

RESOLUTION NO. 18-075

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING AND AUTHORIZING THE CITY MANAGER TO ENTER INTO AND EXECUTE A DISPOSITION AND DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MORGAN HILL, AND THE LATALA GROUP, LLC, FOR THE PURCHASE BY THE CITY OF PROPERTY; FOR THE SALE OF PROPERTY BY THE CITY; AND FOR THE CONSTRUCTION OF PUBLIC IMPROVEMENTS INCLUDING SURFACE PARKING ENHANCEMENTS AT THE COMMUNITY AND CULTURAL CENTER, AND THE REALIGNMENT OF DEPOT STREET.

WHEREAS, the City of Morgan Hill (“City”) is the owner of (i) the Community and Cultural Center (the “CCC”) located on an approximate eight (8) acre parcel located at the northeast corner of East Dunne Avenue and Monterey Road in Morgan Hill California, designated by Assessors Parcel Number 726-13-052 (the “CCC Property”) and (ii) Depot Street, a City street that runs north-south between East Main Avenue and East Dunne Avenue;

WHEREAS, the City desires to sell, and the The Latala Group, LLC (“Developer”) desires to buy, for fair market value, Depot Street right-of-way, which totals .29 acres.

WHEREAS, The Downtown Specific Plan, and the General Plan 2035 guide development in Morgan Hill. These documents envision the realignment of Depot Street to connect to Church Street, improving transportation circulation and movement in the Downtown area. To reach this goal, City has been examining opportunities that could lead to realignment of Depot Street by exploring development opportunities with adjacent properties;

WHEREAS, Developer and the City propose to enter into this Agreement for the purpose of memorializing an agreement between themselves to redevelop the sites as follows: 1) a mixed-use housing development with office space on the Hale Lumber Property located at 17020 Depot Street, Morgan Hill (APN: 726-13-049), including the .29 acre portion of the former Depot Street alignment, 2) the realignment of Depot Street to connect with Church Street, 3) and surface parking lot enhancements on with no net loss in parking on the CCC property;

WHEREAS, the Developer will construct the new realigned Depot Street with enhanced crosswalk. Developer will additionally construct new surface parking with parking lot enhancements on the CCC property for purposes of public parking;

WHEREAS, the Developer will construct a 3,000 square foot office building to be sold to the City at fair market value;

WHEREAS, the parties previously entered into an Exclusive Negotiating Agreement (“ENA”) approved by the City Council and this Disposition and Development Agreement memorializes the transaction described within the ENA;

WHEREAS, the City Council has determined that the Project is consistent with the Downtown Specific Plan and the 2035 General Plan;

WHEREAS, the Final Master Environmental Impact Report for the Morgan Hill Downtown Specific Plan was certified in November 2009 in conformance with California Environmental Quality Act (CEQA) Guidelines Section 15175(a), identified the impacts of the Downtown Specific Plan in order to streamline the later environment review of projects and approvals required to implement the Specific Plan. The intent was for the Downtown Specific Plan FEIR to be a program-level document from which subsequent development consistent with the Specific Plan could tier from (in conformance with CEQA Guidelines Section 15176(d)).

WHEREAS, an Environmental Impact Report (EIR) for the Morgan Hill 2035 Project, was prepared in accordance with CEQA and certified by the Morgan Hill City Council on July 27, 2016. (SCH #2015022074).

WHEREAS, CEQA Guidelines Section 15164 states that the lead agency or a responsible agency shall prepare an Addendum to a previously certified EIR if some changes or additions are necessary, but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.

WHEREAS, an Addendum was prepared to provide a program-level CEQA analysis of the proposed project, as part of the adopted 2009 Downtown Specific Plan EIR. The TIA prepared for the project concluded consistency with both the General Plan Final Environmental Impact Report (FEIR) and the Downtown Specific Plan Master Environmental Impact Report (MFEIR) and was incorporated within the Addendum.

WHEREAS, the Addendum found no impacts that were not previously disclosed in the General Plan FEIR or the Downtown Specific Plan Master FEIR, nor would it result in a substantial increase in the magnitude of any significant environmental impacts previously identified.

WHEREAS, the City will contribute up to \$303,178 toward the construction costs to realign Depot Street;

WHEREAS, the City’s overall contribution of land and funds does not exceed the value that the City is receiving in return. The City is receiving a net benefit from this DDA; and

WHEREAS, pursuant to Government Code Section 65402, on September 11, 2018, the City of Morgan Hill Planning Commission determined that the Project is consistent with the General Plan.

**NOW, THEREFORE, THE CITY OF MORGAN HILL DOES HEREBY FIND,
DETERMINE, RESOLVE AND ORDER AS FOLLOWS:**

SECTION 1. The City does hereby find, determine and resolve that all of the foregoing recitals are true and correct.

SECTION 2. That the sales price of \$303,178 as provided in the DDA for the sale of the .29 acres of former Depot Street to the Developer represents fair market value of the Property.

SECTION 3. That the sales price of \$800,812 as provided in the DDA for the sale of the office building to the City represents fair market value of the property.

SECTION 4. That the City hereby approves and authorizes the City Manager and City Clerk to execute and enter into the Agreement with Developer, in substantially the form attached hereto as Exhibit A, together with such further minor conforming, technical or clarifying changes or revisions as may be agreed to and approved by the City Attorney which do not materially increase the obligations of the City there under. Further, the City Manager and City Clerk are authorized and directed to take such further actions and execute such documents on behalf of the City of Morgan Hill as are necessary to carry out the transaction contemplated by the Agreement, including without limitation, one or more deeds, use agreements, easements, assignment and assumption agreements, and certificates of completion.

SECTION 4. This Resolution shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of Morgan Hill at a Regular Meeting held on the 3rd day of October 2018 by the following vote:

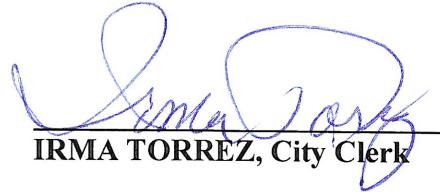
AYES:	COUNCIL MEMBERS:	Steve Tate, Rich Constantine, Larry Carr
NOES:	COUNCIL MEMBERS:	Rene Spring, Caitlin Robinett Jachimowicz,
ABSTAIN:	COUNCIL MEMBERS:	None
ABSENT:	COUNCIL MEMBERS:	None

APPROVED:



STEVE TATE, Mayor

ATTEST:



IRMA TORREZ, City Clerk

☒ CERTIFICATION ☒

I, Irma Torrez, City Clerk of the City of Morgan Hill, California, do hereby certify that the foregoing is a true and correct copy of Resolution No. 18-075, adopted by the City Council at the meeting held on October 3, 2018.

WITNESS MY HAND AND THE SEAL OF THE CITY OF MORGAN HILL.

DATE: 10/11/2018


IRMA TORREZ, City Clerk

DISPOSITION AND DEVELOPMENT AGREEMENT

by and between the

CITY OF MORGAN HILL,

a California municipal corporation

and

THE LATALA GROUP, LLC

a California Limited Liability Company

regarding the

HALE LUMBER SITE, DEPOT STREET REALIGNMENT

AND COMMUNITY & CULTURAL CENTER

Dated: _____, 2018

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LIST OF EXHIBITS

Exhibit A-1	Exiting Site Map
Exhibit A-2	Legal Description –Property
Exhibit B	Form of Grant Deeds (With Covenants)

DISPOSITION AND DEVELOPMENT AGREEMENT

HALE LUMBER, DEPOT STREET, AND COMMUNITY CULTURAL CENTER

THIS DISPOSITION AND DEVELOPMENT AGREEMENT ("Agreement") dated as of this ____ day of _____, 2018 ("Date of Agreement"), is entered into by and between the CITY OF MORGAN HILL, a California municipal corporation ("City"), and the Latala Group, LLC, a California Limited Liability Company ("Latala" or "Developer"). Developer and City are sometimes referred to individually as a "Party", and collectively as the "Parties."

RECITALS

The following Recitals are a substantive part of this Agreement; capitalized terms used and not otherwise defined are defined in Section 1.1 of this Agreement:

A. Robert and Linda Hammond, Trustees of the Robert and Linda Hammond Revocable Trust, Robert Hammond Jr., and Robert Traurig (collectively, the "Hale Lumber Property Owners") are the owners of that certain approximately two (2) acre real property located at the northeast corner of East Dunne Avenue and Depot Street in Morgan Hill, California, designated as APN 726-13- 049 (the "Hale Lumber Property"). The Hale Lumber Property Owners currently operate a lumber yard, Hale Lumber, on the Hale Lumber Property.

B. The Developer is the Latala Group, LLC, a California Limited Liability Company.

C. City is the owner of (i) the Community and Cultural Center (the "CCC") located on approximately eight (8) acre real property located at the corner of Dunne Avenue and Monterey Road in Morgan Hill California, designated as APN 726-13-052 (the "CCC Property") and (ii) a portion of Depot Street, a City street that runs north-south, adjacent to the CCC between East Dunne Avenue and East Fifth Street, consisting of approximately .29 acres ("Depot Property").

D. The area encompassing the Hale Lumber Property, CCC Property, and Depot Property are shown on the attached map, attached hereto as Exhibit "A" and incorporated herein by this reference.

E. The Downtown Specific Plan and the Morgan Hill 2035 General Plan guide development in Morgan Hill. These documents envision the realignment of Depot Street through the existing CCC parking lot to connect to Church Street, improving transportation circulation and movement in the Downtown area. To realize this, City has been examining opportunities that could lead to the realignment of Depot Street by exploring development opportunities with adjacent properties.

