to Owner's Project as well as the ITC Project and the City Public Improvements.

3.2.a.4 The Public Benefit Fee Advance Amount must be used as "local match" funding that creates access to matching funds from a third party agency.

3.2.a.5 Owner must have a demonstrated financial ability to make the Public Benefit Fee Advance Amount available to City.

(b) If it is necessary that Owner build portions City Public Improvements in order to facilitate Owner's development of the Project, Owner may request that City enter into an agreement with Owner under which (i) the fair market value of Owner's work on the City Public Infrastructure shall be credited against Owner's future Public Benefit Fee obligations to City, and (ii) City shall provide Owner, at no cost to Owner, with all access rights (by way of right of entry, or otherwise) necessary to complete Owner's work on said portion(s) of the City Public Improvements. This paragraph 3.2(b) contains all of the material provisions of said agreement, and all remaining terms shall be negotiated in good faith. City's approval of said agreement shall not be unreasonably withheld, delayed, conditioned, or denied.

3.3 Public Benefit Fee Advance Dispute Resolution. If City and Owner disagree as to whether Owner is required by Section 3.2 to advance to City the Public Benefit Fee Advance Amount, the matter shall be submitted to an expedited arbitration process in accordance with Section 14.2. If the arbitrator determines that Owner is required to advance the Public Benefit Fee Advance Amount, then notwithstanding any other provision of this Agreement, the sole and exclusive remedies available to the City shall be, at Owner's election in its sole and absolute discretion, either (i) Owner shall make the Public Benefit Fee Advance Amount available to City, or (ii) Owner shall forfeit credits in an amount equal to the lesser of (A) the requested Public Benefit Fee Advance Amount or (B) seven hundred fifty thousand dollars (\$750,000) in credits; said forfeiture of credits shall be from any or all of the following categories of credits (in the Owner's sole and absolute discretion): pre-existing Owner's Public Benefit Fee Advance Exaction Credits, Owner's Landside PSA Exaction Credits, Owner's Waterside PSA Exaction Credits, and/or Owner's Reimbursement Exaction Credits. If, and only if, Owner fails to provide one of those two remedies specified in the preceding sentence, City may proceed with the breach and termination procedures set forth in Section 14.1.

3.4 Reduction in Public Benefit Fees Upon Payment of Advance. Upon Owner's payment of a Public Benefit Fee Advance Amount to City, Owner shall receive credits against future Public Benefit Fees in the amount of the Excused Public Benefit Fee Amount. Owner shall be entitled to expend said Public Benefit Fee credits until exhausted before re-commencing any cash payment of Public Benefit Fees.

3.5 Reimbursement of Development Expenses Related to ITC Project. The City has been presented with evidence demonstrating and documenting substantial expenditures incurred by Owner for the benefit of City's development of the ITC Project. Based on that evidence, the City has found and determined that reimbursement for expenses incurred by Owner in an amount equal to the sum of Owner's Reimbursement Exaction Credits is necessary, appropriate, and in the best interest of advancing the Project and the ITC Project. Owner's Reimbursement Exaction Credits shall be provided by City to Owner on the Effective Date.

3.6 Additional Advances Upon Mutual Agreement. At any time during the term of this Agreement, the City may request that Owner advance funding and/or make available human resources and/or advance construction of improvements that are the responsibility of the City and/or otherwise devote Owner's resources to the advancement of City objectives. Owner, in its sole and absolute discretion, may for any reason or no reason choose to decline City's request. If, however, Owner accepts City's request, Owner shall at a minimum receive Owner's Additional Work Exaction Credits in an amount equal to the fair value of Owner's work or funding, plus reasonable overhead, profit, and interest thereon.

4. GENERAL DEVELOPMENT OF THE PROJECT

4.1 Vested Right to Develop the Project. During the Term, the terms and conditions of development applicable to the Project Site, including but not limited to permitted uses of the Project Site, fees, exactions, and conditions applicable to the Project Site, the density and intensity of use, maximum height and size of proposed buildings and provisions for the reservation and dedication of land for public purposes shall be those, and only those, set forth in this Agreement and the Governing Ordinances. City's right to control development and use of the Project Site is subject to the provisions of this Agreement, the Project Approvals, and the Governing Ordinances. Except as otherwise specified in this Agreement, the Project Approvals and Governing Ordinances shall control the overall design, development and construction of the Project and the issuance of Subsequent Project Approvals.

4.2 Subsequent Changes In Land Use Regulations. Given Owner's vesting of its right to development of the Project Site in accordance with this Agreement, the Project Approvals, and the Governing Ordinances, any General Plan amendment or zone changes 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. By this paragraph City does not represent that it will accept, process or approve any General Plan Amendment or zone changes; provided, however, that City shall, subject to and consistent with its police power authority, accept, process and approve all regulatory actions that are consistent with this Agreement in order to effectuate the vested rights and benefits to Owner contained herein. Nothing in this Agreement 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. This

Agreement does not change or diminish Owner's or voter's rights under the Initiative including without limitation Sections 13, 14, 15 and 16 of the Initiative.

4.3 Timing of Development. Owner shall have the right to develop the Project in compliance with this Agreement, the Project Approvals, the Governing Ordinances and the Phasing Plan and Protocol set forth in EXHIBIT F. The Parties further acknowledge that Owner cannot at this time predict when or in what order a development phase of the Project will be developed unless otherwise specified in this Agreement. Owner has developed the Phasing Plan to generally describe anticipated phasing of development; provided, however, that, as specified in EXHIBIT F, Owner shall be permitted to alter or vary the Phasing to accommodate market conditions and demands, construction schedules, funding availability, and other development factors. 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.

4.4 Phasing Plan. Subject to Section 4.3, the Parties agree to observe and abide by the Phasing Plan and the protocols, procedures and requirements contained therein.

4.5 Application for Subsequent Project Approvals. 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. City 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; provided, however, that nothing in this Agreement shall prevent the City from imposing upon Owner laws, rules, or regulations or conditions on Subsequent Project Approvals that are required by state, federal, or regional authorities to be imposed by City on Owner.

(a) Issuance of Subsequent Project Approvals. Owner shall timely submit to City 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. Upon submission by Owner of an application, City shall promptly commence and diligently complete all steps necessary to review, process, and grant the requested Subsequent Project Approvals, to the extent that they are consistent with the Existing Project Approvals, 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, imposition of development impact fees, location of public improvements, location of public utilities, 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. Unless otherwise required or permitted pursuant to this Agreement, 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 City; provided, however, that in the case of the issuance of a certificate of occupancy (or temporary certificate of occupancy) authorizing only the partial occupancy of a building, only those fees and charges due and payable for the portion of the building to be occupied must be paid prior to the issuance of said certificate.

