

INTRODUCED BY COUNCILMEMBER \_\_\_\_\_


  
 City Attorney

**ORDINANCE NO. \_\_\_\_\_ C.M.S.**
**AN ORDINANCE OF THE CITY OF OAKLAND APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF OAKLAND AND JACK LONDON SQUARE PARTNERS, LLC, AND CEP-JLS I LLC, AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE DEVELOPMENT AGREEMENT ON BEHALF OF THE CITY**

**WHEREAS**, in November, 2002, the project applicants filed an environmental review application for a mixed use project that would intensify the retail, dining, entertainment and office uses in a nine block area bounded roughly by Castro Street, Alice Street, the Embarcadero and the Estuary with an additional site bounded by Alice, Harrison, Second and Third Streets; and

**WHEREAS**, on February 13, 2003, in accordance with the California Environmental Quality Act ("CEQA"), City staff issued a Notice of Preparation ("NOP") to prepare an Environmental Impact Report ("EIR") for the land use entitlements, including the requested Planned Unit Development ("PUD") permit, Zoning Boundary Line Adjustment ("ZBA"), Development Agreement, Major Conditional Use Permit and Major Variance for the proposed redevelopment of the Jack London Square area; and

**WHEREAS**, on May 12, 2003, City staff reissued the NOP, along with a revised Initial Study that reflected a decision to consider recreation and public services in the EIR; and

**WHEREAS**, as a part of the proposed development, the project applicant requested that the City of Oakland enter into a development agreement with the applicant in order to regulate the large-scale development project and to provide both the City and the project sponsor with assurances that the project could be successfully and completely built out over time; and

**WHEREAS**, on September 8, a Draft EIR ("DEIR"), State Clearinghouse No. 2003022086, was released by the City for a 46-day public review and comment period and on October 1, 2003, the Planning Commission conducted a public hearing to provide the public with an additional opportunity to comment on the DEIR; and

**WHEREAS**, on February 13, 2004, a document entitled "Jack London Square Final Environmental Impact Report" ("FEIR") was released, which included and analyzed a revised version of the proposed project (the "Revised Project"); and

**WHEREAS**, on February 25, 2004 and March 17, 2004, the Planning Commission conducted public hearings, took testimony and determined that the EIR (consisting of the DEIR, Responses to Comments and other information presented in the FEIR) was adequate for certification and for decision-making on the requested land use entitlements for the Revised Project; and

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**WHEREAS**, on March 17, 2004, the Planning Commission certified the EIR, adopted CEQA Findings and a Statement of Overriding Considerations, adopted a Mitigation Monitoring and Reporting Program, adopted General Findings, granted a PUD permit, approved a Preliminary Development Plan for all nine sites and Final Development Plans for eight of the nine sites within the Revised Project, approved Design Review, approved a Major Conditional Use Permit and a Major Variance, recommended that the City Council grant the proposed ZBA and approve the proposed Development Agreement, and adopted accompanying Conditions of Approval; and

**WHEREAS**, the Planning Commission found that the Development Agreement contains all information required by State Law and by the Oakland Municipal Code, including all information referenced in chapter 17.138; and

**WHEREAS**, the Planning Commission further found that the Revised Project is consistent with the General Plan (including the Estuary Policy Plan) and all applicable planning and zoning enactments as set forth specifically in Exhibit D entitled "General Findings and incorporated by this reference;" and

**WHEREAS**, the Planning Commission further found that the Revised Project is extensive in scope and therefore is likely to be constructed over a significant period of time, with several different development phases proposed, and thus the Development Agreement is desirable in order to facilitate the successful implementation and provide assurances to both the City and the project sponsor concerning a unified set of development standards, requirements and expectations; and

**WHEREAS**, the Planning Commission further found that the Revised Project will improve the open space areas within the project boundaries, as discussed in the "Public Uses" section of the Preliminary Development Plan for the Revised Project; and

**WHEREAS**, the Planning Commission further found that the Revised Project will have substantial economic benefits to the City because, as a regional commercial and entertainment destination, it will generate significant income from visitors, neighbors and tenants alike; and

**WHEREAS**, the Planning Commission further found that the Revised Project is likely to generate thousands of permanent and construction jobs; and

**WHEREAS**, the Planning Commission further found that the Revised Project will be a catalyst for the establishment of more mixed uses throughout the Jack London Square District, will aid in other long term investment in the area and will accelerate revitalization of the Broadway corridor; and

**WHEREAS**, the Planning Commission further found that Site G of the Revised Project is located within the Central District Urban Renewal Plan area and therefore will generate tax increment revenue to assist with redevelopment projects in the area; and

**WHEREAS**, the Planning Commission further found that the project sponsor will comply with the small business utilization guidelines of the Port of Oakland, which are meant to help promote small businesses within the Revised Project; and

**WHEREAS**, the Planning Commission further found that construction of the Revised Project will strengthen the Jack London District an attractive, clean, and safe world-class waterfront destination that will enhance the image of Oakland; and

**WHEREAS**, the Planning Commission further found that the California Harvest Hall expected to be located on Site F1 would be a permanent showcase of the food, wine and agricultural industries of California and thus attract customers and visitors from the entire region and beyond; and

**WHEREAS**, the Planning Commission further found that the project sponsor plans to conduct historical walking tours featuring Heinold's First and Last Chance Saloon and Jack London's cabin to highlight Jack London and his association with the waterfront, as well as other historical features of Jack London Square and the waterfront, such as the Potomac; and

**WHEREAS**, the Planning Commission further found that the Revised Project includes a sustainable development strategy through state-of-the-art energy efficiency features, use renewable resources and products with low Volatile Organic Compound (VOC) content, and an extensive reuse/recycling program in both the construction and operation phases of the project; and

**WHEREAS**, the Planning Commission further found that the Revised Project, as an urban infill mixed-use project, will encourage the use of public/alternative transportation and will not contribute to the negative impact of urban sprawl such as air pollution and traffic congestion; and

**WHEREAS**, the Planning Commission further found that by creating a convincing example of large-scale retail success in the City, the Revised Project will act as a catalyst for retail in Downtown and beyond; and

**WHEREAS**, the City Council affirms and adopts the Planning Commission findings cited above, and additionally finds that the public safety, health, convenience, comfort, prosperity, and general welfare will be furthered by the Development Agreement; and

**WHEREAS**, the notice required by Oakland Municipal Code section 17.138.030 has been given.

**THE CITY COUNCIL OF THE CITY OF OAKLAND ORDAINS AS FOLLOWS:**

Section I: The City Council hereby approves the Development Agreement substantially in the form attached hereto as Exhibit E, subject to such minor and clarifying changes consistent with the terms thereof as may be approved by the City Attorney prior to execution thereof.

Section II: This ordinance, including the Development Agreement approval described in Section I above, is based in part on the findings set forth above, and the CEQA Findings and Statement of Overriding Considerations Related to Approval of the Jack London Square Project, Mitigation

Monitoring and Reporting Program, Conditions of Approval and the General Findings Related to Approval of the Jack London Square Project attached as Exhibits A-D and incorporated by this reference.

Section III: The City Manager is hereby authorized and directed to perform all acts to be performed by the City in the administration of the Development Agreement pursuant to the terms of the Development Agreement, including but not limited to conducting annual review of compliance as specified in Article VI thereof. The City Manager is further authorized and directed to perform all other acts, enter into all other agreements and execute all other documents necessary or convenient to carry out the purposes of this Ordinance and the Development Agreement.

Section IV: Except as specifically set forth herein, this ordinance suspends and supercedes all conflicting resolutions, ordinances, plans, codes, laws and regulations.

Section V: If any provisions of this ordinance or application thereof to any person of circumstances is held invalid, the remainder of this ordinance and the application of provisions to the other persons or circumstances shall not be affected thereby.

Section VI: If any provision of this Ordinance or application thereof to any person or circumstances is held invalid, the remainder of this Ordinance and the application of provisions to other persons or circumstances shall not be affected thereby.

Section VII: If any provision of the Development Agreement that this Ordinance approves or application of the Development Agreement to any person or circumstances is held invalid, the remainder of the Development Agreement and the application of provisions to other persons or circumstances shall not be affected thereby.

Section VIII: This Ordinance shall not be codified in the Oakland Municipal Code.

IN COUNCIL, OAKLAND, CALIFORNIA, \_\_\_\_\_

PASSED BY THE FOLLOWING VOTE:

AYES –

NOES –

ABSENT –

ABSTENTION –

ATTEST: \_\_\_\_\_

CEDA FLOYD  
City Clerk and Clerk of the Council  
of the City of Oakland, California

10.10-2CC  
CITY COUNCIL  
JUL 6 2004

**PUBLIC REVIEW DRAFT OF JUNE 323, 2004**

RECORDING REQUESTED BY  
AND WHEN RECORDED, RETURN TO:

City of Oakland  
Oakland Community and Economic Development Agency  
250 Frank H. Ogawa Plaza  
Suite 3330  
Oakland, CA 94612

Attention: Director of City Planning

**DEVELOPMENT AGREEMENT**

**BETWEEN**

**CITY OF OAKLAND**

**AND**

**JACK LONDON SQUARE PARTNERS, LLC,**

**AND**

**CEP-JLS I LLC**

Dated: \_\_\_\_\_, 2004

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CITY OF OAKLAND

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "Agreement") is made and entered into as of this \_\_\_\_ day of \_\_\_\_, 2004, by and between the CITY OF OAKLAND, a California charter city ("City"), and JACK LONDON SQUARE PARTNERS, LLC, a Delaware limited liability company ("JLSP"), and CEP-JLS I LLC, a Delaware limited liability company ("CEP-JLS").

**RECITALS:**

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

A. These Recitals refer to and utilize terms which are defined in this Agreement; and the Parties refer to those definitions in conjunction with their use in these Recitals.

B. The Development Agreement Legislation authorizes City to enter into development agreements in connection with the development of real property within its jurisdiction. The Development Agreement Ordinance establishes the authority and procedure for review and approval of proposed development agreements by City.

C. JLSP on behalf of Developer applied for approval of this Agreement in order to (i) vest the land use policies established in the General Plan, the Estuary Plan, and other

Existing City Regulations as of the Adoption Date, and (ii) memorialize certain other agreements made between City and Developer with respect to the Project. City and Developer acknowledge that development and construction of the Project is a large-scale undertaking involving major investments by Developer, with development occurring in phases over a period of years. Certainty that the Project can be developed and used in accordance with the General Plan, the Estuary Plan, and other Existing City Regulations, will benefit City and Developer and will provide the Parties certainty with respect to implementation of the policies set forth in the General Plan, the Estuary Plan and the other Existing City Regulations.

D. City considers Jack London Square a magnet location within City, of vital importance to the economic health, vibrance and stature of City, and to attracting City and Bay Area residents and national and international visitors to City. Port and City enacted the Estuary Plan in order to implement the development of land along the estuary of Jack London Square. To this end, the Estuary Plan contemplates development of public infrastructure, retail, commercial, entertainment, hotel and other uses in Jack London Square to enhance the value, operation and function of, and access to, Jack London Square and the adjacent waterfront. The adoption of the Estuary Plan was

accomplished through cooperation and collaboration among City, Port and the public. The uses approved by the Estuary Plan were designed to strengthen City's position as an urban center, accommodate economic growth and encourage development that complements City's downtown and adjacent neighborhoods. The Estuary Plan recommends reinforcing the Jack London Square area as a primary dining and entertainment venue in City by promoting a mixture of retail, dining and visitor-serving uses oriented to significant gathering places and public access along the waterfront. City intends through implementation of the policies and goals set forth in the Estuary Plan to enhance the value, operation and function of existing Jack London Square improvements.

E. Development of the Project will meet these objectives of City embodied in the Estuary Plan. Furthermore, development of the Project will increase employment opportunities in City and lead to the production of increased revenues to City through taxes resulting from the ownership, operation and occupancy of the improvements contemplated by the Project, and the overall enhancement of the entire Jack London Square area as a result of development of the Project. City is therefore willing to enter into this Agreement to (i) provide certainty to encourage investment in the comprehensive development and planning of the

Project; (ii) secure orderly development and progressive fiscal benefits for public services, improvements and facilities planning in City; and (iii) fulfill and implement adopted City plans, goals, policies and objectives, including, among others, those embodied in the Estuary Policy Plan and other elements of City's General Plan.

F. The Development Agreement Legislation authorizes City to enter into a development agreement with any Person having a legal or equitable interest in real property, and such development agreement cannot become effective with respect to such real property unless and until the developer under such development agreement has acquired a legal or equitable interest in such real property. To this end, Developer has assured City that it possesses or will as of the Effective Date possess, legal or equitable interests in the Project site as necessary to enter into this Agreement. Pursuant to the AAGLI, Port has granted JLSP the Options to enter into Development Parcel Ground Leases for the Development Parcels designated as Site C, Site D, Site E, Site F-1, Site F-2, Site F-3 and Site G on the Site Plan. Port may also enter into a Development Parcel Ground Lease for the Development Parcel designated "Pavilion 2" on the Site Plan. CEP-JLS is an Affiliate of JLSP and owns Lessee's interest under the Development Parcel Ground Leases for the Development Parcels

designated Water Street I, 70 Washington, 66 Franklin and Pavilion on the Site Plan. Based on Developers' assurances, City has determined that it is reasonably foreseeable that JLSP, or a Transferee, will exercise the Options and enter into Development Parcel Ground Leases as Lessee for the affected Development Parcels, and enter into a Development Parcel Ground Lease for Development Parcel Pavilion 2, thereby acquiring the legal or equitable interests necessary to enter into this Agreement.

G. At a duly noticed public hearing held on March 17, 2004, pursuant to the Development Agreement Legislation and the Development Agreement Ordinance, City's Planning Commission (i) certified the CEQA Documents for the Project and determined that consideration of this Agreement complies with CEQA based on the CEQA Documents, and that this Agreement is consistent with the objectives, policies, land uses and programs specified in the General Plan, the Estuary Plan, and the other Existing City Regulations pertaining thereto, and (ii) recommended that the City Council approve this Agreement based on the foregoing findings. In adopting its Resolution, the Planning Commission reviewed and heard the report of the City staff on Developer's application for this Agreement and considered all other evidence heard and submitted at the public hearing, including the matters to be considered pursuant to Section 17.138.060 of the

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Development Agreement Ordinance in recommending to the City Council the adoption of a development agreement.

H. On June 15, 2004, the City Council held a duly noticed public hearing on this Agreement pursuant to the requirements of the Development Agreement Legislation and the Development Agreement Ordinance. After due review of and report on Developer's application for this Agreement by City staff, consideration of the Planning Commission's recommendations thereon, all other evidence heard and submitted at such public hearing, all other matters considered by the Planning Commission, and the matters to be considered pursuant to Section 17.138.060 of the Development Agreement Ordinance in enacting a development agreement, the City Council (i) considered and found the CEQA Documents in compliance with CEQA; (ii) adopted the findings required by CEQA as part of the CEQA Documents; (iii) directed staff to make specified changes to this Agreement (which changes are incorporated herein) and to the other Project Approvals, including elimination of the Final Development Plan for Development Parcel 66 Franklin that included a two-story addition, the application for which Final Development Plan was approved by City Planning Commission and subsequently withdrawn by Developer on appeal to the City Council; and (iv) introduced the Enacting Ordinance approving this Agreement, finding and

determining in connection therewith that this Agreement is consistent with the objectives, policies, land uses and programs specified in the General Plan and the Estuary Plan, and in the other Existing City Regulations pertaining thereto. On July 6, 2004, the City Council adopted the Enacting Ordinance enacting this Agreement.

NOW, THEREFORE, pursuant to the authority contained in the Development Agreement Legislation and the Development Agreement Ordinance, and in consideration of the foregoing Recitals and the mutual covenants and promises of the Parties herein contained, the Parties agree as follows:

**ARTICLE I**

**DEFINITIONS**

1.1. Defined Terms.

Each reference in this Agreement to any of the following terms shall have the meaning set forth below for each such term.

AAGLI: The Amended and Restated Agreement for Acquisition of Ground Lease Interests, dated March 20, 2002, entered into between Port and Developer.

Adoption Date: The date the City Council adopted the Enacting Ordinance enacting this Agreement.



Affiliate: Any Person directly or indirectly Controlling, Controlled by or under Common Control with Developer.

Agent: Any member, shareholder, partner, official, officer, director, board, commission, employee, agent, or contractor or subcontractor of a Party, and its respective heirs, legal representatives, successors and assigns of an Agent in accordance with Laws, as each Agent is acting in his, her or its official capacity

Applicable City Regulations: The Existing City Regulations, and such other City Regulations otherwise applicable to development of the Project pursuant to the provisions of Section 3.3.

Applicable Conditions of Approval: The conditions of approval contained in the Project Approvals, which apply by their terms solely to a single Development Parcel as specified by the Project Approvals.

CEQA: The California Environmental Quality Act (Public Resources Code Section 21000, et seq.) and the Guidelines thereunder (14 California Code of Regulations Section 15000, et seq.).

CEQA Documents: The information and documents listed in Exhibit A prepared pursuant to the requirements of CEQA for

the Project Approvals, and approved by City acting through its City Council, in accordance with the requirements of CEQA.

City Application Fees: Fees levied or assessed by City to cover the reasonable cost of City's performance of any discretionary, ministerial, clerical or other action, or required by City for reviewing and processing applications for City Approvals, including City Application Fees for the Project Approvals and compliance with CEQA. As specified in Section 3.3.6 (City Fees), notwithstanding any other provision of this Agreement, Developer shall pay City Application Fees chargeable in accordance with City Regulations (including any action by the City Council to increase or otherwise adjust City Application Fees listed in the City's Master Fee Schedule) at the time the relevant application is made. The term "City Application Fee" shall refer to any or all City Application Fees as the context may require.

City Approvals: Permits or approvals required under Applicable City Regulations in order to develop, use and operate the Project. The term "City Approval" shall refer to any or all of the City Approvals as the context may require.

City Council: The City Council of City or its designee.

City Clerk: The City Clerk of City or his/her designee.

City Development Fees: Fees or assessments, other than City Application Fees, charged or required by City in connection with any City Approval under City Regulations to defray the cost of public services or facilities or imposed for a public purpose. As specified in Section 3.3.6 (City Fees) of this Agreement, the sole City Development Fee required to be paid or funded by Developer for development of the Project in accordance with this Agreement is the City's Jobs/Housing Impact Fee pursuant to Chapter 15.68 of the City's Municipal Code, as in effect as of the Adoption Date (including any provision thereof for future fee escalation or adjustment). The term "City Development Fee" shall refer to any or all of the City Development Fees as the context may require.

City Fees: City Application Fees and/or City Development Fees. The term "City Fee" shall refer to any or all City Fees as the context may require.

City Policies: The interpretations made by City of the manner in which Existing City Regulations will be applied to the development of the Project under Applicable City Regulations. Certain selected City Policies germane to the Project are listed and described in Exhibit B hereto. The term "City Policy" shall refer to any or all City Policies as the context may require.

City Regulations: The General Plan of City, the Estuary Plan, and all other ordinances, resolutions, codes, rules, regulations and policies in effect as of the time in question.

Common Area: Those portions of Jack London Square owned by Port and designated as Common Area on the Site Plan.

Construction Codes and Standards: The City Regulations pertaining to or imposing life safety, fire protection, mechanical, electrical and/or building integrity requirements with respect to the design and construction of buildings and improvements, including the then current Uniform Building Code and other construction codes, and City's then current design and construction standards for streets, drains, sidewalks and other similar improvements, which codes and standards are applied to comparable development on a City-wide basis.

Control: The ownership (direct or indirect) by one Person of an interest in the profits and capital and the right to manage and control, in fact, the day to day affairs of another Person. The term "Control" includes any grammatical variation thereof, including "Controlled" and "Controlling."

Common Control means that two Persons are both Controlled by the same other Person.

Dedication: An Exaction comprised of land and/or improvements required to be Dedicated to City.

Design Guidelines: The design standards for improvements to be developed by Developer on each Development Parcel, adopted as part of the Project Approvals. The Design Guidelines are set forth in Exhibit C hereto for reference purposes.

Design Review: The procedure for the review of the design of improvements proposed for development pursuant to Chapter 17.136 of City's Planning Code in effect as part of the Existing City Regulations, or as part of the review and approval of a Final Development Plan pursuant to Section 17.140.040 of City's Planning Code in effect as part of the Existing City Regulations.

Design Review Committee: The Design Review Committee of the City Planning Commission or any successor to such Committee of the City Planning Commission or, in the event there is no successor Committee, the City Planning Commission.

Design Submittal: Design development documents for improvements on a Development Parcel which contain sufficient detail to show the final design for such improvements on such Development Parcel, but which are not of the level of specificity

and detail that would be required for a building permit application.

Developer: JLSP and CEP-JLS. The term "Developer" shall refer to either or both of JLSP and CEP-JLS and their respective Transferees, as the context may require, including for this purpose, Affiliates of Developer.

Development Agreement Legislation: Government Code §§ 65864-65869.5, authorizing City to enter into development agreements as therein set forth.

Development Agreement Ordinance: Chapter 17.138 of City's Planning Code, in effect as of the Adoption Date, establishing City's authority and procedure for review and approval of proposed development agreements.

Development Parcels: The parcels of real property (including any improvements thereon) located in Jack London Square owned by Port, and more particularly described in Exhibit D hereto. The boundaries of a Development Parcel (but not of the Project Site) may be changed based on subsequent agreements between Port and Developer and, if so changed, the affected description in Exhibit D shall be automatically deemed amended to reflect such changed boundaries, and such change, at Developer's request, shall be confirmed in a memorandum of such change, in recordable form, between City and Developer pursuant to Section

11.2 below. Any change to the boundaries of the Project Site shall require application by Developer for, and processing of, City Approvals in accordance with City Regulations in effect at the time such application is made. The term "Development Parcel" shall refer to any or all of the Development Parcels as the context may require.

Development Parcel Ground Lease: The ground leases of the Development Parcels entered into by Port and Developer or another Person (including Affiliates of Developer) as of the time in question. The term "Development Parcel Ground Lease" shall refer to any or all Development Parcel Ground Leases as the context may require.

Development Parcel Transfer: Any transaction by which a third Person is assigned the right to enter into a Development Parcel Ground Lease for a Development Parcel pursuant to an Option, or is assigned the right to acquire the interest granted by an Option, or by which Developer's interest in a Development Parcel is assigned and transferred to a third Person.

Effective Date: The later of (i) thirty (30) days after the Adoption Date, or (ii) if a referendum petition is timely and duly circulated and filed, the date the election results on the ballot measure by City voters approving this

Agreement are certified by the City Council in the manner provided by the Elections Code.

Enacting Ordinance: Ordinance No. \_\_\_\_\_, enacted by the City Council on July 6, 2004, enacting this Agreement.

Estuary Plan: The Estuary Policy Plan, which is part of the Existing City Regulations, adopted by Port on February 10, 1999, and by the City Council on June 8, 1999.

Exaction: An exaction (other than City Fees), Dedication or reservation requirement, an obligation for on- or off-site improvements or construction of public improvements, or an obligation to provide services. For purposes hereof, Exactions include mitigation measures imposed or adopted pursuant to CEQA as part of the Project Approvals.

Existing City Regulations: The City Regulations in effect as of the Adoption Date, including the Project Approvals and City Policies.

Fast-Food Restaurant: A restaurant that meets the definition of "Fast-Food Restaurant Commercial Activities" in Section 17.10.290 of the Oakland Municipal Code.

Feasible: Capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological



factors. The term "Feasible" includes any grammatical variant thereof, including "Feasibly" and "Infeasible."

Final Design Review Decision: The final approval of the improvements proposed for a Development Parcel rendered by City pursuant to Design Review.

Force Majeure: A delay in performance caused by war, terrorist acts, insurrection, strikes or other labor disturbances, walk-outs, riots, floods, earthquakes, fires, casualties, or acts of God; restrictions or delays imposed or mandated by Governmental Agencies; enactment of Laws that prevent or preclude compliance by a Party with any material provision of this Agreement; litigation brought by Persons other than a Party, or Affiliate of a Party; acts of one Party, or failure of such Party to act when action is required, which to the extent in and of itself prevents or precludes compliance by the other Party with any material provision of this Agreement; neglect of one Party which to the extent in and of itself prevents or precludes compliance by the other Party with any material provision of this Agreement; or other similar basis for excused performance that is not within the reasonable control of the Party whose performance is to be excused. Force Majeure does not include delays that are within the reasonable control of the Party whose performance is to be excused, delays associated with economic or market

conditions, or delays related to financial inability or insolvency of a Party.

Governmental Agencies: All governmental or quasi-governmental agencies (such as public utilities) having jurisdiction over, or the authority to regulate development of, the Project. As used in this Agreement, the term "Governmental Agencies" does not include City or any of the departments of City.

Governmental Agency Approvals: All permits and approvals required by Governmental Agencies under Governmental Agency Regulations for construction, development, operation, use, provision of services to, or occupancy of, the Project.

Governmental Agency Regulations: The Laws, ordinances, resolutions, codes, rules, regulations and official policies of Governmental Agencies in effect as of the time in question.

Indemnify: An obligation of Developer to indemnify, defend, protect and hold the Indemnitees harmless from and against Losses. The term "Indemnify" includes any grammatical variation thereof, including "Indemnified", "Indemnifies" and "Indemnity".

Indemnitees: City, its Agents, departments, subdivisions, agencies (including City's Redevelopment Agency), the City Council, Mayor, boards and commissions (and each

individual member of the City Council or any other City board or commission) and all of the heirs, legal representatives, successors and assigns of an Indemnitee in accordance with Laws, as each Indemnitee is acting in his, her or its official capacity.

Jack London Square: That area of City commonly referred to as "Jack London Square" within which the Development Parcels are located, and as more generally described in the Estuary Plan.

Laws: The Constitution and laws of the State, the Constitution of the United States, and any codes, statutes, regulations, or executive mandates thereunder, and any court decision, State or federal, thereunder. The term "Laws" shall refer to any or all Laws as the context may require.

Losses: Any and all losses, damages (including foreseeable and unforeseeable consequential damages), liabilities, claims, liens, obligations, interest, penalties, fines, lawsuits and other proceedings, judgments and awards, challenges, demands, judgments, actions, causes of action, court costs, and legal or other expenses (including reasonable attorneys' fees, reasonable expert witness and consultant fees, reasonable City Attorney time and overhead costs, and other normal, reasonable day-to-day business expenses incurred by

City), all of whatever kind or nature, known or unknown, contingent or otherwise.

Mayor: The Mayor of City or his/her designee.

Minimum Project: The portion of the Project to be developed by Developer in accordance with Section 4.3 of this Agreement as described in Exhibit E hereto. The term "Minimum Project" includes the Common Area that is within the Minimum Project.

Mortgage: (i) A mortgage or deed of trust, or other transaction, in which Developer conveys or pledges as security its interest in a Development Parcel, or a portion thereof, or interest therein, or any improvements thereon for the purpose of (A) financing the acquisition of a Development Parcel or Development Parcels, or the development of the Project, or a Development Parcel or Development Parcels, (B) refinancing any of the foregoing, or (C) obtaining financing proceeds by encumbering a Development Parcel or Development Parcels; (ii) a sale and leaseback arrangement, in which Developer sells and leases back concurrently therewith its interest in a Development Parcel, or a portion thereof, or interest therein, or improvements thereon for the purpose of (A) financing the acquisition of a Development Parcel or Development Parcels, or the development of the Project, or a Development Parcel or Development Parcels, (B) refinancing

any of the foregoing, or (C) obtaining financing proceeds by encumbering a Development Parcel or Development Parcels; or (iii) a Development Parcel Ground Lease under which Port is Lessor. The term "Mortgage" includes all other customary vehicles of real estate financing, financing for real estate acquisition, construction and land development, and refinancing any of the foregoing.

Mortgagee: The holder of the beneficial interest under a Mortgage, the lessor under a sale and leaseback Mortgage, or Port, as the Lessor, under a Development Parcel Ground Lease.

National Fast-Food Chain Restaurant: A Fast-Food Restaurant that, at the time of its application for a building permit for a facility located within the Project, operates under a brand identity that also applies to other restaurants in more than ten (10) states in the United States.

Operating Agreement: The Operating Agreement between Port and CEP-JLS I LLC, a Delaware limited liability company, an affiliate of Developer, dated March 29, 2002, and recorded March 29, 2002, as Instrument No. 2002141789, in the Official Records of the County of Alameda, which Operating Agreement governs the operation, maintenance and repair of those portions of Jack London Square owned by Port, including the Development Parcels,

all as more particularly described in the Operating Agreement, as such Operating Agreement may hereafter be amended from time to time or at any time in accordance with the provisions thereof. Operating Agreement is attached as Exhibit F to this Agreement.

Options: The options specified in Recital F above. Reference to an "Option" shall refer to any or all of the Options as the context may require.

Party: City and/or Developer, and Developer's Transferees, as applicable, determined as of the time in question.

Person: An individual, partnership, firm, association, corporation, trust, governmental agency, administrative tribunal or other form of business or legal entity.

Port: The City of Oakland, a California charter city, acting by and through its Board of Port Commissioners. References in this Agreement to "City" shall not include the Port unless expressly so provided.

Project: The development, use and occupancy of buildings and other improvements on the Development Parcels pursuant to the Project Approvals and any other City Approvals to the extent required under this Agreement.

Project Approvals: The City Approvals governing the Project enacted by City and listed in Exhibit G hereto, as the

same may be amended from time to time during the Term. Reference to a particular Project Approval shall have the meaning ascribed to such Project Approval set forth in Exhibit G. The Project Approvals include all conditions of approval contained therein and the Mitigation Monitoring and Reporting Program approved as part of the Project Approvals pursuant to CEQA and the CEQA Documents.

Project Site: The real property and improvements upon and in which the Project will be developed, as shown on the Site Plan.

Site Plan: The site plan for the Project attached hereto as Exhibit H approved as part of the Project Approvals, which generally shows the Development Parcels and Common Area.

State: The State of California and any department or agency acting on behalf of the State.

Term: The term of this Agreement, as determined pursuant to Article II below, unless sooner Terminated as provided in this Agreement.

Terminate: The expiration of the Term of this Agreement, whether by the passage of time or by any earlier occurrence pursuant to any provision of this Agreement. The term "Terminate" includes any grammatical variant thereof, including "Termination" or "Terminated".

Transfer: The sale, assignment, lease, sublease, or other transfer by Developer of this Agreement, or any right, duty or obligation of Developer under this Agreement, made pursuant to the terms, standards and conditions of Article X of this Agreement, including by foreclosure, trustee sale, or deed in lieu of foreclosure, under a Mortgage, but excluding (i) a Dedication, (ii) a Mortgage, including a transfer or assignment of this Agreement to a mortgagee as additional security under a Mortgage, and (iii) leases or subleases entered into by Developer with tenants of the Project solely for occupancy of space or improvements (together with any appurtenant tenant rights and controls customarily included in such leases or subleases) in the Project, and any assignment or transfer of any such lease or sublease by either party thereto.

Transferee: The Person to whom a Transfer is effected.

1.2. Certain Other Terms. Certain other terms shall have the meaning set forth for each such term in this Agreement.

## ARTICLE II

### TERM

2.1. Effective Date; Term Commencement. This Agreement shall be dated as of the Adoption Date; the rights, duties and obligations of the Parties hereunder shall be effective, and the Term shall commence, as of the Effective Date. Not later than



five (5) days after the Adoption Date, Developer shall execute and acknowledge this Agreement and return the Agreement to City; not later than ten (10) days after the Effective Date, City, by and through its Mayor, shall execute and acknowledge this Agreement; and not later than fifteen (15) days after the Effective Date, Developer shall cause this Agreement to be recorded in the Official Records of the County of Alameda.

2.2. Expiration of Term. Unless sooner Terminated pursuant to the applicable provisions of this Agreement, the Term shall expire on December 31 of the calendar year in which the 15th anniversary of the Effective Date falls, as such date may be extended in the event of Force Majeure. The Parties have established the Term as a reasonable estimate of the time required to carry out the Project, develop the Project, and obtain the public benefits of the Project.

2.3. Subsequent Amendments or Termination. If the Parties amend, modify or Terminate this Agreement as herein provided, or as otherwise provided by the Development Agreement Ordinance, or this Agreement is modified or Terminated pursuant to any provision hereof, then the City Clerk shall, within ten (10) days after such action takes effect, cause an appropriate notice of such action to be recorded in the Official Records of the County of Alameda.

2.4. Expiration of Term. Except for accrued obligations of a Party, upon expiration of the Term, this Agreement and all of the rights, duties and obligations of the Parties hereunder shall Terminate and be of no further force or effect. Except for the rights conferred by this Agreement, any right that is vested under Laws, including City Approvals, as applicable, shall not expire due to the expiration of the Term.

### ARTICLE III

#### GENERAL REGULATION OF DEVELOPMENT OF PROJECT

##### 3.1. Application of Agreement to Development Parcels.

As between the Parties, this Agreement is effective as of the Effective Date and is enforceable by each Party in accordance with its terms. Upon the exercise of an Option and acquisition by JLSP (or a Transferee of JLSP) of a legal or equitable interest in a Development Parcel pursuant to such Option, and/or entry by JLSP (or by a Transferee of JLSP) into a Development Parcel Ground Lease with Port for Development Parcel Pavilion 2, this Agreement shall automatically become effective as to, and govern, such Development Parcel as of the later of (i) the Effective Date or (ii) the date JLSP (or a Transferee of JLSP) provides written evidence reasonably acceptable to City that it has acquired such interest. Promptly after this Agreement becomes effective as to and governs such Development Parcel, JLSP

(or a Transferee of JLSP, if applicable) and City shall execute and acknowledge a Memorandum of this Agreement in the form of the Memorandum of Development Agreement attached hereto as Exhibit I, and Developer shall cause such Memorandum of Development Agreement to be recorded in the Official Records of the County of Alameda to provide record evidence that this Agreement has become effective as to and governs such Development Parcel pursuant to Section 65868.5 of the Development Agreement Legislation.

3.2. Project Development; Permitted Uses; Control of Development. Developer shall have the right to develop the Project in accordance with the terms and conditions of this Agreement; and City shall have the right to control development of the Project in accordance with the provisions of this Agreement. The permitted uses of the Project Site, the density and intensity of use of the Project Site, the maximum height, bulk and size of proposed buildings in the Project, and provisions for Exactions shall be those set forth in the Project Approvals, including this Agreement. The Applicable City Regulations and this Agreement shall control the overall design, development and construction of the Project, and all on- and off-site improvements and appurtenances in connection therewith, in the manner specified in this Agreement. In the event of any inconsistency between the Applicable City Regulations and this

Agreement, this Agreement shall control, except that if the inconsistency cannot be reconciled by application of this rule of construction, the provision which best gives effect to the purposes of this Agreement shall control.

3.3. Applicable City Regulations. Except as expressly provided in this Agreement, the Existing City Regulations shall govern the development of the Project and all subsequent City Approvals with respect to the Project. City shall have the right, in connection with any further City Approvals, to apply City Regulations as Applicable City Regulations only in accordance with the following terms, conditions and standards:

3.3.1. Future City Regulations. Except as otherwise specifically provided in this Agreement, including the provisions relating to regulations for health and safety reasons under Section 3.3.2 below and provisions relating to the payment of City Application Fees pursuant to Section 3.3.6 below, City shall not impose or apply any City Regulations adopted or modified by City after the Adoption Date (whether by action of the Planning Commission or the City Council, or by initiative, referendum, ordinance, resolution, rule, regulation, standard, directive, condition, or other measure) (i) which would be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement; (ii) which would

change or modify the permitted uses of the Project Site, the density or intensity of use of the Project Site, the maximum height, bulk, or size of proposed buildings in the Project, or provisions for Exactions as set forth in the Project Approvals, including this Agreement; (iii) which would materially increase the cost of development of the Project (subject to the acknowledgement as to the cost of Exactions specified in Section 3.3.7 below); (iv) which would, other than to a *de minimus* extent, change or modify, or interfere with, the timing, phasing, or rate of development of the Project; or (v) which would materially interfere with or diminish the ability of a Party to perform its obligations under the Project Approvals, including this Agreement, or expand, enlarge or accelerate Developer's obligations under the Project Approvals, including this Agreement.

3.3.2. Regulation for Health and Safety.

Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by City after the Adoption Date, if such application (i) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (ii) City determines that a failure to do so would place existing or future occupants, or users of the Project, or any portion thereof, or the immediate

community, or all of them, in a condition dangerous to their health or safety, or both.

3.3.3. Design Review. Except as otherwise specified in this Section 3.3.3, as part of the Project Approvals, City has undertaken final Design Review of, and rendered the Final Design Review Approval for, the improvements proposed for all Development Parcels, other than Development Parcel Water Street I as shown on the Site Plan.

3.3.3.1. Final Development Plan and Design Review for Development Parcel Water Street I. Prior to commencing any development with respect to Development Parcel Water Street I, Developer shall submit for processing by City in accordance with Applicable City Regulations a Final Development Plan for Development Parcel Water Street I. City shall undertake Design Review of improvements proposed for Development Parcel Water Street I and render a Final Design Review Approval for such improvements as part of City's processing of such Final Development Plan for Development Parcel Water Street I.

3.3.3.2. Design Review Process for All Development Parcels. Prior to application by Developer for a building permit to construct improvements on a Development Parcel (including for Development Parcel Water Street I after City's approval of a Final Development Plan for such Development Parcel pursuant to Section 3.3.3.1 above), Developer shall make a Design

Submittal to City's Director of City Planning. Upon receipt of such Design Submittal from Developer, City's Director of City Planning shall determine whether the Design Submittal is complete and, if not, by notice to Developer what additional design information is required to make the Design Submittal complete. Upon the determination by City's Director of City Planning that a Design Submittal is complete, City's Director of City Planning shall review such Design Submittal and determine whether the design of the improvements as shown by the Design Submittal substantially complies with the Final Development Plan for the affected Development Parcel. If City's Director of City Planning reasonably determines that the design set forth by a Design Submittal for a Development Parcel substantially complies with the Final Development Plan for such Development Parcel, then (except as to Development Parcels Water Street I or G) City's Director of City Planning shall refer the Design Submittal for the affected Development Parcel to the Design Review Committee for the purpose of approving the specific design features of exterior siding finishes, colors, materials, window types and treatment, and other exterior details such as railings and trim indicated in such Design Submittal, as such features are generally indicated on the Final Development Plan for the affected Development Parcel. With respect to Development Parcel G only, City's Planning Director shall refer a Design Submittal the City Planning Commission (instead of the Design Review

Committee as described in the foregoing sentence), which shall determine whether the Design Submittal complies with (i) the Design Guidelines; and (ii) the design and landscaping-related Conditions of Approval contained in the Project Approvals. If the Design Review Committee or, with respect to Development Parcel G, the Planning Commission approves the ~~such specific~~ design features in such Design Submittal for the affected Development Parcel in accordance with this Section 3.3.3.2,<sup>7</sup> then Developer shall have the right to apply for a building permit for the improvements on such Development Parcel, the application for which building permit shall be processed in accordance with Section 3.3.5 below. -If City's Director of City Planning determines, pursuant to this ~~Section 3.3.3.2~~, that a Design Submittal for a Development Parcel does not substantially comply with the Final Development Plan for such Development Parcel, then the City's Director of City Planning shall refer the Design Submittal for the affected Development Parcels hereunder to the City Planning Commission ~~Design Review Committee~~ for the purpose of determining whether such Design Submittal substantially complies with (i) the Design Guidelines; and (ii) the design and landscaping-related Conditions of Approval contained in the Project Approvals. If the City Planning Commission ~~Design Review Committee~~ determines that the Design Submittal substantially complies with the foregoing clauses (i) and (ii), then Developer shall have the right to apply for a building



permit for the improvements on such Development Parcel, the application for which building permit shall be processed in accordance with Section 3.3.5 below. If the City Planning Commission Design Review Committee determines that the Design Submittal does not substantially comply with the foregoing clauses (i) and (ii), no building permit for the improvements on such Development Parcel shall be processed nor issued unless and until Developer revises its Design Submittal and subsequently obtains a ~~Design Review Committee~~ determination of substantial compliance with the foregoing clauses (i) and (ii) from the City Planning Commission (or the City Council in the event of an appeal). Any decision of the City Planning Commission under this Section 3.3.3.2 shall be appealable to the City Council in accordance with Applicable City Regulations.

3.3.3.3. Time Limits Applicable to Design Review Procedures. All decisions by City's Director of City Planning on the completeness of a Design Submittal pursuant to this Section 3.3.3 (or any additional design documents specified by City's Director of City Planning to make a Design Submittal complete) shall be made within thirty (30) days after submission by Developer of a Design Submittal (or any additional design documents specified by City's Director of City Planning to make a

Design Submittal complete) to City's Director of City Planning. All other decisions by City's Director of City Planning made pursuant to this Section 3.3.3 shall be rendered within thirty (30) days after City's Director of City Planning determines that a Design Submittal is complete. All decisions of the Design Review Committee, City Planning Commission or City Council made pursuant to this Section 3.3.3 shall be placed on the agenda for consideration by such body ~~rendered~~ within sixty (60) days after referral of a Design Submittal to the Design Review Committee or the City Planning Commission by City's Director of City Planning or appeal to the City Council of the City Planning Commission's determination, as applicable. -

3.3.3.4. Parameters of Decisions. All decisions made under this Section 3.3.3 by City's Director of City Planning, or the Design Review Committee, as applicable, shall be final and non-appealable, notwithstanding anything to the contrary contained in Applicable City Regulations. All decisions and actions rendered or taken under this Section 3.3.3 by City's Director of City Planning and by ~~the Design~~ the Design Review Committee, the City Planning Commission or City Council, as applicable, shall be limited solely to the design determinations specified in this Section 3.3.3. If City's Director of City Planning makes a determination of non-

substantial compliance pursuant to the standards specified in this Section 3.3.3, or if the Design Review Committee, the City Planning Commission or the City Council, as applicable, reasonably determines not to approve the specific design features in a Design Submittal for the affected Development Parcel pursuant to Section 3.3.3.2, then Developer shall have the right, in addition to any other rights or remedies available under Laws, to modify the affected Design Submittal and resubmit such modified design for processing in accordance with this Section 3.3.3.

3.3.3.5. Consultation and Advice in Preparation of Design Submittal. The Parties acknowledge that the preparation by Developer of a Design Submittal for a Development Parcel is an iterative process requiring a high degree of consultation and cooperation by City with Developer and its design consultants. Accordingly, upon Developer's request, City's Director of City Planning (or his or her designated Staff member) shall, from time to time, consult and advise with Developer and its design consultants regarding proposed schematic designs for improvements on a Development Parcel to be incorporated into a Design Submittal for such Development Parcel. No such consultation or advice by City's Director of City Planning or Staff shall, however, constitute a decision or determination regarding substantial compliance in accordance with the standards specified in this Section 3.3.3.

3.3.3.6. Nature of Design Review Decision. City acknowledges that City has exercised discretion pursuant to City's Design Review with respect to the design of proposed improvements for the Development Parcels which meet the standards specified in this Section 3.3.3. City's discretion with respect to future Design Review for the Project shall be limited to determining whether Design Submittals substantially conform to the Design Guidelines, the Preliminary Development Plan, the

Final Development Plan and the design and landscaping-related Conditions of Approval for the affected Development Parcel or Parcels, as contained in the Project Approvals, as specified in this Section 3.3.3.

3.3.4. Sign Program. As part of Developer's proposed Sign Program, as required under the Conditions of Approval incorporated into Project Approvals, Developer shall have the right, at a minimum, to signage for the Project specified in Section 17.38.090 of City's Planning Code for the C-20 Zoning District, and (i) the Project will be considered, and treated as, an "integrated shopping center" for purposes of Section 17.38.090 of City's Planning Code, and (ii) any ground level pedestrian or vehicle pathway or open space area (including Water Street) shall be considered, and treated as, an "abutting street" for purposes of Section 17.38.90 of City's Planning Code.

Pursuant to Condition of Approval No. 32.d. Developer shall submit its Master Sign Program to the City Planning Commission for the purpose of determining whether such Sign Program substantially complies with (i) the Design Guidelines; and (ii) the design and landscaping-related Conditions of Approval contained in the Project Approvals. If the City Planning Commission determines that the Sign Program substantially complies with the foregoing clauses (i) and (ii), then Developer

shall have the right to apply for a building permit for signage.  
If the Planning Commission determines that the Master Sign  
Program does not substantially comply with the foregoing clauses  
(i) and (ii), no building permit for signage shall be processed  
nor issued unless and until Developer revises its Design  
Submittal and subsequently obtains a City Planning Commission  
determination of substantial compliance with the foregoing  
clauses (i) and (ii). Any decision of the City Planning  
Commission under this Section 3.3.4 shall be appealable to the  
City Council in accordance with Applicable City Regulations.

~~All decisions made by City's Director of City  
Planning under this Section 3.3.4 shall be final and non-  
appealable.~~

3.3.5. Construction Codes and Standards. City shall have the right to apply to the Project at any time, as a ministerial act, the Construction Codes and Standards in effect at the time of the approval of any City Approval thereunder.

3.3.6. City Fees. The sole City Development Fee required to be paid or funded by Developer for development of the Project is City's Jobs/Housing Impact Fee pursuant to Chapter 15.68 of City's Municipal Code, as in effect as of the Adoption Date (including any provision thereof for future fee escalation or adjustment). City shall not impose on the Project any other

City Development Fees other than the Jobs/Housing Impact Fee. Notwithstanding any other provision of this Agreement, Developer shall pay City Application Fees chargeable in accordance with City Regulations (including any action by the City Council to increase or otherwise adjust City Application Fees listed in the City's Master Fee Schedule) at the time the relevant application is made in effect at the time the relevant application is made.

3.3.7. Project Exactions. Developer and City acknowledge that the Project Approvals authorize and require implementation of Exactions in connection with the development of the Project and that the specific costs of implementing such Exactions currently cannot be ascertained with certainty, but notwithstanding such uncertainty, Developer shall be solely responsible for such costs in connection with implementing such Exactions as and when they are required to be implemented. Subject to the terms and conditions of this Agreement, including this Section 3.3, no new Exactions shall be imposed by City on the Project or Developer, or on any application made by Developer for any City Approval, or in enacting any City Approval, or in connection with the development, construction, use or occupancy of the Project.

3.3.8. Term of City Approvals. Notwithstanding anything to the contrary in Applicable City Regulations, the term

of any City Approval for the Project shall be automatically extended and equal the Term of this Agreement.