F. The City and the Developer have entered into an "Exclusive Negotiating Agreement," dated as of April 18, 2018 (ENA), which provides for the Parties to negotiate towards a Disposition and Development Agreement with respect to the Project. This Agreement is entered into pursuant to and in furtherance of certain provisions of the ENA. Notwithstanding the foregoing, the Parties acknowledge that this Agreement differs in certain respects from certain terms of the ENA. Upon mutual execution and delivery of this Agreement, this Agreement shall supersede and replace the ENA which shall be hereby terminated, except to the extent that certain provisions thereof expressly remain in effect.

G. Developer and City have entered into this Agreement for the purpose of memorializing an agreement between themselves that Developer shall redevelop the sites as follows: 1) a mixed use development on the Project Property with a 3,116 square feet ground floor office building which will include multi-family residential space on the second floor; 2) the realignment of Depot Street to connect with Church Street, and 3) the replacement of the parking spaces and parking lot enhancements for the CCC Property (the "Project").

H. Developer will privately acquire the Hale Lumber Property from the Hale Lumber Property Owners. City will not be a party to this transaction and will not be a third-party beneficiary of this transaction.

I. To implement the purposes of this Agreement, City desires to sell a portion of Depot Street ("Depot Property") to the Developer for fair market value and Developer desires to acquire the property from City on an "As Is with All Faults" basis.

J. Together, the Hale Lumber Property and the Depot Property are the "Project Property".

K. Developer shall realign Depot Street and construct the new Depot Street, which will impact the current CCC parking. Developer shall replace parking within the CCC parking lot and construct associated parking lot enhancements for purposes of public parking.

L. Upon completion of construction of the ground floor office building, Developer shall offer to the City the ground floor office portion of the building for purchase for fair market value as further described below.

M. The Project relies on the following analysis under the California Environmental Quality Act ("CEQA") (set forth in Public Resources Code, section 21000 *et seq.*): Draft Master Environmental Impact Report for the Morgan Hill Downtown Specific Plan, as modified by the Final Master Environmental Impact Report for the Morgan Hill Downtown Specific Plan ("DSP") (SCH #2008012025) (together, "FEIR") certified by the City Council on November 18, 2009 by Ordinance No. 1956. This Project is further described in the Program Level Addendum for the Hale Lumber and Community and Cultural Center project ("ADDENDUM"). Collectively, the FEIR, DSP, and ADDENDUM are the "CEQA Project Review."

N. On September 11, 2018, the City Planning Commission conducted a review pursuant to Government Code Section 65402 and determined that the Project described is consistent with the City's General Plan.

The execution and performance of this Agreement is in the best interests of City and the health, safety and welfare of its residents, and is in accord with the provisions of applicable federal, state, and local law.

A G R E M E N T

NOW, THEREFORE, City and Developer hereby agree as follows:

1. **DEFINITIONS; REPRESENTATIONS AND WARRANTIES; CHANGE IN OWNERSHIP, MANAGEMENT AND CONTROL.**

1.1 Definitions.

“Affiliate of Developer” means an entity or person that is directly or indirectly controlling, controlled by, or under common control with Developer. For the purposes of this definition, “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity or a person, whether through the ownership of voting securities, by contract, or otherwise, and the terms “controlling” and “controlled” have the meanings correlative to the foregoing.

“Agreement” means this Disposition and Development Agreement between City and Developer.

“As-Is Condition” is defined in Section 2.27.

“CEQA” California Environmental Quality Act is defined in Recital M.

“City” means the City of Morgan Hill, a California municipal corporation.

“City Council” means the City Council of the City of Morgan Hill.

“City Infrastructure” means the Depot Street realignment, Depot Street utility relocation, CCC parking resurfacing, striping, construction of new spaces, and lot enhancements.

“City Party” means a City employee, agent or representative.

“City Properties” means that Depot Property and Community and Cultural Center (CCC) properties.

“City’s Actual Knowledge” or words to that effect shall mean the present, actual knowledge of Christina Turner, the City Manager, excluding constructive knowledge or duty of inquiry, existing as of the Date of Agreement.

“Claims” means liabilities, obligations, orders, claims, damages, governmental fines or penalties, and expenses of defense with respect thereto, including reasonable attorneys’ fees and costs.

“**Close of Escrow**” is defined in Section 2.19.

“**Closing**” is defined in Section 2.19.

“Commenced Construction of the City Infrastructure” shall be deemed to have occurred when the Developer has completed plans, obtained all required permits and commenced construction of the Improvements, including on the CCC parking lot and for the realigned Depot Street.

“**Control**” is defined in Section 1.2.1.

“**Date of Agreement**” means the date that this Agreement is approved by the City Council at a noticed public hearing.

“**Day-to-Day Management**” means active, day-to day-management responsibilities for the activities of Developer.

“**Default**” means the failure of a Party to perform any action or covenant required by this Agreement within the time period provided following applicable notice and opportunity to cure period.

“**Depot Property**” means that approximately .29-acre portion of Depot Street in-between 5th Street and East Dunne Avenue.

“**Developer**” is defined in recital B.

“**Developer Conditions Precedent**” is defined in Section 2.14.

“**Documents**” is defined in Section 2.26.

“**Downtown Specific Plan**” or “**DSP**” is defined in Recital J.

“**Environmental Laws**” means, collectively: (i) the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. § 9601, *et seq.*, (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. § 1801, *et seq.*, (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901, *et seq.*, (iv) the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251, *et seq.*, (v) the Clean Air Act, as amended, 42 U.S.C. § 7401, *et seq.*, (vi) the Toxic Substances Control Act, as amended, 15 U.S.C. § 2601, *et seq.*, (vii) the Clean Water Act, as amended, 33 U.S. Code § 1251, *et seq.*, (viii) the Oil Pollution Act, as amended, 33 U.S.C. § 2701, *et seq.*, (ix) California Health & Safety Code § 25100, *et seq.* (Hazardous Waste Control), (x) the Hazardous Substance Account Act, as amended, Health & Safety Code § 25300, *et seq.*, (xi) the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program, as amended, Health & Safety Code § 25404, *et seq.*,

(xii) Health & Safety Code § 25531, *et seq.* (Hazardous Materials Management), (xiii) the California Safe Drinking Water and Toxic Enforcement Act, as amended, Health & Safety Code § 25249.5, *et seq.*, (xiv) Health & Safety Code § 25280, *et seq.* (Underground Storage of Hazardous Substances), (xv) the California Hazardous Waste Management Act, as amended, Health & Safety Code § 25170.1, *et seq.*, (xvi) Health & Safety Code § 25501, *et seq.*, (Hazardous Materials Response Plans and Inventory), (xvii) Health & Safety Code § 18901, *et seq.* (California Building Standards), (xviii) the Porter-Cologne Water Quality Control Act, as amended, California Water Code § 13000, *et seq.*, (xix) California Fish and Game Code §§ 5650-5656 and (xx) any other federal, state or local laws, ordinances, rules, regulations, court orders or common law related in any way to the protection of the environment, health or safety.

“Escrow Agent” means Chicago Title, 675 North First Street, Suite 300, San Jose, California 95112 (Christina Molotla, Escrow Officer).

“Final Certificate of Completion” is defined in Section 3.10.

“Final Completion” means Final completion of all City Infrastructure and acceptance by the City Council.

“Final Environmental Impact Report” or **“FEIR”** is defined in Recital J.

“Force Majeure Delay” is defined in Section 6.2.

“Governmental Requirements” means all laws, ordinances, statutes, codes, rules, regulations, orders and decrees of the United States, the State, the County, the City,

“Grant Deeds” means the grant deeds for the conveyance of the properties from City to Developer or from the Developer to the City to be executed and recorded at the Closing substantially in the form attached hereto as Exhibit “B” and incorporated herein by this reference.

“Hazardous Materials” means any substance, material, or waste which is or becomes regulated by any local governmental authority, the State of California, or the United States Government under any Environmental Laws, including any material or substance which is defined as a “hazardous waste,” “extremely hazardous waste,” “restricted hazardous waste” or “hazardous substance” under any Environmental Laws.

“Improvements” means the improvements to be constructed by the Developer upon the Project Property and the offsite improvements relating thereto.

“Initial Litigation Challenge” is defined in Section 6.23.

“Municipal Code” means the Morgan Hill Municipal Code.

“Mixed Use” is defined in Morgan Hill Municipal Code Chapter 18.128.020.

“Mixed Use Project” means the office space and the residential development proposed by Developer on the Project Property.

“Notice” means a written notice in the form prescribed by Section 6.1.

“Office Building” means the 3,116 square feet office building constructed by Developer to be sold to the City.

“Organizational Documents” means the Certificate of Formation and Operating Agreement of the Developer, as the same may be amended from time to time.

“Partial Certificate of Completion” is defined in Section 3.10.

“Permitted Transfer” is defined in Section 1.22.

“Planning Commission” means the Planning Commission of the City of Morgan Hill.

“Project” is defined in Recital G.

“Project Agreements” means this Agreement and the Grant Deeds (once recorded).

“Project Approvals” means all of the discretionary approvals by the City which will permit the Project in its entirety to proceed.

“Property Claims” is defined in Section 2.30.

“Reports” is defined in Section 2.26.

“Residential Development Control System” or **“RDCS”** is contained in Morgan Hill Municipal Code Chapter 18.156.

“Schedule of Performance” means the dates and/or time periods by which certain obligations set forth in this Agreement must be accomplished.

“Substantially Complete” or **“Substantial Completion”** shall be deemed to have occurred when (i) Substantial completion of all City Infrastructure as reasonably determined by the City Manager.

“Title Company” means Chicago Title.

“Transfer” means any assignment or transfer of this Agreement or the Property or any portion thereof or any interest therein.

“Title Policy” is defined in Section 2.23.

“Unrecorded Agreements” is defined in Section 2.26.