(b) Environmental Review for Subsequent Project Approvals. The Hercules Bayfront Project EIR was certified in connection with the approval of this Agreement and the Existing Project Approvals and provides appropriate mitigation measures (all of which measures, together with other conditions, are included in the Conditions of Approval). City shall utilize the Hercules Bayfront EIR to the full extent allowed by CEQA in processing Subsequent Project Approvals. City may prepare a supplemental or subsequent EIR only if City is required to do so pursuant to either: (a) a judgment in a Third Party Legal Challenge or (b) the requirements of Public Resources Code Section 21166 and Title 14, Section 15162 of the California Code of Regulations, as they may be amended from time to time. In connection with such future environmental review, City acknowledges that due to the vested rights conferred under this Agreement, City shall not impose additional mitigation measures that are in conflict with the Conditions of Approval, unless Owner proposes major revisions to General Plan, Zoning Code, and/or Vesting Tentative Map No. 9290 (in which case the City may impose additional mitigation measures to the extent necessary to offset the additional increment of impact caused by such change, when compared to the amount of impact forecasted to occur on account of the development assumed in the Hercules Bayfront Project EIR). If the City's inability to impose additional mitigation measures is challenged in a Third Party Legal Challenge, Owner shall comply with the procedures for the defense of such a challenge, as set forth in Section 14.3. If such a Third Party Legal Challenge is successful, Owner shall comply with the final judgment or elect to abandon the Project changes prompting the additional mitigation and shall pay 100% of the City's costs of compliance.

4.6 Streamlined Approval Process. The Parties agree to observe and abide by the Streamlined Approval Process (EXHIBIT K), and the protocols, procedures and requirements contained therein.

4.7 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. At the request of Owner, City 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 City's discretion, to serve as a co-applicant with Owner for permits and approvals required from other public agencies.

4.8 Permitted Uses. The uses permitted on the Project Site are those identified in the Existing Project Approvals and in the Project Description and Scope of Development.

4.9 Maintenance of Initiative Rights and Obligations. Except as specifically modified by the Existing Project Approvals, the rights and obligations of the Parties under the Initiative,

including without limitation sections 13, 14, 15, and 16 of the Initiative, are neither modified nor diminished by this Agreement.

4.10 Exactions; Public Improvements; Use of Exaction Credits.

(a) Schedule of Exactions. Owner shall pay the monetary Exactions set forth in the Schedule of Exactions attached hereto as EXHIBIT I. Owner shall pay such monetary Exactions prior to issuance of building permits for a particular Phase or sub-Phase of the Project except to the extent Owner is permitted by law to defer such payment(s) to prior to issuance of a certificate of occupancy.

(b) No Other Exactions. So long as Owner develops the Project in accordance with the Project Description and Scope of Development and this Agreement, and subject to the partial waiver of vested rights set forth in Section 4.10(c), the only Exactions applicable to the Project and/or the Project Site shall be those set forth in the Schedule of Exactions and the Conditions of Approval, which set forth in full the Exactions applicable to the Project under the Governing Ordinances and Existing Project Approvals as of the Effective Date.

(c) Partial Waiver of Vested Rights. Notwithstanding Owner's vested right to pay the Vested Exactions in the amounts specified in Schedule of Exactions and in City Council Resolution No. 11-132, Owner agrees as follows:

4.10.c.1 Owner shall be entitled to pay the Vested Exactions at the rate set forth in the Schedule of Exactions during the Initial Vested Fee Period.

4.10.c.2 For fees due and payable during the first year following the expiration of the Initial Vested Fee Period, Owner shall pay (i) the amount required by the Schedule of Exactions, plus (ii) one third of the difference between any newly adopted fee rate and the amount required by the Schedule of Exactions.

4.10.c.3 For fees due and payable during the second year following the expiration of the Initial Vested Fee Period, Owner shall pay (i) the amount required by the Schedule of Exactions, plus (ii) two thirds of the difference between any newly adopted fee rate and the amount required by the Schedule of Exactions.

4.10.c.4 For fees due and payable during and after the third year following the expiration of the Initial Vested Fee Period, Owner shall pay, when due and payable, the fully adjusted fee rate for Vested Exactions.

4.10.c.5 Notwithstanding anything to the contrary in this Agreement, during the Term, no increases in the General Plan Update Fee or Art in Public Spaces Fee (or equivalent fee) above the rates shown on the Schedule of Exactions shall be applicable to Owner's development of the Project Site.

4.10.c.6 Notwithstanding anything to the contrary in this Agreement, during the Term, no Exactions other than those set forth on the Schedule of Exactions shall be applicable to Owner's development of the Project Site in a manner consistent with this

Agreement. These exactions specifically include the Public Benefit Fee which shall remain in effect for the life of the project.

(d) Right to Pay Fees at Lower of Vested and Actual Rate. Notwithstanding anything to the contrary in this Agreement, during the Vested Fee Period, Owner has the right to pay the lower of (i) the Vested Exaction rates set forth in Sections 4.10(a) through 4.10(c), and (ii) the then-generally applicable fee rate imposed by City.

(e) Use and Transferability of Owner's Exaction Credits: Owner's Exaction Credits shall not expire. Owner may transfer, through one or multiple separate transactions, Owner's Exactions Credits, or any portion thereof, to one or more third parties for use in satisfaction of fee and exaction obligations imposed by the City in connection with development anywhere in the City. If Owner proposes to sell any portion of Owner's Reimbursement Exaction Credits Buyback Amount to a third party, the following procedures shall apply.

4.10.e.1 Owner shall provide City with thirty (30) days prior written notice of Owner's intent to transfer of any portion of Owner's Reimbursement Exaction Credits Buyback Amount to a third party.

4.10.e.2 During said thirty (30) day period, City may, in its sole and absolute discretion, elect to purchase the portion of Owner's Reimbursement Exaction Credits Buyback Amount that are proposed by Owner for transfer to a third party.

4.10.e.3 If City makes the election authorized by Paragraph 4.10.e.3 the purchase price of the portion of the Owner's Reimbursement Exaction Credits Buyback Amount proposed for transfer shall be (i) fifty percent of the face amount of the portion of the Owner's Reimbursement Exaction Credits Buyback Amount proposed for transfer plus (ii) four percent (4%) per year following the Effective Date multiplied by fifty percent (50%) of the face amount of the portion of the Owner's Reimbursement Exaction Credits Buyback Amount proposed for transfer. For example, if Owner proposes to sell one million dollars (\$1,000,000) of Owner's Reimbursement Exaction Credits Buyback Amount to a third party two (2) years after the Effective Date, City may instead purchase those credits for five hundred forty eight hundred dollars (\$540,800).

4.10.e.4 If City does not make the election authorized by Paragraph 4.10.e.3, Owner may complete the proposed transfer of the portion of the Owner's Reimbursement Exaction Credits Buyback Amount to a third party within one hundred twenty (120) days after the notification provided in Paragraph 4.10.e.1.

4.10.e.5 If Owner complete a transfer of a portion of Owner's Reimbursement Exaction Credits Buyback Amount to a third party, the consideration received by Owner shall be divided among City and Owner as follows: (1) Owner shall receive fifty percent (50%) of the face value of the portion of Owner's Reimbursement Exaction Credits Buyback Amount transferred to a third party plus eight percent (8%) per year following the Effective Date multiplied by fifty percent (50%) of the face amount of the portion of the Owner's Reimbursement Exaction Credits Buyback Amount transferred to the third party plus fifty percent (50%) of any remaining amount received from the third party; and (2) City shall receive

any remaining portion of the amount received by the third party after deduction of the amounts specified in sub-section (1), above. For example, if Owner sells two million dollars (\$2,000,000) of Owner's Reimbursement Exaction Credits Buyback Amount to a third party for one million six hundred thousand dollars (\$1,600,000) one (1) year after the Effective Date, Owner shall retain one million three hundred forty thousand dollars (\$1,340,000) of the consideration paid by the third party, and City shall receive two hundred sixty thousand dollars (\$260,000) of the consideration paid by the third party.

