

## **PUBLIC IMPROVEMENTS REIMBURSEMENT AGREEMENT**

24th Street, Harrison Street, Bay Place, 27th Street Public Improvements  
City of Oakland Agreement # \_\_\_\_\_

This Public Improvement Reimbursement Agreement (“Agreement”) is entered into this \_\_\_\_ day of \_\_\_\_\_, 202\_, by and between NASH – Holland 24<sup>th</sup> & Harrison Investors, LLC, a Delaware limited liability company (“Developer”) and the City of Oakland, a California Charter City and municipal corporation. (“City”) in connection with the construction of a new mixed-use multifamily residential and retail building located at intersection of 24<sup>th</sup> Street and Harrison Street in Oakland, California (collectively, Developer and City may be referred to as “the Parties”).

### **RECITALS**

WHEREAS, Developer has obtained City’s approval of a Design Review permit authorizing the construction of a mixed-use multifamily residential and retail building at the intersection of 24<sup>th</sup> Street and Harrison Street in Oakland, California (“the Project”); and

WHEREAS, as an accommodation to the City and to avail the City of certain efficiencies from performing such work concurrently with other streetscape work being performed by Developer in connection with the construction of the Project, Developer has agreed to construct street improvements along 24<sup>th</sup> Street east of Waverly Street, 27<sup>th</sup> Street south of 26<sup>th</sup> Street, and Harrison Street , in order to coordinate development of the Project (“the Public Improvements,” as described in greater detail in Exhibit “A”, attached hereto and incorporated herein by reference); and

WHEREAS, City acknowledges that construction of the Public Improvements will be of benefit to City and the public and wishes to provide for a process by which City can reimburse Developer for the cost of construction of the Public Improvements as public infrastructure improvements that will benefit the City; and

WHEREAS, in anticipation of the commencement of construction of the Project, Developer has designed and submitted a complete set of construction plans (PX1900031), for the Public Improvements, which have been reviewed and conditionally approved by City on [enter date], attached hereto as Exhibit “B” and incorporated herein by reference; and

WHEREAS, the implementation of the Public Improvements must substantially comply with the conditionally approved plans (PX1900031) and the Developer must in alignment with the City on the official approved plans; and

WHEREAS, as a California Charter City pursuant to California Constitution Article XI, Section 5, City has broad “home rule” authority with respect to city contracts, and is exempt from the provisions of state law governing general law cities, including the provisions of the California Public Contract Code; and

WHEREAS, the City Administrator has made a written determination, attached hereto as Exhibit "C" and incorporated herein by reference, that Developer's construction of the Public Improvements achieves efficiencies and coordination of the construction of the Public Improvements; and

WHEREAS, the Parties wish to memorialize the terms and conditions of City's reimbursement of Developer for construction of the Public Improvements.

## **AGREEMENT**

NOW THEREFORE, Developer and City hereby enter into this Agreement on the following terms and conditions:

### **1. DEFINITIONS:**

A. "Agreement" means this Public Improvements Reimbursement Agreement, including all exhibits to this Agreement.

B. "Authorized Reimbursement Amount" shall mean the amount of reimbursement to be paid to Developer for construction of the Public Improvements in accordance with the requirements of Section 23 of this Agreement, up to the Maximum Reimbursement Amount.

C. "Certificate of Substantial Completion" is defined in Section 21(D) of this Agreement.

D. "Change Order" means any change to the Public Improvements required as conditions of approval to the Project, as set forth in the descriptions and plans (PX1900031), detailed and conditionally approved on [enter date] by City as set forth in Exhibit "B".

E. "City" means the City of Oakland, California.

F. "Completion Certificate" is defined in Section 21(E) of this Agreement.

G. "Construction Plans" means the complete set of plans, engineering specifications and construction plans for the Public Improvements attached hereto as Exhibit "B."

H. "Contractor" means the firm or company with whom Developer contracts to construct the Public Improvements.

I. "Director" means the Department of Transportation Director of the City, or a designee of the Department of Transportation Director.

J. "Governmental Requirements" means all applicable federal, state and local laws, ordinances, codes, city standards, regulations and requirements of all governmental authorities having jurisdiction over the completion of the Public Improvements.

K. "Materialperson" means one who supplies or furnishes materials for the completion of the Public Improvements.

L. "Maximum Reimbursement Amount" means the highest amount that City will pay to reimburse Developer for its claimed Public Improvement Costs under this Agreement, which amount shall be subject to adjustment pursuant to any Change Order.

M. "Developer" means NASH – Holland 24<sup>th</sup> & Harrison Investors, LLC, a Delaware limited liability company.

N. "Notice" means a notice given pursuant to the provisions of Section 30 of this Agreement.

O. "Project" means the Public Improvements at 24th Street/Harrison Street/Bay Place/27th Street Project (PX1900031), as conditionally approved on [enter date] by City Resolution number O.M.S. \_\_\_\_\_.