"Warm Shell" means a commercial building with all wiring, sheetrock, a heating and cooling (HVAC) system including all electronic controls and duct work, drop ceilings, plumbing and restrooms including all fixtures, interior lighting, hardscape and landscape to the standard of a high quality office building in the City of Morgan Hill.

1.2 Representations and Warranties.

1.2.1 City Representations. City represents and warrants to Developer as follows:

a) **Authority.** City is a California municipal corporation with full right, power, and lawful authority to perform its obligations hereunder, and the execution, delivery, and performance of this Agreement by City has been fully authorized by all requisite actions on the part of the City Council.

b) **No Conflict.** City's execution, delivery, and performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement, or order to which City is a party or by which City is bound.

c) **No Litigation or Other Proceeding.** To City's Actual Knowledge, no litigation or other proceeding (whether administrative or otherwise) is outstanding or has been threatened which would prevent, hinder, or delay the ability of City to perform its obligations under this Agreement, or that would adversely affect the Depot Property or the ability of Developer to develop the same as contemplated by this Agreement.

d) **No City Bankruptcy.** City is not the subject of any bankruptcy proceeding, and no general assignment or general arrangement for the benefit of creditors or the appointment of a trustee or receiver to take possession of all or substantially all of City's assets has been made.

e) **Right to Possession.** No person or entity other than City has the right to use, occupy, or possess the City Properties, or any portion thereof. City shall not enter into any lease or other agreement respecting use, occupancy, or possession of the Property or any portion thereof that would affect the ability of the Developer to complete its obligations without the written consent of Developer.

f) **Condition of Property.** City has no notice of any pending or threatened action or proceeding arising out of the condition of the City Properties or any alleged violation of any Environmental Laws. Except as otherwise disclosed by City, to City's Actual Knowledge, the Property is in compliance with all Environmental Laws.

g) Until the expiration or earlier termination of this Agreement, City shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section 1.2.1 not to be true, immediately give written Notice of this fact or condition to Developer. The foregoing representations and warranties shall survive each Closing for a period of 12 months.

1.2.2 Developer's Representations.

Developer represents and warrants to City as follows:

(a) Authority. Developer is a limited liability company duly organized in the State of California and is qualified to do business and is in good standing under the laws of the State of California. The Organizational Documents provided (or to be provided) by Developer to City are true and complete copies of the originals. Developer has full right, power and lawful authority to undertake all of its obligations hereunder and the execution, performance and delivery of this Agreement by Developer has been fully authorized by all requisite company actions on the part of Developer.

(b) No Conflict. Developer's execution, delivery, and performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement, or order to which Developer is a party to.

(c) No Litigation or Other Proceeding. To Developer's current actual knowledge, no litigation or other proceeding (whether administrative or otherwise) is outstanding or has been threatened which would prevent, hinder, or delay the ability of Developer to perform its obligations under this Agreement.

(d) No Developer Bankruptcy. Developer is not the subject of any bankruptcy proceeding, and no general assignment or general arrangement for the benefit of creditors or the appointment of a trustee or receiver to take possession of all or substantially all of Developer's assets has been made.

(e) Until the issuance of a Final Certificate of Completion or earlier termination of this Agreement, Developer shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section 1.2.2 not to be true, immediately give written Notice of such fact or condition to City. The foregoing representations and warranties shall survive each Closing and continue until issuance of a Final Certificate of Completion.

(f) The Developer is an experienced developer of mixed use and residential projects.

1.3 Change in Ownership, Management and Control of Developer. The qualifications and identity of Developer are of particular concern to City. It is because of those unique qualifications and identity that City has entered into this Agreement with Developer.

1.3.1 Additional Matters. Except for Permitted Transfers as provided in Section 1.3.2, the term "Transfer" for the purposes of this Section 1.3.1 shall include any significant change in the Control of Developer by any method or means. The term "Control" as used in the immediately preceding sentence, shall mean the power to direct

the Day-to-Day Management of Developer, and it shall be a presumption that control with respect to a corporation or limited liability company is the right to exercise, directly or indirectly, more than 50% of the voting rights attributable to the controlled corporation or limited liability company, and, with respect to any individual, partnership, trust, other entity, or association, control is the possession, indirectly or directly, of the power to direct or cause the direction of the Day-to-Day Management of the controlled entity. An assignment of this Agreement to an Affiliate of Developer, shall be subject to prior review and approval by the City Manager. Any Transfers, except those delineated below shall be subject to prior review and approval by the City Manager. City Manager's criteria shall be the capitalization, financial capacity, experience and ability of the successor Developer to assume all rights and obligations entered into by Developer through this Agreement..

1.3.2 Permitted Transfers. Notwithstanding any other provision of this Agreement to the contrary, each of following Transfers are permitted and shall not require City consent under this Section 1.3.2 (each, a "Permitted Transfer"):

(a) Any lien or encumbrance on the Mixed Use Project to secure the funds necessary for acquisition, construction, and/or permanent financing of the Project;

(b) Permanent financing of a portion of the Project following its Substantial Completion; or

(c) Dedications and grants of easements and rights of way required in accordance with the Project Approvals.

2. SALE OF PROPERTY AND INFRASTRUCTURE IMPROVEMENTS.

2.1 The City and the Developer desire by this Agreement for the City to acquire from the Developer an office building, and for City to convey the Depot Property to Developer, in two separate closings. Developer shall develop a mixed use project, together with other onsite and offsite improvements (collectively, the "Improvements").

2.2 Escrow. The parties will open an escrow for the conveyance of the Depot Property to Developer and the Office Building to City.

2.4 City Conveyance to Developer. In the first closing, City shall convey to Developer a portion of the current Depot Street alignment such that Developer is provided an additional approximately .29 acres to add to the Mixed Use Project. The Grant Deed to the Developer shall contain a reversionary clause in that the Depot Property shall revert to the City upon Developer's failure to complete the construction and relocation of Depot Street by _____, 201__. Developer is not entitled to construct any portion of its project on the Depot Street portion until the relocation and vacation of Depot Street are complete. The City shall have the right to re-enter and take possession of the conveyed Depot Property from Developer with all improvements thereon if after conveyance to Developer of title to the Depot Property the Developer has failed to complete construction of the relocated road. The funds from this sale may be treated as a credit in escrow to

be considered as City's contribution to the realignment of Depot Street. The Developer acknowledges and understands that the Depot Property will be conveyed to the Developer for purposes of development pursuant to this Agreement and not for speculation in undeveloped land.

2.4 Developer Conveyance to City. Once Developer has constructed the office building, in the second closing, Developer shall convey to City, on the terms and conditions provided in this Agreement, a ground floor office building ("Office Building") of approximately 3,116 square feet to be used by the City as office space for public purposes. The office building shall be constructed on the Developer Property. Should developer not construct either a mixed use condominium or a residential condominium above the Office Building, Developer shall convey to City the Office Building Parcel in fee simple absolute. If Developer constructs either condominium project as planned than Developer shall convey City all air rights to the Office Building via Grant Deed.

2.5 City Conditions Precedent. City's obligation to proceed with the disposition of the Depot Property to Developer pursuant to the terms of this Agreement is subject to the fulfillment or waiver by City of each and all of the conditions precedent described below ("City Conditions Precedent"). The City Conditions Precedent are solely for the benefit of City and shall be fulfilled or waived within the time periods provided for herein, and in any event, no later than the closing of escrow for each applicable transaction, as the case may be. Except as otherwise indicated, all City Conditions Precedent shall apply to both the closings.

2.5.1 No Default. Developer shall not be in Default under this Agreement or the other Project Agreements, and no event shall have occurred which with the passage of time or giving of Notice or both would constitute a Default by Developer hereunder or under any of the other Project Agreements.

2.2. Execution and Delivery of Documents. City and Developer shall have executed and acknowledged the Grant Deeds for the applicable closing, and City and Developer shall each have executed (and, where appropriate, acknowledged), and delivered into escrow all other documents that each party is required to deliver into escrow pursuant to this Agreement.

2.4.3 Delivery of Funds. Developer shall deposit into escrow the Purchase Price and such other funds, including escrow costs, recording fees, and other closing costs as are necessary to comply with Developer's obligations under this Agreement for the Depot Property closing.

The Parties may agree to credit the purchase price to Developer in place of Developer depositing fees in escrow in the amount of \$303,178.00.

2.4.4 Evidence of Available Funds. In connection with closing of the Depot Property transaction, Developer shall demonstrate evidence of available funds equal to the purchase price, regardless of whether it is to be deposited into escrow.

2.4.5 Financial Documentation. Developer shall provide the City with sufficient financial documentation prior to commencing construction of City Infrastructure that Developer has the financial capacity to complete construction of the City Infrastructure.

2.8 Insurance. Developer shall have provided proof of insurance as required by Section 3.7 below.

2.12 Organizational Documents. Developer shall have submitted the Organizational Documents for Developer confirming that the Developer is a valid Limited Liability Company formed as a California LLC.

2.13 Anything herein to the contrary notwithstanding, so long as the applicable City Conditions Precedent above are satisfied or waived by the City, Developer shall have the right to acquire the Depot Property in accordance with this DDA.

2.4 Developer Conditions Precedent. Developer's obligation to proceed with the acquisition of the Property from City pursuant to the terms of this Agreement is subject to the fulfillment or waiver by Developer of each and all of the conditions precedent described below ("Developer Conditions Precedent"). The Developer Conditions Precedent are solely for the benefit of Developer and shall be fulfilled or waived within the time periods provided for herein, and in any event, no later than the closing of escrow for each applicable transaction, as the case may be.

2.4.1 No Default by City. City shall not be in Default under this Agreement or the other Project Agreements, and no event shall have occurred which with the passage of time or giving of Notice or both would constitute a default by City hereunder or under the other Project Agreements.

