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Oakland, California 94612

FOX THEATER
DISPOSITION AND DEVELOPMENT AGREEMENT
BY AND BETWEEN

THE REDEVELOPMENT AGENCY OF THE
CITY OF OAKLAND

and

OAKLAND RENAISSANCE NMTC, INC.

AMENDED AND RESTATED

_____, 2006

[DRAFT WITHOUT EXHIBITS]

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DRAFT

THIS DISPOSITION AND DEVELOPMENT AGREEMENT (the "Agreement") is entered into this _____ day of _____, 2006, by and between the Redevelopment Agency of the City of Oakland, a public body, corporate and politic ("Agency") and Oakland Renaissance NMTC, Inc., a California non-profit corporation, ("Developer").

RECITALS

1. The City of Oakland (the "City") created Agency, pursuant to the provisions of the Community Redevelopment Law of the State of California (Health and Safety Code Section 33000, et seq.) for the purpose of encouraging and facilitating redevelopment, removal of blight, reuse of blighted and unproductive property, and economic growth in the City.
2. On June 12, 1969, Agency adopted and subsequently amended a Redevelopment Plan for the Central District Urban Renewal Area of Oakland (the "Redevelopment Plan"). (The Central District Urban Renewal Area is referred to as "Central District.") Health and Safety Code Section 33430 authorizes a redevelopment agency within a survey (project) area or for purposes of redevelopment to sell real property. Health and Safety Code Section 33432 requires that any sale of real property by a redevelopment agency in a project area must be conditioned on redevelopment and use of the property in conformity with the redevelopment plan. Health and Safety Code Section 33439 provides that a redevelopment agency must retain controls and establish restrictions or covenants running with the land for property sold for private use as provided in the redevelopment plan.
3. Agency desires to have the Developer renovate the historic Fox Theater and existing wrap around buildings (the "Fox Theater Project") located on the real property generally between 18th and 19th Streets and west of Telegraph Avenue in the City of Oakland and more particularly described in Exhibit A attached hereto (the "Site"). The Site is located within the Uptown Area. The purposes of redevelopment are furthered by the construction of a 600 to 2,300 seat theater, facilities for the Oakland School for the Arts and ancillary retail on the Site. Agency determined it is in the public interest to convey the Site to Developer, so that Developer can construct the Fox Theater Project.
4. Further, the Agency desires to provide additional retail and entertainment activities within the Uptown Theater District.
5. The Parties agree that the renovated theater and ancillary buildings shall be of such design and quality to enhance the immediate area surrounding the Site and within the Central Redevelopment District to encourage further economic development and maintain high quality aesthetic standards.
6. The Site will be comprised of two Parcels that have not yet been consolidated into one parcel. The main parcel is the existing theater building at 1807-1829 Telegraph Avenue (APN 008-0642-001). The second Parcel will be a fifty (50) foot strip of land at the rear of the theater (APN 008-0642-015, APN 008-0642-002 Partial, and APN 008-0642-014 Partial).

7. The restoration of the theater and surrounding “wrap around” buildings will accommodate three uses. The theater building as well as ancillary lobby, restroom and support spaces will be renovated into a 600 to 2,300 seat cabaret-style theater with platform seating and food and beverage services. The ground floor of the wrap around buildings off Telegraph, along 18th Street and 19th Street, as well as the second and third floors and a new second and third floor addition on the 18th and 19th Streets sides of the existing one story wrap buildings will be developed for the Oakland School for the Arts. The remaining ground floor space along Telegraph Avenue will be developed as retail. These three uses combined are referred to as the “Fox Theater Project.”

8. Agency has the authority to provide financial assistance to redevelopment efforts in accordance with the best interests of the City and its residents and in accordance with state redevelopment law. The Fox Theater Project is not feasible to develop and operate without Agency financial assistance. Agency agrees to provide financial assistance the Fox Theater Project. The financial assistance consists of a Thirty-two Million Dollar (\$32,000,000) loan, fire insurance proceeds, and making available various grants acquired by the Agency.

9. The Oakland School for the Arts has a timetable to occupy the Project before beginning the 2008 the school year and the Agency desires to have the Oakland School for the Arts vacate its current location in order to make way for a housing development project. In order to better enable the Project to meet the Oakland School for the Arts and Agency housing development timetables, The Agency will give Developer a predevelopment loan in the amount of \$40,000 as part of the \$32 million loan in advance of conveying the Site to Developer so that Developer can proceed with certain predevelopment activities.

10. Developer is willing to grant Agency rights to recover the Site as set forth in this Agreement in the event that the Developer does not proceed with the Project or portions of the Project or otherwise defaults under the terms of this DDA.

11. A Corrected Initial Study/Mitigated Negative Declaration was prepared on behalf of Agency for the Oakland City Planning Commission Case File Number CMD05255 and ER050009 for 1807-1829 Telegraph Avenue – Fox Oakland Theater. The Environmental Impact Report was approved by the City Planning Commission on June 1, 2005, and reviewed and approved by the City Council and Agency on July 19, 2005 pursuant to the California Environmental Quality Act ("CEQA").

12. This Agreement sets forth the terms and conditions under which Agency may convey the Site to Developer so that the Project can be developed in accordance with this Agreement and the Redevelopment Plan.

13 The Fox Theater is a community asset. For this reason, the Agency requires that after the tax credit investors are no longer invested in the Fox Theater, the Fox Theater be owned only by a non-profit corporation or a governmental entity, and the Agency desires an option to purchase the Fox Theater.
NOW, THEREFORE, in consideration of the preceding Recitals of fact and the

mutual covenants and obligations of the Parties set forth herein, Agency and Developer agree as follows:

Article I. Redevelopment Plan

1.01 Incorporation of Redevelopment Plan.

The parties agree that this Agreement is subject to the provisions of the Central District Urban Renewal Plan (the "Redevelopment Plan" or the "Plan") adopted on June 12, 1969 and most recently amended on July 24, 2004 in effect as of the date of this Agreement and incorporated by reference into this Agreement. This Agreement will be subject to the Plan while the Plan remains in effect.

Article II. Definitions

In addition to words and phrases defined elsewhere in this Agreement, the initially capitalized words and phrases set out in this Article II have the meanings in this Agreement unless specifically provided otherwise. Other definitions are located in the Articles of this Agreement in which they are used.

2.01 Agency.

Agency means the Redevelopment Agency of the City of Oakland, a public body, corporate and politic, exercising governmental functions and powers under the Community Redevelopment Law of the State of California.

2.02 Agency Loan.

Agency Loan means the Thirty-two Million Dollar (\$32,000,000) loan as set out in Section 5.01.

2.03 Agreement.

Agreement means this Disposition and Development Agreement, together with all exhibits, supplements, amendments, and modifications hereto, and all extensions and renewals hereof. All exhibits to this Agreement are incorporated into this Agreement by reference.

2.04 Attorneys' Fees.

The phrase Attorneys' Fees and Costs means the fees of counsel retained by the parties to this Agreement and the costs and expenses they incur, which may include printing, duplicating, messengering, filing fees and fees incurred for legal support staff (persons not admitted to the bar but performing services under the supervision and direction of an attorney). Attorneys' Fees and Costs shall also include, without limitation, all such fees and expenses incurred with respect to appeals, arbitrations, bankruptcy proceedings, and any post judgment proceedings to collect any judgment. The recovery of post judgment fees, costs and expenses is separate and several and shall survive the merger of the applicable Loan Documents into any judgment. All such Attorneys' Fees

and Costs shall be reasonable, shall be charged for services which are appropriate to address the specific issue or problem, and shall not exceed competitive market fees and costs of equivalent Oakland, California firms.

2.05 Bankruptcy Code.

Bankruptcy Code mean Titles 7, 11, or 13 of the United States Code, as applicable, or any similar federal or state laws for the relief of debtors, each as hereafter amended.

2.06 City.

City means the City of Oakland.

2.07 Closing Date.

Closing Date means the date of the closing of the transfer of the Site to Developer and the recordation of the conveyance documents in the Official Records of Alameda County.

2.08 Developer.

Developer initially means Oakland Renaissance NMTC, Inc. (ORNMTC), a California non-profit corporation, or an entity which is approved as a successor pursuant to Article XV. It is intended that this Agreement will be transferred to Fox Oakland Theater, Inc. (FOT), a California non-profit corporation, and at that point all references to Developer will mean FOT. References to Developer are deemed to include any successors of Oakland Renaissance NMTC, Inc and FOT.

2.09 Corrected Initial Study/Mitigated Negative Declaration.

Corrected Initial Study/Mitigated Negative Declaration means that certain report prepared on behalf of Agency for the Oakland City Planning Commission Case File Number CMD05255 and ER050009 for 1807-1829 Telegraph Avenue – Fox Oakland Theater dated June 1, 2005, and reviewed and approved by the City Council and Agency on July 19, 2005, pursuant to the California Environmental Quality Act ("CEQA").

2.10 Environmental Laws.

Environmental Laws means any and all present and future federal, state and local laws, ordinances, regulations, policies and any other requirements of any Governmental Agency relating to health, safety, the environment or to any Hazardous Substances, including without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Resource Conservation Recovery Act (RCRA), the Hazardous Materials Transportation Act, the Toxic Substance Control Act, the Endangered Species Act, the Clean Water Act, the Occupational Safety and Health Act, the California Environmental Quality Act and the applicable provisions of the California Health and Safety Code, California Labor Code and the California Water Code, each as hereafter amended from time to time, and the present and future rules, regulations and guidance documents promulgated under any of the foregoing.

2.11 Event of Default.

Event of Default means any of the events specified in Article XVI.

2.12 Financial Assistance.

Financial Assistance means the loan to be made by the Agency and the grants to be assigned to the Developer by the Agency.

2.13 Formation Documents.

Formation Documents means (a) as to any corporation, its articles of incorporation, bylaws, shareholder agreements, and any other organic documents, (b) as to any limited partnership, its Certificate of Limited Partnership and partnership agreement, (c) as to any general partnership or joint venture, its Statement of Partnership and partnership agreement, (d) as to any limited liability company, its articles or certificate of organization, operating agreement, and any other organic documents, and (e) as to any trust, its performing services under the supervision and direction of an attorney.

2.14 Fox Theater Project.

Fox Theater Project means the 600 to 2,300 seat theater, facilities for the Oakland School for the Arts and retail uses.

2.15 General Partner.

General Partner means the general partners of the partnership in question, together with any constituent general partners of any such general partners.

2.16 Governmental Agency.

Governmental Agency means any federal, state, municipal or other governmental or quasi-governmental court, agency, authority or district.

2.17 Grantor.

Grantor mean and Governmental Agency or private party providing a grant or funding for the Fox Theater Project.

2.18 Hazardous Substances.

Hazardous Substances means: (a) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, or otherwise classified pursuant to, any Environmental Laws as a "hazardous substance", "hazardous material", "hazardous waste", "extremely hazardous waste", "acutely hazardous waste", "radioactive waste", "infectious waste", "biohazardous waste", "toxic substance", "pollutant", "toxic pollutant", "contaminant" as well as any formulation not mentioned herein intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, "REP toxicity," or "GULP toxicity," (b) petroleum, natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas) and ash produced by a resource recovery facility utilizing a municipal solid waste stream, and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal resources; (c) "hazardous substance"

as defined in Section 25281(f) of the California Health and Safety Code; (d) "waste" as defined in Section 13050(d) of the California Water Code; (e) asbestos in any form; (f) urea formaldehyde foam insulation; (g) polychlorinated biphenyls (PCBs); (h) radon; and (i) any other chemical, material, or substance exposure to which is limited or regulated by any Governmental Agency because of its quantity, concentration, or physical or chemical characteristics, or which poses a significant present or potential hazard to human health or safety or to the environment if released into the workplace or the environment. "Hazardous Substances" shall not include ordinary office supplies and repair, maintenance and cleaning supplies maintained in reasonable and necessary quantities and used in accordance with all Environmental Laws.

2.19 Law(s).

Law(s) means all federal, state, county, municipal and other governmental and quasi-governmental statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions affecting either the Project or the occupancy, operation, ownership or use thereof, whether now or hereafter enacted and in force including, without limitation, the Americans With Disabilities Act, 42 U.S.C. 3312101-12213 (1991) and all Environmental Laws, any zoning or other land use entitlements, and any requirements which may require repairs, modifications or alterations in or to the Project, all Permits and all covenants, agreements, restrictions and encumbrances running in favor of any Person, contained in any instruments, either of record or known to Developer, at any time in force affecting the Project or the occupancy, operation, ownership or use thereof.

2.20 Permits.

Permits means all permits, licenses, franchises, approvals, variances and land use entitlements necessary for the construction, occupancy, operation, ownership and use of the Project.

2.21 Person.

Person means and includes natural persons, corporations, limited liability companies, limited liability partnerships, limited partnerships, general partnerships, joint stock companies, joint ventures, associations, companies, trusts, banks, trust companies, land trusts, business trusts, real estate investment trusts or other organizations, whether or not legal entities, and governments and agencies and political subdivisions thereof.

2.22 Post Acquisition Disbursement.

Post Acquisition Disbursement means the disbursement of funds from the Agency Loan occurring after Developer acquires the site from Agency, the total amount of such disbursements not to exceed Thirteen Million Dollars (\$13,000,000) less the amount of any Preconveyance Disbursements.

2.23 Principal.

The words Principal and Principals mean (a) with respect to Developer, the general partners of Developer, and (b) with respect to another type of business entity the directors, officers, managing members, shareholders, and similar Persons.

2.24 Preconveyance Activities.

Preconveyance Activities means the activities Developer is required to perform prior to the Closing Date pursuant to Section 3.01.

2.25 Preconveyance Disbursement.

Preconveyance Disbursement means the Four Million, Fifty Thousand Dollars (\$4,050,000) of the Agency Loan that Agency agrees to disburse to Developer in advance of the Closing Date and under conditions set out in Section 3.02.

2.26 Project Documents.

Project Documents means (a) all agreements, studies, and reports now or hereafter in effect with, and prepared by, any contractor, architect, engineer, and/or other professional, including, without limitation, any design architect, landscape architect, civil engineer, electrical engineer, environmental engineer, soils engineer, or mechanical engineer, in connection with the Project, (b) all other agreements now or hereafter in effect with any property manager or broker with respect to the management, leasing, or operation of the Project, (c) Design Development Plans and the Final Construction Plans, including hard copy drawings and specifications, and those provided in digital electronic form, (d) all as-built plans and specifications and surveys for the Project, (e) all Permits, and (f) all renewals, substitutions, extensions, modifications, or replacements of any of the foregoing.

2.27 Site.

The Site is that real property together with all improvements located in Oakland, Alameda County, California located on the block between 18th Street, 19th Street, and Telegraph Avenue as more particularly described in Exhibit A. The Site is shown on a diagram attached as Exhibit B and including all of the Fox Theater parcel (APN 008-0642-001) and a fifty (50) foot strip from the parcels behind the Fox Theater (APN 008-0642-015, APN 008-0642-002 Partial, and APN 008-0642-014 Partial).