3.4. Review and Processing of City Approvals. City shall accept for processing, review and action all applications for City Approvals with respect to the Project when and if the same are complete, as determined pursuant to City Policies and Government Code Section 65940, et seq. Upon acceptance by City, City shall cooperate with Developer to facilitate prompt and timely review and processing of such applications, including the timely provision of notice and scheduling of all required public hearings, and processing and checking of all maps, plans, permits, building plans and specifications and other plans relating to development of the Project filed by Developer. In connection with any City Approval, City shall exercise its discretion or take action only in that manner which complies and is consistent with this Agreement.

3.5. Effect of Agreement. This Agreement constitutes a part of the Enacting Ordinance, as if incorporated by reference therein in full, and shall constitute a City Approval pursuant to the Applicable City Regulations as if separately enacted thereunder.

3.6. Other Governmental Approvals. Developer shall promptly and timely apply for and diligently pursue all required



Governmental Agency Approvals from Governmental Agencies, as and when each such Governmental Approval is required during the course of design, development, construction, use or occupancy of, and delivery of services to, the Project. Developer shall diligently take all reasonable steps necessary to obtain all such Governmental Approvals, including those as are necessary for development of the Minimum Project pursuant to Section 4.3 below, and shall bear all costs and expenses for obtaining such Governmental Approvals. When and if obtained, copies of all such Governmental Approvals shall be submitted to City promptly after Developer's receipt of a written request therefore from City. Developer shall comply with, and shall cause the Project to comply with, all Governmental Agency Regulations and Laws related to the development, use and operation of, or provision of services to, the Project. Developer shall take all reasonable, diligent efforts to fulfill its obligations under this Section 3.6. City shall cooperate with Developer in such endeavors upon Developer's written request for such cooperation. Developer shall be solely responsible for undertaking any investigation and acquiring necessary knowledge of Governmental Agency Regulations and Laws applicable to or affecting the Project Site, including existing or proposed restrictions, environmental and land use

laws and regulations (other than City Regulations) to which the Project Site may be subject.

3.7. Effect of Termination. Upon any Termination of this Agreement, City shall retain any and all benefits, including money or land, received by City as of the date of Termination under or in connection with this Agreement. No Termination of this Agreement shall prevent Developer from completing and occupying buildings or other improvements authorized pursuant to valid building permits previously approved by City or under construction at the time of Termination, except that nothing herein shall preclude City, in its discretion, from taking any action authorized by Laws or City Regulations to prevent, stop or correct any violation of Laws or City Regulations occurring before, during or after construction.

3.8. Developer to Maintain Port Interests. Developer acknowledges that its selection by the Port as the developer for the Project Site and its ongoing contractual relationship with the Port, as owner of the Project Site, is a material consideration in City's decision to enter into this Agreement. Therefore, as a material term of this Agreement, Developer shall maintain in good standing its legal and equitable interest in each Development Parcel, unless and until Developer (or a Transferee, as the case may be) is either released from its

obligations under this Agreement in accordance with Section 10.4 below, or this Agreement Terminates for reasons other than an Event of Default by Developer.

ARTICLE IV

**CERTAIN ADDITIONAL CRITERIA AND  
OBLIGATIONS APPLICABLE TO DEVELOPMENT OF PROJECT**

4.1. Requirements for Approval of Project. City and Developer acknowledge that Developer has obtained all required City Approvals for the development, construction, use and occupancy of the Project pursuant to the Project Approvals, other than (i) the City Approvals under Applicable City Regulations for a Final Development Plan for Development Parcel Water Street I as shown on the Site Plan, (ii) Design Review as may be applicable pursuant to Section 3.3.3 above, and (iii) City Approvals under Construction Codes and Standards, and that, subject to the attainment of such City Approvals, as applicable, Developer may proceed with the development, construction, use and occupancy of the Project as a matter of right under this Agreement. Developer shall, at its sole cost and expense, fund, comply with, and implement (or ensure implementation of) all mitigation measures or conditions of approval that are (i) identified in the CEQA Documents and incorporated as part of the Project Approvals, (ii) otherwise incorporated as part of the Project Approvals, or (iii) incorporated as part of Governmental Agency Approvals, all in

accordance with the standards, timing, terms and conditions specified for such mitigation measures in the Project Approvals, City Approvals or Governmental Agency Approvals. Developer's compliance with Mitigation Measure B.4, as specified in the Project Approvals, shall constitute compliance with Sections 17.116.170 and 17.116.180 of the City Planning Code.

4.2. Effect of CEQA Documents. City's review of subsequent discretionary City Approvals shall utilize the CEQA Documents incorporated as part of the Project Approvals to the fullest extent permitted by Laws.

4.3. Terms and Conditions for Development of Minimum Project. The Parties acknowledge that uncertainties associated with market conditions, availability of financing, and other factors, may alter Developer's ability to construct the Project within the Term of this Agreement. Notwithstanding this possibility, in order to assure City that the Project will be developed within a reasonable time period, Developer shall use all reasonable efforts to (i) within four (4) years of the Effective Date, substantially complete the West Green, as depicted on the Improvement Diagram, attached as Exhibit E-1 to this Agreement and the Common Area components of the Minimum Project that are within thirty (30) feet of the waterfront railing; (ii) within six (6) years of the Effective Date, procure

all required building permits and other ministerial permits (such as grading permits) from City for development of the Minimum Project, and (iii) within eight (8) years of the Effective Date, substantially complete the building shells for the buildings in the Minimum Project and all portions of the Common Area that are part of the Minimum Project. City shall have the right to Terminate this Agreement by written notice to Developer if City determines that, if for any reason, despite such Developer's reasonable efforts and other factors, including market and economic conditions as of the time in question for the uses contemplated for the Minimum Project, appropriate mix of uses and use categories, return on investment and similar criteria, Developer has not substantially completed the improvements specified in the foregoing clause(i) within four (4) years of the Effective Date, procured all required building permits and other ministerial permits (such as grading permits) for development of the Minimum Project within six (6) years of the Effective Date, and/or substantially completed the improvements specified in the foregoing clause (iii) within eight (8) years of the Effective Date. Notwithstanding the foregoing, however, within sixty (60) days after City delivers such notice, Developer shall have the right to apply to City Council for an extension of any of the deadlines specified in the foregoing clauses (i), (ii) and/or

(iii) on the basis that market and economic conditions as of the time in question for the uses contemplated for the Minimum Project, appropriate mix of uses and use categories, return on investment and similar criteria have prevented Developer from satisfying such deadline. In the event that Developer timely submits a complete application to extend the applicable 4-year, 6-year and/or 8-year period, the Agreement shall remain in effect unless and until City Council takes final action on such submitted application. Developer's application to City Council for to extend such 4-year, 6-year and/or 8-year period shall be accompanied by appropriate information and documentation evidencing the basis of Developer's request for extension. Upon receipt of such application, City shall have the right to request such additional information and documents as City may deem reasonably necessary or appropriate to analyze Developer's request for such extension. If City Council determines, on the basis of Developer's application and other factors City Council deems relevant, that the factors cited by Developer in such application, in fact, prevented Developer from substantially completing the improvements specified in the foregoing clause (i) within four (4) years of the Effective Date, from procuring the permits specified in the foregoing clause (ii) within six (6) years of the Effective Date, and/or and/or substantially

completing the building shells and Common Area in the Minimum Project within eight (8) years of the Effective Date, then City Council, in its sole discretion, may extend such 4-year, 6-year period and/or 8-year period for any period as City Council deems appropriate. If the City Council determines that Developer has not satisfied the requirements of the foregoing clauses (i), (ii) and/or (iii) within the deadlines specified therein and denies Developer's application to extend such 4-year, 6-year and/or 8-year period, as applicable, then the Agreement shall Terminate. City Council shall have the right in its sole discretion to approve or disapprove any extension (including multiple extensions) of any of the time periods set forth in this Section 4.3 or to impose reasonable conditions any decision it makes under this Section 4.3. The City Council may impose requirements that do not relate to the development of the Minimum Project in accordance with this Section 4.3 only if they are agreed upon by Developer. Termination of this Agreement pursuant to this Section 4.3 shall be City's sole and exclusive remedy in the event that City determines Developer has failed within the deadlines specified in this Section 4.3 (A) substantially to complete the West Green and those portions of the Common Area components of the Minimum Project that are within thirty (30) feet of the waterfront railing, (B) to procure all required

building permits and other ministerial permits for the development of the Minimum Project, and/or (C) substantially to complete the building shells and Common Area in the Minimum Project; however, any such Termination shall not relieve Developer of any other obligation to City, including obligations under this Agreement that survive Termination (such as Indemnity obligations), accrued obligations under this Agreement, and obligations to comply with City Approvals, Governmental Agency Approvals and other Laws. As used in this Section 4.3 and elsewhere in this Agreement, the term "building shells" means that the affected building is substantially enclosed with an exterior facade and with utilities stubbed to the exterior of such building sufficient to enable a tenant or tenants of such building to commence construction of interior and exterior tenant improvements for such tenant's occupancy of space in such building.

4.4. Operation and Maintenance of Project. Developer shall operate and maintain the Project, and/or cause the Project to be operated and maintained and the Common Area to be operated and maintained, in accordance with the provisions of the Operating Agreement. Developer shall use commercially reasonable efforts and due diligence to enforce all obligations under the Operating Agreement to cause the "Operator" thereunder to comply



with the operation and maintenance standards set forth in the Operating Agreement.

4.5. Small Local Business Utilization, Prevailing Wage and Living Wage Requirements. Developer shall comply with the Port's Non-Discrimination and Small Local Business Utilization Policy, the Port's Prevailing Wage Requirements, and the Port's Living Wage Requirements, copies of which Policy and Requirements are attached to this Agreement for reference purposes as Exhibits J-1, J-2, and J-3. Developer shall comply with all applicable requirements of the California Labor Code, including prevailing wage requirements. Developer shall use all diligent efforts to ensure that its contractors and subcontractors comply with all provisions of the California Labor Code applicable to the Project.

4.6. Compliance with Port Art in Public Places Ordinance. Developer shall comply with Port's Ordinance No. 3694, providing for art in public places, pursuant to the provisions of such Ordinance, attached as Exhibit K to this Agreement.

4.7. Local Hiring Provisions. Developer shall abide by the City's Local Employment Program (April 2004), attached as Exhibit L to this Agreement, which establishes goals for the hiring of Oakland-resident employment on construction,

alteration, demolition or repair work done under certain contracts. Developer shall take commercially reasonable measures to assure that its contractors and subcontractors on the Project abide by such Program. Developer understands that these requirements apply to the entire work of site development and construction (including building shells) with the exception of tenant improvements.

4.8 Fast-Food Restaurants. Fast-Food Restaurants within the Project, when viewed together, shall represent a world-wide variety of high-quality food types and cultural origins. The selection of Fast-Food Restaurants to be constructed within the Project (other than any conventional sit-down restaurants with table service that may also qualify as Fast-Food Restaurants) shall emphasize local and regional entities, as distinct from National Fast-Food Chain Restaurants. At least sixty (60) percent of the Fast-Food Restaurants within the Project shall be local and regional entities, as distinct from National Fast-Food Chain Restaurants unless, at the sole discretion of the City Council, such percentage is increased.

**ARTICLE V**

**INDEMNITY**

5.1. Developer Indemnity. Except as hereinafter specifically otherwise provided, Developer shall Indemnify the

Indemniteses from any Losses arising out of, related to, or in connection with (i) any City Approval (including any litigation or other proceeding initiated by a third Person challenging any City Approval); (ii) development and construction of the Project (including any Losses associated with any alleged violations of the California Labor Code); (iii) any Governmental Agency Approval (including any litigation or other proceeding initiated by a third Person challenging any Governmental Agency Approval); (iv) any accident, injury, bodily injury, or death, or loss of or damage occurring to property damage on any Developer Parcel, or any part thereof, or within the Common Area; (v) any use, possession, occupation, operation, maintenance, or management of the Project or the Project Site or any part thereof by Developer or any of its tenants, subtenants, Agents, or invitees; (vi) any act or omission of Developer or any of its Agents, architects, engineers, or suppliers with respect to the development or use of the Project, or the Project Site; (vii) any latent design construction or structural defect relating to the improvements on the Project Site or other improvements funded or otherwise implemented by Developer or its Agents; (viii) the physical, geotechnical or environmental condition of the Project Site or any part thereof, including any hazardous materials or other contamination in, on, under, above, or about the Project Site

(including soils and groundwater conditions), and/or (ix) any civil rights actions or other legal actions or suits initiated by any user or occupant of the Project or the Project Site. The foregoing Indemnity shall not apply to an Indemnitee to the extent Losses are caused solely (A) by the gross negligence or willful misconduct of such Indemnitee; (B) by a claim filed by the City to recover any decrease in or a loss of tax revenue by City or its Agents as a result of the invalidation of any City Approval applicable to the Project or the failure of the Project to generate projected real property taxes or sales tax revenues; and/or (C) with respect to a Loss directly caused by the foregoing (iv), (v), (viii) or (ix) only, by an act, action, or omission that is exclusively within the discretion and control of such Indemnitee and is not related (directly or indirectly) to any action or omission of Developer or an Agent of Developer, and is unrelated to the foregoing (i), (ii), (iii), (vi) or (vii). When a Loss is caused by the joint negligence or willful misconduct of Developer and an Indemnitee, Developer's Indemnity to such Indemnitee shall be limited to Developer's contributory share of the joint active negligence or willful misconduct. If Developer is required to Indemnify one or more Indemnitees hereunder, Developer shall pay within thirty (30) days after receipt from City (together with appropriate backup) any amount

owing by Developer to an Indemnitee under this Section 5.1. Developer's Indemnity obligation under this Section 5.1 includes the duty to defend Indemnitees in any court action, administrative action or other proceeding brought by any third Person included within the Indemnitee obligations under this Section 5.1. In the event Developer is defending an Indemnitee with counsel designated by Developer, then such counsel shall be reasonably acceptable to City, except that, to the extent Losses subject to Developer's Indemnity hereunder are covered by insurance carried by Developer, then counsel designated by the insurance company providing such insurance coverage shall defend City. Upon the advice of the City Attorney, City shall retain the right to reject such insurance company designated counsel (on the basis of a conflict, incompetency or similar grounds) and to require Developer to retain counsel reasonably acceptable to City for Indemnitee's defense.

5.2. Construction Claims. If through acts or neglect on the part of Developer, or any of its construction contractors, any other construction contractor, or any subcontractor, suffers loss or damage on its work, and such other contractor or subcontractor asserts any claim against City on account of any damage alleged to have been sustained, City shall so notify Developer, who shall defend at its own expense any suit based

upon such claim, and Developer shall pay all reasonable costs and expenses incurred by City in connection with any final, non-appealable judgment entered as to such claim.

5.3. Insurance. Developer shall, at all times during the Term of this Agreement, maintain and keep in full force and effect at Developer's own cost and expense, the following policies of insurance in accordance with the terms and conditions of this Section 5.3. The insurance requirements and other provisions of this Agreement shall not limit Developer's Indemnification obligations under this Article V nor any other obligation Developer may have to any Indemnitee.

5.3.1. Commercial General Liability Insurance. Developer shall maintain Commercial General Liability Insurance applicable to the Project and improvements thereon with limits of liability of not less than \$2,000,000.00 combined single limit per occurrence and general aggregate. The Commercial General Liability Insurance hereunder shall include coverage for Bodily Injury, Broad Form Property Damage, Contractual Liability, Operations, Products and Completed Operations, Owners and Contractors Protective Liability, and/or XCU coverage, when applicable. Each Commercial General Liability Insurance policy shall provide that it is primary and any other insurance or self-insurance available to City under any other policies shall be

excess insurance over the insurance required by this Section

5.3.1. Each Commercial General Liability Insurance policy shall provide for severability of interests for all insureds and additional insureds under such policy. Each Commercial General Liability Insurance policy shall name City, its officers, agents, employees, and members of its Boards and Commissions as additional insureds so long as, and to the extent that, the insurer issuing the Commercial General Liability Insurance policy permits such Persons to be named as an additional insured and is at no additional cost to Developer.

5.3.2. Automobile Liability Insurance. Developer shall maintain Automobile Liability Insurance with a limit of liability of not less than \$1,000,000.00 combined single limit per occurrence and general aggregate. Each Automobile Liability Insurance policy shall include coverage for owned, leased, hired, or borrowed vehicles by or on behalf of Developer, or its agents.

Each Automobile Liability Insurance policy shall provide for severability of interests for all insureds and additional insureds under such policy. Each Automobile Liability Insurance policy shall name City, its officers, agents, employees, and members of its Boards and Commissions as additional insureds so long as, and to the extent that, the insurer issuing the Automobile Liability Insurance policy permits such Persons to be

named as an additional insured and is at no additional cost to Developer.

5.3.3. Workers' Compensation Insurance. Developer shall maintain Workers' Compensation Insurance as required by the Laws of the State. Statutory coverage may include Employers Liability coverage with limits not less than \$1,000,000.00. Developer certifies that it is aware of the provisions of Section 3700 of the California Labor Code, which requires every employer to provide Workers' Compensation coverage, or to undertake self-insurance in accordance with the provisions of that Code. Developer shall comply with the provisions of Section 3700 of the California Labor Code.

5.3.4. Property Insurance. Developer shall maintain Property Insurance covering the improvements on each Development Parcel. Each Property Insurance policy shall provide Special Form ("All Risk") coverage in an amount at least equal to the replacement value of the covered improvements. Each insurer issuing a policy of Property Damage Insurance shall waive rights of subrogation, if any, against City.

5.3.5. General Requirements of Insurance. Each policy of insurance carried by Developer hereunder shall provide that it may not be cancelled without at least thirty (30) days' prior written notice to City. Developer shall furnish to City a



certificate of each such policy of insurance, stating that such insurance is in full force and effect and, in the case of the Commercial General Liability Insurance and Automobile Liability Insurance, showing additional insureds as required by Sections 5.3.1 and 5.3.2 above. Developer shall submit the ACORD Insurance Certificate, together with the additional insured endorsement set forth on a CG 20 10 11 85 Form and/or CA 20 48 - Designated Insured Form and/or an or equivalent form as approved by the City's Risk Manager. Each insurance company issuing a policy of insurance hereunder shall have a Best's-Rating of at least B+. Any insurance required to be maintained by Developer hereunder may be maintained under a so-called "blanket policy", insuring other parties and other locations, so long as the amount of insurance required to be provided hereunder is not thereby diminished.

5.3.6. City Right to Take Out Insurance. If for any reason Developer fails to maintain any policy of insurance required under this Section 5.3, City may at City's option, after notice of such Event of Default given in accordance with Article VIII below, take out and maintain, at Developer's expense, such insurance in the name of Developer as required pursuant to this Section 5.3; however, any failure of City to take out or maintain insurance in accordance with this Section 5.3.6 shall not limit or

waive any of City's rights or remedies under this Agreement. Developer shall reimburse City for all costs and expenses incurred by City in so doing, promptly after demand by City for such costs and expenses.

5.4. Cooperation of City. If Developer is obligated to Indemnify an Indemnitee under this Article V, Developer shall coordinate and cooperate fully with the City Attorney in fulfilling such Indemnity obligation, shall use diligent efforts to fully protect City's rights, and shall keep the City Attorney fully informed of all developments relevant to such Indemnity (subject only to any privileges which prevent the communication of any such information to the City Attorney). City shall fully cooperate with Developer as necessary to facilitate Developer's fulfillment of such Indemnity obligation.

5.5 Survival; Other Obligations. Developer's obligations under this Article V and any other Developer Indemnity under City Approvals or otherwise may have shall survive Termination. Developer's Indemnity obligations in this Article V are in addition to, and in no way shall be construed to limit or replace, any other obligations or liabilities that Developer may have to any Indemnitee in the Project Approvals, Laws or otherwise.

5.6 Release of Claims Against City. Developer hereby waives and releases any and all claims against the Indemnitees from any Losses arising at any time, including all claims arising from the joint or concurrent negligence of Indemnitees, but excluding any gross negligence or willful misconduct of Indemnitees.

## ARTICLE VI

### ANNUAL REVIEW OF COMPLIANCE

6.1. Annual Review. City and Developer shall annually review this Agreement, and all actions taken pursuant to the terms of this Agreement with respect to the Project, in accordance with the provisions of Section 17.138.090 of the Development Agreement Ordinance and this Article VI.

6.2. Developer's Submittal. Not later than the first anniversary date of the Effective Date, and not later than each anniversary date of the Effective Date thereafter during the Term, Developer shall apply for annual review of this Agreement, as specified in Section 17.138.090.A of the Development Agreement Ordinance, Developer shall pay with such application the City Application Fee in effect for annual review of development agreements under Existing City Regulations. Developer shall submit with such application a report to the Director of City

Planning describing Developer's good faith substantial compliance with the terms of this Agreement during the preceding year. Such report shall include a statement that the report is submitted to City pursuant to the requirements of Government Code Section 65865.1, and Section 17.138.090 of the Development Agreement Ordinance.

6.3. Finding of Compliance. Within thirty (30) days after Developer submits its report hereunder, the Director of City Planning shall review Developer's submission to ascertain whether Developer has demonstrated good faith substantial compliance with the material terms of this Agreement. If the Director of City Planning finds and determines that Developer has in good faith substantially complied with the material terms of this Agreement, or does not determine otherwise within thirty (30) days after delivery of Developer's report under Section 6.2 above, the annual review shall be deemed concluded. If the Director of City Planning initially determines that such report is inadequate in any respect, he or she shall provide written notice to that effect to Developer, and Developer may supply such additional information or evidence as may be necessary to demonstrate good faith substantial compliance with the material terms of this Agreement. If the Director of City Planning concludes that Developer has not demonstrated good faith

substantial compliance with the material terms of this Agreement, he or she shall so notify Developer prior to the expiration of the 30-day period herein specified and prepare a staff report to the City Council with respect to the conclusions of the Director of City Planning and the contentions of Developer with respect thereto.

6.4. Hearing Before City Council to Determine Compliance. After submission of the staff report of the Director of City Planning, the City Council shall conduct a noticed public hearing pursuant to Section 17.138.090.B of the Development Agreement Ordinance to determine the good faith substantial compliance by Developer with the material terms of this Agreement. At least sixty (60) days prior to such hearing, the Director of City Planning shall provide to the City Council, Developer, and to all other interested Persons requesting the same, copies of all staff reports and other information concerning Developer's good faith substantial compliance with the material terms of this Agreement and the conclusions and recommendations of the Director of City Planning. At such hearing, Developer and any other interested Person shall be entitled to submit evidence, orally or in writing, and address all the issues raised in the staff report on, or with respect or germane to, the issue of Developer's good faith substantial

compliance with the material terms of this Agreement. If, after receipt of any written or oral response of Developer, and after considering all of the evidence at such public hearing, the City Council finds and determines, on the basis of substantial evidence, that Developer has not substantially complied in good faith with the material terms of this Agreement, then the City Council shall specify to Developer the respects in which Developer has failed to comply, and shall also specify a reasonable time for Developer to meet the terms of compliance, which time shall be not less than thirty (30) days after the date of the City Council's determination, and shall be reasonably related to the time necessary adequately to bring Developer's performance into good faith substantial compliance with the material terms of this Agreement. If the areas of noncompliance specified by the City Council are not corrected within the time limits prescribed by the City Council hereunder, subject to Force Majeure pursuant to Section 7.1 below, then the City Council may by subsequent noticed hearing extend the time for compliance for such period as the City Council may determine (with conditions, if the City Council deems appropriate), Terminate or modify this Agreement, or take such other actions as may be specified in the Development Agreement Legislation and the Development Agreement Ordinance. Any notice to Developer of a determination of

noncompliance by Developer hereunder, or of a failure by Developer to perfect the areas of noncompliance hereunder, shall specify in reasonable detail the grounds therefor and all facts demonstrating such noncompliance or failure, so that Developer may address the issues raised in the notice of noncompliance or failure on a point-by-point basis in any hearing held by the City Council hereunder.

6.5. Meet and Confer Process. If either the Director of City Planning or the City Council makes a determination that Developer has not demonstrated good faith substantial compliance with the material terms of this Agreement, the Director of City Planning and/or designated City Council representatives may initiate a meet and confer process with Developer pursuant to which the Parties shall meet and confer in order to determine a resolution acceptable to both Parties of the bases upon which the Director of City Planning or City Council has determined that Developer has not demonstrated good faith substantial compliance with the material terms of this Agreement. If, as a result of such meet and confer process the Parties agree on a resolution of the bases related to the determination that Developer has not demonstrated good faith substantial compliance with the material terms of this Agreement. The results and recommendations of the meet and confer process shall be presented to the City Council

for review and consideration at its next regularly scheduled public meeting, including consideration of such amendments to this Agreement as may be necessary or appropriate to effectuate the resolution achieved through such meet and confer process. Developer shall be deemed to be in good faith substantial compliance with the material terms of this Agreement, only upon City Council acceptance of the results and recommendations of the meet and confer process.

6.6. Certificate of Compliance. If the Director of City Planning (or the City Council, if applicable) finds good faith substantial compliance by Developer with the material terms of this Agreement, the Director of City Planning shall issue a certificate of compliance within ten (10) days thereafter, certifying Developer's good faith compliance with the material terms of this Agreement through the period of the applicable annual review. Such certificate of compliance shall be in recordable form and shall contain such information as may be necessary in order to impart constructive record notice of the finding of good faith compliance hereunder. Developer shall have the right to record the certificate of compliance in the Official Records of the County of Alameda.

6.7. Effect of City Council Finding of Noncompliance; Rights of Developer. If the City Council determines that



Developer has not substantially complied in good faith with the material terms of this Agreement pursuant to Section 6.4 above and takes any of the actions specified in Section 6.4 above with respect to such determination of noncompliance, Developer shall have the right to contest any such determination of noncompliance by City Council pursuant to Section 14.14 below.

ARTICLE VII

**PERMITTED DELAYS; SUPERSEDURE BY SUBSEQUENT LAWS**

7.1. Permitted Delays. Performance by a Party of its obligations (including Developer's performance under Section 4.3) hereunder shall be excused during, and extended for a period of time equal to, any period of delay caused at any time by reason of Force Majeure. Promptly after learning of the occurrence of a Force Majeure event, the affected Party shall notify the other Party of the occurrence of such Force Majeure event.

7.2. Supersedure by Subsequent Laws.

7.2.1. Effect of Conflicting Law. As provided in Government Code §65869.5 of the Development Agreement Legislation, this Agreement shall not preclude application to the Project or the Project Site of changes in Laws, nor shall anything in this Agreement preclude City from imposing on Developer any fee required by Laws. As specified in Government Code §65869.5 of the Development Agreement Legislation, if any

Law enacted after the date of this Agreement prevents or precludes compliance with one or more provisions of this Agreement, then the provisions of this Agreement shall, to the extent feasible, be modified or suspended by City as may be necessary to comply with such new Law. Immediately after becoming aware of any such new Law, the Parties shall meet and confer in good faith to determine the feasibility of any such modification or suspension based on the effect such modification or suspension would have on the purposes and intent of this Agreement. At the conclusion of such meet and confer process, and to the extent feasible in any event no later than ninety (90) days after such new Law takes effect, City shall initiate proceedings for the modification or suspension of this Agreement as may be necessary to comply with such new Law. Such proceedings shall be initiated by public notice given in accordance with the Applicable City Regulations, and the City Council shall make the determination of whether modifications to or suspension of this Agreement is necessary to comply with such new Law. The City Council's determination shall take into account the results of the meet and confer process between the Parties, including all data and information exchanged in connection therewith. To the extent feasible, the City Council

shall make its determination hereunder within sixty (60) days after the date the proceedings hereunder are initiated.

7.2.2. Contest of New Law. Either Party shall have the right to contest the new Law preventing compliance with the terms of this Agreement, and, in the event such challenge is successful, this Agreement shall remain unmodified and in full force and effect. The City Council, in making its determination under Section 7.2.1, shall take into account the likelihood of success of any contest pending hereunder, and if the contesting Party has obtained interim relief preventing enforcement of such new Law, then the City Council shall delay consideration of action on modifications to or suspension of this Agreement pursuant to Section 7.2.1 above until such contest is concluded or such interim relief expires.

#### ARTICLE VIII

##### **EVENTS OF DEFAULT; REMEDIES; ESTOPPEL CERTIFICATES**

8.1. Events of Default. Subject to the provisions of this Agreement, any failure by a Party to perform any material term or provision of this Agreement shall constitute an "Event of Default", (i) if such defaulting Party does not cure such failure within thirty (30) days following written notice of default from the other Party, where such failure is of a nature that can be cured within such 30-day period, or (ii) if such failure is not

of a nature which can be cured within such 30-day period, the defaulting Party does not within such 30-day period commence substantial efforts to cure such failure, or thereafter does not within a reasonable time prosecute to completion with diligence and continuity the curing of such failure. Any notice of an Event of Default given hereunder shall specify in reasonable detail the nature of the failures in performance which the noticing party claims constitute the Event of Default and the manner in which such Event of Default may be satisfactorily cured in accordance with the terms and conditions of this Agreement. For purposes hereof, an Event of Default shall include the failure of Developer to maintain in good-standing, its legal and equitable interest in each Development Parcel pursuant to Section 3.8 above, but any such failure shall apply solely to, and constitute an Event of Default applicable solely to, such Development Parcel as to which such failure occurs and shall not affect the interest of Developer (or a Transferee of Developer) in any other Development Parcel or the continuing validity of this Agreement with respect to such other Development Parcels.

8.2. Remedies. Upon the occurrence of an Event of Default, each Party shall have the right, in addition to all other rights and remedies available under this Agreement, to (i) bring any proceeding in the nature of specific performance,

injunctive relief or mandamus, and/or (ii) bring any action at law or in equity as may be permitted by Laws or this Agreement. Notwithstanding the foregoing, however, neither Party shall ever be liable to the other Party for any consequential damages on account of the occurrence of an Event of Default (including claims for lost profits, loss of opportunity, lost revenues, or similar consequential damage claims), and the Parties hereby waive and relinquish any claims for consequential damages on account of an Event of Default, which waiver and relinquishment the Parties acknowledge has been made after full and complete disclosure and advice regarding the consequences of such waiver and relinquishment by counsel to each Party.

8.3. Time Limits; Waiver; Remedies Cumulative. Failure by a Party to insist upon the strict or timely performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. In the event a Party determines that the other Party has not complied with any applicable time limit governing performance under this Agreement by such other Party or governing the time within which such other Party must approve a matter or take an action, then the Party affected by such circumstance shall, prior

to taking any other action under this Agreement or exercising any other right or remedy under this Agreement, notify such other Party of such failure of timely performance or such failure to render an approval or take an action within the required time period. In the case of City, Developer shall send such notice to the City's Agent, including the head of any Board or Commission, the President of the City Council, or the Mayor, having responsibility for performance, approval or action, as applicable, and to the City Administrator. Any such notice shall include a provision in at least ten face bold type as follows:

**"YOU HAVE FAILED TIMELY TO PERFORM OR RENDER AN APPROVAL OR TAKE AN ACTION REQUIRED UNDER THE AGREEMENT: [SPECIFY IN DETAIL]. YOUR FAILURE TO COMMENCE TIMELY PERFORMANCE AND COMPLETE SUCH PERFORMANCE AS REQUIRED UNDER THE AGREEMENT OR RENDER SUCH APPROVAL TO TAKE SUCH ACTION WITHIN THIRTY (30) DAYS AFTER THE DATE OF THIS NOTICE SHALL ENTITLED THE UNDERSIGNED TO TAKE ANY ACTION OR EXERCISE ANY RIGHT OR REMEDY TO WHICH IT IS ENTITLED UNDER THE AGREEMENT AS A RESULT OF THE FOREGOING CIRCUMSTANCES."**

The failure of the Party receiving such notice to proceed to commence timely performance and complete the same as required, or render such approval or take such action, within such thirty (30) day period shall entitle the Party giving such notice to take any action or exercise any right or remedy available under this

Agreement, subject to any additional notice, cure or other procedural provisions applicable thereto under this Agreement. Any deadline in this Agreement that calls for action by the City Council or other body that is subject to the requirements of the Ralph M. Brown Act, the City Sunshine Ordinance, or other noticing and procedural requirements, shall be automatically extended as may be reasonably necessary to comply with such requirements and with the City's ordinary scheduling practices and other procedures for setting regular public meeting agendas. No waiver by a Party of any failure of performance, including an Event of Default, shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from any omission by a Party to take any action with respect to such failure. No express written waiver shall affect any other action or inaction, or cover any other period of time, other than any action or inaction and/or period of time specified in such express waiver. One or more written waivers under any provision of this Agreement shall not be deemed to be a waiver of any subsequent action or inaction, and the performance of the same or any other term or provision contained in this Agreement. Nothing in this Agreement shall limit or waive any other right or remedy available to a party to seek injunctive relief or other

expedited judicial and/or administrative relief to prevent irreparable harm.

8.4. Limitations on Actions. Unless otherwise provided by Laws, any action by any third Person to attack, review, set aside, void or annul any action or decision taken by a Party under this Agreement shall not be maintained by such Person unless such action or proceeding is commenced within ninety (90) days after the date such decision or action is made or taken hereunder.

8.5. Estoppel Certificate. Either Party may, at any time, and from time to time, deliver written notice to the other Party requesting such other Party to certify in writing that (i) this Agreement is in full force and effect and a binding obligation of the Parties, (ii) this Agreement has not been amended or modified either orally or in writing, and if so amended, identifying the amendments, and identifying any administrative implementation memoranda entered into by the Parties pursuant to Section 3.8 above, and (iii) to the knowledge of such other Party, neither Party has committed an Event of Default under this Agreement, or if an Event of Default has to such other Party's knowledge occurred, to describe the nature of any such Event of Default. A Party receiving a request hereunder shall execute and return such certificate within twenty (20) days



following the receipt thereof, and if a Party fails so to do within such 20-day period, the information in the requesting Party's notice shall conclusively be deemed true and correct in all respects. The Director of City Planning, as to City, shall execute certificates requested by Developer hereunder. Each Party acknowledges that a certificate hereunder may be relied upon by Transferees and Mortgagees. No Party shall, however, be liable to the requesting Party, or third Person requesting or receiving a certificate hereunder, on account of any information therein contained, notwithstanding the omission for any reason to disclose correct and/or relevant information, but such Party shall be estopped with respect to the requesting Party, or such third Person, from asserting any right or obligation, or utilizing any defense, which contravenes or is contrary to any such information.

#### ARTICLE IX

##### MORTGAGEE PROTECTION; DEVELOPER RIGHTS OF CURE

9.1. Mortgagee Protection. This Agreement shall be superior and senior to the lien of any Mortgage encumbering any interest in the Project. Notwithstanding the foregoing, no Event of Default shall defeat, render invalid, diminish or impair the lien of any Mortgage made for value, but, subject to the provisions of Section 9.2 below, all of the terms and conditions

contained in this Agreement shall be binding upon and effective against any Person (including any Mortgagee) who acquires title to the Project, or any portion thereof or interest therein or improvement thereon, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

9.2. Mortgagee Not Obligated; Mortgagee as Transferee.

No Mortgagee shall have any obligation or duty under this Agreement, except that nothing contained in this Agreement shall be deemed to permit or authorize any Mortgagee to undertake any new construction or improvement project, or to otherwise have the benefit of any rights of Developer, or to enforce any obligation of City, under this Agreement, unless and until such Mortgagee has become a Transferee in the manner specified in Article X below.

9.3. Notice of Default to Mortgagee; Right of Mortgagee to Cure. If City receives notice from a Mortgagee requesting a copy of any notice of an Event of Default given Developer hereunder and specifying the address for service thereof, then City shall deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an Event of Default. If City makes a determination of noncompliance under Article VI above, City shall likewise serve notice of such

noncompliance on such Mortgagee concurrently with service thereof on Developer. Such Mortgagee shall have the right (but not the obligation) to cure or remedy, or to commence to cure or remedy, the Event of Default claimed or the areas of noncompliance set forth in City's notice within the applicable time periods for cure specified in this Agreement. If, however, the Event of Default or such noncompliance is of a nature which can only be remedied or cured by such Mortgagee upon obtaining possession of the Project, or portion thereof, such Mortgagee shall seek to obtain possession with diligence and continuity (but in no event later than one hundred and eighty [180] days after the notice of the Event of Default is given) through a receiver or otherwise, and shall thereafter remedy or cure such Event of Default or noncompliance promptly and with diligence and dispatch after obtaining possession. Other than an Event of Default or noncompliance (i) for failure to pay money; or (ii) that is reasonably susceptible of remedy or cure prior to a Mortgagee obtaining possession, so long as such Mortgagee is pursuing cure of the Event of Default or noncompliance in conformance with the requirements of this Section 9.3, City shall not exercise any right or remedy under this Agreement on account of such Event of Default or noncompliance. When and if a Mortgagee acquires the interest of Developer encumbered by such Mortgagee's Mortgage and

such Mortgagee becomes a Transferee pursuant to Section 10.3.3 below, then such Mortgagee shall promptly cure all monetary or other Events of Default or noncompliance then reasonably susceptible of being cured by such Mortgagee to the extent such that such Events of Default or noncompliance are not cured prior to such Mortgagee's becoming a Transferee pursuant to Section 10.3.3. If an Event of Default is not so reasonably susceptible of cure, then such Event of Default shall be deemed cured when such Mortgagee acquires such interest and becomes a Transferee pursuant to Section 10.3.3. Subject to the Mortgagee protection provisions specified in this Section 9.3, nothing in this Agreement shall preclude City from exercising any right or remedy under this Agreement with respect to any Event of Default by Developer during the pendency of a Mortgagee's proceedings to obtain possession or title.

9.4. Priority of Mortgages. For purposes of exercising any remedy of a Mortgagee pursuant to this Article IX, or for becoming a Transferee in the manner specified in Article X below, the applicable Laws of State shall govern the rights, remedies and priorities of each Mortgagee, absent a written agreement between Mortgagees otherwise providing. Notwithstanding the foregoing, the rights of Port in its status as a Mortgagee, and with respect to becoming a Transferee in the manner specified in

Article X below, shall at all times be junior, subject and subordinate to any other Mortgagee.

9.5. Effect of Mortgagee Protection Provisions on Port.

The provisions of this Article IX with respect to Mortgagees as to Port, is intended solely to provide Port the necessary protection to enable Port to assume Developer's rights, duties and obligations under this Agreement in the event of a termination of one or more of the Development Parcel Ground Leases, and to establish the relative priority between Port and other Mortgagees with respect to the right of a Mortgagee to assume Developer's rights, duties and obligations under this Agreement. Nothing in this Article IX is intended to affect the rights, duties and obligations of Port under a Development Parcel Ground Lease as the Lessor thereunder, and the ownership of Port of the fee title interest in each Development Parcel subject to a Development Parcel Ground Lease, including that any Mortgage placed by Developer on a Development Parcel pursuant to the provisions of a Development Parcel Ground Lease, shall at all times remain subject and subordinate to the Lessor's interest under the Development Parcel Ground Lease.

ARTICLE X

TRANSFERS AND ASSIGNMENTS; DEVELOPER CURE RIGHTS, ALLOCATION OF DEVELOPER RIGHTS, DUTIES AND OBLIGATIONS

10.1. Limitations on Developer's Right to Transfer.

Developer acknowledges that the qualifications of Developer are of particular importance to City for, among others, the following reasons: (i) the importance of development of the Project Site to the Jack London Square area and to the general welfare of City, with particular reference to City's objectives as reflected in the Estuary Policy Plan and other applicable provisions of the General Plan; (ii) City's reliance upon the qualifications and ability of Developer to serve as the catalyst for development of the Project and to assure the quality of the use, operation and maintenance in the development of the Project; and that (iii) such qualifications and identity are material considerations inducing City to enter into this Agreement with Developer. In recognition of these factors, Developer's rights to Transfer any right or interest under this Agreement shall be governed strictly in accordance with the provisions of this Article X, and no voluntary or involuntary successor-in-interest of Developer shall acquire any rights or powers under this Agreement except as expressly set forth in this Article X.

10.2. Conditions Precedent to Developer Right to Transfer. Except as otherwise provided in this Article X, Developer shall only have the right to effect a Transfer subject to and upon fulfillment of the following conditions precedent:

10.2.1. No Event of Default. No Event of Default by Developer shall be outstanding and uncured as of the effective date of the proposed Transfer, or in the event of a Transfer by Developer of its rights, duties and obligations with respect to a Development Parcel, no Event of Default by Developer (or a Transferee) shall be outstanding and uncured as to such Development Parcel as of the effective date of the proposed Transfer, unless City Council has received adequate assurances satisfactory to City Council in its sole discretion that such Event of Default shall be cured in a timely manner either by Developer or the Transferee under the Transfer.

10.2.2. Assumption Agreement. At least forty-five (45) days prior to the effective date of the proposed Transfer, Developer or the proposed Transferee has delivered to City an executed and acknowledged assumption agreement in recordable form. Such assumption agreement shall include provisions regarding (i) the portion or portions or interest in one or more Development Parcels proposed to be Transferred and the concomitant rights of Developer necessary to ensure that the proposed Transferee will have the ability to perform all of the obligations of Developer the Transferee is to assume, (ii) the obligations of Developer under this Agreement that the proposed Transferee will assume, and (iii) the proposed Transferee's

acknowledgment that such Transferee has reviewed and agrees to be bound by this Agreement and all applicable City Approvals. The assumption agreement shall also include the name, form of entity, and address of the proposed Transferee, and shall provide that the Transferee assumes the obligations of Developer to be assumed by the Transferee in connection with the proposed Transfer. The assumption agreement shall be recorded in the Official Records of the County of Alameda concurrently with the consummation of the Transfer, and a copy thereof, certified by the County Recorder as a duplicate copy of the approved assumption agreement with recording information, shall be delivered to City within three (3) days after consummation of the Transfer.

10.2.3. Qualifications of Transferee. Unless the proposed Transferee is an Affiliate, at least forty-five (45) days prior to the effective date of the proposed Transfer, Developer or the proposed Transferee has delivered to City Council, and City Council has approved, reasonably sufficient information and documentation (such as financial statements) evidencing that the Transferee (either directly or indirectly through the owner of one or more of its beneficial interests in the Transferee) (i) has the financial capacity and business reputation to fulfill the obligations to be assumed by such Transferee under this Agreement, and (ii) has the ability and



intent to implement a concept that is consistent with the Estuary Policy Plan objectives of promoting a development that complements and enlivens the world-class, destination waterfront environment in the Project vicinity and that emphasizes high quality, well-designed, diversified retail and entertainment uses, consistent with, and as envisioned by, the Project Approvals.

10.3. Limitations and Exceptions on Developer Right to Transfer. Developer's right to Transfer any right or interest under this Agreement shall be subject solely to the following limitations and exceptions:

10.3.1. Transfer to Affiliate. Developer shall have the right to Transfer all of its rights, duties and obligations under this Agreement to an Affiliate, and/or to effectuate a Development Parcel Transfer to an Affiliate. Such Affiliate shall become a Transferee upon (i) the acquisition by such Affiliate of the affected interest of Developer under this Agreement, and (ii) delivery to City of an assumption agreement pursuant to Section 10.2.2 above assuming, from and after the date such Affiliate so acquires its interest, the applicable rights, duties and obligations of Developer under this Agreement. By virtue of its demonstrated status as an Affiliate of Developer and recognizing that Transfers to Affiliates will facilitate

Developer's ability to develop the Project consistent with the Project Approvals, including this Agreement, City hereby consents to the Transfer to an Affiliate in accordance with this Section 10.3.1 and Section 17.138.080 of the Development Agreement Ordinance, and no further consent of City shall be required for any Transfer by Developer to an Affiliate pursuant to this Section 10.3.1.

10.3.2. Transfer to Non-Affiliate. Developer shall have the right to Transfer all of its rights, duties and obligations under this Agreement to a Transferee which is not an Affiliate of Developer, and/or effectuate a Development Parcel Transfer to a Transferee which is not an Affiliate of Developer, only with the prior written consent of City Council pursuant to Section 17.138.080 of the Development Agreement Ordinance and subject to this Article X. No such Transfer can be effectuated without prior written consent of the City Council notwithstanding City's failure to strictly comply with any of the provisions herein. If Developer intends to effect a Transfer pursuant to this Section 10.3.2, Developer shall so notify City and provide to City, with such notice, the assumption agreement required by Section 10.2.2 above, and the information and documentation required by Section 10.2.3 above, which information and documentation shall include the identity of the proposed

Transferee, the qualifications of the proposed Transferee which will enable it to perform Developer's rights, duties and obligations under this Agreement to be Transferred to such Transferee, and financial information regarding the proposed Transferee demonstrating that it has the financial capacity to perform Developer's obligations to be Transferred to such Transferee under this Agreement. Within 45 days of receiving such information and documentation, City shall (subject to the requirements of the Ralph M. Brown Act, the City's Sunshine Ordinance and all other applicable legal noticing requirements then in effect) cause the proposed Transfer to be placed on the City Council agenda for consideration. At such City Council meeting, (as it may be reasonably continued by the Council) the City Council shall review such information and documentation and render a decision regarding its consent to the Transfer. City shall have the right to request such additional information regarding the proposed Transferee as may be reasonably necessary in order to enable City Council to render its decision hereunder. City Council's consent to such Transfer shall be limited solely to the proposed Transferee's qualifications and financial capacity as specified in Section 10.2.3 above. The proposed Transferee shall become a Transferee upon (i) the receipt of City Council's written consent; (ii) the acquisition by such

Transferee of the interest of Developer under this Agreement to be Transferred to such Transferee; and (iii) delivery to City of the assumption agreement pursuant to Section 10.2.2 above assuming, from and after the date such Transferee so acquires such interest of Developer, the applicable rights, duties and obligations of Developer under this Agreement.

10.3.3. Mortgagee as Transferee. No Mortgage (including the execution and delivery thereof to the Mortgagee) shall constitute a Transfer. A Mortgagee shall be a Transferee only upon (i) the acquisition by such Mortgagee of the affected interest of Developer encumbered by such Mortgagee's Mortgage; and (ii) delivery to City of an assumption agreement pursuant to Section 10.2.2 above assuming, from and after the date such Mortgagee so acquires its interest, the applicable rights, duties and obligations of Developer under this Agreement. City hereby consents to the Transfer to a Mortgagee in accordance with this Section 10.3.3. No further consent of City shall be required for any such Transfer pursuant to this Section 10.3.3 or Section 17.138.080 of the Development Agreement Ordinance.

