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MEMORANDUM

TO: The Honorable Chairman and Members of the San Dimas Planning Commission

FROM: Mark W. Steres

DATE: November 17, 2010

RE: Brasada Project
Development Agreement

The developer, NJD, LTD has requested that the City approve a Development Agreement for this Project. A copy is attached.

A Development Agreement is a contract, authorized pursuant to Section 65864 of the California Government Code, between the City and the developer, whereby certain development rights as set forth in the Agreement are vested subject to the terms and conditions of the Agreement. Section 3.1 of the Agreement provides the purpose of a Development Agreement:

“Section 3.1 State Enabling Statute. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Act which authorized any city to enter into binding development agreements establishing certain development rights in real property with persons having legal or equitable interests in such property. Section 65864 of the Development Agreement Act expressly provides as follows:

The Legislature finds and declares that:

(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

(b) Assurance to the applicant for a development project that upon approval of the project the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.”

The Development Agreement has been prepared following discussions between the City staff, attorneys and the Developer's representatives. In addition to vesting the project approvals, some of the key terms of the attached Development Agreement are as follows:

1. Term: 10 years.
2. Project Development: Developer shall (i) record a subdivision map for at least 1/3 of the residential lots prior to the third anniversary of the effective date of the Agreement, and (ii) complete all subdivision improvements including all roads, equestrian trails and backbone infrastructure prior to the fifth anniversary of the effective date of the Agreement.
3. Equestrian Trails: Developer shall construct and dedicate an equestrian trail that connects Horse Thief Canyon Park and Sycamore Canyon trail system.
4. Open Space Parcel: Developer shall offer for dedication to the public an approximately eighty-four (84) acre tract as permanent public open space.
5. Fees: The development and construction of the project are subject to all applicable processing fees and development fees in effect at the time of such development and construction.

The developer, however, does not agree with all of the terms of the attached Development Agreement. The developer has raised the following:

1. Term: Developer requests an 18 year term.
2. Project Development: Developer does not want any obligation to develop any portion of the project at any time during the Term of the Agreement. Developer requests to strike the requirement to record a map for at least 1/3 of the residential lots within the first three years, and to strike the requirement to complete subdivision improvements within the first five years. With the above requested change to the Term, the Developer is requesting an open-ended vested right to develop for 18 years.
3. Fees: Developer requests that the applicable development fees be identified now and frozen for the Term of the Agreement.
4. Development Agreement Section 7.18 (Settlement Agreement): Developer requests to strike the provision in the Agreement that states that by entering into the Agreement, and with the project approvals, the City's responsibilities and obligations under certain sections of the Settlement Agreement are fully satisfied.

Recommendation: Staff recommends that the Planning Commission recommend to the City Council approval of the Development Agreement as attached and recommend direction, if any, on the requests of Developer for revisions or strike-outs.

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

City of San Dimas
245 East Bonita Avenue
San Dimas, California 91773
Attn: City Clerk

No Recording Fee (Government Code Section 6103)

(Space above for recorder's use)

Agreement No. 2010-

DEVELOPMENT AGREEMENT

by and between

CITY OF SAN DIMAS,
a general law city and municipal corporation

and

NJD, LTD.,
a Texas limited partnership

TABLE OF CONTENTS

	Page
Section 1. Incorporation of Recitals	3
Section 2. Definitions	3
2.1 Applicable Rules	3
2.2 California Building Standards Codes	4
2.3 CEQA	4
2.4 Conditions of Approval	4
2.5 Developer Fees	5
2.6 Development Agreement	5
2.7 Development Agreement Act	5
2.8 Discretionary Action(s)	5
2.9 Effective Date	5
2.10 Enabling Resolution	5
2.11 FEIR	5
2.12 General Plan Amendment	5
2.13 “Ministerial Permit(s)” or “Ministerial Approval(s)”	5
2.14 Mortgagee	6
2.15 Phase	6
2.16 Processing Fees	6
2.17 Project	6
2.18 Project Approvals	6
2.19 Property	6
2.20 Reserved Powers	6
2.21 Specific Plan	6
2.22 Term	7
2.23 TTM	7
2.24 Zoning Regulations	7
Section 3. Recitals of Premises, Purpose and Intent	7
3.1 State Enabling Statute	7
3.2 Intentionally Omitted	7
3.3 Property Ownership	7

TABLE OF CONTENTS
(continued)

	Page
3.4 Development of the Property	8
3.5 Public Objectives.....	8
Section 4. Project Development	8
4.1 Project Development; Entitlement to Develop	8
4.2 Timing of Development and Allotment	9
4.3 Moratorium.....	9
4.4 City Services	9
4.5 Partial Termination.....	10
4.6 Equestrian Trails	10
4.7 Dedication or Transfer of Open Space Parcel	10
Section 5. Changes	11
5.1 Nonapplication of Changes; Additional Conditions of Approval and Other Exceptions	11
5.1.1 Nonapplication of Changes to Applicable Rules Without Developer Consent	11
5.1.2 Additional Conditions of Approval.....	11
5.1.3 Changes in Building Codes	11
5.1.4 Changes Mandated by Federal or State Laws or Regulations	11
5.1.5 Cooperation in Securing Permits.....	12
5.1.6 Changes in Processing Fees and Developer Fees	12
5.1.7 Developer's Right to Contest New or Increased Fees, Charges or Assessments	13
5.1.8 Ministerial Permits	13
5.1.9 Discretionary Approvals.....	13
5.1.10 Timely City Actions	13
5.1.11 Interim Uses	13
5.1.12 Additional Staffing	13
5.1.13 Term of Project Approvals	14
5.1.14 Minor Modifications.....	14
Section 6. Default Provisions	14
6.1 Default by Developer	14

TABLE OF CONTENTS

(continued)

	Page
6.2 Default by the City; Notice of Default	15
Section 7: General Provisions	16
7.1 Termination	16
7.2 Enforced Delay; Extension of Time of Performance	16
7.3 Developer's Right to Terminate upon Specified Events	17
7.4 Venue	17
7.5 Applicable Law	17
7.6 Amendments.....	17
7.7 Assignment.....	17
7.8 Release of Transferring Owner	18
7.9 Covenants.....	18
7.10 Cooperation and Implementation	18
7.11 Relationship of the Parties.....	19
7.12 Notices.....	19
7.13 Recordation	20
7.14 Severability.....	20
7.15 Time of the Essence	20
7.16 Waiver.....	20
7.17 No Third Party Beneficiaries.....	20
7.18 Entire Agreement	21
7.19 Advice; Neutral Interpretation.....	21
7.20 Certificate of Compliance	21
7.21 Mortgagee Protection	21
7.22 Processing of Modification	22
7.23 Indemnity	22
7.23.1 General.....	22
7.23.2 Exceptions.....	23
7.23.3 Loss and Damage	23
7.23.4 Period of Indemnification.....	23
7.23.5 Waiver of Subrogation	23