2.28 Title Company.

Title Company means First American Title Company, 1535 Harrison Street, Oakland, California 94612.

2.29 Title Policy.

Title Policy means an American Land Title Association Extended Coverage Policy of Title Insurance in form and content reasonably acceptable to Agency and Developer, insuring Developer's title as set forth in Section 4.06, and, insuring Agency that on the Closing Date Developer owns fee simple title to the Site. The Title Policy shall contain such endorsements as Agency and Developer reasonably require and shall be subject only to such exceptions to coverage as reasonably approved by Agency and Developer in writing prior to the Closing Date consistent with the applicable provisions of Article IV and Article VI.

Article III.

Preconveyance Activities and Preconveyance Disbursements

3.01 Preconveyance Activities

- (a) In order to meet the development schedule set out in this DDA, Agency and Developer agree that Developer will undertake certain activities in advance of Agency's conveying the Site to Developer. These Preconveyance Activities include:
- (i) Work by development consultants for project planning and implementation;
 - (ii) Preparation of construction drawings;
 - (iii) Construction bidding documents;
 - (iv) Construction bidding;
 - (v) Permits
 - (vi) Environmental cleanup at the Site
 - (vii) Preparing surveys, maps, and legal descriptions and any other information, including CEQA compliance, as may be required to subdivide or make lot line adjustment to create the expanded Site; and
 - (viii) Legal work concerning syndication and tax credit issues.
- (b) It is anticipated that most of the above Preconveyance Activities will be contracted for and undertaken by Developer, however, Agency may also directly contract for some of the services necessary to perform the Preconveyance Activities.

3.02 Preconveyance Disbursement From the Agency Loan.

- (a) Agency agrees to make up to Four Million, Fifty Thousand Dollars (\$4,050,000) of the Agency Loan available to Developer for Preconveyance Activities. The purpose of the Preconveyance Disbursement is to finance Developer's Preconveyance Activities set out in Section 3.01 above. Funds from the Preconveyance Disbursement will be advanced to Developer either through reimbursement for actual expenses, direct payment to a vendor by Agency, or a two-party check to a vendor for services related to Preconveyance Activities rendered to Developer. Agency's obligation to disburse funds for Preconveyance Activities under the Preconveyance Disbursement cannot exceed Four Million, Fifty Thousand Dollars (\$4,040,000) and in any event ceases on the Closing Date.
- (b) Agency's obligation to release Preconveyance Disbursement funds for Preconveyance Activities is conditioned upon the following requirements and

agreements being met and performed by Developer:

- (i) Developer meeting all conditions and requirements for Agency to make the Agency Loan to Developer pursuant to Section 5.01(a), except for those required with securing the Agency Loan after the Agency conveys the Site to Developer, such as executing and recording the Deed of Trust, procuring title insurance, and the fire and casualty insurance for the Site.
 - (ii) Developer submitting a detailed and itemized preconveyance project budget on or before the first request for a disbursement, which budget is subject to the reasonable approval of Agency. Each request for reimbursement shall be based on the amounts allocated for particular cost items or categories in the Project Design Budget. The Preconveyance Budget may be revised from time to time by Developer subject to the reasonable approval of Agency.
 - (iii) Developer having not committed an Event of Default.
 - (iv) Agency receiving copies of applicable statements and/or invoices evidencing expenditures for authorized Preconveyance Activities.
 - (v) Agency receiving unconditional lien releases in form and content acceptable to Agency to evidence lien-free completion of the work covered by the statements and invoices.
 - (vi) All Project Documents must be owned at all times by Developer free and clear of all liens and encumbrances, and transferable to Agency as herein provided, and Developer shall provide reasonable evidence of such ownership and transferability to Agency, including, without limitation, agreements from all architects, engineers, and other professionals in connection with the Project Documents in form and content reasonably satisfactory to Agency.
 - (vii) Agency's obligation to make a subsequent reimbursement payment hereunder is conditioned upon Agency's approval of Developer's architects, engineers, and project manager, the scope of services, performance schedules, and payment schedules.
 - (viii) Developer having obtained insurance in such amounts and terms as set out in Article XVIII, except for any insurance covering property liability.
- (c) Agency shall reimburse Developer for such costs within thirty (30) days after receipt of the materials in (a), (c), (d) and (f) and conditioned upon the requirements and agreements in (b), (e) and (f) being satisfied; provided, Agency shall not be obligated to reimburse Developer more frequently than once every thirty (30) days. Agency shall make the final determination of the amount of each payment in the event of a dispute between Agency and Developer. At Agency's sole discretion, Agency may make the payment directly to the vendor or in a two-party check made payable to Developer and the vendor.

- (d) If the Post Acquisition Loan is consummated as herein provided, such amounts reimbursed by Agency to Developer will be considered as part principal under the Note pursuant to Section 5.01.
- (e) In the event the Site is not transferred and this Agreement terminates, Agency shall have one of the following options, as Agency may determine in its sole discretion (in addition to Agency's right to liquidated damages pursuant to Section 17.01 if this Agreement is terminated as a result of Developer committing an Event of Default):
- (i) To require Developer to pay back to Agency the amounts Agency disbursed to Developer pursuant to this Section within thirty (30) days following Developer's receipt of Agency's written demand for repayment; and/or
 - (ii) If the Project Documents are completed at the time of termination, to require Developer to deliver to Agency original copies of all Project Documents; or
 - (iii) If the Project Documents are not completed at the time of termination, Agency may require Developer and all vendors providing to complete the Project Documents and/or turn over all Project Documents to Agency. In the event Agency requires vendors to complete the Project Documents, Agency will be responsible for paying the costs necessary to complete the Project Documents
- (f) As security for Developer's performance of its obligations pursuant to the preceding paragraph Developer agrees to the following:
- (i) Developer will give Agency a promissory note in the principal amount of Thirteen Million dollars (\$32,000,000) on the following terms:
 - 1) Agency will not disburse more than Four Million, Fifty Thousand Dollars \$ 4,050,000 until the Agency conveys the Site to Developer;
 - 2) Interest will accrue at eight percent (8%) per annum simple interest; and
 - 3) If the Agency decides not to proceed with the Fox Theater Project with Developer, the outstanding principal balance and interest will be payable one hundred eighty (180) days notice from Agency that the Fox Theater Project will not go forward date of the promissory note, subject to two extensions of ninety (90) days each at Agency's. If Agency goes forward with the Fox Theater Project and Agency conveys the Site to Developer and secures the Agency loan with a deed of trust against the Site, in which case the amount of the Preconveyance Disbursement will be part of the principal and interest due on the \$32 million Agency Loan.
 - (ii) As partial security for the promissory note, Developer grants to Agency a security interest in the Project Documents. Concurrent with the execution of the promissory note, Developer must execute a Financing Statement

(UCC-1 Form), and any other instruments reasonably required by Agency, perfecting the security interest granted to Agency herein.

- (iii) Each of the professionals that provide work product for the Project Documents executes a letter agreement agreeing that all work performed and work product produced in furtherance of the Fox Project is owned by Developer and that the work product and Project Documents and all title and ownership interest in such work product and Project Documents will be transferred to Agency on Agency's demand therefore. The form of letter agreement is set out in Exhibit C.

3.03 Preconveyance Activities Contracted for Directly by Agency.

In the event that Agency, in its sole election, decides to contract directly for services for Preconveyance Activities, Agency's payment for such services will be considered part of the Preconveyance Disbursement.

3.04 Parcel Combination and Lot Line Adjustment for Site.

The Site requires the combination of two parcels. Agency and Developer will determine how such surveys, maps, and legal descriptions and any other information, including CEQA compliance, as may be required to combine or make lot line adjustment to create the expanded Site will be prepared. Agency will obtain any governmental approvals required to merge the parcels to create the Site. The combination of the parcels will be contingent upon Agency's conveying the Site to Developer.

Article IV. Conveyance of the Site

4.01 Conveyance of the Site.

Agency agrees to convey the Site for the payment of Six Million, Five Hundred Thousand Dollars (\$6,500,000.00) ("Purchase Price") and on such further conditions as are set out in Article IV and Article VII. Conveyance may be by long term lease, so long as the value of such lease has a value of Six Million, Five Hundred Thousand Dollars (\$6,500,000.00). Such conditions include a right of reversion to Agency should Developer fail to complete development of the Fox Theater Project pursuant to this Agreement. Agency's obligation to transfer the Site does not arise unless and until Developer meets all of the preconditions Site transfer as set out in VI.

4.02 Time of Disposition of the Site; Escrow.

Within ten (10) business days following the date that the last of the conditions in Section 6.01 have been satisfied as therein provided, or such other date as may be mutually agreed between the parties, Agency shall transfer the Site and Developer shall accept transfer of the Site. The transfer shall be accomplished through an escrow established with the Title Company. The parties shall provide the Title Company with escrow instructions consistent with this Agreement.

4.03 Conveyance; Delivery of Ancillary Documents and Instruments.

On the Closing Date, Agency will convey the Site to Developer. If the conveyance is by a grant deed, the grant deed shall be in substantially the form set out in Exhibit D. If the conveyance is by a lease, the lease shall be in the form to be negotiated in good faith by the parties to reflect the terms of this Agreement and to conform with federal tax credit and any Grantor requirements. The lease shall require the parties to record a memorandum of lease.

4.04 Possession.

Possession of the Site shall be delivered to Developer concurrent with the conveyance of title. Developer shall accept title on the date of conveyance.

4.05 Execution of Documents.

Developer shall execute those documents that require Developer's and Agency's execution prior to Agency's obligation to deliver them to Developer. To the extent reasonably possible, all documents and instruments necessary for closing escrow shall be prepared and circulated for review and approval of all parties prior to the Closing Date. To the extent reasonably possible, the parties shall execute all closing documents and instruments in advance of the Closing Date, and/or shall obtain all approvals as are necessary for execution of the closing documents and instruments on the Closing Date.

4.06 State of Title.

Agency shall convey to Developer title to the Site free and clear of all liens, encumbrances, deeds of trust, covenants, conditions, restrictions, assessments, easements, leases and taxes except for those exceptions which Developer has caused or agrees to, and further subject to:

- (a) This Agreement (which shall be recorded with the Alameda County Recorder prior to recordation of the grant deed or memorandum of lease, as appropriate);
- (b) The covenants, conditions, and restrictions specified in the Redevelopment Plan;
- (c) Applicable building and zoning laws and regulations;
- (d) Any lien for current taxes and/or assessments which accrue subsequent to the recordation of the grant deed or recording of the memorandum of lease, as appropriate;
- (e) Matters listed on Exhibit E;
- (f) All standard printed exceptions appearing on the Title Policy issued by the Title Company; and
- (g) Such additional conditions, covenants, restrictions, or easements as may be agreed upon between Developer and Agency
- (h) Developer agrees to pay all costs of any surveys or other items necessary to

obtain an ALTA extended title policy.

- (i) Agency access easement pursuant to Section 14.03.
- (j) A deed covenant restricting transfers pursuant to Section 15.02(b) .

4.07 Physical Condition of the Site.

Agency is not in any way responsible for any conditions of the Site. Agency makes no warranty or representation, express or implied, to Developer other than those specifically stated in this Agreement, as to the fitness or condition of the Site. The Site shall be conveyed in an “as is, where is, and with all faults” physical condition.

4.08 Purchase Price.

Agency will lend Developer the Purchase Price as part of the Agency Loan.

4.09 Agency Closing Costs.

At the Closing Date, Agency will pay the following:

- (a) Ad valorem taxes and assessments, or pro-rations thereof, if any, for any period prior to the Closing Date even if not due until after the Closing Date;
- (b) All costs and expenses, if any, necessary to place title to the Site in the condition set forth in Section 4.06;
- (c) All costs and expenses of preparing, executing, acknowledging, and delivering the Grant Deed; and
- (d) The cost, if any, of preliminary title reports ordered by Agency.

4.10 Developer’s Closing Costs.

At the Closing Date, Developer will pay:

- (a) Alameda County documentary transfer taxes;
- (b) City of Oakland real estate transfer taxes; and
- (c) The cost of title insurance premiums on the Title Policy.

4.11 Shared Closing costs.

Any escrow fees and other costs of escrow charged by the Title Company and not specifically allocated by this Agreement shall be shared equally by Agency and Developer.

**Article V.
Fox Theater Project Financing and Leasing**

5.01 Agency Financial Assistance. Agency agrees to provide the Financial Assistance

set out in this section. Except for the Preconveyance Disbursement, the Financial Assistance will be provided on or after Agency conveys the Site to Developer and under such terms and conditions as required by the grantor or lender, as the case may be, and as may be required by this Agreement.

(a) Agency Loan of Thirty Two Million Dollar (\$32,000,000) comprising predevelopment advances, the Purchase Price loan, and a development loan, but the principal balance may be increased as necessary to provide for the Loan Guaranty as set out in Section 5.01(b), the fire insurance proceeds as set out in Section 5.01(d), and the Contingent Loan as set out in Section 5.01(e)..

(i) Loan terms. The basic terms of the Agency Loan are set out below in this subsection:

- 1) Interest rate will be Eight Percent (8%) per annum simple interest.
- 2) Term: The loan term will be thirty (30) years.
- 3) Payments. Loan payments will be based on a residual retention formula.
- 4) The promissory note will be substantially in the form in Exhibit F.
- 5) Preconveyance Disbursement. Agency shall disburse up to Four Million, Fifty Thousand Dollars (\$4,050,000) from the Agency Loan prior to transfer of the site for the preconveyance activities set out in Article III

(b) Loan Guarantee of \$6,500,00 for Commercial Loan. Agency agrees to guarantee loan to Developer for construction and permanent financing from a commercial lender in an amount not exceed Six Million, Five Hundred Thousand Dollars \$6,500,000. In the event any Agency funds are actually applied to the guarantee, the amount of such funds will be added to the Agency Loan.

(c) Assignment of Grants.

Agency will assign the grants for the Fox Theater Project, the proceeds from each, or the use of the proceeds, subject to Developer assuming all duties and obligations of each grant and the grantor's willingness to assign the grant or the proceeds from the grant to Developer:

- (i)** , California Conservation Historic Endowment Grant (Cal. Prop. 40) (CCHE): Two Million, Eight Hundred, Eighty-Seven Thousand, Five Hundred Dollars (\$2,887,500) from the California Cultural and Historical Endowment to reimburse expenditures related to the renovation of the theater.
- (ii)** California Heritage Fund Grant through the California Office of Historic Preservation: Three Hundred, Seventy-Five Thousand Dollars (\$375,000) from the State Office of Historic Preservation for façade restoration.
- (iii)** U.S Dept. of Housing and Urban Development: Six Hundred

Thousand Dollar (\$600,000) HUD grant for Fox Theater restoration. HUD grant is to the City. Agency agrees to obtain appropriation of HUD grant from the City to the Fox Theater Project.