P. "Public Improvement Costs" shall mean and include actual costs related to the construction of the Public Improvements, including design fees, bond fees, change orders and cost and fees associated with all other contracts for professional and other services to implement and complete construction.

Q. "Punch List Items" means minor unfinished items or defective items which must be completed by Developer and the Contractor before the City shall determine Project Completion as further set forth in Section 22 of this Agreement.

R. "Purchase Orders" means all purchase orders executed for materials from Material persons.

U. "Stop Orders" means the notice and claim procedures for payment available in California Civil Code section 9000, *et seq.*, to laborers, subcontractors, suppliers, materialmen and other parties identified in California Civil Code 9100 that provide labor or materials to a public project.

V. "Subcontractors" means all those performing labor or furnishing materials or equipment for the completion of the Public Improvements pursuant to a Subcontract with the Contractor, except Material persons.

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<sup>1</sup> The term "Public Improvements" is already defined in the recitals.

W. "Subcontracts" means all contracts or other agreements executed by the Contractor and Subcontractors.

**2. PUBLIC IMPROVEMENTS:**

The Public Improvements are set forth in detail in Exhibit B.

**3. AMOUNT OF CITY PUBLIC IMPROVEMENT REIMBURSEMENT FUNDS:**

The Maximum Reimbursement Amount payable to Developer for design and construction of the Public Improvement under this Agreement is \$2.1 Million, which amount shall be subject to adjustment pursuant to any Change Orders. City reimbursement of the cost of the Public Improvements Costs shall be disbursed in monthly installments equal to the amount of Public Improvement Costs incurred by Developer during such month following the Director or designee's review of the claim for reimbursement submitted by Developer in accordance with the requirements of Section 21 of this Agreement, following City's acceptance of the Public Improvements. All payments for reimbursements shall be made to Developer no later than twenty (20) business days after the claim for reimbursement is submitted to the City.

**4. CONTRACTING FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS:**

Developer shall enter into a contract with Contractor to construct the Public Improvements in conformance with the construction plans attached hereto as Exhibit B.

**5. MINIMUM WAGE ORDINANCE:**

Oakland employers are subject to Oakland's Minimum Wage Law whereby Oakland employees must be paid the current minimum wage. Employers must notify employees of the annually adjusted rates by each December 15<sup>th</sup> and prominently display notices at the job site. The law requires paid sick leave for employees and payment of service charges collected for their services. For further information, please refer to:

<http://www2.oaklandca.gov/Government/o/CityAdministration/d/MinimumWage/OAK051451>

**6. INDEPENDENT CONTRACTOR:**

Contractor will furnish all necessary machinery, tools, apparatus, and other means of construction. Further, Developer will ensure that its Contractor will do all work and furnish the materials specified in the contract in the manner and time therein prescribed in the attached Exhibit D, "Contract Scope of Work/Deliverables". The contract documents shall include this contract, all documents identified herein, and the construction plans attached hereto as Exhibit B. The aforementioned documents shall constitute the contract between the parties as though all documents were attached hereto or herein repeated. The contract documents are intended to be cooperative and to

provide for a complete work. Said contract documents are on file in the Department of Transportation.

**7. PAYMENT RELEASE AND WAIVER:**

Notwithstanding the estimated value of the Public Improvements and Contractor's actual costs for constructing the Public Improvements, Developer acknowledges and agrees that the City's obligation to render payment hereunder shall be fully satisfied upon payment of the Maximum Reimbursement Amount per Section 3 above, as such amount may be adjusted by Change Order, for any and all work performed hereunder.

**8. COMMENCEMENT OF WORK:**

In accord with Exhibit B, Public Improvements work shall be commenced on the date of the Notice to Proceed which is sent by the Developer to Contractor, with copies to the Director, and shall be completed in a timely manner not to exceed 36 months or prior to the Certificate of Occupancy for the entitled development called "24<sup>th</sup> & Waverly, whichever comes first; which will begin on the date of the Notice to Proceed.

**9. BONDS:**

Developer shall cause the Contractor to provide a good and sufficient performance and payment surety bonds, which name the City of Oakland as insured. The payment and performance bonds shall, each, be for One Hundred percent (100%) of the Public Improvements to guarantee faithful payment to subcontractors, material suppliers, and laborers. The Developer shall cause Contractor to maintain the bonds in full force and effect until the work is accepted by the City, and until all claims for material and labor are paid, and shall otherwise comply with the Civil Code.

Upon full completion of the construction of the Public Improvements, City acceptance of the Public Improvements, and receipt of Completion Notice from the Developer in accordance with the procedures set forth under Section 22 of this Agreement, the City will initiate bond release.

**10. DEVELOPER/CONTRACTOR'S LIABILITY:**

Developer and Contractor shall be responsible for all injuries to persons and for all damage to real or personal property of the City or others, caused by, or resulting from the negligence of itself, its employees, or its agents during the progress of, or connected with, the rendition of services hereunder. Developer and Contractor shall defend and hold harmless and indemnify the City, its Councilmembers, officers and employees from all costs and claims for damages to real or personal property, or personal injury to any third party, resulting from the negligence of Developer or Contractor, Contractor's subcontractors, employees or agents, arising out of Contractor's performance of work under this Contract.