2.4.2 Execution and Delivery of Documents by City. City and Developer shall have executed and acknowledged the applicable Grant Deed for the applicable transaction, and City shall have executed (and, where appropriate, acknowledged) and delivered into escrow all other documents that City is required to deliver into escrow pursuant to Section 2.7.2.

2.4.4 Permits. Subject to payment of the applicable fees and completion of all application requirements, City shall be ready to issue the demolition and grading permit(s) necessary for the Developer to perform the work for the Initial Site Preparation for the applicable portion of the Project.

2.4.5 Title Policy. The Parties shall request that the Title Company, upon payment of Title Company's regularly scheduled premium, issue the Title Policy upon recordation of the Grant Deed subject only to the Pre -Approved Exceptions or the Condition of Title.

2.4.6 Absence of Proceedings. There shall be an absence of any condemnation, environmental or other pending governmental or any type of administrative or legal

proceedings with respect to the Property, or applicable part thereof, which would materially and adversely affect Developer's intended uses of the Property or the development or value of the Property, or applicable part thereof.

2.4.7 No Material Adverse Change. There shall not have occurred between the Date of Agreement and the Closing a material adverse change to the physical, environmental or title condition of the Property, or applicable part thereof.

2.4.8 No Leases or Parties in Possession. City shall have demonstrated to Developer the ability to deliver fee title to the applicable Phase of the Property to Developer free and clear of any tenants, lessees, licensees or any third party occupants or parties in possession, and executed the Title Company's standard form Commercial Owner's Affidavit as required by Section 2.7.2(d) below.

2.5 Escrow. The parties will open escrow for the conveyance of the Depot Street Property to Developer. Within five days following Developer's delivery of a notice of completion of the Office Building, the Parties shall open an escrow for the conveyance of the Office Building to City.

2.5.1 Costs of Escrow. All customary fees, charges, and costs chargeable by Escrow Agent for the escrows including recording fees, document fees, title insurance premiums, and documentary transfer taxes, if any, due with respect to the conveyance of the Depot Property to Developer and the Office Building to City shall be paid by Developer or the City, as the case may be, in accordance with the custom in Santa Clara County; provided, however, the City shall take all actions and pay all charges and costs (if any) required by Section 2.6.

2.5.2 Escrow Instructions. This Agreement constitutes the joint escrow instructions of Developer and City with respect to the conveyances of the Depot Property to Developer and the Office Building to City, and the Escrow Agent to whom these instructions are delivered is hereby empowered to act under this Agreement. Insurance policies for fire or casualty are not to be transferred. To the extent that substantial funds aside from those to cover the costs of escrow are received in the escrow shall be deposited in interest-bearing accounts for the benefit of the depositing Party in any state or national bank doing business in the State of California. All disbursements shall be made by check or wire transfer from such accounts. If, in the opinion of either Party, it is necessary or convenient in order to accomplish the Closing, such Party may provide supplemental escrow instructions; provided that if there is any inconsistency between this Agreement and the supplemental escrow instructions, then the provisions of this Agreement shall control. The Closing shall take place as set forth as described herein. Escrow Agent is instructed to release City's and Developer's escrow closing statements to the respective parties.

2.4.1 Authority of Escrow Agent. Escrow Agent is authorized to, and shall:

(a) For the Depot Property, charge City for that portion of the premium of the Title Policy allocable to a CLTA standard owner's policy of title insurance and charge Developer for the any excess premium of the Title Policy allocable to extended coverage, including any endorsements requested by Developer.

(b) For the Office Building, charge Developer for that portion of the premium of the Title Policy allocable to a CLTA standard owner's policy of title insurance and charge City for the any excess premium of the Title Policy allocable to extended coverage, including any endorsements requested by City.

(c) Charge Developer for escrow fees associated with the closing of the purchase and sale of the Depot Property, as applicable. Charge City for escrow fees associated with the closing of the purchase and sale of the Office Building, as applicable.

(d) Charge City or Developer, as the case may be, all other charges and costs referred to in Section 2.18.

(e) Disburse funds, if any, to City and record the Grant Deed for the Depot Property, as applicable, when both the Developer Conditions Precedent for the Project have been fulfilled or waived in writing by Developer and City, as applicable and after City has provided notice of acceptance of all infrastructure; or Developer has provided payment and performance bonds to the City in amount to completely cover the costs of construction of all of the public improvements. Immediately following recordation of the Grant Deed, Escrow Agent shall record any other recordable documents delivered into escrow for the Closing.

(f) Do such other actions as necessary, including obtaining and issuing the Title Policies, to fulfill its obligations under this Agreement.

(g) Direct City and Developer to execute and deliver any instrument, affidavit, and statement, and to perform any act, reasonably necessary to comply with the provisions of FIRPTA, if applicable, and any similar state act and regulations promulgated thereunder.

(h) Prepare and file with all appropriate governmental or taxing authorities uniform settlement statements, closing statements, tax withholding forms including IRS 1099-S forms, and be responsible for withholding taxes, if any such forms are provided for or required by law.

2.5 Closing. The escrow for conveyance of the Depot Property and the Office Building close (each, a "**Close of Escrow**") within 30 days after the satisfaction, or waiver by the appropriate Party, Conditions Precedent, and acceptance of the City of all Developer constructed City Infrastructure. For purposes of this Agreement, a "**Closing**" shall mean the time and date each Grant Deed is recorded with the Santa Clara County Recorder.

2.6 Delivery of Documents and Closing Funds.

2.6.1 At or before the Closing, Developer and City as applicable to their respective parcels shall deposit into escrow the following items with respect to Depot Property and the Office Building:

- (a) Funds in an amount necessary to consummate the Closing, including the applicable escrow costs, respectively;
- (b) executed and acknowledged Grant Deed for each Property;
- (c) an original executed Preliminary Change of Ownership Report for each Property;
- (d) a duly executed non-foreign certification for the Property in accordance with the requirements of Section 1445 of the Internal Revenue Code of 1986, as amended, for each property;
- (e) a duly executed California Form 593-W Certificate for the Property or comparable non-foreign person affidavit each property; and
- (f) a Commercial Owner's Affidavit in the standard form of the Title Company for each property.

2.6.2 At each Closing, City and Developer shall each deposit such other instruments as are reasonably required by the Title Company or otherwise required to close the escrow and consummate the conveyance of the Property in accordance with the terms hereof.

2.7 Condition of Title. Developer and City will work together in good faith to remove exceptions to the title policy or agree to accept the exceptions.

2.8 Title Insurance. Concurrently with recordation of each Grant Deed, the Title Company shall issue to the appropriate Party such policy of title insurance for the respective Property, which at appropriate Party's option may be an ALTA extended coverage owner's policy (or if requested by the appropriate Party a CLTA standard owner's policy of title insurance with survey exceptions) (each, a "Title Policy") as may be required by the appropriate Party, and/or the appropriate Party's lenders or other institutions that may be providing financing for the Project, together with endorsements as are reasonably requested by the appropriate Party and/or the appropriate Party's lenders or other institutions, insuring that the appropriate Party has a valid fee ownership interest in the Property, subject only to Pre-Approved Exceptions and the Condition of Title. The Title Policy for each Property shall be in the amount as specified by the appropriate Party. The premium for each Title Policy, plus any additional costs related thereto (except for such costs to remove any title exceptions agreed to be removed by the appropriate Party, which shall be at the appropriate Party's sole cost), including the

cost of surveys, and any endorsements requested by appropriate Party shall be paid by the appropriate Party.

2.10 Property Taxes and Assessments. Ad valorem taxes and assessments levied, assessed, or imposed on the Depot Property or the Office Building for any period prior to the applicable Closing, if any, shall be paid by appropriate Party. Ad valorem taxes and assessments levied, assessed, or imposed on the Property acquired by either Party or any other improvements thereon, for the period after the applicable Closing shall be paid by the appropriate Party.

2.11 Access to Property. Prior to the Closing, City shall cooperate to enable representatives of Developer to obtain the right of access to all portions of the Depot Property for the purposes of implementing this Agreement. Developer agrees to provide written Notice to City at least twenty-four (24) hours prior to undertaking any studies or work upon the Depot Property.

2.11.1 Indemnity. Developer shall indemnify, defend, protect, and hold City harmless from any Claims arising out of the acts, omissions, negligence, or willful misconduct of Developer or its employees, agents, contractors, subcontractors, or representatives in connection with such studies and investigations, except for Claims arising from or related to any pre-existing condition on or of the City Property or Claims to the extent caused by the active negligence or willful misconduct of Developer or its employees, agents, contractors, or representatives. In addition, in the event Developer causes any damage to any portion of the Property, Developer shall promptly restore the Property as nearly as possible to the physical condition existing immediately prior to Developer's entry onto the Property. Developer shall deliver to City, within ten (10) days of receipt thereof, a complete copy of any written investigation, test, report or study which Developer conducts, or causes to be conducted, with respect to the involved Depot Property.

2.11.2 Documents. The Parties represent and warrants that, to the best of their current actual knowledge, as of the Date of Agreement, the Parties have furnished each other with copies or provided each other with access to any and all material existing surveys, inspection reports, environmental and/or hazardous material reports, and any other data, reports, studies, agreements, correspondence, and other writings (collectively, "Reports") pertaining to the physical, environmental, and/or title condition of the Property, or applicable portion thereof, and the use and development of the Property, or applicable portion thereof, which are in Developer's possession or control. The Parties also represent and warrant that, each has furnished each other with copies of any and all unrecorded leases, service contracts, easements, licenses, and/or other unrecorded agreements (collectively, "Unrecorded Agreements," and with the Reports, "Documents") affecting the Property, or portion thereof. The Parties shall notify each other in writing of any material changes to any Documents of which Developer becomes aware before Closing. Developer shall terminate any Unrecorded Agreements prior to Closing.