TABLE OF CONTENTS
(continued)

	Page
7.24 Insurance	23
7.24.1 Types of Insurance	23
7.24.2 Failure to Maintain Insurance and Proof of Compliance.....	24
7.25 Consideration	25
7.26 Periodic Reviews.....	25
7.27 Record of Applicable Rules	25
7.28 Eminent Domain	26
7.29 Binding Effect	26
7.30 Conflicts of Interest.....	26
7.31 Counterparts	26

DEVELOPMENT AGREEMENT

This Development Agreement (“Agreement” or “Development Agreement”) is made and entered into as of _____, 2010, by and between the CITY OF SAN DIMAS, a general law city and municipal corporation (“City”), and NJD, LTD., a Texas limited partnership (“Developer”) pursuant to Article 2.5 of Chapter 4 of Division 1 of Title 7, Sections 65864 through 65869.5 of the California Government Code. The City and Developer are individually referred to herein as a “Party” and collectively referred to as the “Parties.”

RECITALS

This Agreement is made and entered into with regard to the following facts, each of which is acknowledged as true and correct by the Parties to this Agreement:

(a) Developer is the owner of certain real property which is located in the City, which is more particularly described in Exhibit A attached hereto and incorporated herein by reference and is shown on the location map attached hereto as Exhibit B (hereafter “Property”); and

(b) Developer has contractual rights to acquire approximately 76.7 acres of property in the City adjacent to the Property, commonly known as Assessor’s Parcel Numbers (“APN”) 8665-001-004 and 8165-001-005, more particularly described on Exhibit A-1 attached hereto and incorporated herein by reference (the “Additional Property”). The Additional Property is depicted on Exhibit B-1 and described on Exhibit B-2 attached hereto and incorporated herein by reference. Developer’s rights to acquire the Additional Property are established by that certain Option Agreement and Right of First Refusal, as amended (“Option Agreement”), as evidenced by that recorded Amendment to Memorandum of Option Agreement and Right of First Refusal recorded as Instrument No. 2008-1872650 in Los Angeles County, California. County Official Records on October 21, 2008. As provided by Sections 4.3 and 4.4 of that Option Agreement, Developer is entitled to seek Project-related approvals and the current fee owner is obligated to cooperate in seeking such approvals. At such time that Developer becomes fee owner of the Additional Property an approximately 40-acre portion of the Additional Property, as depicted on Exhibit B-1, shall become part of the “Property” for purposes of this Agreement. The Parties agree that this is a sufficient beneficial interest for an approximately 40 acre portion of the Additional Property to be included in this Agreement.

(c) Developer desires to construct a Project (as hereinafter defined) on the Property consisting, among other improvements and amenities, of sixty-one (61) single family homes and approximately eighty-four (84) acres of open space; and

(d) Developer and City are also parties to that certain Settlement Agreement & Release dated as of December 21, 2004 (the “Settlement Agreement”), pursuant to which the current Project is being processed; and

(e) Concurrently with or prior to approval of this Agreement, City has approved and adopted General Plan Amendment No. 99-1, as amended by _____ (the “General Plan Amendment”) and Specific Plan No. 25, as amended by _____ (the “Specific Plan”), Tentative Tract Map No. 70583 (“TTM”) and the other Project Approvals (as hereinafter defined) applicable to the Project; and

(f) The Project is fully described in the FEIR (as hereinafter defined) and the Project Approvals, which are on file with the City; and

(g) Developer's TTM and other Project Approvals allowing construction of the Project have been conditionally approved concurrently herewith, and the Conditions of Approval (as hereinafter defined) applicable thereto have been accepted by the Developer as being lawfully imposed thereon; and

(h) Developer has applied to the City for approval of this Agreement pursuant to the provisions of the Development Agreement Act (as hereinafter defined), the Enabling Resolution (as hereinafter defined), and other applicable laws; and

(i) The City is authorized pursuant to the Development Agreement Act and other applicable laws to enter into binding development agreements with persons or entities having legal or equitable interests in real property for the development of property as therein described; and

(j) The City desires to obtain the binding agreement of the Developer for the development of the Project in accordance with the provisions of this Agreement; and

(k) Developer desires to obtain the vested right from the City to allow Developer to develop the Project in accordance with the provisions and requirements of this Agreement, the Project Approvals, the Conditions of Approval and the Applicable Rules (as hereinafter defined), including only those modifications, changes or additions to those Applicable Rules permitted or required by this Agreement; and

(l) The Planning Commission and the City Council of the City have each conducted a duly noticed public hearing to consider the approval of this Agreement pursuant to Government Code Section 65867 and each has found that the provisions of this Agreement are consistent with the City's adopted plans and policies, the General Plan (as hereinafter defined), and the Specific Plan; and

(m) An environmental review has been conducted and completed with regard to the Project and a FEIR was certified by the City Council on _____, _____, in accordance with CEQA (as hereinafter defined), including all State and local guidelines, which FEIR contemplates a development agreement and its execution by the Parties as one component of the Project; and

(n) This Agreement is in furtherance of the public health, safety and welfare of the residents of the City and the surrounding region, and will serve the public interest, convenience and necessity of the City and its residents and the surrounding region; and

(o) The City Council has specifically considered and approved the impact and benefits of the Project upon the welfare of the City and the region; and

(p) This Agreement will serve to eliminate uncertainty in planning and will provide for the orderly development of the Project in a manner consistent with the Applicable Rules and the General Plan and Specific Plan; and

(q) This Agreement will provide Developer with the assurance that it can complete the Project and that the Project will not be changed, delayed or modified after the Effective Date (as hereinafter defined) of this Agreement, except pursuant to the provisions of this Agreement; and

(r) The Project will provide substantial benefit to the City by providing, without limitation, increased tax and other revenues; the construction and dedication of public improvements, the offer for dedication to permanent public open space of approximately eighty-four (84) acres, the provision for dedication and improvement of equestrian trails connecting Horse Thief Canyon Park and the Sycamore Canyon trail system, and the creation of job opportunities for residents of the City.

AGREEMENT

NOW, THEREFORE, pursuant to the authority contained in the Development Agreement Act, as it applies to the City, and the Enabling Resolution, and in consideration of the premises and mutual promises and covenants herein contained, and other valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties hereto agree as follows:

Section 1. Incorporation of Recitals.

The foregoing recitals are hereby acknowledged and affirmed by the Parties and are incorporated herein as a substantive term of this Agreement.

Section 2. Definitions.