(d) Fire Insurance Claim of at Least \$1,500,000.

Agency will assign proceeds of at least One Million, Five Hundred Thousand Dollars (\$1,500,000) anticipated from a property insurance claim arising out of fire damage to the Fox Theater. Agency agrees to increase the Agency Loan by One Million, Five Hundred Thousand Dollars (\$1,500,000), which amount must be repaid by cancellation of assignment of the first One Million, Five Hundred Thousand Dollars (\$1,500,000) to Developer.

(e) Contingent Loan of up to \$3,530,000 for Payment of Annual Return and Buy Out of Tax Credit Investors.

Agency agrees to increase the Agency Loan by up to Three Million, Five Hundred, Thirty Thousand Dollars (\$3,530,000) in the event that the net income to Developer from the operation of the Fox Theater Project is insufficient to provide funds to pay the tax credit investors the annual return and/or the amount necessary to buy out the tax credit investors interest at the end of the tax credit benefit period. The insufficiency of operating funds available to pay the tax credit investors will be based on a residual retention formula.

(f) No Assignment of Financial Assistance by Developer.

Developer may not assign or pledge the Financial Assistance to any other person without the Agency's prior approval, which approval Agency may give or deny in Agency's sole and absolute discretion. Notwithstanding the foregoing, Developer may assign the Financial Assistance for purposes of obtaining financing for the construction of the Fox Theater Project, subject to the terms or restrictions of each grant, with Agency's prior approval, which approval shall not be unreasonably withheld.

(g) Use of Financial Assistance to Cure Monetary Default

In the case of an uncured monetary default by Developer, Agency may deduct or offset the amount of such uncured monetary default from any Financial Assistance due Developer, provided that the source of funds permits such use of the funds.

(h) Developer's Acceptance of Terms of Grants and Financing and Indemnification.

Developer certifies that it has reviewed, understands, and accepts the terms of all the grants and other financing that Agency will provide, transfer, or assign to Developer as set out in this Section 5.01 for purposes of funding or financing the Fox Theater Project. Developer further agrees and warrants that it will conform to and comply with all requirements for each of the financing or funding sources. Developer further agrees to indemnify Agency for any Developer failure to conform to or comply with the requirements of any financing or funding source.

5.02 Developer's Financial Obligations.

(a) Developer's Financial Contributions.

Developer agrees to provide a minimum of Seventeen Million, Three Hundred Thousand Dollars (\$17,300,000) in financial contribution or financing. The parties anticipate that Developer will provide financial contributions from the following sources and in the following amounts:

- (i)** Historic Tax Credits. Federal Historic Tax Credit financial contribution of at least Five Million, Thousand Dollars (\$5,000,000);
- (ii)** New Market Tax Credits. Federal New Market Tax Credits financial contribution of at least Five Million, Three Hundred Thousand Dollars (\$5,300,000);
- (iii)** Pledge of Rent From the Arts School. A pledge of rent in the amount of at least Six Million, Five Hundred Thousand Dollars (\$6,500,000) from the Arts School to provide an income stream to retire debt service on Developer's construction loan set out in Section 5.02(a)(vii)
- (iv)** Charter School Facilities Grant. A Federal Charter Schools Facility grant of \$1,200,000.00 through the State of California to OSA that Developer will require OSA apply to construction on the Fox Theater Project.
- (v)** Friends of the Fox Contribution. A grant of at least Five Hundred Thousand (\$500,000) from the Friends of the Fox.
- (vi)** Substitution of Developer's Financial Contributions. Developer may substitute other sources of funding subject to Agency's reasonable approval of the amount and terms of such funding.
- (vii)** Construction Loan.
 - 1)** Developer agrees to obtain a construction loan in the principal amount of at least Six Million Five Hundred Dollars (\$6,500,000) on such terms as are subject to Agency's reasonable approval.
 - 2)** Developer understands that Agency and Developer's construction lender may enter into an intercreditor agreement. Developer will ensure that its construction lender negotiates, in good faith with Agency over any terms of the intercreditor agreement.

Article VI.

Conditions Precedent to Agency's Obligations; Termination Date

6.01 Conditions Precedent to Agency's Obligations To Convey Site.

Agency shall not be obligated to convey the Site to Developer pursuant to Article IV unless and until the conditions and requirements stated in this Section 6.01 have been satisfied.

- (a)** Developer shall have executed and delivered to Agency the following documents and instruments:
 - (i)** Reversionary grant deed for Parcel, in substantially the form set out in Exhibit G (the "Reversionary Grant Deed"). The Escrow holder will be instructed to hold the Reversionary Grant Deed in Escrow until Agency provides the Escrow holder with further instructions in accordance with Section 17.01(b).
 - (ii)** The Assignment of Project Documents, Permits and Licenses. Contracts, and Intangibles related to the Site substantially in form and content as Exhibit H; and
 - (iii)** The Environmental Indemnity in form and content as Exhibit I.
 - (iv)** Operating Agreement. Developer has executed an operating agreement pursuant to Section 0 subject only to the City issuing a certificate of occupancy for the Fox Theater.
 - (v)** Arts School Lease. Developer has executed the lease with the Art School pursuant to Section 9.02 subject only to the City issuing a certificate of occupancy for the Fox Theater
- (b)** Developer has obtained commitments or assignments to it of all the financing specified in Section 5.02 as Developer's Financial Commitments to Agency's satisfaction.
- (c)** Developer has delivered the Purchase Price to Title Company.
- (d)** Developer's construction financing is approved, subject only to Agency conveying the Site to Developer.
- (e)** All warranties and representations of Developer made in this Agreement are true and correct at the Closing Date.
- (f)** Developer has not committed an Event of Default.
- (g)** Agency has received copies of all Building Permits permitting construction of the Improvements according to the plans and specifications pursuant to Section

7.03(d).

- (h) Developer has an executed contract with contractor subject only to Agency's conveyance of the Site to Developer.
- (i) Agency has received signed letters from Developer's architect and general contractor in the form and content as Exhibits J, and K, respectively.
- (j) Agency has received and approved Developer's Formation Documents.
- (k) Developer has obtained all insurance coverages required by Article XVIII
- (l) Agency has received original copies of the bonds referred to in Section 7.03(k)(iii).
- (m) The Site has not been damaged or injured in any manner unless Developer establishes that it has sufficient funds to restore the damage or injury satisfactory to Agency in its sole discretion.
- (n) Agency shall notify Developer when all of the conditions and requirements in this Article VI have been satisfied.

Article VII. Development and Other Requirements for the Fox Theater Project

7.01 The Fox Theater Project.

- (a) Developer is to develop the Fox Theater Project.

7.02 Design criteria.

The Fox Theater Project must be designed and constructed in accordance with the criteria set out in Exhibit L, with all requirements set out in the Mitigated Negative Declaration adopted by Agency on July 19, 2005 for the Fox Theater Project, the requirements of any Grantor, and the U.S. Secretary of the Interior's Standards for the Treatment Historic Properties. All designs are subject to the Agency's approval.

7.03 Design of Fox Theater Project; Construction Provisions.

- (a) Final Design Development Plans.

- (i) Not later than one hundred twenty (120) days following execution of this Agreement, Developer shall submit to Agency its Final Design Development Plans for the Project for Agency's review and approval. Agency shall review the submitted Final Design Development Plans and submit written comments to Developer within fourteen (14) days. Developer shall have fourteen (14) days following receipt of Agency's written comments to incorporate changes covered by Agency's comments and then resubmit the revised Final Design Development

Plans to Agency for Agency's approval. This procedure shall be repeated, if necessary, until the Final Design Development Plans are approved by Agency as herein provided, subject to the provisions of Section 7.03(c). The term "Final Design Development Plans" means all design documentation upon which Developer and City will rely in the approval of the design of the Project and the issuance of required Permits for the development and construction of the Fox Theater Project. The Final Development Design Plans shall include, without limitation, architectural drawings, elevations, building plans, specifications, and a schedule for development and construction for the Fox Theater Project. Prior to Agency approval of the Final Design Development Plans, Agency's Director of Redevelopment must have approved the Final Design Development Plans.

- (ii) Prior to submission of the Final Design Development Plans, Developer shall consult with Agency concerning Design Development Plans every thirty (30) days, or more frequently as may be required by Agency. Developer shall also submit draft Design Development Plans to Agency on a monthly basis, or more frequently as may be required by Agency, for its approval, comment and review on an informal basis to assure that submission of the Final Design Development Plans will be complete and in proper form within the time established for final submission.

(b) CEQA Compliance and Predevelopment Permits.

- (i) Developer shall apply for and diligently pursue the issuance of all applicable zoning permits and related governmental approvals, including environmental review pursuant to the California Environmental Quality Act, for the construction and development of the Project ("Predevelopment Permits"). Agency will use reasonable efforts to assist Developer as needed to obtain Predevelopment Permits. Certified copies of all Predevelopment Permits and approvals required by this Subsection 7.03(b)(i) shall be submitted to Agency immediately upon receipt by Developer.
- (ii) Receipt of the Predevelopment Permits and governmental approvals set forth in this Subsection 7.03(b), including environmental review pursuant to the California Environmental Quality Act and incorporation of any mitigation measures identified in the environmental review process into the Final Construction Plans is a precondition to conveyance of the Site pursuant to Articles Article IV and Article VI.

(c) Final Construction Plans.

- (i) Not later than one hundred fifty (150) days following the execution of this Agreement, Developer shall submit to Agency its Final Construction Plans for construction of the Fox Theater Project for Agency's review and approval. Agency shall review the submitted Final Construction Plans and submit written comments to Developer within fourteen (14) days. Developer shall have fourteen

(14) days following receipt of Agency's written comments to incorporate changes covered by Agency's comments and then resubmit the revised Final Construction Plans to Agency for Agency's approval. This procedure shall be repeated, if necessary, until the Final Construction Plans are approved by Agency as herein provided, subject to the provisions of Section 7.03(c)(iii). The term "Final Construction Plans" means all construction documentation upon which Developer and Developer's several contractors will rely in constructing the Project and shall include, without limitation, final architectural drawings, landscaping plans and specifications, final elevations, building plans, specifications, and a schedule for construction, including a phasing schedule.

- (ii) Prior to submission of the Final Construction Plans, Developer shall consult with Agency concerning construction plans every thirty (30) days, or more frequently as may be required by Agency. Developer agrees that the proposed structural design shall be analyzed through dynamic modeling. Developer shall also submit draft construction plans to Agency on a monthly basis, or more frequently as may be required by Agency, for its approval, comment and review on an informal basis to assure that submission of the Final Construction Plans will be complete and in proper form within the time established for final submission. Developer shall deliver a complete set of Final Construction Plans to Agency, as well as any subsequently approved revisions and supplements thereto.
- (iii) Any subsequent material change to the approved Final Construction Plans must be submitted to and approved by Agency. If such change is not approved by Agency, the latest approved Final Construction Plans shall continue to control development of the Project.
- (d) Building Permits and Other Governmental Approvals. In addition to those Permits and approvals required in Section 7.03(b), Developer shall apply for and diligently pursue the issuance of building Permit(s) and other required governmental approvals for the construction and development of the Project. Developer shall thereafter diligently take all reasonable steps necessary to obtain such Permit(s) and governmental approvals. Agency will use reasonable efforts to assist Developer to obtain such Permits. Developer shall apply for the necessary building Permit(s) not later than three (3) days after approval by Agency of the Final Construction Plans. Certified copies of all required Permits and approvals necessary to construct the Project shall be submitted to Agency immediately upon receipt by Developer, but in no event more than sixty (60) days following approval by Agency of the Final Construction Plans. Receipt of such building Permits is a precondition to conveying the Site pursuant to Articles Article IV and Article VI.
- (e) Commencement of Construction. Developer shall have the goal of commencing construction of the Fox Theater Project not later than September 1, 2006 or within such time as the parties may agree. Commencement of construction means Developer's contractor has begun interior demolition and Hazardous Substances remediation for the development approved by Agency. The performance of grading or excavation work alone shall not be considered commencement of construction,

pursuant to the approved Final Construction Plans (or portions thereof), but shall not include work related solely to the removal and/or remediation of Hazardous Substances.

- (f)** Construction Pursuant to Plans. Developer must construct the Fox Theater Project according to the Final Construction Plans approved by the Agency's Director of Redevelopment, and/or City Building Department, and Agency. Developer is solely responsible for all aspects of Developer's construction of the Project, including, without limitation, the quality and suitability of the Final Construction Plans, the supervision of construction work, and the qualifications, financial conditions, and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants, and property managers. Agency is under no duty to review the Final Construction Plans or to inspect construction of the Fox Theater Project, nor shall Agency be responsible for, or bound by any acts or omissions of City in this regard. Any review or inspection undertaken by Agency for the Fox Theater Project is solely for the purpose of determining whether Developer is properly discharging its obligations to Agency pursuant to this Agreement, and should not be relied upon by Developer or by any third parties as a warranty or representation by Agency as to the quality of the design or construction of the Fox Theater Project. Agency's approval of the Final Construction Plans does not constitute a representation or warranty as to compliance with state or local building codes and/or other applicable Laws.
- (g)** Changes in Final Construction Plans. Following commencement of construction of the Fox Theater Project, if Developer wishes to make any material change in the Final Construction Plans then in effect, Developer must first submit the proposed change to Agency for its written approval. If the Final Construction Plans, as modified by any proposed material change, conform to the requirements of this Agreement, Agency shall approve the change by notifying Developer in writing. Unless the proposed change is rejected by Agency within ten (10) business days, it shall be deemed approved. If rejected within that time, the previously approved Final Construction Plans shall remain in effect.
- (h)** Completion of Improvements. Developer will diligently pursue construction of the Fox Theater Project following commencement of construction, and agrees to complete of the construction Fox Theater Project within twelve (12) months following the Closing Date, and in no event later than July 1, 2008. Completion of construction occurs when the City issues a certificate of occupancy. Agency may extend the completion date in two (2) month increments, but Agency may grant no more than three (3) such extensions. Within forty-five (45) days following completion of construction Developer shall deliver to Agency a complete set of as-built plans prepared by Developer's architect.
- (i)** Progress Reports. Until completion of construction, Developer will provide Agency with copies of all documents for construction draws and approval by the construction lender. In the event the period between any construction draw exceeds thirty (30) days Developer will make written reports to Agency, in such

detail as may be reasonably requested by Agency, as to the actual progress of construction and expenses in relation to the budget.

(j) No Obstruction Of Streets. Developer must make best efforts to undertake construction of the Fox Theater Project in such manner so as to minimize or not obstruct the streets surrounding the Site, and to minimize any loss of parking along the streets.

(k) General Contractor; Construction Contract.

(i) Developer's general contractor and the construction contract are subject to Agency's reasonable approval. The contractor shall meet the obligations and requirements in Sections 7.03(m), 7.03(n), 7.03(o), 7.03(p), and Article X and Article XX .