10.4. Effect of Transfer. Except for the limitations and exceptions specified in Sections 10.3 above, a Transferee shall become a Party to this Agreement only with respect to the interest Transferred to it under the Transfer and

then only to the extent set forth in the assumption agreement delivered under Section 10.2.2 above. When and if, and only when and if, Developer Transfers all of its rights, duties and obligations under this Agreement in accordance with this Article X, Developer (or a Transferee, as the case may be) shall be released from any and all obligations accruing after the date of the Transfer with respect to the rights, duties and obligations of Developer under this Agreement which the Transferee assumes. If Developer (or a Transferee, as the case may be) effectuates a Developer Parcel Transfer, Developer (or such Transferee) shall not be released from any of its obligations accruing before, during or after the date of the Transfer with respect to the rights, duties and obligations of Developer under this Agreement which the Transferee of the Development Parcel Transfer assumes, unless City has provided its prior written agreement to a release of such obligations in connection with such Development Parcel Transfer.

10.5. Right of Developer to Cure. If Developer completes a Development Parcel Transfer, then City shall deliver to Developer (or to Developer's Transferee if Developer has effectuated a Transfer of all of its rights, duties and obligations under this Agreement pursuant to Section 10.3.1 or 10.3.2 above), concurrently with service thereon to the

Transferee under the Development Parcel Transfer, any notice given with respect to any claim by City that such Transferee has committed an Event of Default, including noncompliance with the Applicable Conditions of Approval for such Development Parcel Transfer. If City makes a determination of noncompliance under Article VI above, City shall likewise serve to Developer notice of such Transferee's noncompliance. Developer (or its Transferee) shall have the right to cure or remedy, or to commence to cure or remedy, the Event of Default claimed or the areas of noncompliance set forth in City's notice within the applicable time periods for cure specified in this Agreement. If, however, the Event of Default or such noncompliance is of a nature which can only be remedied or cured by Developer (or its Transferee) upon obtaining possession of the affected Development Parcel, Developer (or its Transferee) shall seek to obtain possession with diligence and continuity, and shall thereafter remedy or cure the Event of Default or noncompliance as soon as reasonably possible after obtaining possession. So long as Developer (or its Transferee) demonstrates to the satisfaction of City that it is diligently pursuing cure of the Event of Default or noncompliance in conformance with the requirements of this Section 10.5, City shall not exercise any right or remedy under this Agreement on account of such Event of Default or

noncompliance; however, nothing herein shall prevent the City from seeking any right or remedy under this Agreement if it determines in its sole discretion that the Developer (or its Transferee) has failed to make such a showing. Except with respect to the requirements of Section 4.3 of this Agreement (Terms and Conditions for Development of Minimum Project), no Event of Default or finding of noncompliance under Article VI with respect to a Development Parcel shall affect the rights, duties and obligations of Developer, or its Transferees, under this Agreement with respect to Development Parcels not affected by such Event of Default or finding of noncompliance under Article VI, and all such rights, duties and obligations shall continue in full force and effect in accordance with their terms.

10.6. Allocation of Rights, Duties and Obligations of Developer. The provisions of this Section 10.6 are intended to provide City with a designated Person to represent Developer in accordance with the provisions of this Section 10.6, and nothing in this Section 10.6 shall limit City's rights and remedies with respect to any Developer, Affiliate of Developer or a Transferee, as applicable, under this Agreement, nor limit the performance by Developer of any of its obligations under this Agreement. Unless and until JLSP Transfers all of its rights, duties and obligations under this Agreement (including as a

result of effectuating Development Parcel Transfers), JLSP shall have the sole and exclusive power to exercise all of the rights and remedies of Developer under this Agreement, and shall have the sole and exclusive responsibility to perform all of Developer's duties and obligations under this Agreement. From and after the date JLSP Transfers all of its rights, duties and obligations under this Agreement, then the Persons holding at least 51% of the legal and equitable interests as Lessees in the Development Parcels shall designate by written notice to City one of such Persons to act on behalf of Developer in the place and stead of JLSP pursuant this Section 10.6. On behalf of itself and its successors and assigns, CEP-JLS hereby consents to the foregoing grant of authority to JLSP and such successor Person, and for itself and its successors and assigns hereby assigns to JLSP and such successor Person the foregoing rights and obligations. CEP-JLS, on behalf of itself and its successor and assigns, hereby constitutes and appoints JLSP and such successor Person as the true and lawful attorney-in-fact of CEP-JLS, and such successors and assigns, to exercise all rights and remedies of Developer under this Agreement and to perform all duties and obligations of Developer under this Agreement in accordance with the provisions of this Section 10.6. The power-of-attorney granted hereunder is irrevocable and continuing, shall survive



the insolvency or dissolution of CEP-JLS, or any successors or assigns of CEP-JLS, and any Transfer, until Termination of this Agreement. Any document or instrument executed by JLSP or such successor Person pursuant to the foregoing grant of power-of-attorney shall be binding and enforceable on all Persons then comprising Developer.

## ARTICLE XI

### AMENDMENT AND TERMINATION

11.1. Amendment or Cancellation. Except as expressly provided in this Agreement, this Agreement may be Terminated, modified or amended only by the consent of the Parties made in writing, and then only in the manner provided for in Section 65868 of the Development Agreement Legislation. Neither this Agreement nor any term, covenant, condition or provision herein contained shall be subject to initiative or referendum after the Effective Date.

11.2. Certain Actions Not an Amendment. Notwithstanding the provisions of Section 11.1 above, a modification to this Agreement which does not relate to the Term, permitted uses of the Project, location, density or intensity of uses of the Project, height, design or size of improvements within the Project, provisions for Dedications, or to any conditions, terms, restrictions and requirements relating to

subsequent actions of City under Article IV, or related to any uses of the Project, shall not require a noticed public hearing before the Parties execute such modification, but shall require the giving of notice pursuant to Section 65867 of the Development Agreement Legislation as specified by Section 65868 thereof.

ARTICLE XII

NOTICES

12.1. Procedure. All formal notices to a Party (such as notices of an Event of Default, or City's determination of noncompliance with the Minimum Project requirements of Section 4.3) shall be in writing and given by delivering the same to such Party in person or by sending the same by registered or certified mail, or Express Mail, return receipt requested, with postage prepaid, or by overnight courier delivery, to such Party's mailing address. The respective mailing addresses of the Parties are, until changed as hereinafter provided, the following:

City: City of Oakland  
Community and Economic Development Agency  
250 Frank H. Ogawa Plaza, Suite 3330  
Oakland, California 94612  
Attention: Director of City Planning

Developer: c/o Ellis Partners LLC  
111 Sutter Street, Suite 800  
San Francisco, California 94104  
Attention: Harold A. Ellis, Jr.  
James F. Ellis

Notices and communications with respect to technical matters in the routine performance and administration of this Agreement shall be given by or to the appropriate representative of a Party by such means as may be appropriate to ensure adequate communication of the information, including written confirmation of such communication where necessary or appropriate. All formal notices under this Agreement shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed or sent by courier, on the delivery date or attempted delivery date shown on the return receipt or courier records. Any notice which a Party desires to be a formal notice hereunder and binding as such on the other Party must be given in writing and served in accordance with this Section 12.1.

12.2. Change of Notice Address. A Party may change its mailing address at any time by giving formal written notice of such change to the other Party in the manner provided in Section 12.1 at least ten (10) days prior to the date such change is effected.

### ARTICLE XIII

#### COVENANTS RUNNING WITH THE LAND

13.1. Covenants Running With the Land. All of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this Agreement shall be

binding upon the Parties and their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, devisees, administrators, representatives, lessees, and all other Persons that acquire a legal or equitable interest of Developer in the Development Parcels, or any portion thereof, or any interest therein, or any improvement thereon, whether by operation of Laws or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and permitted assigns as Transferees, as covenants running with the land pursuant to Section 65868.5 of the Development Agreement Legislation. This Agreement and the covenants shall run in favor of City without regard to whether City has been, remains or is an owner of any land or interest in the Development Parcels, or any parcel or subparcel thereof.

13.2. Successors to City. For purposes of this Article XIII, "City" includes any successor public agency, including Port, to which land use authority over the Project may be transferred, which public agency shall, as part of such transfer, by written instrument satisfactory to City and Developer, expressly (i) assume all of City's rights, duties and obligations under this Agreement; and (ii) release and Indemnify City from all obligations, claims, liability or other Losses under this Agreement.

ARTICLE XIV

MISCELLANEOUS

14.1. Negation of Partnership. The Parties specifically acknowledge that the Project is a private development, that neither Party is acting as the agent of the others in any respect hereunder, and that each Party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. None of the terms or provisions of this Agreement shall be deemed to create a partnership between or among the Parties in the businesses of Developer, the affairs of City, or otherwise, or cause them to be considered joint venturers or members of any joint enterprise. This Agreement is not intended and shall not be construed to create any third Party beneficiary rights in any Person who is not a Party or a Transferee; and nothing in this Agreement shall limit or waive any rights Developer may have or acquire against any third Person with respect to the terms, covenants or conditions of this Agreement.

14.2. Approvals. Unless otherwise provided in this Agreement, whenever approval, consent, satisfaction, or decision (herein collectively referred to as an "approval"), is required of a Party pursuant to this Agreement, it shall not be unreasonably withheld or delayed. If a Party shall disapprove,

the reasons therefor shall be stated in reasonable detail in writing. Approval by a Party to or of any act or request by the other Party shall not be deemed to waive or render unnecessary approval to or of any similar or subsequent acts or requests. Whenever, under this Agreement, the term "approve" (or any grammatical variant thereof, such as "approved" or "approval") is used in connection with the right, power or duty of City, or any representative board, commission, committee or official of City, to act in connection with any City Approval, such term shall only include the right to approve, conditionally approve, or disapprove in accordance with the applicable terms, standards and conditions of this Agreement.

14.3. Not A Public Dedication. Except for Exactions made in accordance with this Agreement, and then only when made to the extent so required, nothing herein contained shall be deemed to be a gift or dedication of the Project, or portion thereof, to the general public, for the general public, or for any public use or purpose whatsoever, it being the intention and understanding of the Parties that this Agreement be strictly limited to and for the purposes herein expressed for the development of the Project as private property.

14.4. Severability. Invalidation of any of the provisions contained in this Agreement, or of the application

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

14.5. Exhibits. The Exhibits listed below, to which reference is made herein, are deemed incorporated into this Agreement in their entirety by reference thereto:

- Exhibit A - CEQA Documents
- Exhibit B - Selected City Policies
- Exhibit C - Design Guidelines
- Exhibit D - Development Parcels
- Exhibit E - Minimum Project
- Exhibit E-1 - Improvement Diagram
- Exhibit F - Operating Agreement
- Exhibit G - Project Approvals
- Exhibit H - Site Plan
- Exhibit I - Memorandum of Development Agreement
  
- Exhibit J-1 - Port's Non-Discrimination and Small Local Business Utilization Policy

- Exhibit J-2- Port's Prevailing Wage Requirements
- Exhibit J-3 - Port's Living Wage Requirements
- Exhibit K - Port Art in Public Places Ordinance  
(Port Ordinance No. 3694)
- Exhibit L - City's Local Employment Program
- Exhibit M - Energy Standards

14.6. Entire Agreement. This written Agreement and the Exhibits hereto, and any administrative implementation memoranda entered into pursuant to Section 3.8, contain all the representations and the entire agreement between the Parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, any prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and Exhibits hereto, and such administrative implementation memoranda. Neither the conduct or actions of the Parties, nor the course of dealing or other custom or practice between the Parties, shall constitute a waiver or modification of any term or provision of this Agreement; and this Agreement may be modified or amended only in the manner specified in this Agreement.

14.7. Construction of Agreement. All of the provisions of this Agreement have been negotiated at arms-length between the Parties and after advice by counsel and other representatives chosen by each Party, and the Parties are fully



informed with respect thereto. Therefore, this Agreement shall not be construed for or against either Party by reason of the authorship or alleged authorship of any provisions hereof, or by reason of the status of either Party. The provisions of this Agreement and the Exhibits hereto shall be construed as a whole according to their common meaning and not strictly for or against any Party and consistent with the provisions hereof, in order to achieve the objectives and purpose of the Parties hereunder. The captions preceding the text of each Article, Section and the Table of Contents hereof are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement.

14.8. Mitigation of Damages. In all situations arising out of this Agreement, each Party shall attempt to avoid and minimize the damages resulting from the conduct of the other Party. Each Party shall take all necessary measures to effectuate the provisions of this Agreement.

14.9. Further Assurances; Covenant to Sign Documents. Each Party shall take all actions and do all things, and execute, with acknowledgment or affidavit if required, any and all documents and writings, which may be necessary or proper to achieve the purposes and objectives of this Agreement.

14.10. Covenant of Good Faith and Fair Dealing.

Neither Party shall do anything which shall have the effect of harming or injuring the right of the other Party to receive the benefits of this Agreement; each Party shall refrain from doing anything which would render its performance under this Agreement impossible; and each Party shall do everything which this Agreement contemplates that such Party shall do in order to accomplish the objectives and purposes of this Agreement. The Parties intend by this Agreement to set forth their entire understanding with respect to the terms, covenants, conditions and standards for the development, use and occupancy of the Project and by which the performance of the rights, duties and obligations of the Parties hereunder shall be measured or judged.

14.11. Governing Law. This Agreement, and the rights and obligations of the Parties, shall be governed by and interpreted in accordance with the Laws of the State.

14.12. References; Terminology. Unless otherwise specified, whenever in this Agreement, reference is made to the Table of Contents, any Article or Section, or any defined term, such reference shall be deemed to refer to the Table of Contents, Article or Section or defined term of this Agreement. The use in this Agreement of the words "including," "such as" or words of similar import, when following any general term, statement or

matter, shall not be construed to limit such statement, term or matter to specific items or matters, whether or not language of nonlimitation, such as "without limitation" or "but not limited to," or words of similar import, are used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such statement, term or matter.

14.13. Irregularity in Proceeding. No action, inaction or recommendation by a Party pursuant to this Agreement, or of City in connection with a City Approval, shall be held void or invalid, or be set aside by a court on the grounds of improper admission or rejection of evidence, or by reason of any error, irregularity, informality, neglect or omission (collectively, an "error") as to any matter pertaining to petition, application, notice, finding, record, hearing, report, recommendation or any matters of procedure whatsoever, unless after an examination of the entire record with respect to such error, including the evidence, the court finds that the error complained of was prejudicial, and that by reason of the error, the complaining Party, or third Person, sustained and suffered substantial injury, and that a different result would have been probable if the error had not occurred or existed. No presumption shall

arise that an error is prejudicial, or that injury resulted from an error, solely as a result of a showing that error occurred.

14.14. Judicial Proceeding To Challenge Termination.

Any challenge made by Developer to City's Termination, modification, or amendment of this Agreement pursuant to a right so to do granted by this Agreement, shall be subject to review in the Superior Court of the County of Alameda and solely pursuant to California Code of Civil Procedure section 1094.5(c).

14.15. Conflicts of Interest. Developer shall use all diligent efforts to ensure that no member, officer, employee, or consultant of City who participates in any way in the Project or in the making of this Agreement, or a member of such Person's immediate family, shall have any personal financial interest in the Project or this Agreement or receive any personal financial benefit from the Project. Except for any real estate commissions or brokerage or finders fee which are the sole responsibility of Developer, Developer warrants that it has not paid or given, and will not pay or give, to any third Person any money or other consideration in exchange for obtaining this Agreement. Developer shall Indemnify City from any claims for real estate commissions or brokerage fees, finders or any other fees in connection with this Agreement.

14.16. Nonliability. No member, official, employee, agent, or member of its Boards and Commissions (including City's Redevelopment Agency) of City shall be personally liable to Developer, or any Transferee, in the event of any Event of Default committed by City or for any amount that may become due to Developer or a Transferee under the terms of this Agreement.

14.17. Developer's Warranties. Developer represents and warrants: (i) that it has access to professional advice and support to the extent necessary to enable Developer to fully comply with the terms of this Agreement and otherwise carry out the Project; (ii) that it is duly organized and validly existing under the laws of the State of Delaware; (iii) that it has the full power and authority to undertake the Project; and (iv) that the Persons executing and delivering this Agreement are authorized to execute and deliver this Agreement on behalf of Developer.

14.18. Execution of Other Documentation. City and Developer shall execute any further documentation that may be necessary to carry out the intent and obligations under this Agreement, so long as such documentation does not conflict with this Agreement.

14.19. Exercise of Police Power. The Parties acknowledge that City has exercised its police power in the

interest of the parties, the citizens of City and the general public, by enacting this Agreement as its legislative act, and that full implementation of this Agreement will confer substantial benefits to the citizens of City and the general public.

14.20. City of Oakland Campaign Contribution Limits.

Developer has dated and executed and delivered to City an Acknowledgement of Campaign Contributions Limits Form as required by Chapter 3.12 of the Oakland Municipal Code.

14.21 Employment Nondiscrimination. Neither

Developer, nor its successors, assigns, contractors and subcontractors shall not discriminate against any employee or applicant for employment in connection with construction of the Project on the basis of race, color, ancestry, national origin, religion, sex, sexual preference, marital status, AIDS or AIDS-related complex, or physical or mental disability. In addition, 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.

14.22 Disabled Access. Developer shall construct the Project in compliance with all applicable federal, state, and local requirements for access for disabled persons.

14.23 Environmentally Sustainable Project. Developer's Project design shall incorporate elements in the Project design intended for environmental sustainability, including but not limited to, substantial use of energy-conserving design and appliances, water-conserving fixtures and landscaping, recycled-content building materials, and low-waste construction techniques. As appropriate and subject to the foregoing provision of this Section 14.23, Developer, and its representatives for design and construction of the Project, shall work with City's environmental sustainability development staff to develop reasonable, appropriate and economically feasible environmental sustainability building goals and strategies for the Project. Developer shall comply with each requirement set forth in the document entitled "INTENT: Exceed Title 24 Energy Standards by 15%," attached hereto as Exhibit M.

14.24 Quality of Work. Developer shall construct the Project in conformance with general industry standards and shall employ building materials of a quality suitable for the requirements of the Project as set forth in the Project Approvals. Developer shall develop the Project in full

conformance with the Project Approvals, City Approvals, Applicable City Regulations, Governmental Agency Regulations and Governmental Agency Approvals.

14.25. City Subject to Brown Act Requirements.

Developer acknowledges that all City Council actions are subject to the requirements of the provisions of the Ralph M. Brown Act (Government Code Section 54950, et seq.), and the published agenda of the City Council and procedures of the City Council applicable thereto. City shall cause all City Council actions to conform to the foregoing requirements and Developer shall take no action which would violate the foregoing requirements.

14.26. Signature Pages. For convenience, the signatures of the Parties to this Agreement may be executed and acknowledged on separate pages which, when attached to this Agreement, shall constitute this as one complete Agreement.

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

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



PUBLIC REVIEW DRAFT OF JUNE 323, 2004

AUTHORIZED SIGNATURE OF CITY TO AGREEMENT:

CITY OF OAKLAND, a California  
charter city

By: \_\_\_\_\_

Its: \_\_\_\_\_

APPROVED AS TO FORM:

By: \_\_\_\_\_  
John Russo  
Its City Attorney

AUTHORIZED SIGNATURE OF DEVELOPER TO AGREEMENT:

JACK LONDON SQUARE PARTNERS, LLC, a  
Delaware limited liability company

By: EPI/JLS Investors LLC, a  
California limited liability  
company

By: Ellis Partners LLC, a  
California limited  
liability company

By: \_\_\_\_\_  
Harold A. Ellis, Jr.  
Its President

CEP-JLS I LLC, a Delaware limited  
liability company

By: EPI-JLS I LLC, a California  
limited liability company  
Its: Manager

By: ELLIS PARTNERS, LLC, a  
California limited  
liability company  
Its: Manager

By: \_\_\_\_\_  
Harold A. Ellis, Jr.  
Its: President

EXHIBIT A

CEQA DOCUMENTS

Exhibit A

1

EXHIBIT A

CEQA DOCUMENTS

1. Notice of Preparation dated February 13, 2003
2. Reissued Notice of Preparation and accompanying Initial Study dated March 12, 2003
3. Draft Environmental Impact Report dated September 8, 2003 (SCH No. 2003022086)
4. Final Environmental Impact Report dated February 11, 2004 (SCH No. 2003022086)
5. Certification of the Environmental Impact Report by the City Council on \_\_\_\_\_, 2004
6. CEQA Findings approved by the City Council on \_\_\_\_\_, 2004
7. Mitigation Monitoring and Reporting Program approved by the City Council on \_\_\_\_\_, 2004

EXHIBIT B

SELECTED CITY POLICIES

Exhibit B

1

EXHIBIT B

CITY POLICIES

The following selected City Policies are incorporated herein by this reference:

1. Guidelines for Determining Project Conformity with the General Plan and Zoning Regulations, Adopted by the City of Oakland City Planning Commission on May 6, 1998 (as amended on November 3, 1999, August 8, 2001 and December 5, 2001).
2. Resolution No. 73036, Declaring the City of Oakland's Support of Public Transit and Other Alternatives to Single-Occupant Vehicles, adopted by the Oakland City Council on October 29, 1996.

EXHIBIT C

DESIGN GUIDELINES

Exhibit C

1

## **DESIGN GUIDELINES**

### **General Design Principles Applicable to the Entire Project**

#### **JLS Redevelopment Project**

Draft Number 4 3/7/04

## **GENERAL**

### *Buildings – General*

All buildings should reflect a high level of design quality through use of durable materials befitting of the large scale of the buildings, well proportioned design elements and other substantial design features.

Individual architectural identity should be expressed and the landscape and hardscape features should unify the development by maintaining overall harmony and continuity.

Vary building heights within maximum limits to create visually-interesting architectural profiles.

Avoid long, continuous roof parapet lines unrelieved by vertical accent features.

Create a common set of physical features and thematic elements to link each building together and to Water Street and the plazas, to foster coherence and a sense of place.

### *Facades*

Variations of wall planes, fenestration and materials are required to create strong visual interest and must be an integral part of building design. Complimentary or contrasting architectural details should provide relief and shadow to bring further richness and interest to facades.

Flat, monolithic facades must be avoided.

Offset accent elements from primary wall planes and utilize contrasting materials/textures for visual richness.

Building entries should be clearly visible, attractive and inviting.

Balance horizontal and vertical elements.

Façade exteriors should express floor levels.

Buildings exteriors should include patterns of fenestration which create rhythm and bring life to facades.



### *Windows*

Use window treatments which create visual interest, rhythm and a sense of human scale on facades.

Avoid horizontal ribbon windows and glass curtain walls which lack interest and scale.

Utilize reveals and recessed windows, doors, and eaves to enhance visual interest and human scale.

Avoid thin-appearing curtain walls which are predominantly glass spandrel or metal panels.

Avoid continuous strip windows which lack interest or scale.

Windows should be well articulated.

### *Materials and Colors*

All building facades should receive high-quality finishes and detailing throughout.

Avoid materials and finishes susceptible to weather damage, fading or corrosion.

Materials and colors should harmonize with the exteriors of neighboring structures and the surrounding natural environment.

A wide variety of accent materials should be used, including but not limited to cast concrete, ceramic tile, stone and painted metal.

The colors and textures of buildings should reflect the high-quality character intended for the project.

Color, light and shadow must be used to create a sense of human scale and visual interest.

Animate building facades, particularly at the ground floor levels of buildings, with “people-friendly” components such as canopies, portals, and decorative details.

Ground floor materials should be of durable, high quality materials such as stone, tile, cast-concrete or split face block. Use of EIFS material or stucco must be avoided.

Facades shall be designed to convey a sense of order and richness through the interplay of light, shadow, color, texture, and materials.

Articulate facades to create layered and/or relief effects for visual interest and depth.

Recess window and door openings into wall surfaces to create shadow lines and express differences in materials.

Do not use bronze glass.

Avoid large unrelieved flat surfaces, flush windows and flush doors.

Avoid monotony on buildings by establishing a rhythm that is not repetitious but serves to lend a sense of scale.

#### *Roofs, Mechanical Equipment and Other Functional Elements*

Individual building roof forms should be integral to the architecture and also contribute to the overall character of the development.

Design roofs and parapets to be visually attractive and integral with building architecture.

Roof forms should be appropriate to the waterfront setting and surrounding neighborhood.

Shape roof profiles to complement adjacent buildings and help create a distinctive skyline.

Gutters and downspouts should be concealed unless designed as integral architectural features.

Rooftop mechanical equipment should be attractively screened from public view.

Exterior stairs and ramps should be designed as extensions of building architecture and should complement building massing, materials, color and detailing.

#### *Lighting*

Use lighting for aesthetics in addition to safety and security reasons wherever possible.

Provide visual drama through the use of accent lighting highlighting wall planes and architectural features.

### **GUIDELINES APPLICABLE TO SPECIFIC DEVELOPMENT PARCELS**

#### Site C:

- 1) Maintain the elegant v-shaped roofline with either the two or three level version of the building.

- 2) The degree of step back should be proportional to the base, so that the expansive views to the Estuary and openness to the West Green can be preserved. Therefore, step backs for the second level should be incorporated into the design.

#### Site D:

- 1) The larger building mass option at this site provides an exciting opportunity to create a signature entertainment presence through color, lighting, signage and other design elements to create visibility and interest. In either option, the building marquee should be increased in height and width to provide a substantial visual anchor statement. The increased height and width of the marquee would add variety to the design of the building and surrounding structures, breaking up the mass of the building, while creating an exciting visual presentation.
- 2) The cinema entrance should be more strongly emphasized, in part through the comments already identified about a more prominent marquee. The use of different paving material or other entry features are also encouraged. The stronger entry would only add visual interest to the appearance of the building, and would also create an inviting draw and a stronger statement of arrival for the cinema.
- 3) Provide more detail in the final design development to assure the use of high quality exterior materials and a dramatic combination of exterior materials that will be used to "decorate the box" in order to provide as much architectural interest and articulation as possible.
- 4) For the larger building option, provide a stronger top edge to the building, assure proportions in materials and variety in the elevations.

#### Pavilion 2:

- 1) Limit this building to the lower profile as set forth in the FDP, and decrease the maximum size of the ground floor retail footprint to 10,000 square feet, thereby providing additional plaza space. The lower profile will serve as a visual relief to the taller building masses on either side of this site, and the larger ground floor site area will enable a more integrated, full use of the plaza and a connection to the historic Broadway terminus and provide the major gateway into the project from Broadway.
- 2) Provide a major art installation, interpretative elements and multi-level high design quality to this plaza area.
- 3) Pull back the automobile turnarounds and valet parking function toward Embarcadero, to assure a primarily pedestrian-friendly orientation for Water Street. There is a remaining point of conflict regarding valet access points. The developer believes it is not possible to eliminate one of them due to Kincaid's valet service. The DRC suggested one of these points be eliminated.

- 4) Further strengthen the relationship between the new building forms and existing important features in this location, such as the tile walls and the Broadway terminus to create a major focal point in this area.

#### 66 Franklin:

- 1) The varied building proportions should be maintained as the building increases in height, to avoid a large box-like structure with monolithic elevations.
- 2) With either option, strong building edges and cornice elements should be carried up to the roof.
- 3) The solid-void proposition of glass or open areas to solid building elements should be maintained as the building expands.
- 4) The mechanical equipment area along Embarcadero must be architecturally integrated to provide a strong visual screen for this area.
- 5) The large curtain wall on the east elevation must be further articulated and architectural interest added.
- 6) For the new building option, the ground floor of the east elevation must be further developed to provide a stronger, more pedestrian friendly quality.
- 7) The future design for this building, with either option, needs more considered review, given its scale. Window type, concrete finishes, vertical and horizontal elements are all important to consider further through the design development phases.

#### Site F-1:

- 1) Create a stronger compilation of Jack London interpretative elements in the area around Heinold's and Jack London's cabin, and unify the existing art and sculpture elements in the area having to do with Jack London such as the wolf, wolf tracks, statue, etc.
- 2) Eliminate the round window element on the upper floor.
- 3) The v-shaped roof element should be removed.
- 4) The future design for this building, with either option, needs more considered review, given its scale and the historic resource issues. Window type, concrete finishes, vertical and horizontal elements are all important to consider further through the design development phases.

#### Site F-2:

- 1) The over crossings must be commensurate in quality as the one that currently exists at the Amtrak station. The crossing should present civic imagery that builds on substantial and key physical features in this area.
- 2) The future design for this building, with either option, needs more considered review, given its scale. Window type, concrete finishes, vertical and horizontal elements are all important to further develop. Therefore, the Draft Development Agreement provides that future design

review is required by the DRC prior to the issuance of a building permit if the building plans are substantially different than the approved FDP.

Site F-3:

- 1) The v-shaped roof along the lower portion of the building should be retained and strengthened to provide further interest.
- 2) Key building components, particularly along the bottom levels, should be substantially proportioned to provide a strong base to the building.

Site G:

- 1) Incorporate a large art installation such as a mural, frieze or other three-dimensional design element in the building façade facing the Amtrak station.
- 2) Include a more substantial architectural element along the top of the building, most importantly with a much substantial cornice or railing than presently designed. In addition, add stronger corner elements, such as a taller elevator, recessing the corners, providing pop-outs or other dimensional elements to create breaks in the plane of the building façade. A taller midsection to the building should also be considered, in order to create asymmetry.
- 3) The rooftop parking should also include screening, incorporated into the overall design, to obscure the cars and headlights.
- 4) Further refine and detail the essential box-like nature of the building through more finely grained patterns, recesses, and color and materials variations to produce more of a rhythm across the facades.
- 5) The draft Development Agreement provides that any future change in the building, if consistent with the PDP and the approved design guidelines, can be approved at staff level.

6

Site Plan and Landscape Plan

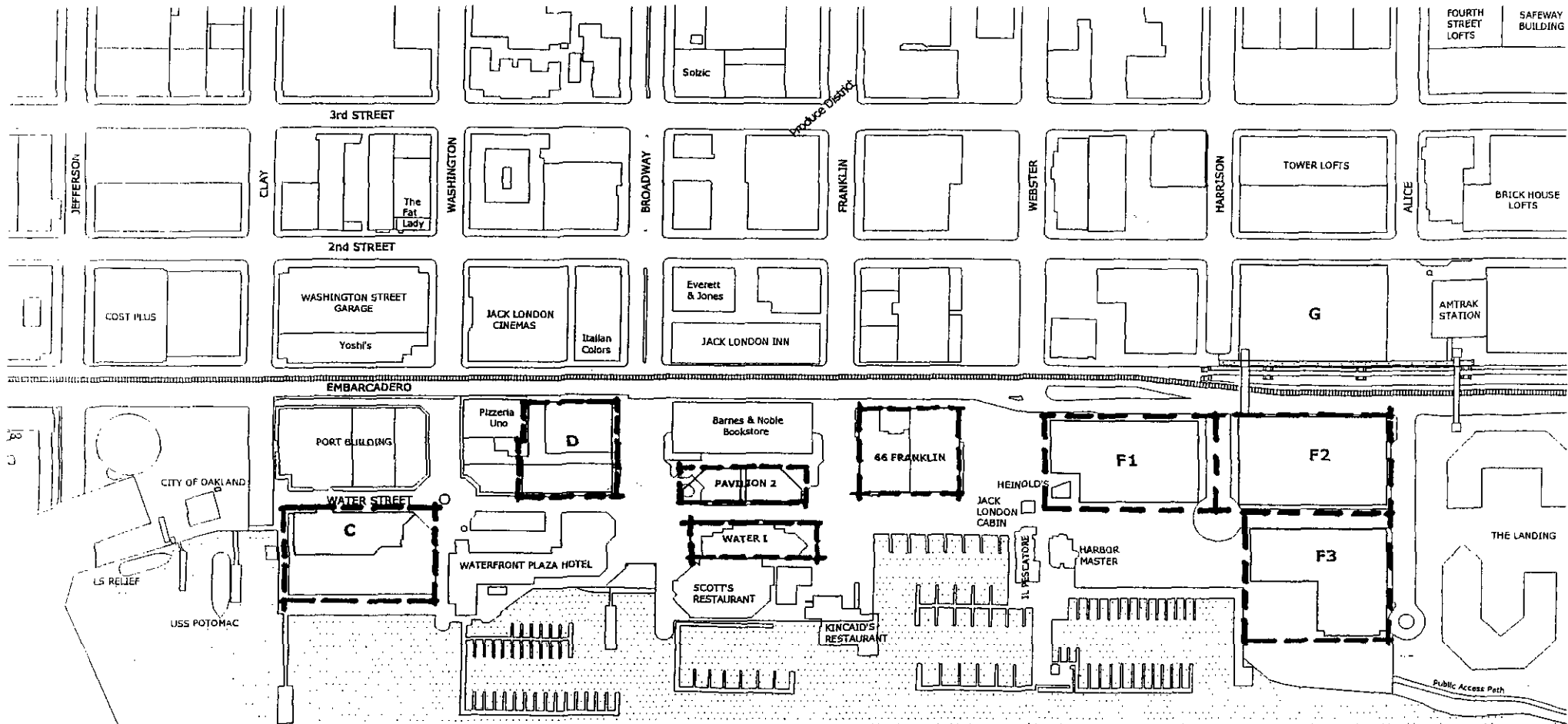
- 1) Incorporate works of art into public areas in a variety of ways, including sculptures, street furniture, murals, friezes on parts of buildings or parking structures, etc. As a part of initial project implementation, a public art historic interpretive plan should become part of the PDP. At a minimum, the preferred location, type and scale of public art should be schematically developed for the base of Broadway area, the plazas, the Jack London area around Heinold's, the Amtrak parking structure, and the theater building. Further develop the base of Broadway in a way that reflects it as the historic and current terminus of Broadway and as a primary gateway to the Jack London and Estuary area.
- 2) Severely restrict the Franklin Street valet service by pulling it toward Embarcadero as much as feasible to increase pedestrian flow along Water Street and the vicinity.

- 3) Create physical elements that help link the various segments of Water Street together along between the east and west greens, and also establish active and lively linkages from Water Street to the nine building sites.

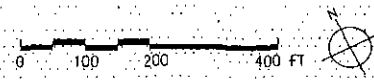
EXHIBIT D

DEVELOPMENT PARCELS

Exhibit D



SITEPLAN  
 JACK LONDON SQUARE REDEVELOPMENT



JACK LONDON SQUARE PARTNE



EXHIBIT E

MINIMUM PROJECT

The Minimum Project shall entail the following improvements:

1. Development of improvements on Development Parcel Site D and Development Parcel Site F-1, as shown on the Site Plan, containing a minimum of 145,000 square feet of space in the aggregate for any of the uses permitted for such Development Parcels pursuant to the Project Approvals, and in accordance with all terms and conditions of the Project Approvals.

2. Installation of improvements for public access and waterfront on those portions of the Common Area specified on the improvement diagram attached hereto as Exhibit E-1, in accordance with the requirements, standards, terms and conditions of the Project Approvals.

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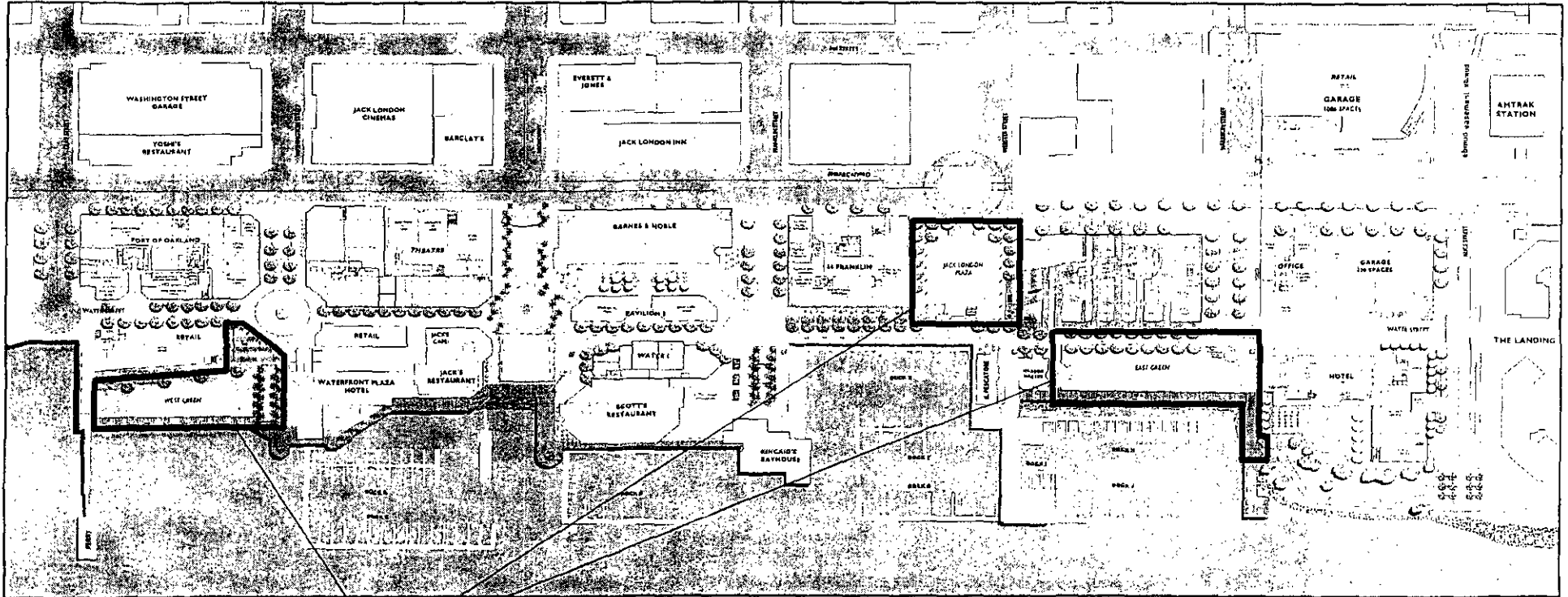
Exhibit E

EXHIBIT E-1

IMPROVEMENT DIAGRAM

Exhibit E-1

# Exhibit E-1



Minimum Project Public Access and Waterfront Improvements

EXHIBIT F

OPERATING AGREEMENT

Exhibit G

21

**RECORDING REQUESTED BY  
FIRST AMERICAN TITLE**

**2002141789 03/29/2002 08:30 AM**  
OFFICIAL RECORDS OF RECORDING FEE: 301.00  
ALAMEDA COUNTY  
PATRICK O'CONNELL

WHEN RECORDED MAIL TO:

Crosby, Heafey, Roach & May  
Professional Corporation  
Two Embarcadero Center, Suite 2000  
San Francisco, California 94111  
Attention: Sherry L. Geyer, Esq.

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*99*  
*RU*



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*SP159888*

(Space above this line is for recorder's use)

**OPERATING AGREEMENT**

**BETWEEN**

**THE CITY OF OAKLAND**

**a municipal corporation**

**acting by and through its**

**BOARD OF PORT COMMISSIONERS**

**AND**

**CEP-JLS I LLC**

**a Delaware limited liability company**

~~PUBLIC REVIEW DRAFT OF MARCH 9 JUNE 3, 2004~~

~~EXHIBIT F~~

~~OPERATING AGREEMENT~~

Exhibit G

1

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## EXHIBITS TO OA

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Exhibit A-2	Legal Description of Complex
Exhibit B-1	Port Tract (Parcel listing)
Exhibit B-2	Port Tract (Map)
Exhibit C-1	Developer Tract (Parcel listing)
Exhibit C-2	Developer Tract (Map)
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Exhibit E-1	Common Area (Map)
Exhibit E-2	Common Area Subject to Bonds (Map)
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Exhibit G	Exclusive Use Areas
Exhibit H	Parking Lots (map)
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Exhibit L	Plan Approval Process
Exhibit M	Common Area Costs and Administrative Fee Allocations
Exhibit N	Assignment Amendment
Exhibit O	Operator Agreement

## OPERATING AGREEMENT

THIS OPERATING AGREEMENT ("OA") is made and entered into as of the 29th day of March, 2002 ("Effective Date"), between THE CITY OF OAKLAND, a municipal corporation of the State of California, acting by and through its Board of Port Commissioners ("Port"), and CEP-JLS I LLC, a Delaware limited liability company ("CEP-JLS I").

### RECITALS

A. This OA governs certain parcels of land located in a mix-use development known as "Jack London Square" located in the City of Oakland, California (the "Complex"). The Complex is depicted on Exhibit A-1 hereto (the "Site Plan") and more particularly described in Exhibit A-2 hereto.

B. The Port is the fee owner of all real property located within the Complex. For purposes of this OA, the Port is defined as an "Owner" of certain parcels of land located within the Complex collectively described in Exhibit B-1 hereto and identified as the "Port Tract" on the map attached hereto as Exhibit B-2.

C. CEP-JLS I is the ground lessor of, and for purposes of this OA is defined as the "Owner" of, certain parcels of land located within the Complex collectively described in Exhibit C-1 hereto and identified as the "Developer Tract" on the map attached hereto as Exhibit C-2.

D. Jack London Square Partners ("JLSP") has the right to develop certain parcels of land located within the Complex (the "Development Parcels") pursuant to an Agreement for Acquisition of Ground Lease Interests dated May 1, 2001, between the Port and JLSP, as amended and restated by that Amended and Restated Agreement for Acquisition of Ground Lease Interests dated as of March 20, 2002, between the Port and JLSP (as amended, the "Amended AAGLI") The Development Parcels are generally identified on Exhibit D hereto.

E. The Parties hereto intend to develop and operate their respective Parcels in conjunction with each other as integral parts of the Complex, and in order to effectuate the common use and operation thereof they desire to enter into certain covenants and agreements regarding the Complex.

NOW, THEREFORE, in consideration of the premises, the covenants and agreements hereinafter set forth and in furtherance of the parties understanding, it is agreed as follows:

### ARTICLE 1

#### DEFINITIONS

1.1 Affiliate. Any Person or group of Persons acting in concert in respect of the Person in question that, directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with such Person. For the purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person or group of Persons, shall mean possession,

directly or indirectly, through one or more intermediaries, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise.

1.2 Approving Party. "Approving Party" shall mean the Party designated from time to time to make certain decisions and/or give certain approvals pursuant to the terms of this OA.

1.3 Architectural and Design Theme. "Architectural and Design Theme" is defined in Section 4.3(B).

1.4 Assignment Amendment. "Assignment Amendment" means an Amendment to this OA executed in connection with a sale, assignment or other transfer of all or any part of an Owner's fee or ground lease interest in a Parcel, pursuant to which the transferee agrees to be bound by and to comply with the terms of this OA. The Assignment Amendment shall be substantially in the form of Exhibit N hereto and shall be executed (and notarized) by the transferring Owner, the transferee and the Approving Parties. The transferring Owner shall use its best efforts to record the Assignment Amendment contemporaneously with the transfer. The Assignment Amendment shall also amend, as applicable, Exhibits A-1, B-1, B-2, C-1 and C-2.

1.5 BCDC. "BCDC" means the San Francisco Bay Conservation and Development Commission.

1.6 BCDC Permits. "BCDC Permits" means those certain permits issued by the BCDC from time to time which regulate the activities, use and construction of all or a portion of the Complex and includes those permits listed on Exhibit F hereto.

1.7 Bond Counsel. "Bond Counsel" shall mean a nationally recognized bond counsel, selected by the Port in its sole discretion.

1.8 Building. "Building" shall mean any enclosed structure placed, constructed or located on a Parcel, which for the purpose of this OA shall include any appurtenant canopies, supports, loading docks, truck ramps and other outward extensions, except when used to describe the Common Area, in which case the "Building" shall mean the building footprint.

1.9 Building Area. "Building Area" shall mean the limited areas of the Complex within which Buildings may be constructed, placed or located; as reflected on the Site Plan. One or more Buildings may be within a Building Area. The Development Parcels constitute Building Areas.

1.10 City. "City" shall mean the City of Oakland.

1.11 Common Area. The "Common Area" as of the date of this OA is depicted on Exhibit E-1 hereto and is comprised of: areas within the exterior boundaries of the Complex excluding (i) Buildings (as measured by the building footprint) other than the Jack London Cabin which shall be included in the Common Area (ii) Parking Lots, (iii) dedicated public streets, (iv) Exclusive Use Areas, and (v) the Marina (except for those portions of the Marina indicated on the Site Plan). Unless otherwise specifically indicated in this OA, the Common Area includes the Common Area Subject to Bonds. Except for those Common Areas within a Developer Tract

Parcel ground lease boundary line, all Common Areas, as of the initial Effective Date of this OA, are located within the Port Tract.

1.12 Common Area Costs. "Common Area Costs" are defined in Section 5.2.5.

1.13 Common Area Subject to Bonds. "Common Area Subject to Bonds" shall mean those portions of the Common Area constructed with funds from and subject to certain restrictions imposed by the Port's bonded indebtedness. The Common Area Subject to Bonds is depicted on Exhibit E-2 hereto.

1.14 Complex. "Complex" is defined in Recital D.

1.15 Compliance Program. "Compliance Program" is defined in Section 5.2.4 hereof.

1.16 Constant Dollars. "Constant Dollars" means the present value of the dollars to which such phrase refers. An adjustment shall occur on January 1 of the sixth calendar year following the date of this OA, and thereafter at five (5) year intervals. Constant Dollars shall be determined by multiplying the dollar amount to be adjusted by a fraction, the numerator of which is the Current Index Number and the denominator of which is the Base Index Number. The "Base Index Number" shall be the level of the Index for the month during which the OA is dated; the "Current Index Number" shall be the level of the Index for the month of September of the year preceding the adjustment year; the "Index", shall be the Consumer Price Index for All Urban Consumers, for the county in which the Complex is located. All items published by the United States Department of Commerce (base year 1962-84 = 100), or any successor index thereto as hereinafter provided. If publication of the Index is discontinued, or if the basis of calculating the Index is materially changed, then the Approving Parties shall substitute for the Index comparable statistics as computed by an agency of the United States Government or, if none, by a substantial and responsible periodical or publication of recognized authority most closely approximating the result which would have been achieved by the Index.