4.11 Confirmation of Exaction Pre-Payment Rights. Consistent with City Council Resolution No. 11-132, Owner may pre-pay Exactions that City does not collect on behalf of another agency, subject to the following limitations and requirements.

(a) First, the prepayment rate for all Exactions shall be the rate applicable to Owner at the time of prepayment.

(b) Second, Owner shall have no obligation to propose a specific development project prior to prepaying any Exactions that are otherwise pre-payable under this Agreement.

(c) Third, Owner may, in Owner's sole and absolute discretion, expend any or all of Owner's Exaction Credits to prepay Exactions.

(d) Fourth, in addition to the expenditure of Owner's Exaction Credits, Owner may, in Owner's sole and absolute discretion, also prepay Exactions for up to forty percent (40%) of the Initial Entitlement with either (i) cash or equivalent funds, or (ii) Owner's Public Benefit Fee Advance Exaction Credits (if any). Notwithstanding the foregoing, if an advance of a Public Benefit Fee Advance Amount causes Owner to hold Owner's Public Benefit Fee Advance Exaction Credits that if fully expended to prepay Exactions would cause Owner to exceed the forty percent (40%) limitation set forth in the preceding sentence, then Owner may nevertheless fully expend Owner's Public Benefit Fee Advance Exaction Credits to prepay Exactions.

(e) Fifth, Owner shall expend \$200,000 of Owner's Reimbursement Exaction Credits on Exactions applicable to retail, office, or flex space.

(f) Sixth, once Owner elects to prepay Exactions under this Section 4.11, Owner shall have no financial responsibility for any increase in the amount of any Exaction that may occur between the time of prepayment and the time payment of the Exaction would otherwise be due and payable to City.

4.12 Project Improvements.

(a) Owner's Responsibilities. Subject to Section 4.3, and except for the City Public Improvements, Owner shall, at Owner's expense, design, construct, install, or repair, as appropriate, all on-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 on the Project Site, domestic water service on the Project Site, storm drain facilities on the Project Site, public and private street improvements and utility improvements (including electric and natural gas service,

telecommunications and other public utilities) on the Project Site, sewage conveyance facilities on the Project Site, landscaping on the Project site and other public facilities within the Project Site. During the Vested Fee Period, Owner's payment of the amounts set forth in the Schedule of Exactions shall fully satisfy Owner's obligations with regard to any and all off-site improvements necessary to serve the Project.

(b) City's Responsibilities. Owner shall have no responsibility, and City shall have full responsibility, for the funding and construction of the City Public Improvements; provided, however, that the precise timing of the funding and construction of the City Public Improvements is subject to Section 6.2 concerning the availability of funds. In addition to the funding and construction of the City Public Improvements, City shall actively pursue planning, funding, and establishment of a ferry terminal to operate in tandem with, and complementary to, the ITC Project; provided, however, that the City's obligation to pursue the ferry terminal is subject to Section 6.2 concerning the availability of funds. Notwithstanding the foregoing, City obligation to build the City Public Improvements exists only to the extent of City's ability to obtain outside, non-general fund, funding to build improvements. If for any reason the Parties fail to close escrow on the lands described in the Waterside PSA, City shall have no responsibility to fund and construct those City Public Improvements that are located on those portions of the land for which escrow on the Waterside PSA does not close. Neither the failure to close escrow on the Landside PSA nor the failure to close escrow on the Waterside PSA shall expressly or impliedly create an obligation on Owner to fund or construct City Public Improvements on land that is not acquired by City under the Landside PSA and/or the Waterside PSA.

4.13 Substituted Security. In connection with the transfer, sale, or assignment of all or any portion of the Project Site, any security provided by Owner for the installation of public improvements which are Owner's obligation under this Agreement, shall be substituted with Substituted Security on a Pro-Rata Basis.

4.14 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 imposed upon the Project Site.

4.15 Obligations of Open Space and Slope Maintenance. City shall be responsible for any costs and obligations relating to the ownership and maintenance of the natural open space areas within the portions of the Project Site acquired by City under either the Landside PSA or the Waterside PSA, or both; provided, however, that (i) this Agreement shall not require City to fund such costs if City is prevented from doing so by budgetary limitations which shall be determined in the sole and absolute discretion of the City; and (ii) City shall have no right to impose such costs on Owner in the event City is prevented from budgetary limitations from funding such costs. To the extent Owner has maintenance obligations for the remaining portions of the Project Site (i.e., those not conveyed through the Landside PSA and/or the Waterside PSA), it may transfer such maintenance obligations to one or more property owners' or homeowners' association created for the Project or any portion thereof. Notwithstanding anything in this Agreement to the contrary, the transfer of such obligation to such association(s) shall be effective upon City's receipt of notification of such transfer.

4.16 Participation in Assessment Districts, Community Facilities Districts, and Other Public Financing Mechanisms. City and Owner mutually agree to abide by the Public Financing Plan, which contemplates the formation of one or more assessment districts, community facilities districts, or other mechanisms to publicly finance the cost of construction and installation of public improvements within or necessitated by the Project that are the obligations of Owner under this Agreement.

4.17 Coordinated Project Management. The Parties shall observe and abide by the Phasing Plan and Protocols set forth in EXHIBIT F, unless (i) the Parties fail to close escrow on the Landside PSA or the Landside PSA is terminated, and (ii) the City affirmatively decides that it will not construct any of the City Public Improvements.

5. DEVELOPMENT PLAN

5.1 Inclusionary Housing. The Parties acknowledge that Owner's development of housing units as part of the Project will trigger an obligation for inclusionary housing pursuant to City's inclusionary housing ordinance set forth in Chapter 19 of Title 10 of the Hercules Municipal Code. The Parties further acknowledge and agree that subdivision (3) of Section 10-19.105 of the Hercules Municipal Code allows City to approve an alternate method of achieving full compliance with Chapter 19 of Title 10 the Hercules Municipal Code. Under Section 10-19.105, the City Council finds and declares that the affordable housing obligations set forth in the Affordable Housing Program (EXHIBIT E) is an alternate method of full compliance with Chapter 19 of Title 10 of the Hercules Municipal Code. Except for Owner's obligations as set forth in the Affordable Housing Program, Owner shall not be responsible for producing any additional affordable or inclusionary housing units within or related to the Project or the Project Site.

5.2 Design and Building Permits. Owner or its designee shall follow the procedures in Exhibit K in obtaining design and building permits, consistent with the Existing Approvals.