(ii) Developer shall submit the proposed construction contract to Agency within thirty (30) days following execution of this Amended and Restated Agreement. Agency shall review the submitted proposed construction contract and submit written comments to Developer within twenty-one (21) days. Developer shall have fourteen (14) days following receipt of Agency's written comments to incorporate changes covered by Agency's reasonable comments and then resubmit the revised construction contract to Agency for Agency's approval. This procedure shall be repeated, if necessary, until the construction contract is approved by Agency as herein provided, subject to the provisions of Section 7.03(c).

(iii) The construction contract shall provide for the Fox Theater Project to be constructed for fixed or specified maximum amounts pursuant to the approved Final Construction Plans and, at Developer's discretion or as required by the construction lender, require that the contractor furnish payment, performance and completion bonds to secure payment of the claims of laborers, mechanics or materialpersons employed to work on the Fox Theater Project, and guarantee faithful performance of the contract. If bonds are used in place of any portion of the additional security, the bonds shall be issued in a form and by a surety acceptable to Agency, and otherwise subject to Agency's approval. Each of the bonds shall be in a sum equal to the contract price. Each of the bonds shall on its face name the construction lender and Agency as beneficiaries (in that priority order) with the consecutive right of each beneficiary the option to cure the contractor's default. The construction contract must contain a completion schedule that results in completion of construction within twelve (12) months of the Closing Date. The construction contract(s) for the Project and related documents, including, without limitation, the Final Construction Plans and the required bonds, are collectively referred to as "Construction Contracts".

(iv) Agency's reasonable approval of the contractor and the Construction Contract is a precondition to conveying the Site pursuant to Article VI.

(l) Developer's Architect and Engineers.

(i) Developer shall retain architects and engineers (including an architect and an engineer with substantial experience historic renovation and theater design the Fox Theater Project) to prepare the materials required by Sections 7.03 and to supervise construction of the Project.

(ii) Within thirty (30) days following execution of this Agreement, Developer shall submit the following to Agency for its reasonable approval:

1) The names and addresses of Developer's architects, and engineers.

2) A detailed statement concerning the scope of services to be provided Developer by each individual, including detail as to how the services of individuals are to be coordinated. Such scope of services will be incorporated into the contracts with such individuals.

3) A detailed statement covering the performance schedules and payment schedules for each individual, which schedules are to be incorporated into the contracts with such individuals.

(iii) Developer's contracts with architects and engineers are subject to Agency's reasonable approval prior to execution. Developer shall deliver to Agency copies of the executed contracts with the architects and engineers solely for the purpose of enabling Agency to review the contracts and to verify compliance with items (ii) and (iii). From time to time upon receipt of request from Agency, Developer shall provide Agency with reasonable evidence that Developer is complying with items (ii) and (iii).

(m) Equal Opportunity Requirements. The requirements in this Subsection 7.03(m) are preconditions to the transfer of the Site pursuant to Article VI.

(i) Equal Opportunity.

1) Developer shall submit information on forms supplied by Agency concerning the ownership and work force composition of Developer's firm as well as its consultants, subconsultants, contractors, subcontractors and suppliers, as reasonably required by Agency.

2) All affirmative action efforts of Developer are subject to tracking by Agency. This information or data shall be used for statistical purposes only. All contractors and consultants are required to provide data regarding the make-up of their subcontractors, subconsultants, and agents who will perform Agency contracts, including the race and gender of each employee and his or her job title or function and the methodology used by Developer to hire and/or contract with the individual or entity in question. The Agency Administrator will track Developer's MBE/WBE utilization to ensure the absence of unlawful discrimination on the basis of race, ethnicity, national

origin, gender, religion, sexual orientation, or disability, and make reports quarterly, or as more frequently requested, to Agency. In the use of such recruitment, hiring and retention of employees or subcontractors, Agency requires all contractors to undertake nondiscriminatory and equal outreach efforts which include outreach to minorities and women as well as other segments of Oakland's business community.

(n) Prevailing Wage.

- (i)** The parties acknowledge that the construction of the Fox Theater Project is a public work of improvement, and the Developer agrees to cause the construction of the Improvements to be performed as a public work.
- (ii)** Developer must ensure that all workers performing construction work for the Project employed by Developer, and must include in its contracts with its contractors requirements that its contractors' employees and their subcontractors' employees, will all be compensated in an amount no less than the general prevailing rate of per diem wages as determined by the California Department of Industrial Relations under California Labor Code Sections 1770, et seq. Developer must comply with and, will include in its contracts with its contractors, requirements that its contractors and their subcontractors, ensure that their contractors and subcontractors comply with, all reporting and recordkeeping requirements of the applicable prevailing wage statutes and regulations. Developer is aware of and shall comply with all provisions of Agency's prevailing wage requirements contained in Resolution No. 87-4 C.M.S., passed on January 20, 1987, a copy of which is on file with Agency.
- (o) Local Employment.** Developer must ensure that all contractors and subcontractors performing work on the Project comply with Agency's Local Employment Program for providing employment at the Project for qualified and licensed (if licensing is required by law) Oakland residents except that for the Fox Theater Project, Developer shall require that all contractors and subcontractors attempt to meet a local hire goal of at least fifty percent (50%) of the workforce . A copy of the program is on file with Agency.
- (p) Local/Small Business Enterprise.** Developer must ensure that all consultants, contractors and subcontractors performing work on the Fox Theater Project comply with Agency's Local/Small Business Enterprise Program for participation of small Oakland businesses in Project construction and professional services except that for the Fox Theater Project the Local/Small Business requirement attempt to reach a goal of at least fifty percent (50%) of the consultants, contractors and subcontractors performing work on the on the Fox Theater Project. A copy of the program is on file with Agency.
- (q) Review and Approval of Developer Submissions by Agency.**

 - (i)** Subject to the specific timing requirements in this Article VII, if the

materials required by this Article VII are initially submitted by Developer (the "Developer Submissions") in a timely manner and in their entirety conform to the provisions of this Agreement, subject to Agency's disapproval rights in the following paragraph, Agency shall approve in writing each Developer Submission and no further filings by Developer or approval by Agency shall be required for that Developer Submission, except with respect to any subsequent material change in the contents of the Developer Submission. Agency may approve those portions of a Developer Submission that conform to the provisions of this Agreement and reject those portions that do not conform. Agency may also approve all or a portion of a Developer Submission subject to conditions requiring further submissions for Agency review and approval. Unless rejected, or approved subject to conditions, by Agency in writing within thirty (30) days of submission by Developer, a Developer Submission shall be deemed approved by Agency.

- (ii) If a Developer Submission is rejected by Agency in whole or in part, or approved subject to conditions requiring further submissions, Developer must submit a new or revised Developer Submission within thirty (30) days of written notification of Agency's rejection or conditional approval and the reasons therefor. Unless rejected or approved subject to conditions by Agency in writing within fifteen (15) days of a resubmission by Developer, the Developer Submission shall be deemed approved by Agency. If a resubmitted Developer Submission is rejected by Agency in whole or in part or approved subject to conditions requiring further resubmissions, Developer must submit new or revised Developer Submissions within thirty (30) days of written notification of Agency's rejection or conditional approval and the reasons therefor.

- (r) Financing Plan and Fox Theater Project Development Budget. Not later than the dates stated in this Subsection 7.03(r), Developer must submit to Agency for its review and approval, evidence of the availability of the funds necessary to develop and complete construction of the Fox Theater Project (the "Financing Plan"). Sources for funding the development and construction (including evidence of the availability of funds when required) must be provided by Developer and approved by Agency.

- (i) The Financing Plan shall include:

- 1) A detailed cost breakdown of construction of the Fox Theater Project (the "Fox Theater Project Development Budget"). The Fox Theater Project Development Budget shall be an itemized project budget for the construction of the Fox Theater Project. The Fox Theater Project Development Budget must provide for a ten percent (10%) retainage for all items of construction
- 2) A twenty (20) year cash flow projection for the Fox Theater Project
- 3) A copy of a binding commitment obtained by Developer for interim construction financing from a reputable institutional lender in a principal

amount of not less than Six Million Five Hundred Dollars (\$6,500,000), certified by Developer to be a true and correct copy thereof. The commitment for construction financing shall be in such form and content as is normally furnished by construction lenders and shall be subject to the approval of Agency.

(ii) Time to Make Submissions.

- 1)** Within fifteen (15) days after execution of this Agreement, Developer shall submit to Agency the materials required by Sections 7.03(r)(i). Within thirty (30) days after execution of this Agreement, Developer shall submit to Agency the construction loan commitment referred to in item 7.03(r)(i)3).
- 2)** Any subsequent material change to the approved Financing Plan must be first submitted to and approved by Agency. If such change is not approved, the latest approved Financing Plan shall continue to control development of the Project. For purposes of this paragraph, a material change shall include, without limitation, a change in lenders, a refinancing of a loan, or any change in a lender's commitment letter.

(s) Contingencies. If during construction of the Fox Theater Project Developer shall encounter contingencies (including unexpected and unanticipated conditions and work, cost overruns, and the like), Developer shall pay for such contingencies from all available funds, as determined by Developer including: the possible funds from the Construction Loan and Developer's funds. As a contingency, the construction budget shall have a goal of at least ten percent (10%) of the total amount construction contract.

7.04 Construction Loan.

- (a)** Immediately after Agency conveys the Site to Developer and this Agreement is recorded, Developer will cause the deed of trust securing the Developer's construction loan to be recorded with the Alameda County Recorder. This requirement is a precondition to Agency conveying the Site to Developer pursuant to Article VI.
- (b)** The construction loan documents in connection with the construction loan are subject to Agency's approval. No later than thirty (30) days prior to the Closing Date, Developer shall submit to Agency for its approval the construction loan documents. Any subsequent changes in the construction loan documents must first be submitted to and approved by Agency.

7.05 Formation Documents.

As a condition to Agency conveying the Site to Developer pursuant to Article VI, Developer's Formation Documents shall be subject to Agency's reasonable approval.

Article VIII. Hazardous Substances

8.01 Agency.

Agency has available copies of the reports or summaries that may contain relevant information as to the existence of any Hazardous Substances on the Site. Exhibit M contains a list of the reports available. Developer hereby certifies that it has received copies of all the reports or summaries listed.

8.02 Notice.

Agency hereby gives notice to Developer that, to the best of its knowledge and relying solely on analysis performed by its environmental consultants, Hazardous Substances are present at, on or beneath the Site. Agency has provided Developer with reports regarding potential Hazardous Substances set out in Exhibit M. Agency also believes there may be other Hazardous Substance on the Site that may not have been identified in any reports. This notice constitutes the notice required under California Health and Safety Code Section 25359.7 and other laws. The knowledge referred to in this Section is the actual knowledge of Patrick S. Lane and Dan Vanderprieem, without having conducted any investigation and is effective to the date of execution of this Agreement. Agency is conveying the Site to Developer in an "As is, where is" condition and Agency accepts no responsibility or liability for the presence of any Hazardous Substances on the Site.

8.03 Environmental Release.

- (a)** As of the Closing Date, Developer for itself, its lessees, successors, assigns and every successor in interest to the Site (collectively "Developer and its Successors") releases Agency and the City of Oakland, and their officers, employees and agents from any claims, demands, administrative actions, litigation, liabilities, investigative costs, response costs, remediation costs and penalties, including costs of legal proceedings and reasonable attorneys' fees, that Developer and its Successors may incur as a consequence of or arising out of the presence of any Hazardous Substances on, at, or near the Site.
- (b)** Developer expressly waives the benefits of Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR EXPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN TO HIM MUST HAVE MATERIALLY AFFECTED THE SETTLEMENT WITH THE DEBTOR.

- (c)** Developer must obtain a release similar in form and substance from (i) its agents and contractors who perform work of any kind on the Site, including testing; and (ii) its successor in Interest.

8.04 Phase II Report;
Hazardous Substance Remediation and Removal.

- (a) If required by a governmental agency having jurisdiction over matters pertaining to Hazardous Substances, Developer shall cause an environmental engineering firm (acceptable to Agency) to prepare a Phase II Report covering the Site. A true and accurate copy of the Phase II Report will be delivered to Agency within ninety (90) days after execution of this Agreement.
- (b) If the Phase II Report indicates the presence of Hazardous Substances at the Site and all or part of the Hazardous Substances are required to be removed and/or remediated pursuant to applicable Environmental Laws, Developer shall cause to be prepared a removal and/or remediation plan subject to Agency's approval which shall be submitted to Agency within one hundred twenty (120) days after execution of this Agreement.
- (c) Agency's approval of the Construction Contracts and contractors pursuant to Section 7.03(k) includes the contract between Developer and the environmental contractor or firm, and approval of the environmental contractor or firm that is to conduct the removal and/or remediation plans. The conduct of the removal and/or remediation plan shall be included in Developer's construction obligations pursuant to the applicable provisions of Article VI
- (d) The requirements in this Section 8.04 are preconditions to Agency's obligation to transfer the Site to Developer pursuant to Article VI.
- (e) The provisions of this Section 8.04 to the contrary notwithstanding, if Developer reasonably concludes that the costs of conducting and completing the removal and/or the remediation plan (based upon bids from a minimum of three (3) reputable environmental engineering firms or contractors) will render the Project uneconomic to Developer, Developer shall have the election to terminate this Agreement by giving written notice of such termination (together with a detailed statement by Developer of why Developer has concluded the Project is uneconomic) no later than one hundred forty (140) days after execution of this Agreement, otherwise this Agreement shall remain effective in accordance with its terms.

8.05 Environmental Indemnifications.

As a condition to Agency conveying the Site to Developer pursuant to Article VI, all of the General Partners and/or other Principals of Developer shall deliver to Agency at the Closing Date executed original copies of the Environmental Indemnity executed by each such General Partner and/or Principal.

8.06 Environmentally sustainable project.

- (a) Developer will make reasonable, good faith efforts within the limits of the financing available for the Fox Theater Project as set out in Article V to design, develop, and

construct the Project to be environmentally sustainable in conformance with the LEED Green Building Rating System (Version 2.0, March 2000) published by the U.S. Green Building Council, which is on file with Agency. Developer and its design consultants shall work with Agency's economic development staff to develop appropriate and economically feasible sustainable building goals and strategies using the Agency's Sustainable Building Guide and Project Management Tool. Principles of environmental sustainability, including substantial use of such green building techniques as energy-conserving design and appliances, water-conserving fixtures and landscape, recycled-content building materials and low waste construction techniques, shall be incorporated into the final construction plans for the Project. Developer shall have as a goal to achieve a score of at least 26 on the LEED Green Building Rating System and will have the Project "LEED Certified." Developer may take advantage of the City of Oakland's program offering free Energy Efficiency Design Assistance in designing the Project.