1.17 Developer Tract. "Developer Tract" is described in Exhibit C hereto.

1.18 Developer Tract Parcel(s). "Developer Tract Parcel" shall mean each of the Parcels located on the Developer Tract and "Developer Tract Parcels" shall mean collectively all of the Parcels located on the Developer Tract. As of the Effective Date, the "Developer Tract Parcels" are those listed on Exhibit C-1 hereto and depicted on Exhibit C-2 hereto. The Parties agree that as of the date of recordation of an Assignment Amendment, the Development Parcel the subject thereof automatically shall be deleted from the Port Tract Parcels and be included in the Developer Tract Parcels.

1.19 Development Parcels. "Development Parcels" are defined in Recital D and identified on Exhibit D hereto.

1.20 Development Parcel Ground Lease. "Development Parcel Ground Lease" shall mean a ground lease entered into between the Port and JLSP (or its assignee) pursuant to which JLSP (or its assignee) ground leases one or more of the Development Parcels.

1.21 Exclusive Use Area. "Exclusive Use Area" shall mean collectively those areas located in the Common Area over which an Owner and/or one or more Occupant has exclusive use rights pursuant to the terms of a Ground Lease or an Occupant's lease, sublease, license, concession, or other similar agreement, and granted in accordance with this OA. The Exclusive Use Areas existing as of the Effective Date of this OA and approved by the Approving Parties (and the Port with respect to any Exclusive Use Areas located in the Common Area Subject to Bonds) are identified on Exhibit G hereto. Additional Exclusive Use Areas may be added or deleted from time to time in accordance with Section 6.6 below and may be subject to the opinion of bond counsel as set forth in Section 6.6.

1.22 Exempt Hazardous Materials. "Exempt Hazardous Materials" shall mean ordinary office and janitorial supplies in amounts reasonably necessary for their intended purpose, substances in cooling systems (e.g., refrigerators and air conditioning units), or automobiles and the standard contents therein, used in the ordinary course of a Party's or Occupant's permitted uses, and cargo handled at the Port maritime facilities to which the Port's Tariff applies, so long as said items are stored, used, handled and disposed of in accordance with all Hazardous Materials Laws; provided, however, that with respect to cooling systems and automobiles and the standard contents therein, Exempted Hazardous Materials shall not include the use of any Hazardous Materials outside of a cooling system or an automobile.

1.23 Existing Assets Properties. "Existing Assets Properties" shall mean 70 Washington Street Building (F-112), 98 Broadway (Pavilion Building, F- 111), 401-449 Water Street (odd numbered street addresses)(Water Street I, F-115) and 66 Franklin Street (F-107).

1.24 Floor Area. "Floor Area" shall mean the actual number of square feet of space contained on each floor within a Building, including any mezzanine or basement space, as measured from the exterior faces of the exterior walls or store front and/or the center line of any common walls; provided, however, that (i) the following areas shall not be included in such calculations: space attributable to any multi-deck, platform, rack or other multi-level system used solely for the storage of merchandise which is located vertically above ground floor; any space used for Building utilities or mechanical equipment; and (ii) "net rentable" square footage shall be used in calculating Floor Area for office improvements and "gross leasable area" square footage shall be used in calculating Floor Area for retail improvements. Within thirty (30) days of a request from the Operator, a Party shall certify the amount of Floor Area applicable to each Building on its Parcel. If any Party causes an as-built survey to be prepared with respect to any portion of the Complex, such Party shall furnish a copy of the survey to the Operator for informational purposes only.

During any period of rebuilding, repairing, replacement or reconstruction of a Building, the Floor Area of that Building shall be deemed to be the same as existed immediately prior to that period. Upon completion of such rebuilding, repairing, replacement or reconstruction, the Party upon whose Parcel such Building is located, shall cause a new determination of Floor Area for such Building to be made in the manner described above, and such determination shall be sent to any Party requesting the same.



1.25 Ground Lease. "Ground Lease" shall mean a ground lease executed by the Port as the ground lessor to a Person with respect to real property located within the Complex.

1.26 Governmental Authorities. "Governmental Authorities" shall mean all federal, state, county, municipal and local governmental and quasi-governmental bodies and authorities (including the United States of America, the State of California, the City of Oakland, the County of Alameda and any political subdivision, public corporation, district or other political or public entity) or departments thereof having or exercising jurisdiction over the Parties, the Complex, or such portions thereof as the context indicates.

1.27 Hazardous Materials. "Hazardous Materials" shall mean: (i) substances that are toxic, corrosive, inflammable or ignitable; (ii) petroleum products, crude oil (or any fraction thereof) and their derivatives; (iii) explosives, asbestos, radioactive materials, hazardous wastes, toxic substances or related hazardous materials; (iv) substances, including, without limitation, fumes, soot, vapors and smoke, which now or in the future are defined by applicable local, State or federal law as "hazardous substances," "hazardous materials," "hazardous wastes," "reproductive toxins," or "toxic substances," or regulated under applicable local, state or federal law, including those so defined in or regulated under any of the following: 15 U.S. Code Section 2601, et seq. (the Toxic Substances Control Act); 33 U.S. Code Section 1251, et seq. (the Federal Water Pollution Control Act); 42 U.S. Code Section 6901, et seq. (the Resource Conservation and Recovery Act); 42 U.S. Code Section 7401, et seq. (the Clean Air Act); 42 U.S. Code Section 9601, et seq. (the Comprehensive Environmental Response, Compensation and Liability Act); 49 U.S. Code Section 1801, et seq. (the Hazardous Materials Transportation Act); California Health & Safety Code ("H&S Code") Section 25100, et seq. (Hazardous Waste Control); H&S Code Section 25300, et seq. (the Hazardous Substance Account Act); H&S Code Section 25404, et seq. (Unified Hazardous Waste and Hazardous Materials Management Regulatory Program); H&S Code Section 25531, et seq. (Hazardous Materials Management); H&S Code Section 18901, et seq. (California Building Standards); California Water Code Section 13000, et seq. (the Porter-Cologne Water Quality Control Act); local fire codes; the regulations adopted and promulgated pursuant to such statutes, and any regulations adopted pursuant to such statutes after the date of this OA, as well as any subsequently enacted federal or California statute relating to the use, release or disposal of toxic or hazardous substances, or to the remediation of air, surface waters, groundwater, soil or other media contaminated with such substances.

1.28 Hazardous Material Clean Up. "Hazardous Material Clean up" shall mean the evaluation, investigation, testing, feasibility study, risk assessment, removal, disposal, remediation, containment, capping, encapsulating and monitoring of Hazardous Materials and restoration of the Complex or Common Area.

1.29 Hazardous Materials Laws. "Hazardous Materials Laws" shall mean all federal, state and local laws, statutes, ordinances, codes including the Uniform Fire Code as adopted by the City, regulations and orders, relating to the handling, use, storage, accumulation, transportation, generation, spillage, migration, discharge, release, treatment, and disposal of any Hazardous Materials.

1.30 JLSP. "JLSP" means Jack London Square Partners, LLC, a Delaware limited liability company.

1.31 Legal Requirements. "Legal Requirements" shall mean all laws, rules, regulations, orders, ordinances, mandatory guidelines and other requirements of Governmental Authorities (except that, as to the Port, only those rules, regulations and requirements which relate to the Port's police powers shall be included within the definition of Legal Requirements).

1.32 Marina. "Marina" shall mean those areas of Jack London Square designated for use as a boat marina and more particularly described on the Site Plan. The costs of operating and maintaining the Marina shall not be included in the Common Area Costs.

1.33 Occupant. "Occupant" shall mean any Person from time to time entitled to use and occupy any portion of a Building in the Complex under an ownership right or any lease, sublease, license, concession, or other similar agreement.

1.34 Operator. "Operator" shall mean the Person designated from time to time by the Approving Parties to maintain and operate the Common Area of the Complex. The Person designated as Operator shall serve in such capacity until he, she or it resigns or is removed by the Approving Parties for cause as provided herein. The Approving Parties by separate agreement have designated Ellis Partners LLC, a California limited liability company ("EPL"), as the Operator, and EPL has accepted such appointment. As a condition of its appointment, the Operator shall execute an Operator Agreement, in the form attached hereto as Exhibit O, providing that the Operator agrees to be subject to the terms, conditions and obligations of this OA for the duration of its term.

1.35 Operator Indemnitees. "Operator Indemnitees" is defined in Section 5.26(C).

1.36 Own, Owned, Owning, Owner, Ownership. The terms "Own," "Owned," "Owning," "Owner," and "Ownership" when used in connection with a Party's interest in a Parcel, shall refer to the fee ownership unless and until all or a portion of such Parcel has been ground leased, at which time the terms "Own," "Owned," "Owning," "Owner," and "Ownership" shall refer to the ground lease interest in the real property constituting the Parcel. With respect to any Ground Lease entered into after the recordation of this OA, the "Ownership" of the Parcel (as defined above) shall not transfer for purposes of this OA until an Assignment Amendment has been fully executed and recorded in the official records of the Alameda County recorder.

1.37 Parcel. "Parcel" shall mean a portion of the Complex having such boundaries as are designated on the then current Site Plan.

1.38 Parking Lot. "Parking Lot" shall mean a surface area of the Complex designated by the Port for vehicular parking. The Parking Lots existing as of the date of this OA are designated on Exhibit H hereto.

1.39 Parking Plan. "Parking Plan" shall mean a plan for controlling Occupant and Permittee parking at the Complex to be developed by the Operator and approved by the

Approving Parties and shall take into account the "Vehicular Access Plan for Jack London Square" as approved by the Port and BCDC.

1.40 Party. "Party" shall mean each signatory hereto and, after compliance with the notice requirements set forth below, their respective successors and assigns who become Owners of any fee or ground lease interest of any portion of the Complex.

1.41 Permittee. "Permittee" shall mean all Occupants and the officers, directors, employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, licensees, subtenants, and concessionaires of Occupants insofar as their activities relate to the intended development, use and occupancy of the Complex.

1.42 Person. "Person" shall mean any individual, partnership, firm, association, corporation, limited liability company, limited liability partnership, trust, or any other form of business or government entity.

1.43 Port Tract. "Port Tract" is described in Exhibit B hereto.

1.44 Port Tract Parcels. "Port Tract Parcels" shall mean all of the Parcels located on the Port Tract. As of the Effective Date, the "Port Tract Parcels" are those listed on Exhibit B-1 hereto and depicted on Exhibit B-2 hereto. The Parties agree that as of the date of recordation of an Assignment Amendment, the Development Parcel the subject thereof automatically shall be deleted from the Port Tract Parcels and be included in the Developer Tract Parcels.

1.45 Retail Master Plan. "Retail Master Plan" shall mean a conceptual plan developed by JLSP and approved by the Port for the permitted retail and entertainment uses, use allocation, tenant mix and tenant standards for the Complex, as may be modified from time to time by the Developer Tract Approving Party; provided that such modification shall be approved by the Port.

1.46 Rules and Regulations. "Rules and Regulations" shall mean the rules and regulations initially developed and mutually approved by the Port and JLSP governing the use and enjoyment by the Parties and their respective Permittees of the Common Areas, as the same may be amended or supplemented from time to time by the Operator; provided that such amendment or supplement shall be approved by the Approving Parties.

1.47 Sign Program. "Sign Program" shall mean an integrated signage program developed by the Operator and approved by the Approving Parties and the City of Oakland. Until the Sign Program is developed and adopted by the Port, Owners must obtain the approval of the Port prior to erecting or placing any signage on their respective Parcels.

1.48 Site Plan. "Site Plan" is defined in Recital A, as it may be amended from time to time in accordance with Section 7.12 hereof.

1.49 Tract. "Tract" shall mean either the Port Tract (as described in Exhibit B hereto) or a Developer Tract (as described in Exhibit C hereto), as the context requires. "Tracts" shall mean collectively, both the Port Tract and the Developer Tract.

1.50 Utility Lines. "Utility Lines" shall mean those facilities and systems for the transmission of utility services, including drainage of surface water, water sprinkler system lines, telephone, electrical conduits or systems, fiber optic and other cables used for security/parking and inter-building communication systems, sewers, gas mains, or other public or private utilities. "Common Utility Lines" shall mean those Utility Lines which are installed to provide the applicable service to Parcels located in both the Developer Tract and the Port Tract. The Common Utility Lines shall include, without limitation, storm drain and related facilities which service the Complex, which are located on the Port Tract. "Separate Utility Lines" shall mean those Utility Lines which are installed to provide the applicable service solely to Parcels located within the Developer Tract or within the Port Tract, as the case may be. For the purpose of this OA, the portion of a Utility Line extending between a Common Utility Line and a Building shall be considered a Separate Utility Line.

## ARTICLE 2

### OBLIGATION OF PARTIES; APPROVING PARTIES

2.1 Obligation of Parties; Transfer of Interest. Each Party shall be liable for the performance of all covenants, obligations and undertakings set forth herein with respect to the portion of the Complex in which it has an Ownership interest which accrues during the period of such Ownership, and such liability shall continue with respect to any portion transferred. At the time an Assignment Amendment is recorded the transferring Party shall be released only from the obligations of this OA arising subsequent to the date of recordation of the Assignment Amendment. A Party transferring all or any portion of its interest in the Complex shall give notice to all other Parties and the Operator of such transfer no later than thirty (30) days prior to the proposed transfer and shall include therein at least the following information:

- (i) the name and address of the new Party;
  - (ii) a copy of the legal description of the portion of the Complex transferred;
- and
- (iii) whether the transferee has been designated as the Approving Party for the subject Tract.

Nothing contained herein to the contrary shall affect the existence, priority, validity or enforceability of any lien permitted hereunder which is placed under the transferred portion of the Complex prior to receipt of the notice.

2.2 Approving Party. There shall be one Approving Party representing the Developer Tract and one Approving Party representing the Port Tract. Each Approving Party shall have absolute discretion to make the decisions and/or give the approvals expressly designated to be made by and/or given on behalf of the Tract represented by such position regardless of whether the Approving Party then owns all or less than all of the Port Tract Parcels or the Developer Tract Parcels, as the case may be; provided that: (i) the Port Approving Party must Own an interest in one of the Port Tract Parcels or an interest (direct or Affiliate) in the Owner of one of the Port Tract Parcels and (ii) the Developer Approving Party must Own an interest in one of the

Developer Tract Parcels or an interest (direct or Affiliate) in the Owner of one of the Developer Tract Parcels. If the Ownership interest in either the Developer Tract or the Port Tract is held by only one Person, that Person will be the Approving Party for that Tract unless and until that Tract's Owner gives the Operator written notice designating a different Person as that Tract's Approving Party. If, however, a Tract is Owned by more than one Person, the provisions of Section 2.3 shall apply. The holder of the Approving Party position shall have the right to assign such position to any other Party Owning either a Parcel in the Tract represented by such position or an interest (direct or Affiliate) in the Owner of a Parcel in such Tract. In the event that the Owner of the Parcel on which the Approving Party's position is based sells or otherwise conveys its interest in the Parcel and no assignment is made, then such Approving Party position shall automatically be deemed assigned to the Party acquiring the subject Parcel.

2.3 Multiple Tract Owners. In the event that a Tract is Owned by more than one Person, the Person(s) holding at least fifty-one percent (51%) of the Ownership interest in that Tract shall designate, by giving written notice to the Operator and the other Owner(s), one of their number to act as the Approving Party for all Owners of that Tract. Such designation may be revised at any time by a similar designation signed by Person(s) then holding at least fifty-one percent (51%) of the Ownership interest in that Tract and delivered to the Operator and the other Owner(s). At any time that (i) the Developer Tract or the Port Tract is owned by more than one (1) Person and (ii) for more than three (3) months no Approving Party has been in office respecting that Tract, then (x) Operator automatically shall be deemed to have been designated the Approving Party for that Tract, and (y) Operator shall remain the Approving Party for that Tract until such time as a new Approving Party is designated by the Tract's Owners as provided above. In the event of any conflict between Approving Party designations (or deemed designation) under this Section 2.3 and Section 2.2 above, the designation made (or deemed to be made) under this Section 2.3 shall control. For purposes of this Section 2.3, the percentage Ownership interest shall be calculated on the basis of improved space square footage ratios to be determined by the Parties.

2.4 Approving Party for Port Tract. Notwithstanding the provisions set forth in Sections 2.1, 2.2 and 2.3 above, for as long as the Port is the fee owner of any Port Tract Parcel, the Port (or its successor agency) shall be the Approving Party for the Port Tract.

2.5 Initial Approving Party for Developer Tract. The initial Approving Party for the Developer Tract shall be JLSP.

## ARTICLE 3

### PUBLIC ACCESS AREAS

#### 3.1 Public Access.

(A) Each of the Parties shall, for the duration of this OA, hold open the Common Area (Owned by them) to the members of the general public and for (1) the ingress, egress and passage of vehicles in, on, around, over, under, through and between the roadways, driveways, entrances, exits and ramps and such other portions of the Common Area as are constructed and maintained for such use and (2) pedestrian ingress, egress, passage and

accommodation in, on, around, over, under, through, and between the sidewalks, plaza areas, and such other portions of the Common Area as are constructed and maintained for such use.

(B) Each Party shall have the same rights as the general public with respect to the rights granted in Section 3.1(A) above and shall have the right to enforce the rights provided to the general public, including the Parties, to ingress and egress by specific performance to the extent permitted by law.

(C) During the term of this OA, each Party hereby grants and conveys to each other Party and their respective Permittees, for their use in common with others entitled to use the same, a non-exclusive easement for the passage and parking of vehicles over and across the parking and driveway areas of the grantor's Parcel, as the same may from time to time be constructed and maintained for such use, and for the passage and accommodation of pedestrians over and across the parking, driveways and sidewalk areas of the grantor's Parcel, as the same may from time to time be constructed and maintained for such use; provided, however, that if and to the extent that any portion of the Parcel in question is subject to Port bonded indebtedness, no easement shall be granted under this Section 3.1(C) and the provisions of Section 3.1(A) above shall control.

(D) The following reservations shall apply to the rights granted under Sections 3.1(A) and (B) above and shall not be exercised by the Parties, or any of them, in such a way as to obstruct or defeat the purpose of this OA:

(i) Each Party reserves the right to close off its portion of the Common Area for such reasonable period of time as may be legally necessary, in the opinion of such Party's counsel, to prevent the acquisition of prescriptive rights by anyone; provided, however, that prior to closing off any portion of the Common Area, as herein provided, such Party shall give written notice to the Operator and each other Party of its intention to do so, and shall attempt to coordinate such closing with the Operator so that no unreasonable interference in the passage of pedestrians or vehicles shall occur; and

(ii) Each Occupant for whom the Operator has approved an Exclusive Use Area hereby reserves, and is hereby granted, the right at any time and from time to time to use its Exclusive Use Area in accordance with the terms of Occupant's lease, sublease, license, or concession agreement and the Rules and Regulations then in effect respecting that Exclusive Use Area.

(E) In addition to the reservations set forth in Section 3.1(C) above, the rights set forth in Sections 3.1(A) and 3.1(B) above shall be subject to: (i) the Jack London Square Vehicular Access Plan; (ii) the BCDC Permits; (iii) Port ordinances that affect the Complex; (iv) the Rules and Regulations; (v) the provisions of Section 3.7 below; and (vi) other provisions contained in this OA.

### 3.2 Utilities; Drainage Easements.

(A) Each Party hereby grants and conveys to each other Party non-exclusive easements in, to, over, under, along and across those portions of the Common Area (exclusive of any portion located within Building Areas) Owned by grantor necessary for the installation,

operation, flow, passage, use, maintenance, connection, repair, relocation, and removal of Utility Lines serving the grantee's Parcel, including but not limited to, sanitary sewers, storm drains, water (fire and domestic), gas, electrical, telephone and communication lines. Such easements are appurtenant to and for the benefit of the grantee's Parcel. The location of any new Utility Line shall be subject to the prior written approval of the Party whose Common Area is to be burdened thereby, such approval not to be unreasonably withheld or delayed. The construction and design of any new Utility Line shall also be subject to the prior written approval of the Port to the extent that the Port will be responsible for any Hazardous Materials on or under the Common Area, which approval shall not unreasonably withheld. The easement area shall be no wider than necessary to reasonably satisfy the requirements of a private or public utility, or five feet (5') on each side of the centerline if the easement is granted to a Party. Upon request, the grantee shall provide to the grantor and to the Operator a copy of an as-built survey showing the location of such Utility Line. All Utility Lines shall be underground.

At least thirty (30) days prior to exercising the right granted herein, the grantee shall first provide the grantor with a written statement describing the need for such easement, identifying the proposed location of the Utility Line, the nature of the service to be provided, the anticipated extent of any subsurface excavation, the anticipated amount of soils to be excavated, the anticipated cost of any Hazardous Material Clean up associated with the subsurface excavation, the anticipated commencement and completion dates for the work and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 6.4(C) hereof. Except as otherwise agreed to by the grantor and the grantee, any Party installing Separate Utility Lines pursuant to the provisions of this subparagraph shall pay all costs and expenses with respect thereto and shall cause all work in connection therewith (including general clean-up and proper surface and/or subsurface restoration) to be completed as quickly as possible and in a manner so as to minimize interference with the use of the Common Area. In addition, the grantee of any Separate Utility Line agrees to defend, protect, indemnify, and hold harmless the grantor from and against all claims or demands, including any action or proceeding brought thereon, and all costs, losses, expenses and liabilities of any kind related thereto (including reasonable attorneys' fees and court costs) arising out of or resulting from the exercise of the right to install, maintain and operate the Separate Utility Line as herein provided. If the Approving Parties elect to install Common Utility Lines, all repair, maintenance, replacement and other work thereon, if not performed by a public utility or governmental agency, shall be performed by the Operator as part of Common Area maintenance.

(B) Each Party hereby grants and conveys to each Party Owning an adjacent Parcel the perpetual right and easement to discharge surface storm drainage and/or runoff from the grantee's parcel over, upon and across the Common Area Owned by the grantor. No Party shall alter or permit to be altered the surface of the Common Area if such alteration would materially increase the flow of surface water onto an adjacent Parcel either in the aggregate or by directing the flow of surface water to a limited area. The surface water collection, retention and distribution facilities shall be deemed a Common Utility Line.

(C) Subject to the Port's prior approval for the relocation of any underground utility line, the grantor shall have the right to relocate a Utility Line upon thirty (30) days prior written notice, provided that such relocation:

(i) shall not interfere with or diminish the utility service to the grantee during the grantee's business hours; and if an electrical line/computer line is being relocated, then the grantor and grantee shall coordinate such interruption to eliminate any detrimental effects;

(ii) shall not reduce or unreasonably impair the usefulness or function of such Utility Line;

(iii) shall be performed without cost or expense to grantee;

(iv) shall be completed using materials and design standards which equal or exceed those originally used;

(v) shall have been approved by the provider of such service and the appropriate Governmental Authority having jurisdiction thereover; and

(vi) shall minimize the extent of any subsurface excavation, the amount of soils to be excavated, and the cost of any Hazardous Material Clean up associated with the Utility Line relocation.

Documentation of the relocated easement area, including the furnishing of an "as-built" survey, shall be the grantor's expense and shall be accomplished as soon as possible following completion of such relocation.

### 3.3 Construction, Maintenance and Reconstruction.

(A) In order to accommodate any Building improvements which may inadvertently be constructed beyond a Parcel's boundary line, each Party grants to each Party Owning an adjacent Parcel an easement, not to exceed a maximum lateral distance of six inches (6"), in, to, over, under, and across that portion of the grantor's Parcel adjacent to such common boundary line for the maintenance and replacement of such encroaching Building improvements. Such easement is appurtenant to and for the benefit of the encroaching Parcel. Notwithstanding the foregoing, certain Building drainage down spouts, signage and awnings existing as of the date of this OA encroach more than six inches (6") beyond the adjacent Parcel's boundary line. With respect to such existing encroachments, the Port hereby grants to CEP-JLS I an easement for each such encroachment across that portion of the Port Tract Parcel adjacent to the common boundary line for the benefit of the adjacent Developer Tract Parcel for the lateral distance corresponding respectively to each encroachment plus one inch (1"); provided that in no event shall such easements extend onto the adjacent Port Tract Parcel (i) more than six (6) inches for down spouts, (ii) more than four (4) feet for signage, nor (iii) more than eight (8) feet for awnings.

(B) In the event a constructing Party (the "Constructing Party") determines that it is necessary to place underground piers, footings and/or foundations ("Subsurface Construction Elements") across the boundary line of its Parcel, the Constructing Party shall advise the Party Owning the adjacent Parcel (the "Adjacent Party") and the Port of its construction requirement and shall provide plans and specifications relating thereto, including proposed construction techniques for the Subsurface Construction Elements and the anticipated extent of any subsurface excavation, the anticipated amount of soils to be excavated, the



anticipated cost of any Hazardous Material Clean Up associated with the subsurface excavation. The Adjacent Party hereby grants and conveys to the Constructing Party for the benefit of its Parcel an easement, not to exceed a maximum lateral distance of five feet (5'), in, to, under, and across that portion of the Adjacent Party's Parcel not theretofore occupied by any then existing structure, for the installation, maintenance and replacement of such Subsurface Construction Elements; provided, however, that the Constructing Party shall have no right to use such easement if the Adjacent Party is able to provide the Constructing Party a reasonable alternative construction method for the placement of the Subsurface Construction Elements entirely on the Constructing Party's Parcel. Such easement is appurtenant to and for the benefit of the Adjacent Party's Parcel.

The Adjacent Party reserves the right to require the Constructing Party to modify the design specifications for the Subsurface Construction Elements in order to permit the Adjacent Party the opportunity to utilize the same in connection with the construction of its Building improvements to the end that each Party shall be able to place its Building immediately adjacent to the common boundary line. If a common Subsurface Construction Element is used by the Parties, each shall assume and pay its reasonable share of the cost and expense of the design and construction thereof. In the event any Building utilizing a common Subsurface Construction Element is destroyed and not replaced or is removed, the common Subsurface Construction Element shall remain in place for the benefit of the other Building utilizing the same.

(C) The foregoing easement grants shall not diminish or waive any right of a Party to recover damages resulting from the constructing Party's failure to construct its Building within its Parcel in the case of (A) above, or within the easement area limits in the case of (B) above. The easements in each instance shall:

(i) continue in effect for sixty-six (66) years; and

(ii) include the reasonable right of access necessary to exercise and enjoy such grant upon terms and with the limitations described in Section 4.1(E) below.

(D) With respect to Buildings constructed along the common boundary line between Parcels, nothing herein shall be deemed to create or establish:

(i) a "common" or "party" wall to be shared with the adjacent Building; or

(ii) the right for a Building to receive support from or apply pressure to the adjacent Building.

3.4 Signage. Each Party hereby agrees to permit another Party to place signs consistent with the Sign Program upon the Common Area or their respective Parcels and to permit the other Party to repair and maintain such signage.

3.5 Maintenance Access. Each Party hereby grants for the benefit of each of the other Parties a non-exclusive right upon, across, in, over and under their respective Parcels, for the sole purpose of permitting the Operator and its property manager access to perform the obligations of the Operator under this OA, including without limitation the administration, operation, repair,

removal, construction, use, maintenance, applicable Hazardous Material Clean Up as set forth in this OA, replacement, management and control of the Common Areas.

3.6 No Merger. Notwithstanding a Party's Ownership of more than one Parcel in either the Port Tract or the Developer Tract, the easements granted hereunder shall burden and benefit each Parcel individually, without merger as a result of such common Ownership. Upon conveyance of a Parcel so that such Parcel ceases to be under common ownership neither the Party conveying said Parcel nor the Party acquiring said Parcel shall need to execute additional documentation to evidence the existence of said easements, and said easements shall relate back to and shall be deemed to have been created as of the date this OA is recorded in the office of the recorder of the county in which the Complex is located.

3.7 Nature of Easements. All rights or easements created by or pursuant to this OA shall be appurtenant to the Parcel(s) benefited thereby and not rights or easements in gross.

## ARTICLE 4

### CONSTRUCTION

#### 4.1 General Requirements.

(A) Each Party agrees that all construction activities performed by it within the Complex shall be performed in compliance with this OA, all applicable Legal Requirements, and the Hazardous Materials Laws. All construction shall utilize new materials (including appropriate recycled materials) and be performed in a good, safe, workman like manner.

(B) Each Party further agrees that its construction activities shall not:

(i) cause any unreasonable increase in the cost of constructing improvements upon another Party's Parcel;

(ii) unreasonably interfere with construction work being performed on any other part of the Complex;

(iii) unreasonably interfere with the use, occupancy or enjoyment of any part of the remainder of the Complex by any other Party or its Permittees;

(iv) cause any Building located on another Parcel to be in violation of any Legal Requirements;

(v) breach the subsurface of the Complex, the Common Area or any Parcel, including the excavation or the engagement of any subsurface activity, including without limitation any subsurface excavation under Section 3.3(B), without the prior written approval of the Port, which approval may be given or withheld in the Port's reasonable discretion, based on its good faith business judgment; provided that any remediation plan which addresses Hazardous Materials approved by the Port and the Parcel Owner which addresses excavation or subsurface activity shall be deemed consent under this Section 4.1.

(C) Each Party agrees to defend, protect, indemnify and hold harmless each other Party and the Operator and the respective officers, directors, managing member, manager, employees, contractors and agents of each from and against all claims and demands, including any action or proceeding brought thereon, and all costs, losses, expenses and liabilities of any kind relating thereto, including reasonable attorneys' fees and costs of suit arising out of or resulting from any construction activities performed or authorized by such indemnifying Party; provided however, that the foregoing shall not be applicable to either events or circumstances caused by the negligence or willful act or omission of such indemnified Party, its licensees, concessionaires, agents, servants, employees, or anyone claiming by, through, or under any of them, or claims covered by the release set forth in Section 6.4(D). Nothing contained in this Section 4.1(C) is intended to abrogate or modify any written indemnifications in connection with Hazardous Materials as set forth in the Amended AAGLI, the Purchase and Sale Agreement, any Ground Lease or any other future written agreement which addresses indemnification for Hazardous Materials between the Port and an Owner or between the Port and the Operator.

(D) In connection with any construction, reconstruction, repair or maintenance on its Parcel, each Party reserves the right to create a temporary staging and/or storage area in the Common Area or in the Building Area on its Parcel at such location as will not unreasonably interfere with access between such Parcel and the other areas of the Complex. Prior to the commencement of any work which requires the establishment of a staging and/or storage area on its Parcel, a Party shall give at least thirty (30) days prior notice to the Operator, for their approval, of the proposed location, provided, however, that if a business is operating on an adjacent Parcel then no other Party's staging area shall be located within 50 feet of such Parcel, unless located within a Building Area, and if substantial work is to be performed, the constructing Party shall, at the request of the Operator, fence off the staging and storage area. If the Operator does not approve the proposed location of the staging and/or storage area, the Party requesting approval shall modify the proposed location to satisfy the reasonable requirements of the Operator. All storage of materials and the parking of construction vehicles, including vehicles of workers, shall occur only on the constructing Party's Parcel, and all laborers, suppliers, contractors and others connected with such construction activities shall use only the access points located upon the constructing Party's Parcel. Upon completion of such work, the constructing Party shall restore the affected Common Area to a condition equal to or better than that existing prior to commencement of such work.

(E) Each Party hereby grants and conveys to each other Party and its designated contractors, materialmen and laborers a temporary license for access and passage over and across the Common Area of the grantor's Parcel as shall be reasonably necessary for the licensee to construct and/or maintain improvements upon the grantee's Parcel; provided, however, that such license shall be in effect only during periods when actual construction and/or maintenance is being performed and provided further that the use of such license shall not unreasonably interfere with the use and operation of the Common Area by others. Prior to exercising the rights granted herein, the licensee shall first provide the grantor with a written statement describing the need for such license, and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 6.4(D) hereof. Any Party availing itself of the temporary license shall promptly pay all costs and expenses associated with such work, shall diligently complete such work as quickly as possible, and shall promptly clean the area, and restore and/or repair the affected portion of the

Common Area to a condition which is equal to or better than the condition which existed prior to the commencement of such work. Notwithstanding the foregoing, in the event a dispute exists between the contractors, laborers, suppliers, and/or others connected with construction activities, each Party shall have the right to prohibit the contractors, laborers, suppliers and/or others working for another Party from using the Common Area on its Parcel.

4.2 Common Area. The Parties agree that the Common Area of the Complex existing as of the date of this OA is identified on the Site Plan. The Parties further agree that additional Common Areas may be developed and, if constructed, shall be constructed as shown on the then current Site Plan which shall be amended to incorporate the additional Common Areas designated by the mutual agreement of the Port and JLSP. The proposed sites for the additional Common Areas are identified as "Additional Common Areas" on the Site Plan. No fence or other barrier which would prevent or unreasonably obstruct the passage of pedestrian or vehicular travel shall be erected or permitted within or across the Common Area, exclusive of the limited curbing and other forms of traffic control depicted on the Site Plan, permitted staging and/or storage areas, or outdoor restaurant seating which must be placed in accordance with state or local regulations. Contemporaneously with the construction of a Building upon its Parcel, the constructing Party shall cause the Common Area on its Parcel, if any, to be substantially completed no later than the day the first Occupant of such Parcel opens for business to the public. Such work shall be done in a good and workmanlike manner and in accordance with good engineering standards and the plans and specifications approved by the City of Oakland; provided, however, the following minimum general design standards shall be complied with throughout the term of this OA:

(A) The type and design of the Common Area light standards shall be approved by the Approving Parties. Notwithstanding the foregoing, no lighting shall be permitted hereunder which would not be in accordance with City of Oakland requirements applicable to the Complex.

(B) All sidewalks and pedestrian aisles shall be concrete or other materials approved by the Approving Parties.

(C) Utility Lines that are placed underground shall be at depths designated by the Port (or successor fee owner) of the subject Parcel, and shall not be installed without the Port's advance consent.

(D) Parking areas for the Complex shall contain sufficient parking spaces in order to comply with the requirements of the City of Oakland which are applicable to the Complex.

(E) A Party shall not make material changes which are inconsistent with this OA to the Common Area, without the approval of the Approving Parties; provided, however that the Port shall be permitted to make changes required under the BCDC Permits without the approval of the Approving Parties. Provided a Party has obtained any permits or approvals which would be required in order for such changes to be in accordance with the requirements of the City of Oakland applicable to the Complex each Party hereby reserves the right, from time to time without obtaining the consent or approval of the Approving Parties, to make at its own

expense any insignificant change, modification or alteration in its portion of the Common Area, including the installation of convenience facilities such as mailboxes, public telephones and benches, provided that:

(i) the accessibility of such Common Area for pedestrian and vehicular traffic (as it relates to the remainder of the Complex) is not unreasonably restricted or hindered, and all parking and vehicular traffic lanes shall remain generally as shown on the Site Plan;

(ii) no change shall be made in the access points between the Common Area and the public streets; provided, however, that additional access points may be created with the approval of the Approving Parties, such approval not to be unreasonably withheld; and

(iii) at least thirty (30) days prior to making any such change, modification or alteration, the Party desiring to do such work shall deliver to the Approving Parties copies of the plans therefor.

The provisions of this paragraph (E) do not apply to any changes, modifications or alterations of Common Area located within Building Areas which result from or arise out of the construction, expansion or maintenance of Buildings or Exclusive Use Areas.

(F) With respect to the portion of the Common Area located above the subterranean parking garage at 98 Broadway, as shown on the Site Plan, the Common Area shall be limited to the area above the completed roof of the parking garage structure is above such elevation, and in addition the Common Area shall not include any elevators or stairways serving such parking garage. However, the Common Area shall include any water, irrigation, electrical, storm sewer, sanitary sewer and other utility lines, services and conduits below such elevation and within the garage structure as are reasonably necessary to serve facilities located in the Common Area over such parking garage.

#### 4.3 Building Improvements.

(A) While it is acknowledged and agreed that no Party shall have an obligation to commence construction of any Building on its Parcel pursuant to this OA, the Parties hereby agree once construction has been commenced, such Building shall be completed. No Building shall be located outside of the Building Area designated on the then current Site Plan at the time of the Building's construction except and unless approved by the Approving Parties. If a Building Area has a maximum Floor Area designation, such amount shall not be exceeded.

(B) The Approving Parties shall agree upon an architecturally compatible theme ("Architectural and Design Theme") (which may be modified from time to time) for the exterior of all Buildings to be constructed, placed or located within the Complex which, when finalized, shall be attached hereto by way of an amendment as Exhibit K. Each Party agrees that any Building constructed on its Parcel shall comply with such architectural theme; provided that all improvements located on the Complex as of the date of this OA shall be exempt from such compliance.

In order to insure compliance with such theme, each Party shall submit to the Approving Parties detailed plans ("Plans") in accordance with Exhibit L attached hereto ("Plan Approval Process") covering the initial construction of each Building and any additions, remodeling, reconstruction or other alteration thereto which changes the exterior thereof for approval at least thirty (30) days prior to the commencement of any such work. If an Approving Party should reject the Plans for not complying with the Architectural and Design Theme, the submitting Party and the Approving Parties shall mutually consult to establish approved Plans for the proposed work. The Approving Parties shall not arbitrarily or unreasonably withhold approval of the Plans or recommend changes in the Plans which otherwise conform with the requirements hereof, nor shall they withhold approval of exterior remodeling or exterior reconstruction which does not either substantially enlarge an existing structure, or substantially change an existing structure. In no event shall an Approving Party require any other Party to utilize design standards superior to those utilized by the Approving Party in the construction of Buildings on its Parcel. Approval of Plans by the Approving Parties shall not constitute assumption of responsibility for the accuracy, sufficiency, or propriety thereof, nor shall such approval constitute a representation or warranty that the Plans comply with applicable Legal Requirements. No material deviation shall be made from the approved Plans. Notwithstanding the foregoing, if any Party proposes to initially construct a building which is in conformity with the elevations and design elements set forth in the Architectural and Design Theme, then such Party shall not be required to submit the Plans for such building for approval pursuant to this Section 4.3(B) or Exhibit L hereto.

Notwithstanding anything contained herein, if an Approving Party fails to respond to a request for approval within thirty (30) days after such request, and if the requesting party thereafter gives to the Approving Party written notice that failure to respond within twenty (20) days after that notice is given will constitute approval of the request, and if the Approving Party fails to respond within the additional time stated in that notice, the Approving Party shall be deemed to have approved the request.

No Approving Party shall be liable in damages or otherwise for any reason, including any mistake in judgment, negligence or nonfeasance, arising out of or in connection with the approval or disapproval or failure to approve or disapprove any proposal submitted pursuant to this OA. Each Party hereunder agrees that, by submission of such plans, drawings and/or specifications, it will not bring any action or suit against any Approving Party to recover such damages. In addition, each Party shall indemnify, defend, protect and hold the Approving Parties and their respective officers, directors, shareholders, employees and agents harmless for, from and against any and all causes of action, claims, liabilities, losses, damages, costs and expenses (including reasonable attorneys' fees and court costs and reasonable attorneys' fees and court costs on any appeal) arising out of or related to the approval or disapproval of any plans, drawings and/or specifications submitted to an Approving Party by or on behalf of such Party or its Occupants. No approval shall be considered an approval of the plans, drawings and/or specifications from an engineering perspective or a determination that they meet building, environmental or engineering design standards, or that any such buildings or improvements have been built in accordance with such plans, drawings and/or specifications.

(C) The Parties hereby specifically consent to the placement of Buildings along their respective common boundary lines, and each agrees to support any request by another Party for a side-yard or setback variance if the same is required in order to accommodate such construction.

The second Party to construct a Building along a common boundary line shall:

(i) cause such construction to be completed in such a manner that the improvements on the adjoining Parcel are not damaged, and that the wall of one Building does not receive support from nor apply pressure to the wall of the other Building; and

(ii) undertake and assume the obligation of completing and maintaining the nominal attachment (flashing and seal) of its Building to that of the existing Building on the adjoining Parcel, it being the intent of the Parties to establish and maintain the appearance of one continuous Building complex.

(D) If a Building is razed or reduced in size, then, until the surface is once more improved with a Building, the areas shall be improved either as automobile parking and drive area or as landscaped area consistent with standards set forth in this OA.

4.4 Liens. In the event any mechanic's lien is filed against the Parcel of one Party as a result of services performed or materials furnished for the use of another Party, the Party permitting or causing such lien to be so filed agrees to cause such lien to be discharged within fifteen (15) days after the entry of a final judgment (after all appeals) for the foreclosure of such lien. Upon request of the Party whose Parcel is subject to such lien, the Party permitting or causing such lien to be filed agrees to promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other security as shall be required by law to obtain such release and discharge. Nothing herein shall prevent the Party permitting or causing such lien from contesting the validity thereof in any manner such Party chooses, so long as such contest is pursued with reasonable diligence. In the event such contest is determined adversely (allowing for appeal to the highest appellate court), such Party shall promptly pay in full the required amount, together with any interest, penalties, costs, or other charges necessary to release such lien. The Party permitting or causing the lien agrees to defend, protect, indemnify and hold harmless the other Party and its Parcel from and against all claims and demands, including any action or proceeding brought thereon, and all costs, losses, expenses and liabilities of any kind relating thereto, including reasonable attorneys' fees and cost of suit, arising out of or resulting from such lien.

4.5 Permits. The Party undertaking any construction work shall secure and keep in force, at its expense, all licenses and permits necessary for such work and shall complete all construction work in accordance with all requirements of any necessary permits, including requisite construction permits, temporary and permanent certificates of occupancy, board of fire underwriter certificates and certificates of plumbing and electrical inspections.

4.6 Dust. Dust from all construction work shall be controlled at all times by watering down the construction site or by any other method permitted under Legal Requirements and approved by any Governmental Authority in connection with the issuance of a construction permit. Any sandblasting activities shall be restricted to the water-type method or any other state-of-the-art method permitted under Legal Requirements. The Party on whose behalf such construction work is being performed shall be responsible at its sole cost and expense for keeping the Common Areas (or causing the same to be kept) clean and free of dust and mud caused by such Construction Work on a daily basis.

4.7 Orderly Site. The Parcels shall be kept in a neat and orderly condition during construction periods; however, normal construction activities and parking in connection with construction work on a Parcel shall not be considered a nuisance or otherwise prohibited by this OA. Trash and debris shall not be permitted to accumulate on any Parcel. The Parties may store construction equipment and building materials only in areas established under this OA or otherwise approved by the Operator, who may require screening of the construction areas.

4.8 Acknowledgement of Hazardous Materials. The Parties have a reasonable basis to believe that the subsurface of the Complex may contain Hazardous Materials. Each Party agrees that any and all construction activities performed by it within the Complex shall be performed in compliance with all Hazardous Materials Laws.

## ARTICLE 5

### MAINTENANCE AND REPAIR

#### 5.1 Utility Lines.

(A) Each Party shall maintain and repair, or cause to be maintained and repaired, to the extent not maintained and repaired by a public utility or government agency other than the Port in its ownership capacity, in a good state of repair and safe condition, all Separate Utility Lines utilized by it regardless of where located. Any maintenance, replacement and/or repair of nondedicated Utility Lines located on another Party's Parcel shall be performed: after two (2) weeks notice to the grantor (except in an emergency the work may be initiated with reasonable notice); after normal business hours whenever possible; and in such a manner as to cause as little disturbance in the use of the grantor's Parcel as is practicable under the circumstances. Any Party performing, or causing to be performed, maintenance or repair work agrees: to promptly pay all costs and expenses associated therewith; to diligently complete such work as quickly as possible; and to promptly clean the area and restore the affected portion of the Common Area to a condition equal to or better than the condition which existed prior to the commencement of such work.

(B) Common Utility Lines shall be maintained, repaired and/or replaced as part of the Common Area pursuant to Section 5.2 below to the extent not maintained and repaired by a public utility or government agency other than the Port in its ownership capacity.

(C) The Parties have a reasonable basis to believe that the subsurface of the Complex may contain Hazardous Materials. Each Party agrees that any and all Utility Line maintenance or repair activities performed by it within the Complex shall be performed in compliance with all Hazardous Materials Laws.

#### 5.2 Common Area.

5.2.1 Operator Duties. The Operator shall maintain, or cause to be maintained, the Common Area in a slightly, safe condition and good state of repair. Any unimproved Common Area shall be mowed, if applicable, and kept litter-free. The minimum standard of maintenance for the improved Common Area shall be comparable to the standard of maintenance followed in other first class mixed-use developments of comparable size in the San Francisco



Bay area; notwithstanding the foregoing, however, the Common Area shall be operated and maintained in compliance with all applicable Legal Requirements applicable to any Owner of real property and subject to the Compliance Plan and the provisions of this OA. Any and all Common Area maintenance or repair activities performed shall be performed in compliance with all Hazardous Materials Laws. The surface of the Common Area shall not be breached, nor shall any soils be excavated nor any subsurface activity be conducted, without the prior written approval of the Port, which approval may be give or withheld in the Port's reasonable discretion, based on its good business judgment; provided that in the event of an emergency which threatens serious bodily injury or substantial property damage, including without limitation a ruptured utility line, Port consent shall not be required, but Operator shall notify Port of such surface breach within twenty four (24) hours. All Common Area improvements shall be repaired or replaced with materials at least equal to the quality of the materials being repaired or replaced so as to maintain the architectural and aesthetic harmony of the Complex as a whole. The maintenance and repair obligation shall include but not be limited to the following:

(i) Drive and Parking Areas. Maintaining all paved surfaces and curbs in a smooth and evenly covered condition, including, without limitation, replacement of base, skin patch, resealing and resurfacing.

(ii) Debris and Refuse. Periodic removal of all papers, debris, filth, and refuse, including daily vacuuming and broom sweeping to the extent necessary to keep the Common Area in a first-class, clean and orderly condition; provided, however, that Occupant trash and/or garbage removal shall not be a Common Area Maintenance Cost. All sweeping shall be at appropriate intervals during such times as shall not interfere with the conduct of business or use of the Common Area.

Notwithstanding anything to the contrary, each Party shall have the obligation to operate, maintain, and repair, in a clean, sightly and safe condition its Exclusive Use Area and the following items located on its Parcel or in its Exclusive Use Area: an exterior shipping/receiving dock area, any truck ramp or truck parking area, any recycling center or similarly designated area for the collection of items intended for recycling, any drive-through service area, and any refuse, compactor or dumpster area located on its Parcel.

(iii) Non-Occupant Signs and Markers. Maintaining, cleaning and replacing any appropriate directional, stop or handicapped parking signs or markers; restriping parking lots and drive lanes as necessary to maintain parking space designation and traffic direction; and keeping clearly marked fire lanes, loading zones, no parking areas and pedestrian cross-walks.

(iv) Lighting. Maintaining, cleaning and replacing Common Area lighting facilities, including light standards, wires, conduits, lamps, ballasts and lenses, time clocks and circuit breakers.