6. CITY'S OBLIGATIONS REPRESENTATIONS AND WARRANTIES

6.1 Generally. The Parties acknowledge and agree that each Party's agreement to perform and abide by the covenants and obligations of such Party set forth herein is material consideration for the other Party's agreement to perform and abide by the covenants and obligations of the other Party set forth herein.

6.2 Permitting and Construction of the ITC Project and the City Public Improvements. To the extent City's financial resources allow, City shall diligently pursue its goal of permitting and constructing the ITC Project and the City Public Improvements. City intends to construct the ITC Project and the City Public Improvements with grant money, Public Benefit Fees and other sources and needs to acquire funding and to continue to process and ultimately build the ITC Project and the City Public Improvements. Consistent with the foregoing, City shall (i) use the grant funds that, as of the Effective Date, have been identified for expenditure on the ITC Project and the City Public Improvements for the permitting and construction of the ITC Project and the City Public Improvements, and (ii) diligently pursue additional grant funding to obtain additional resources for the permitting and construction on the

ITC Project and the City Public Improvements. City has no obligation to Owner under this Agreement to build the ITC Project or the City Public Improvements if and to the extent City does not obtain adequate outside funding for the permitting and construction.

6.3 Financial Obligations. By entering into this Agreement, City is not agreeing to provide any redevelopment funds, and City general funds or other City discretionary funds, or financial assistance or subsidy of any sort toward the Project.

6.4 City Representations and Warranties. In addition to any other representations and warranties of City set forth in this Agreement, City hereby represents and warrants to Owner as follows:

(a) City is a general law city and municipal corporation of the State of California and is duly organized and existing and authorized to transact business and exercise powers under the laws of the State of California and the Municipal Code of the City of Hercules, and City has the full lawful right, power, and authority to enter into, carry out, give effect to, and consummate the transactions contemplated by this Agreement.

(b) This Agreement and all other transactions contemplated by this Agreement have been duly executed by City and constitutes the valid and binding agreement of City enforceable against City in accordance with its terms.

(c) The individuals who have executed this Agreement on behalf of City have the right, power, and authority to execute this Agreement on behalf of City.

(d) To the best knowledge of the City other than identified herein, 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 after due inquiry, threatened against City contesting or affecting any of the matters referred to in this Agreement. Owner is aware of (1) the pending/threatened challenges to the City's redevelopment authority, (2) the state auditor's investigation of City's past finances, and (3) the possible federal investigation of former City officials.

6.5 [RESERVED].

6.6 Repurchase of Landside PSA Property. If at any time after the close of escrow on the Landside PSA, City determines not to use one or more of Parcels 16, 20, 22, 24, 33, 37, and/or 41 (as those Parcel numbers are defined in the Landside PSA) for the development of the City Public Improvements, City shall offer to convey those parcels to Owner at the same price as contained in the Landside PSA plus a three percent (3%) per year escalation from and after the close of escrow on the Landside PSA. If Owner fails to accept City's offer of conveyance, City may offer such parcels on the open market.

6.7 Repurchase of Waterside PSA Property: If at any time after the close of escrow on the Waterside PSA, City determines not to use any portion of the land that is the subject of the Waterside PSA for the development of the City Public Improvements and/or the ITC Project, City shall offer to convey those parcels to Owner at the same price as contained in the Waterside PSA, plus a three percent (3%) per year escalation from and after the close of escrow on the

Waterside PSA. If Owner fails to accept City's offer of conveyance, City may offer such parcels on the open market.

6.8 Use of Parcel 33. City covenants for itself, and for all of its successors and assigns, to use Parcel 33 (as that Parcel number is defined in the Landside PSA) for the construction of a train station or other municipal facility that is designed to provide public services to the general citizenry (e.g., a City Hall). Allowable uses for Parcel 33 shall exclude public works yards, jails, shelters, or other similar facilities. The covenant contained in this Paragraph 6.8 shall run with the land for the benefit of the Project Site, but shall be extinguished upon conveyance of Parcel 33 from City (or any successor in interest to City) to Owner. The Parties agree to execute such further instruments as are reasonably requested by Owner to ensure the enforceability of this use restriction.

6.9 Use of Parcels 37 and 41: After the acquisition of Parcel 37 and/or Parcel 41 (as those parcel numbers are defined in the Landside PSA), City shall from time to time examine the scope of the "Transit Loop" component of the ITC Project and determine if any portion of Parcel 37 and/or Parcel 41 is not necessary for City's development of the Transit Loop component of the ITC Project. City shall convey to Owner those Portions of Parcel 37 and/or Parcel 41 that are determined by the City to be not needed for the development of the Transit Loop component of the ITC Project and Owner shall, upon such conveyance, return those portions of Owner's Landside PSA Exaction Credits that are attributable to the property conveyed by City to Owner.

7. SPECIFIC CRITERIA APPLICABLE TO DEVELOPMENT OF THE PROJECT

7.1 Applicable Ordinances And Approvals. Owner shall have the right to proceed with development of the Project in compliance with this Agreement, the Project Approvals, and the Governing Ordinances. In the event of any conflict between this Agreement and the Existing Project Approvals on the one hand, and the Governing Ordinances on the other, this Agreement and the Existing Project Approvals shall control. Except as allowed elsewhere in this Agreement and specifically in Sections 4.2, 4.5, and 9.2 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 Project Approvals, the Exactions, 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, the 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) Except for the Uniform Codes governing construction, building, fire, plumbing, electrical and life safety, applying to the Project any amendment of the Governing Ordinances or any new ordinance, or any written or unwritten 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. 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 City.

(e) Imposing any additional Exaction on the Project that is not expressly contained within or authorized by this Agreement including those set forth in Exhibits I and L.

(f) Limiting, constraining, or restricting in any manner the rate, timing, phasing, or accelerating of the phasing of the Project or any Phase or sub-Phase or portion thereof, which is not expressly provided for in the Project Phasing Plan.

7.2 Rights of Access; Temporary Construction Access. The Parties shall cooperate reasonably and in good faith to provide one another with temporary access to each other's property as necessary to facilitate construction in accordance with the Project Description and Scope of Development and/or the Phasing Plan. The duration of access provided under this Section 7.2 shall be no longer than necessary to complete the improvements for which access is sought. The Party seeking access under this Section 7.2 shall promptly commence and diligently pursue to completion the construction of the improvement for which access is sought, with an objective of minimizing the inconvenience such access causes to the other Party. Neither Party shall charge any fee to the other for a right of access necessary to implement the development described in the Project Description and Scope of Development and/or the Phasing Plan; provided, however, that Owner may charge City for temporary access rights over, under, or along those portions of the Project Site owned by Owner, in connection with improvements that are not City Phase I Improvements. Charges to City for temporary access to the Project Site or any portion thereof, for the temporary access rights beyond that necessary for construction of City Phase I Improvements shall be subject to negotiations between Owner and City and, if agreement cannot be reached, subject to a value determination by a mutually selected independent third party appraiser, the costs of which appraisal shall be paid by City.

7.3 Eminent Domain Powers. City shall not impose any Conditions of Approval on the Project that require the acquisition of public or private property, unless City affirmatively demonstrates that it can and will exercise its powers of eminent domain to acquire such property. Nothing herein is a prejudgment of any of the matters concerning acquisition of real property, whether by condemnation or otherwise.