- (b)** Developer shall use good faith efforts to include the following in the Project: maintenance of systems to maintain efficiency; use of non-phosphate liquid detergents; use of oxygen-based bleach; education of staff to use environmentally friendly products; use of low volatile organic compounds ("VOC") products such as office supplies and cleaning products whenever possible; use of recycled paper products; purchase of products with less packaging; use of refillable containers; and such other methods and materials which subsequently become available.
- (c)** Developer shall write into specifications for construction bid and contract the need to comply with the City's Construction Demolition and Debris ("CD&D") ordinance, and to seek to achieve seventy-five percent (75%) or higher salvage or recycling of CD&D materials.
- (d)** Developer shall contact the East Bay Municipal Utility District ("EBMUD") to investigate feasibility of plumbing to utilize recycled water for appropriate applications.
- (e)** Developer shall ensure that specifications for low VOC and/or environmentally friendly cleaning products are used by any building maintenance or janitorial services.
- (f)** Economic Sustainability. Developer shall inform and invite general contractor and property manager (when timely) of the availability of "Hire Oakland" local employee recruitment, and/or other related local employment training and placement services, as appropriate for construction, facility operation, and tenants' employee hiring.
- (g)** Equity/Civic Sustainability. Developer shall consider installation of public art in and around the public areas of the building site.

8.07 Use and Operation of Site.

Neither Developer, nor any agent, employee, or contractor of Developer, nor any authorized user, occupant, lessee of the Site or Project, or successor in interest of Developer shall use the Site or Project or allow the Site or Project to be used for the generation, manufacture, storage, disposal, or release of Hazardous Substances following conveyance of title to the Site to Developer.

**Article IX.
Fox Theater Post Completion Operating Requirements**

9.01 Theater.Operator and Operating Agreement

Following completion of the Fox Theater Project, Developer must operate or cause the theater portion of the improvements on the Site to be operated as performing arts theater. The parties anticipate that the initial operator for the theater will be Another Planet Entertainment, Inc. (“APE”) and that will lease the theater portion of the Fox Theater Project. The essential terms of the APE lease are set out in Exhibit P. The terms set out in Exhibit P may not be changed without Agency approval unless the changes are necessary to comply with federal tax credit requirements, the requirements of any Grantee, or to satisfy a tax credit investor.

9.02 Oakland School for the Arts

- (a) Art School Lease Approval** The ground floor of the wrap around buildings off Telegraph, along 18th Street and 19th Street, as well as the second and third floors are intended for use by the Oakland School for the Arts (“OSA”). Developer must design these wrap building to accommodate a school for the arts unless another use is approved in advance by the Agency Board. Prior to the Closing Date and as a condition of Agency’s conveying the Site to Developer, Developer will enter into a lease with the OSA. The essential terms of the OSA lease are set out in Exhibit Q. The terms set out in Exhibit Q may not be changed without Agency approval unless the changes are necessary to comply with federal tax credit requirements, the requirements of any Grantee, or to satisfy a tax credit investor.

9.03 Ground Floor Retail Space.

Developer must design for retail uses that portion of the wrap around buildings on the ground floor that are not used for the Oakland School for the Arts .

9.04 First Source Program.

- (a) Under the City of Oakland’s First Source Employment Referral Program (“First Source”),** the City obtains commitments from employers to allow the City to first refer Oakland residents to fill job vacancies in a company before advertising to the general public. Developer will: (a) use the referral resources of First Source for any job openings that arise for employment at the Project before making such openings available to the general public; (b) provide First Source staff with the job

specifications for all such openings and all applications and forms for such employment; (c) meet with First Source staff to explain the job descriptions and its employment needs; and (d) provide placement information, comments, and evaluation of First Source services to staff as requested. Developer will encourage its operator to use First Source.

(b) The requirements in the above paragraph shall apply to all businesses (including nonprofits) occupying any portion of the Site, including without limitation all business tenants, subtenants, and any successors-in-interest to the Site. Developer shall ensure that all First Source requirements are incorporated into any leases, licenses, or conveyancing agreements with any businesses occupying any portion of the Site.

(c) The City, through First Source staff, shall:

- (i) Recruit Oakland applicants through its consortium of employment and job training providers to be referred for employment to Developer and other Site occupants;
- (ii) Assist in assessing all applicants prior to referral to ensure that applicants meet the minimum qualifications set forth in the job specifications;
- (iii) Prescreen job applications to ensure completeness;
- (iv) Provide facility accommodations to Developer and other Site occupants for recruitment and interviewing; and
- (v) Provide all First Source services free of charge to Developer and other Site occupants.

9.05 Post Completion Maintenance, Design and Operating Standards. The transfer of the Site is subject to Post Completion Maintenance, Design and Operating Standards and guidelines intended to preserve the condition, and historic character of Fox Theater, to assure compliance with grant requirements, and to assure the Fox Theater's continued operation as a performing arts theater as agreed upon by the parties hereto. The Post Completion Maintenance, Design and Operating Standards are attached to this Agreement as Exhibit R. The Maintenance, Design, and Operating Standards will be recorded against the Property at Close of Escrow as deed covenants running with the land in perpetuity. The Maintenance, Design and Operating Standards shall be senior in priority to any private liens, encumbrances, mortgages, or deeds of trust on the Property. Any breach of the Post Completion Maintenance, Design, and Operating Standards is a breach of this Agreement and is subject to the remedies set forth in Article XVII.

9.06 Other Requirements.

Developer will operate and maintain the Site in accordance with: (1) all applicable federal, state and local requirements for access for disabled persons; (2) the City's Equal Benefits Ordinance; (3) environmentally sustainability measures to the extent that such

features are equivalent or lower in cost than comparable non-sustainable alternatives, when measured over their respective life-cycles, (4) any applicable requirements of any Grantor or lender, and (5) in federal tax credit requirements.

Article X. Living Wage Requirements

10.01 Agreement Subject to Living Wage

This Agreement is subject to the Living Wage Ordinance (“Living Wage”) of the Oakland Municipal Code and its implementing regulations. Living Wage requires among other things, submission of the Declaration of Compliance attached and incorporated herein and made part of this Lease, unless specific exemptions apply or a waiver is granted, that Developer provide the following to its employees who perform services under or related to this Agreement.

10.02 Minimum Compensation Due Employees.

Employees covered by Living Wage must be paid an initial hourly wage rate of \$9.66 with health benefits or \$11.11 without health benefits (effective July 1, 2004). These initial rates shall be upwardly adjusted each year no later than April 1 in proportion to the increase at the immediately preceding December 31 over the year earlier level of the Bay Region Consumer Price Index as published by the Bureau of Labor Statistics, U.S. Department of Labor.

10.03 Health Benefits.

Said full-time and part-time employees paid at the lower living wage rate shall be provided health benefits of at least \$1.25 per hour. Developer shall provide proof that health benefits are in effect for those employees no later than 30 days after execution of the contract or receipt of City financial assistance.

10.04 Compensated Days Off.

Said employees shall be entitled to twelve compensated days off per year for sick leave, vacation or personal necessity at the employee’s request, and ten uncompensated days off per year for sick leave. Employees shall accrue one compensated days off in increments proportional to that accrued by full-time employees. The employees shall be eligible to use accrued days off after the first six months of employment or consistent with company policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required twelve (12) compensated days off. Ten (10) uncompensated days off shall be made available, as needed, for personal or immediate family illness after the employee has exhausted his or her accrued compensated days off for that year.

10.05 Federal Earned Income Credit (EIC).

Developer shall inform said employees who earn less than \$12.00 per hour that he or she may be eligible for EIC and shall provide forms to apply for advance EIC payments to eligible employees.

10.06 Notice to Employees

Developer shall provide to all employees and to the Office of Contract Compliance, written notice of its obligation to eligible employees under the City's Living Wage requirements. Said notice shall be posted prominently in communal areas of the work site(s) and shall include information set forth in Subsections 10.01 through 10.05 above.

10.07 Forms in Other Languages

Developer shall provide all written notices and forms required above in English, Spanish or other languages spoken by a significant number of covered employees within thirty (30) days of employment under this Agreement.

10.08 Reporting.

Developer must maintain a listing of the name, address, hire date, occupation classification, rate of pay and benefits for each of its employees that perform work pursuant to this Lease. Developer shall initially certify that such employees receive the minimum wages and benefits required by signing the Declaration of Compliance. When requested by the Office of Contract Compliance, Developer shall also provide a list of positions or classifications with related wages or salaries of its employees that are performing work under this Lease. Failure to provide said list within five days of the due date will result in a penalty of five hundred dollars (\$500.00) for each day that the list remains outstanding. Developer shall maintain employee payroll and related records for a period of four (4) years after expiration of the compliance period.

10.09 Compliance by Developer Affiliates

Developer will require affiliates that provide services under or related to this Agreement to comply with the above Living Wage provisions.

10.10 Application to Developer Contractors and Subcontractors.

Developer must include the same or similar provisions as those set forth in Sections 10.01 through 10.09 above in its contracts, subcontracts, leases, and subleases, including those for the development of the Project. Developer must submit copies of said contracts, subcontracts, leases, and subleases to the Office of Contract Compliance

Article XI.

COMPLIANCE WITH GRANT CONDITIONS

11.01 Grants to Agency, City or OSA.

As part of the financing for the Fox Theater Project, Agency, City, and OSA have received grants from state and federal agencies. The grants for the Fox Theater Project as of the date of the execution of this amended and restated Agreement are generally set out in Article V. Agency, City, OSA, and Developer may receive additional grants for the Fox Theater Project. Developer will have the right to approve the terms and conditions of any additional grants not already listed in Article V.

11.02 Developer Agreement Regarding Grants

As to all grants Agency or City has received or may receive in the future, Developer agrees to the following:

- a) To comply with all grant terms, conditions and requirements and to assist Agency in complying with such terms, conditions and requirements.
- b) To timely cure or assist Agency in curing any violations of grant terms, conditions or requirements.
- c) To provide Agency and City with all information necessary for Agency and City to comply with grant reporting requirements, or if otherwise permitted by the Grantor, to report directly to the grantor and provide Agency and City with documentation showing compliance with the reporting requirements.
- d) To permit grantors access to the Fox Theater Project, any documents, records, information, and employees or agents required to comply with grant requirements.
- e) To cooperate with grantors and Agency and City in complying with grant terms, conditions, or requirements.
- f) Not to engage in any conduct or take any actions that would violate grant terms or requirement or jeopardize any grant funding.
- g) To acknowledge a Fox Theater Project Grantor's assistance when required to do so by a grant agreement or by Agency or City.

11.03 Failure to Comply With Grant Requirements.

Any failure by Developer to comply with a requirement, covenant, or condition of any grant is a breach of this Agreement.

Article XII.

Developer's Agreements, Warranties and Representations

12.01 Developer Warrants Truth and Accuracy.

As an inducement to Agency to execute this Agreement and perform its obligations hereunder, Developer represents and warrants to Agency the truth and accuracy of the matters set forth in this Article XII.

12.02 Organization; Power; Good Standing; and Business

- (a)** Developer is a non-profit public benefit corporation duly formed, validly existing and in good standing under the Laws of the State of California. Developer has the full power and authority to own, lease, and operate its properties, to carry on its business as now conducted, to enter into this Agreement and to carry out the transactions contemplated hereby and thereby. Developer does not do business under any trade name or fictitious business name other than "Oakland Renaissance NMTC, Inc." Developer has delivered to Agency true, correct and complete copies of its Formation Documents and such Formation Documents have

not been amended or modified except pursuant to agreements delivered to Agency prior to the date hereof.

- (b) Developer has or will submit an application to obtain approval from the Internal Revenue Service as a non-profit corporation and approval from the California Franchise Tax Board for like status.

12.03 Authorization.

- (a) Authorization. The execution, delivery and performance of this Agreement and all ancillary documents required by this Agreement have been duly authorized by all necessary action of Developer and its Board of Directors and/or Officers.
- (b) No Conflict. The execution, delivery and performance by Developer, and its Board of Directors and/or Officers of this Agreement, the Promissory Note, Deed of Trust, security agreements, and all ancillary documents required by this Agreement do not and will not:
 - (i) Violate any Law applicable to any such Person, the Formation Documents or any order, judgment or decree of any court or other Governmental Agency binding on any such Person;
 - (ii) Conflict with, result in a breach of or constitute (with the giving of notice or the passage of time or both) a default under any contractual obligation of any such Person; and
 - (iii) Require any approval or consent of any Person under any contractual obligation of Developer and its Board of Directors and/or Officers.
- (c) Governmental Consents. The execution, delivery and performance by Developer and its Board of Directors and/or Officers of this Agreement, the Promissory Note, Deed of Trust, security agreements, and all ancillary documents required by this Agreement does not and will not require any registration with, consent or approval of, or notice to, or other action to, with or by, any Governmental Agency or other Person.

12.04 Actions.

There is no action, suit, proceeding or arbitration, before or by any Governmental Agency or other Person, pending or, to Developer's best knowledge, threatened against or affecting Developer, any of its Board of Directors and/or Officers that might adversely affect Agency's rights or remedies under this Agreement, the Promissory Note, Deed of Trust, security agreements and all ancillary documents required by this Agreement or the business, assets, operations or financial condition of any such Person or its ability to perform its obligations under this Agreement, Promissory Note, Deed of Trust, security agreements, and all ancillary documents required by this Agreement. As of the date hereof there are no outstanding judgments against Developer and its General Partners and/or Principals.

12.05 Financial Position.

- (a) Financial Information.** All financial statements and financial data delivered to Agency relating to Developer, its Board of Directors and/or Officers are true, correct and complete in all material respects and accurately present the financial position of such Persons as of the date thereof no material adverse change has occurred in the financial position disclosed by financial statements or financial data delivered to Agency.
- (b) Bankruptcy and Insolvency.** Neither Developer or any of its Board of Directors and/or Officers has filed or been the subject of any bankruptcy, insolvency, reorganization, dissolution or similar proceeding or any proceeding for the appointment of a receiver or trustee for all or any substantial part of their respective property. Neither Developer nor any of its Board of Directors and/or Officers has admitted in writing its inability to pay its debts when due, made an assignment or the benefit of creditors or taken other similar action.
- (c) Other Borrowing.** Except for the construction financing contemplated by this Agreement and as otherwise provided in this Agreement, no borrowings have been made by Developer which are secured by the Project or any other assets of Developer which might give rise to any lien other than the liens created by this Agreement. In no event may Developer place or allow to be placed any liens or encumbrances on the Site.

12.06 Representations and Warranties.

The representations and warranties set forth in Article XII shall remain true and complete until Developer obtains a certificate of occupancy for the Fox Theater Project.

12.07 Further Assurances.

Developer shall execute and deliver from time to time, within ten (10) days after any request by Agency, any and all instruments, agreements and documents and shall take such other action as may be reasonably necessary or desirable in the opinion of Agency to maintain, perfect or insure Agency's security provided for herein, including, without limitation, the execution of any UCC-1 renewal statements, and the delivery of such endorsements to the Title Policy, all as Agency shall reasonably require.