Exterior Building lighting, including any associated with a canopy or other architectural feature forming a part of such Building, shall not be considered a Common Area improvement, but instead the maintenance and replacement of such fixtures, and the cost of illumination, shall be the obligation of the Party upon whose Parcel such fixtures are located.

(v) Landscaping. Maintaining and replacing of all landscape plantings, trees and shrubs in an attractive and thriving condition, trimmed and reasonably weed free. Maintaining and replacing landscape planters and irrigation systems servicing same. Modifying irrigation systems to satisfy governmental water allocation or emergency requirements. If any Occupant requires "special" landscaping (i.e. beyond the standard landscaping requirements for the remainder of the Complex), or if landscaping additions/modifications are required as a result of a Building addition, expansion or remodel, the cost of installation, replacement and maintenance of such special or required landscaping shall be borne solely by such Occupant and shall not be included in Common Area Costs.

(vi) Common Utility Lines. Maintaining, cleaning, replacing, and repairing any and all Common Utility Lines.

(vii) Obstructions. Keeping the Common Area free from any obstructions including those caused by the sale or display of merchandise, unless such obstruction is permitted under the provisions of this OA.

(viii) Sidewalks. Maintaining, cleaning and replacing of all sidewalks and walkways throughout the Common Area, including those adjacent and contiguous to Buildings located within the Complex. Sidewalks and walkways shall be steam cleaned at least monthly and shall be swept at appropriate intervals during such time as shall not interfere with the conduct of business or use of the Common Area.

(ix) Special Events. Coordinating all public events held at the Complex in accordance with the conditions and procedures for such events set forth in Port Ordinance No. 3395 adopted in 1997 as the same may be modified or amended from time to time.

(x) Security. Hiring and supervising third-party security personnel and maintaining the closed-circuit security monitoring system housed in the control room in 66 Franklin Parcel and located throughout the Complex.

(xi) Marketing and Promotion. Coordinating the marketing and promotion of the Complex, including the maintenance of a Complex Internet website.

Operator may hire companies affiliated with it to perform the maintenance and operation of the Common Area, but only if the rates charged by such companies are competitive with those of other companies furnishing similar services in the metropolitan area in or about the Complex, it being agreed that this provision shall be construed strictly against Operator. Each Party hereby grants to Operator, its agents and employees a license to enter upon its Parcel to discharge the duties to operate, maintain and repair the Common Area.

Port shall make available, non-exclusively, to Operator Port's maintenance tools and equipment as specified in Exhibit J, for use by Operator in the repair, maintenance and upkeep of the Common Area.

5.2.2 Common Area Costs. Operator shall expend only such funds as are reasonably necessary for the operation, maintenance, real property taxes and insurance of the

Common Area and shall promptly pay such costs ("Common Area Costs") when incurred. For the purpose of this OA, Common Area Costs shall not include:

- (i) any late charges or fees;
- (ii) any charge for electricity to a Party that separately pays the electrical costs for lighting the Common Area on its Parcel;
- (iii) any costs to clean up or repair the Common Area resulting from the promotional activities of an individual Occupant or from construction, maintenance or replacement of Buildings;
- (iv) Operator's profit, administrative and overhead costs (including but not limited to: office space, equipment and utilities; legal, accounting or administrative services; Operator's personnel who are not permanently located at the Complex);
- (v) entertainment, transportation, meals and lodging of anyone;
- (vi) costs to maintain the Marina; and
- (vii) cost to clean-up or remediate any Hazardous Materials existing on or under the Common Areas, except for minor spills of oil or petroleum products by unknown third parties.

In lieu of Operator's profit, administrative and overhead costs, Operator shall be permitted to charge an amount ("Administration Fee") computed by multiplying the Common Area Costs by five percent (5%). Operator is also being engaged by the Port to operate certain Port-owned assets located within the Complex (the "Retained Assets") pursuant to a separate Assets Management Agreement of even date herewith ("AMA"). The Parties acknowledge that economies of scale would be lost if Operator were terminated before the end of the AMA term pursuant to Section 12.1(d) of the AMA. Accordingly, the Parties hereby agree that the Administrative Fee paid to Operator hereunder shall be increased to ten percent (10%) should Operator be terminated by Port under Section 12.1(d) of the AMA.

**5.2.3 Budget.** Within thirty (30) days following the effective date of this OA, Operator shall provide the Approving Parties an estimated budget for the balance of the current calendar year containing the information required by this Section 5.2.3, and each Party agrees to pay its share thereof in accordance with Section 5.2.5 below. Thereafter, Operator shall, at least ninety (90) days prior to the beginning of each calendar year, submit to the Approving Parties an estimated budget ("Budget") for the Common Area Costs and the Administration Fee for operating and maintaining the Common Area for the ensuing calendar year. The Budget shall be in a form and content reasonably acceptable to the Approving Parties and shall identify separate cost estimates for at least the categories specified under Section 5.2.1 above, plus:

- (i) premium for Commercial General Liability and casualty Insurance covering the Common Area as required by Section 6.4(A) below;
- (ii) rental or purchase of equipment and supplies;

(iii) depreciation or trade-in allowance applicable to items purchased for Common Area purposes; and

(iv) Administration Fee.

If an item of maintenance or replacement is to be accomplished in phases over a period of calendar years, such as resurfacing of the drive and/or parking areas, then the Budget shall separately identify the cost attributable to such year (including the area of the Common Area affected), and shall note the anticipated cost and timing (indicating the area of the Common Area affected) of such phased work during succeeding calendar years. The cost of approved "phased" work shall be paid by the Parties approving the same, or their successors or assigns, as the case may be, notwithstanding that when such work is performed a Party may not then be participating in the joint maintenance of the Complex.

If an Approving Party disapproves the proposed Budget, it shall consult with the other Approving Party and the Operator to establish a final approved Budget. If a Budget is not approved by December 1st of any calendar year, Operator shall have the right to terminate its maintenance obligation with respect to the Common Area located on the Parcels of the disapproving Approving Party by written notice prior to December 10th. If the notice is given, then such Approving Party shall maintain and operate the Common Area on its Parcel and the Operator shall maintain and operate the balance of the Common Area, commencing on the following January 1st. If the notice is not given, then Operator shall continue to maintain and operate the Common Area for the next calendar year, and until the final Budget is approved, Operator shall be permitted to continue to bill the other Parties for the costs of performing its Common Area duties based on the lesser of 105% of the previous year's approved Budget or the proposed Budget for the current year.

Operator shall use its diligent, good faith efforts to operate and maintain the Common Area of the Complex in accordance with the Budget. Notwithstanding the foregoing, Operator shall have the right to make emergency repairs to the Common Area to prevent injury or damage to person or property, it being understood that Operator shall nevertheless advise each Party of such emergency condition as soon as reasonably possible, including the corrective measures taken and the cost thereof. If the cost of the emergency action exceeds \$10,000.00 in Constant Dollars then Operator may submit a supplemental billing to each Party, together with evidence supporting such payment, and each Party shall pay its share thereof within thirty (30) days; if the cost limitation set forth above is not exceeded then such costs shall be included as part of the Common Area Costs at the year end.

5.2.4 Compliance Program. Some or all of the Common Area is subject to, among other governmental and third-party regulations, BCDC Permits, Port bonded indebtedness and Tideland Trust Act requirements. The Approving Parties agree to meet and confer with the Operator at least one hundred twenty (120) days before the end of each calendar year to discuss the nature, scope and cost of a program prepared by Operator to comply with the foregoing requirements ("Compliance Program"). The Port, if requested by Operator, will provide Operator with a written directive setting forth any specific compliance measures to be undertaken under Operator's supervision and control which are affected by the Port's municipal finance requirements. The Port shall deliver to Operator, promptly after receipt, all notices,

correspondence and other written documentation received by the Port relating to Compliance Plan matters. Operator may engage special counsel to advise it on BCDC Permit, Tideland Trust and other Complex-specific matters which exceed the scope of customary shopping center operations, which cost shall be a Common Area Maintenance Cost. Operator shall incorporate the cost of implementing the Compliance Program into the Annual Budget. Notwithstanding the foregoing, nothing contained in this OA is intended as an assignment of the BCDC Permits or a transfer by the Port of its duty to administer the BCDC Permits.

5.2.5 Allocation of Common Area Costs. Common Area Costs and the Administration Fee shall be allocated to each Parcel based upon the formula set forth on Exhibit M. In the event an existing Parcel is divided, the Party causing such division shall prorate the allocation attributable to the existing Parcel between the newly created Parcels, file a recorded declaration confirming such allocation and deliver a copy of such declaration to the Operator and each other Party.

Each Party shall pay to the Operator in equal monthly payments, in advance, its share of the Common Area Costs and the Administrative Fee based either upon the amount set forth in the approved Budget, or if a Budget is not approved, then the lesser of the amount set forth in the unapproved Budget or 105% of the monthly payment established for the prior year. The Operator shall reasonably estimate such costs for the partial year during which its maintenance obligations commence and each Party shall make its first payment in the month following Operator's undertaking of such maintenance and repair of the Common Area. Within ninety (90) days after the end of each calendar year, Operator shall provide each Party with a statement certified by an authorized Person, together with supporting invoices and other materials setting forth the actual Common Area Costs paid by it for the operation and maintenance of such Common Area, the Administration Fee, and such Party's share of the aggregate thereof. If the amount paid by a Party for such calendar year shall have exceeded its share, Operator shall refund the excess to such Party at the time such certified statement is delivered so that no Party shall pay more than its allocated share of the actual Common Area Costs for said year, or if the amount paid by a Party for such calendar year shall be less than its share, such Party shall pay the balance of its share to Operator within thirty (30) days after receipt of such Reconciliation.

Within two (2) years after receipt of any such certified statement, each Party shall have the right to audit Operator's books and records pertaining to the operation and maintenance of the Common Area for the calendar year covered by such certified statement; the Party shall notify Operator of its intent to audit at least fifteen (15) days prior to the designated audit date. In the event that such audit shall disclose any error in the determination of the Common Area Costs, the Administration Fee or in the allocation thereof to a Parcel, an appropriate adjustment shall be made forthwith. The cost of any audit shall be assumed by the auditing Party unless such Party shall be entitled to a refund in excess of three percent (3%) of the amount calculated by Operator as its share for the calendar year, in which case Operator shall pay the cost of such audit, provided however, that Operator shall not be obligated to pay for a Party's audit expense if said Party's auditor's fee was contingency based.

5.2.6 Indemnity.

(A) Operator agrees to defend, protect, indemnify and hold harmless each Party from and against all claims or demands, including any action or proceeding brought thereon, and all costs, losses, expenses and liabilities of any kind, including reasonable attorneys' fees and cost of suit, asserted or incurred in connection with or arising out of the performance, or failure to perform, by Operator of its duties or obligations under this OA with respect to the maintenance and operation of the Common Area; provided however, the foregoing obligation shall not apply to claims caused by the gross negligence or by the willful act or omission of the Party to be indemnified.

(B) Operator agrees to defend, indemnify and hold each Party harmless from and against any mechanic's, materialmen's and/or laborer's liens, and all costs, expenses and liabilities in connection therewith, including reasonable attorneys' fees and court costs, arising out of the maintenance and operation by Operator of the Common Area, and in the event that any Parcel shall become subject to any such lien, Operator shall promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting such bond or other security as shall be required by law to obtain such release and discharge.

(C) Each Owner respectively agrees to indemnify, defend and hold harmless the Operator, its successors and assigns, and all of its and their officers, directors, shareholders, beneficial owners, partners, members, managers, affiliates, agents and employees (collectively, "Operator Indemnitees") against any and all claims, losses, penalties, fines, forfeitures, judgments, reasonable attorneys' fees and related litigation costs, fees and expenses and amounts paid in settlement in connection with any claims against any Operator Indemnitee which result from any act or omission constituting negligence, bad faith or willful misconduct by the Owner or any of their respective officers, agents or employees in connection with the Port's or Developer's respective performances under this Agreement, except as caused by the gross negligence or willful misconduct of Operator.

(D) In addition, the Port agrees to indemnify, defend and hold harmless the Operator Indemnitees against any and all claims, losses, penalties, fines, forfeitures, judgments, reasonable attorneys' fees and related litigation costs, fees and expenses and amounts paid in settlement in connection with any claims against any Operator Indemnitee resulting from or in connection with the existence or release of Hazardous Materials on, in, under or around the Common Area of the Complex, except the Port shall not indemnify Operator Indemnitees for a release of Hazardous Materials which results from any act or omission by Operator or any Operator Indemnitee.

5.2.7 Damage or Destruction. In the event any of the Common Area is damaged or destroyed by any cause whatsoever, whether insured or uninsured, during the term of this OA, other than damage caused by ordinary use or wear and tear, the Party upon whose Parcel such Common Area is located shall repair or restore such Common Area at its sole cost and expense with all due diligence; provided that no Party shall be required to expend more than \$250,000 in Constant Dollars in excess of insurance proceeds which may be available (or which would have been available except for elections relating to deductibles or self-insurance for which the Party shall be responsible to contribute) for such repair or restoration. Notwithstanding the limitation set forth in the preceding sentence, a Party may require another Party to do such restoration work

if the requiring Party has agreed in writing to pay the costs in excess of such sum. Except to the extent limited by Section 6.4(D) hereof, in the event such damage or destruction of Common Area is caused in whole or in part by another Party or third Person, the Party obligated to make such repair or restoration reserves and retains the right to proceed against such other Party or third Person for indemnity, contribution or damages.

5.2.8 Operator Term. The Operator shall serve for a period of five (5) years subject to earlier termination as set forth below. Notwithstanding the foregoing, the initial operator, Ellis Partners LLC shall have the right to serve beyond the five-year term limit subject to its right to terminate after the initial five year term at anytime within thirty (30) days notice or to be removed at anytime for Cause as defined herein.

The Approving Parties may remove the Operator for cause by delivering written notice to Operator setting forth the reason for and the effective date of termination. For purposes of this Section 5.2.8, "Cause" shall be defined as:

- (i) gross negligence or willful misconduct in the performance of Operator's duties;
- (ii) misappropriation by Operator of material funds or property of one of the Parties;
- (iii) The Operator shall apply for or consent to the appointment of a receiver for all or a substantial part of its assets, file a voluntary petition in bankruptcy, or admit in writing its ability to pay its debts as they come due, make a general assignment for the benefit of creditors, file a petition or answer seeking reorganization or arrangement with creditors or liquidators or to take advantage of any insolvency proceeding, or if any order, judgment or decree shall be entered by any court of competent jurisdiction on the application of creditor adjudicating Operator a bankrupt or insolvent or approving a petition seeking reorganization or liquidation of Operator or appointing a receiver, trustee or liquidator for Operator or for all or a substantial portion of its assets, and such judgment, order or decree shall continue unstayed and in effect for any period of ninety (90) consecutive days;

In the event the Operator resigns or is terminated pursuant to Section 5.2.8, the Approving Parties shall appoint another person to be Operator. Upon assumption by a new Operator of the Common Area maintenance duties, the previous Operator shall transfer to the new Operator all applicable books and records relating to such duties and shall provide any and all other information and documentation to effectuate the transfer of responsibility hereunder, including notification to insurers and transfer of insurance policies. The previous Operator shall also transfer to the new Operator any and all equipment and machinery used by the previous Operator in connection with the operation and maintenance of the Common Area hereunder which was paid for as a Common Area Maintenance Cost.

### 5.3 Building Improvements.

(A) After completion of construction, each Party covenants and agrees to maintain and keep the exterior portion of the Buildings, and Exclusive Use Areas, if any, located on its Parcel in first-class condition and state of repair, in compliance with all Legal

Requirements exercising jurisdiction thereover, and in compliance with the provisions of this OA, including the Architectural and Design Theme set forth in Exhibit K.

(B) In the event any of the Buildings are damaged by fire or other casualty (whether insured or not), the Party upon whose Parcel such Building is located shall, subject to governmental regulations and/or insurance adjustment delays, immediately remove the debris resulting from such event and provide a sight barrier, and within a reasonable time thereafter shall either (i) repair or restore the Building so damaged to a complete unit, such repair or restoration to be performed in accordance with all provisions of this OA, or (ii) erect another Building in such location, such construction to be performed in accordance with all provisions of this OA, or (iii) demolish the damaged portion and/or the balance of such Building and restore the cleared area to either a hard surface condition or a landscaped condition in which event the area shall be Common Area until a replacement Building is erected. Such Party shall have the option to choose which of the foregoing alternatives to perform, but such Party shall be obligated to perform one of such alternatives. Such Party shall give notice to each other Party within ninety (90) days from the date of such casualty of which alternative it elects.

(C) In the event any of the Common Area is damaged or destroyed by any cause during the term of the OA, other than damage caused by ordinary wear and tear, the Operator shall cause such Common Area to be repaired or restored with all due diligence. The Port shall cooperate with Operator to expeditiously submit all insurance claims under the Port's casualty insurance (or to process such claims if self-insuring the Common Area) and, promptly after receipt, shall turn over all insurance proceeds to the Operator who shall hold such funds in a separate account. In the event that the costs to repair or restore the damaged Common Area exceeds the available insurance proceeds, the excess costs shall be shared between the Parties on a prorata basis in accordance with the percentages established for the Common Area Costs under Section 5.2.5 hereof; provided that: (i) if the costs of repair or restoration exceed \$25,000, the Approving Parties shall have approved the repair or restoration costs prior to the commencement of construction; and (ii) if the insurance proceeds are insufficient due to the Port's failure to maintain the insurance required under Section 6.4(E), the Port shall bear the burden of 100% of the repair or restoration costs.

## ARTICLE 6

### OPERATION OF THE COMPLEX

#### 6.1 Uses.

(A) No part of the Complex shall be used for any use which is: (i) not approved for this Complex by the City of Oakland where City approval for such use is required, (ii) in violation of the BCDC Permits, (iii) in violation of a Port ordinance which is applicable to the Complex or (iv) inconsistent with the Retail Master Plan.

(B) No use shall be permitted in the Complex which is inconsistent with the operation of a first-class mixed-use development. Without limiting the generality of the foregoing, the following uses shall not be permitted:



- (i) Any use which emits an obnoxious odor, noise, or sound which can be heard or smelled outside of any Building in the Complex;
- (ii) Any operation primarily used as a storage warehouse operation and any assembling, manufacturing, refining, smelting, agricultural, or mining operation;
- (iii) Any mobile home park, trailer court, labor camp, junkyard, or stockyard (except that this provision shall not prohibit the temporary use of construction trailers during periods of construction, reconstruction, or maintenance);
- (iv) Any dumping, disposing, incineration, or reduction of garbage (exclusive of garbage compactors located near the rear of any Building);
- (v) Any fire sale, bankruptcy sale (unless pursuant to a court order) or auction house operation;
- (vi) Any central laundry, dry cleaning plant, or laundromat; provided, however, this prohibition shall not be applicable to pickup and delivery by the ultimate consumer as the same may be found in retail shopping districts in the metropolitan area where the Complex is located; provided, further, however, that in no event shall any on-site dry cleaning or other processing be conducted with the use of solvents or similar materials;
- (vii) Any automobile, truck, trailer or recreational vehicles sales, leasing, display or body shop repair operation;
- (viii) Any veterinary hospital or animal raising facilities (except that this prohibition shall not prohibit pet shops);
- (ix) Any mortuary or funeral home;
- (x) Any establishment selling or exhibiting pornographic materials or drug-related paraphernalia; or
- (xi) Any video game or pinball arcade-type establishment.

(C) No Party shall use, or permit the use of Hazardous Materials on, about, under or in its Parcel, or the Complex, except for Exempt Hazardous Materials. Each Party shall agree to indemnify, protect, defend and hold harmless each other Party from and against all claims, or demands, including any action or proceeding brought thereon and all costs, losses, expenses and liabilities of any kind relating thereto, including, but not limited to costs of investigation, remedial response and reasonable attorneys' fees and costs of suit, arising out of or resulting from any Hazardous Material used or permitted to be used by such Party, whether or not in the ordinary course of business.

The Operator shall not be responsible for the Hazardous Materials Clean Up of the Common Area, except for minor spillage of oil or other petroleum products caused by an unknown third party or a Hazardous Materials release caused by Operator or Operator's agents. A Party shall give prompt notice to the Operator upon obtaining knowledge of any release of

Hazardous Materials on or surrounding the Common Areas and the Operator shall take such action, including notification of the Approving Parties, as Operator deems prudent or is required by Hazardous Materials Laws.

(D) No merchandise, equipment or services, including but not limited to vending machines, promotional devices and similar items, shall be displayed, offered for sale or lease, or stored within the Common Area; provided however, that the foregoing prohibition shall not be applicable to (i) the storage of Occupant shopping carts in the areas designated on the Site Plan; (ii) temporary Complex promotions, (iii) any "ATM" banking facility within a Building Area, (iv) any recycling center required by Legal Requirements, the location of which shall be subject to the Operator's approval, or (v) public telephones.

(E) Unless the Approving Parties agree on a name change, the Complex shall be called "Jack London Square."

(F) Each Party shall use its best efforts to cause employees of the Occupants of its Parcel to park their vehicles in its area(s) designated for "Employee Parking," if any, in the Parking Plan.

(G) This OA is not intended to, and does not, create or impose any obligation on a Party to operate, continuously operate, or cause to be operated a business or any particular business at the Complex or on any Parcel.

## 6.2 Lighting.

(A) After completion of the Common Area lighting system the lighting system shall be fully illuminated each day in accordance with lighting criteria approved by the Approving Parties. During the term of this OA, each Party grants an irrevocable license to each other Party for the purpose of permitting the lighting from one Parcel to incidentally shine on the adjoining Parcel.

## 6.3 Occupant Signs.

(A) No freestanding sign shall be permitted within the Complex unless constructed in accordance with the Sign Plan.

(B) No paper or cardboard signs, temporary signs (exclusive of contractor signs), stickers or decals; provided, however, the foregoing shall not prohibit the placement at the entrance of each Occupant's space a small sticker or decal, indicating hours of business, emergency telephone numbers, acceptance of credit cards, and other similar bits of information.

(C) Notwithstanding anything above to the contrary, each Party shall be permitted to place within the Common Area located on its Parcel directional signs or informational signs such as "Handicapped Parking", the temporary display of leasing information and the temporary erection of one sign identifying each contractor working on a construction job.

(D) Each Party shall have the obligation to operate, maintain, and repair, in a clean, sightly and safe condition, all signs, including components thereof, located upon its Parcel pursuant to Section 6.3 above or the provisions hereof.

Notwithstanding anything in this Section which may appear to be to the contrary, no signs shall be permitted hereunder which would violate the requirements of the City of Oakland, which are applicable to the Complex.

#### 6.4 Insurance.

(A) During the period the Operator is maintaining the Common Area, Operator shall maintain or cause to be maintained in full force and effect Commercial General Liability Insurance covering the Common Area of the Complex with a combined single limit of liability of Five Million Dollars (\$5,000,000.00) in Constant Dollars for bodily injury and property damage, arising out of any one occurrence; each Party shall be a "named insured" under such policy. It is the agreement of the Parties that the insurance maintained by Operator shall be primary insurance and non contributory with the insurance maintained by the Parties pursuant to Section 6.4(B) below, or any other insurance maintained by the Parties. Prior to obtaining or renewing such Commercial General Liability insurance, Operator shall use its best efforts obtain a minimum of two (2) bids from insurance carriers, one of which may be the Port for coverage under its self-insurance program.

(B) Each Party (as to its Parcel only) shall maintain or cause to be maintained in full force and effect Commercial General Liability Insurance with a combined single limit of liability of Five Million Dollars (\$5,000,000.00) in Constant Dollars for bodily injury and property damage, arising out of any one occurrence; the other Parties shall be "additional insureds" by endorsement under such policy as it applies to the insuring Party's Parcel. Each Party agrees to look first to the insurance coverage obtained pursuant to (A) above, and to exhaust all limits thereof before making any claim, other than to preserve rights if coverage under (A) is inadequate, under the insurance carried by a Party hereunder.

Each Party agrees to defend, protect, indemnify and hold harmless each other Party from and against all claims or demands, including any action or proceedings brought thereon, and all costs, losses, expenses and liability of any kind relating thereto, including reasonable attorneys' fees and cost of suit, arising out of or resulting from the injury to or death of any Person, or damage to the property of any Person located on the Parcel owned by each indemnifying Party; provided however, the foregoing obligation shall not apply to claims caused by the gross negligence or willful act or omission of such other Party, its licensees, concessionaires, agents, servants, or employees, or the agents, servants, or employees of any licensee or concessionaire thereof.

(C) Prior to commencing any construction activities within the Complex, the Party or the Operator contracting for or undertaking construction activity shall obtain or require contractor to obtain and thereafter maintain so long as such construction activity is occurring, at least the minimum insurance coverages in Constant Dollars set forth below:

(i) Workers' Compensation And Employer's Liability Insurance:

- (a) Worker's compensation insurance as required by any applicable law or regulation.
- (b) Employer's liability insurance in the amount of \$1,000,000 each accident for bodily injury, \$1,000,000 policy limit for bodily injury by disease and \$1,000,000 each employee for bodily injury by disease.

(ii) General Liability Insurance: Commercial General Liability insurance covering all operations by or on behalf of the contractor, which shall include the following minimum limits of liability and coverages:

(a) Required coverages:

- (1) Premises and Operations,
- (2) Products and Completed Operations;
- (3) Contractual Liability, insuring the indemnity obligations assumed by a contractor under the contractor documents between contractor and Owner,
- (4) Broad Form Property Damage (including Completed Operations);
- (5) Explosion, Collapse and Underground Hazards;
- (6) Personal Injury Liability; and
- (7) Independent Contractor coverage (typical to ISO Commercial General Liability Forms).

(b) Limits of liability:

- (1) \$5,000,000 each occurrence (for bodily injury and property damage);

(iii) Automobile Liability Insurance: Any automobile liability insurance (bodily injury and property damage liability) including coverage for owned, hired, and non-owned automobiles. The limits of liability shall not be less than \$1,000,000 combined single limit each accident for bodily injury and property damage combined. The contractor shall require each of his subcontractors to include in their liability insurance policies coverage for Automobile Contractual Liability.

If the construction activity involves the use of another Party's Parcel, then the owner of such Parcel shall be an additional insured by endorsement and such insurance shall provide that the same shall not be canceled, or reduced in amount or coverage below the requirements of this OA, without at least thirty (30) days prior written notice to each insured. If such insurance is canceled or expires then the constructing Party shall immediately stop all work on or use of the other Party's Parcel until either the required insurance is reinstated or replacement insurance obtained.

(D) Each Party shall carry, or cause to be carried, property insurance with "all-risk" or "special form" coverage, in the amount of 100% of full replacement cost of any Building existing as of the date of this OA or subsequently constructed on its Parcel and for so long as such Building exists (excluding footings, foundations or excavations).

Each Party (the "Releasing Party") hereby releases and waives for itself, and each Person claiming by, through or under it, each other Party (the "Released Party") from any liability for any loss or damage to all property of such Releasing Party located upon any portion of the Complex, which loss or damage is of the type covered by the insurance required to be maintained under this Section 6.4(D), irrespective either of any negligence on the part of the Released Party which may have contributed to or caused such loss, or of the amount of such insurance required or actually carried, including any deductible or self insurance reserve. Releasing Party agrees to use its reasonable efforts to obtain, if needed, appropriate endorsements to its policies of insurance, and to the policies of insurance carried by its occupants, with respect to the foregoing release; provided, however, that failure to obtain such endorsements shall not affect the release hereinabove given.

Each Party agrees to defend, protect, indemnify and hold harmless each other Party from and against all claims or demands, including any action or proceeding brought thereon, and all costs, losses, expenses, and liabilities of any kind relating thereto, including reasonable attorneys' fees and cost of suit asserted by or through any Permittees of the indemnifying Party's Parcel for any loss or damage to the property of such Permittee located upon the indemnifying Party's Parcel, which loss or damage would have been covered by the insurance required to be maintained under this Section 6.4(D), irrespective of any negligence on the part of any other Party which may have contributed to or caused such loss.

(E) "All Risk" or "Special Form" Insurance.

(i) While there exists Common Areas Subject to Bonds, the Parties agree that the Port shall obtain and carry or caused to be carried property insurance with "all risk" or "special form" coverage, in the amount of 100% of full replacement cost of the Common Areas. The cost of said casualty insurance shall be included in the Common Area Costs.

(ii) When there are no longer any Common Areas Subject to Bonds, the Parties agree that the Port shall obtain and carry or caused to be carried property insurance with "all risk" or "special form" coverage, in the amount of 100% of full replacement cost of the Common Areas. The cost of said casualty insurance shall be included in the Common Area Costs, provided that the Approving Parties have approved of the cost of such insurance. In the event that the Approving Parties do not approve the cost of such insurance, the Operator shall

obtain and carry or caused to be carried property insurance with "all risk" or "special form" coverage, in the amount of 100% of full replacement cost of the Common Areas. The cost of said casualty insurance shall be included in the Common Area Costs.

(F) All insurance required by Section 6.4 shall be procured from companies authorized to do business in the state where the Complex is located and shall be rated by Best's Insurance Reports not less than A+/VII. In the event that insurance market conditions are such that obtaining insurance from an "A+" rated company is commercially unreasonable (due to reduction of the number of "A+" rated companies or the cost of insurance from "A+" companies is prohibitive, in the good faith judgment of the Party) the Party obligated to obtain the insurance shall notify the Operator and the Approving Parties of such circumstance and the parties shall meet and confer in good faith to modify the insurance company rating requirement. All insurance may be provided under (i) an individual policy covering this location, (ii) a blanket policy or policies which includes other liabilities, properties and locations of such Party; provided, however, that if such blanket commercial general liability insurance policy or policies contain a general policy aggregate of less than \$20,000,000 in Constant Dollars, then such insuring Party shall also maintain excess liability coverage necessary to establish a total liability insurance limit of \$20,000,000 in Constant Dollars, (iii) a plan of self-insurance, provided that any Party so self-insuring complies with the provisions of Section 6.4(H) below, or (iv) a combination of any of the foregoing insurance programs. To the extent any deductible is permitted or allowed as a part of any insurance policy carried by a Party in compliance with this Section 6.4, such Party shall be deemed to be covering the amount thereof under an informal plan of self-insurance; provided, however, that in no event shall any deductible exceed \$50,000.00 in Constant Dollars unless such Party complies with the requirements regarding self-insurance pursuant to Subclause 6.4(H) below. Each Party agrees to furnish to the Operator and the Operator agrees to furnish to the Approving Parties a certificate(s) of insurance, or statement of self-insurance, as the case may be, evidencing that the insurance required to be carried by such Person is in full force and effect.

(G) The insurance required pursuant to (A) and (B) above shall include the following provisions:

(i) shall provide that the policy may not be canceled or reduced in amount or coverage below the requirements of this OA, without at least thirty (30) days prior written notice by the insurer to each insured and to each additional insured;

(ii) shall provide for severability of interests;

(iii) shall provide that an act or omission of one of the insureds or additional insureds which would void or otherwise reduce coverage, shall not reduce or void the coverage as to the other insureds or additional insured; and

(iv) shall provide for contractual liability coverage with respect to the indemnity obligation set forth in Sections 6.4(A) and 6.4(B).

(H) Each Party may self-insure with respect to all or any portion of the insurance requirements if such Party has both net current assets and a tangible net worth of

\$100,000,000 in Constant Dollars or more as disclosed on its latest annual audited statement and subject to other requirements as the Port Risk Manager may reasonably impose.

If a Party desires to self-insure with respect to all or a part of the above-required insurance, it shall submit the following to the Operator:

(i) Evidence in form of a letter executed by such Party's Director of Risk Management (or equivalent), confirming that such Party has a formal policy of self-insurance for the amount required to be insured;

(ii) A letter from such Party indicating that such Party meets the net assets and tangible net worth tests described above;

(iii) The name and address of legal counsel and claims representatives under the self-insurance program;

(iv) With respect to workers' compensation coverage, a certificate to self-insure from the California Department of Industrial Relations; and

(v) The latest audited annual statement.

(I) Each Party hereby releases each other Party from any claims for damage and/or injury to any part of the Complex, a Building or other improvements located on a Parcel 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 or endorsed 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.

6.5 Taxes and Assessments. Each Party shall pay, or cause to be paid prior to delinquency, all taxes and assessments with respect to its Parcel, the Building, and other improvements located thereon, and any personal property owned or leased by such Party in the Complex, provided that if the taxes or assessments or any part thereof may be paid in installments, the Party may pay each such installment as and when the same becomes due and payable. Nothing contained in this subsection shall prevent any Party from contesting at its cost and expense any such taxes and assessments with respect to its Parcel in any manner such Party elects, so long as such contest is maintained with reasonable diligence and in good faith. At the time as such contest is concluded (allowing for appeal to the highest appellate court), the contesting Party shall promptly pay all such taxes and assessments determined to be owing, together with all interest, penalties and costs thereon.

6.6 Exclusive Use Areas. Land within the Common Area shall remain Common Area for the term of this OA, unless removal from the Common Area is approved by the Approving Parties, which approval may be withheld in the sole and absolute discretion of either Approving Party; provided however, such approval shall not be withheld if removal is required under a BCDC Permit, and provided further that the consent rights shall not constitute an assignment of any applicable permits. Notwithstanding the preceding sentence, the Port Approving Party shall

not approve the removal of any land from the Common Area Subject to Bonds if in the opinion of Bond Counsel such approval could adversely affect the exclusion of interest on any Port bonded indebtedness from gross income for federal tax purposes. The Operator shall have no right or power to grant any additional Exclusive Use Areas over the Common Area Subject to Bonds without the express written permission of the Port Approving Party which may be based upon the opinion of Bond Counsel. In the event that the Operator purports to grant any additional Exclusive Use Areas or other rights of use greater than those of the general public over the Common Area Subject to Bonds without the express written permission of the Port Approving Party, such grant shall be null and void. The Operator shall have the right to approve from time to time additional Exclusive Use Areas for use by an Occupant for outdoor restaurant seating, trash areas or such other uses as are consistent with the terms of this OA; provided that (i) no more than ten percent (10%) in the aggregate of the Common Area (excluding Common Area Subject to Bonds) shall be designated Exclusive Use Areas without the consent of the Approving Parties and (ii) the Port Approving Party shall have the exclusive right to approve new or expanded Exclusive Use Areas in the Common Area Subject to Bonds, which approval may be conditioned on receipt by the Port of an opinion of its Bond Counsel to the effect that such additional Exclusive Use Areas will not adversely affect the exclusion of interest on any Port bonded indebtedness from gross income for federal tax purposes. Any approval of the Port Approving Party or both Approving Parties required under this Section 6.6 shall be requested in writing by the Operator and shall contain: (a) the nature of the exclusive use, (b) the name of the Occupant, (c) the dimension of the proposed Exclusive Use Area and (d) a site map indicating the location of the proposed area (the "EUA Request"). If an Approving Party fails to respond to the EUA Request within twenty-one (21) days, the Operator shall deliver, in writing, a second request. An Approving Party's failure to respond to the second request within two (2) business days shall be deemed said Approving Party's approval of the proposed Exclusive Use Area; provided, however, no approval by the Port Approving Party shall be deemed to have been given with respect to a request for exclusive use of any portion of the Common Area Subject to Bonds unless affirmatively approved in writing by the Port Approving Party.

#### 6.7 Common Areas Subject to Bonds.

(A) The Operator shall not take, or cause or permit to be taken by it or any party under its control any action regarding the Common Area Subject to Bonds (including the granting of Exclusive Use Areas), other than the Operator carrying out the duties specified in Section 5.2.1, without the express written permission of the Port Approving Party, which may be based upon the opinion of Bond Counsel ("Bond Compliance").

(B) - The Port may, at any time, provide the Operator with a written directive setting forth (i) any specific bond compliance measures to be undertaken under Operator's supervision and control of the Common Area Subject to Bonds or (ii) any specific actions undertaken under the Operator's supervision and control which must be ceased for reasons of bond compliance of the Common Area Subject to Bonds ("Port Directive"). The Port Directive may be based on the opinion of Bond Counsel.

(C) The failure of the Operator to comply with a Port Directive within ten (10) days (or begin to diligently prosecute to completion the compliance with a Port Directive if such compliance cannot be completed in ten (10) days) shall constitute a default of this OA by the



Operator and may result in the termination of the Operator's term at the Port's sole election, notwithstanding the provisions of Section 5.2.8. The Operator may comply with the Port Directive under protest and request arbitration of the matter under Section 7.2 of this OA.

(D) In the event that the Operator receives a Port Directive that addresses a violation of Section 6.7(A), the Operator must comply with such Port Directive. If the Operator receives a second Port Directive that addresses a violation of Section 6.7(A) within any five (5) year period, the Operator must comply with such Port Directive and the Operator will be liable for liquidated damages to the Port in the amount of twenty five thousand dollars (\$25,000) (in Constant Dollars). Such liquidated damages will be deducted from the Administration Fee under Section 5.2.2. The Operator may pay the liquidated damages under protest and request arbitration of the second Port Directive under Section 7.2 of this OA. If the Operator receives a third Port Directive that addresses a violation of Section 6.7(A) within any five (5) year period, the Operator must comply with such Port Directive and the Operator will be liable for liquidated damages to the Port in the amount of fifty thousand dollars (\$50,000) (in Constant Dollars). Such liquidated damages will be deducted from the Administration Fee under Section 5.2.2. The Operator may pay the liquidated damages under protest and request arbitration of the third Port Directive under Section 7.2 of this OA. If the Operator receives a fourth Port Directive that addresses a violation of Section 6.7(A) within any five (5) year period, the Operator must comply with such Port Directive and it shall constitute a default of this OA by the Operator and may result in the termination of the Operator's term at the Port's sole election, notwithstanding the provisions of Section 5.2.8. The Operator may request arbitration of the fourth Port Directive under Section 7.2 of this OA and the Operator's termination will be stayed pending the outcome of such arbitration.

(E) The amounts specified in Section 6.7(D) are intended as liquidated damages for the violations of Section 6.7, and shall be payable in lieu of actual damages (other than attorneys fees and costs) for such violation. The parties acknowledge that the Port will incur financial risk associated with bond compliance and additional costs associated with evaluating bond compliance. The parties further acknowledge that it would be impracticable or extremely difficult to fix the actual damages which the Port would sustain as a result of bond compliance issues, and agree that the liquidated damages amounts specified in this Section represent a reasonable estimate of the damage the Port would sustain.

THEREFORE, IN PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THIS AGREEMENT WAS MADE.

Initials:

  
The Port

  
CEP

6.8 Common Area Reports.

(A) On or before the first day of the months of January and July of every year of the Term of this OA, the Operator shall submit to the Port Approving Party a report detailing

the uses of the Common Areas Subject to Bonds ("Common Area Reports"). The Common Area Reports shall contain the following:

- (i) A detailed list of any and all Exclusive Uses of the Common Area Subject to Bonds during the period since the last Common Area Report;
- (ii) A detailed list of any and all rights to use or actual use of the Common Area Subject to Bonds which are greater than the rights of the general public during the period since the last Common Area Report;
- (iii) A detailed list of any and all construction on the Common Area Subject to Bonds during the period since the last Common Area Report;
- (iv) A detailed list identifying any and all changes in the above lists from the prior Common Area Report during the period since the last Common Area Report; and
- (v) A detailed list and accompanying explanation of any and all actions taken in connection with or regarding the Common Area Subject to Bonds (other than the Operator carrying out the duties specified in Section 5.2.1) without the express written permission of the Port during the period since the last Common Area Report.

## ARTICLE 7

### MISCELLANEOUS

#### 7.1 Default.

(A) The occurrence of any one or more of the following events shall constitute a material default and breach of this OA by the non-performing Party (the "Defaulting Party"):

(i) The failure to make any payment required to be made hereunder within ten (10) days of the due date, or

(B) The failure to observe or perform any of the covenants, conditions or obligations of this OA, other than as described in (i) above, within thirty (30) days after the issuance of a notice by the Operator or another Party (the "Non-Defaulting Party") specifying the nature of the default claimed, or such longer period as shall be reasonably necessary to effect such cure if the nature of such condition will take longer than thirty (30) days to complete, provided the Defaulting Party commences such cure within such thirty (30) day period and diligently pursues the same thereafter. With respect to any default under (A)(ii) above, any Non-Defaulting Party shall have the right, but not the obligation, to cure such default by the payment of money or the performance of some other action for the account of and at the expense of the Defaulting Party; provided, however, that in the event the default shall constitute an emergency condition, the Non-Defaulting Party, acting in good faith, shall have the right to cure such default upon such advance notice as is reasonably possible under the circumstances or, if necessary, without advance notice, so long as notice is given as soon as possible thereafter. To effectuate any such cure, the Non-Defaulting Party shall have the right to enter upon the Parcel of the Defaulting Party (but not into any Building) to perform any necessary work or furnish any

necessary materials or services to cure the default of the Defaulting Party. Each Party shall be responsible for the default of its Occupants. In the event any Non-Defaulting Party shall cure a default, the Defaulting Party shall reimburse the Non-Defaulting Party for all costs and expenses incurred in connection with such curative action, plus interest as provided herein, within ten (10) days of receipt of demand, together with reasonable documentation supporting the expenditures made. Any notice sent pursuant to this section to a Defaulting Party shall simultaneously be sent to any first priority mortgagee of the Defaulting Party which has previously requested any other Party, in writing, to forward such notices to it, and that first priority mortgagee shall have the right to cure the default on behalf of the Defaulting Party within the time specified above for a cure by the Defaulting Party.

(C) If not timely paid, (i) any amounts required by this OA to be paid by a Party and (ii) costs and expenses accruing and/or assessed pursuant to Section 7.1(B) above shall constitute a lien against the Defaulting Party's Parcel. The lien shall attach and take effect only upon recordation of a claim of lien in the office of the recorder of the County in which the Complex is located, by the Party making the claim. The claim of lien shall include the following:

- (i) The name of the lien claimant;
- (ii) A statement concerning the basis for the claim of lien and identifying the lien claimant as a curing Party;
- (iii) An identification of the owner or reputed owner of the Parcel or interest therein against which the lien is claimed;
- (iv) A description of the Parcel against which the lien is claimed;
- (v) A description of the work performed which has given rise to the claim of lien and a statement itemizing the amount thereof; and
- (vi) A statement that the lien is claimed pursuant to the provisions of this OA, reciting the date, book and page of recordation hereof. The notice shall be duly verified, acknowledged and contain a certificate that a copy thereof has been served upon the Party against whom the lien is claimed, by personal service or by mailing pursuant to Section 7.5 below. The lien so claimed shall attach from the date of recordation solely in the amount claimed thereby and may be enforced in any judicial proceedings allowed by law, including without limitation, suit in the nature of a suit to foreclose a mortgage/deed of trust or mechanic's lien under the applicable provisions of the law of the State in which the Complex is located.

Notwithstanding the foregoing provisions of this Section 7.1(C) the lien referred to in this Section shall be subordinate to any first mortgage or deed of trust or similar instrument now or hereafter affecting the Defaulting Party's Parcel, recorded prior to the lien and any purchaser at any foreclosure or trustee sale (as well as any grantee by deed in lieu of foreclosure or trustee sale) under any such mortgage or deed of trust shall take title subject only to the liens which predate such mortgage or which accrue after acquisition of title by the purchaser or grantee.

(D) With respect to a default regarding Port Directives, such provisions are addressed in Section 6.7.

## 7.2 Arbitration.

(A) Disputes Covered. Unless expressly otherwise stated, all disputes between the Parties concerning or arising under this OA shall be resolved by arbitration as provided herein and shall be enforceable in accordance with the California Arbitration Act, California Code of Civil Procedure Sections 1280, et seq. Notwithstanding the foregoing, any Party may seek and obtain a temporary restraining order and/or preliminary injunction in order to maintain the status quo or cease the offending action pending the outcome of an arbitration by filing a complaint and motion (ex-parte or otherwise) for injunctive relief in the Superior Court of the State of California in the County of Alameda. Regardless of whether the court grants or denies the requested relief, the Parties shall immediately refer the matter to arbitration (whether already or yet to be initiated) as provided herein, the litigation initiated by the filed complaint shall be stayed pending the outcome of the arbitration, and any judgment rendering permanent any temporary or preliminary injunctive relief shall be left to the arbitrators and enforced by the court only on petition for confirmation of the arbitrators' award. No eminent domain proceeding of any nature initiated by the Port or the City of Oakland shall be subject to arbitration under this provision.

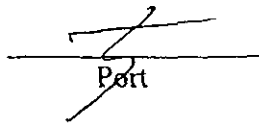
(B) Arbitration Procedure. Prior to submitting any matter to arbitration, the Party seeking arbitration shall request in writing a meeting to be attended by all Parties, (which request shall describe in reasonable detail the dispute in question), for the purpose of resolving such dispute. If the matter is not resolved at such meeting, or the meeting is not held within twenty-five (25) days of the written request therefor other than due to the fault of the requesting Party, then any Party may within forty-five (45) days from the date of the requesting Party's original request initiate arbitration. Arbitration shall be carried out by a panel of three (3) neutral arbitrators selected in accordance with the rules of the American Arbitration Association and who, thereafter, shall resolve the dispute in accordance with such rules and in accordance with the provisions of the next paragraph. The arbitration shall be conducted in Oakland, California, or such other place as the parties mutually agree.

Within forty-five (45) days after such appointment, said arbitrators shall hold a hearing and review evidence as is necessary to determine the matter in-dispute and shall resolve the same and all questions pertaining thereto as promptly thereafter as is practicable under the circumstances in accordance with the Commercial Arbitration Rules of the American Arbitration Association (including provisions relating to hearings, notice, presentation of evidence and witnesses and discovery). A majority decision shall be final at any stage of the proceeding. The arbitration proceedings shall be governed exclusively by the substantive and procedural laws of the State of California applicable to contracts made in and between residents of and to be performed wholly within California. Each party shall pay an equal share of the fees and expenses of the person serving as an arbitrator and each party's own attorneys and witnesses, except that in any bankruptcy, appeal, collection, enforcement or other legal proceedings to enforce the arbitration award, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable attorneys' fees and costs and the fees and expenses incurred by the prevailing party in enforcing the arbitration. The arbitrator shall have the power to award damages, injunctive relief and all other remedies otherwise available at law or in equity, except that no party shall be entitled to demand, sue for or collect lost profits or other special, consequential or punitive damages for a breach of or for any act or omission in connection with this OA. The arbitrator shall not vary the provisions of this OA. The arbitrator shall have the

power to determine whether any issue is arbitrable under this Section 7.2. The award of the arbitrator shall be in writing, shall be accompanied by a written opinion explaining the basis or reason for the decision and shall be communicated promptly to each party in writing. The decision of the arbitrators shall be binding upon the parties to such arbitration and may be enforced by subsequent legal or equitable proceedings. In any arbitration proceeding pursuant to this Section 7.2, only arbitrators having appropriate certification and at least ten (10) years' experience in the substantive area subject to arbitration shall be selected as arbitrators.