2.12 AS-IS CONVEYANCE.

DEVELOPER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT CITY IS CONVEYING AND DEVELOPER IS TAKING TITLE TO, AS OF THE APPLICABLE CLOSING, THE DEPOT PROPERTY ON AN "AS IS WITH ALL FAULTS" BASIS, CONDITION AND STATE OF REPAIR INCLUSIVE OF ANY AND ALL FAULTS AND DEFECTS, LEGAL, PHYSICAL, OR ECONOMIC, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE CLOSING ("AS-IS CONDITION") AND THAT, EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, THE REPORTS OR THE DOCUMENTS, DEVELOPER IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES FROM CITY, OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES OR ATTORNEYS AS TO ANY MATTERS CONCERNING THE PROPERTY

2.13 Independent Investigation. Developer acknowledges, agrees, represents, and warrants that, prior to Closing, Developer will have been given a full opportunity to obtain, review, inspect, and investigate each and every aspect of the City Properties, either independently or through agents of the Developer's choosing, including the following:

- (a) The size and dimensions of the Property;
- (b) The availability and adequacy of water, sewage, fire protection, and any utilities serving the Property;
- (c) All matters relating to title including extent and conditions of title to the Property, taxes, assessments, and liens;
- (d) All legal and governmental laws, statutes, rules, regulations, ordinances, limitations on title, restrictions or requirements concerning the Property including zoning, use permit requirements and building codes;
- (e) Natural hazards, including flood plain issues, currently or potentially concerning or affecting the Property;
- (f) The physical, legal, economic, and environmental condition and aspects of the Property, and all other matters concerning the conditions, use or sale of the Property, including any permits, licenses, agreements, liens, zoning reports, engineers' reports, and studies and similar information relating to the Property. This examination of the condition of the Property has included examinations for the presence or absence of Hazardous Materials as Developer deemed necessary or desirable;
- (g) Any easements and/or access rights affecting the Property;
- (h) Any contracts and other documents or agreements affecting the Property; and

(i) All other matters of material significance affecting the Property.

2.14 Disclaimers. Developer acknowledges and agrees that except as expressly set forth in this Agreement: (a) neither City, nor any City Party, has made any representations, warranties, or promises to Developer, or to anyone acting for or on behalf of Developer, concerning the condition of the City Properties or any other aspect of the Properties; (b) the condition of the Properties has been independently evaluated by Developer prior to the Closing; and (c) any information including any engineering reports, architectural reports, feasibility reports, marketing reports, title reports, soils reports, environmental reports, analyses, or data or other similar reports, analyses, data or information of whatever type or kind, if any, which Developer has received or may hereafter receive from City or any City Party were and are furnished without warranty of any kind and on the express condition that Developer has made its own independent verification of the accuracy, reliability and completeness of such information and that Developer may rely on the foregoing at its own risk.

2.15 Waivers and Releases. Developer hereby waives and releases City and City Parties, as of the Closing for the Depot Property, from any Claims or other compensation whatsoever, in law or equity, of whatever kind or nature, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, now existing or which may in the future arise, including lost business opportunities or economic advantage, and special and consequential damages, arising out of, directly or indirectly, or in any way connected with: (a) all warranties of whatever type or kind (excepting therefrom warranties set forth in Section 1.1.1 above) with respect to the physical or environmental condition of the Properties, whether express (except as set forth in Section 1.1.1), implied or otherwise, including those of fitness for a particular purpose, tenantability, habitability or use; (b) use, management, ownership or operation of the Depot Property, whether before or after Closing; (c) the physical, environmental or other condition of the Properties; (d) the application of, compliance with or failure to comply with any and all Applicable Laws with respect to the Properties; (e) Hazardous Materials in, on, or under the Properties; and (vi) the As-Is Condition of the Properties; the foregoing are collectively referred to as "Property Claims".

Notwithstanding the foregoing to the contrary, the release and waiver of Property Claims set forth in this Section 2.13 shall not apply to (a) any Property Claims to the extent arising from the active negligence or willful misconduct of City or any City Party, (b) any breaches or Defaults by City of any covenants, agreements, representations, or warranties set forth in this Agreement, (c) any breaches or Defaults by City of any other Projects Agreements to which City is a party, or (d) any fraud committed by City or any City Party.

3. DEVELOPMENT OF THE PROJECT.

3.1 Permits. Developer, at its expense, shall exercise commercially reasonable efforts to secure or cause to be secured any and all permits and approvals which may be required by City and any other governmental agency having jurisdiction over the

applicable portion of the Project, including permits for the demolition and removal of any temporary structures or improvements, if any, on the Project Property. Upon approval of the General Plan Amendment and the Zoning Amendment, but no later than December 31, 2018, Developer shall submit all entitlement applications, at its own expense, including but not limited to RDCS application, Subdivision Map, Development Agreement, Encroachment Permit, and Conditional Use Permit (if required), along with any required environmental documents/reports concerning the proposed Project, for City consideration. Applications for on-site and off-site improvements shall be as detailed below and as contained in the Subdivision Improvement Agreement. No entitlements for residential construction may be permitted until allotments have been awarded through the RDCS.

3.2 The execution of this Agreement does not constitute the granting of, or a commitment to grant or obtain, any land use permits, or approvals required by City or any other government agency. City shall process within a reasonable time all entitlements, zone change, and general plan change, following application from the Developer, with the City retaining discretion on all items.

3.3 Costs of Development. All the costs of site preparation (including demolition and removal of all temporary structures or improvements on the Property), planning, designing, constructing and developing the Project, or applicable Phase thereof, incurred by Developer shall be borne solely by Developer.

3.4 Residential Development Control System Application. Pursuant to MHMC section 18.156.060, Developer must apply for allotments through the RDCS. Project is not required to compete, but must achieve a minimum score. If approved by the City and subject to reasonable conditions, Developer shall construct up to 48 residential dwelling units on the Hale Lumber property.

(a) Developer understands and agrees that its RDCS application will be processed according to the RDCS manual approved by City Council in September 2018. If Developers' application fails to meet the minimum score of 160 points to receive allotments, it must submit a new RDCS application.

(b) All residential development shall be constructed pursuant to a separately negotiated Development Agreement.

(c) Measure S Allocations. So long as the Project achieves the required minimum score, City shall award up to 48 Downtown residential allocations in accordance with Measure S for the Latala residential project. City is not waiving its discretionary rights under Measure S.

3.5 Allocation of Sewage Treatment Payment Credits to Developer. The City has a sewer credit program available to certain developers within the former downtown redevelopment area (RDA) on a first come, first served basis. To the extent available, this project is located in the former RDA area and is eligible to receive credit for sewer impact fees.

3.6 Subdivision Maps Required. Developer shall file all required Tentative and Final Maps in compliance with Title 17 of the MHMC, and as required by RDCS to exercise allotments.

(a) Tentative map. Tentative map shall be filed no later than February 28, 2019. Developer's engineer shall timely respond to all corrections requested by the city engineer until it has been marked as "Approved as Submitted."

(b) Final Map. Within 6 months of approval the tentative map, but no later than August 30, 2019, Developer must file its phase 1 Final Map and execute the Subdivision Improvement Agreement if improvements have not been constructed. Within six months of approval of the phase 1 Final map by City Council, Developer shall apply to the Engineering and Public Works Department for all entitlements necessary for the off-site improvements.

3.6.1 Developer may process the Final Map as a Phased Map. Due to the fact that a portion of the project is proposed to be located within a current City Street, and the City desires to vacate the portion of Depot Street after construction of the realigned Depot Street, Developer may submit a Phase 1 Final map to allow it to commence construction on the mixed use project concurrently with construction of the off-site improvements. The Phase 2 Final Map would contain the remaining portion of the project that is contained within the Depot Street Property.

3.6.2 Subdivision Map. City shall process the Subdivision (Tentative and Final) Maps for the Mixed Use Project in compliance with Title 17. Construction of City Infrastructure shall be a condition of approval required by the Tentative map.

3.7 Developer to Construct City Infrastructure Improvements. Subject to all of the other terms and conditions set forth in this Agreement, the Developer shall develop or cause the development of the City Improvements in accordance with the City's Municipal Code, and the plans, drawings and documents submitted by the Developer and reasonably approved by the City as set forth herein. These Improvements shall be a condition of the tentative map. The off-site Improvements shall generally consist of the following:

3.7.1 Realignment of Depot Street: In order to acquire .29 additional acres for Developer's project, and to receive points through the City's RDCS, Developer agrees to cause Depot Street to be realigned, including utility relocation. The Depot Street realignment will result in an approximately .7 acre realigned street. Substantial completion of the realignment of Depot Street is a condition precedent to Developer being issued permits for the demolition of the current alignment portion of Depot Street.

3.7.2 Redesign and Construction of CCC Parking Lot: Developer shall cause the CCC Parking Lot to be redesigned so that there is no net loss of parking to the CCC. If approved by the City, Developer shall replace Morgan Hill Community and Cultural Center ("CCC") parking and on-street parking on a 1:1 basis resulting in no net loss of parking concurrently with the road construction. Developer shall replace parking by resurfacing and restriping the remaining CCC parking lot spaces, construct new parking in

underutilized landscaped areas, construct new on-street parking, and construct parking enhancements. The CCC has 264 spaces currently. Developer covenants that at the conclusion of the Project that the CCC will have 274 spaces.

3.7.3 The Developer shall construct and develop the City Infrastructure in accordance with this Agreement. City Improvements shall be constructed per City standards, and shall be reviewed and approved to the satisfaction of the City Engineer. All such work related to the City Infrastructure shall be performed by licensed contractors.