12.08 Distribution of Assets.

From and after the occurrence of a material Event of Default which remains uncured after proper notice and opportunity to cure, Developer shall not make any distribution of its assets, directly or indirectly, to its partners, members, Principals or other owners. As used herein, the distribution of assets shall include, without limitation, the repayment of any loans made to Developer or any interest or other charges payable in connection therewith, the return of capital contributions and distributions upon the termination, liquidation or dissolution of Developer. In particular, Developer may not assign nor pledge its rights to receive the Financial Assistance pursuant to Article V except as permitted by that Article.

12.09 Nature and Quality of Fox Theater Project; Operating Standards.

As a material consideration of Agency entering into this Agreement, Developer shall utilize its best efforts at all times to satisfy and comply with the provisions of Article X. The parties desire to impose those covenants and conditions in Article X with respect to the Site for the benefit of the Site and successor owners, which covenants and conditions are hereby expressly declared to be binding upon the Site and each portion thereof and shall run with the Site and each portion located therein, shall inure to the benefit of and be a burden upon the Site, shall bind the respective heirs, successors and assigns of the Site and any portion thereof, and shall be covenants running with the land and mutual equitable servitudes.

**Article XIII.
Agency's Warranties and Representations**

13.01 Authorization.

- (a) Authorization.** The execution, delivery and performance of this Agreement have been duly authorized by all necessary action of Agency, except that this Agreement is subject to ratification by the Agency Board.
- (b) No Conflict.** The execution, delivery and performance by Agency of this Agreement and each ancillary document required by this Agreement do not and will not:

 - (i)** Violate any Law applicable to Agency or any order, judgment or decree of any court or other Governmental Agency binding on Agency;
 - (ii)** Conflict with, result in a breach of or constitute (with the giving of notice or the passage of time or both) a default under any contractual obligation of Agency; and
 - (iii)** Require any approval or consent of any Person under any contractual obligation of Agency.
- (c) Binding Obligation.** This Agreement and all ancillary documents required by this Agreement are the legally valid and binding obligations of Agency, enforceable against Agency in accordance with their respective terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws relating to or limiting creditors' rights generally.

13.02 Actions.

As of the date of this Agreement, there is no action, suit, proceeding or arbitration, before or by any Governmental Agency or other Person, pending or, to Agency's best knowledge, threatened against or affecting Agency that might adversely affect Developer's rights or remedies under this Agreement or any ancillary documents required by this Agreement.

Article XIV. Access to the Site

14.01 Agency Inspection of Site.

Until such time as all Agency's obligations to provide the Financial Assistance to Developer pursuant to Article V, are fulfilled, including Developer's repayment of the Agency Loan Agency and its employees, agents, architects, engineers and contractors have the right to enter upon the Site following the Closing Date, to inspect the Site and the Fox Theater Project at reasonable times upon giving notice, to ensure development in conformance with this Agreement. Agency shall be liable for and shall protect, defend, indemnify and hold Developer harmless from any damages to the Persons or property caused by such entry and activities on the Site resulting from the negligence, wrongful acts or omissions of Agency and its employees, agents and consultants.

14.02 Developer Access to Site Prior to Closing Date.

Prior to the Closing Date, Developer and its employees, agents, consultants, architects, engineers and contractors have the right to enter upon the Site, to inspect the Site and perform Predevelopment Activities at reasonable times upon giving notice. Developer will be liable for and will protect, defend, indemnify and hold Developer harmless from any damages to the Persons or property caused by such entry and activities on the Site resulting from the negligence, wrongful acts or omissions of Developer and its employees, agents and consultants. Developer will require all of its employees, agents, consultants, architects, engineers and contractors who access the Site to provide written agreements in a form acceptable to Agency to indemnify and hold the Agency harmless from damages or injuries occurring to such Person.

14.03 Agency Easement.

Agency will retain an easement over the Property entitling Agency or any entities retaining a right to enter the Property by virtue of a grant or other agreement, to enter onto the Property at reasonable times to inspect the Property for compliance with this Agreement, to verify completion for loan disbursement, for compliance with Post-Completion Maintenance, Design and Operating Standards or any grant agreement, or to remedy any defaults under the Maintenance, Design and Operating Standards or grant agreement.

Article XV. Transfers and Changes in Developer

15.01 Definition of Transfer.

Definition of Transfer. As used in this Agreement, the term "Transfer" shall mean:

- (a)** Any transfer (voluntary or involuntary) of any partnership interest, stock, or other form of ownership interest of Developer;

- (b) Any assignment by Developer of all or any part of this Agreement or transfer of ownership of the Site; or
- (c) Any merger, consolidation, sale, or lease of all or substantially all of the assets of Developer.

15.02 Purpose of Transfer Restrictions.

Developer represents that its purchase of the Site and its other undertakings pursuant to this Agreement are for the purpose of timely redevelopment of the Site, not for speculation, and to retain the Fox Theater as a community asset and not for profit motivation. Developer further recognizes that, in view of the following factors, the qualifications of Developer are of particular concern to the community and Agency:

- (a) The importance of redevelopment of the Site to Agency's interest in the surrounding properties to be developed as part of the Redevelopment Plan, and to the general welfare of the community, with particular reference to the community's objectives of the elimination of structural and environmental blight and the establishment of an appropriate level of economic development, property utilization, and visual appearance pursuant to the Redevelopment Plan;
- (b) The Fox Theater Project is a community asset and should remain as such by restricting ownership, after the tax credit investors are no longer invested in it, the Fox Theater should be owned only by a non-profit corporation or a governmental entity ;
- (c) The reliance by Agency upon the unique qualifications and ability of Developer to serve as the catalyst for development of the Project and upon the continuing interest which Developer will have in the Project to assure the quality of the use, operation and maintenance deemed critical by Agency in the development of the Site;
- (d) The fact that a change in ownership or control of Developer or any other act or transaction resulting in a change in ownership or the identity of the parties in control of Developer is for practical purposes a transfer or disposition of the Site; and
- (e) The fact that the Site is not to be acquired or used for speculation, but only for development and operation by Developer in accordance with this Agreement.

15.03 Agency Reliance On Developer Qualifications. Agency is relying on the status of Developer as a non-profit public benefit corporation able to receive grant funding and eligible for historic tax credits and new market tax credits. Developer further recognizes that it is because of Developer's qualifications and identity that Agency is entering into this Agreement with Developer. No voluntary or involuntary successor in interest of Developer shall acquire any rights or powers under this Agreement except as expressly set forth herein.

15.04 Permitted Transfers.

It is the intent of this Agreement that it will be transferred from Developer, (ORNMTC) to Fox Oakland Theater, Inc. and that FOT will create a for profit subsidiary that will syndicate the Fox Theater Project by participating in a for profit entity that will include tax credit investors. The Transfer to FOT and the Transfers for tax credit syndication purposes are all Permitted Transfers that do not require prior Agency approval.

15.05 Prohibited Transfers.

Subject to Section 15.06, Developer represents and agrees that it has not made, and will not make or permit, any Transfer other than a Permitted Transfer, either voluntary or by operation of law without the written consent of Agency, which consent must be approved by Agency's governing body. Any Transfer in contravention of this Section shall be void and shall be deemed to be a default under this Agreement whether or not Developer knew of or participated in the Transfer. In any event, except for Permitted Transfers, the Fox Theater Project may not be Transferred to an entity other than a non-profit corporation or a governmental entity. The grant deed or lease transferring the Site will include such a Transfer restriction.

15.06 Notice of Transfer.

Developer must give to Agency written notice of any involuntary Transfer of which Develop

15.07 Termination of Provisions.

The provisions of this Article XV shall terminate when Developer repays the Agency Loan.

Article XVI. Events of Default

16.01 Default by Agency.

- (a)** The occurrence of any of the following events shall constitute an Event of Default by Agency under this Agreement.
 - (i)** Agency's failure to convey the Site to Developer;
 - (ii)** Agency's failure to perform or comply with any material term, obligation or condition contained in this Agreement and all ancillary documents required by this Agreement within thirty (30) days after the delivery of written notice from Developer of such failure; provided, that if such default is not reasonably capable of being cured within such thirty (30) day period, such failure shall not constitute an event of Default so long as Agency commences the cure of such default within such thirty (30)-day period and diligently prosecutes such cure to completion within one hundred eighty (180) days after such written notice from

Developer; or

- (b)** In case of an Event of Default by Agency, Developer may pursue any of the following remedies:
- (i)** Equitable relief, including, without limitation, specific performance; and
 - (ii)** Any other remedy available to Developer, except no default by Agency shall relieve Developer of any of its obligations under this Agreement, and all ancillary documents required by this Agreement.

16.02 Default by Developer.

- (a)** The occurrence of any of the following events shall constitute an Event of Default under this Agreement:
- (i)** Failure to Deliver Materials. Developer's failure to deliver to Agency materials required by this Agreement within ten (10) days after the delivery of written notice by Agency of such failure to deliver materials specifically designated in the notice.
 - (ii)** Failure to start construction on the Fox Theater Project in accordance with Section 7.03(e).
 - (iii)** Failure to complete construction on the Fox Theater Project in accordance with Subsection 7.03(h), or within any extensions granted by Agency pursuant to that Section.
 - (iv)** Breach of Covenant. Developer's failure to perform or comply with any material term, obligation or condition contained in this Agreement or other ancillary documents required by this Agreement within thirty (30) days after the delivery of written notice from Agency of such failure; provided that if such default is not reasonably capable of being cured within such thirty (30) day period, such failure shall not constitute an Event of Default so long as Developer commences the cure of such default within such thirty (30) day period and diligently prosecutes such cure to completion within one hundred eighty (180) days after such written notice from Agency.
 - (v)** Breach of Warranty. Any material representation, warranty, certification or other statement made by Developer herein in or any ancillary document required by this Agreement, or in any statement or certificate at any time given by Developer, its Board of Directors and/or Officers in writing in connection with this Agreement shall be materially false or misleading
 - (vi)** Breach of Post Completion Maintenance, Design and Operating Standards. Any failure to perform or comply with any material term, obligation or condition contained in the Post Completion Maintenance, Design and Operating

Standards is considered a breach of covenant under this Agreement and is treated as such pursuant to Section 16.02(a)(iv).

(vii) Breach of Grant Agreement. Any failure to perform or comply with any material term, obligation or condition contained in any grant agreement or any other action or inaction that is considered a breach under any grant agreement is considered a breach of covenant under this Agreement and is treated as such pursuant to Section 16.02(a)(iv).

(viii) Involuntary Bankruptcy; Appointment of Receiver, etc.

- 1) A court having proper jurisdiction shall enter a decree or order for relief with respect to Developer, its Board of Directors and/or Officers in an involuntary case under the Bankruptcy Code or any applicable bankruptcy, insolvency or other similar Law now or hereafter in effect, which decree or order is not stayed within fifteen (15) days after entry and dismissed within ninety (90) days after the entry of such order; or any other similar relief shall be granted under any applicable federal or state Law; or
- 2) An involuntary case is commenced against Developer, its Board of Directors and/or Officers, under any applicable bankruptcy, insolvency or other similar Law now or hereafter in effect; or a decree or order of a court for the appointment of a receiver, liquidator, sequestrator, trustee, custodian or other officer having similar powers over Developer, its Board of Directors and/or Officers or over all or a substantial part of their respective property, shall be entered; or the involuntary appointment of an interim receiver, trustee or other custodian of Developer, its Board of Directors and/or Officers, for all or a substantial part of their respective property; or the issuance of a warrant of attachment, execution or similar process against any substantial part of the respective property of Developer, its Board of Directors and/or Officers, and the continuance of any such event in this clause (ii) for ninety (90) days unless dismissed or discharged.

(ix) Voluntary Bankruptcy; Appointment of Receiver, etc.

- 1) Developer, its Board of Directors and/or Officers shall have an order for relief entered with respect to them which remains in effect and not removed or released within ten (10) days, or commence a voluntary case under the Bankruptcy Code or any applicable bankruptcy, insolvency or other similar Law now or hereafter in effect, or shall consent to the entry of an order for relief in an involuntary case, or to the conversion of an involuntary case to a voluntary case, under any such Law, or shall consent to the appointment of or taking possession by a receiver, trustee or other custodian for all or a substantial part of their respective property; the making by Developer, its Board of Directors and/or Officers of any assignment for the benefit of creditors; or

- 2) The inability or failure of Developer, its Board of Directors and/or Officers, or the admission by Developer, its Board of Directors and/or Officers in writing of its inability, to pay their respective debts as such debts become due.
- (x) Lien Priority. Agency fails to have legal, valid binding and enforceable liens on the Project and the Personal Property as herein provided as a result of the intentional acts or omissions of Developer.
- (xi) Unapproved Transfer. Any Transfer of the Project or any interest in Developer occurs without Agency's prior written consent in accordance with Article XV.
- (b) In case of an Event of Default by Developer, Agency may pursue any of the following remedies:
- (i) Termination of this Agreement;
 - (ii) Liquidated damages pursuant to Subsection 17.01(a);
 - (iii) Seeking equitable relief, including, without limitation, specific performance; and/or
 - (iv) Any other remedy available to Agency.
- (c) The phrase Event of Default as used in this Agreement and all ancillary documents required by this Agreement also means a condition or event that, with the giving of notice or passage of time, or both, would subsequently constitute an Event of Default under this Agreement or any ancillary document required by this Agreement.