(C) NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THIS "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THIS "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THIS "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION:

  
\_\_\_\_\_  
Party

  
\_\_\_\_\_  
HSPCER HEC

7.3 Interest.

Any time a Party or Operator shall not pay any sum payable hereunder to another within five (5) days of the due date, such delinquent Party or Operator shall pay interest on such amount from the due date to and including the date such payment is received by the Person entitled thereto, at the lesser of:

(i) The highest rate permitted by law to be paid on such type of obligation by the Person obligated to make such payment or the Person to whom such payment is due, whichever is less; or

(ii) Three percent (3%) per annum in excess of the prime rate from time to time publicly announced by Bank of America or its successor.

7.4 Estoppel Certificate.

Each Party and Operator agrees that upon written request (which shall not be more frequent than three (3) times during any calendar year) of any other Party or Operator, it will issue, within ten (10) days following the request to such Person, or its prospective

mortgagee or successor, an estoppel certificate stating to the best of the issuer's knowledge that as of such date:

(i) whether it knows of any default under this OA by the requesting Person, and if there are known defaults, specifying the nature thereof;

(ii) whether this OA has been assigned, modified or amended in any way by it and if so, then stating the nature thereof; and

(iii) whether this OA is in full force and effect.

Such statement shall act as a waiver of any claim by the Person furnishing it to the extent such claim is based upon facts contrary to those asserted in the statement and to the extent the claim is asserted against a bona fide encumbrancer or purchaser for value without knowledge of facts to the contrary of those contained in the statement, and who has acted in reasonable reliance upon the statement. The issuance of an estoppel certificate shall in no event subject the Person furnishing it to any liability for the negligent or inadvertent failure of such Person to disclose correct and/or relevant information (but it shall estop such Person from making assertions contrary to those set forth in the certificate for the period covered by the certificate), nor shall such issuance be construed to waive any rights of the issuer to either request an audit of the Common Area Costs for any year it is entitled to do so, or challenge acts committed by other Parties for which approval by the Approving Parties was required but not sought or obtained.

#### 7.5 Notices.

All notices, demands and requests (collectively the "notice") required or permitted to be given under this OA must be in writing and shall be deemed to have been given as of the date such notice is (i) delivered to the Party intended, (ii) delivered to the then designated address of the Party intended, (iii) rejected at the then designated address of the Party intended, provided such notice was sent prepaid, or (iv) sent via facsimile so long as the original copy is also sent via (i) or (ii) above on the same day. The initial addresses of the Parties shall be:

Port: Port of Oakland  
530 Water Street  
Oakland, California 94607  
Attn: Director of Commercial Real Estate  
Telephone: (510) 272-1210  
Facsimile: (510) 839-2793

With a copy to: Port Attorney  
530 Water Street  
Oakland, California 94607  
Attn: David Alexander, Esq.  
Telephone: (510) 272-1344  
Facsimile: (510) 444-2093

With a copy to: Plageman, Lund & Miller LLP  
1999 Harrison Street, Suite 2700

Oakland, California 94612  
Attn: William H. Plageman, Jr., Esq.  
Telephone: (510) 273-8553  
Facsimile: (510) 273-8559

CEP-JLS I: CEP-JLS I LLC  
c/o Ellis Partners LLC  
433 California Street, Suite 610  
San Francisco, CA 94104  
Attn: Melinda Ellis Evers  
Telephone: (415) 391-9800  
Facsimile: (415) 391-4711

With a copy to: Crosby, Heafey, Roach & May  
Professional Corporation  
Two Embarcadero Center, Suite 2000  
San Francisco, CA 94111  
Attn: Sherry Geyer, Esq.  
Telephone: (510) 466-6743  
Facsimile: (510) 273-8832

Operator: As from time to time designated.

Initial Operator: Ellis Partners LLC  
433 California Street, Suite 610  
San Francisco, CA 94104  
Attn: Melinda Ellis Evers  
Telephone: (415) 391-9800  
Facsimile: (415) 391-4711

Initial Developer  
Tract Approving  
Party: Jack London Square Partners, LLC  
c/o Ellis Partners LLC  
433 California Street, Suite 610  
San Francisco, CA 94104  
Attn: Melinda Ellis Evers  
Telephone: (415) 391-9800  
Facsimile: (415) 391-4711

Upon at least ten (10) days prior written notice, each Person shall have the right to change its address to any other address within the United States of America.

#### 7.6 Approval Rights.

(A) In any instance in which a Party or the Approving Parties shall be requested to consent to or approve of any matter with respect to which such Party's or Approving Parties', as the case may be, consent or approval is required by any of the provisions of this OA, such consent or approval shall be given in writing, and shall not be unreasonably withheld or delayed, unless the provisions of this OA with respect to a particular consent or approval shall

expressly provide that the same shall be given or refused in the sole judgment or discretion of any Party or the Approving Parties.

(B) Unless provision is made for a specific time period, each response to a request for an approval or consent required to be considered pursuant to this OA shall be given by the Person to whom directed within thirty (30) days of receipt. Each disapproval shall be in writing and, subject to (A) above, the reasons shall be clearly stated. If a response is not given within the required time period, the requesting party shall send a second notice and if a response is not given within two (2) business days, the requested Party shall be deemed to have given its approval if the second notice stated in capitalized letters that failure to respond within the applicable time period will be deemed an approval; provided, however, that the failure of the Port to respond to the second notice where the approval concerns Common Area Subject to Bonds shall be deemed disapproval.

(C) If the Approving Parties' approval is requested, unanimous approval must be given.

(D) The Parties agree to carry out their respective obligations and approval rights under this OA in good faith and with fair dealing.

7.7 Condemnation. In the event any portion of the Complex shall be condemned, or conveyed under threat of condemnation, the award shall be paid to the Party owning the land or the improvements taken, and the other Parties hereby waive and release any right to recover any value attributable to the Property interest so taken, except that (i) if the taking includes improvements belonging to more than one Party, such as Utility Lines or signs, the portion of the award allocable thereto shall be used to relocate, replace or restore such jointly owned improvements to a useful condition, and (ii) if the taking includes easement rights which are intended to extend beyond the term of this OA, the portion of the award allocable to each such easement right shall be paid to the respective grantee thereof. In addition to the foregoing, if a separate claim can be filed for the taking of any other property interest existing pursuant to this OA which does not reduce or diminish the amount paid to the Party owning the land or the improvement taken, then the owner of such other property interest shall have the right to seek an award for the taking thereof. Except to the extent they burden the land taken, no easement or license set forth in this OA shall expire or terminate based solely upon such taking.

7.8 Binding Effect. The terms of this OA and all easements, rights, covenants, and restrictions granted hereunder shall constitute covenants running with the land and shall bind the real estate described herein and inure to the benefit of and be binding upon the signatories hereto and their respective successors and assigns who become Parties hereunder. This OA is not intended to supersede, modify, amend, or otherwise change the provisions of any prior instrument affecting the land burdened hereby.

7.9 Construction and Interpretation.

(A) This OA and the Exhibits hereto together with that certain side letter dated as of even date herewith executed by the Port and CEP-JLS I contain all the representations and the entire agreement between the Parties with respect to the subject matter hereof. Any prior



negotiations, correspondence, memoranda or agreements are superseded in total by this OA and Exhibits hereto. This OA has been fully negotiated at arms length between the signatories hereto, and after advice by counsel and other representatives chosen by such signatories, and such signatories are fully informed with respect thereto; no such signatory shall be deemed the scrivener of this OA; and, based on the foregoing, the provisions of this OA and the Exhibits hereto shall be construed as a whole according to their common meaning and not strictly for or against any Party. With respect to the Port and JLSP, this OA is part of an integrated transaction which includes Ground Leases and the Amended AAGLI.

(B) Whenever required by the context of this OA, (i) the singular shall include the plural, and vice versa, and the masculine shall include the feminine and neuter genders, and vice versa and (ii) use of the words "including," "such as," or words of similar import, when following any general term, statement or matter shall not be construed to limit such statement, term or matter to specific items, whether or not language of non-limitation, such as "without limitation," or "but not limited to," are used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest scope of such statement, terms or matter.

(C) The captions preceding the text of each article and section are included only for convenience of reference. Captions shall be disregarded in the construction and interpretation of this OA. Capitalized terms are also selected only for convenience of reference and do not necessarily have any connection to the meaning that might otherwise be attached to such term in a context outside of this OA.

(D) Invalidity of any of the provisions contained in this OA, or of the application thereof to any person by judgment or court order shall in no way affect any of the other provisions hereof or the application thereof to any other person and the same shall remain in full force and effect.

(E) This OA may be executed in several counterparts each of which shall be deemed an original. The signatures to this OA may be executed and notarized on separate pages, and when attached to this OA shall constitute one complete document.

**7.10 Negation of Partnership and Assignment.** None of the terms or provisions of this OA shall be deemed to create a partnership, joint venture or joint enterprise between or among the Parties in their respective businesses or otherwise, nor shall it be deemed to constitute an assignment of any underlying permits. Each Party shall be considered a separate owner, and no Party shall have the right to act as an agent for another Party, unless expressly authorized to do so herein or by separate written instrument signed by the Party to be charged.

**7.11 Amendments.** This OA may be amended by, and only by, a written agreement signed by both of the then current Approving Parties and shall be effective only when recorded in the county and state where the Complex is located. Notwithstanding the foregoing power of amendment, no such amendment shall impose any materially greater obligation on, or materially impair any right of, a Party or its Parcel without the consent of such Party. Each Approving Party shall timely consider, approve or disapprove any proposed amendment to this OA in its sole discretion. No consent to the amendment of this OA shall ever be required of any Occupant

or Person other than the Approving Parties (or a Party, as provided in the second sentence of this Section), nor shall any Occupant or Person other than the Approving Parties or the Operator have any right to enforce any of the provisions hereof.

The Site Plan may be amended from time to time by the mutual agreement of JLSP and the Port during such periods as JLSP Owns or has the right under the Amended AAGLI to acquire a Developer Tract Parcel, and during all other periods the Site Plan may be amended by approval of the Approving Parties. Amendments to the Site Plan may alter, for example but not by way of limitation, the number and/or boundaries of the Parcels and locations, configurations and/or other details of parking areas, landscaping areas, walkways and Building Areas, subject always to compliance with all applicable Legal Requirements. Notwithstanding the foregoing, no Site Plan amendment may alter the boundaries or Building Area of any Parcel without the written consent of the Owner of said Parcel which consent may be withheld in Owner's sole discretion. Any amendment of the Site Plan shall only be effective upon recordation of an appropriate notice of amendment and copy of the amended Site Plan.

7.12 Not a Public Dedication. Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Complex or of any Parcel or the Common Area or portion thereof to the general public, or for any public use or purpose whatsoever. Except as herein specifically provided, no right, privileges or immunities of any Party hereto shall inure to the benefit of any third-party Person, nor shall any third-party Person be deemed to be a beneficiary of any of the provisions contained herein.

7.13 Force Majeure Causes. Force Majeure Causes are those causes which would prevent a Party from performing any material act hereunder, by acts of God, acts of terrorism, fire, earthquakes, floods, unusually severe weather, governmental action (excluding Public Agency Approvals as defined in the Amended AAGLI), strikes, labor difficulties that have the same effect as a strike, acts of war, riot and civil commotion, or by any similar cause reasonably beyond the control of such Party ("Force Majeure Causes").

For all purposes of this OA, a Party whose performance of its obligations hereunder is hindered or affected by Force Majeure Causes shall not be considered in breach of or in default in its obligations hereunder to the extent of any delay resulting from Force Majeure Causes. A Party seeking an extension of time pursuant to the provisions of this Section shall give notice to the Operator and the Approving Parties describing with reasonable particularity (to the extent known) the facts and circumstances constituting Force Majeure Causes within a reasonable time (but not more than thirty (30) days) after determining that such Force Majeure Cause shall affect or hinder the Party's performance under this Agreement. The Party seeking an extension of time pursuant to this Section shall have the affirmative duty to diligently pursue resolution of the Force Majeure Cause to the extent such resolution is possible.

7.14 Mitigation of Damages. In all situations arising out of this OA, all Parties shall attempt to avoid and mitigate the damages resulting from the conduct of any other Party. Each Party hereto shall take all reasonable measures to effectuate the provisions of this OA.

7.15 OA Shall Continue Notwithstanding Breach. It is expressly agreed that no breach of this OA shall (i) entitle any Party to cancel, rescind, or otherwise terminate this OA, or

(ii) defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value as to any part of the Complex. However, such limitation shall not affect in any manner any other rights or remedies which a Party may have hereunder by reason of any such breach.

7.16 Time. Time is of the essence of this OA, except as provided in Section 7.13 hereof.

7.17 No Waiver. The failure of any Party to insist upon strict performance of any of the terms, covenants or conditions hereof shall not be deemed a waiver of any rights or remedies which that Party may have hereunder, at law or in equity and shall not be deemed a waiver of any subsequent breach or default in any of such terms, covenants or conditions. No waiver by any Party of any default under this OA shall be effective or binding on such Party unless made in writing by such Party and no such waiver shall be implied from any omission by a Party to take action in respect to such default. No express written waiver of any default shall affect any other default or cover any other period of time other than any default and/or period of time specified in such express waiver. One or more written waivers or any default under any provision of this OA shall not be deemed to be a waiver of any subsequent default in the performance or the same provision or any other term or provision contained in this OA.

7.18 Rule Against Perpetuities. To the extent that any provision of this OA would otherwise be invalid or unenforceable due to a violation of the rule against perpetuities, the same shall be construed and interpreted, so that it shall have effect rather than be destroyed, and as though it were expressly stated that the happening of any contingency or event must take place, if at all, within the maximum period permitted therefor in order not to violate said rule.

7.19 Additional Property. Additional property may be annexed from time to time to the Complex by an amendment to this OA executed and recorded in the manner set forth in Section 7.11. Such amendment may contain supplementary provisions dealing solely with the annexed property so long as such provisions are not inconsistent with the provisions of this OA.

7.20 Limitation of Liability.

(A) Except as specifically provided below, there shall be absolutely no corporate or personal liability of individuals, firms, corporations or entities who constitute a Party hereto, including, but not limited to, officers, directors, members, managers, partners, employees or agents of a party hereto with respect to any of the terms, covenants, conditions, and provisions of this OA. In the event of a default by a Defaulting Party hereunder (as defined in Section 7.1) any Non-Defaulting Party (as defined in Section 7.1 hereof) who seeks recovery from a Defaulting Party hereto shall look solely to the interest of such Defaulting Party, its successors and assigns, in the Complex for the satisfaction of each and every remedy of the Non-Defaulting Party; provided, however, the foregoing shall not in any way impair, limit or prejudice the right of any Party:

(i) to pursue equitable relief in connection with any term, covenants or condition of this OA, including a proceeding for temporary restraining order, preliminary injunction, permanent injunction or specific performance,

(ii) to recover from another Party (or its guarantor) all losses suffered, liabilities incurred or costs imposed arising out of or in connection with, or on account of, such Party's (or its guarantor's) breach of its obligation to carry liability insurance, or fund its self insurance obligation pursuant to Section 6.4 above, and

(iii) to recover from a Party all damages and costs arising out of or in connection with, or on account of a breach by such Party of its obligations with respect to Hazardous Materials set forth in Section 6.1(C).

7.21 Regulatory Authority. Nothing in this Agreement shall be construed as the Port having contractually waived or limited its lawful regulatory authority.

## ARTICLE 8

### TERM

8.1 Term of this OA. This OA shall be effective as of the date first above written and shall continue in full force and effect until 11:59 p.m. on March 29, 2068. Upon termination of this OA, all rights and privileges derived from and all duties and obligations created and imposed by the provisions of this OA shall terminate and have no further force or effect; provided, however, that the termination of this OA shall not limit or affect any remedy at law or in equity that a Party may have against any other Party with respect to any liability or obligation arising or to be performed under this OA prior to the date of such termination. The indemnities set forth in Sections 3.2(A), 4.1(C), 4.3(B), 4.4, 5.2.6, 6.1(C), 6.4(A), 6.4(B), and 6.4(D) shall survive the termination of this OA.

[Signatures on Following Page]

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

CEP-JLSI:

PORT:

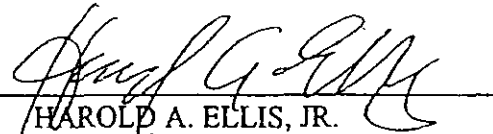
CEP-JLS I LLC,  
a Delaware limited liability company

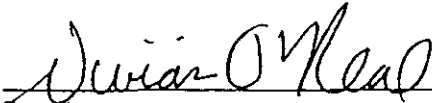
CITY OF OAKLAND, a municipal  
Corporation of the State of California, Acting  
By and through its Board of Port  
Commissioners

By: EPI-JLS I LLC,  
A California limited liability company  
Its Manager

By:   
JAY YOSHITANI  
Its: Executive Director

By: ELLIS PARTNERS, LLC,  
A California limited liability company  
Its Manager

By:   
HAROLD A. ELLIS, JR.  
Its: President

  
Dennis O'Meara  
Port Attorney

THIS AGREEMENT SHALL NOT BE  
VALID OR EFFECTIVE FOR ANY  
PURPOSE UNLESS AND UNTIL IT IS  
SIGNED BY THE PORT ATTORNEY

Approved as to form and Legality this \_\_\_\_\_

March 26<sup>th</sup>  
2002.

Port Ordinance No 3676

STATE OF CALIFORNIA)  
 )  
COUNTY OF ALAMEDA)

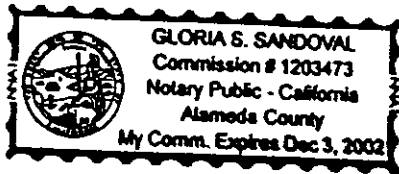
On March 26, 2002 before me, Gloria S. Sandoval, Notary Public, personally appeared Harold Andrus Ellis, Jr.,

personally known to me

proved to me on the basis of satisfactory evidence

to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.



Gloria S. Sandoval  
Signature of Notary

STATE OF CALIFORNIA)  
 )  
COUNTY OF ALAMEDA)

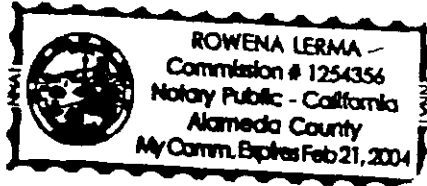
On March 26, 2002 before me, Rowena Lerma, Notary Public personally appeared Tay Yoshitani,

personally known to me

proved to me on the basis of satisfactory evidence

to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.



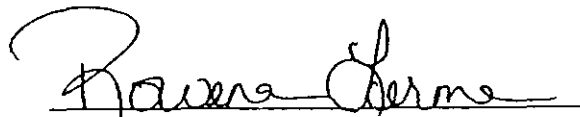
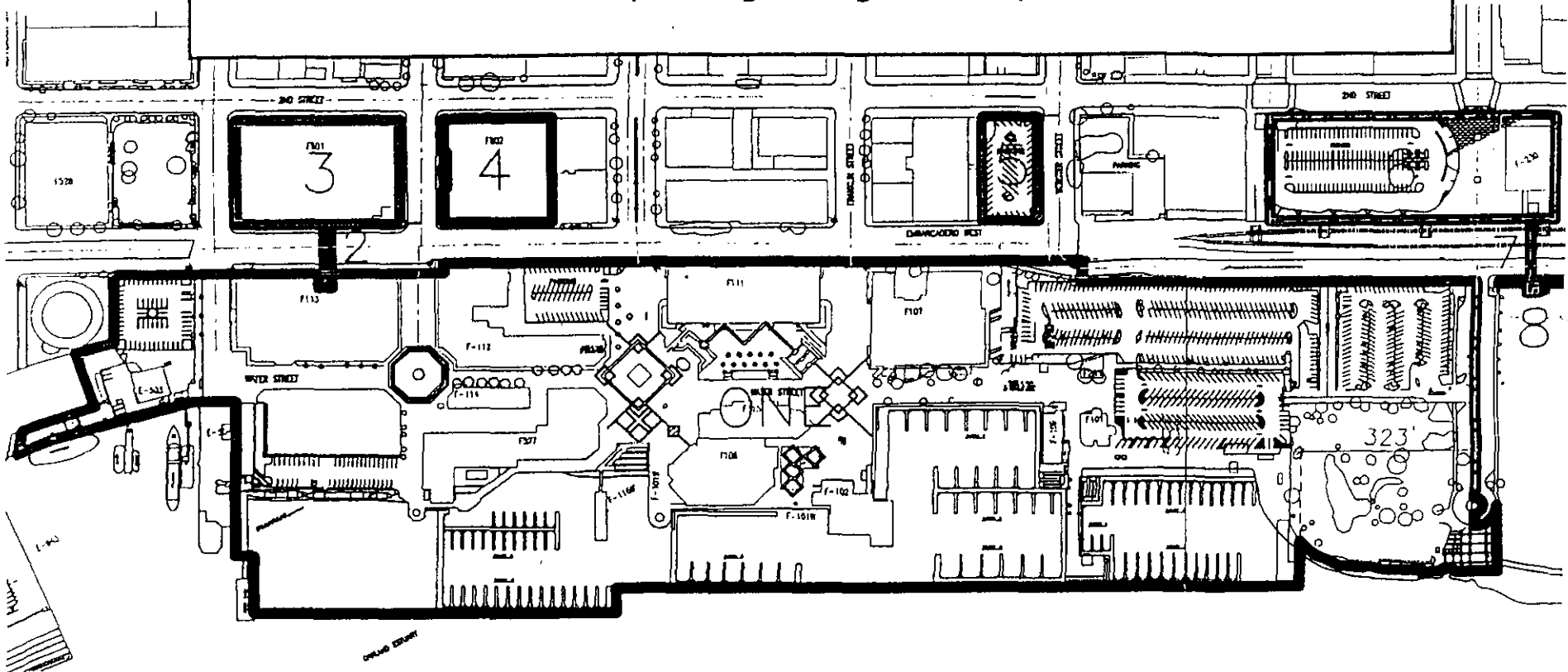
  
Signature of Notary

Exhibit A -1  
Jack London Square Complex  
Corresponding to Legal Descriptions



Operating Agreement



Boundary of Area



EXHIBIT A - 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION  
JACK LONDON SQUARE COMPLEX  
PARCEL 1

All that property lying within the City of Oakland, County of Alameda, State of California, more particularly described as follows:

Being all or portions of the following parcels of land recorded in the office of the Alameda County Recorder:

- Oakland Water Front Company to the City of Oakland: Quitclaim Deed recorded January 13, 1869 in Book 37 of Deeds at Page 505;
- Puget Sound Lumber Co. to the City of Oakland: Grant Deed recorded August 10, 1910 in Book 1778 of Deeds at Page 326;
- Taylor & Co. to the City of Oakland: Grant Deed recorded May 12, 1911 in Book 1849 of Deeds at Page 416;
- Southern Pacific Company to the City of Oakland: Quitclaim Deed recorded August 3, 1911 in Book 1901 of Deeds at Page 432;
- Oakland Water Front Company to the City of Oakland: Quitclaim Deed recorded August 3, 1911 in Book 1988 of Deeds at Page 35;
- Trustees of Merritt Hospital to the City of Oakland: Final Order of Condemnation recorded February 10, 1912 in Book 2016 of Deeds at Page 200;
- Thomas B. Bishop Co. to the City of Oakland: Grant Deed recorded August 13, 1936 in Book 3350 of Official Records at Page 413;
- Trustees of Merritt Hospital to the City of Oakland: Grant Deed recorded August 18, 1941 in Book 4082 of Official Records at Page 419;
- Southern Pacific Golden Gate Ferries to the City of Oakland: Grant Deed recorded September 24, 1943 in Book 4421 of Official Records at Page 320;
- Southern Pacific Company and Central Pacific Railway Company to the City of Oakland: Grant Deed and Quitclaim Deed recorded August 8, 1944 in Book 4607 of Official Records at Page 29;
- Hofert to the City of Oakland: Grant Deed recorded June 4, 1948 in Book 5519 of Official Records at Page 250;
- Bresee and Welch to the City of Oakland: Grant Deed recorded June 26, 1950 in Book 6147 of Official Records at Page 359;
- Julia Adams, et al to the City of Oakland: Grant Deeds (eight documents) recorded August 24, 1951 in Book 6520 of Official Records at Pages 113-136;

- Hogan Lumber Company, et al To East Bay Municipal Utility District: Final Order of Condemnation recorded February 27, 1952 in Book 6667 of Official Records at Page 227;
- Warehouse Investments Co. to State of California Grant Deed recorded March 13, 1956 in Book 7963 of Official Records at Page 459;
- State of California to the City of Oakland: Grant Deed recorded December 21, 1956 in Book 8238 of Official Records at Page 531;
- Fletcher, Carter, and Hogan to the City of Oakland: Grant Deed recorded September 4, 1957 in Book 8459 of Official Records at Page 591 and Carter to the City of Oakland: Grant Deed recorded September 4, 1957 in Book 8459 of Official Records at Page 595;
- Southern Pacific Company to the City of Oakland: Grant Deed recorded June 22, 1967 in Reel 1985 of Official Records at Image 658;
- Pacific Gas and Electric Company to the City of Oakland Grant Deed recorded May 15, 1995 as Series No. 95106292;

And being all of the vacated city streets described in the following documents recorded in the office of Alameda County Recorder:

- Alice Street, vacated by Ordinance No. 9164 C.M.S., recorded July 11, 1975 in Reel 4030 of Official Records at Image 314
- Clay Street, vacated by Ordinance No. 10173, C.M.S., recorded May 18, 1982 as Series No. 82-073044
- Washington, Franklin, Broadway and Water Streets, southwest of First Street, vacated by Ordinance No. 10936, C.M.S., recorded March 30, 1988 as Series No. 88-077009
- Webster Street, permit to occupy for the purpose of a Public Parking Area, Resolution No. 42624 C.M.S., dated November 27, 1962 (not recorded at the county)

And being portion of parcels of land described in the following State Tideland Trust Grants:

- State of California to the City of Oakland: Trust Grant Chapter 174 Statutes of 1923;
- State of California to the City of Oakland: Trust Grant Chapter 45 Statutes of 1937;
- State of California to the City of Oakland: Surface Trust Grant Chapter 720 Statutes of 1941;
- State of California to the City of Oakland: Trust Grant Chapter 218 Statutes of 1945;
- All Grants as amended by Chapter 1016 of Statutes of 1981;

All of which is more particularly described as follows:

**Beginning** at the intersection of the southwesterly line of Embarcadero (formerly known as First Street) as defined in Port Commissioners' Resolution No. 22628,

dated June 4, 1975 (Res. 22628) and the centerline of Alice Street (81 feet wide) as described in that certain City Street Vacation document recorded on Reel 4030 of Official Records at Image 314, Alameda County Records; **thence** South 27°24'37" West 419.21 feet along said centerline to its intersection with the curb line of a circular traffic island located in the middle of the cul-de-sac of said Alice Street, *the radius of the said curb being 15 feet*; **thence** southerly, southwesterly and westerly along said curb line an arc distance of 47.12 feet through a central angle of 180 degrees to its intersection with said centerline; **thence** South 27°24'37" West 25.00 feet along said centerline to its intersection with the outside curb line of said cul-de-sac, having a radius of 40 feet; **thence** southeasterly and easterly along said curb an arc distance of 62.83 feet through a central angle of 90 degrees; **thence** South 62°35'23" East 0.5 feet to a point on the southeasterly line of said Alice Street (Re 4030 Im 314); **thence** South 27°24'37" West 127.15 feet along said southeasterly line; **thence** at a right angle North 62°35'23" West 73.55 to a point on the top of bank of the shoreline of the Oakland Estuary; **thence** northwesterly along said top of bank approximately 317 feet to a point on a line parallel with and 323 feet northwesterly of said centerline of Alice Street; **thence** along said parallel line South 27°24'37" West 86.65 feet to a point on a line parallel with and 585 feet southwesterly of said southwesterly line of Embarcadero (Res. 22628); **thence** along said parallel line North 62°35'23" West 1251.18 feet; **thence** at a right angle South 27°24'37" West 47.00 feet; **thence** North 62°35'23" West 666.83 feet; **thence** North 27°24'37" East 110.88 feet; **thence** North 62°35'23" West 33.55 feet; **thence** North 27°24'37" East 296.50 feet; **thence** North 62°35'23" West 81.33 feet to a point on the existing face of wharf; **thence** along said face of wharf North 78°29'23" West 258.09 feet and North 83°58'40" West 70.20 feet to a point on the Howard Terminal Lease boundary line; **thence** along said boundary line the following 3 courses: 1) North 37°15'06" East 45.28 feet, 2) South 81°10'42" East 138.85 feet, and 3) North 08°50'42" East 109.27 feet to the most westerly corner of a parcel of land described in a Grant Deed from Pacific Gas and Electric Company to the City of Oakland, recorded May 15, 1995 as Series No. 95106292, Alameda County Records; **thence** along the northwesterly line of said parcel of land North 27°24'37" East 130.19 feet to a point on the southwesterly line of Embarcadero (99 feet wide); **thence** along said southwesterly line South 62°35'23" East 371.67 feet; **thence** around a common area the following 3 courses: 1) South 27°24'37" West 26.08 feet, 2) South 62°35'23" East 25.00 feet, and 3) North 27°24'37" East 26.08 feet to a point on said southwesterly line; **thence** along said southwesterly line South 62°35'23" East 205.41 feet; **thence** at a right angle North 27°24'37" East 20 feet to a point on the southwesterly line of Embarcadero (79 feet wide); **thence** along said southwesterly line South 62°35'23" East 1171.41 feet; **thence** at a right angle South 27°24'37" West 42.00 feet to a point on said southwesterly line of Embarcadero as defined in said Resolution No. 22628; **thence** along said southwesterly line South 62°35'23" East 721.31 feet to the **Point of Beginning**.

Containing 33.963 Acres, more or less, measured at ground elevation.

This description is based upon the North American Datum of 1983, (1986 Adjustment) as shown upon Record of Survey 990, filed for record in Book 18 of Record of Surveys, Pages 50-60, in the Office of the Recorder of Alameda County. All distances called for by this description are grid distances. To obtain ground distances, multiply distances called for herein by 1.0000705.

This description was prepared in January 2002.

EXHIBIT A- 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL TWO

Pedestrian Bridge, Elevator and Stairway

REAL PROPERTY in the City of Oakland, County of Alameda, State of California, described as follows:

All that area containing a pedestrian bridge from the 4<sup>th</sup> floor of the Washington Street Parking Garage Building to the 3<sup>rd</sup> floor of the 530 Water Street Building and the elevator and stairway within the 530 Water Street Building, more particularly described as follows:

Commencing at the most northerly corner of a parcel of land described in that certain Grant Deed from Pacific Gas and Electric Company to the City of Oakland, recorded May 15, 1995 as Series No. 95106292, being a point on the southwesterly line of Embarcadero (99 feet wide); thence along said southwesterly line South 62°35'23" East 371.67 feet to the Point of Beginning;

thence South 27°24'37" West 26.08 feet; thence South 62°35'23" East 25.00 feet; thence North 27°24'37" East 26.08 feet to a point on said southwesterly line; thence along said southwesterly line North 62°35'23" West 2.71 feet; thence North 27°24'37" East 98.99 feet to a point on the northeasterly line of said Embarcadero; thence along said northeasterly line North 62°35'23" West 12.50 feet; thence South 27°24'37" West 98.99 feet to a point on said southwesterly line; thence along said southwesterly line North 62°35'23" West 9.79 feet to the Point of Beginning.

Containing 1890 square feet, more or less.

This description was prepared in January 2002

EXHIBIT A – 2

OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL THREE  
Washington Street Parking Garage  
Facility F-601

REAL PROPERTY in the City of Oakland, County of Alameda, State of California, described as follows:

All of Block 5 as shown on Kellersberger's Map of Oakland, filed January 5, 1874 in Map Book 7 at Page 3, Alameda County Records.

Containing an approximate area of 60,000 square feet (1.38 acres).

This description was prepared in January 2002

EXHIBIT A - 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL FOUR  
JACK LONDON CINEMA  
Facility F-602

ALL THAT REAL PROPERTY SITUATED IN THE CITY OF OAKLAND,  
COUNTY OF ALAMEDA, STATE OF CALIFORNIA, BEING A PORTION OF  
PARCEL B-2 AS DESCRIBED IN THE GRANT DEED FROM PACIFIC GAS  
AND ELECTRIC COMPANY TO THE CITY OF OAKLAND, RECORDED  
OCTOBER 22, 1963 ON REEL 1024 AT IMAGE 494, SERIES NO. AU174088,  
ALAMEDA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

LOTS 1 TO 12 INCLUSIVE, AND LOTS 25 TO 28 INCLUSIVE, AND PORTIONS  
OF LOTS 13 AND 24, ALL IN BLOCK 6, AS SAID LOTS AND BLOCK ARE  
SHOWN ON "KELLERSBERGER'S MAP OF OAKLAND" WHICH IS FILED IN  
BOOK 7 OF MAPS AT PAGE 3, ALAMEDA COUNTY RECORDS, AND BEING  
MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE WESTERLY CORNER OF SAID BLOCK 6;

THENCE NORTH 27°24'37" EAST 199.99 FEET TO THE NORTHERN  
CORNER OF SAID BLOCK 6;

THENCE ALONG THE NORTHEASTERN LINE OF SAID BLOCK 6, SOUTH  
62°35'23" EAST, 198.35 FEET TO A POINT ON THE NORTHEASTERLY LINE  
OF SAID LOT 13, FROM WHICH POINT THE NORTHEASTERLY CORNER OF  
SAID LOT 13 BEARS SOUTH 62°35'23" EAST 1.66 FEET TO THE  
SOUTHEASTERLY LINE OF SAID LOT 24;

THENCE PARALLEL WITH THE NORTHWESTERLY LINE OF SAID BLOCK 6,  
SOUTH 27°24'37" WEST 109.09 FEET;

THENCE PERPENDICULAR TO THE LAST COURSE, SOUTH 62°35'23" EAST  
1.66 FEET TO THE SOUTHEASTERLY LINE OF SAID LOT 24;

THENCE ALONG SAID SOUTHWESTERLY LINE OF SAID LOT 24, SOUTH  
27°24'33" WEST 90.90 FEET TO THE SOUTHWESTERLY LINE OF SAID  
BLOCK 6;

THENCE ALONG SAID SOUTHWESTERLY LINE, NORTH 62°35'23" WEST  
200.01 FEET TO THE POINT OF BEGINNING.

CONTAINING AN APPROXIMATE AREA OF 39,825 SQUARE FEET (0.91  
ACRES).

This description was prepared in January 2002



EXHIBIT A - 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL FIVE  
Webster Street Parking Lot  
(Owned by State of California)

REAL PROPERTY in the City of Oakland, County of Alameda, State of California, including that parcel of land described in that certain Grant Deed recorded January 4, 1956 in Book 7895 at Page 475, Series No. AL 337, Alameda County Records more particularly described as follows:

Lots 14 through 23, inclusive, in Block 8, as shown on Kellersberger's Map of Oakland, filed January 5, 1874 in Map Book 7 at Page 3, Alameda County Records.

Containing an approximate area of 20,000 square feet (0.34 acre).

This description was prepared in January 2002

EXHIBIT A – 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL SIX  
Amtrak Station & Parking Lot

REAL PROPERTY in the City of Oakland, County of Alameda, State of California, described as follows:

All that portion of Harrison Street (80.67 feet wide) between Embarcadero (formerly First Street) and Second Street lying easterly of the centerline of said street; said street having been vacated by the City of Oakland, by Resolution Number 11646 C.M.S., recorded November 9, 1993, Series No. 93-399745, Alameda County Records.

Together with Lots 1 through 28, inclusive, in Block 10, as shown on Kellersberger's Map of Oakland filed January 5, 1874 in Map Book 7, at Page 3, Alameda County Records.

Together with all that portion of Alice Street (81 feet wide) between Embarcadero (formerly First Street) and Second Street, vacated by the City of Oakland by Resolution Number 11594 C.M.S., recorded August 27, 1993, Series No. 93-307111, Alameda County Records.

Together with Lots 1 through 9, inclusive and lot 28, in Block 11, as shown on said Kellersberger's Map (M.B. 7-3).

Containing a total area of approximately 2.39 acres.

This description was prepared in January 2002

EXHBIT A – 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL SEVEN  
Pedestrian Bridge for Amtrak Station

REAL PROPERTY in the City of Oakland, County of Alameda, State of California, described as follows:

All that area containing a pedestrian bridge from the Jack London Square Amtrak Station crossing over Embarcadero, more particularly described as follows:

Commencing at the intersection of the southeasterly line of Alice Street and the northeasterly line of Embarcadero (121 feet wide), (formerly First Street); thence along said northeasterly line South  $62^{\circ}25'23''$  East 56.46 feet to the Point of Beginning;

thence continuing along said northeasterly line South  $62^{\circ}25'23''$  East 11.00 feet; thence South  $27^{\circ}24'37''$  West 120.99 feet to a point on the southwesterly line of said Embarcadero; thence along said southwesterly line North  $62^{\circ}25'23''$  West 11.00 feet; thence North  $27^{\circ}24'37''$  West 120.99 feet to the Point of Beginning.

Containing 1,330 square feet. more or less.

This description was prepared in January 2002

EXHIBIT A – 2  
OPERATING AGREEMENT  
LEGAL DESCRIPTION OF  
JACK LONDON SQUARE COMPLEX  
PARCEL EIGHT  
Elevator to Amtrak Pedestrian Bridge

REAL PROPERTY in the City of Oakland, County of Alameda, State of California, described as follows:

Beginning at the northwest corner of a strip of land described as Parcel 2 in a Grant Deed from Santa Fe Plaza Corporation to the City of Oakland, recorded February 11, 1976 in Reel 4255 of Official Records at Image 256, Alameda County Records, being on the southeasterly line of Alice Street; thence along the southwesterly line of said Parcel 2 South 62°35'23" East 130.70 feet to a point on the northeasterly boundary of a parcel of land described as Site "B" – Parcel 1 in that certain Grant Deed from the City of Oakland to Legacy Landing LLC, recorded June 2, 1999 as Document No. 99206802, Alameda County Records; thence along said northeasterly line the following 8 courses:

1. westerly and northwesterly along non-tangent curve, concave to the north, having a radius of 9.00 feet, to which point a radial line bears South 33°35'03" East, an arc distance of 9.58 feet, through a central angle of 60°59'40";
2. North 62°35'23" West 40.32 feet;
3. South 27°24'37" West 15.64 feet;
4. North 62°35'23" West 11.68 feet;
5. South 27°24'37" West 4.15 feet;
6. North 62°35'23" West 19.57 feet;
7. North 27°24'37" East 19.07 feet;
8. North 62°35'23" West 51.25 feet to a point on said southeasterly line of Alice Street;

thence along said southeasterly line North 27°24'37" East 5.36 feet to the Point of Beginning.

Containing an approximate area of 1,202 square feet.

This description was prepared in January 2002

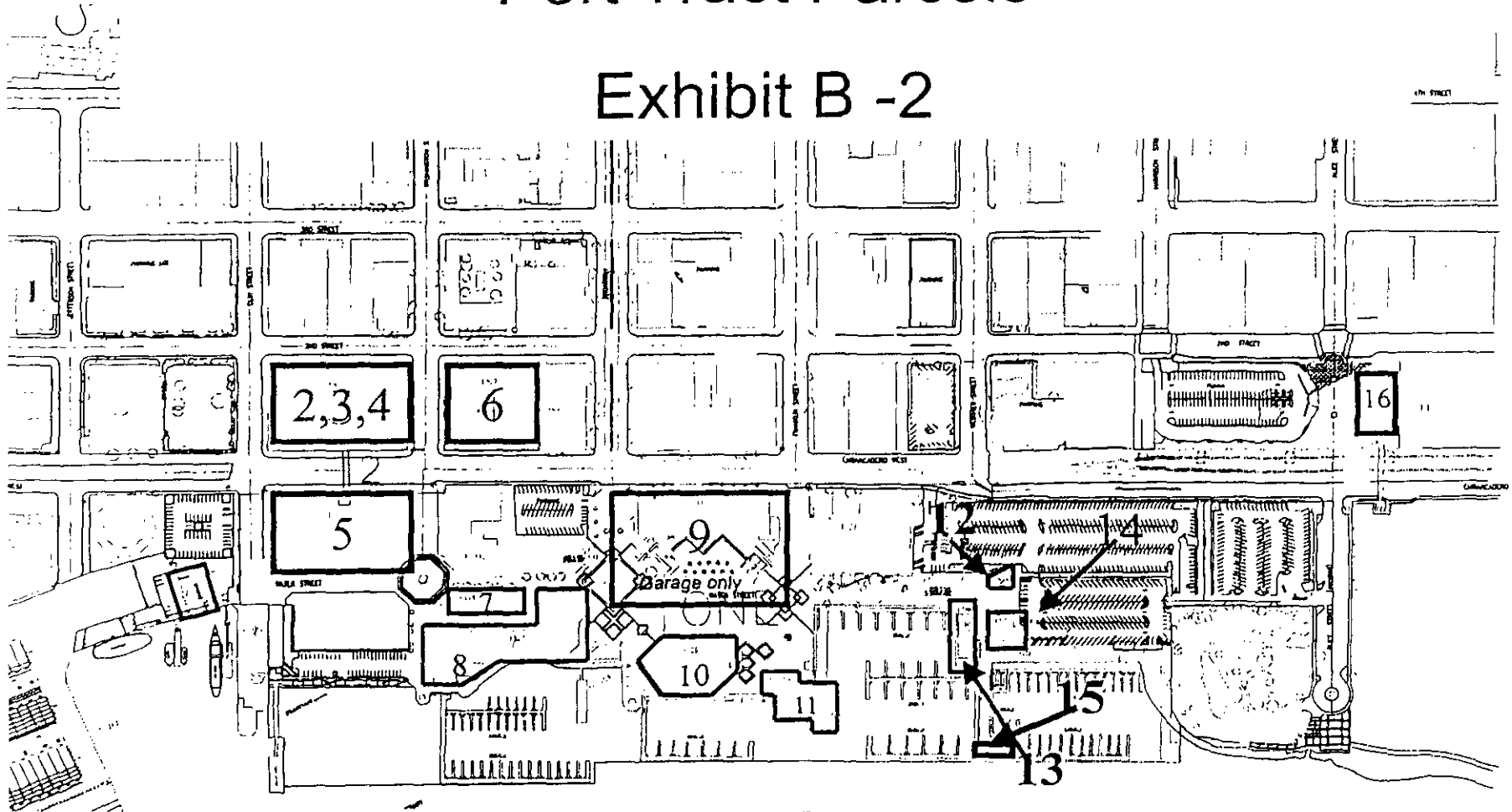
**EXHIBIT B -  
Port Tract and Port Tract Parcels**

The Port Tract consists of all of the property located within the Complex excluding the Developer Tract Parcels. The Port Tract includes, without limitation, the following specific Parcels :


<u>Number</u>	<u>Parcel Description</u>	<u>Building Number</u>
1	City of Oakland Fire Station	F-503
2	Washington Street Garage Building	F-601
3	Yoshi's Restaurant	F-601
4	Bank of America ATM	F-601
5	530 Water Street Building	F-113
6	Jack London Cinema	F-527
7	Water Street III and its successor hotel expansion	F-114
8	Waterfront Plaza Hotel	F-602
9	Underground Garage Underground Garage only	F-111
10	Scott's Restaurant	F-106
11	Kincaid's Restaurant	F-102
12	Heinold's First and Last Chance	F-203
13	Il Pescatore Restaurant	F-109
14	Harbormaster Building	F- 101
15	Webster Street Pier Fueling and Supply Building	F-108
16	Amtrak Station	F-230
17	Marina Slips (Marina slips in the water area that are not common area as designated in Exhibit E1)	N/A

# Port Tract Parcels

## Exhibit B -2



Operating Agreement

 Port Tract Parcels (See exhibit B-1)  
Marina Tract Parcel is waterside (not outlined) and is Parcel 17