For all purposes of this Agreement, except as otherwise expressly provided herein or unless the context of this Agreement otherwise requires, the following words and phrases shall be defined as set forth below:

2.1 "Applicable Rules" means, as provided in Government Code Section 65866, the rules, regulations, and official policies, including but not limited to those contained in the City's General Plan (as Amended by the Project Approvals), Municipal Code (as Amended by the Project Approvals), Specific Plan No. 25 (as amended by the Project Approvals) and Zoning Regulations (defined below), governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications applicable to development of the Property, whether adopted by the City Council or the voters in an initiative, which are in force as of the Effective Date of this Agreement. During the term of this Agreement and except as otherwise expressly provided herein, (1) the permitted uses of the Property; (2) the density or intensity of that use; (3) the maximum height and size of proposed buildings on the Property; and (4) the provisions for reservation or dedication of land for public purposes applicable to the Property shall be those provided by the "Project Approvals" (as defined below), including, without limitation, the "General Plan" (as defined below), the "Specific Plan" (as defined below), and the TTM. Applicable Rules shall also mean and include all Developer Fees (as hereinafter defined) and Processing Fees (as hereinafter defined) in effect from time to time during the term of this Agreement and there shall be no limit upon the Developer Fees and the Processing Fees payable with respect to the Project by virtue of this Agreement. Notwithstanding anything above contained in the definition of the Applicable Rules

which appears to be to the contrary, (i) this Agreement shall not prevent the City, in subsequent actions applicable to the Property, from applying new rules, regulations and policies which do not conflict with the Project Approvals or Applicable Rules applicable to the Property as set forth herein ("New Rules"), nor prevent the City from denying or conditionally approving any subsequent development project application on the basis of such New Rules, and (ii) this Agreement shall not prevent the City from imposing reasonable conditions or restrictions on future tentative subdivision or parcel maps and/or conditional use permits where such conditions or restrictions are necessary to avoid putting the residents of the Project or the area immediately surrounding the Project in a condition which would adversely impact their health or safety, or both, based on objective and identified health and safety standards. Notwithstanding anything above to the contrary, the term "Applicable Rules" shall not limit the application to the Project of new rules, regulations, and official policies of the City governing design, improvement and construction standards and specifications (each a "Design Rule") if (i) such change is a citywide change applying uniformly throughout the City, and (ii) except for update or adoption of uniform codes pursuant to the next sentence (which shall apply to the Project in any event), such change does not impose a material adverse financial impact upon the overall Project or the development thereof as contemplated by this Agreement; provided, further, that the additional time, if any, necessary to comply with a change in a Design Rule (as opposed to the additional cost or expense of compliance) shall not, in itself, constitute a material adverse financial impact. Notwithstanding anything herein to the contrary, the Developer Parties specifically acknowledge and agree that the construction of the Project shall be subject to (i) any adoption or update of building, electrical, mechanical, fire, pool or other similar uniform codes of citywide scope which are based on the recommendations of a multi-state professional organization and become applicable throughout the City, including all applicable California Building Standards Codes (as defined below) or (ii) are City-wide laws, regulations or ordinances relating to energy and/or resource conservation (so-called "sustainability" or "green building" laws, regulations or ordinances). Nothing in this Agreement deprives Developer of any rights it may have under Government Code Section 66474.2(a) and nothing in this Agreement constitutes a waiver by Developer of such rights.

2.2 "California Building Standards Codes" means those building, electrical, mechanical, fire, pool and other similar regulations, which are mandated by state law and which become applicable throughout the City, including, but not limited to, the California Building Code, the California Electrical Code, the California Mechanical Code, the California Plumbing Code, and the California Fire Code (including those amendments to the promulgated California codes which reflect local modification to implement requirements justified by local conditions, as allowed by state law, and which are applicable City-wide).

2.3 "CEQA" means the California Environmental Quality Act (California Public Resources Code Section 21000, et seq.) (the "Act") and the guidelines promulgated by the Governor's Office of Planning and Research in accordance with said Act (the "Guidelines"), as they now exist or may hereafter be amended.

2.4 "Conditions of Approval" shall mean those conditions of approval imposed by the City upon the Project Approvals as of the date hereof, as they may be amended or modified by the City prior to recording of the Final Map in order to comply with the requirements of other approving agencies (e.g., without limit, USFWS, CDFG, Division of Dam

Safety) including all requirements of any applicable Mitigation Monitoring Program, and any additional conditions of approval hereafter imposed on the Project consistent with Section 5.1.2 below.

2.5 “Developer Fees” mean those fees established and adopted by City with respect to development and its impacts pursuant to applicable governmental requirements, including Section 66000, *et seq.*, of the Government Code of the State of California, including impact fees, linkage fees, exactions, assessments or fair share charges or other similar impact fees or charges imposed on or in connection with new development by the City. Developer Fees does not mean or include Processing Fees. **[We are discussing with the City your requested fix to the type of City Development Fees applicable to the Project and the amount of those fees. This is an open point.]**

2.6 “Development Agreement” or “Agreement” means this Agreement.

2.7 “Development Agreement Act” means Article 2.5 of Chapter 4 of Division 1 of Title 7 (Sections 65864 through 65869.5) of the California Government Code.

2.8 “Discretionary Action(s)” or “Discretionary Approval(s)” means an action which requires the exercise of judgment, deliberation or discretion on the part of the City, including any board, agency, commission or department and any officer or employee thereof, in the process of approving or disapproving a particular activity, as distinguished from an activity which is defined herein as a Ministerial Permit or Ministerial Approval.

2.9 “Effective Date” shall mean the date this Agreement, fully executed, is recorded in the Office of the Recorder of Los Angeles County.

2.10 “Enabling Resolution” means Resolution No. _____ adopted by the City Council on _____, _____ (Exhibit C hereto).

2.11 “FEIR” shall mean that certain Final Environmental Impact Report (FEIR) (SCH#2010051020) which was prepared, circulated and certified in accordance with applicable law, including, without limitation, CEQA. “Mitigation Monitoring Program” shall mean the mitigation measures imposed upon the Project pursuant to the FEIR and the Conditions of Approval.

2.12 “General Plan Amendment” means that certain General Plan Amendment to General Plan 99-1, approved by the City Council by Resolution No. ___.

2.13 “Ministerial Permit(s)” or “Ministerial Approval(s)” mean a permit or approval including, but not limited to, building permits, grading permits, zone clearances and certificates of occupancy, which require the City, including any board, agency, commission or department or any officer or employee thereof, to determine whether there has been compliance with applicable rules, statutes, ordinances, conditions of approval and/or regulations, as distinguished from an activity which is included in the definition of Discretionary Action or Discretionary Approval.