3.8 Financing of City Improvements

3.8.1 Depot Street:

City and Developer agree on the construction and improvements and to expend the estimated cost of Depot Street alignment in the amount of \$710,821, which includes a 20% contingency consistent with the "Order of Magnitude Cost Analysis Hale Lumber/Community Center Depot Street Realignment" dated August 13, 2018. Cost estimates will be reconfirmed during off-site permit review.

City shall contribute \$303,178.00 received from the sale of Depot Property to Developer. Developer and City agree this transaction may occur as a credit in escrow.

Developer will pay \$213,739.00 toward the reconstruction of the realigned Depot Street as described in the cost estimate portion of Depot Street project frontage.

Developer will pledge between 8 (8 x \$1,000 x 48 units = \$384,000) and 10 (10 x \$1,000 x 48 units = \$480,000) points under the *Transportation* portion of the RDCS manual at \$1,000 each unit up to 48 units which pledge will contribute up to \$193,904.00 to the remaining construction costs for Depot Street realignment.

If the project exceeds the budget, the City would require approval from City Council to amend this Agreement.

If the project costs less than the estimate, the City keeps the funds as they are cost for development fees. Those fees will stay in the accounts separated RDCS accounts and go towards the account associated projects.

3.8.2 CCC Parking Lot:

The parking improvements are estimated to cost \$190,905, including a contingency, pursuant to the "Order of Magnitude Cost Analysis Hale Lumber/Community Center Community Surface Improvements" dated August 13, 2018. Developer Fees pledged towards the RDCS commitments will fund the parking lot improvements.

3.9 Timing of City Improvements

Developer will work with City on phasing construction plan to insure minimal disruption to CCC facilities. The CCC parking lot construction shall be performed concurrently with the road construction.

Parties agree to negotiate in good faith a construction timeline for realignment of Depot Street to minimize impacts to the travelling public. Developer acknowledges that Depot Street must remain open to the public during construction of the realignment to the

greatest extent possible. Developer shall not build in or obstruct in anyway the current Depot Street alignment until Substantial Completion of the Depot Street realignment without written permission of the City.

Construction of parking facilities and Depot Street realignment shall begin by 2020, and be completed within 18 months from the date of commencement of construction.

3.10 Mixed Use Construction.

Developer shall construct a 3,116 square foot "warm shell" ground floor office building on the Project Property to be conveyed to City for public purpose ("Office Building"). If approved by City, Developer may construct up to eight condominiums on the second floor of the building. The Office Building shall be conveyed from Developer to City at Fair Market Value of \$800,812 based upon \$257 per square foot valuation (Purchase Price) established by appraisal dated August 3, 2018 by Valbridge Property Advisors/Hulberg Associates. Should the size of the portion of the building be increased or decreased the payment by City shall be adjusted based upon the \$257 per square foot calculation.

(a) Should the building include residential units, Developer shall convey to City only the office portion of the building.

(b) Conditional Use Permit. A CUP will be required if the Project is residential only, and not Mixed Use.

(c) Agreements regarding common areas. The City will not participate in or become a member of the Home Owners Association (HOA) contemplated to be formed for the residential areas of the project. The City will be responsible for maintenance and repair of grounds specifically designated as a part of the commercial parcel to a commercially reasonable standard and will limit access of commercial tenants and their customers to those commercial areas as designated on a mutually agreed upon plan to be determined during site review.

As to those common structures necessitating replacement or common maintenance/servicing (roof, exterior paint, common water lines), the City will contribute to the cost of the repair, replacement, servicing, in a manner proportionate to the square footage cost of the improvements, commensurate with the proportionate square footage of commercial occupancy. Should the residential or mixed use portion not be constructed, and City purchases the office building in fee simple than City will be solely responsible for any maintenance and there will be no common area.

To the extent that the City has not maintained the commercial space and associated landscaping in a commercially reasonable manner, HOA may notice City, describe failure, and City will respond to HOA and or replace or repair within 60 days. City intends to maintain a cooperative relationship with the HOA, indicative of the long term occupancy of a portion of the project.

3.11 Depot Street Transactions

City shall sell to Developer the Depot Property, and Developer shall purchase from City a portion of Depot Street on the terms and conditions and for the fair market value amount as described below.

If City approves the General Plan Amendment and the Zoning Amendment, City shall sell to Developer for the fair market value of \$303,178.00, based upon \$24.00 per square foot valuation for the approximately .29-acre portion of existing Depot Street to be made part of the Mixed Use Project development site. These funds may be placed in escrow, and shall be released to Developer upon verification from the City that Developer has applied for, and City has approved, all entitlements necessary to relocate Depot Street. Developer and City agree this transaction may occur as a credit in escrow.

Subject to applicable hearing and notice requirements, City shall vacate Depot Street from 5th Street to Dunne Avenue. City shall use its best efforts to notice for public hearing, if required, the vacation of Depot Street property so that it is scheduled before City Council at the same meeting at which the Phase 2 Final map is considered. If the Depot Street realignment is complete, this may occur as a summary vacation.

In order to assure that the development of the Depot Street realignment occurs in a timely manner and prior to demolition of the existing Depot Street required for the Project, Depot Street alignment shall be constructed to substantial completion prior to any demolition or construction occurring in the Depot Property area. Developer shall provide performance and payment bonds, regardless of whether these bonds are accompanied by a Subdivision Improvement Agreement, guaranteeing construction of the Depot Street realignment, and the demolition of the current Depot Street.

Until Developer constructs the realigned Depot Street and it is accepted by the City and opened for public use, Developer agrees to keep Depot Street open to the public to the maximum extent possible. Developer shall be responsible for all maintenance of Depot Street once it has been vacated and conveyed to Developer. Any closing of Depot Street prior to the opening of the Depot Street realignment shall only be done with the prior written approval of the City.

Developer shall not allow any lien or stop notice to be placed on the Depot Property arising from any work performed or materials provided by Developer or its contractors, subcontractors, agents or representatives until after the vacation is complete.

4. COVENANTS, RESTRICTIONS AND AGREEMENTS.

4.1 Taxes and Assessments. After the Closing, it shall be Developer's responsibility to pay prior to delinquency all ad valorem real estate taxes and assessments on the Residential Property, subject to Developer's right to contest in good faith any such taxes.

4.2 Effect and Duration of Covenants. The covenants established in this Agreement shall, without regard to technical classification and designation, be binding upon and inure for the benefit and in favor of City, and its successors and assigns. City is deemed the beneficiary of the terms and provisions of this Agreement and of the covenants running with the land for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit this Agreement and the covenants running with the land have been provided. 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 Project. Subject to the limitations on remedies set forth in Section 5, City shall have the right, if this Agreement or the covenants are breached, to exercise all rights and remedies and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it may be entitled under the terms of this Agreement.

4.3 Limitations of this Agreement. By its execution of this Agreement, City is not committing itself to or agreeing to undertake: (a) approval of the proposed development Project described, or (b) any other acts or activities requiring the subsequent independent exercise of discretion by City or any agency or department thereof. In addition, nothing in this Agreement shall be construed to limit the application of CEQA to any change to the DDA or the proposed Project, or to changes to the foregoing, or to control the actions of City in meeting its CEQA obligations. In fulfilling its obligations under CEQA, City reserves full and complete discretion with respect to any such CEQA approvals without reference to this Agreement. City shall not be liable, in any respect, to Developer for its action or inaction in fulfilling its CEQA obligations. City will not consider the approval of any DDA or the proposed Project, or to changes to the foregoing, unless and until it has fully reviewed and considered the environmental impacts in accordance with CEQA. City is not, and shall not be considered to be, obligated by this Agreement, or otherwise, to approve the proposed Project or any changes to this Agreement or any other agreement. After CEQA review, City is not obligated, by this Agreement or otherwise, to adopt findings of overriding considerations for approval of or to take any other action in support of the proposed Project or any changes to this Agreement or any changes to the foregoing. City is not precluded from rejecting any change to this Agreement DDA or the proposed Project or imposing mitigation measures as a condition of Project approval, which measures mitigate or avoid direct or indirect environmental effects of the proposed Project. If City rejects the proposed Project, this Agreement shall automatically terminate and, except as otherwise provided in Sections 4.1 and 4.8, neither Party shall have any further rights or obligations hereunder.

4.4 Due to the location of the Mixed Use Project, access to the Project may at times be limited due to special circumstances. City and Developer agree to discuss in good faith the creation of an easement over City property to allow for an emergency access to the Project.

5. DEFAULTS AND REMEDIES.

5.1 Default Remedies— General. Failure by either Party to perform any action or covenant required by this Agreement within 30 days following receipt by the failing Party of written Notice from the other Party specifying the failure shall constitute a “Default” under this Agreement; provided, however, that if the failure to perform cannot be reasonably cured within such 30 day period, a Party shall be allowed additional time as is reasonably necessary to cure the failure so long as such Party commences to cure the failure within the 30 day period and thereafter diligently prosecutes the cure to completion. Subject to the limitations of Section 6.2 below, any default by either Party under one or more of the other Project Agreements which is not cured following notice and expiration of any applicable cure periods thereunder shall also constitute a Default under this Agreement, and upon occurrence of such Default and without any right to further notice or additional cure period, the non-defaulting Party shall have all remedies available to it under this Agreement, including the right to terminate this Agreement as set forth in Section 5.3 below.