Article XVII. Remedies

17.01 Agency's Remedies.

(a) Agency's Right to Liquidated Damages

- (i) IN THE EVENT THE CLOSING AND THE CONSUMMATION OF THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT DO NOT OCCUR AS HEREIN PROVIDED BY REASON OF ANY DEFAULT OF DEVELOPER, DEVELOPER AND AGENCY AGREE THAT IT WOULD BE IMPRACTICAL AND EXTREMELY DIFFICULT TO ESTIMATE THE DAMAGES SUFFERED BY AGENCY AS A RESULT OF DEVELOPER'S FAILURE TO COMPLETE THE TRANSACTIONS PURSUANT TO THIS AGREEMENT, AND THAT UNDER THE CIRCUMSTANCES EXISTING AS OF THE DATE OF THIS AGREEMENT, THE LIQUIDATED DAMAGES PROVIDED FOR IN THIS SECTION REPRESENT A REASONABLE ESTIMATE OF THE DAMAGES

WHICH AGENCY WILL INCUR AS A RESULT OF SUCH FAILURE; PROVIDED, HOWEVER THAT THIS PROVISION WILL NOT LIMIT AGENCY'S RIGHT TO RECEIVE REIMBURSEMENT FOR THE SUMS PAID TO DEVELOPER PURSUANT TO SECTION 5.1. ATTORNEYS' FEES NOR WAIVE OR AFFECT DEVELOPER'S INDEMNITY OBLIGATIONS AND AGENCY'S RIGHTS TO THOSE INDEMNITY OBLIGATIONS UNDER THIS AGREEMENT. THEREFORE, DEVELOPER AND AGENCY DO HEREBY AGREE THAT A REASONABLE ESTIMATE OF THE TOTAL NET DETRIMENT THAT AGENCY WOULD SUFFER IN THE EVENT THAT DEVELOPER DEFAULTS AND FAILS TO COMPLETE THE TRANSACTIONS IS TWENTY-FIVE THOUSAND DOLLARS (\$25,000). THIS AMOUNT WILL BE THE FULL, AGREED AND LIQUIDATED DAMAGES FOR THE BREACH OF THIS AGREEMENT BY DEVELOPER. THE PAYMENT OF SUCH AMOUNT AS LIQUIDATED DAMAGES IS NOT INTENDED AS A FORFEITURE OR PENALTY WITHIN THE MEANING OF CALIFORNIA CIVIL CODE SECTION 3275 OR 3369, BUT IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO AGENCY PURSUANT TO CALIFORNIA CIVIL CODE SECTION 1671, 1676 AND 1677. UPON DEFAULT BY DEVELOPER, AT AGENCY'S OPTION, THIS AGREEMENT WILL BE TERMINATED AND, EXCEPT FOR DEVELOPER'S INDEMNITY AND OTHER OBLIGATIONS WHICH MAY BE ENFORCED BY AGENCY NEITHER PARTY SHALL HAVE ANY FURTHER RIGHTS OR OBLIGATIONS HEREUNDER, EACH TO THE OTHER EXCEPT FOR THE RIGHT OF AGENCY TO COLLECT SUCH LIQUIDATED DAMAGES FROM DEVELOPER. THIS PROVISION SHALL TERMINATE ON THE CLOSING DATE AND FUNDING OF THE LOAN.

Developer's Initials: _____

Agency's Initials: _____

- (b)** Agency remedies prior to commencement of construction. If an Event of Default by Developer occurs prior to the commencement of construction of the Fox Theater Project and is not cured as set forth above, Agency may pursue any or all of the following remedies:
- (i)** Agency may terminate this Agreement, in which case Developer will be liable for the amount of the liquidated damages if termination occurs prior to the conveyance of the Site to Developer.
 - (ii)** Agency may institute an action for specific performance of the terms of this Agreement to the extent that such action is available at law or in equity with respect to the Event of Default.
 - (iii)** If title to the Site has been conveyed to Developer, Agency may exercise its optional right to repurchase the Site as follows:
 - 1)** Agency shall deposit into Escrow an amount equal to the Purchase Price,
 - 2)** Provide written notice to the Escrow holder, with a copy to Developer, that

an uncured Event of Default has occurred,

- 3)** Developer may be required to buyout the tax credit investors and instruct the Escrow holder to record the Reversionary Grant Deed with the Alameda County Recorder concurrent with the payment of the deposited amount to the Developer. Upon such recordation of the Reversionary Grant Deed, the Agency may reenter and take exclusive possession of the Site.
- (iv)** Agency may pursue all other remedies permitted by law or at equity.
- (c)** Agency remedies during construction. If an Event of Default by the Developer occurs following the commencement of construction of the Project and prior to the completion of the Project as evidenced by the City's issuance of a certificate of occupancy, and the Event of Default is not cured as set forth above, the Agency may pursue any or all of the following remedies:
- (i)** Agency may terminate this Agreement.
 - (ii)** Agency may institute an action for specific performance of the terms of this Agreement to the extent that such action is available at law or in equity with respect to the Event of Default.
 - (iii)** Agency may exercise its optional right to repurchase the Site pursuant to Section 17.01(b)(iii).
 - (iv)** Agency may pursue all other remedies permitted by law or at equity.
- (d)** Agency Remedies Following Completion Of Construction. If an Event of Default by Developer occurs following the completion of the Site as evidenced by Agency issuance of a Certificate of Completion, and the Event of Default is not cured as set forth above, Agency may pursue any or all of the following remedies:
- (i)** Agency may institute an action for specific performance of the terms of this Agreement to the extent that such action is available at law or in equity with respect to the Event of Default.
 - (ii)** Agency may institute an action for damages to recover from Developer all of the damages caused by the Event of Default.
 - (iii)** Agency may pursue all other remedies permitted by law or at equity.
- (e)** Fair Market Value of Improvements.
- (i)** If the Agency elects to exercise its option to repurchase the Site pursuant to Subsection 17.01(b)(iii) above, Agency shall, within sixty (60)

calendar days of written notice to exercise such option, provide Developer with written notice of Agency's determination of Fair Market Value for the improvements made by Developer.

- (ii) If Developer disputes the Agency's determination of the Fair Market Value as contained in Agency's notice, Developer shall notify Agency in writing, within ten (10) calendar days of its receipt of Agency's determination, of its determination of the Fair Market Value for the improvements made by Developer. If Developer fails to dispute Agency's determination within the ten-day period, Agency's determination of the Fair Market Value is deemed final. If Developer disputes Agency's determination, Agency and Developer will then attempt to resolve their differences within ten calendar days following Agency's receipt of Developer's notice.
- (iii) If, during such ten (10) day period, Agency and Developer cannot agree on Fair Market Value for the improvements made by Developer, Agency and Developer shall each appoint an appraiser who shall be an MAI and a California licensed appraiser experienced in appraising commercial real estate in Alameda County and experienced in appraising projects under construction, if applicable, and give notice of such appointment to the other within ten calendar days after the foregoing ten-day period. Such appraisers shall, within thirty (30) calendar days after the appointment of the last of them to be appointed, complete their written determinations of Fair Market Value and furnish it to Agency and Developer. Each party shall pay the fees and costs of its own appraiser.
- (iv) If the valuations vary by ten percent (10%) or less of the higher value, the Fair Market Value shall be the average of the two valuations. If the valuations vary by more than ten percent (10%) of the higher value, the two appraisers shall, within ten calendar days after submission of the last appraisal report, appoint a third disinterested appraiser who shall be an MAI and a California licensed appraiser with the experience described above. If the two appraisers are unable to agree in a timely manner on the selection of the third appraiser, then either appraiser, on behalf of both, may request appointment of such third disinterested appraiser by the presiding judge of the Superior Court of Alameda County. Such third appraiser shall, within fifteen (15) calendar days after appointment, make a determination of Fair Market Value by selecting one of the prior appraisals. The third appraiser shall have no right to select a Fair Market Value other than as determined by one of the prior appraisals.
- (v) For purposes of this Agreement, the Fair Market Value of the improvements made by Developer shall mean the purchase price that an unrelated party negotiating at arm's length would pay to purchase the improvements to the Site, taking into account all then current market factors, including without limitation the quality, design, condition and location of the Site, the extent and condition of the construction completed to date, the amount of any and all liens against the Site, the terms and conditions of this Agreement, and the value of the existing improvements, less the Fair Market Value of the Site without

the improvements made by Developer. Notwithstanding the above, in no case shall the Fair Market Value of the improvements be less than the Purchase Price.

(vi) Upon determination of the Fair Market Value, Agency shall have the right to withdraw its exercise of its option by giving the Developer notice of withdrawal within fifteen (15) calendar days of the Agency's receipt of notice of the determination. If the Agency withdraws its option exercise, the Agency shall pay all appraisal fees incurred by the Agency and the Developer in determining the Fair Market Value.

(f) Reversionary Rights.

(i) In the event that title to the Site reverts to Agency, Developer shall be released by Agency and City from any and all damages, liabilities, or obligations to Agency or City arising from or related to the existence of any Hazardous Materials on the Site, except if such damages, liabilities or obligations are due to the exacerbation of Hazardous Materials existing on the Site prior to Closing Date or unless such Hazardous Materials were released or placed on the Site by or on behalf of Developer

(ii) Agency may assign any of its optional rights to repurchase the Site to any other entity in its sole discretion.

(g) Priority Of Agency Option. Agency's optional rights to repurchase the Site upon a Developer default shall be senior in priority to any private liens, leases, mortgages or encumbrances on the Site entered into after the date of this Agreement, including without limitation any deeds of trust or other instruments securing any acquisition, construction or permanent financing for any phase of the Fox Theater Project, but subject to the mortgagee protections set forth herein. Upon exercise of the option, Developer shall deliver title to the Site to Agency free and clear of any such liens, leases, mortgages, or encumbrances except those liens, leases, mortgages, or encumbrances already approved by Agency.

(h) Termination Upon Failure To Close. Notwithstanding any other provisions of this Agreement to the contrary, if title to the has not been conveyed to Developer within six (6) months following the execution of this Agreement, and the failure is not due to an Event of Default by Agency which has not been cured after notice to Agency by Developer, this Agreement may be terminated at the election of the Agency Administrator. Thereafter, the parties shall be released from any further obligations under this Agreement except for those obligations and liabilities that continue after termination as expressly set forth herein.

Article XVIII.

Developer's Insurance Requirements

18.01 Developer To Insure.

Developer shall, at Developer's sole cost and expense, maintain the following insurance coverage (or its then reasonably available equivalent):

- (a) General Liability. Developer shall carry Commercial General Liability insurance at least as broad as ISO Form CG0001 (Commercial General Liability) or its equivalent, with the extensions noted below, covering claims against property damage and bodily injury, to include death, occurring in or about the Site, in minimum limits of not less than Five Million Dollars (\$5,000,000) per occurrence.
- (b) Worker's Compensation. Developer shall maintain, and ensure that its contractors maintain, in accordance with California Labor Code Section 3700 et seq., workers' compensation insurance, (or provide proof of self-insurance in accordance with the provisions of that same Code) covering all Persons employed in connection with the Site or with development, construction, alteration, repair or operation of the Fox Theater Project, for injury, illness, or death, in statutory amounts for compensation, with not less than \$1,000,000 for employer's liability for bodily injury by accident and occupational disease.
- (c) Property Damage. Developer shall carry Special Risk of Physical Loss insurance (or a so-called "Special Risk" policy) with an agreed amount endorsement in an amount not less than 100% of the full replacement value of the completed Fox Theater Project and other improvements on the Site, excluding excavations, foundations and other items not generally covered by such standard forms of insurance, but including any cost required to upgrade to meet then-current building code requirements or insurance contract sublimits, whichever is less, providing coverage for all risks of direct physical loss; provided, however, that coverage for the peril of earthquake shall be obtained in Developer's sole and absolute discretion.
- (d) Other. All insurance required by any lender, and such other insurance as Developer determines appropriate in the exercise of Developer's reasonable business judgment.

18.02 Policy, Form, Content and Insurer.

All insurance required to be carried by Developer shall be in a form reasonably satisfactory to Agency and written by one or more insurance companies reasonably approved by Agency and which are licensed or approved to do business in the State of California. Insurance companies must be rated at least A in Best's Insurance Guide and a financial rating of 10, or equivalent rating. All such insurance may be carried under a blanket or umbrella policy covering the Site and other locations, provided that the coverage afforded the insuring party by such blanket policy shall not be reduced or diminished by reason of the use of such blanket policy of insurance, and provided further that the requirements of this Article XVIII are otherwise satisfied. All such insurance shall contain endorsements that (a) such insurance shall not be canceled or amended except upon thirty (30) calendar days' prior notice to the other party by the insurance company, (b) the insuring party shall be solely responsible for payment of premiums, and (c) the insuring party's insurance is primary in the event of overlapping coverage which may be carried by the other party. Developer shall deliver to Agency at least thirty (30) calendar days prior to the time such insurance is first required to be carried, except that any insurance required to be as of the execution of this Agreement shall be provided to

Agency within twenty-one (21) calendar days following the execution of this Agreement, and thereafter at least thirty (30) calendar days prior to the expiration of such policy, either a duplicate original or a certificate clearly showing compliance by the Developer with its obligations under this Agreement, together with evidence satisfactory to Agency of the payment of the premiums therefore.

18.03 Deductibles; Self Insured Retention.

Any deductible or self-insured retention greater than \$25,000 shall be subject to Agency's approval in its reasonable discretion.

18.04 Additional Insureds.

All liability insurance policies shall name Agency and the City and their respective officials, directors, employees, and agents, and any Grantors, as may be required under any grant agreement, as additional insureds.

18.05 Developer Default.

Developer's failure to procure and maintain the required insurance during the entire term of this Agreement shall constitute a Developer Default for which Agency may (but shall not be obligated to), in addition to any other remedies it may have pursuant to this Agreement, and after prior written notice from Agency to Developer and the passage of such time to cure as may be required by this Agreement, procure or renew such insurance to protect the interests of Agency, pay any and all premiums in connection therewith, and recover all monies so paid from the Developer together with interest thereon at eight percent (8%) accruing from the date the premium is paid to the date of recovery by Agency. Agency may recover the costs of insurance obtained by Agency from Developer.

18.06 Waiver of Subrogation.

The Parties release each other, and their respective Agents, from any claims for damage and/or injury to any part of the Site or Fox Theater Project, Developer's trade fixtures, personal property, and Developer's improvements in or on the Site that are caused by or result from risks insured against under any insurance policies (but not workers' compensation) carried by such Party and in force at the time of any such damage to the extent of the available insurance proceeds. Each Party shall cause each casualty or property damage insurance (but not workers' compensation) policy carried by it to be written to provide that the insurance company waives all right of recovery by way of subrogation against either party in connection with any damage covered by any policy.

18.07 Periodic Increase in Policy Limits.

Agency shall have the right from time to time to review the policy limits set forth in this Agreement and require that they be increased in order to bring such policy limits into conformity with the limits customarily maintained for similar facilities or commercial properties located in Alameda County, California; provided however, that Developer shall not be required to increase the policy limits more frequently than every three (3) years.

18.08 Insurance Requirement.

The insurance requirements in this Article XVIII remain in effect so long as Agency retains title to or a reversionary interest in Site, including a deed of trust security interest for the Agency Loan.

**Article XIX,
Agency Option to Purchase After Expiration of Tax Credit
Benefit Period**

19.01 Developer to Buy Out Tax Credit Investors at End of Tax Credit Benefit Period

After the period during which the tax benefits to the tax credit investors in the Fox Theater Project expires, Developer shall buy out the interests of the tax credit investors in accordance with the terms of any agreement with the tax credit investors. In the event that the net income available to Developer has not produced sufficient reserves to cover the investor's buy out, the Agency will advance the funds necessary for the buy out through the Contingent Loan as set out in Article *.

19.02 Agency Option to Purchase

For a period of one year following the closing on the buy out of the tax credit investors, Agency shall have an exclusive option to purchase the Fox Theater Property. Agency must notify Developer within the one year period of Agency's intent to exercise its purchase option. The Agency's option will be subject to the requirements of any lenders, Grantors, and federal tax credit laws and regulations. The purchase price will be the appraised value of the Fox Theater Property as determined by an independent appraisal based on an income approach valuation. Agency will pay all costs of the purchase, including but not limited to closing and escrow costs and appraisal costs. The Agency and Developer will have goal of closing escrow on the purchase within ninety (90) days after Agency notifies Developer of its intent to exercise the purchase option or within such other time as they may agree on.