Developer shall indemnify, defend and hold harmless City and their officials, officers, directors, employees, agents, and volunteers, from and against any and all

claims, allegations, suits, actions, causes of action, loss, damages, expense and costs (including, without limitation, costs and fees obligation) of every nature arising out of or in connection with negligent performance of work hereunder, including, but not limited to, performance of work on the construction of the Public Improvements, except such losses or damages which are caused by the negligence, active negligence, or willful misconduct of City.

**11. STOP ORDER NOTICE AND OTHER CLAIM PROCEDURES FOR PUBLIC WORKS OF IMPROVEMENT:**

Developer and Contractor are knowledgeable of Stop Order Notices and the claim procedures for payment available in California Civil Code section 9000, *et seq.*, to laborers, subcontractors, suppliers, materialmen and other parties identified in California Civil Code 9100 that provide labor or materials to a public project. The Developer agrees to make all required withholdings on behalf of the City from the Contractor's progress payments that are necessary to satisfy any Stop Order notice demand for payment on the Project ("Withheld Funds"). Developer agrees to continue to hold Contractor's Withheld Funds for each claim until one of the following events occurs: i) a claimant submits an unconditional release on the release form attached and labeled "Attachment 1"; or, ii) Contractor submits a surety bond to secure the full amount of the claim plus twenty five percent (25%) that names the City as an additional covered party; or, iii) the parties enter into a written settlement agreement that specifies terms or payment and release of the Withheld Funds; or, iv) the time for filing a lawsuit to enforce the Stop Order notice expires and Contractor or the City requests that Withheld Funds be released to Contractor. Alternatively, Developer may convey all Withheld Funds to the City for withhold and disposition to Contractor or claimant upon one of the above described events.

**12. NUCLEAR WEAPONS POLICY:**

It is the policy of the City of Oakland to minimize the expenditure of City funds on goods and services produced by Nuclear Weapons Makers. In furtherance of this goal, the City of Oakland urges all contractors to avoid contracting for goods and services which are manufactured or provided by Nuclear Weapons Makers.

**13. [RESERVED]<sup>2</sup>**

**14. DISCRIMINATION:**

Developer agrees not to discriminate against any individual or company because of marital status, race, color, religion, ancestry, sex, sexual orientation, age, national origin, physical handicap, Acquired Immune Deficiency Syndrome (AIDS), or AIDS related conditions, or any other arbitrary basis.

**15. OAKLAND BUSINESS LICENSE:**

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<sup>2</sup> Deleted Section 13 is duplicative of Section 32.

Developer has and will continue to maintain a current Oakland Business License during the term of this contract. Developer shall insert in each of its subcontract agreements a provision, which requires its subcontractors to present proof that the subcontractor has obtained a current Oakland Business License during the term of this contract.

**16. VALIDITY OF CONTRACTS:**

This Agreement shall not be binding or of any force or effect until it is approved for form and legality by the Office of the City Attorney and signed by the City Administrator or his or her designee.

**17. PREVAILING WAGES:**

A. Developer shall cause the Contractor and Subcontractors to pay prevailing wages in the construction of the Public Improvements as those wages are determined pursuant to Labor Code Sections 1720 *et seq.*, and Sections 1774 and 1775, to employ apprentices as required by Labor Code Sections 1777.5 *et seq.*, and the implementing regulations of the Department of Industrial Relations (the "DIR") relating thereto. Developer shall cause the Contractor and Subcontractors to comply with the other applicable provisions of Labor Code Sections 1720 *et seq.*, 1774, 1775, and 1777.5 *et seq.*, and applicable implementing regulations of the DIR. Developer shall ensure that Contractor, and any of Contractor's Subcontractors, are registered with the DIR pursuant to Labor Code section 1725.5. Developer shall cause the Contractor and Subcontractors to keep and retain such records as are necessary to determine if such prevailing wages have been paid as required pursuant to Labor Code Sections 1720 *et seq.*, Sections 1774 and 1775, and apprentices have been employed as required by Labor Code Sections 1777.5 *et seq.* Copies of the currently applicable per diem prevailing wages are available from DIR. During the construction of the Public Improvements, Developer shall cause the Contractor to post at the job site the applicable prevailing rates of per diem wages. Developer is hereby notified that the construction of the Public Improvements under this Agreement is subject to compliance monitoring and enforcement by the DIR.

B. In accordance with Labor Code section 1776, Developer shall cause the Contractor and Subcontractors to provide Developer a copy of all payrolls for work subject to this Agreement upon completion of the Public Improvements. Payrolls shall contain the full name of each employee, his/her classification, rate of pay, and daily and weekly number of hours worked. The documentation shall also indicate apprentices and ratio of apprentices to journeymen.