7.4 Nondiscrimination.

(a) General.

7.4.a.1 Owner, on behalf of itself and its successors and assigns, covenants that there shall be no discrimination in the rental, sale, or leasing of the Project Site or any portion thereof on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code. All deeds, leases, or contracts for the sale, lease, sublease, or other transfer of any land in the Project Site shall contain or be subject to the nondiscrimination or nonsegregation clauses prescribed in this Section 7.4.

7.4.a.2 Notwithstanding Section 7.4.a.1 above, with respect to familial status, Section 7.4.a.1 shall not be construed to apply to housing for older persons, as defined in Government Code Section 12955.9. With respect to familial status, nothing in Section 7.4.a.1 shall be construed to affect Civil Code Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5, relating to housing for senior citizens. Civil Code Sections 15(d), 1360 and Government Code Sections 12955(n), (o), and (p) shall apply to Section 7.4.a.1.

(b) Nondiscrimination Provisions. Owner, on behalf of itself and its successors and assigns, covenants that the following provisions shall be included in all deeds, leases, and contracts with respect to the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Project Site in substantially the following form:

7.4.b.1 In deeds the following language shall appear – “The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land.”

7.4.b.2 Notwithstanding paragraph 7.4.b.1, with respect to familial status, Section 7.4.b.1 shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in Section 7.4.b.1 shall be construed to affect Civil Code Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5, relating to housing for senior citizens. Civil Code Sections 51(d) and 1360, and Government Code sections 12955(n), (o), and (p) shall apply to Section 7.4.b.1.

7.4.b.3 In leases the following language shall appear--”The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and

assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions: That there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased.”

7.4.b.4 Notwithstanding paragraph 7.4.b.3, with respect to familial status, Section 7.4.b.3 shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in Section 7.4.b.3 shall be construed to affect Civil Code Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5, relating to housing for senior citizens. Civil Code Sections 51(d) and 1360, and Government Code sections 12955(n), (o), and (p) shall apply to Section 7.4.b.3.

8. PERIODIC REVIEW OF COMPLIANCE

8.1 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 Agreement and all actions taken pursuant to the terms of this Agreement to determine good faith compliance with this Agreement. On or before October 15 of each year, Owner shall initiate the annual review by submitting to the City Manager a report demonstrating the good faith compliance with this Agreement. City Manager shall then present a report to the City Council concerning the status of Owner’s good faith compliance with this Agreement. Notwithstanding the foregoing, nothing in this Agreement shall preclude the City Council, in its sole and absolute discretion, from delegating to the City Manager the authority to review and approve Annual Reviews under this Agreement.

8.2 Copies of Documents. City shall deliver to Owner a copy of all staff reports and documents to be used or relied upon in conducting the annual review and, to the extent practical, related exhibits concerning Owner’s performance hereunder, at least ten (10) days prior to any hearing before the City Council. Owner shall be permitted during the annual review to respond, to City’s evaluation of Owner’s performance. The annual review shall be limited in scope to determining compliance with the terms of this Agreement.

8.3 Failure to Conduct Annual Review. In the event Owner timely submits its compliance report and if City fails to either: (i) conduct the annual review, or (ii) notify Owner in writing (following the time during which the review is to be conducted) of City’s determination as to compliance or noncompliance with the terms of this Agreement, which includes delivery of a Notice of Default, and such failure to provide Notice remains uncured as of January 1 of each year, such failure shall be deemed a determination by City of Owner’s compliance with the terms of this Agreement for that annual review period. Failure of City to perform the annual review shall not otherwise affect the validity or enforceability of this Agreement.

8.4 Noncompliance Review by City Council. If the City Council determines at a hearing that there is an event of alleged non-compliance on the part of Owner, City Council may elect to initiate the Notice of Default, Event of Default, opportunity to cure, and termination procedures set forth in Section 14. This Agreement shall not be modified or terminated on grounds of noncompliance by Owner, unless and until City has complied with the processes and procedures set forth in Section 14.1.

9. PERMITTED DELAYS; SUPERSEDURE BY SUBSEQUENT LAWS

9.1 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, acts of terrorism, 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 out of the control of Owner; (iii) restrictions or delays caused, imposed or mandated by governmental or quasi-governmental entities; (iv) enactment of conflicting New Law(s) (including, without limitation, new or supplementary environmental regulations); (v) initiation of a Third Party Legal Challenge; (vi) failure of nonparty agencies to promptly process or grant any application necessary for the Project, or any facet thereof to proceed; (vii) any actions or inactions on the part of City or any other governmental or quasi governmental agency or entities (including without limitation utilities) having jurisdiction over the Project or the Project Site, (viii) significant adverse economic or market conditions affecting the ability of Owner to obtain financing, construction contracts, or tenant leases at commercially reasonable rates and on commercially reasonable terms (ix) any other cause beyond the reasonable control of Owner. Owner shall promptly notify City of any delay hereunder as soon as possible after the same has been ascertained. Further, after the issuance of such notification, City may request in writing that Owner provide a confirmation of the status and then-current duration of any permitted delay under this Paragraph 9.1. Within ten (10) days after receipt of such request, Owner shall provide in writing confirmation as to whether the permitted delay is continuing and, if it is, the then-current duration of the permitted delay; alternately, if the permitted delay is no longer in effect, the written notice shall indicate the length of the full duration of the permitted delay. Any disputes as to the existence or duration of a permitted delay under this Paragraph 9.1 shall be resolved in accordance with the arbitration procedure set forth in Section 14.2.

9.2 State and Federal Law. As provided in Government Code Section 65869.5, this Agreement shall not preclude the application to the Project or the Project Site of New Laws. If any New 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, 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 City, or, at Owner's election the Term of this Agreement may be extended pursuant to Section 9.1 for

the duration of the period during which such New Law precludes compliance with the provisions of this Agreement. Owner shall have the right to challenge the New Law preventing compliance with this Agreement, and, in the event such challenge is successful, this Agreement shall remain unmodified and in full force and effect, except that the Term may be extended by the period of such challenge pursuant to Section 9.1 above. Notwithstanding the foregoing, City and Owner shall each retain the right (if and to the extent such right exists) to enforce the obligation of the other Party to complete any public improvements after construction of such public improvements has commenced.

10. TRANSFERS AND ASSIGNMENTS

10.1 Right to Assign. Owner and its successors and assigns shall have the right 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 Transferee; provided, however, that no assignment of Owner's rights, interests and obligations under this Agreement shall occur without approval by the City, which approval shall not be withheld, conditioned, delayed, or denied in a commercially unreasonable manner. Owner shall remain liable for all obligations hereunder, and no assignment or assumption of this Agreement shall be valid, unless Owner obtains the prior approval of the City Council.

10.2 Form of Assignment Agreement. Unless and until (i) City provides written consent to assignment of this Agreement to a Transferee and (ii) City approves a form of Assignment Agreement (which is executed and recorded by Owner, City and Transferee), Owner shall remain liable for any and all obligations hereunder, notwithstanding any sale or transfer of the Property or portion thereof. The form of Assignment Agreement shall (i) set forth the rights and obligations which are being expressly assigned to and assumed by Transferee, (ii) provide that the Transferee shall be subject to all the terms and conditions of this Agreement, and (iii) require adequate replacement security for any obligations being assumed by Transferee that require security under this Agreement.