2.14 “Mortgagee” means a mortgagee of a mortgage or a beneficiary under a deed of trust encumbering all or a portion of the Property.

2.15 “Phase” shall mean any discrete portion or part of the Project developed by the Developer or any successor in interest thereto.

2.16 “Processing Fees” means all processing fees and charges required by the City including, but not limited to, fees for land use applications, building permit applications, building permits, grading permits, subdivision or parcel maps, inspection fees and certificates of occupancy. Processing Fees shall not mean or include Developer Fees.

2.17 “Project” means the project as described in the General Plan Amendment, Specific Plan Amendment, TTM and the other Project Approvals.

2.18 “Project Approvals” shall mean, collectively, the Specific Plan (including the Specific Plan Amendment), the General Plan (including the General Plan Amendment), the TTM, this Agreement and any other plans, maps, permits and entitlements of every kind and nature specifically applicable to the Project, and shall also include any subsequent project specific approvals obtained by the Developer. To the extent that any of the Project Approvals are amended, from time to time, “Project Approvals” shall include, if Developer and City agree in writing, such matters as so amended. If this Agreement is required by law to be amended in order for “Project Approvals” to include any such amendments, then “Project Approvals” shall not include such amendments unless and until this Agreement is so amended.

2.19 “Property” means the real property described on Exhibit A and shown on the Location Map attached as Exhibit B. Upon Developer obtaining fee title to the Additional Property, an approximately 40-acre portion of the Additional Property, as depicted on Exhibit B-1, shall be deemed part of the “Property” for the purpose of this Agreement.

2.20 “Reserved Powers” means the rights and authority excepted from this Agreement’s restrictions on the City’s police powers and which are instead reserved to the City. The Reserved Powers include the power to enact and implement rules, regulations, ordinances and policies after the Effective Date with respect to development or use of the Project that may be in conflict with the Applicable Rules, but are: (1) necessary to prevent or remedy conditions which the City has found to be injurious or detrimental to the public health or safety based on objective and identified health and safety standards; (2) necessary to implement California Building Standards Codes; (3) necessary to comply with state or federal laws, rules and regulations (whether enacted previous or subsequent to the Effective Date) or to comply with a court order or judgment of a state or federal court; (4) Design Rule changes described in Section 2.1 above; (5) agreed to or consented to by Developer; (6) are City-wide fees or charges of general applicability [**OPEN**]; or (7) are City-wide laws, regulations or ordinances relating to energy and/or resource conservation (so-called “sustainability” or “green building” laws, regulations, or ordinances).

2.21 “Specific Plan” means Specific Plan No. 25, as amended, as approved by the City prior to or concurrent with this Agreement pursuant to Resolution No. ___.

2.22 “Term” means the term of this Agreement, which shall commence on the Effective Date of this Agreement and shall terminate ten (10) [We have noted your request to the City for a longer term, this is an open point.] years from and after the Effective Date of this Agreement unless modified or extended as set forth in this Agreement or by mutual written consent of the Parties hereto. If any party other than Developer initiates litigation that challenges the Project or the Existing Project Approvals, then Developer will have the right to toll commencement of the Term. The tolling shall commence upon receipt by the City of written notice from Developer invoking this right to tolling. The tolling shall terminate when (1) a final order is issued in said litigation that upholds the Project and the Project Approvals or (2) the litigation is dismissed with prejudice by all parties; whichever occurs first; provided that any tolling shall not exceed twelve (12) months unless the City consents thereto.

2.23 “TTM” means that certain Tentative Tract Map No. 70583 for the subdivision of the Property and a portion of the Additional Property into 61 residential lots, lettered common area lots, and related improvements, approved by the City Council pursuant to Resolution No. _____.

2.24 “Zoning Regulations” shall mean the official zoning regulations of the City.

Section 3. Recitals of Premises, Purpose and Intent.

3.1 State Enabling Statute. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Act which authorized any city to enter into binding development agreements establishing certain development rights in real property with persons having legal or equitable interests in such property. Section 65864 of the Development Agreement Act expressly provides as follows:

“The Legislature finds and declares that:

“(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

“(b) Assurance to the applicant for a development project that upon approval of the project the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.”

3.2 Intentionally Omitted

3.3 Property Ownership. The Developer is the owner of the Property and has a legal and equitable interest in the Additional Property and thus is qualified to enter into and be

a party to this Agreement. Upon becoming fee title owner of the Additional Property, an approximately 40 acre portion of such property generally depicted on Exhibit B-1 shall be deemed part of the Property. The remainder of the Additional Property shall not be governed by or encumbered by this Agreement or the Project Approvals. After tentative map approval for subdivision of the Additional Property, the parties shall execute such documents as necessary to cause this Agreement to be removed from record title to the remainder of the Additional Property.

3.4 Development of the Property. It is the Developer's intent to develop the Property as described in the Project Approvals. The Parties hereby agree that, for the Term of this Agreement, the Developer shall have a vested right to develop the Property and the Project in accordance with, and to the extent of, the Project Approvals, the Applicable Rules, the Conditions of Approval and this Agreement.

3.5 Public Objectives. In accordance with the legislative findings set forth in Section 65864 of the Development Agreement Act, City wishes to attain certain public objectives that will be furthered by this Agreement. Development of the Project in accordance with this Agreement will provide for the orderly development of the Property in accordance with the Applicable Rules and the Project Approvals in a manner which is consistent with the surrounding community. Moreover, this Agreement will eliminate uncertainty in planning for and will secure orderly development of the Project, assure installation of necessary improvements, and otherwise achieve the goals and purposes for which the Development Agreement Act was enacted.

Section 4. Project Development.

4.1 Project Development; Entitlement to Develop. In consideration of the premises, purposes and intentions set forth in Section 3, above, Developer agrees that it will use commercially reasonable efforts to develop the Project in accordance with the terms set forth in this Agreement, the Project Approvals and the Applicable Rules. Developer may develop the Property or any portion thereof with a development of lesser height or density than that currently approved, provided that such development otherwise complies with the Applicable Rules, the Project Approvals, the Conditions of Approval and this Agreement.

The City has determined that the Project is consistent with the General Plan (as amended) and the Specific Plan (as amended). Notwithstanding anything herein to the contrary, including anything contained in Section 4.2 below, as a condition to the continued effectiveness of this Agreement, (i) Developer shall record a final subdivision map with respect to at least one-third (1/3) of the residential lots contained in the Project (and enter into all required subdivision improvement agreements and post all required subdivision bonds in connection therewith) prior to the third anniversary of the Effective Date of this Agreement, and (ii) prior to the fifth anniversary of the Effective Date, Developer shall complete all subdivision improvements required as a result of that map recordation, including all roads, equestrian trails, backbone infrastructure and other like public improvements. At the time of completing those first phase improvements, Developer shall complete the dedication and improvement of the equestrian trails described in Section 4.6 below if that dedication and improvement has not previously occurred. If Developer fails to record that map or complete those improvements by

the outside dates set forth above, City may, at any time prior to completion of those actions, terminate this Agreement upon written notice to the Developer. City's only remedy for Developer's failure to timely record that map or complete those improvements by those outside dates set forth above shall be to terminate this Agreement and City shall not have the right to compel Developer to complete those actions by an action for specific performance.