C. Developer certifies and agrees that it and its Contractor will comply with the requirement to pay its employees prevailing wages as set forth in the City of Oakland Resolution No. 57103 C.M.S. City may request documentation to certify that Developer and Contractor have paid prevailing wages as required by applicable provisions of the California Labor Code. In the event that the City determines that Developer or Contractor has failed to prevailing wages as required by applicable

provisions of the California Labor Code, City shall report its findings to the Department of Labor and/or withhold the difference between the amount paid and amount owed for prevailing wages from any amount owed contractor until such time as the payment dispute is fully and finally resolved. This provision in no way creates any contractual or third party beneficiary relationship between any of Contractor's employees and the City, nor does it create any liability or duty on the City for Developer's or Contractor's failure to make timely or appropriate payments to its employees, on behalf of its employees.

The requirements in this Section shall survive the termination of this Agreement.

**18. EXECUTION OF CONTRACTS, SUBCONTRACTS AND PURCHASE ORDERS:**

A. All contracts, Subcontracts and Purchase Orders shall be executed in Developer or the Contractor's name and not as agent for the City, it being expressly understood and agreed that the Contractor, Subcontractors and Materialpersons shall at all times be deemed to be engaged by the Developer or the Contractor as applicable, and not by the City.

**19. OBLIGATIONS OF DEVELOPER:**

A. Developer shall cause its Contractor to do the following:

(1) Furnish all services, labor, equipment, tools, and materials necessary for the construction of the Public Improvements, and perform, in a good and workmanlike manner, the construction of the Public Improvements.

(2) Ensure Contractor supervises and directs the construction of the Public Improvements and be solely responsible for all work means, methods, techniques, sequences and procedures within the scope of the completion of the Public Improvements.

(3) Cooperate and coordinate with any site visits or inspections from City officials to confirm that prosecution of the work and construction of the Public Improvements is in accordance with the requirements of Exhibit B.

(4) In performing the construction of the Public Improvements:

i. Provide continuous on-site administration of the work of all Subcontractors;

ii. Erect and maintain, as required by existing conditions and performance of the construction of the Public Improvements, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.



(5) Take reasonable precautions for safety of, and provide reasonable protection to prevent damage, injury or loss to:

i. employees at the site and other persons who may be affected thereby;

ii. the Public Improvements construction site and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or sub-subcontractors; and

iii. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of work performed.

(6) Take all necessary steps to ensure that the prevailing wages provisions of the Labor Code Sections 1720 *et seq.* are fully met in connection with completion of the Public Improvements.

(7) Keep adjoining real property not being used for construction free from accumulation of waste materials and rubbish caused by the performance of the work.

(8) Conduct operations in a manner commercially reasonably calculated to minimize obstruction and inconvenience to the public.

(9) Make, or cause to be made, prompt payment of all monies due and legally owing to all persons, firms and corporations doing any work, furnishing any materials or supplies, or renting any equipment to Developer, Contractors or Subcontractors in connection with completion of the Public Improvements, except where Contractor is disputing in good faith its obligation to pay.

## **20. CHANGE ORDERS:**

A. Developer shall require that any change to the Public Improvements, which is proposed by the Contractor must be submitted to Developer and City for approval ("Change Order"). No Change Order shall be implemented by the Contractor without the prior written approval of Developer, who shall not issue any such Change Order without the prior consent and approval of City. Developer's contract with the Contractor shall provide that in the absence of an executed Change Order, no: (1) course of conduct or dealings between the parties, nor (2) oral, express or implied acceptance of alterations or additions to the Public Improvements, nor (3) any claim that the Developer has been unjustly enriched by any alteration or addition to the Improvements (whether or not there is in fact any such unjust enrichment) shall be the basis for any claim by the Contractor for additional funds.

B. Developer shall require that all Change Order requests shall be accompanied by a detailed description of the proposed change, the reason for the

change, and the amount of adjustment, if any, of the construction cost and time, as a result of approval and implementation of the proposed Change Order. Agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Public Improvement work that is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change.

C. The City shall approve or disapprove any Change Order within five (5) business days of receipt of written request for approval forwarded from Developer.

D. For Change Order requests proposed by the City, Developer shall forward the Change Order requests to the Contractor for quotes on construction cost and time. The City shall approve or disapprove any Change Order within five (5) business days of receipt of written request for approval forwarded from Developer. No Change Order shall be implemented by the Contractor without the prior written approval of Developer. Agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Public Improvement work.

## **21. CITY REIMBURSEMENT FOR IMPROVEMENT COSTS:**

A. City shall not make any reimbursement payment to Developer for the Public Improvements under this Agreement except as provided below.

B. Following City inspection and acceptance of the Public Improvements, Developer shall submit to the City a monthly claim for reimbursement in a form acceptable to the City containing the following:

(1) All documentation substantiating the cost of the Public Improvements delivered under the monthly claim for reimbursement.