5.2 Legal Actions.

5.2.1 Institution of Legal Actions. Upon the occurrence of a Default by Developer, City shall have the right, in addition to any other rights or remedies (but subject to the limitations set forth in Section 5.2.2 below), to institute any action at law or in equity to cure, correct, prevent, or remedy such Default, or to recover actual damages (subject to the limitations set forth below and in Section 5.2.2); provided, however, that in no event shall City’s pre-Closing remedies include specific performance of Developer’s obligation to close escrow on the Property. Developer’s remedies in the event of a Default by City under this Agreement shall be limited to obtaining specific performance or injunctive relief, or terminating this Agreement. Neither Party shall have the right to recover any punitive, consequential, or special damages. All legal actions must be instituted in the Superior Court of the County of Santa Clara, State of California.

5.3 Termination. In addition to the automatic termination provided for under Section 2.6 above, this Agreement may be terminated: (a) if there is an uncured Default, after Notice from the Party not in default and expiration of all cure periods, or (b) if there is a failure of an express Developer Conditions Precedent (which is not waived by the Party whom the condition benefits) by timely Notice from the Party whom the condition benefits. If requested by City, upon termination of this Agreement, Developer shall promptly execute and deliver to City a Quitclaim Deed, in recordable form, as to all portions of the Property not yet purchased by Developer.

5.4 City Option to Repurchase, Reenter, and Repossess.

5.4.1 Depot Property. Subject to notice and opportunity to cure under Section 5.1, City shall have the additional right, at its option, to reenter and take possession of the Depot Property if after conveyance of title to the Depot Property, Developer shall:

(a) Fail to Commence Construction of Mixed Use Project within the time set forth on the Schedule of Performance; or

(b) Abandon or substantially suspend construction of City Infrastructure.

5.4.2 Such rights to reenter and reposess, to the extent provided in this Agreement and (as applicable) Grant Deeds, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

(a) Any mortgage, deed of trust or other security instrument permitted by this Agreement (including, without limitation, any assignment of rents and leases);

(b) Any rights or interests provided in this Agreement for the protection of the holder of such mortgages, deeds of trust or other security instruments; or

(c) City's rights under this Section 5.4 shall terminate upon the issuance of a Final Certificate of Completion as to those portions of the Property covered by such Final Certificate of Completion.

5.5 Rights and Remedies Are Cumulative. Except as specified otherwise in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party, except as otherwise expressly provided herein.

5.6 Inaction Not a Waiver of Default. Except as specified otherwise in the Agreement, any failures or delays by either Party in asserting any of its rights and remedies as to any Default shall not operate as a waiver of any Default or of any such rights or remedies, or deprive either such Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

6. GENERAL PROVISIONS.

6.1 Insurance Requirements. Prior to Commencement of Construction until the completion of construction of the Project, as evidenced by issuance of a Final Certificate of Completion, Developer shall take out and maintain or shall cause its contractor to take out and maintain, a commercial general liability policy with a minimum limit of Two Million Dollars (\$2,000,000) per occurrence for bodily injury, personal injury, and property damage, or such other higher policy limits as may be required by Developer's lenders or other institutions providing financing to Developer for the Project. Coverage shall be at least as broad as Insurance Services Office Commercial General Liability coverage (occurrence Form CG 0001). If commercial general liability insurance or other form with a general aggregate is used, the general aggregate limit shall at least Five Million Dollars

(\$5,000,000). Developer and each of its contractors shall also take out and maintain a comprehensive automobile liability policy in an amount not less than One Million Dollars (\$1,000,000).

Until such time as Developer has completed the Project, Developer shall also obtain and maintain builder's all-risk insurance in an amount not less than the full insurable cost of the building shell improvements applicable to that particular portion of the Project to be constructed, or caused to be constructed, on a replacement cost basis, or such other greater policy limits as may be required by Developer's lenders or other institutions providing financing for the Project, and shall furnish or cause to be furnished to City evidence reasonably satisfactory to City that Developer and any contractor with whom it has contracted for the performance of work on the Property or otherwise pursuant to this Agreement carries workers' compensation insurance as required by law.

Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII or otherwise reasonably acceptable to City. The commercial general liability and comprehensive automobile policies hereunder shall name City and City Parties as additional insureds with respect to liability arising out of work or operations performed by or on behalf of the Developer on or about the Property, including materials, parts or equipment furnished in connection with such work or operations.

Developer shall furnish City with a certificate of insurance evidencing the required insurance coverage and a duly executed endorsement evidencing such additional insured status. To the extent provided by the insurance carrier, the insurance policies shall be endorsed to notify City of any material change, cancellation or termination of the coverage at least 30 days in advance of the effective date of any such material change, cancellation or termination. Coverage provided hereunder by Developer shall be primary insurance and shall not be contributing with any insurance, self-insurance or joint self-insurance maintained by City, and the policy shall so provide. Any insurance, self-insurance or joint self-insurance maintained by City shall be excess of and shall not contribute with the insurance required to be maintained by Developer. The insurance policies shall contain a waiver of subrogation for the benefit of City. The required certificate and endorsement for the Project shall be furnished by the Developer to City prior to the commencement of construction of the Project.

Any deductibles or self-insured retentions must be declared to and approved by City (which shall not be unreasonably withheld, conditioned or delayed), which may require Developer to provide proof of its ability to pay losses and costs of related investigation, claim administration, and defense expenses within the retention.

6.2 Notices, Demands and Communications Between the Parties

Any approval, disapproval, demand, document or other notice ("Notice") which either Party may desire to give to the other Party under this Agreement must be in writing and shall be given by certified mail, return receipt requested and postage prepaid, personal

delivery, or reputable overnight courier (but not by facsimile or email), to the Party to whom the Notice is directed at the address of the Party as set forth below, or at any other address as that Party may later designate by Notice.

To City: City of Morgan Hill
Office of the City Manager
17575 Peak Avenue
Morgan Hill, CA 95037
Attention: City Manager

With a copy to: City of Morgan Hill
City Attorney's Office
17575 Peak Avenue
Morgan Hill, CA 95037
Attention: City Attorney

To Developer: The Latala Group, LLC
1999 South Bascom Avenue,
Suite 700
Campbell, CA 95008
Attention: Paul Latala

Any Notice shall be deemed received on the date of delivery if delivered by personal service, on the date of delivery or refused delivery as shown by the return receipt if sent by certified mail, and on the date of delivery or refused delivery as shown by the records of the overnight courier if sent via nationally recognized overnight courier. Notices sent by a Party's attorney on behalf of such Party shall be deemed delivered by such Party.

6.3. Compliance with Laws. Developer shall carry out, and shall ensure that its contractors and subcontractors carry out the Project work in conformity with all Applicable Laws, including all applicable state labor laws and standards; the City zoning and development standards; building, plumbing, mechanical and electrical codes; all other provisions of the City of Morgan Hill Municipal Code; and all applicable disabled and handicapped access requirements, including the Americans With Disabilities Act, 42 U.S.C. Section 12101, *et seq.*, Government Code Section 4450, *et seq.*, Government Code Section 11135, *et seq.*, and the Unruh Civil Rights Act, Civil Code Section 51, *et seq.* Developer's obligations under this Section 3.10 shall include the obligation to undertake all appropriate inquiries with state and federal governmental enforcement and regulatory agencies as necessary to fully comply with all Applicable Laws.

6.4. Prevailing Wages. For the City Infrastructure improvements considered to be a Public Work for purpose of the prevailing wage laws under State law, Developer and any successor or assign shall cause the contractor and any subcontractor to pay prevailing wages in the construction of those improvements as those wages are determined pursuant to Labor Code section 1720 *et seq.* and implementing regulations

of the Department of Industrial Relations. Developer shall further cause its contractor and any subcontractor employed on the work to comply with all State laws relating to Public Works, including but not limited to registration, record keeping, and postings.

6.5 Enforced Delay: Extension of Time of Performance. Subject to the limitations set forth below, performance by either Party hereunder shall not be deemed to be in Default, and all performance and other dates specified in this Agreement shall be extended, where delays are due to: (a) war and insurrection; (b) strikes, lockouts and labor disputes; (c) riots, floods, earthquakes, fires, casualties, acts of God and acts of the public enemy; (d) epidemics, quarantine restrictions, freight embargoes, and governmental restrictions or priority; (e) delays in issuance of any Project Approvals entitlements or permits necessary to develop any improvements contemplated to be developed on the Property, except for those delays which are caused by actions of the Developer or applicable portion thereof; (f) litigation and arbitration, including court delays; legal challenges to this Agreement, the Project Agreements, the Project Approvals, or any other approval required for the Project or any initiatives or referenda regarding the same; (g) unusually severe weather or unseasonable inclement weather); or (h) moratorium (each a "Initial Delay"). An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if Notice by the Party claiming such extension is sent to the other Party within 30 days of the commencement of the cause or discovery of the cause. If Notice is sent after the 30 day period, then the extension shall commence to run no sooner than 30 days prior to the giving of the Notice. Developer's inability or failure to obtain financing or otherwise timely satisfy the Conditions Precedent to Closing (other than due to clauses (e) and (f) above or due to the acts, failure to act or fault of the City, and other than the Conditions to Closing set forth in Sections 2.4.1, 2.4.6, 2.4.7 and 2.4.8) on or before any date in the Performance Schedule Date shall not be deemed to be a cause outside the reasonable control of the Developer and shall not be the basis for an excused delay unless approved in writing by the City.

6.6 Successors and Assigns. Subject to the restrictions on Developer transfers set forth in Section 1.2.1 above, all of the terms, covenants and conditions of this Agreement shall be binding upon Developer and City and their respective successors and assigns. Whenever the term "Developer" is used in this Agreement, such term shall include any permitted successors and assigns as provided.

6.7 Relationship Between City and Developer. It is hereby acknowledged that the relationship between City and Developer is not that of a partnership or joint venture and that City and Developer shall not be deemed or construed for any purpose to be the agent of the other. Accordingly, except as expressly provided or in the exhibits hereto, City shall have no rights, powers, duties or obligations with respect to the development, operation, maintenance, or management of the Project.

