

CITY COUNCIL REPORT

ATTACHMENT 7

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. ~~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.~~

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 ~~but~~ 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 _____, 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 Development Agreement Ordinance in recommending to the City Council the adoption of a development agreement.

H. On _____, 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; and (iii) 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 _____, 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 its respective heirs, legal representatives, successors and assigns of an Agent and assigns 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 the City of Oakland 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 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 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 an administrative implementationa memorandum of such change, in recordable form, between City and Developer pursuant to Section 3.8 below. 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. pursuant to the applicable provisions of this Agreement.

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 _____, 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's~~ 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. ~~All Existing City Regulations applicable to the Project have been assembled by the Parties in a separate Appendix, which Appendix is, by reference, incorporated into this Agreement.~~

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 ~~respective officials, officers, employees,~~ Agents, departments, subdivisions, agencies (including City's Redevelopment Agency), the City Council, Mayor, bBoards and cCommissions (and each individual member of the City Council

or any other City board or commission) ~~(and individual members of each of the foregoing)~~ and all of their ~~respective~~the heirs, legal representatives, ~~and~~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 ~~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 ~~the City of Oakland~~ 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 Dedicationand, (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 ~~have the right to 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 3.3.6~~ 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. General 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 Parcel Water Street I) City's Director of City Planning shall refer the Design Submittal for the affected Development Parcel to the City's 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. If the City's Design Review Committee approves such specific design features in such Design Submittal for the affected Development Parcel, 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.

~~3.3.3.3. Specific Design Review Procedures for Certain Development Parcels. If City's~~ 3.3.3.2.1. If City's Director of City Planning determines, pursuant to this ~~to~~ Section

~~3.3.3.2~~ above, that a Design Submittal for a Development Parcel does not substantially comply with the Final Development Plan for such Development Parcel, ~~but the improvements shown by the Design Submittal for such Development Parcel are contained within the building envelope approved under the Preliminary Development Plan for such Development Parcel, then the following procedures shall apply to Design Review for such Design Submittal for such Development Parcel:~~

~~(a) Development Parcels C, D, F-3, G, Pavilion 2, and Water Street I. For Development Parcels C, D, F-3, G, Pavilion 2, and Water Street I, City's Director of City Planning shall determine if the Design Submittal substantially complies with the Design Guidelines and the design related Conditions of Approval contained in the Project Approvals. If City's Director of City Planning reasonably determines that the Design Submittal for the affected Development Parcel hereunder substantially complies with the Design Guidelines and the design-related Conditions of Approval contained in the Project Approvals, 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.~~ (b) ~~Development Parcels F-1, F-2, and 66 Franklin. For Development Parcels F-1, F-2, and 66 Franklin, the City's Director of City Planning shall refer the Design Submittal for the affected Development Parcels hereunder~~

to the City's Design Review Committee for the purpose of determining whether such Design Submittal ~~(i)~~ substantially complies with (i) ~~(i)~~ the Design Guidelines; + and (ii) the design and landscaping-related ~~(ii)~~ the Conditions of Approval contained in the Project Approvals. If the City's 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 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).

~~3.3.3.4~~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 City's~~ Design Review Committee made pursuant to this Section 3.3.3 shall be rendered within sixty (60) days after referral of a Design Submittal to ~~the City's~~ Design Review Committee by City's Director of City Planning.

~~3.3.3.5~~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 City's~~ 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 City's~~ Design Review Committee, as applicable, shall be limited solely to the design determinations specified in this Section 3.3.3. ~~If either City's Director of City Planning, or City's Design Review Committee, as applicable,~~ makes a determination of non-substantial compliance pursuant to the standards specified in this Section 3.3.3, or if the City's Design Review Committee 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.

~~3.3.3.6~~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.

~~3.3.3.7~~3.3.3.6. Nature of Design Review
Decision. City acknowledges that City has exercised ~~its complete~~
discretion pursuant to City's Design Review with respect to the

design of proposed improvements for the Development Parcels which meet the ~~standard of substantial compliance pursuant to the procedures~~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. ~~, and that so long as any such improvements meet the standards set forth in this Section 3.3.3, City's action on any application for approval of the design of such improvements constitutes a ministerial act under Laws, including CEQA.~~

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.

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 Fees ~~Fee~~ required to be paid or funded by Developer for development of the Project ~~shall be those required or authorized~~ is City's Jobs/Housing Impact Fee pursuant to Chapter 15.68 of City's Municipal Code, as required by the Project Approvals 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 those required or authorized by the Project Approvals, including this Agreement. City shall have the right to require payment by the Jobs/Housing Impact Fee. Notwithstanding any other provision of this Agreement, Developer of 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 ~~as of~~at the time ~~in question~~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 ~~and good faith~~ 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~~ Mitigation Measures or Conditions of Approval that are (i) identified in the CEQA Documents ~~that are~~ and incorporated as part of the Project Approvals₇, (ii) otherwise incorporated as part of the Project Approvals₇, 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 ~~alle~~commercially 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 ~~the~~ Common Area that are part of the Minimum Project. -taking into account 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. City shall have the right to Terminate this Agreement by written notice to Developer if City determines that, if for any reason,

~~If for any reason, despite such commercially~~ 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. at the end of such 6 year period, City shall have the right
to Terminate this Agreement by written notice to Developer given
within sixty (60) days after the expiration of such 6 year
period. 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) such 6 year period 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. procuring all

~~such required permits for development of the Minimum Project despite using commercially reasonable efforts. 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 extension of 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 such required permits for development of the Minimum Project within such 6-year period, 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 such period 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, procured all required building permits and other ministerial permits for development of the Minimum Project at the end of such extension period, then the Agreement shall then City shall again have the right to Terminate. this Agreement by written notice to Developer given within sixty (60) days after the expiration of such extension period. 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. shall have the right to impose reasonable conditions on any decision made under this Section 4.3. to extend the period for issuance of permits for, or for development of, the Minimum Project. City's right to Terminate Termination of this Agreement pursuant to this Section 4.3 Section 4.3 shall be City's sole and exclusive remedy~~

in the event that City determines Developer has failed ~~to~~ within the deadlines specified in this Section 4.3 ~~to~~ (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 ~~pursuant to this Section 4.3~~; 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-1J-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 Indemnitees 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) ~~the process for 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 Agent of its Agents, architects, engineers, or ~~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 ~~(ixviii)~~ 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 active 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 any 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 Indemnatee'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 ~~indemnify, defend or hold harmless~~Indemnify any Indemnitees.

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 ~~Damage~~ 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 ~~reasonable~~ efforts to fully protect ~~ensure~~ City's rights ~~are fully protected~~, and shall keep the City Attorney fully informed of all developments relevant to such Indemnity (subject only to any privileges which ~~pertain to~~ prevent the communication of any such

information, ~~including attorney client and attorney work product~~
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.

6-6-6.7. 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 THIRTYEN (3±0) 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 en

(310) 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 ~~without limitation~~ 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 e-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 Mortgage 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. within the 45 day period specified in Section 10.2.3 above. City shall have the right ~~within such 45 day period~~ 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's~~ 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 ~~pursuant to Section 10.2.3 above and Section 17.138.080 of the Development Agreement Ordinance~~; (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 the requirements of Section 4.3 of this Agreement (Terms and Conditions for Development of Minimum Project) nNo 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

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) ~~as a case in which such Court is authorized by Laws to exercise its independent judgment on the evidence.~~

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 ~~use commercially reasonable efforts to include~~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.

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.

~~14.26.~~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.

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