19.03 Agency Assignment of Option

Agency may assign its purchase option, but only to a non-profit corporation or a governmental entity.

19.04 Action Regarding Purchase Option By Agency Governing Body

Any action taken to exercise or assign the Agency's purchase option must be taken by the Agency's governing body.

Article XX. General Provisions

20.01 Employment Non-Discrimination.

Developer shall not discriminate against any employee or applicant for employment in connection with the use of the Site or the Fox Theater Project on the basis of race, color, religion, sex, sexual preference, marital status, AIDS or AIDS-related complex, disability, ancestry or national origin, and must include in its contracts with its contractors, requirements that its contractors and their subcontractors, joint ventures, successors, and assigns shall not so discriminate. Each of the following activities shall be conducted in a nondiscriminatory manner; hiring, upgrading; demotion and transfers; recruitment and recruitment advertising; layoff and termination; rates of pay and other forms of compensation; and selection for training, including apprenticeship.

20.02 Notices, Demands and Communications.

Formal notices, demands and communications between Agency and Developer shall be given by registered or certified mail, postage prepaid, return receipt requested, or delivered personally, to the principal offices of Agency and Developer as follows:

Agency: Redevelopment Agency of the City of Oakland
 Community and Economic Development Agency
 250 Frank H. Ogawa Plaza, Suite 5313
 Oakland, California 94612
 Attn: Executive Director
 Telephone: (510) 238-3015
 Fax: (510)238-3691

copies to: Redevelopment Agency of the City of Oakland
 c/o Oakland City Attorney's Office
 One Frank H. Ogawa Plaza, 6th Floor
 Oakland, California 94612
 Telephone: (510) 238-3601
 Facsimile: (510) 238-6500

Developer: Oakland Renaissance NMTC, Inc.
 Attn: President, Board of Directors
 c/o Community and Economic Development Agency
 City of Oakland
 250 Frank H. Ogawa Plaza, Suite 5313
 Oakland, California 94612
 Telephone: (510) 238-3015
 Fax: (510)238-3691

Written notices, demands and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate.

20.03 Conflict of Interest.

Developer shall use its best efforts to ensure that no member, officer, employee, or consultant of Agency who participates in any way in the Fox Theater Project or the making of this Agreement, or a member of such Person's immediate family, shall have a financial interest in the Project or this Agreement. Developer warrants and represents that it has not paid or given, and will not pay or give, to any officer, employee or representative of Agency any money or other consideration in exchange for obtaining this Agreement.

20.04 Alcohol, Firearms, Tobacco Product Advertising Prohibition.

Developer acknowledges and agrees that no advertising of alcohol, firearms, cigarettes or tobacco products shall be allowed on the Site, except only as incidental to an allowed retail use such as advertising in markets or stores that sell such products if allowed by law. The foregoing prohibition shall include the placement of the name of a company producing, selling or distributing alcohol, firearms, cigarettes or tobacco products or the name of any alcohol, firearms, or cigarette or tobacco product in any promotion of any event or product or on any sign. The foregoing prohibition shall not apply to any advertisement sponsored by a state, local or nonprofit entity designed to communicate the health hazards of drinking, using firearms, or using cigarettes and tobacco products or to encourage people not to drink, use firearms, or smoke or to stop smoking.

20.05 Campaign Contributions Limits.

- (a) This Agreement is subject to the City of Oakland Campaign Reform Act of Chapter 3.12 of the Oakland Municipal Code and its implementing regulations if it requires City Council approval. The City of Oakland Campaign Reform Act prohibits developers that are doing business or seeking to do business with the City of Oakland from making campaign contributions to Oakland candidates between commencement of negotiations and either one hundred, eighty180 days after completion of, or termination of, contract negotiations.
- (b) Developer must sign and date an Acknowledgement of Campaign Contributions Limits Form attached hereto as Exhibit O and incorporated herein.

20.06 Nonliability of Agency Officials, Employees and Agents.

No member, official, employee, or agent of Agency shall be personally liable to Developer, or any successor in interest, in the event of any default or breach by Agency or for any amount that may become due to Developer or successor under the terms of this Agreement.

20.07 Nonmerger; Survivability of Provisions.

None of the provisions of this Agreement are intended to or shall be merged with the Grant Deed, and the Grant Deed shall not affect or impair this Agreement. Any obligations of the parties that are to be performed after the Closing Date shall survive the Closing Date and shall be performed as provided in this Agreement.

20.08 Nonsubordination of this Agreement.

This Agreement may not be subordinated to any liens or encumbrances.

20.09 Applicable Law.

This Agreement shall be governed by the Laws of the State of California.

20.10 Severability.

If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

20.11 Publicity.

Any publicity generated by Developer for the Fox Theater Project must make reference to the contribution of Agency in making the Project possible. The words "Redevelopment Agency of the City of Oakland" and "Community and Economic Development Agency" shall be prominently displayed in all pieces of publicity generated by Developer, including flyers, press releases, posters, signs, brochures, and public service announcements. Agency staff will be available whenever possible at the request of Developer to assist Developer in generating publicity for the Fox Theater Project. Developer agrees to cooperate with Agency in any Agency-generated publicity or promotional activities with respect to the Project.

20.12 Waiver.

Any waiver by Agency of an obligation in this Agreement must be in writing and executed by an authorized agent of the Agency. No waiver will be implied from any delay or failure by the Agency to take action on any breach or event of default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the Agency to any act or omission by the Developer shall not be construed to be a consent to any other act or omission or to waive the requirement for the Agency's written consent to future waivers.

20.13 Indemnification

- (a)** If through acts or neglect on the part of Developer or its construction contractor(s), any other contractor or any subcontractor suffers loss or damage on the work, and such other contractor or subcontractor assesses any claim against Agency on account of any damage alleged to have been sustained, Agency shall notify Developer and its construction contractor who shall defend at their own expense any suit based upon that claim, and Developer shall pay all costs and expenses incurred by Agency in connection with any judgment or claim.
- (b)** Developer shall indemnify and hold Agency, the City, and their respective officials, directors, employees, and agents (collectively, "Indemnitees") harmless from any

losses, damages, liabilities, claims, demands, judgments, actions, causes of action, court costs, and legal or other expenses (including attorneys' fees) which Indemnitees may incur as a result of (1) Developer's failure to perform any of its obligations as and when required by this Agreement; (2) a failure of any of Developer's representations or warranties to be true and complete; or (3) any act or omission by Developer or any contractor, subcontractor, architect, engineer or supplier with respect to development or use of the Fox Theater Project or the Site, except to the extent the loss is caused by the negligence or willful misconduct of the Agency. When a loss is caused by the joint negligence or willful misconduct of Developer and Agency, the Developer's duty to indemnify and hold Indemnitees harmless shall be in proportion to Developer's allocable share of the joint negligence or willful misconduct. Developer shall pay immediately upon Agency's demand any amounts owing under this indemnity. The duty of Developer to indemnify includes the duty to defend Indemnitees in any court action, administrative action, or other proceeding brought by any third party arising from the matters set forth in this Section.

- (c) These indemnity and hold harmless provisions are severable from this Agreement, in that they shall survive termination or invalidation of this Agreement.

20.14 Non-Liability of Agency or City Commissioners, Officials and Employees.

No member, commissioner, official, agent or employee of the Agency or the City will be personally liable to the Developer or any successor-in-interest of the Developer, in an Event of Default by the Agency or /City or for any amount which may become due to the Developer or any successor-in-interest or on any obligations under the terms of this Agreement.

20.15 Real estate commissions.

Neither party shall be responsible to the other for any real estate commissions or brokerage fees which may arise from this Agreement or otherwise be incurred by the other party.

20.16 Attorneys' Fees.

In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or any ancillary documents required by this Agreement, or to collect damages as a result of any breach of the Agreement, the party prevailing in any such action shall be entitled to recover against the party not prevailing all reasonable Attorneys' Fees and Costs incurred in the action.

20.17 Binding Upon Successors.

This Agreement and all ancillary documents required by this Agreement are binding upon and inure to the benefit of the heirs, administrators, executors, successors in interests and assigns of each of the parties hereto, except that there shall be no Transfer of any interest of Developer except pursuant to the terms of Article XV. Any reference in this Agreement to a specifically named party shall be deemed to apply to any successor, heir, administrator, executor or assign of such party who has acquired an

interest in compliance with the terms of this Agreement or under Law. This Agreement shall constitute a covenant running with the land comprising the Site and shall be binding upon each successive owner, during its ownership, of any portion of the Site and upon each person having an interest derived through an owner thereof. To the extent any provision of this Agreement is deemed not to constitute a covenant running with the land, such provision shall be deemed an equitable servitude.

20.18 Relationship of Parties.

- (a)** The relationship of Developer and Agency is and shall remain solely that of a purchaser and seller of real property and a lender and borrower, and shall not be construed as a joint venture, equity venture, partnership, or any other relationship. Agency neither undertakes nor assumes any responsibility or duty to Developer (except as provided for herein) or any third party with respect to the Fox Theater Project or the Site. Developer shall have no authority to act as an agent of Agency or to bind Agency to any obligation.
- (b)** Developer shall be solely responsible for all aspects of its conduct in connection with construction of the Fox Theater Project, including, but not limited to, the quality and suitability of the plans and specifications, the supervision of construction work, and the qualifications, financial conditions, and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants, and property managers. Agency is under no duty to review the construction plans or to inspect construction of the Fox Theater Project. Any review or inspection undertaken by Agency for the Project is solely for the purpose of determining whether Developer is properly discharging its contractual obligations to Agency, and should not be relied upon by Developer or by any third parties as a warranty or representation by Agency as to the quality of the design or construction of the Fox Theater Project. Approval of the Schematic Design Plans or other construction plans by Agency under this Agreement shall not constitute a permit approval by the City or a representation or warranty as to compliance with state or City building codes, zoning or land use regulations, or design review standards.

20.19 Recorded Memorandae.

Recorded memorandae of Agency Rights Regarding Site. Agency may record a separate document for the Site summarizing Agency's rights to recover title to the Site as set out in this Agreement.

20.20 Acknowledgement of Consultation With Attorney.

Developer acknowledges that it has either consulted with an attorney concerning this Agreement or has had the opportunity to do so prior to executing this Agreement.

20.21 Reasonable Approvals.

The approval of a party of any documentation or submissions herein called for shall not be unreasonably withheld or delayed, except as otherwise specifically provided.

20.22 Agency Approvals.

Where Agency approval, consent, or other action is required or requested in this Agreement, such approval may be given by the Agency Administrator or her/his designee, unless the specific approval, consent, or other action is required to be by the governing body or the Agency Administrator elects to seek approval from the Agency governing body.

20.23 Amendments.

Any amendment to this Agreement shall be executed in writing by Agency and by Developer.

20.24 Estoppel Certificates.

Either party to this Agreement shall provide an estoppel certificate to the other as requested from time to time stating that this Agreement and/or any ancillary documents required by this Agreement have not been modified, or, if modified, stating the nature of such modification, and certifying that this Agreement, as modified, is in full force and effect.

20.25 Complete Understanding; Exhibits.

This Agreement may be executed in duplicate originals each of which is deemed to be an original. This Agreement, and all ancillary documents required by this Agreement constitute the entire understanding and agreement of the parties. All Exhibits to this Agreement are part of such documents and are incorporated into the documents. The Agency Administrator may modify any Exhibits in order to conform to lender, Grantor, or federal tax credit requirements.

20.26 Nonforeign Status.

Section 1445 of the Internal Revenue Code of 1985, as amended (the "Internal Revenue Code") and Sections 18662, 18668 and 18669 of the California Revenue and Taxation Code (the "California Tax Code") provide that a transferee of a United States real property interest, or California property interest, as the case may be, must withhold tax under the circumstances described therein. To inform Agency that the withholding of tax will not be required in the event of the disposition of the Project, Developer hereby certifies, under penalty of perjury, that: (a) Developer and its Principals are not a foreign corporation, foreign partnership, foreign trust or foreign estate, as those terms are defined in the Internal Revenue Code and/or California Tax Code and the regulations promulgated thereunder; and (b) Developer's U.S. employer identification number is Tax Identification Number 45-0538133; (c) Developer's principal place of business is at the address set forth in Section 20.02; and (d) Developer is qualified to do business in the State of California. Agency may disclose the contents of this Section 20.26 to the Internal Revenue Service or any other Governmental Agency, and Developer acknowledges that any false statement contained herein could be punished by fine, imprisonment or both. Developer covenants and agrees to execute further certificates, which shall be signed under penalty of perjury, as Agency shall reasonably require in connection with the certifications set forth herein. The covenant set forth herein shall survive a Transfer.

20.27 Failure or Indulgence Not Waiver:

Remedies Cumulative. No failure or delay on the part of either party in the exercise of any power, right or privilege hereunder shall impair such power, right or privilege or be construed to be a waiver of any default or acquiescence therein, nor shall any single or partial exercise of any such power, right or privilege preclude other or further exercise thereof or of any other right, power or privilege. All rights and remedies existing under this Agreement and all ancillary documents required by this Agreement are separate, distinct, and cumulative to, and not exclusive of, any rights or remedies otherwise available at law or in equity. No act of either party under this Agreement and all ancillary documents required by this Agreement shall be construed as an election to proceed under any one provision to the exclusion of any other provision, notwithstanding anything in the this Agreement and all ancillary documents required by this Agreement to the contrary. Developer expressly waives all right to the benefit of any statute of limitations and any moratorium, reinstatement, marshaling, forbearance, extension, redemption, or appraisalment now or hereafter provided by federal or state law, as a defense to any demand against Developer to the fullest extent permitted by law.

20.28 No Third Party Beneficiaries.

This Agreement and all ancillary documents required by this Agreement are made and entered into for the sole protection and benefit of Agency and Developer, and no other Person or entity shall be a direct or indirect beneficiary of, or shall have any direct or indirect cause of action or claim in connection with this Agreement.

20.29 Enforced delay.

Performance by either party under this Agreement shall not be deemed to be in default where delays or default are due to war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; lack of transportation; or unusually severe weather. An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within thirty days of the commencement of the cause. Times of performance under this Agreement may also be extended in writing by the Agency and the Developer. Notwithstanding the above, in no event shall construction of the Project be completed later than one year from that completion date stated in this Agreement.

IN WITNESS WHEREFORE, the parties hereby have executed this Amended and Restated Disposition and Development Agreement as of the date first above written.

DEVELOPER: OAKLAND RENAISSANCE NMTC, INC., a California non-profit corporation

By: _____
President,
Board of Directors

AGENCY: THE REDEVELOPMENT AGENCY OF THE
CITY OF OAKLAND, a public body, corporate and politic
Deborah Edgerly
Agency Administrator

Approved as to form and legality:

By: _____
Agency Attorney

DRAFT