10.3 Release of Owner Upon Transfer. Upon the written consent of City Council to the partial or complete assignment of this Agreement (which consent shall not be unreasonably withheld) and the express written assumption, in the form approved by City under Section 10.2, of such assigned obligations of Owner under this Agreement by assignee, Owner shall be relieved of its legal duty to perform the assigned obligations set forth in this Agreement.

10.4 Termination of Agreement With Respect to Individual Residential Units or Lots Upon Sale to Public. Notwithstanding any other provision of this Agreement, this Agreement shall automatically terminate with respect to any residential unit or lot, and such unit or lot shall be released and no longer subject to this Agreement, when a final certificate of occupancy or equivalent is issued for any lot or parcel within a phase or tract. Such release of obligations shall occur automatically and shall not require the execution or recordation of any further document or instrument.

10.5 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 and Owner pursuant to Government Code Section 65868.5 or any successor Laws.

11. AMENDMENT AND TERMINATION

11.1 In General. Except as provided in Section 8 relating to City's annual review and Section 14.1 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 Section 65868, City's Development Agreement Ordinance, and the terms of this Agreement.

11.2 Amendment. Any Agreement Amendment shall require giving of notice and shall require a public hearing before the Planning Commission and a public hearing of the City Council. The City Council shall make the final decision on whether to approve an Agreement Amendment. Upon such approval by the City, and Agreement Amendment shall be signed by both parties to become effective.

11.3 Operating Memoranda. The Parties acknowledge that certain minor refinements may need to be made to the Project or this Agreement to allow the parties to perform their obligations under this Agreement. If and when the City Council and the Owner mutually find that minor changes, adjustments, or clarifications are appropriate to further the intended purposes of this Agreement, they may, unless otherwise required by law, effectuate such minor changes, adjustments, or clarifications without amendment to this Agreement through operating memoranda. After execution, it shall be attached hereto as addenda and become a part hereof and which may be further changed and amended from time. To the maximum extent permitted by law, the City Council may in its sole and absolute discretion approve and enter into such operating memoranda and the managing member or other authorized representative designated for such purpose in a writing signed by the managing member or other authorized representative of Owner shall have the authority, on behalf of Owner, to approve and enter into such operating memoranda. Unless otherwise required by law, by the Project Approvals or by the Governing Ordinances, no such minor changes, adjustments, or clarifications shall require prior notice or hearing. Notwithstanding the foregoing, nothing in this Agreement shall preclude the City Council, in its sole and absolute discretion, from delegating to the City Manager the authority to review and approve operating memoranda under this Agreement.

11.4 Assuming Transferee. Where a portion of Owner's right or obligations have been transferred to a Transferee pursuant to Section 10, the signature of the Transferee shall not be required to amend this Agreement unless such amendment would materially alter the rights or obligations of such Transferee hereunder. Owner shall indemnify, defend, and hold harmless City if any such Transferee which Owner determines is not a required signatory to such amendment brings an action against City due to City not requiring that Transferee to sign the amendment. The foregoing sentence does not, and is not intended to, create any third party beneficiary rights in a Transferee. No Transferee shall be entitled to amend this Agreement without the written consent of the entity that is the named Owner or its Affiliate in the preamble to this Agreement as long as such entity or Affiliate owns any portion of the Project Site.

Hercules, CA 94607
Fax No.: (510) 799-8200

If to Owner: Hercules Bayfront, LLC
c/o AndersonPacific, LLC
Attn: James R. Anderson
6701 Center Drive West, Suite 710
Los Angeles, CA 90045
Telephone: (310) 689-2300
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
Telephone: (310) 689-2300
Facsimile: (310) 689-2305
Email: esischo@andersonpacificllc.com

With copy to: Rutan & Tucker, LLP
Attn: Jeffrey Melching
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
Telephone: (714) 641-5100
Facsimile: (714) 546-9035
Email: 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.

12.2 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 expressly provided in, or applicable to the Section of the Agreement pursuant to which is given, 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 12.2. No waiver of this Section 12.2 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.

13. MORTGAGEE PROTECTIONS

13.1 Discretion to Encumber. This Agreement shall not prevent or limit Owner, in any manner, at Owner's sole and absolute discretion, from encumbering the Project Site or any portion thereof or any improvement thereon by any mortgage, deed of trust, UCC financing statement and/or fixture filing, or other security device securing financing of the Project or any portion thereof, or in Owner's sole and absolute discretion the use of the Project Site as collateral or security for any purpose.

13.2 Mortgagee Rights and Obligations. A Mortgagee of the Project Site or any portion thereof shall be entitled, upon written request to City, to receive from City written notification of any default of Owner and any successor or assign of the performance of Owner's (or such successor's or assign's) obligations under this Agreement which has not been cured with in the time required, and subject to the provisions of Section 14; provided that the failure by City to provide such Notice shall not affect the status of Owner's default but shall extend the time for the Mortgagee's right to cure the default which shall not commence to run until it received such written notice.

13.3 Right to Cure. Notwithstanding Owner's default, this Agreement shall not be terminated by City as to any Mortgagee to whom Notice is actually given and to which either of the following is true:

(a) The Mortgagee cures any default by Owner involving payment of money within ninety (90) days, or such additional period of time as City may provide, after Mortgagee's receipt of written Notice of Owner's default; or

(b) As to defaults requiring title or possession of the Project Site or applicable portion thereof to effect a cure: (i) the Mortgagee agrees in writing, within ninety (90) days after receipt from City of the written Notice of Default, to perform the proportionate share of Owner's obligations under this Agreement allocable to that part of the Project Site in which the Mortgagee has an interest, conditioned upon such Mortgagee's acquisition of the Project Site or portion thereof by foreclosure or by deed-in-lieu of foreclosure; (ii) the Mortgagee commences foreclosure proceedings to acquire title to the Project Site or applicable portion thereof, within said ninety (90) day period and thereafter diligently pursues such foreclosure to completion; and (iii) the Mortgagee promptly and diligently cures such default after obtaining title or possession. Subject to the foregoing, in the event any Mortgagee records a notice of default as to its security interest, upon the Mortgagee's written request to assume Owner's obligations hereunder City shall consent to the assignment to the Mortgagee or to any purchaser of Owner's interest at a foreclosure or trustee's sale, of the rights and obligations of Owner under this Agreement applicable to the portion of the Project Site to which the Mortgagee has a security interest being foreclosed, provided the Mortgagee executes and delivers to City an assignment and assumption agreement in a form and with terms reasonably acceptable to City, and Owner shall thereafter be released by City from liability under this Agreement with regard to the portion of the Project Site

that is transferred. Notwithstanding the foregoing, City shall not impose any terms on the Mortgagee or such purchaser that are inconsistent with the provisions of this Agreement.