(2) All monthly claim shall be billed against the engineering estimate (herein Exhibit B).

(3) Evidence that all of the costs of the Public Improvements for which reimbursement is sought have been fully paid or shall be paid from any reimbursement amounts requested by Developer in a particular monthly reimbursement request accompanied by conditional lien waivers from Contractor or any Subcontractor submitting invoices for payment, including all lien claims. If required by the Director, Developer shall provide statutory notices of completion and/or general lien releases as the Director may reasonably deem necessary to assure that payment of outstanding claims of the Developer's Contractors, Subcontractors, and Material persons have been paid.

C. The Director shall authorize reimbursement of the Public Improvement Costs up to the Maximum Reimbursement Amount. In no event shall the amount authorized by the Director exceed the Maximum Reimbursement Amount, as such Maximum Reimbursement Amount may be increased through any Change Orders.

D. No interest shall accrue on the Authorized Reimbursement Amount.

E. The Developer acknowledges and agrees that any and all obligations of the City arising out of or related to this Agreement are special and limited obligations of the City, and the City's obligations to make any payments hereunder are restricted entirely to the Maximum Reimbursement Amount stated in Section 3.

**22. INSPECTION AND ACCEPTANCE OF PUBLIC IMPROVEMENTS:**

A. Access to the Work.

(1) City shall at all times have access to and the right to observe the construction of the Public Improvements and all facilities where the construction work or any part thereof is being fabricated or stored, and Developer and Contractor shall provide proper facilities for such access and observation. All contracts with the Contractor or Subcontracts relating to the construction of the Public Improvements shall provide such access.

B. Correction of Work.

(1) If the City shall determine by Notice given to Developer and the Contractor at any time prior to the expiration of the applicable warranty period, as set forth in subsection (B.) of this Section 22, that any part of the Public Improvements has not been performed in accordance with the requirements as set forth in Exhibit B and D, the same shall be reconstructed, made good, replaced or corrected by Developer or the Contractor within thirty (30) working days after being requested to do so (unless such correction cannot, in the exercise of reasonable diligence, be completed within that period, in which event that period shall be extended for so long as it shall be reasonably required for Developer or the Contractor, as the case may be, to complete such corrections), failing which, the City may do so, at the sole reasonable cost and expense and for the account of Developer, and all such costs and expenses reasonably incurred by the City shall be reimbursed by Developer to the City, on demand.

(2) Developer, at its own cost and expense, shall correct (within the time periods set forth in subsection (B.) of this Section 22) defects in any part of the Public Improvements, due to latent defects in the Public Improvements and/or defective materials or construction, of which Developer is notified (in accordance with the provisions of subsection (B.) of this Section 22) within a period equal to any warranty period obtained by Developer or Contractor from any Subcontractor or Materialperson with respect to the part of the construction work performed. Developer shall make good faith and diligent efforts to obtain warranties from the Contractor, Subcontractors and Material persons that extend as long as possible. Unless a longer warranty period is obtained from the Contractor, Subcontractor or Materialpersons with respect to the part of the construction performed, the applicable warranty period shall mean the later of: (i) at least one (1) year from the date of issuance of the Certificate of Substantial Completion; or (ii) if corrective

work is required, at least twelve (12) months after the corrective work is completed. All warranties shall be assignable by the Contractor or Developer to the City.

C. Liability Prior To Acceptance; Insurance; Indemnification.

(1) Until the City has accepted the Public Improvements and except for damage or injury due to the negligence or willful misconduct of the City, Developer shall be solely responsible for all damage to the work related to the construction of the Public Improvements and for injury to any person and damage to any property related to such work, regardless of cause.

D. Substantial Completion

(1) Following request from Developer stating that in Developer's good faith opinion, the Public Improvements have been completed in accordance with the requirements set forth in Exhibit B and all approved Change Orders, except for Punch List Items (at the responsibility of the developer, a list of such items and the estimated cost for completing such items shall accompany such request), the City shall perform an inspection of the Public Improvements and take all other action necessary to determine that:

i. The Public Improvements have been completed in accordance with the requirements of Exhibit B and all approved Change Orders, except for Punch List Items, and that the Punch List Items can be completed for the estimated costs of completing those items;

ii. Any permits, licenses, or other authorizations required for such use shall have been issued by the governmental authorities having jurisdiction over the construction of the Public Improvements, and

iii. No Stop Orders or notices or other liens or encumbrances have been filed in connection with the Public Improvements, as the case may be, or as described in Section 12 of this Agreement any of the materials incorporated therein or purchased in connection therewith other than any Stop Order notice or other lien for which Developer or Contractor has posted a bond or other security satisfactory to the City.

(2) Substantial Completion shall not terminate or alter Developer's obligation under this Agreement to: (1) complete the Punch List Items in accordance with the requirements of Exhibit B, and (2) correct any defects in the Public Improvements to the extent required under Section 2 (B.) above.

The City shall complete its inspection and review within fifteen (15) working days of receipt of Developer's request for Substantial Completion.