4.2 Timing of Development and Allotment. The Parties acknowledge that the Developer cannot at this time predict when or the rate at which the Project would be developed and they acknowledge that the actual rate of development will depend upon numerous factors which are not all within the control of the Developer, such as market orientation and demand, interest rates, absorption, completion, availability of financing and other similar factors. Because the California Supreme Court held in Pardee Construction Co. v. City of Camarillo (1984) 37 Cal.3d 465, that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the intent of the Developer and City to hereby cure that defect by acknowledging and providing that, except as otherwise provided by the Project Approvals, Applicable Rules or this Agreement, including Section 4.1 above, the Developer shall have the right to develop the Property in such order and at such rate and at such times as the Developer deems appropriate within the exercise of its sole and subjective business judgment. City acknowledges that such a right is consistent with the intent, purpose and understanding of the Parties to this Agreement. This Agreement shall immediately vest the right to develop the Property with the permitted uses of land and the density and intensity of uses specifically set forth in the Project Approvals, subject only to the requirements of the Applicable Rules, the Project Approvals, the Conditions of Approval and the terms of this Agreement.

4.3 Moratorium. No City-imposed moratorium or other limitation (including, without limit, limitations relating to the rate, timing or sequencing of the development or construction of all or any part of the Property or any phase thereof, whether imposed by ordinance, initiative, resolution, policy, order or otherwise, and whether enacted by the City Council, a board, agency, commission or department of City, the electorate, or otherwise) affecting parcel or subdivision maps (whether tentative, vesting tentative or final), building permits, occupancy certificates or other entitlements to use or service (including, without limitation, water and sewer) approved, issued or granted within City, or portions of City, shall apply to the Property or Project Approvals to the extent such moratorium or other limitation is in conflict with this Agreement; provided, however, the provisions of this Section shall not affect City's compliance with moratoria or other limitations mandated by other governmental agencies or court-imposed moratoria or other limitations or to the City's exercise of its Reserved Powers.

4.4 City Services. Subject to Developer's installation of infrastructure in accordance with the requirements of the Project Approvals, Conditions of Approval, Applicable Rules and any subsequent additional Discretionary Approvals, if any, sought by Developer to implement the Project under any New Rules or Design Rules, City has determined and hereby finds that it will have sufficient capacity in its infrastructure, services and utility systems, including, as applicable, traffic circulation, storm drainage, sewer collection, sewer treatment, sanitation service and water supply, treatment, distribution and service, to accommodate the Project. To the extent that City renders such services or provides such utilities, City hereby

agrees that it will serve the Project and that there shall be no restriction on hookups or service for the Project.

4.5 Partial Termination. Developer shall have the right to request that the City approve a partial termination of this Agreement to release a portion(s) of the Property from the Agreement's obligations and benefits ("Partial Termination"). A Partial Termination may be approved by the City if Developer demonstrates to the City's satisfaction, in its sole and independent judgment, that the portion of the Property to be released from the Agreement obligations is not needed to satisfy any of the obligations established in the Agreement. If the City makes such a determination, such released Property shall not be subject to any of the obligations created in this Agreement, and similarly, will not receive any of the benefits created in this Agreement. Notwithstanding anything in this Agreement, the obligations of Developer in this Agreement are not intended to and shall not encumber any portion of the Property that has been finally subdivided, constructed and is individually (and not in "bulk") sold or leased to a member of the public or other ultimate user as a residential lot. Upon any such sale or lease, the residential lot shall be automatically and without further need for approval by the Parties be released from the duties and obligations of the Developer under this Agreement. Despite the intention of the Parties for this paragraph to be self-executing, the City shall execute a recordable instrument sufficient to release the Developer's obligations in this Agreement from a residential lot within thirty (30) days of a written request by Developer or any person with ownership rights to such residential lot. No such owner of an individual lot shall have the right to assert any rights of Developer under this Agreement, and Developer shall remain the responsible party for purposes of exercising any of those rights.

4.6 Equestrian Trails. In connection with development of the Project and prior to the earlier of issuance of any certificates of occupancy with respect to any of the improvements within the Project or the fifth (5th) anniversary of the Effective Date, the Developer shall construct and offer for dedication to the public (or convey to a third party designated by the City if the City so elects) an equestrian trail within the Property connecting Horse Thief Canyon Park and the Sycamore Canyon trail system. The Developer shall have no obligation to maintain these trails following improvement by the Developer, and such maintenance shall be performed by either the City or a third party designated by the City following dedication or transfer thereof as provided above; provided, however, that if the City elects to designate a third party to maintain the trails, the City shall first obtain the Developer's written consent to the identity and qualifications of the third party, which consent shall not be unreasonably withheld. The equestrian trail shall be located substantially as shown on Exhibit B attached hereto and shall meet all requirements of the Project Approvals and all Conditions of Approval applicable thereto.

4.7 Dedication or Transfer of Open Space Parcel. At such time as City shall direct following the Effective Date of this Agreement but in no event later than the expiration of the Term, Developer shall offer for dedication to the public (or convey to a third party designated by the City if the City so elects) an approximately eighty-four (84) acre tract of undeveloped property as permanent public open space area (the "Open Space Parcel"). If the City elects to designate a third party to receive conveyance of the Open Space Parcel, the City shall first obtain the Developer's written consent to the identity and qualifications of the third party, which consent shall not be unreasonably withheld. Dedication by Developer shall be free of all liens or

encumbrances but may be subject to a Section 1542 waiver and release for Developer's benefit with respect to all disclosed or unknown conditions. The City or approved third party designee shall take title subject to, and Developer shall have a right to record prior to conveyance, a deed restriction on the Open Space Parcel restricting the uses of this parcel from development that would materially impair the successful marketing, sale and use of the Project. The approximate location of the Open Space Parcel is shown on Exhibit B attached hereto. City shall not have any obligation to issue certificates of occupancy with respect to any improvements constructed on the Property until this condition has been satisfied or the City elects, in its sole and absolute discretion, to waive or defer that requirement; provided, however, if Developer is otherwise entitled to certificates of occupancy and City has not yet tendered its direction to Developer to offer the Open Space Parcel for dedication, then City shall have thirty (30) days from Developer's request for certificates of occupancy to do so. If a written request for dedication is not delivered to Developer within such thirty (30) day period then the condition requiring dedication prior to the issuance of those requested certificates of occupancy shall be waived; provided, however, that such Open Space Parcel's dedication obligation shall continue as otherwise provided in this Agreement and shall apply prior to the issuance of any further certificates of occupancy.