13.4 Extended Cure Period. Notwithstanding the foregoing provisions of Section 13.3, if any Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings including by any process of injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Owner, the times specified in Section 13.3 for commencing or prosecuting foreclosure or other proceedings or curing any default by Owner, including the payment of money, shall be extended for the period of the prohibition.

13.5 Superior Lien. The lien of any existing or future deeds of trust recorded against all or any part of the Project Site shall be superior and senior to any lien created by this Agreement or the recordation thereof. At the request of any lender whose loan is or will be secured by a deed of trust or other security instrument on all or any part of the Project Site, City shall execute a subordination agreement (which may be recorded at the election of the lender) subordinating its interest hereunder to the lien of such deed of trust or other security instrument, which subordination agreement shall be subject to the reasonable approval of the City Council. Notwithstanding anything to the contrary in this Agreement, the City Council may in its sole and absolute discretion elect to delegate its authority to approve subordination agreements to a City official or employee, including the City Attorney.

13.6 No Impairment of Lien. Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any existing or future mortgage, deed of trust, or other security instrument recorded against the Project Site.

13.7 Election to Assume Obligations. Except as may be provided to the contrary in this Agreement, no Mortgagee or beneficiary shall have an obligation or duty under this Agreement to perform the obligations of Owner hereunder, or to guarantee such performance, and no Mortgagee shall be liable for any defaults or monetary obligations of Owner arising prior to the acquisition of title to the Project Site or applicable portion thereof by the Mortgagee or successors or assigns; provided, however, that except to the extent any covenant to be performed by Owner is a condition to the performance of a covenant by City, the performance thereof shall continue to be a condition precedent to City's performance. In the event a Mortgagee elects to develop the Project Site or applicable portion thereof in accordance with this Agreement and the Project Approvals, the Mortgagee shall be required to assume and perform the obligations of Owner under this Agreement.

13.8 Request for Modifications. City acknowledges that lenders providing financing for the Project may require certain modifications to this Agreement, and City agrees, upon request from time to time, to negotiate in good faith any such requested modification. Requested modifications shall be made without additional conditions, dedications, or Exactions from Owner unless a requested Modification relates to the Exactions, term, permitted uses, overall density requirements, reservation dedication of land for public improvements, or provision of affordable housing.

14. MISCELLANEOUS PROVISIONS

14.1 Default; Termination. Subject to 8.1, failure or unreasonable delay by any Party to perform any obligation under this Agreement for a period of ninety (90) days after written Notice of Default 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 of Default 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.

(a) City Termination Procedure. Subject to Section 14.1, after Notice of Default and expiration of the ninety (90) day period without cure, if applicable, City, at its option, may institute legal proceedings to compel performance (but not to terminate this Agreement), and/or give notice of intent to terminate the Agreement pursuant to Government Code Section 65868 and City's Development Agreement Ordinance. Following such notice of intent to terminate, the matter shall be scheduled for consideration before the City Council no sooner than thirty (30) calendar days thereafter, 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, City may give written notice of termination of this Agreement to Owner. The waiver by City 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.

(b) Owner Termination Procedure. Subject to Section 14.1, after notice and expiration of the ninety (90) day period without cure, if applicable, Owner, at its option, may institute legal proceedings pursuant to this Agreement (but not to terminate this Agreement) and/or give notice of intent to terminate the Agreement to City. Following such notice of intent to terminate, City representatives and Owner representatives shall meet and confer in a good faith attempt to resolve the breach of this Agreement. If the meet and confer effort does not result in a satisfactory outcome for Owner, Owner may give written notice of termination of this Agreement to City. The waiver by Owner 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.

14.2 Arbitration of Disputes Over Public Benefit Fee Advances. The Parties agree that any disputes involving the applicability, interpretation, and enforcement of Sections 3.1 through 3.6, Section 9.1, and Exhibit K, of this Agreement shall be resolved by final and binding arbitration conducted by JAMS' San Francisco, California, office or by such other arbitrator as may be mutually approved by the Parties or, if for whatever reason JAMS or its successor is no longer in business and the Parties cannot agree on the identity of an arbitrator, by an arbitrator selected by the Contra Costa County Superior Court. The Parties shall endeavor to select a JAMS arbitrator within fifteen (15) days after either Party notifies the other Party in writing that it has elected to arbitrate a dispute. If the Parties are unable to agree to a JAMS arbitrator, the Parties consent to having JAMS assign an available arbitrator from a JAMS list, provided that either Party may disqualify any prospective arbitrator who, if the arbitrator were a Superior

Court judge, would be subject to disqualification for cause in accordance with applicable law. The Parties agree that JAMS' Comprehensive Arbitration Rules and Procedures (or the successor rules thereto), as the same exist at the time the arbitration occurs, shall govern, except to the extent the Parties (and JAMS) mutually agree to modify the same; provided, however, that in the case of a dispute arising under Exhibit K of this Agreement (i) the matter shall be submitted to arbitration based on the administrative record associated with the dispute, and (ii) the most expedited review procedure available shall be utilized. If another arbitrator is selected to hear and determine the dispute, the most closely comparable rules of such other arbitrator's firm, if any, shall apply; if no such rules exist, all of the applicable JAMS rules shall apply to the extent the same can be used. The arbitrator shall have the authority to make final determinations concerning the applicable rules and procedures to be utilized, consistent with the foregoing. The Parties agree to cooperate in attempting to obtain a final ruling from the arbitrator as expeditiously as possible and in any event within ninety (90) days after the arbitrator is appointed; provided, however, that (i) the arbitrator shall not be divested of jurisdiction if final resolution of the arbitration does not occur until a later date; and (ii) that in the case of a dispute arising under Exhibit K to this agreement, the parties shall cooperate in attempting to obtain a final ruling from the arbitrator within no longer than thirty (30) days. Any remedy ordered or awarded by the arbitrator shall be subject to the limitations on remedies set forth in this Agreement, including without limitation Section 3.3. Each Party shall be responsible for payment of fifty percent (50%) of the arbitrator's costs and fees; provided, however, that the arbitrator shall have the authority to require the non-prevailing Party to pay or reimburse the prevailing Party for the prevailing Party's portion of such costs and fees.

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

(a) Approval of Agreement and Concurrent Approvals and Subsequent Project Approvals. In the event of any Third Party Legal Challenge, Owner reserves the right to withdraw the application that is the subject of the Third Party Legal Challenge. 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. If Owner elects not to contest a Third Party Legal Challenge, City shall have no obligation to contest such challenges. If City elects to contest a Third Party Legal Challenge and Owner does not elect to contest such challenge, City shall have no right of reimbursement from Owner for litigation expenses, including attorney's fees. If Owner elects to defend a Third Party Legal Challenge, Owner shall hold City harmless from all claims for recovery of the third party's litigation expenses, including the third party's attorney's fees.