E. Project Completion

(1) Upon the request from Developer stating that in its opinion the Punch List Items (including any items added pursuant to Section 20 above) for the Public Improvements have been fully performed in accordance with Exhibit B, the City shall perform a final inspection of the Public Improvements. When the City determines after such final inspection that the Public Improvements shall have been completed in accordance with the requirements of Exhibit B, and that the Punch List Items have been completed, the City will finalize the improvement project if there are no other outstanding items.

(2) The City shall complete the inspection described in subsection (E.) of this Section 22 within ten (10) working days of request from Developer that the Punch List Items have been fully performed in accordance with the requirements of Exhibit B.

F. As-Built Plans and Maintenance Manuals.

(1) Upon completion of the Public Improvements, Developer shall provide the City with 1. Stamped and signed project completion certification by the owners' Engineer of Record. 2. As-Built of the record drawings indicating all revisions (in Electronic and AutoCAD format). 3. Materials Testing Laboratory Certification.

**23. NON-WAIVER:**

A. Approval by the City of design, plans and specifications and construction pursuant to this Agreement, and acceptance of the Public Improvements or any portion thereof pursuant to this Agreement, shall not waive any of Developer's warranties as set forth in this Agreement, the rights of the City, or the express disclaimers of liability of the City under this Agreement.

**24. INDEPENDENT CONTRACTOR/NOTRUST/FIDUCIARY RELATIONSHIP:**

This Agreement shall not constitute nor create any form of association, joint venture, partnership or cooperative activity of any nature between City and Developer. This Agreement shall not constitute nor create a trust, expressed or implied, for the benefit of Developer or any other party. City shall have no fiduciary duty to Developer or any other party with respect to any obligation created or anticipated by this Agreement and any funds or other source of reimbursement. The City's obligations hereunder do not constitute a legal or equitable debt, pledge, charge, lien, or encumbrance upon any of the City's property or upon its income, receipts, or revenues.

**25. OWNERSHIP OF PUBLIC IMPROVEMENTS:**

City and Developer acknowledge that the completed Public Improvements once accepted in accordance with Section 22 will be the property of the City.

**26. TERM:**

This Agreement shall remain in effect until City's acceptance of the Public Improvements and determination of project completion as defined in Section 22(E), and the City's reimbursement Funds to Developer unless terminated earlier as provided below.

**27. TERMINATION FOR CONVENIENCE:**

Prior to the beginning of Project construction by Developer, either party may terminate this Agreement at any time by giving written notice of termination to the other party which shall specify the effective date thereof. Notice of termination under this paragraph shall be given at least sixty (60) days before the effective date of such termination. If the City terminates this Agreement for convenience pursuant to this Section 27, the City shall reimburse Developer within thirty (30) days for all actual costs incurred through the date of such termination in connection with the design, permitting and construction of the Public Improvements.

**28. TERMINATION FOR CAUSE:**

If either party shall fail to fulfill in a timely and proper manner that party's obligations under this Agreement or otherwise breach this Agreement and fail to cure such failure or breach within 30 days of receipt of written notice from the other party describing the nature of the breach, the non-defaulting party may, in addition to any other remedies it may have, terminate this Agreement by giving 10 days written notice to the defaulting party in the manner set forth in Paragraph 30 (Notice). If a default cannot reasonably be cured within such 30 days period, then such cure period shall be extended so long as the defaulting party commences cure within such 30-day period and diligently pursues such cure to completion.

**29. INSURANCE:**

Developer and Contractor shall obtain and maintain in full force and effect throughout the term of this Agreement, and thereafter as to matters occurring during the term of this Agreement, the following insurance coverage:

A. Workers' Compensation Insurance. Developer and Contractor shall provide workers compensation insurance as required by law during the term of this Agreement, and shall provide City with certification of all such coverages upon request by City's Risk Manager.

B. Liability Insurance. Developer and Contractor shall obtain and maintain in full force and effect during the term of this Agreement the following liability insurance coverages, issued by a company licensed (admitted) to transact business in the State of California and/or having a A.M. Best rating of A- VII or better:

(1) General Liability. Commercial general liability [CGL] insurance coverage (personal injury and property damage) of not less than ONE MILLION DOLLARS (\$1,000,000) combined single limit per occurrence, covering liability or claims

for any personal injury, including death, to any person and/or damage to the property of any person arising from the acts or omissions of Developer or any officer, agent, or employee of Developer under this Agreement.

(2) Comprehensive Automobile Liability Insurance. Comprehensive automobile liability insurance (Bodily Injury and Property Damage) on owned, hired, leased and non-owned vehicles used in conjunction with Developer's and Contractors business of not less than THREE HUNDRED THOUSAND DOLLARS (\$300,000) combined single limit per occurrence.