Section 5. Changes.

5.1 Nonapplication of Changes; Additional Conditions of Approval and Other Exceptions.

5.1.1 Nonapplication of Changes to Applicable Rules Without Developer Consent. The adoption of any change in the Applicable Rules, adopted or becoming effective after the Effective Date of this Agreement, shall not be applied to the Project, unless the Developer gives written notice to the City of its election to have such change in the Applicable Rules applied to the Project, which it may grant or withhold in Developer's sole and absolute discretion, or unless such change in the Applicable Rules constitutes a lawful exercise of the City's Reserved Powers or is otherwise expressly authorized by this Agreement.

5.1.2 Additional Conditions of Approval. Although no additional conditions or dedications shall be imposed by the City on the development of the Project, the Parties acknowledge and agree that, in approving any tentative subdivision maps with respect to the Property filed after the date of this Agreement, the City reserves its right to impose normal and customary dedications pursuant to the Applicable Rules for rights of way or easements for public access, utilities, water, sewers, and drainage necessary for the Property. In addition, nothing in this Section 5.1 shall preclude the City from requiring further conditional use permits, planned unit development permits, site plan reviews and other development permits and approvals with respect to the Project that are provided for by the Applicable Rules.

5.1.3 Changes in Building Codes. As set forth above in Section 2.1, notwithstanding any provision of this Agreement to the contrary, any Project improvements that are not yet completed shall be subject to changes occurring from time to time resulting from the City's adoption of building regulations based on the recommendations of a multi-state professional organization and which become applicable throughout the City, including, but not limited to, the California Building Standards Codes and other similar or related uniform codes.

5.1.4 Changes Mandated by Federal or State Laws or Regulations. In the event that any Federal, State, County or multi-jurisdictional laws or regulations (collectively "Federal or State law or regulation") enacted after the Effective Date prevents or precludes compliance with one or more of the provisions of this Agreement or the Applicable Rules, such provisions of this Agreement or the Applicable Rules shall be modified or changed as necessary to comply with such Federal or State law or regulation in a manner that minimizes, so far as reasonably possible, the adverse impact to the Project. In the event City has discretion to do so, the City shall interpret and implement a Federal, State, County or multi-jurisdictional law or regulation in a manner that minimizes, so far as reasonably possible, the adverse impact to the Developer's rights in the Project Approvals or under this Agreement. Where City or Developer believes that such modification or change is required, that Party shall take the following actions:

(a) Notice and Copies. The Party which believes a change or addition is required shall provide the other Party hereto with a copy of such State or Federal law or regulation and a statement of the nature of its conflict with the provisions of the Applicable Rules and/or of this Agreement.

(b) Modification Conferences. The Parties shall, within ten (10) days, meet and confer in good faith and engage in a reasonable attempt to modify this Agreement to comply with such Federal or State law or regulation consistent with the provisions of Section 5.1.4 above. In such discussions, the City and the Developer agree to preserve the terms of this Agreement and the rights of the Developer and the City derived from this Agreement to the maximum feasible extent while resolving the conflict.

(c) Council Hearings. Thereafter, if the representatives of the Parties are unable to reach agreement on the effect of such Federal or State law or regulation and the change in this Agreement or the Applicable Rules necessitated thereby, or if the required change which is agreed to by the Parties requires, in the judgment of the City Manager and the City Attorney, a hearing before and/or approval by the City Council, then, the matter shall be scheduled for hearing before the City Council by the City Clerk, at its next most convenient meeting. At least ten (10) days' written notice of the time and place of such hearing shall be given by the City Clerk to the representative of Developer and the City Manager. The City Council, at such hearing, or at a continuation of such hearing, shall determine the exact modification which is necessitated by such Federal or State law or regulation. Developer, and any other interested person, shall have the right to offer oral and written testimony at the hearing. The determination of the City Council shall be final and conclusive, except for judicial review thereof.

5.1.5 Cooperation in Securing Permits. Upon Developer's request, the City shall reasonably cooperate with Developer, at no cost or expense to the City, in the securing of any permits or approvals of other governmental agencies having jurisdiction over the Project required for the development of the Project, including, without limitation, any permits or approvals required as a result of a modification pursuant to Section 5.1.4 above.

5.1.6 Changes in Processing Fees and Developer Fees. Notwithstanding anything herein to the contrary, development of the Property and construction of the Project shall be subject to payment of all applicable Processing Fees and Developer Fees which may be in

effect from time to time and which are then applicable to the Project in accordance with the terms thereof.

5.1.7 Developer's Right to Contest New or Increased Fees, Charges or Assessments. Nothing in this Agreement shall prevent Developer from contesting, in any appropriate forum, the imposition or the amount of any Processing Fees, Developer Fees, or other fees, charges or assessments, or any increase therein. Such right of protest shall not extend to the existence or amount of any Developer Fees or Processing Fees in effect as of the Effective Date of this Agreement, and the Developer hereby agrees to pay the same pursuant to the terms of this Agreement and the City's normal fee payment schedule without objection thereto. Notwithstanding any pending good faith contest of such new or increased fees, charges or assessments, City shall proceed with issuance of all required Ministerial Approvals with respect to the Project and shall not withhold or delay issuance of those Ministerial Approvals based upon any pending protest or appeal with respect to such fee, charges or assessments; provided any contested amount has been paid to City under protest with a reservation of rights.

5.1.8 Ministerial Permits. The City shall not require Developer to obtain any Ministerial Permits for the development of the Project in accordance with this Agreement other than those required by the Applicable Rules or by agencies unrelated to the City. Any Ministerial Permit required under the Applicable Rules shall be governed by the Applicable Rules.

5.1.9 Discretionary Approvals. Any approval involving a Discretionary Action or Discretionary Approval and required or needed after the Effective Date in order to commence or complete the approved Project, which does not materially change, modify or alter the Project, shall be governed by the Applicable Rules. Any subsequent Discretionary Action or Discretionary Approval sought by Developer in connection with a modification which materially changes, modifies or alters the Project shall be subject to all then applicable governmental rules, regulations and requirements without limitation to the Applicable Rules. Notwithstanding anything to the contrary contained herein, no subsequent Discretionary Action or Discretionary Approval shall require further CEQA review unless the City finds, based on substantial evidence, that such further CEQA review is required in order to comply with CEQA.