14.4 Actions; Remedies; Attorney's Fees. In addition to any other rights and remedies, a 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. In no event shall a 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 any Party for a breach or violation of this Agreement by another Party shall be an action in mandamus, specific performance, injunctive or declaratory relief to enforce the

provisions of this Agreement. The Parties acknowledge that neither City nor Owner would have entered into this Agreement had it been exposed to damage claims from the other Party for any breach thereof. As such, the Parties agree that in no event shall City or Owner be entitled to recover damages against the other Party for breach of this Agreement. Notwithstanding the foregoing, (i) a Party shall not be foreclosed from initiating an action to enforce an obligation by another Party to make monetary payments under this Agreement, which action shall be deemed an action for specific performance, and (ii) in any legal action between or among the Parties hereto, the Prevailing Party shall be entitled to recover all litigation expenses, including but not limited to its discovery costs, expert witness fees, reasonable attorney's fees, and court costs, and costs of appeal (if any).

14.5 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 Agreement is in full force and effect and is a binding obligation of the Parties; (ii) this 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.

14.6 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. If this Agreement is terminated, the Vesting DA shall apply to the Project Site assuming the Vesting DA has not terminated, expired or been rendered invalid by a court, in which case the Initiative DA shall apply. If the Vesting DA is no longer valid or operative, development of the Project Site shall be subject to the rules and regulations that may be legally applied to the Project Site.

14.7 Negation of Partnership, Agency and Joint Venture. City and Owner specifically acknowledge that the Project is a private development, that City is not acting as the agent of Owner, and Owner is not acting as the agent of City, 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.

14.8 Nonliability of Officers and Employees. No officer, official, director, employee, agent, or representative of any of the Parties hereto or their respective parent, subsidiaries, or affiliates, shall be personally liable to any other Party hereto, or any successor or assign, for any loss, costs, damage, claim, liability, or judgment, arising out of or connected to this Agreement, or for any act or omission on the part of such official, officer, employee, agent or representative.

14.9 Agreement Negotiated; Interpretation. The language in this Agreement shall be construed in accordance with its fair meaning and not strictly for or against a Party hereto. The Parties acknowledge that this Agreement has been prepared by all the Parties hereto and shall not be interpreted or construed against the Party preparing or drafting it or any portion hereof. The Parties hereto have been represented by counsel of their own choosing through the negotiation and preparation of this Agreement. As a consequence, the presumptions of Civil Code Section 1654 relating to the interpretation of contracts against the drafter shall be applied to the interpretation of this Agreement.

14.10 No Third Party Beneficiaries. The Parties to this Agreement acknowledge and agree that the provisions of this Agreement are for the sole benefit of the Parties hereto and not for the benefit, directly or indirectly, express or implies, of any other person or entity, except as may otherwise expressly be provided in this Agreement.

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

14.12 Waivers. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. No waiver of any right or remedy in respect to any occurrence or event shall be deemed a waiver of any right or remedy in respect to any other or subsequent occurrence or event.

14.13 No Brokers. Each of the Parties hereto represents and warrants to each other Party hereto that it has not employed any broker or finder with respect to the execution and delivery of this Agreement, and each Party agrees to indemnify, defend, and hold harmless the other from and against any and all liability, cost, or expense (including court costs, expert witness fees, and attorney's fees) in any manner connection with a claim asserted by any person or entity for any commission or finder's fee in connection with the execution and delivery of this Agreement, or arising out of any agreement(s) by the indemnifying Party to pay any commission or finder's fee.

14.14 Entire Agreement. This Agreement and the exhibits attached hereto constitute the entire agreement between the Parties with respect to the subject matter hereof. Except as for the

Initiative Development Agreement, the Vesting DA, the Landside PSA, and the Waterside PSA, all prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and the exhibits attached hereto except to the extent incorporated herein as an exhibit or by reference.

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

14.16 Recordation. This Agreement and any amendment or cancellation hereto shall be recorded against the Property at no cost to City, in the Official Records of Contra Costa County by the City Clerk within the period required by Section 65868.5 of the Government Code. Notwithstanding the foregoing, in no event shall any failure or delay in recording this Agreement and any amendment to this Agreement limit or restrict the validity or enforceability of this Agreement.

14.17 Governing Law. 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.

14.18 Counterparts. This Agreement may be executed in multiple counterparts, each of which, when all the Parties hereto have signed this Agreement, shall be deemed an original Agreement.

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

14.20 Notice of Termination. Upon the expiration or earlier termination of this Agreement, the other Parties hereto shall, if requested by a Party hereto, execute for recordation in the Official Records of Contra Costa County, a notice stating that this Agreement has terminated or expired, if 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.

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

14.22 Recitals Incorporated. The Recitals to this Agreement are incorporated herein and by this reference made a part hereof.

14.23 Exhibits. The following exhibits are attached to this Agreement and are incorporated herein and by this reference made a part hereof:

- Exhibit A - Project Site Legal Descriptions
 - A(1) Project Site Legal Descriptions – Current Land Under Ownership.
 - A(2) Project Site Legal Descriptions – Owner’s Land Ownership Assuming Close of Escrow on Landside PSA and Waterside PSA.

- Exhibit B - Project Site Map
 - B(1) Project Site Maps – Tentative Tract Map

- B(2) Project Site Maps – Depiction of Owner’s Land Ownership Assuming Close of Escrow on Landside PSA and Waterside PSA

- Exhibit C - Initiative Development Agreement
 - C (1) Original Initiative Development Agreement (Recorded)
 - C (2) Vesting Development Agreement
- Exhibit D - Project Description and Scope of Development
- Exhibit E - Affordable Housing Program
- Exhibit F - Phasing Plan
- Exhibit G - List of City Public Improvements
- Exhibit H - Public Financing Plan
- Exhibit I - Schedule of Exactions
- Exhibit J - Purchase & Sale Agreement (Two Exhibits)
 - J (1) Public Use Lands, ITC Right-of-Way Expansion, ITC Station
 - J (2) Hercules Point, Water Parcel North and Water Parcel South
- Exhibit K - Streamlined Approval Process
- Exhibit L - Conditions of Approval
- Exhibit M - Coordinated Project Management Plan

[END—SIGNATURE PAGE FOLLOWS]

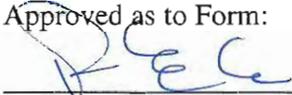
IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

CITY:

CITY OF HERCULES, a California municipal corporation

By: 
Mayor

Approved as to Form:

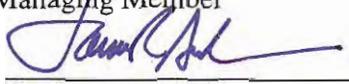

City Attorney
Patricia E. Curtin
Special Legal Counsel
to City

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
Its Managing Member

State of California)
County of Contra Costa)

On 3-14-12, before me, Doreen S. Mathews,
(insert name and title of the officer)

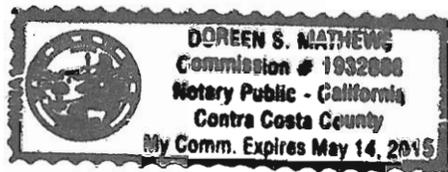
Notary Public, personally appeared James R. Anderson,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
subscribed to the within instrument and acknowledged to me that he/she/they executed the same
in his/her/their authorized capacity(ies), and that by his/her/their 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

(Seal)



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

Date

Here Insert Name and Title of the Officer

personally appeared Dan Romero

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: Implementing New Agent - Hercules Bayfront

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____ Signer's Name: _____

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



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



Signer Is Representing: _____

Signer Is Representing: _____