6.8 City Approvals and Actions. Whenever a reference is made herein to an action or approval to be undertaken by City, the City Manager or his or her designee is

authorized to act on behalf of City, unless specifically provided otherwise or the context requires otherwise.

6.9 Counterparts. This Agreement may be signed in multiple counterparts each of which shall be deemed to be an original.

6.10 Integration. This Agreement, including the exhibits hereto, and the other Project Agreements contain the entire understanding between the parties relating to the transactions contemplated by this Agreement. All prior or contemporaneous agreements, understandings, representations and statements, oral or written, other than the other Project Agreements, are merged in this Agreement and shall be of no further force or effect. Each Party is entering this Agreement based solely upon the representations set forth herein and upon each Party's own independent investigation of any and all facts such Party deems material.

6.11 Brokerage Commissions. City and Developer each represents to the other that it has not engaged the services of any finder or broker and that it is not liable for any real estate commissions, broker's fees, or finder's fees which may accrue by means of the conveyance of the Property as described in this Agreement, or the negotiation and execution of this Agreement. Each Party shall indemnify, defend, protect and hold the other Party harmless from any and all Claims based upon any assertion that such commissions or fees are allegedly due from the Party making such representations.

6.12 Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or of any of its terms. References to section numbers are to sections in this Agreement, unless expressly stated otherwise. References to specific section numbers shall include all subsections which follow the referenced section.

6.13 Interpretation. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The words "include" and "including" shall be construed as if followed by the words "without limitation." The parties acknowledge that each Party and his, her or its counsel have reviewed and revised this Agreement and that the rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any document executed and delivered by either Party in connection with this Agreement.

6.14 Modifications. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each instance signed on behalf of each Party.

6.15 Severability. If any term, provision, condition or covenant of this Agreement or its application to any Party or circumstances shall be held, to any extent, invalid or unenforceable, the remainder of this Agreement, or the application of the term, provision, condition or covenant to persons or circumstances other than those as to whom or which

it is held invalid or unenforceable, shall not be affected, and shall be valid and enforceable to the fullest extent permitted by law.

6.16 Computation of Time. The time in which any act is to be done under this Agreement is computed by excluding the first day, and including the last day, unless the last day is a holiday, Saturday, or Sunday, and then that day is also excluded. The term "holiday" shall mean all holidays as specified in Sections 6700 and 6701 of the California Government Code. If any act is to be done by a particular time during a day, that time shall be Pacific Time Zone time.

6.17 Legal Advice. Each Party represents and warrants to the other the following: they have carefully read this Agreement, and in signing this Agreement, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Agreement, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Agreement; and, they have freely signed this Agreement without any reliance upon any agreement, promise, statement or representation by or on behalf of the other Party, or their respective agents, employees, or attorneys, except as specifically set forth in this Agreement, and without duress or coercion, whether economic or otherwise.

6.18 Time of Essence. Time is expressly made of the essence with respect to the performance by City and Developer of each and every obligation and condition of this Agreement.

6.19 Cooperation. Each Party agrees to cooperate with the other in this transaction and, in that regard, shall execute any and all documents which may be reasonably necessary, helpful, or appropriate to carry out the purposes and intent of this Agreement.

6.20 Conflicts of Interest. No City Council member, official or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to the Agreement which affects his personal interests or the interests of any corporation, partnership or association in which he is directly or indirectly interested.

6.21 Time for Acceptance of Agreement by City. This Agreement, when executed by Developer and delivered to City, must be authorized, executed, and delivered by City on or before forty five (45) days after signing and delivery of this Agreement by Developer or this Agreement shall be void, except to the extent that Developer shall consent in writing to a further extension of time for the authorization, execution and delivery of this Agreement.

6.22 Developer's Indemnity. Developer shall indemnify, defend (with counsel reasonably acceptable to City), protect, and hold City and its officers, employees, agents, and representatives, harmless from, all Claims to the extent arising out of the development of the Project or by anyone directly or indirectly employed or contracted with by Developer that arise out of the construction by or on behalf of Developer of

improvements comprising the Project and whether the Claims shall accrue or be discovered before or after termination of this Agreement. Developer's indemnity obligations under this Section 6.22 shall not extend to Claims to the extent caused by the active negligence or willful misconduct of City or its officers, employees, agents or representatives. Insurance limits shall not operate to limit Developer's indemnity obligations under this Section 6.22. Notwithstanding anything to the contrary in this Section 6.22, any claims related to Initial Litigation Challenges shall be controlled exclusively by Section 6.22.

6.23 Cooperation in the Event of Legal Challenge to Project Approvals. City and Developer shall cooperate in the defense of any court action or proceeding instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement or the City's initial approval of this Agreement or any of the Project Approvals ("Initial Litigation Challenge"), and the Parties shall keep each other informed of all developments relating to such defense, subject only to confidentiality requirements that may prevent the communication of such information.

6.23.1 Meet and Confer. If an Initial Litigation Challenge is filed, upon receipt of the petition, the Parties will have 20 days to meet and confer regarding the merits of such Initial Litigation Challenge and to determine whether to defend against the Initial Litigation Challenge, which period may be extended by the Parties' mutual agreement so long as it does not impact any litigation deadlines. The City and Developer mutually commit to meet all required litigation timelines and deadlines. If the terms of the proposed settlement would constitute an amendment or modification of this Agreement, the settlement shall not become effective unless the amendment or modification is approved by Developer, and by City in accordance with Applicable Laws, and City reserves its full legislative discretion with respect thereto.

6.23.2 Defense Election. If, after meeting and conferring, the Parties mutually agree (each in its sole discretion) to defend against the Initial Litigation Challenge, then the following shall apply:

(a) Developer shall take the lead role defending such Initial Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice;

(b) City may, in its sole discretion, elect to be separately represented by the outside legal counsel of its choice in any such action or proceeding with the reasonable costs of such representation to be paid by Developer;

(c) Developer shall reimburse City, within ten business days following City's written demand therefor, which may be made from time to time during the course of such litigation, all necessary and reasonable costs incurred by City in connection with the Initial Litigation Challenge, including City's administrative, outside legal fees and costs, and court costs.

(d) The Parties intend that the City's role under subsection shall be primarily oversight although the City reserves its right to protect the City's interests, and the City shall make good faith efforts to maximize coordination and minimize its outside legal costs (for example, minimizing filing separate briefs, and duplication of effort to the extent feasible).

(e) For any Initial Litigation Challenge which the Developer has elected to defend under this Section, Developer shall indemnify, and hold harmless the City and City Parties from any liability, damages, claim, action, cause of action, judgment (including City costs to effectuate such judgment, including any attorneys' fees or cost awards, including attorneys' fees awarded under Code of Civil Procedure Section 1021.5, assessed or awarded against City by way of judgment, settlement, or stipulation), loss (direct or indirect), or proceeding (including legal costs, attorneys' fees, expert witness or consultant fees, staff time, expenses or costs) related to such Initial Litigation Challenge; provided, however, such indemnification, defense and hold harmless obligation shall not apply to Claims to the extent caused by the active negligence or willful misconduct of City or any of its agents, employees, officers, contractors or representatives.

6.23.3 Developer Election Not to Defend. If Developer elects, in its sole and absolute discretion, not to defend against the Initial Litigation Challenge, it shall deliver written notice to the City regarding such decision. If Developer elects not to defend, the City has the right, but not the obligation, to proceed to defend against the Initial Litigation Challenge and shall take the lead role defending such Initial Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice, at Developer's sole cost and expense. If Developer elects not to defend, the City has the right, but not the obligation, to terminate this Agreement and consider the Developer's pending application for any related Project Approvals withdrawn. In the event the City does not terminate this Agreement, then if the terms of a proposed settlement would constitute an amendment or modification of this Agreement, the settlement shall not become effective unless the amendment or modification is approved by Developer (which approval shall not be unreasonably withheld), and by City in accordance with Applicable Laws, and City reserves its full legislative discretion with respect thereto. In the event the Developer unreasonably withdraws its approval of such amendment or modification, the City retains the right, but not the obligation, to terminate this Agreement and consider the Developer's application for any related Project Approvals withdrawn.

6.24 Non-liability of Officials and Employees of City. No member, official or employee of City shall be personally liable to Developer, or any successor in interest, in the event of any Default or breach by City or for any amount which may become due to Developer or its successors, or on any obligations under the terms of this Agreement. Developer hereby waives and releases any claim it may have against the members, officials, or employees of City with respect to any Default or breach by City or for any amount which may become due to Developer or its successors under the terms of this Agreement.

6.25 Limitation of Remedies. In the event of an uncured default by either Party under this Agreement, the non-defaulting Party's exclusive remedy is to terminate this Agreement. In no event shall either Party have the right, and each Party expressly waives the right, to seek monetary damages of any kind (including, but not limited to, actual damages, economic damages, consequential damages, or lost profits) in the event of a default by the other Party under this Agreement.

6.26 Applicable Law; Venue. The laws of the State of California, without regard to conflict of laws principles, shall govern the interpretation and enforcement of this Agreement. The exclusive venue for any disputes or legal actions shall be the Superior Court of California in and for the County of Santa Clara.

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6.27 Survival. The parties' indemnification obligations under Sections 3.7, 6.19 and 6.21 shall survive termination of this Agreement.

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

CITY:

CITY OF MORGAN HILL, a California municipal corporation

By:

Christina Turner, City Manager

APPROVED AS TO FORM:

By:

Donald A. Larkin, City Attorney

ATTEST:

By:

Irma Torrez, City Clerk

DEVELOPER:

The Latala Group, LLC
a California Limited Liability Company

By: _____

Name: _____

Its: _____

By: _____

Name: _____

Its: _____

Approved as to Form:

By: _____

Name: _____

Its: _____