5.1.10 Timely City Actions. The City agrees to timely consider and act upon any matter which is reasonably required, necessary or desirable to accomplish the intent, purpose and understanding of the Parties in entering into this Agreement, including, without limitation, processing of any Ministerial Permit or Ministerial Approval or any request for a Discretionary Action or Discretionary Approval implementing the approved Project. City's obligations in this Section 5.1.10 are conditioned upon Developer satisfactorily complying with all preliminary procedures, actions, payments of applicable Processing and Developer Fees, and criteria generally required of developers by the City for processing applications for such Discretionary Actions or Discretionary Approvals or Ministerial Permits/Ministerial Approvals.

5.1.11 Interim Uses. City agrees that, until development of the Project, the Developer may continue the present use and operation of the Property.

5.1.12 Additional Staffing. If standard City staffing fails to result in processing of any permits or approvals as promptly as reasonably required for timely development of the Project by Developer, then the City agrees, upon request of Developer, to reasonably cooperate with Developer in hiring additional staff or consultants as City determines appropriate to process required Ministerial Permits and Approvals or Discretionary Actions and Approvals. The Developer shall reimburse the City for all direct and indirect costs of such staff or consultants, and any required training thereof, within thirty (30) days after Developer receives an invoice identifying such reimbursable expenses; provided, the Developer shall have the right to audit such costs, at its expense, upon request.

5.1.13 Term of Project Approvals. As provided in California Government Code Sections 66452.6 and 65863.9, the term of any tentative, vesting tentative or parcel map hereafter approved with respect to the Project and the term of each of the Project Approvals shall remain in effect and be valid through the scheduled termination date of this Agreement as set forth in Section 2.22 above.

5.1.14 Minor Modifications. It is contemplated that Developer may in the future desire to change or modify the Project based on, without limitation, precise planning, precise grading, structure siting on lots, road or trail configuration, drainage patterns or drainage needs, changes in market demand, or other factors in a manner that will not lead to a material increase in the severity of environmental impacts or materially change the Project as approved (“Minor Modifications”). Such Minor Modifications are contemplated by City and Developer as being within the scope of this Agreement as long as they are consistent with the Applicable Rules and shall, upon approval by City, continue to constitute the “Project Approvals” as referenced herein. The Parties agree that such Minor Modifications in Project Approvals that do not materially alter the Project may be agreed to in writing by the City Manager and the Developer. All Minor Modifications will require approval in accordance with the Applicable Rules. The Parties agree that any such Minor Modifications shall not constitute an amendment to this Agreement nor require an amendment to this Agreement.

Section 6. Default Provisions.

6.1 Default by Developer. In the event the Developer does not perform its obligations under this Agreement (“Defaults”) in a timely manner, the City shall have all rights and remedies provided herein or under applicable law, which shall include, but not be limited to, compelling the specific performance of the material obligations of Developer under this Agreement, or modifying or terminating this Agreement, provided that (i) City hereby waives any right to seek consequential damages from Developer for such breach or any monetary damages for the failure to start or complete the Project and (ii) the City has first complied with the following procedure:

(1) Notice of Default. The City shall give to Developer written notice of default identifying with specificity Developer’s alleged Default(s).

(2) Period to Cure Non-Compliance. Twenty (20) days after service of the notice of default, Developer shall forthwith commence to cure the identified Default(s), and Developer shall complete the cure of such Default(s) within a reasonable period of time not

to exceed sixty (60) days thereafter (“Developer Cure Period”). If a Default cannot be reasonably cured within sixty (60) days, the Developer Cure Period shall be extended for the period necessary to complete the cure so long as Developer has timely commenced to cure such Default(s) and continues to diligently pursue curing such Default(s) to completion within not more than one hundred twenty (120) days after service of the notice.

(3) Failure to Cure Default. If, after the Developer Cure Period (or any extension thereof) has elapsed, the City Council finds and determines that Developer remains in Default, the City Council may terminate or modify this Agreement, after compliance with the provisions of Section 65864 et seq. of the Government Code. Before ordering the termination of this Agreement, the City Clerk shall set the matter for hearing at its next most convenient meeting, and shall give not less than ten (10) days written notice of the time and place of such hearing to the Developer. The City Council shall conduct a public hearing to determine whether this Agreement should be terminated as authorized by Section 65864 et seq. of the Government Code and the provisions of this Agreement. The decision of the City Council to terminate or modify this Agreement shall be final and conclusive subject only to judicial review.

(4) Termination; City Remedies. If the City Council terminates this Agreement, after a final determination is made by City Council that the Developer is in Default and has not cured the Default within the Developer Cure Period, such termination of this Agreement shall not affect any right or duty of either party arising from entitlements or approvals, including the Projects Approvals, on the Property approved prior to the effective date of the City Council’s order of termination. Notwithstanding termination of this Agreement, City shall have the right (i) to compel Developer by an action for specific performance to complete any public improvements which have been commenced and are partially completed as of the date of termination, including, without limitation, bringing an action against any bonds posted to secure the construction of those improvements, and (ii) to require Developer to dedicate any property and complete any public improvements which are required by the Project Approvals to be dedicated and/or completed prior to occupancy of those Project improvements in fact constructed on the Property pursuant to this Agreement, and (iii) to compel Developer by an action for specific performance to complete the dedication and improvement of the equestrian trail easements and the open space dedication or conveyance as contemplated by Sections 4.6 and 4.7 above.

6.2 Default by the City; Notice of Default. In the event the City does not timely accept, process, or render a decision on necessary development permits, entitlements, or other land or building approvals for use of the Property as provided in this Agreement or by the Project Approvals under the Applicable Rules, or if the City otherwise fails to perform its obligations under this Agreement in a timely fashion, Developer shall have the right to specifically enforce the City’s obligations hereunder, provided that Developer shall first serve on City a written notice of default stating with specificity those obligations which it believes City has not performed. The City shall commence to cure the identified default(s) within twenty (20) days after receipt of the notice of default and shall complete the cure of any default within sixty (60) days after receipt of the notice of default (“City Cure Period”). If a Default cannot be reasonably cured within sixty (60) days, the City Cure Period shall be extended for the period necessary to complete the cure so long as City has timely commenced to cure such Default(s)

and continues to diligently pursue curing such Default(s) to completion within not more than one hundred twenty (120) days after service of the notice. Where the City fails to cure a default within the City Cure Period, Developer may, in addition to the specific performance remedy provided for above, forthwith terminate this Agreement and all further rights and obligations of the Parties hereunder; provided such termination shall not affect or release any obligations of a Party that have accrued as of the date of such termination. The Parties agree that Developer's obligations in Sections 4.6 and 4.7 shall not be deemed to be "accrued" for the purpose of the prior sentence if the Agreement is being terminated because of the City's uncured default. As a result, if Developer exercises its rights to terminate this Agreement upon an uncured City default and if the City has not yet accepted dedication of the property in Sections 4.6 and 4.7 prior to such termination, then Developer's termination of this Agreement shall terminate any obligations or rights in Sections 4.6 or 4.7; provided, that such termination of this Agreement shall not waive or limit any conditions of approval or the Developer's obligation to comply therewith in connection with any further development of the Property. Notwithstanding anything to the contrary in the Applicable Rules or otherwise, as provided in California Government Code Sections 66452.6 and 65863.9, the term of any tentative, vesting tentative or parcel map hereafter approved with respect to the Project and the term of each of the Project Approvals shall remain in effect and be valid through the scheduled termination date of this Agreement as set forth in Section 2.22 above or the date such approval would otherwise be in effect under applicable law, whichever is later.