C. Certificates. All insurance coverages referenced in this Section 29, above, shall be evidenced by one or more certificates of coverage or, with the consent of City's Risk Manager, demonstrated by other evidence of coverage acceptable to City's Risk Manager, which shall be filed by Developer and Contractor with City prior to commencement of performance of any of Developer's duties; shall be kept current during the term of this Agreement; shall provide that City shall be given no less than thirty (30) days prior written notice of any non-renewal, cancellation, other termination, or material change, except that only ten (10) days prior written notice shall be required where the cause of non-renewal or cancellation is non-payment of premium; and shall provide that the inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, the coverage afforded applying as though separate policies had been issued to each insured, but the inclusion of more than one insured shall not operate to increase the limits of the company's liability. For the commercial general liability insurance coverage referenced in Section 29(B)(1) and, where the vehicles are covered by a commercial policy rather than a personal policy, for the comprehensive automobile liability insurance coverage referenced in Section 29(B).(2) Developer and Contractor shall also file with the evidence of coverage an endorsement from the insurance provider naming City, its officers, employees, and agents as additional insureds and waiving subrogation, and the certificate or other evidence of coverage shall provide that if the same policy applies to activities of Developer and Contractor not covered by this Agreement then the limits in the applicable certificate relating to the additional insured coverage of City shall pertain only to liability for activities of Developer and Contractor under this Agreement, and that the insurance provided is primary coverage to City with respect to any insurance or self-insurance programs maintained by City .

### **30. NOTICE:**

Formal notices, demands, and communications between the City and the Developer shall be sufficiently given if dispatched by certified or registered mail, facsimile, email or other electronic transmission or reputable overnight delivery service or delivered personally, to the principal offices of the City and the Developer set forth below.

Courier service, including but not limited to Federal Express, shall be considered personal delivery.

CITY OF OAKLAND:

Oakland, California 94612  
Attn: Ryan Russo, Director of Transportation

DEVELOPER:

NASH – Holland 24<sup>th</sup> & Harrison Investors, LLC  
c/o Holland Partner Group  
1970 Broadway, Suite 300  
Oakland, CA 94612  
Attn: John Wayland  
Phone No.: (510) 227-6687  
Email: [jwayland@hollandpartnergroup.com](mailto:jwayland@hollandpartnergroup.com)

With copies to:

Holland Partner Group  
Attn: Principal Staff/ Notices  
1211 Daniels Street #61708  
Vancouver, WA 98660  
Email: [notices@hollandpartnergroup.com](mailto:notices@hollandpartnergroup.com)

Oregon Law Group  
Chris Riha  
1675 SW Marlow Avenue, Suite 404  
Portland, OR 97225  
Phone No.:(971) 285-4263  
Email: [notices@oregonlawgroup.com](mailto:notices@oregonlawgroup.com)

Any Notice shall be deemed to have been given on the date of delivery or the date that delivery is refused by the addressee, as shown on the return receipt.

Such written notices, demands, and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate by mail as provided in this Section 30.

City's Authorized Representative for purposes of this Agreement shall be Ryan Russo, the Director of Department of Transportation. Developer's Authorized Representative for purposes of this Agreement shall be George Hernandez.

### **31. COMPLIANCE WITH LAWS:**

Developer shall observe and comply with all currently applicable Federal, State and local laws, ordinances, and codes, and as amended from time to time. Such laws shall include, but not be limited to, the following, except where prohibited by law:

A. Non-Discrimination. During the performance of this Agreement, Developer and its Subcontractor's shall not deny the benefits thereof to any person on the basis of



sex, race, color, ancestry, religion or religious creed, national origin or ethnic group identification, sexual orientation, marital status, age (over 40), mental disability, physical disability or medical condition (including cancer, HIV and AIDS), nor shall they discriminate unlawfully against any employee or applicant for employment because of sex, race, color, ancestry, religion or religious creed, national origin or ethnic group identification, sexual orientation, marital status, age (over 40), mental disability, physical disability or medical condition (including cancer, HIV and AIDS), or use of family care leave. Developer shall ensure that the evaluation and treatment of employees and applicants for employment are free of such discrimination. In addition to the foregoing general obligations, Developer shall comply with the provisions of the Fair Employment and Housing Act (Government Code section 12900, et seq.), the regulations promulgated there under (Title 2, California Code of Regulations, section 7285.0, et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (sections 11135-11139.5) and any state or local regulations adopted to implement any of the foregoing, as such statutes and regulations may be amended from time to time.

B. Documentation of Right to Work. Developer agrees to abide by the requirements of the Immigration and Control Reform Act pertaining to assuring that all newly-hired employees of Developer performing any services under this Agreement have a legal right to work in the United States of America, that all required documentation of such right to work is inspected, and that INS Form I-9 (as it may be amended from time to time) is completed and on file for each employee. Developer shall make the required documentation available upon request to City for inspection.

C. Inclusion in Subcontracts. To the extent any of the services required of Developer under this Agreement are subcontracted to a third party, Developer shall include all of the provisions of this Section in all such subcontracts as obligations of the subcontractor.