**Exhibit C-1**

**Developer Tract and Developer Tract Parcels**

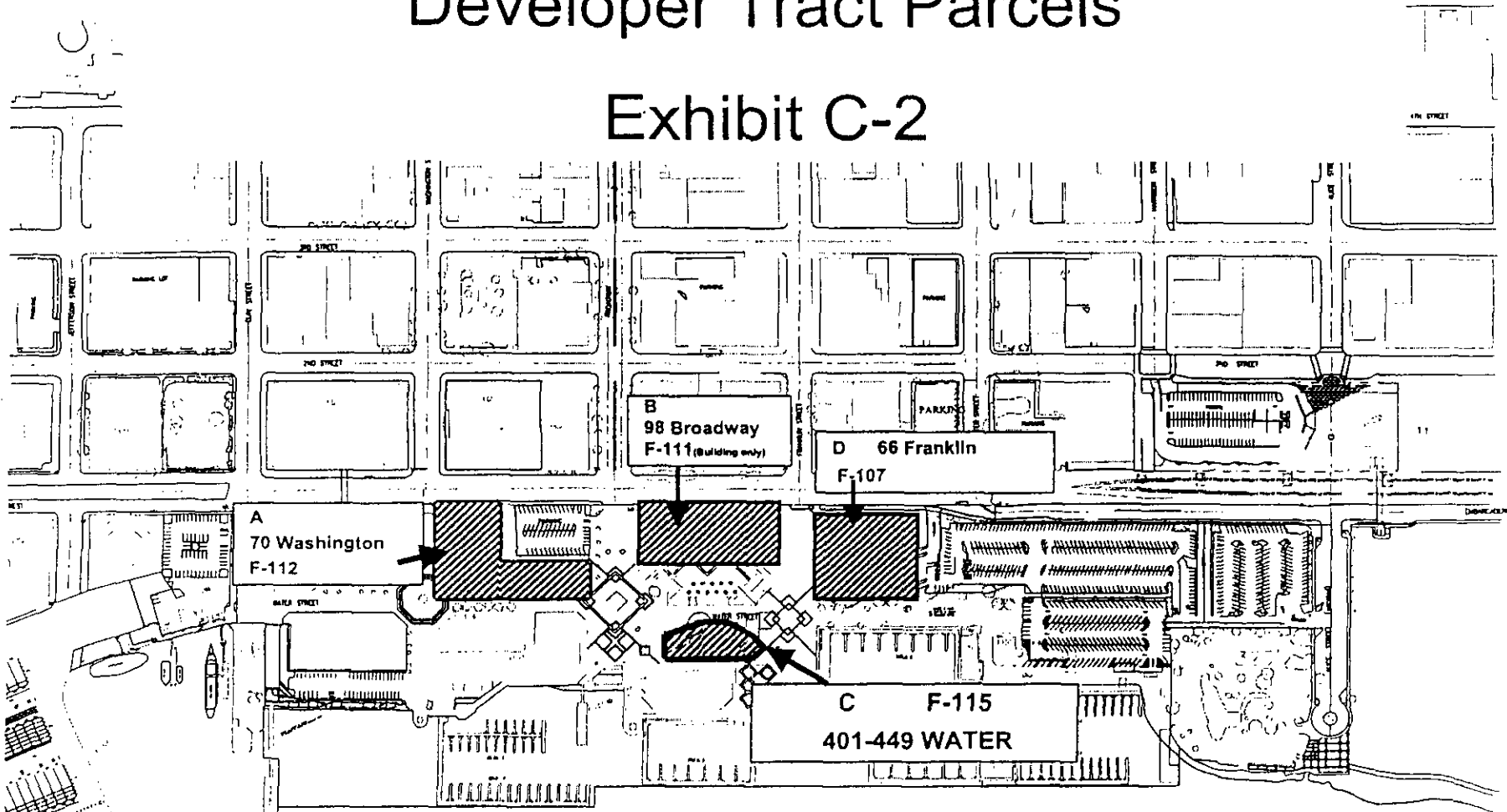
Developer tract consists of the following developer tract parcels:

Number	Parcel Description	Building Number
A	70 Washington Street Building	F-112
B	Pavilion Building (Building above underground garage only)	F- 111
C	Water Street I	F-115
D	66 Franklin Street	F-107

**Operating Agreement**

# Developer Tract Parcels

## Exhibit C-2



Developer Tract Parcels  
Existing Assets (See exhibit C-1)

Operating Agreement





THE UNIVERSITY OF MICHIGAN

1944-1945

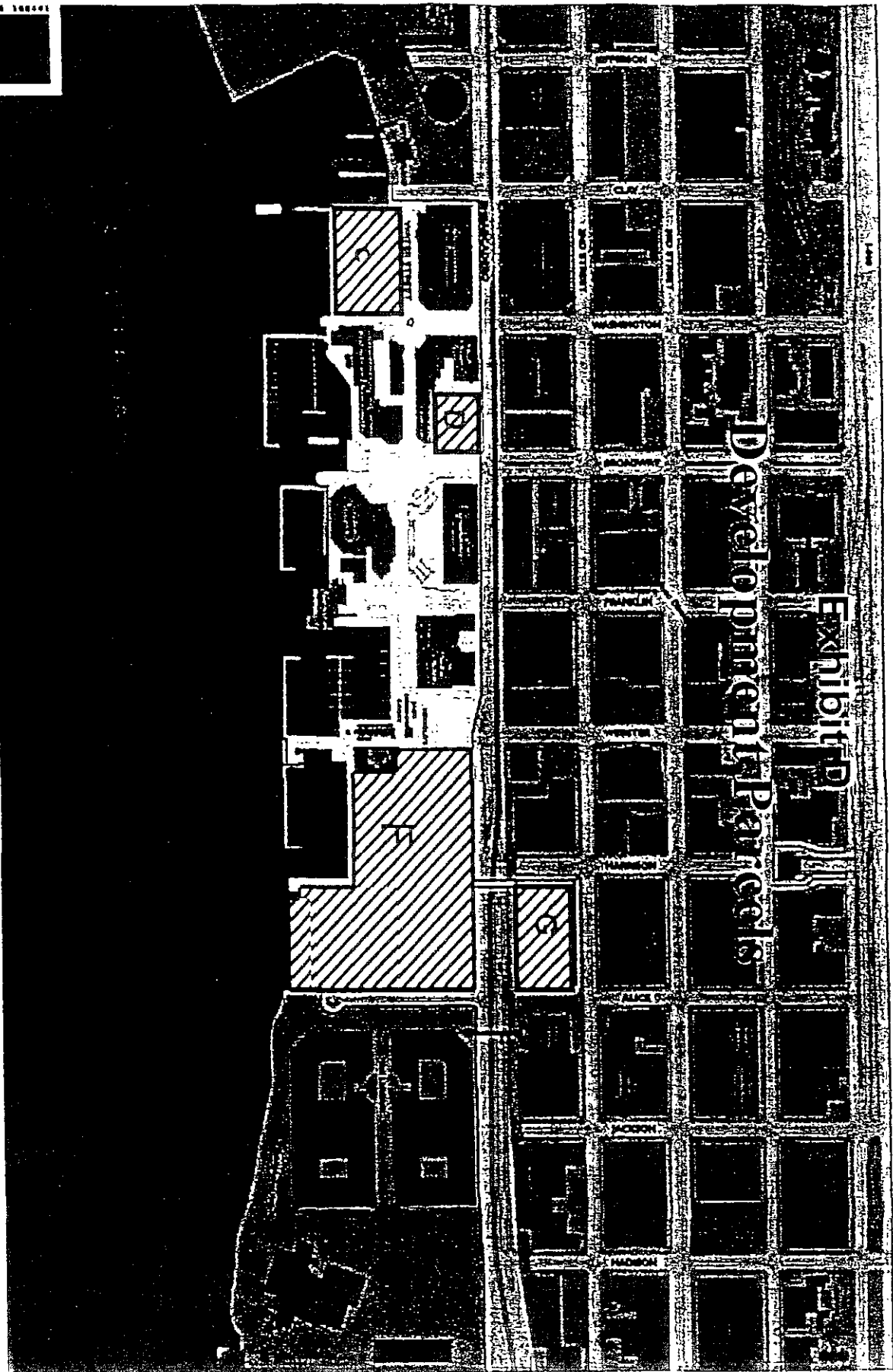
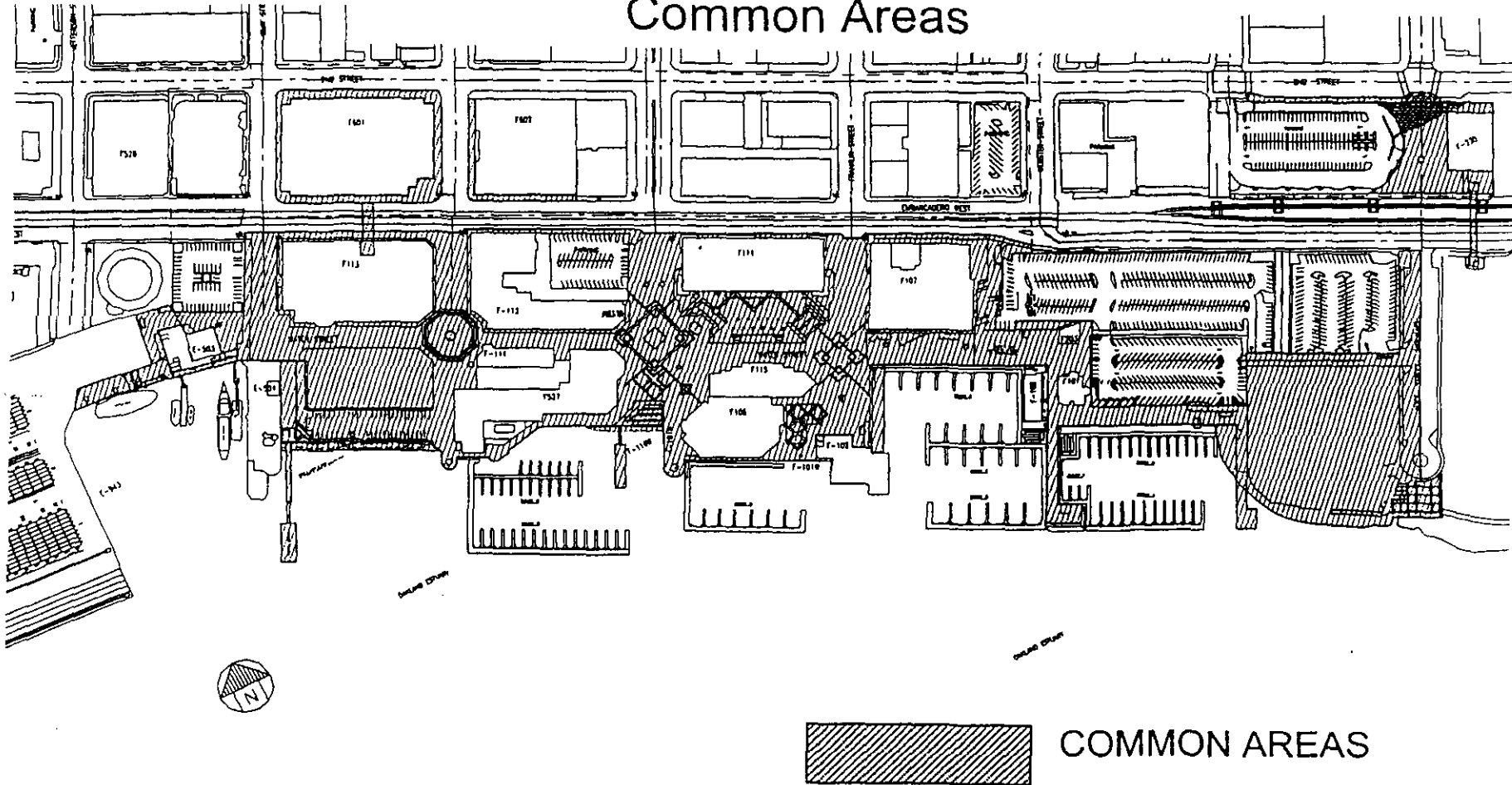


Exhibit D  
Development Parcels

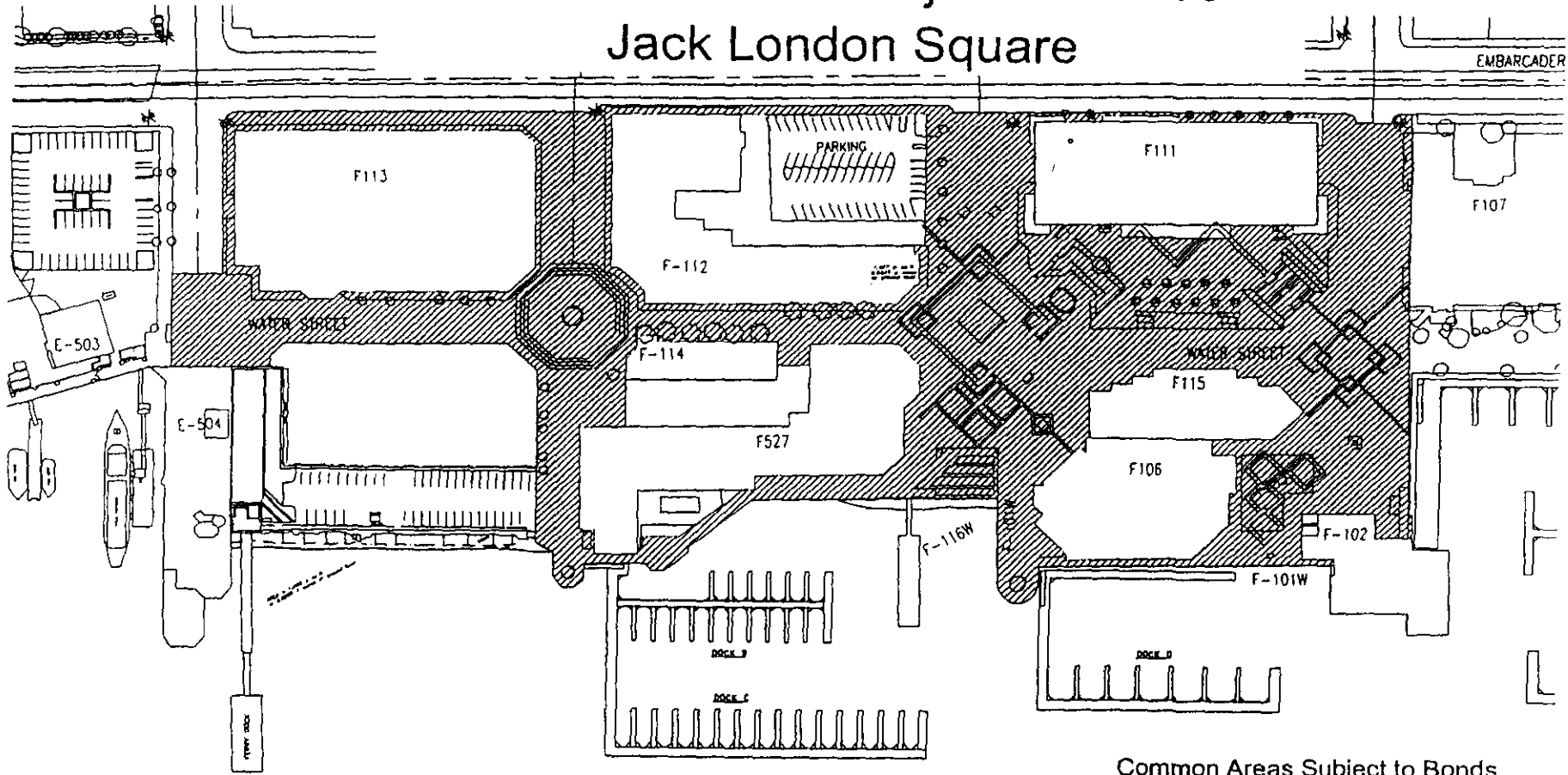
# EXHIBIT E-1

## Common Areas



OPERATING AGREEMENT

# Exhibit E-2 Common Areas Subject to Bonds Jack London Square



Operating Agreement

## Exhibit F BCDC Permits

The following is a list of applicable and currently approved BCDC permits governing Jack London Square, all permits are on file in the Port offices and have been transmitted under separate cover to the parties.

Permit No. 19-85 A. - Amendment 13, issued on March 13, 1986 as Amended Through June 23, 1998: Jack London Square, Clay Street to Harrison Street containing all the previous amendments.

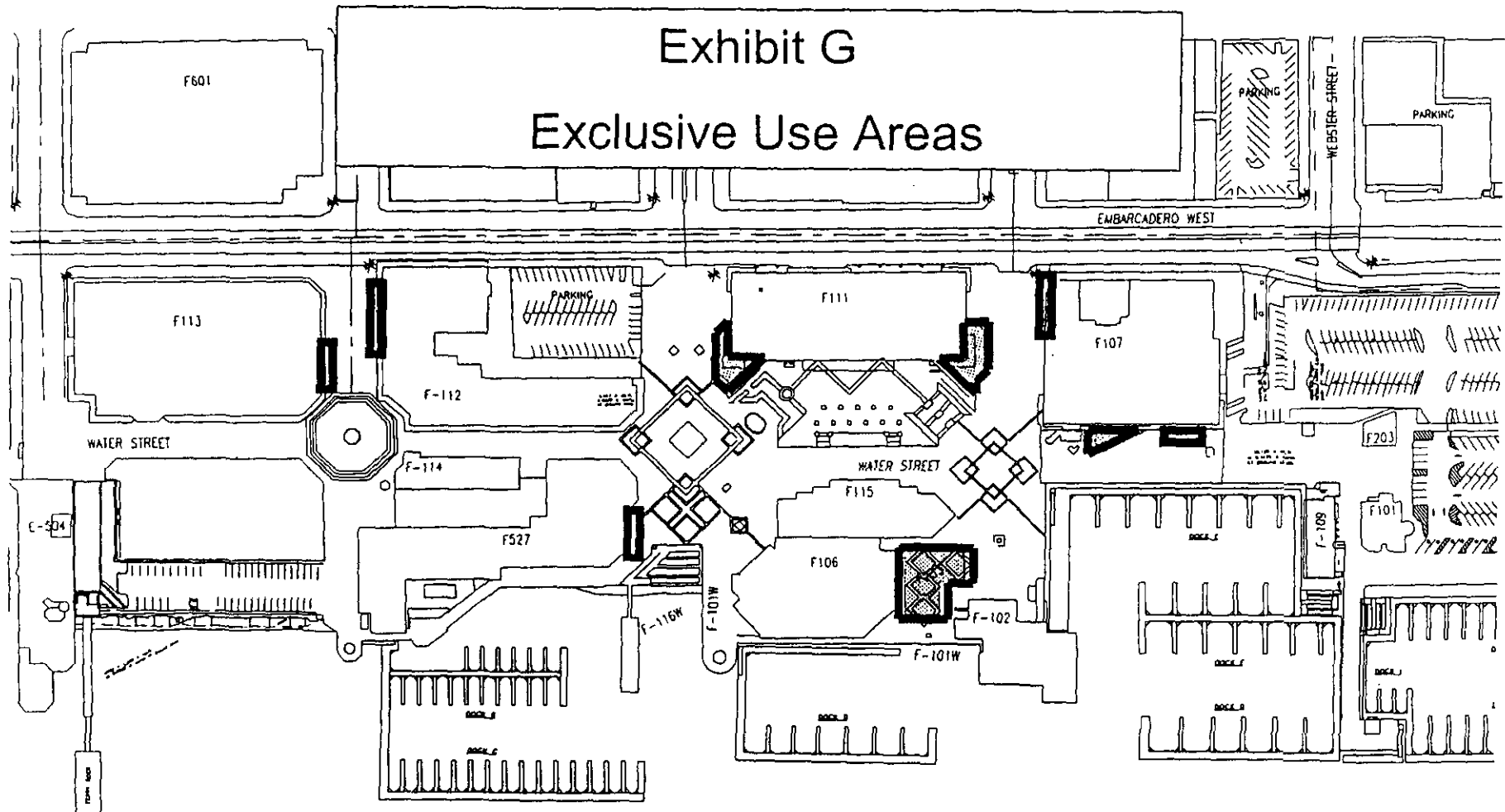
Permit No. 19-85 B. - Corrected Amendment 10, issued on March 13, 1986 as Amended Corrected Through July 8, 1997: Scott's Restaurant within Jack London Square.

Permit No. 13-73 - Amendment 4, issued on June 8, 1973 as Amended Through January 26, 2001: Jack London Village, Harrison Street to Alice Street

Permit No. 13-78 - Amendment 9, issued on February 26, 1979 as Amended Through September 26, 1997: Howard Terminal. This permit contains conditions pertaining to Franklin D. Roosevelt Pier (FDR Pier) and its vicinity.

Permit No. 8-94 - Howard Terminal, dated March 29, 1995 (Approved by BCDC on March 16, 1995): This permit contains conditions pertaining to the JLV site and FDR pier.

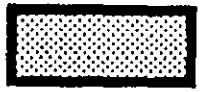
Operating Agreement



# Exhibit G

## Exclusive Use Areas

Operating Agreement



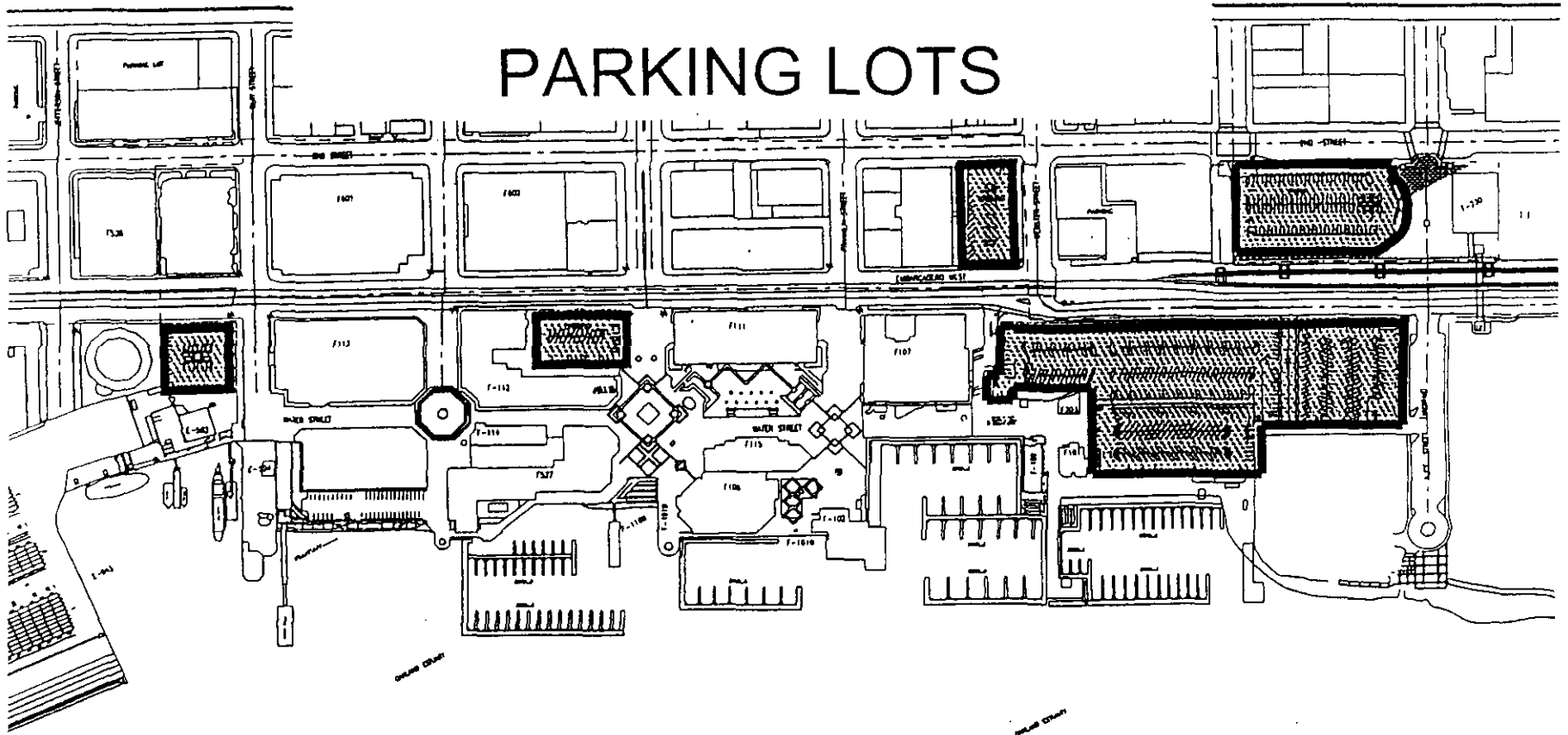
Exclusive Use Areas

OAKLAND ESTUARY

OAKLAND ESTUARY

# Exhibit H

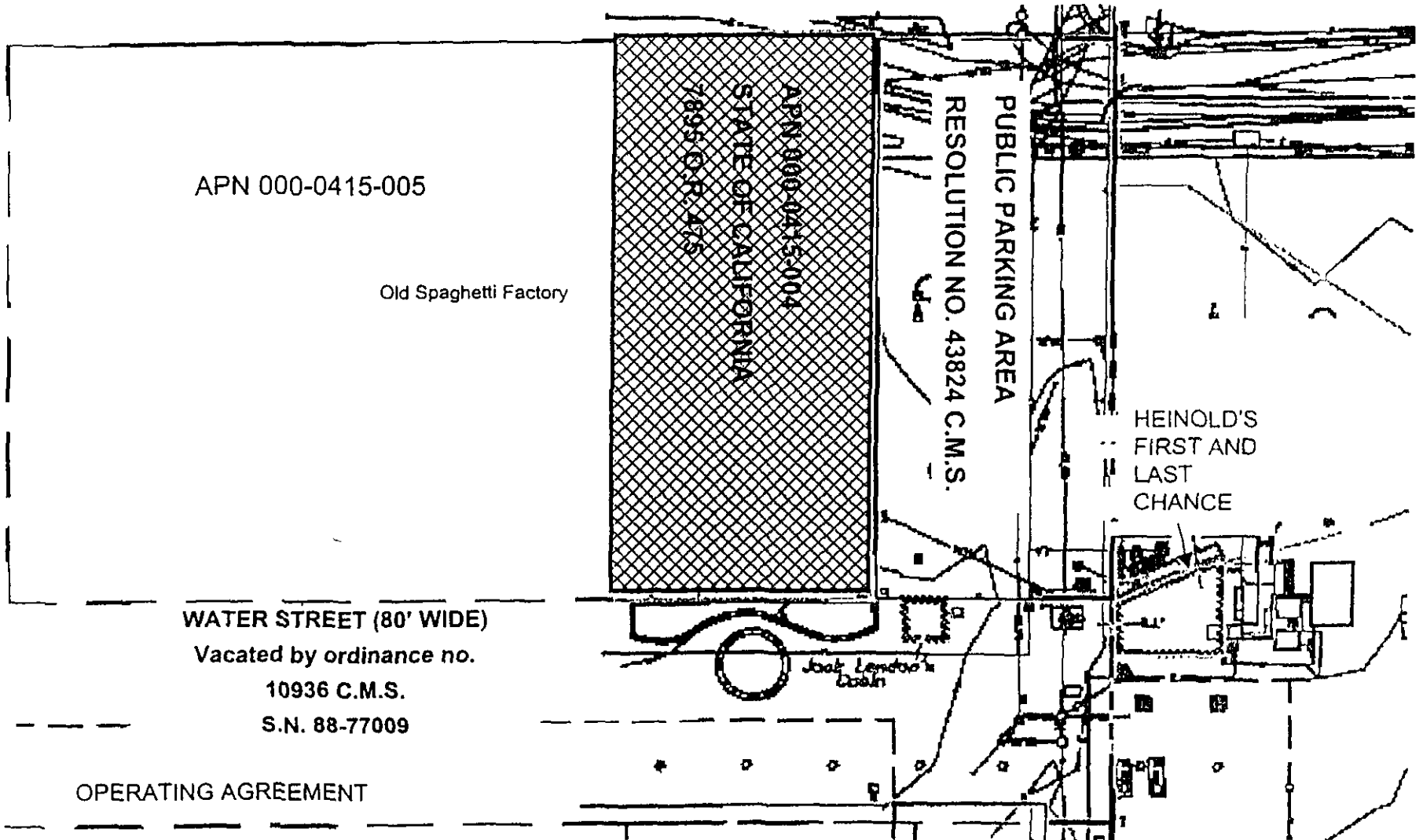
## PARKING LOTS



PARKING LOTS

Operating Agreement

# EXHIBIT I STATE LICENSE AREA



APN 000-0415-005

Old Spaghetti Factory

STATE OF CALIFORNIA  
APN 000-0415-004

PUBLIC PARKING AREA  
RESOLUTION NO. 43824 C.M.S.

HEINOLD'S  
FIRST AND  
LAST  
CHANCE

WATER STREET (80' WIDE)  
Vacated by ordinance no.  
10936 C.M.S.  
S.N. 88-77009

OPERATING AGREEMENT

Joak London's  
Drain

## Exhibit J

## Tools and Equipment

Equipment/Tool Description	QTY	Location of Equipment
0-3" Magnehelic	1	530 Shop
0-6" Magnehelic	1	WS-I Shop
1-1/8" Wrenches	2	WS-I Shop
1-5/8" Wrenches	2	WS-I Shop
100' Extension Cords	2	WS-I Shop
10" Vice Grips	1	WS-I Shop
10" Adjustable Wrench	3	Engineer's Issue
11" Hammer Drill	1	WS-I Shop
12 Piece Allen Set	3	Engineer's Pouch
14" Drill Press	1	WS-I Shop
14" Bolt Cutters	1	WS-I Shop
14" Pipe Wrench	1	WS-I Shop
18" Pipe Wrench	2	WS-I Shop
1" Wrench	1	WS-I Shop
1/2" Electric Drill	1	WS-I Shop
1/2" Drive 11 piece Socket Sets (1 deep) (1 std)	2	WS-I Shop
1/2" 17 piece Socket Set	1	530 Shop
1/2" Drive Torque Wrench	1	WS-I Shop
1/4" x 1 1/2" HD Screwdriver	2	WS-I Shop
1/4" x 4" HD Screwdriver	3	WS-I Shop
2 HP 20gal Air Compressor	1	MAC'S Storage
21 piece 3/8" Drive Socket Sets	2	WS-I Shop
22 piece 1/4" Drive Socket Set	1	WS-I Shop
24" Pipe Wrench	2	WS-I Shop
25" Tape/Rule	1	WS-I Shop
36" Pipe Wrench	1	WS-I Shop
36" Steel Rule	1	530 Shop
3 piece Wood Chisel Set	1	WS-I Shop
3/8" x 8 HD Screwdriver	3	Engineer's Pouch
4" Disc Grinder	1	WS-I Shop
4 Valve Refrigeration Manifold	2	66 & 530 Shops
4-Wheel Cart	2	WS-I & 530 Storage
50' Extension Cords	2	WS-I & 530 Shops
50' Garden Hose	2	66 & 530 Mech.
55gal Drum Cradle	1	530 Gen. Room & 66 Roof
5 CFM Evacuation Pump	1	WS-I Shop
5gal Gas Can	1	WS-I Shop



Equipment/Tool Description	QTY	Location of Equipment
5" Bearing Puller	1	WS-I Shop
5/16" x 6 HD Screwdriver	3	Engineer's Pouch
6 Volt Lantern	1	WS-I Shop
6" Adjustable Wrench	3	Engineer's Pouch
6" Dial Caliper	1	WS-I Shop
6" Needle Nose Pliers	2	Engineer's Pouch
7-1/4 Circular Saw	1	WS-I Shop
75' Extension Cord	1	66 Shop
77 piece Tap & Die Set	1	WS-I Shop
7 piece Chisel Set	1	WS-I Shop
7 piece Drive Pin Set	1	WS-I Shop
7 piece Wrench Set	2	530 & WS-I Shop
7/8" Wrench	1	WS-I Shop
8" Adjustable Wrench	1	Engineer's Pouch
9" Torpedo Level	2	Engineer's Pouch
Air compressor - Model 32419G	1	WS-II Storage
Alnor 342 Flow Hood	1	WS-I Shop
Alternator Tester	1	WS-I Shop
Ammeter - Clamp On	2	530 & WS-I Shop
Ball Peen Hammer - 24oz	1	WS-I Shop
Battery Carrier	1	WS-I Shop
Battery Charger - Model 3620A	1	WS-I
Battery Filler	1	530 Pump Room
Battery Tester	1	WS-I Shop
Battery Tool Set	1	WS-I Shop
Bearing Heater	1	WS-I Shop
Bearing Puller 2/3 Jam	1	WS-I Shop
Bearing Puller Set	1	WS-I Shop
Belt Sander	1	WS-I Shop
Capicator Tester	1	WS-I Shop
Carpenter Square	1	WS-I Shop
Caulking Gun	3	WS-I Shop
Chain Hoist	2	530 & WS-I Shop
Charging Hose 1/4"	3	WS-I Shop
Charging Scale	1	WS-I Shop
Claw Hammers	1	WS-I Shop
CO2 Analyzer	1	WS-I Shop
Computer Desks	2	530 & 66 Fan Room
Cordless Drills	1	530 & WS-I Shop

Equipment/Tool Description	QTY	Location of Equipment
Crescent Wrench 15"	1	WS-I Shop
Dickson On/Off EV4	1	WS-I Shop
Dickson Temptrace	1	WS-I Shop
Dickson Temptrace II	1	WS-I Shop
Drill Bit Sets	3	WS-I Shop
Diagonal Cutters	1	WS-I Shop
Electric Heater	1	WS-I Shop
Electronic Leak Detector	1	WS-I Shop
Elect. Nibbler	1	WS-I Shop
File Set	1	WS-I Shop
Fish Tape	2	WS-I Shop
Flaring Tool	2	WS-I Shop
Flashlights	3	Engineer's Pouch
Fluke 27 Multimeter	1	530 Shop
Fluke 52 Thermometer	2	530 & 66 Shops
Fluke 87 Multimeter	1	WS-I Shop
Fluke 189 Multimeter with Case	1	WS-I Shop
Folding Hex Wrench Set	1	WS-I Shop
Gas Lamp Tester	1	WS-I Shop
Grease Gun	4	2 - 530 Shop 2 - 66 Shop
Grinder with Bench	1	WS-I Shop
Hack Saws	2	WS-I & 530 Shop
Halide Torch	2	530 & 66 Chill Room
Hand Plane	1	WS-I Shop
Hand Truck	3	530, WS-I & WS-II
Hilti Gun	1	WS-I Shop
Hole Saw Kit	1	WS-I Shop
Hydrometer	1	530 Pump Room
Infrared Temp. Meter	1	WS-I Shop
Jig Saw	1	WS-I Shop
Kar Parts Cabinet	1	WS-I Shop
Key Duplicating Machine	2	WS-I Shop
Key Pin Set II	2	WS-I Shop
K-375 Drain Cleaning Machine	1	WS-II Storage
Lap Top Computer	3	530, WS-II & 66 Mech.
Leak Dector Refrigerant - Electronic	1	WS-I Shop
Lincoln Welder 230V AC	1	66 Boiler Room
Lineman Pliers	3	Engineer's Pouch
Locking Cabinets	2	530 & 66 FCC

Equipment/Tool Description	QTY	Location of Equipment
Makita Battery Drill	1	WS-I Shop
Makita Table Saw	1	WS-II Storage
Mallets	2	WS-I Shop
Megger	1	WS-I Shop
Micrometer, Set of 4 Gauges	1	WS-I Shop
Micron Vacuum Meter	1	WS-I Shop
Multimeters	2	WS-I Shop
Nut Driver Set	3	Engineer's Pouch
Offset Hex Wrench	3	Engineer's Pouch
Oil Pump - Hand	2	WS-I Shop
O-Ring Kit	1	WS-I Shop
Pair Rubber Boots	2	530 & WS-I Shop
Pneumatic Cal. Kits	2	66 & 530 Shop
Pneumatic Fitting Kit	1	WS-I Shop
Polaroid Camera	1	WS-I Shop
Pop Rivet Tool	2	WS-I Shop
Portable Pump - Diesel Fuel	2	530 Gen. Rm.
Portable Vacuum	2	530 & WS-I Shops
Power Pull - Come Along	1	WS-I Shop
Pressure Washer - Landa	1	WS-I Shop
Propane Torch	1	WS-I Shop
Quick Couplers	1	WS-I Shop
Rain Suits	4	66, 530 & WS-I Shop
Reclaimer	1	WS-I Shop
Roll Around Barrels	2	66 & WS-I Shop
Roll Around Tool Box	1	WS-I Shop
RS-3 Amprobe	2	Engineer's Pouch
	1	WS-I Shop
Safety Box - Model 66695	1	WS-I Shop
Safety Storage Cabinet	1	530 Pump Room
Sawzall	1	WS-I Shop
Screwdrivers	8	530 & WS-I Shop
Security Screwdriver Set	2	WS-I Shop
Set End Wrenches 1/4-7/8 "	1	WS-I Shop
Sledge Hammer	1	WS-I Shop
Slide Hammer Puller Set	1	WS-I Shop
Sling Psychometer	1	WS-I Shop
Snap Ring Pliers Set	1	WS-I Shop
Solder Gun	1	WS-I Shop
Stakon Crimping Tool	1	WS-I Shop
Stapler, Aarrow T-50	1	WS-I Shop
Sump Pumps	2	66 Shop

Operating Agreement

Equipment/Tool Description	QTY	Location of Equipment
Superheat Thermometer	2	WS-I Shop
Swaging Tool Kid	2	WS-I Shop
Swivel Stools	2	530 & 66 Shop
Taping Knives	2	530 & WS-I Shop
Tool Belt	2	Engineer's Use
Tool Boxes	2	530 & WS-I Shop
Torch Set - Oxy Acet.	1	WS-I Shop
Torque Wrench 3/8" Drive	1	530 Chiller Room
Tube Cutter	3	WS-I Shop
Tube Punching Machine	1	530 Chiller Room
Utility Knife	1	Engineer's Pouch
Vacuum Hose 3/8"	1	WS-I Shop
Vise	1	WS-I Shop
Wet/Dry Vacuum	2	530 & WS-I Storage
Work Area Signs	2	WS-I Storage
Work Benches	3	66, 530 & WS-I Shop
#1 Phillips Screwdriver	3	Engineer's Pouch
#2 Phillips Screwdriver	3	Engineer's Pouch
#3 Phillips Screwdriver	1	Engineer's Pouch
50lb Reclaim Cylinder	4	WS-I Shop

## Exhibit J

## Marketing Equipment

Equipment Description	QTY	Location of Equipment
8' Folding Tables	11	530 Storage
6' Folding Tables	17	530 Storage (16) Information Booth (1)
8' Ladder	1	Pavilion Information Booth
Chairs	NA	530 Storage
Podium (2-piece)	1	530 Storage
JBL EDN Power 10 Speakers	2	530 Storage
Ensign TL-2A Portable PA	1	530 Storage
PA Rack	1	530 Storage
Denon DN-T620 C/D Cassette Player	1	530 Storage
Alesis Studio 12R Mixer	1	530 Storage
AKG D 65S Microphones	2	530 Storage
Microphone Stands	2	530 Storage
Miscellaneous Microphone and Speaker Cables	NA	530 Storage
Ultimate Speaker Stands	2	530 Storage
10' x 12' Stage Risers	3	530 Storage
Stage Riser Slips	3	530 Storage
Stanchions - Plastic	31	530 Storage
Motorola GP350 Radios	5	70 Washington
Motorola Radio Charger	1	70 Washington
Flat Bed Electric Cart	1	530 Storage
Flat Bed Electric Cart Charger	1	530 Storage
Misc. Festival Supplies and Give-A-Ways	NA	530 Storage
Marquee Board Supplies (Letters, Numbers, etc.)	NA	Pavilion Information Booth
Portable Heater	1	Information Booth

**EXHIBIT "K"**

[To be delivered at a later date]

**EXHIBIT "L"**

[To be delivered at a later date]

**Exhibit M**

**Common Area, Security, Marketing Assessment Formula**

Land Use Category	CAM Factor**	Security Factor	Marketing Factor
Office	1.00	1.00	0.00
Retail	2.00	2.00	3.00
Restaurant/Food Service	4.00	4.00	3.00
Hotel Rooms	1.25	1.25	0.50
Cinema	3.33	3.33	0.25
Parking Garages	0.40	.080	0.00
Parking Lots	0.25	.065	0.00
Marina	0.15	.015	0.00
Other	N/A	N/A	N/A

\*\* These factors are to be multiplied by the net rentable square feet of each building or leased space or gross square footage (as it applies to garages parking areas or marinas) for each land use category to determine the adjusted square footage. The adjusted square footage is the factor used to determine the allocation for each assessment category. Net rentable square feet is then multiplied by the cost of each Assessment category to determine the allocation for that use, see example below:

<b>Calculation for CAM (Example only)</b>					
Land use	NRSF	Factor	Adjusted SF factor	Percentage of total	Applicable annual CAM assessment +
Office	80000	1.00	80000	14%	\$68,853
Retail	40000	2.00	80000	14%	\$68,853
Restaurant/Food Service	35000	4.00	140000	24%	\$120,492
Hotel Rooms	75000	1.25	93750	16%	\$80,687
Cinema	40000	3.33	133200	23%	\$114,640
Parking Garages	80000	0.40	32000	6%	\$27,541
Parking Lots	40000	0.25	10000	2%	\$8,607
Marina	80000	0.15	12000	2%	\$10,328
Other					
<b>Totals</b>	<b>470000</b>		<b>580950</b>	<b>100%</b>	<b>\$500,000</b>

+ Assume CAM assessment is \$500,000 annually

Operating Agreement



EXHIBIT N

ASSIGNMENT AMENDMENT

WHEN RECORDED MAIL TO:

Crosby, Heafey, Roach & May  
Professional Corporation  
Two Embarcadero Center, Suite 2000  
San Francisco, California 94111  
Attention: Sherry L. Geyer, Esq.

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(Space above this line is for recorder's use)

ASSIGNMENT AMENDMENT

THIS ASSIGNMENT AMENDMENT (this "Amendment") is entered into as of \_\_\_\_\_, 20\_\_ by and among \_\_\_\_\_, a \_\_\_\_\_ (the "Assignor"), \_\_\_\_\_, a \_\_\_\_\_ (the "Assignee"), \_\_\_\_\_, a \_\_\_\_\_ ("Port Tract Approving Party") and \_\_\_\_\_, a \_\_\_\_\_ ("Developer Tract Approving Party"). The Port Tract Approving Party and the Developer Tract Approving Party shall be collectively known as the "Approving Parties". Capitalized terms not defined in this Amendment are defined in the Operating Agreement (as defined below), unless otherwise indicated herein.

RECITALS

A. Assignor has entered into that certain [*describe assigning agreement*] with Assignee dated as of \_\_\_\_\_ (the "[*Agreement*]"), pursuant to which Assignor has agreed to [*describe nature of transfer and interest to be transferred*] to Assignee ("Transferred Interest").

B. Assignor and the Transferred Interest are subject to an Operating Agreement dated as of March 29, 2002, by and between The City of Oakland, a municipal corporation of the State of California, acting by and through its Board of Port Commissioners and CEP-JLS I LLC, a Delaware limited liability company, recorded as Instrument No. \_\_\_\_\_ in the Official Records of Alameda County, [as amended by [*describe amendments*]] (*collectively, the "Operating Agreement"*) providing for certain covenants and agreements regarding the use and operation of the Jack London Square area of Oakland, California in which the Transferred Interest is located.

C. The Operating Agreement provides at Section [ ] that Assignor, Assignee and the Approving Parties shall execute this Amendment upon the sale,

assignment or other transfer of all or any part of an Owner's fee or ground lease interest in a Parcel.

D. The Operating Agreement also provides that, as between the Owners subject to the Operating Agreement, the Assignor shall be released from obligations and liabilities with respect to the Transferred Interests arising under the Operating Agreement subsequent to the date of recordation of this Amendment.

NOW, THEREFORE, in consideration of the foregoing and for good and valuable consideration, the receipt and adequacy of which are hereby mutually acknowledged, the parties agree as follows:

1. Operating Agreement

1.1 Operating Agreement. Assignee hereby acknowledges that it has received and reviewed a copy of the Operating Agreement. Assignee hereby agrees that upon recordation of this Amendment it shall be an "Owner" as defined in the Operating Agreement and shall be a "Party" to the Operating Agreement, entitled to all rights and benefits thereof and subject to all obligations and liabilities of and restriction on an Owner thereunder.

1.2 Rights and Conditions of Owner. Assignee hereby agrees, upon the recordation of this Amendment, to be bound by and to comply with terms, covenants and conditions of the Operating Agreement.

1.3 Approving Parties. Developer Tract Approving Party and Port Tract Approving Party hereby acknowledge the assignment of the Transferred Interest pursuant to the [Agreement] and pursuant to Section 2.1 of the Operating Agreement.

2. Assignee Representations.

2.1 Assignee Status. Assignee is a [\_\_\_\_\_ duly organized, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and authorized to do business in the State of \_\_\_\_\_].

2.2 Authority. This Amendment is duly authorized, executed and delivered and shall be the legal, valid and binding obligations of the Assignee. Assignee represents and warrants that each person signing this Amendment on behalf of Assignee, and each person signing this Amendment represents and warrants that he or she has full power and lawful authority to sign this Amendment on behalf of Assignee.

3. Miscellaneous.

3.1 Counterparts. This Amendment may be signed in multiple counterparts which, when duly delivered and taken together, shall constitute a binding agreement between all parties.

3.2 Severability. If for any reason, any provision of this Amendment shall be held to be unenforceable, it shall not affect the validity or enforceability of any other provision of this Amendment and to the extent any provision of this Amendment is not determined to be unenforceable, such provision, or portion thereof, shall be, and remain, in full force and effect.

3.3 Governing Law. This Amendment shall be governed by and construed in accordance with California law, without regard to conflict of law principles.

3.4 Further Assurances. Each party hereby covenants that such party will, at any time, and from time to time, upon written request therefor, execute and deliver to the other parties such documents as the requesting party may reasonably request in order to fully satisfy and execute this Amendment.

3.5 Additional Provisions. All of the covenants, terms and conditions set forth herein shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. In the event of any dispute regarding this Amendment which cannot be settled through negotiation, the provisions of Section 7.2 of the Operating Agreement shall apply.

IN WITNESS WHEREOF, the parties have executed and delivered this Amendment the date first written above.

ASSIGNOR:

ASSIGNEE:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

—

PORT TRACT APPROVING PARTY

[\_\_\_\_\_]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

DEVELOPER TRACT APPROVING PARTY

[\_\_\_\_\_]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
\_\_\_\_\_

## EXHIBIT O

### OPERATOR AGREEMENT

This Operator Agreement ("Agreement") is made as of March 29, 2002, by and between the City of Oakland, a municipal corporation acting by and through its Board of Port Commissioners ("Port"), in its capacity as the Port Tract Approving Party, Jack London Square Partners, LLC ("Developer") in its capacity as the Developer Tract Approving Party, and Ellis Partners LLC ("EPL"). Capitalized terms used but not otherwise defined herein shall have the meaning given to such terms in the OA (as defined below).

#### Recitals

A. Section 1.29 of the Operating Agreement ("OA") between the Port and CEP-JLS I LLC ("CEP") dated as of March 29, 2002, provides that the Approving Parties may designate an operator to maintain and operate the Common Area of the Complex.

B. Pursuant to an Operator Appointment Letter dated as of even date herewith, EPL was appointed the "Operator" under the OA, subject to EPL's execution of this Agreement.

#### Agreement

NOW, THEREFORE, the parties agree as follows:

1. EPL hereby accepts appointment as the Operator under the Operating Agreement and agrees to perform all duties of the Operator as defined in the Operating Agreement.

2. EPL agrees to be subject to and comply with all of the terms, conditions and obligations of the Operator under the Operating Agreement and shall be entitled to all rights and benefits accorded the Operator under the Operating Agreement, as such agreement may be amended from time to time during the term of EPL's service as Operator; provided the amendment (i) is executed in accordance with the Operating Agreement and recorded in the official records of the Alameda County Recorder's office and (ii) does not increase the Operator's obligations and liabilities nor reduce the Operator's rights and benefits under the Operating Agreement unless consented to in writing by EPL. Nothing in this Operator Agreement shall limit the right of the Parties under the Operating Agreement to amend the Operating Agreement without the consent of the Operator. In the event an amendment increases the Operator's obligations and liabilities or reduces the Operator's rights and benefits under the Operating Agreement, and EPL does not consent in writing to such amendment, EPL shall have the right to resign as Operator and terminate the Operator Agreement upon written notice to the Parties within thirty (30) days after recordation of the amendment. The Operator shall be deemed to have consented in writing to any recorded amendment of which the Operator

has actual notice if the Operator does not elect to terminate this agreement within thirty (30) days after recordation.

3. Without limiting the generality of the foregoing, in addition to those provisions specifically applying to Operator or the Complex in general, the following provisions of the Operating Agreement shall apply to Operator as well as to the Parties to the Operating Agreement: 3.1(A) (to the extent Operator controls such access rights), 3.1(E), 4.8, 5.1(C), 6.1, 7.1 (excluding 7.1(C) and 7.1(D)), 7.2, 7.5, 7.9, 7.13, 7.14, 7.16, 7.17, and 7.20).

4. Operator's designated address for purposes of Section 7.5 of the Operating Agreement is:

Ellis Partners LLC  
433 California Street, Suite 610  
San Francisco, California 94104  
Attention: Melinda Ellis Evers  
Telephone: (415) 391-9800  
Facsimile: (415) 391-4711

(Signatures follow)

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first set forth above.

The Operator:

**ELLIS PARTNERS LLC,**  
a California limited liability company  
Its: Manager

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Approving Party For Developer Tract:

**JACK LONDON SQUARE PARTNERS, LLC,**  
a Delaware limited liability company

By: **EPI/JLS INVESTORS LLC,**  
a California limited liability company  
Its: Manager

By: **ELLIS PARTNERS LLC,**  
a California limited liability company  
Its: Manager

By: \_\_\_\_\_  
Harold A. Ellis, Jr.  
Its: President

Approving Party For Port Tract:

**CITY OF OAKLAND,**  
a municipal corporation of the State of California,  
acting by and through its Board of Port  
Commissioners

By: \_\_\_\_\_  
Omar R. Benjamin  
Its: Director, Commercial Real Estate

PUBLIC REVIEW DRAFT OF MARCH ~~9~~JUNE 3, 2004

EXHIBIT G

PROJECT APPROVALS

Exhibit G

1



EXHIBIT G

PROJECT APPROVALS

1. Development Agreement approved by the City Council on \_\_\_\_\_, 2004 (Ordinance No. \_\_\_\_\_).
2. Zoning District Boundary Line Adjustment approved by the City Council on \_\_\_\_\_, 2004 (Ordinance No. \_\_\_\_\_).
3. Planned Unit Development, including a Preliminary Development Plan, approved by the City Council on \_\_\_\_\_, 2004.
4. Final Development Plans for the following Development Parcels, approved by the City Council on \_\_\_\_\_, 2004:
  - Site C
  - Site D
  - Pavilion 2
  - 66 Franklin
  - Site F-1
  - Site F-2
  - Site F-3
  - Site G
5. Major Variance for Fast Food Restaurant Commercial Activities under Oakland Municipal Code Chapter 17.148, approved by the City Council on \_\_\_\_\_, 2004.
6. Major Conditional Use Permit for a hotel use on Site F3, two pedestrian bridges and a reduction in parking due to the proposed shared parking provision under Oakland Municipal Code Chapter 17.134, approved by the City Council on \_\_\_\_\_, 2004.
7. Design Review approval by the City Council on \_\_\_\_\_, 2004.

EXHIBIT H

SITE PLAN

Exhibit H

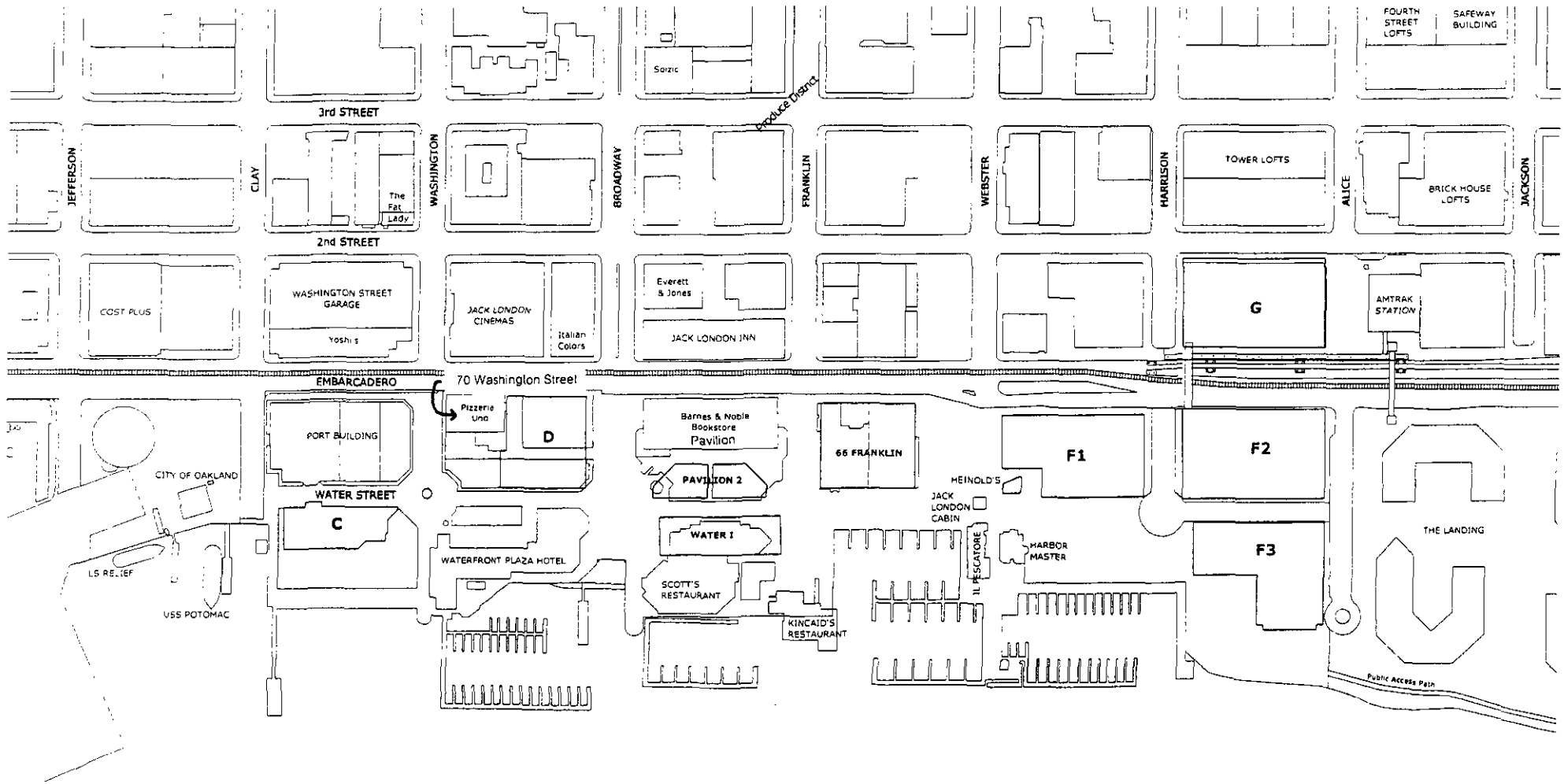


Exhibit H

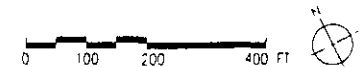
SITEPLAN

JACK LONDON SQUARE REDEVELOPMENT

PDP APPLICATION January 2004

**Project Site:** All of the area south of the Embarcadero and north of the Oakland Estuary that lies between Clay and Alice Streets, plus the full City block bounded by 2nd and Harrison Streets, the Embarcadero, and the Amtrak Station property.

**Common Area:** All of the area within the Project Site that is not covered by existing or future buildings.



JACK LONDON SQUARE PARTNERS

PUBLIC REVIEW DRAFT OF JUNE 323, 2004

EXHIBIT I

MEMORANDUM OF DEVELOPMENT AGREEMENT

Exhibit I

1

RECORDING REQUESTED BY )  
AND WHEN RECORDED MAIL TO: )  
)  
City of Oakland )  
Community and Economic )  
Development Agency )  
250 Frank H. Ogawa Plaza, Suite 3330 )  
Oakland, California 94612 )  
Attn: Director of City Planning )

---

(Space Above This Line for Recorder's Use Only)  
[Exempt from recording fee per Gov. Code § 27383]

### MEMORANDUM OF DEVELOPMENT AGREEMENT

THIS MEMORANDUM OF DEVELOPMENT AGREEMENT ("Memorandum"), dated for reference purposes as of \_\_\_\_\_, 2004, is entered into by and between the CITY OF OAKLAND, a California charter city ("City"), JACK LONDON SQUARE PARTNERS, LLC, a Delaware limited liability company ("JLSP"), and CEP-JLS I LLC, a Delaware limited liability company ("CEP-JLS"; JLSP and CEP-JLS being hereinafter collectively referred to as "Developer").

1. **Development Agreement.** City and Developer have entered into a Development Agreement, dated as of \_\_\_\_\_, 2004, pursuant to the provisions of California Government Code §§65864-65869.5 and City's Development Agreement Ordinance contained in Chapter 17.138 of City's Planning Code. In accordance with California Government Code §65868.5, Developer caused the Development Agreement to be recorded in the Official Records of the County of Alameda [in Book No. \_\_\_\_ at Page \_\_\_\_] [as Instrument No. \_\_\_\_] on \_\_\_\_\_, 2004. A copy of the Development Agreement is available for public inspection and copying at the office of the City Clerk, City of Oakland, 250 Frank H. Ogawa Plaza, Oakland, California 94612. All of the terms, conditions, provisions and covenants of the Development Agreement are incorporated into this Memorandum by reference as if set forth in full herein, and the Development Agreement and this Memorandum shall be deemed to constitute a single instrument or document. For convenience, terms defined in the Development Agreement shall have the same meaning when used in this Memorandum.

2. **Purpose of Memorandum.** Section 3.1 of the Development Agreement provides that, upon exercise of an Option and acquisition by JLSP ( or a Transferee of JLSP) of a legal or equitable interest in a Development Parcel pursuant to such Option, or entry by JLSP (or by a Transferee of JLSP) into a Development Parcel Ground Lease with Port for Development Parcel Pavilion 2, the Development Agreement automatically becomes effective as to, and governs, such Development Parcel as of the later of (i) the Effective Date of the Development Agreement,

or (ii) the date JLSP (or a Transferee of JLSP) provides written evidence acceptable to City that it has acquired such interest. Section 3.1 of the Development Agreement further requires that promptly after the Development Agreement becomes effective as to, and governs such, Development Parcel, JLSP (or a Transferee of JLSP, if applicable) and City shall execute and acknowledge this Memorandum and Developer shall cause this Memorandum to be recorded in the Official Records of the County of Alameda to provide record evidence that the Development Agreement has become effective as to, and governs, such Development Parcel, pursuant to Government Code §65868.5. Accordingly, the Parties have executed and acknowledged this Memorandum and Developer has caused this Memorandum to be recorded in the Official Records of the County of Alameda to provide such record evidence.

3. **Effect of Memorandum.** This Memorandum is solely to provide such record evidence of the Development Agreement, and in no way modifies the terms, conditions, provisions and covenants of the Development Agreement. In the event of any inconsistency between the terms, conditions, provisions and covenants of this Memorandum and the Development Agreement, the terms, conditions, provisions and covenants of the Development Agreement shall prevail.

The Parties have executed this Memorandum on the dates specified immediately adjacent to their respective signatures.

CITY:

CITY OF OAKLAND, a California charter city

By: \_\_\_\_\_  
Its: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
John Russo  
City Attorney

DEVELOPER:

JACK LONDON SQUARE PARTNERS, LLC, a  
Delaware limited liability company

By: EPI/JLS Investors LLC, a California limited  
liability company

By: Ellis Partners LLC, a California limited  
liability company

By: \_\_\_\_\_  
Harold A. Ellis, Jr.  
Its President

CEP-JLS I LLC, a Delaware limited liability company

By: EPI-JLS I LLC, a California limited liability company  
Its Manager

By: ELLIS PARTNERS, LLC, a California limited liability company  
Its Manager

By: \_\_\_\_\_  
Harold A. Ellis, Jr.  
Its: President



**EXHIBIT A**

**LEGAL DESCRIPTION OF DEVELOPMENT PARCEL**

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 2004, before me, \_\_\_\_\_, the undersigned, personally appeared \_\_\_\_\_,

- personally known to me  
 proved to me on the basis of satisfactory evidence

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

WITNESS my hand and official seal:

Signature \_\_\_\_\_

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 2004, before me, \_\_\_\_\_, the undersigned, personally appeared \_\_\_\_\_,

- personally known to me  
 proved to me on the basis of satisfactory evidence

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

WITNESS my hand and official seal:

Signature \_\_\_\_\_

PUBLIC REVIEW DRAFT OF JUNE 323, 2004

EXHIBIT J-1

PORT'S NON-DISCRIMINATION AND  
SMALL LOCAL BUSINESS UTILIZATION POLICY

Exhibit J-1

1

PUBLIC REVIEW DRAFT OF JUNE 323, 2004

EXHIBIT J-2

PORT'S PREVAILING WAGE REQUIREMENTS

Exhibit J-2

1

PUBLIC REVIEW DRAFT OF JUNE 323, 2004

EXHIBIT J-3

PORT'S LIVING WAGE REQUIREMENTS

Exhibit I-3

1

EXHIBIT K

PORT ART IN PUBLIC PLACES ORDINANCE

BOARD OF PORT COMMISSIONERS  
CITY OF OAKLAND

PORT ORDINANCE NO.3694

AN ORDINANCE ESTABLISHING A PUBLIC ART PROGRAM, A PUBLIC ART COMMITTEE AND GUIDELINES, RULES AND REGULATIONS FOR INCORPORATING PUBLIC ART INTO THE PORT'S MAJOR EXPANSION AND DEVELOPMENT GOALS AND PRIVATE AND PUBLIC DEVELOPMENT WITHIN THE JURISDICTION OF THE PORT OF OAKLAND, POLICY AND PROCEDURE FOR ACQUISITION, REVIEW AND ACCEPTANCE OF GIFTS AND LOANS, AND DE-ACCESSIONING OF PUBLIC ART

---

WHEREAS, artistic and cultural resources enhance the quality of life for individuals living in, working in and visiting the Port of Oakland; and

WHEREAS, economic benefits are to be gained by the Port in the form of public pride, increased tourism, enhancement of public spaces, increases in retail and other commercial activity and enhanced economic growth of and in the Port Area and affected by the Port Area enhancements to commerce, shipping and navigation resulting from the development by the Board of artistic and cultural resources; and

WHEREAS, the Board is committed to commissioning a wide range of artistic styles, forms, media, and disciplines that characterize the breadth of contributions an artist can make to public arena; and

WHEREAS, the Board is committed to providing uniform procedures for the review and acceptance of gifts and loans of artwork to the Port; and

WHEREAS, the Board is committed to evaluating the collection of public art as a whole on a regular basis to determine the current condition of the artwork, maintenance needs, and to consider the de-accessioning of individual artwork;

WHEREAS, the Board hereby delegates to the Director of Communications the responsibility for the implementation of this ordinance;

BE IT ORDAINED by the Board of Port Commissioners of the City of Oakland as follows:

ARTICLE I. POLICY AND PROCEDURE FOR ACQUISITION OF PUBLIC ART

Section 1. Purpose.

This ordinance is enacted to provide an opportunity for the public to experience high quality art of enduring value that reflects the diversity of the region served by the Port of Oakland and its people.

This ordinance is enacted to establish a Public Art Program, a Public Art Committee and guidelines, rules and regulations for (1) including works of public art in certain public improvement projects in the Port's Capital Improvement Program and in certain private commercial, industrial and revitalization developments in the Port's Commercial Real Estate Program; and (2) meeting the on-going day-to-day maintenance and conservation needs to preserve the works of public art.

Section 2. Definitions.

a. "Administrative Costs" shall mean all costs incurred in connection with the development and implementation of the Public Art Program established by this Ordinance and the selection, creation, acquisition, installation, maintenance, and presentation of, including publicity and community education about, works of Public Art in the Port's Collection.

b. "Artist" shall mean a person who has established a reputation of artistic excellence in the visual, performing, media or literary arts, as judged by peers, through a record of exhibitions or performances, public commissions, sale of works, and/or educational attainment.

c. "Artist Selection Panel" shall mean the panel appointed by the Public Art Committee (PAC), on a project-by-project basis, to review and recommend to the PAC appropriate artists and artwork according to the criteria and procedures set forth in the Administrative Procedures.

d. "Administrative Procedures" shall mean the process and procedures that govern the implementation of this Ordinance, including detailed information on the composition and responsibilities of the Public Art Committee and Artist Selection Committee, criteria for artist and artwork selection, and process for approval of artists and artwork.

e. "Building Valuation" shall mean the total value of all construction work for which a building permit is issued, and includes all finish work, painting, roofing, electrical, plumbing, heating, air conditioning, elevators, fire-extinguishing systems and any other permanently installed work of permanently installed equipment.

f. "Conservation" shall mean the treatment of a deteriorated or damaged artwork to approximate as nearly as possible its original form, design, color, and function with minimal further sacrifice of aesthetic and historic integrity.



g. "Construction Costs" shall mean the cost of a Port Development Project or Public Facility, excluding "Demolition Costs", "Equipment Costs", "Debt Issuance" and "Permits and Fees".

h. "De-accessioning" shall mean the procedure for the removal of an artwork from a location on Port property or within the jurisdiction of the Port.

i. "Debt Issuance" shall mean those expenses incurred by the Port for the issuance of bonds for a Port Development Project or Public Facility.

j. "Demolition Costs" shall mean payments for any work required for the removal of buildings or other existing structures from the Port Development Project or Public Facility site.

k. "Development Project" shall mean any project involving construction of a new permanent structure located on Port owned property and requiring issuance or approval of a building permit or a zoning permit.

l. "Donor" shall mean an individual or group who proposes a donation of a work of art or funded project for placement on a public site under the jurisdiction of the Port.

m. "Equipment Costs" shall mean payments for any equipment or furnishings that are portable or of standard manufacture. Equipment does not mean items that are custom designed or that create a new use for a Port Development Project or Public Facility, whether portable or affixed.

n. "Executive Director" shall mean the Executive Director of the Port of Oakland or his or her designee.

o. "Fee" shall mean a monetary exaction other than a tax or special assessment that is collected under the terms of this ordinance to provide funds for public art.

p. "Gift" shall mean an existing or proposed work of art or funded project offered as a donation by someone to the Port for placement at a public site under the jurisdiction of the Port.

q. "Lifetime of the Artwork" shall mean for each work of art, the period of time a work of art can be reasonably maintained to accurately represent the condition of the artwork when it was first installed.

r. "Long Term Loan" shall mean a loan of artwork for a period of two years or more.

s. "Maintenance" shall mean actions taken to retard or prevent deterioration or damage to artwork by control of the environment and/or treatment of the artwork on a routine basis.

t. "Non-archival" shall mean does not meet accepted artwork preservation standards, practices, and principles.

u. "Permits and Fees" shall mean payments made for all permits and fees associated with a Port Development Project or Public Facility.

v. "Program Administrator" shall mean the staff person designated by the Communications Division to oversee all functions of the Port Public Art Program and to provide vision for the program. This person works with division directors in the development of public art goals and with private developers to include public art in private projects located on Port property.

w. "Public Art Account" shall mean the account created with separate sub-accounts allocating funds to be used for the selection, acquisition, installation, and substantive structural repair and maintenance of art and art projects in, upon, and adjacent to Port facilities. One Public Art Account shall be created with separate sub-accounts for each Port Revenue Division. The Executive Director or designee, and, as appropriate, the Board of Port Commissioners, shall authorize all disbursements from the Public Art Account.

x. "Port of Oakland" or "Port" shall mean the City of Oakland, a municipal corporation acting by and through its Board of Port Commissioners and the officers, employees and agents, authorized to act for and on behalf of the Board with respect to the matter for which the term is used.

y. "Port Property" shall mean parcels of land, buildings and structures owned in fee or held in trust by the Board of Port Commissioners.

z. "Port Revenue Division" shall mean the following divisions of the Board: Aviation, Maritime and Commercial Real Estate and such other divisions as may be established from time to time by the Board of Port Commissioners which are expressly made subject to this ordinance.

aa. "Public Amenities" shall mean areas designated for public access, public traffic, and/or public accommodation within private or public development projects upon Port owned lands.

bb. "Public Art" shall mean original works of art accessible to the public and conceived in any discipline or medium, including visual, performance, literary, media and temporary works.

cc. "Public Art Collection" shall mean all works of art owned by the Port of Oakland, located on Port property, and within the jurisdiction of the Port.

dd. "Public Art Committee" shall mean a standing committee appointed by the Port to develop overall Public Art Program policy and procedures, as required, to provide review responsibility for the provisions of this Ordinance such as acceptance of gifts of art and de-accessioning of artwork, and to advise the Port on the Public Art Program.

ee. "Public Art Project" shall mean any initiative for the creation, presentation and/or performance of public art, recommended by the Public Art Committee and approved by the Board of Port Commissioners for expenditure from the Public Art Account for the purposes of this ordinance.

ff. "Public Facility" shall mean any publicly accessible, capital project paid for wholly or in part by the Port of Oakland that results in the construction or remodel of any building, decorative or commemorative structure, parking facility and any portion thereof.

gg. "Quality of Artwork" shall mean the overall accomplishment in the art form, content and craftsmanship, as judged in accordance with accepted standards within the professional arts discipline.

hh. "Real Property Acquisition Costs" shall mean payments made for the purchase of parcels of land, existing building and structures, and costs incurred by the Port for the appraisals or negotiations in connection with such purchase for a Port Development Project; provided, however, that a Port Development Project for the acquisition and/or development of parkland or parks shall have included in its construction cost the Real Property Acquisition Costs, as defined above.

ii. "Short Term Loan" shall mean a loan of artwork not exceeding two years.

jj. "Temporary Art" shall mean a work of art displayed for a limited amount of time, generally not exceeding two years.

kk. "Work of Art" shall mean all forms of art created by an Artist and conceived in any discipline or medium, including visual, performance, literary, media and temporary works.

### Section 3. Establishment Of A Public Art Requirement.

There is hereby established a Public Art requirement applicable to the Port's Revenue Divisions covering respectively, their Development Projects and Public Facilities identified in the Port's Capital Improvements Program and, within their respective areas, covering other private and public development projects upon Port owned lands that include Public Amenities or provide for access to the general public as more fully set forth below.

a. Aviation

(1) The Director of Aviation shall include in all estimates for necessary expenditures and all requests for authorization or appropriations for Port Development Projects and Public Facilities, excluding construction of roadways, utilities, airfield projects and non-Port funded tenant developments, an amount to be set aside and made a part of the Public Art Account and used for the selection, acquisition and display or works of art equal to at least one percent (1%) of the related Construction Costs.

(2) Funding set aside for Public Art as defined above shall be expended for Public Art within one-year from the date of completion of the Development Project or Public Facility from which the funds were derived.

(3) For projects or programs that have been approved by the Board of Port Commissioners before the approval of this policy, but not yet completed, the Board shall determine on a case by case basis whether or not to apply this policy retroactively.

(4) If the rules or limitations governing a source of funding or appropriate law governing any particular project does not permit the expenditure of such funds on art or certain forms of art, the amount of funds so restricted shall be excluded from the Construction Cost, as defined herein, in making the aforesaid calculations.

b. Maritime

(1) The Maritime Director shall include in all estimates for annual budget expenditures an annual budget allocation of not less than \$150,000 to be set aside and made a part of the Public Art Account and used for the commission, acquisition and performance of Public Art.

(2) Funding set aside for Public Art as defined above shall be expended for Public Art in projects that include Public Amenities.

c. Commercial Real Estate

The majority of CRE land was given in trust to the Port under the state Tidelands Trust. To uphold the public trust, the Port requires developers who buy tidelands or lease tidelands on a long-term basis to do the following:

(1) The Developer shall provide and maintain public art in a publicly accessible place on or in the vicinity of the project site pursuant to this chapter. The cost of such Public Art shall be as follows:

(i) For development projects with 50,000 square feet or more of new construction, the developer shall commit 0.5% of the building valuation up to \$150,000 toward the purchase or commission of Public Art for the project site.

In lieu of purchasing or commissioning public art for the project site, the developer may elect to pay 0.5% of the building valuation up to \$150,000 to the Public Art Account, as identified below.

(ii) For development projects with less than 50,000 square feet of new construction, the developer is required to commit 0.5% of the building valuation up to \$50,000 toward the purchase or commission of Public Art for the project site.

In lieu of purchasing or commissioning public art for the project site, the developer may elect to pay the amount required by this ordinance to the Commercial Real Estate Public Art Account, as identified below.

(2) For any project, the developer may request that the Board of Port Commissioners consider an alternate approach to Public Art if the terms of this policy pose unnecessary hardship to the ability of the development project to be realized.

(3) If a development project is required to purchase or commission Public Art by both the Port of Oakland and the City of Oakland, the developer only will be required to participate in the City of Oakland public art program.

(4) Applicability.

The provisions of this ordinance shall apply only to public and private development projects for which a building permit has not been issued as of the effective date of this ordinance.

(5) Public Art Standards.

(i) The Public Art of a private developer subject to this ordinance is to be privately owned and maintained by developer or his successor(s), including the future occupants or owners of the Development Project, and such private ownership and maintenance shall be adequately provided for by written agreement, or other appropriate provisions shall be made based on the characteristics of the Public Art.

(ii) The Public Art may be used or viewed by or is freely accessible to the patrons, occupants and owners of the development project;

(iii) The Public Art shall be in an area open and freely accessible to the general public during business hours at least eight (8) hours each day of at least five (5) days per

week (to the extent there are five business days in each week), except for holidays, or public accessibility shall be otherwise provided in an equivalent manner based on the characteristics of the Public Art or its placement on the site;

(iv) The Public Art shall be in substantial compliance with any policies and implementation procedures adopted by the Board of Supervisors.

(6) Ineligible Costs

(i) The architecture of the building or facility, or any portion thereof, including decorative, ornamental or functional elements, unless designed by an artist specifically commissioned for this design enhancement purpose;

(ii) Landscape architecture and landscape gardening, except where these elements are designed by an artist specifically commissioned for this design enhancement purpose; or

(iii) Costs for services or utilities necessary to operate or maintain the Public Art over time.

Section 4. Public Art Account.

a. A Public Art Account shall be established in the Capital Improvement Program (CIP) and shall continue from year to year unless specifically terminated by the Board of Port Commissioners. The Public Art Account shall consist of separate sub-accounts established by the Finance Division.

(1) A separate sub-accounts for each of the three Port Revenue Divisions shall be established from which expenditures may be made for the creation, acquisition, presentation, and performance of works of Public Art.

(2) A separate Administration - Maintenance sub-account shall be established into which shall be deposited funds appropriated as provided pursuant to Section 5 of this Ordinance not to exceed 35% of the aggregate of the Revenue Division subaccounts together with such other funds as the Board may appropriate, for Public Art Program staff costs and administrative costs that are associated with developing and implementing this Ordinance including restoration and conservation of Public Art in the Port's collection.

(3) A separate Proceeds from Sales of Public Art sub-account shall be established and expended for future creation, acquisition, presentation, and performance of works of Public Art.

b. For non-capital projects, funds may be moved out of Maritime and Commercial Real Estate from the CIP into the Port's operating budget for expenditures related to said projects.

c. The use of fees collected shall be as follows:

(1) The Executive Director shall make recommendations to the Board of Port Commissioners for expenditures from the Public Art Account in accordance with Port budgetary procedures and adopted Public Art program policies and implementation procedures, which expenditures shall be exclusively for the commission, acquisition, installation, improvement, maintenance and insurance of works of Public Art, or for the restoration or preservation of existing Public Art, and for the Administration of the Public Art Program.

(2) The Executive Director shall provide an annual report to the Board of Port Commissioners on the provision of on-site art installations and arts services, programs, facilities and amenities, and the use of all funds collected and deposited in the Public Art Account, including identification of all income, expenditures, and balances of each of the accounts in the fund during the prior fiscal year and its recommendations for proposed expenditures for the subsequent fiscal year. Upon receipt of such report, the Board of Port Commissioners shall authorize expenditures from the Public Art Account.

#### Section 5. Administration.

a. Implementation Responsibility

The Board hereby delegates to the Director of Communications responsibility for the implementation of this Article.

b. Public Art Committee

The Executive Director shall appoint a Public Art Committee (PAC), subject to approval by the Board of Port Commissioners, to provide review responsibility for the provisions of this Ordinance and to advise the Port on the Public Art Program. The PAC shall:

(1) Promulgate Public Art program policies and implementation procedures for adoption by the Board of Port Commissioners.

(2) Prepare the annual Public Art Plan for approval by the Board of Port Commissioners. The plan shall include, but not be limited to, a prioritized list of public art projects to be commenced during the current fiscal year and a budget for each project.

c. Artist Selection Panel

An Artist Selection Panel shall be appointed by the PAC, on a project-by-project basis, to recommend appropriate artists and artwork

according to the criteria and procedures set forth in the Administrative Procedures.

(1) The Artist Selection Panel functions in an advisory capacity to the PAC.

(2) The PAC reviews recommendations by the Artist Selection Panel, making further recommendations to the Board of Port Commissioners.

(3) All final decisions and approvals concerning the acquisition of artwork rest with the Board of Port Commissioners.

**ARTICLE II. POLICY AND PROCEDURE FOR REVIEW AND ACCEPTANCE OF GIFTS AND LOANS OF PUBLIC ART**

**Section 1. Summary.**

When gifts of works of Public Art are proposed for placement on Port property within the jurisdiction of the Port of Oakland, an artwork proposal is submitted by the potential donor for review by the Port. This procedure also applies to works of Public Art proposed for long-term loan to the Port. The objectives of this policy are to:

a. Provide uniform procedures for the review and acceptance of gifts and loans of works of Public Art to the Port of Oakland.

b. Maintain high artistic standards for works of Public Art located in the jurisdiction of the Port.

c. Acquire works of Public Art that contribute and enhance the Port's Public Art Collection.

d. Insure that the works of Public Art is adequately maintained.

e. Facilitate planning for the placement of works of Public Art within the jurisdiction of the Port of Oakland.

f. Vest in a single Port division the responsibility for insuring the management and maintenance of the Port's public works of Public Art.

The Program Administrator is responsible for implementation of this Article.

The review of proposed gifts is conducted by a Gifts Review Panel appointed by the PAC. The Gifts Review Panel is comprised of three to five arts professionals (artists, museum curators, art historians, conservators) and three representatives of Port revenue division staff.

The PAC reviews all recommendations of the Gifts Review Panel regarding proposed gifts and loans of works of Public Art. Following PAC



review, the Program Administrator makes a recommendation for acceptance or rejection of the proposed gift to the Port Commission for review and action.

Funds to maintain works of Public Art in the Port's collection are limited. Therefore, in accepting a gift, the Port requires that the donor sign a maintenance agreement or establish a maintenance endowment to insure an adequate quality of care for the work of Public Art.

### Section 2. Acceptance Conditions.

a. The Port will consider gifts of works of art for placement on Port property and locations under the jurisdiction of the Port with the understanding that no Port funds will be required for production, sitting, installation or maintenance of the work of Public Art.

b. No gift of an work of Public Art will be accepted by the Port until all funds required for production, sitting, installation and maintenance of the work of Public Art have been secured by the donor.

c. The Port will be the owner of the work of Public Art and reserves the right to move or alter the work to meet public safety or other Port concerns.

d. The Port will consider the following types of proposals for works of Public Art intended for placement a public site under the Port's jurisdiction:

(1) A donor's offer of an already completed work of art.

(2) Art by a specific artist or artists.

(3) A donor's offer to commission a work of Public Art by means of a public competition as described in the Public Art Program Implementation Guidelines.

### Section 3. Review Process.

a. The donor discusses the nature of the gift and the Port procedures with the Program Administrator. Working with Port division staff, the donor develops a proposal for review by the Gifts Review Panel.

b. The Program Administrator will review each offer of a work of Public Art with Port division staff to determine whether it meets initial criteria as defined in this Article.

c. Each proposed gift of art is reviewed by the Gifs Review Panel on the basis of the criteria established below. Evidence that all issues are satisfactorily addressed will be required from the donor before a recommendation for acceptance or rejection of the gift is made.

d. Before presenting the Gifts Review Panel recommendation to the PAC, the Program Administrator may request further and more detailed information to be considered at additional review sessions. The PAC also may attach conditions to its recommendation of acceptance.

e. Based on the recommendation of the PAC; the Program Administrator recommends acceptance or rejection of the gift to the Port Commission.

f. The Port will accept donated works of Public Art only when accompanied by a legal instrument of conveyance of title, enumerating any conditions of the gift that the Port has agreed to accept, and the appropriate warranty of originality.

g. In general, gifts will be accepted without restrictions as to future use or disposition. Loans and temporary displays of a work of Public Art are not considered gifts, for the purposes of this Article.

h. The Program Administrator will forward copies of the conveyance of title and the stated insurance value for gifts of a work of Public Art to the appropriate Port divisions. The stated value of any loaned work of Public Art will be provided to the Port's Risk Management Office.

i. If the gift of art is accepted, the division under whose jurisdiction the work of Public Art will be placed is responsible to oversee the installation of the work of Public Art.

#### Section 4. Placement.

If a site for the work of Public Art has not been identified by the donor or if the site is deemed inappropriate in accordance with the criteria listed below, the placement of works of art will be determined by the PAC in consultation with Port division staff.

#### Section 5. Costs.

All costs of the proposed donation of art, including production, acquisition, sitting, installation, and maintenance must be provided by the donor and be detailed in the proposal.

#### Section 6. Timeline.

If a proposed gift is not completed within the timeline originally established, or if significant changes in content, presentation, or financing of the gift of art occur, the gift must be reviewed again by the panel. The Port is authorized to request that a proposal be resubmitted.

**Section 7. Legal.**

Consideration will be given to the proposed terms of donation, legal title, copyright authenticity, artist right to reproduce, liability and other issues as appropriate.

**Section 8. De-Accession.**

Gifts of works of Public Art will be reviewed on a regular basis and de-accessioned if necessary, through steps provided in Article III of this Ordinance and in accordance with national standards for de-accessioning works of art.

**Section 9. Exceptions.**

**a. Gifts of State**

(1) Gifts of State presented to the Port by foreign governments are exempt from the provisions of this Article and may be accepted by the Port Commission.

(2) Appropriate recognition and publicity will be the responsibility of the Program Administrator.

**b. Temporary Exhibitions in Port-Managed Facilities**

(1) The Port shall control the content and arrangement of all temporary exhibitions, and reserves the right to reject any part of an exhibition or to change the manner of display if the items to be exhibited are contrary to the Port's community responsibility.

(2) Every aspect of the exhibition must meet the Port's standards of quality, as defined in the Public Art Program Administrative Procedures.

(3) Artwork of exhibitions loaned for display on Port property for 60 (sixty) days or less will not be subject to the standard review process.

(4) Review and approval are the responsibility of the Program Administrator and the division with jurisdiction over the space where the work of Public Art is exhibited. It is understood that all decisions will be based on the standards recommended in this document.

(5) During the period of time that a work of art is displayed on Port property, the owner of the work of art must provide one of the following documents:

(i) An insurance rider covering the specific work of art for the entire negotiated display time OR

- (ii) A signed waiver holding the Port harmless in the event of vandalism, damage, or theft.

Section 10. Donor Submittal Requirements.

The donor must submit a cover letter explaining why she/he is offering the gift of artwork to the Port.

a. Aesthetic Quality

- (1) Written narrative proposal with detailed description of artwork.

- (2) Information on the context of the artwork, provenance, history (where it comes from and where it has been previously displayed, if at all).

- (3) Detailed drawings of the site plan, elevation and section view of artwork, as appropriate.

- (4) Photographs, sketches, and/or model of the artwork.

- (5) Dimensions, materials, and colors.

b. Intrinsic Value

- (1) Background information and credentials of the artist.

- (2) Other examples of the artist's work.

- (3) A letter of authentication from the artist, stating that it is her/his own work.

- (4) Statement of the current value of the artwork prepared by a certified art appraiser.

- (5) A valid, signed contract between the donor and the artist that guarantees full payment for artwork by the donor, as appropriate.

c. Installation

- (1) Construction and installation method.

- (2) Power, plumbing or other utility requirements.

- (3) Qualifications and insurance coverage of the contractor installing the artwork.

- (4) Written commitment that the donor will cover all costs associated with installation of the artwork.

(5) Budget indicating cost of installation.

d. Maintenance

(1) A maintenance plan prepared by a qualified conservator.

(2) Written permission from the artist or artist's estate for a qualified conservator to conserve the artwork when necessary.

Section 11. Panel Review Criteria.

a. Aesthetic Quality

(1) Does the proposed gift of art have strong artistic merit?

(2) Strong, inherent aesthetic quality as measured against the recognized standards of excellence in the field.

(3) Qualifications, credentials, and other pertinent information on the artist.

(4) Warranty of originality of the artwork (artwork must be an original creation or limited edition)

(5) Durability and craftsmanship of the artwork.

b. Site and Environmental Considerations

(1) If a site for the artwork has been identified by the donor, is the relationship between the site and the artwork in the best interest of both?

(2) Appropriateness of artwork scale to the proposed site.

(3) Appropriateness of artwork to other aspects of its surroundings.

(4) Impact on ecology.

c. Relationship to the Port's Art Collection

(1) How is the proposed gift compatible or incompatible with the Port of Oakland's public art collection?

(2) Contribution to the diversity and breadth of the Port's art collection.

(3) Current representation of the artist in the Port's art collection.

d. Liability and Safety Considerations

(1) How susceptible is the artwork to vandalism and safety hazards?

(2) Potential safety hazards and how they are being addressed.

(3) Potential for graffiti and other vandalism and how it is being addressed.

(4) Special insurance requirements, if any.

e. Durability

(1) How has the donor provided for maintenance during the lifetime of the artwork?

(2) Expected life span of artwork in a public, non-archival exhibition setting.

(3) Durability of similar artworks constructed of the same materials.

(4) Environmental conditions and suitability of artwork materials to the conditions of its proposed site.

(5) Seismic safety considerations through report prepared by a licensed engineer.

(6) Adequate attention to unusual conditions of the site, such as poor drainage, steep slope, etc.

f. Maintenance

(1) Are the maintenance needs of the artwork reasonable and can they be adequately managed by the Port?

(2) On-going maintenance requirements and cost.

(3) Provision of maintenance funds or maintenance agreement by the donor.

(4) Artwork installation and removal specifications.

(5) Written permission from the artist or artist's estate for a qualified conservator to conserve the artwork when necessary.

(6) Written permission granted by the artist or artist's estate for removal of the work as a result of safety emergencies and changes in the future use of the site.

Section 12. Administration.

Implementation Responsibility

The Board hereby delegates to the Director of Communications responsibility for the implementation of this Article.

**ARTICLE III. POLICY AND PROCEDURES FOR THE DE-ACCESSIONING OF PUBLIC ART**

Section 1. Purpose.

This ordinance is enacted to provide Provision of procedures for periodic review and evaluation by the Port of Oakland of the Port's Collection of Public Art.

Section 2. De-Accessioning Policy.

De-accessioning is a procedure for the withdrawal of a work of Public Art from public exhibition for an indefinite duration. De-accessioning must be cautiously applied to avoid the influence of fluctuations of taste and the premature removal of a work of Public Art from the collection.

De-accessioning may occur only after a careful and impartial evaluation of the work of Public Art, and may be accomplished through storage or loan of the work of Public Art, or on a permanent basis through several methods of disposition available. Since artworks are acquired by the Port as a result of a thorough review process by impartial peer panels -- based on the quality of the artwork and the value of the work to the collection as a whole -- deaccessioning may be considered only after ten years have elapsed from the date of installation of a permanent work of Public Art, and five years after acceptance of a loan of work of Public Art subject to review by the Port Attorney for compliance with acquisition and/or deaccession covenants from funding and/or lending sources, if any.

Section 3. Eligible Works Of Public Art.

Works of Public Art eligible for consideration for de-accession through this Article include:

a. Works of Public Arts purchased or commissioned in accordance with Article I.

b. Gifts of works of Public Art accepted by the Port in accordance with Article II.

c. All other works of Public Art in the Port's Collection of Public Art purchased separately by Port divisions or received as gifts prior to the passage of this ordinance. Port evaluation of a work of Public Art may be requested by the division under whose jurisdiction the work of Public Art is located or may be initiated as an advisory action by the Board of Port Commissioners.

#### Section 4. Deaccession Procedure.

a. At least a minimum of once every five years the Director of Communications will review the Port's Collection of Public Art.

b. The Director of Communications shall designate an advisory panel comprised of visual art professionals (artists, museum curators, art historians, conservators) to review specific items proposed for de-accession and make recommendations to the Board of Port Commissioners about the disposition of these works.

c. The De-accession Advisory Panel may consider the de-accessioning of works of Public Art for one or more of the following reasons:

(1) A work of Public Art is not, or is only rarely, on display because of lack of a suitable site.

(2) The condition or security of the work of Public Art cannot be reasonably guaranteed in its present location.

(3) The work of Public Art has been damaged or has deteriorated to the point that it can no longer be represented to be the original work of art.

(4) The work of Public Art has been damaged and repair is impractical or unfeasible, or the cost of repair or renovation is excessive in relation to the original cost of the work.

(5) The work of Public Art endangers public safety.

(6) Significant changes in the use, character or actual design of the site require a re-evaluation of the relationship of work of Public Art to the site.

(7) The work of Public Art has been determined to be of inferior quality relative to the quality of other works in the collection, or has been determined to be incompatible with the rest of the collection.

(8) The Port wishes to replace the work of Public Art with a work of more significance by the same artist.



(9) The work of Public Art requires excessive maintenance or has faults of design or workmanship.

Section 5. Sequence Of Action To De-Accession.

a. The Communications Division appoints a De-accession Advisory panel.

b. The De-Accession Advisory Panel and/or staff determines that a work of Public Art meets one of the criteria listed above.

c. The Communications Division staff prepares a report that indicates:

(1) Any restrictions that may apply to this specific work, based on contract review.

(2) An analysis of the reasons for de-accessioning.

(3) Options for storage or disposition of the work.

(4) Appraised value of the work, if obtainable.

d. The De-Accession Advisory Panel reviews the report at its next scheduled meeting. The panel may seek additional information regarding the work from the artist, art galleries, curators, appraisers or other professionals prior to making a recommendation to the Board of Port Commissioners.

e. A recommendation for action is sent to the Board of Port Commissioners.

f. The Board of Port Commissioners considers the recommendation at a regularly scheduled meeting.

g. Upon confirmation of its recommendation, the Communications Division will consider the following actions (in order of priority):

(1) Sale or trade:

(i) Sale through auction, art gallery or dealer resale, or direct bidding by individuals, in compliance with Port and city law and policies or requirements governing surplus property and any limits to which bonds are subject.

(ii) Trade through artist, gallery, museum, or other institutions for one or more other work(s) of Public Art(s) of comparable value by the same artist.

(2) Indefinite loan to another governmental entity.

(3) Destruction of work deteriorated or damaged beyond repair at a reasonable cost, and deemed to be of no or only a negligible value, in accordance with national standards for conservation and deaccession.

(4) Re-donation, sale or other arrangement agreed upon with the donor or artist at the time of the Port's acquisition of such work of Public Art.

**Section 6. Restrictions.**

No works of art shall be sold or traded to members or staff of the Port, consistent with Port conflict of interest policies.

**Section 7. Proceeds.**

Proceeds from the sale of Public Art shall be deposited into the Public Art account for Public Art acquisitions. Any pre-existing contractual agreements between the artist or donor and the Port regarding resale will be honored.

**Section 8. Administration.**

**Implementation Responsibility**

The Board hereby delegates to the Director of Communications responsibility for the implementation of this Article.

**ARTICLE IV. EFFECTIVE DATE.**

This ordinance shall be effective sixty (60) days after adoption.

EXHIBIT L

CITY'S LOCAL EMPLOYMENT PROGRAM

EXHIBIT L

CITY'S LOCAL EMPLOYMENT PROGRAM

EXHIBIT M

ENERGY STANDARDS

**INTENT:** Exceed Title 24 Energy Standards by 15%.

- a. **Requirement:** Utilize free services provided by the Oakland Energy Partnership's Energy Efficiency Design Assistance (EEDA) Program to help evaluate potential energy saving measures to meet the energy efficiency requirements that follow. Contact EEDA by calling Alex Alzugaray, Energy Solutions, 510/482-4420, ext. 225.

**Submittal:** Brief memo summarizing which recommended measures were adopted and which were not. State reasons why any recommended measures were not adopted.

- b. **Requirement:** Work to reduce source energy use 15% below Custom Energy Budget for the project as determined by the performance compliance method of Title 24. Regulated energy components include HVAC systems, building envelope, service hot water systems, lighting and other regulated systems as defined by Title 24.

**Submittal:** Provide a narrative highlighting energy saving measures incorporated in the building design. Include a table listing baseline and proposed comparisons of all model variables that are different.

**Submittal:** Show the extent that the design source energy use is lower than the Title 24 Custom Budget for the project. Provide a completed and signed copy of the Title 24 Report for the project (including Performance Certificate of Compliance, Form PERF-1).

- c. **Requirement:** Use Energy Star Appliances for all appliances provided by the developer. Energy Star Appliances are those receiving an official label through the Environmental Protection Agency's Energy Star program.

**Submittal:** Provide a cut sheet for each appliance provided that shows the Energy Star label.

- d. **Requirement:** Work collaboratively with City of Oakland staff and the Oakland Energy Partnership in evaluating the costs and benefits of using renewable energy production methods. City contacts: Scott Wentworth,

Public Works Agency, 615-5421; Carol Misseldine,  
Mayor's Office, 238-6808 Randy Hayes, 238-7157.

**Submittal:** Listing of dates and outcomes of meetings held, with a particular emphasis on the feasibility of installing a solar or other renewable energy system.