### **32. ACCESS TO RECORDS/RETENTION:**

City shall have access to any books, documents, papers and records of Developer which are directly pertinent to the subject matter of this Agreement for the purpose of making audit, examination, excerpts and transcriptions. Except where longer retention is required by any federal or state law, Developer shall maintain all required records for at least three (3) years after City makes final payment for any other work authorized hereunder and all pending matters are closed, whichever is later.

### **33. ASSIGNABILITY:**

Neither party to this Agreement shall assign or transfer any interest in this Agreement, nor the performance of any duties or obligations hereunder, without the prior written consent of the other party, and any attempt by either party to so assign or transfer this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect.

### **34. GOVERNING LAW AND VENUE:**

The law governing this Agreement shall be that of the State of California. In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the state courts of the County of Alameda, and venue for federal court shall be the Northern District of California, City of Oakland California.

### **35. INTERPRETATION:**

Each party has reviewed this Agreement and any question of doubtful interpretation shall not be resolved by any rule or interpretation providing for interpretation against the drafting party. This Agreement shall be construed as if both parties drafted it. The captions and headings contained herein are for convenience only and shall not affect the meaning or interpretation of this Sub-Agreement.

### **36. FORCE MAJEURE:**

Neither Party shall be liable or deemed to be in default for any delay or failure in performance under this Agreement or for strikes, lockouts and labor disputes, acts of God, governmental restrictions, enemy action, acts of terrorism, civil commotion, fire, unavoidable casualty, adverse weather conditions, unforeseeable delay in transportation or unavailability of materials, or unforeseen site conditions, including, without limitation, the presence of unforeseen hazardous materials or environmental contamination, or any similar cause beyond the reasonable control of the Parties.

### **37. PRIOR AGREEMENTS AND AMENDMENTS:**

This Agreement, including Exhibit A hereto, represents the entire agreement of the parties with respect to the subject matter described in this Agreement, and no representation, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein. This Agreement may only be modified by a written amendment duly executed by the parties hereto.

### **38. SEVERABILITY:**

If any provision of this Agreement, or any portion thereof, is found by any court of competent jurisdiction to be unenforceable or invalid for any reason, such provision shall be severable and shall not in any way impair the enforceability of any other provision of this Agreement.

### **39. APPROVALS:**

If the terms of this Agreement are acceptable to Developer, Partner Organization, and the City, sign and date below.

#### **40. Hazardous Substances.**

City agrees to indemnify, defend and hold harmless Developer, Contractor and their respective owners, members, managers, employees, agents and contractors for liability related to the presence at the Project site of any hazardous substances not brought thereon by Developer or Contractor, and City will be responsible for any testing, removal or remediation of any such hazardous substances as may be necessary for Developer or Contractor to perform the Work. Any delays resulting from or increased costs resulting from the presence of such hazardous substances will be added to the Authorized Reimbursement Amount by execution of a Change Order.

#### **41. Limitation of Liability.**

Notwithstanding anything in this Contract to the contrary, neither Developer or City will be liable for any special, incidental, indirect or consequential damages as a result of a breach, dispute or default under this Agreement.

**IN WITNESS WHEREOF:**

Developer has hereto set his hand, and the City Administrator of the City of Oakland, by Resolution of the City Council of said City, thereunto duly authorized, has caused the name of the CITY OF OAKLAND to be affixed hereto, all in triplicate the day and year first above written.

*Approved as to form and legality:*

**DEPARTMENT DIRECTOR**

\_\_\_\_\_  
Office of the City Attorney                      Date

\_\_\_\_\_  
Department of Transportation                      Date  
Date

**CITY OF OAKLAND**  
**(a municipal corporation)**

City Council Resolution No. \_\_\_\_\_  
Oakland Business Tax Certificate No. \_\_\_\_\_  
Contract Purchase Order No. \_\_\_\_\_

\_\_\_\_\_  
Office of the City Administrator                      Date

**NASH – Holland 24<sup>th</sup> & Harrison Investors, LLC,**  
a Delaware limited liability company

By: Holland HPK 24<sup>th</sup> & Harrison Investors, LLC,  
a Delaware limited liability company,  
its Operating Member

By: Holland Partner Group Management, Inc.,  
a Delaware corporation,  
its Manager

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **Exhibit A**

### Description of Public Improvements

Public improvements at the intersection of 24<sup>th</sup> St., Harrison St., Bay Pl., and 27<sup>th</sup> St. consistent with Exhibit B include:

- creating a public plaza
- realigning the five-way intersection to a four-way intersection
- providing continuous bike lanes and a protected intersection
- shortening the traffic signal cycle length and reducing vehicle delay
- reducing the crossing distance for pedestrians and bicyclists
- increasing safety, comfort, and predictability for all roadway users.

**Exhibit B**

Conditionally Approved Construction Plans for Public Improvements (PX1900031)

**Exhibit C**  
**City Administrator's Written Determination**



**Exhibit D**  
Contract Scope of Work/Deliverables