Section 7. General Provisions.

7.1 Termination. Upon the expiration of the Term, this Agreement shall terminate and be of no further force or effect; provided, however, such termination shall not affect any right or duty of a Party hereto, arising out of any Project Approval or the provisions of this Agreement, in effect on or prior to the effective date of such termination. The Term of this Agreement shall automatically be extended for the period of time of any actual delay resulting from the occurrence of any of the events set forth in Section 7.2 below, provided that the extension of the Agreement pursuant to this sentence shall not cumulatively exceed a period of five (5) years.

7.2 Enforced Delay; Extension of Time of Performance. In addition to specific provisions of this Agreement, whenever a period of time is designated within which a Party hereto is required to do or complete any act, matter or thing, the time for the doing or completion thereof shall be extended by a period of time equal to the number of days during which such Party is actually prevented from, or is unreasonably interfered with, the doing or completion of such act, matter or thing because of causes beyond the reasonable control of the Party to be excused, including, without limitation, war; terrorist acts; insurrection; riots; floods; earthquakes; fires; casualties; acts of God; litigation and administrative proceedings against the Project (not including any administrative proceedings contemplated by this Agreement in the normal course of affairs, such as an annual review); any approval required by the City (not including any period of time normally expected for the processing of such approvals in the ordinary course of affairs, such as the annual review); restrictions imposed or mandated by other governmental entities; enactment of conflicting state or federal laws or regulations; judicial decisions; extraordinary unavailability of goods or materials necessary for the Project or similar bases for excused performance which are not within the reasonable control of the Party to be

excused. Economic constraints, or lack of available funding or financing, shall not constitute grounds for extension under this Section 7.2. Any Party wishing to obtain an extension under this Section 7.2 shall notify the other Party of the cause for that extension within ten (10) days of the Party's actual knowledge of the force majeure event, and the period of extension shall be from the delivery of that notice until the cessation of that specified event.

7.3 Developer's Right to Terminate upon Specified Events. Notwithstanding any other provisions of this Agreement to the contrary, the Developer retains the right to terminate this Agreement upon thirty (30) days written notice to the City in the event that the Developer reasonably determines that continued development of the Project has become economically infeasible due to changed market conditions, increased development costs, or burdens imposed, consistent with this Agreement, by the City or another governmental entity as conditions to subsequent project approvals. In the event the Developer exercises this right, it shall nonetheless be responsible for mitigation of impacts to City resulting from development that may have occurred on the Property prior to the notice of termination, on a fair share or nexus basis, and within the thirty (30) day notice period City and the Developer shall meet to identify any such mitigation obligation that may remain to be satisfied. If the Parties are in disagreement at the end of the (30) day notice period, the Agreement shall be terminated as to all matters except for the remaining mitigation obligation in dispute. Notwithstanding anything herein to the contrary, if at any time during the term of this Agreement the Developer elects to abandon development of the portion of the Project located on the Property it owns or terminate this Agreement as provided in this Section 7.3, the Developer shall nevertheless be obligated to execute and deliver the offers of dedication and/or conveyance required under Sections 4.6 and 4.7 above with respect to the equestrian trail easements and open space dedication or conveyance described therein. The preceding sentence is not applicable in cases of a termination of this Agreement due to a City default as provided in Section 6.2 above.

7.4 Venue. Any legal action arising out of this Agreement must be filed in the Los Angeles County Superior Court.

7.5 Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California applicable to agreements made and to be performed in the State of California.

7.6 Amendments. This Agreement may be amended from time to time by mutual consent in writing of the Parties to this Agreement and in accordance with all applicable laws.

7.7 Assignment. In executing this Agreement, City has relied upon the financial capabilities of Developer to construct and operate the Project. Accordingly, except for transfers to an affiliate, parent, or subsidiary entity of Developer or its partners which is controlled by Developer or such partners (which shall not require any consent from the City but which Developer shall notify City of in writing concurrent therewith), the rights and obligations of Developer under this Agreement may not be transferred or assigned in whole or in part by Developer (collectively an "Assignment") without the prior consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. The Parties agree that any sale or lease of residential lots as provided in Section 4.5 shall not constitute an Assignment that

requires City consent. City shall respond to such request in writing within ten (10) days after receipt and, in the event of any disapproval, set forth the reasons therefor. If City fails to respond within said ten (10) day period, the proposed assignment shall be deemed disapproved. The City Manager is hereby authorized to act upon any request for approval under the foregoing provision, and any approval granted by the City Manager shall constitute the action of and be binding upon the City.

7.8 Release of Transferring Owner. Upon any Assignment of the entirety of this Agreement or the rights hereunder approved by the City, the transferor shall be released of all obligations under this Agreement that relate to the Property or portion thereof being transferred to the extent arising from and after the date of the Assignment, and, thereafter, City shall look solely to such transferee for compliance by such transferee with the provisions of this Agreement as such provisions relate to the Property or portion thereof acquired by such transferee. Except as otherwise provided in Section 4.5, in connection with each transfer of any portion of the Property or portion thereof, transferor shall require the transferee to assume in writing all of the obligations under this Agreement that relate to the portion of the Property or portion thereof being transferred. Notwithstanding anything above to the contrary (except as provided in Section 4.5), the rights and obligations under this Agreement are non-severable and if any buyer, transferee or assignee Defaults under this Agreement, such Default shall constitute a Default by the owner of each other portion of the Property and shall entitle City to terminate this Agreement in its entirety if such Default is not timely cured. Each transferee shall be responsible for the reporting and annual review requirements relating to the portion of the property owned by such transferee.

7.9 Covenants. Until expiration of the Term, the provisions of this Agreement shall constitute covenants which shall run with the land comprising the Property. All provisions of the Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do or refrain from doing some act hereunder with respect to development of the Property: (i) is for the benefit of and is a burden upon the Property; (ii) runs with the Property and each portion thereof; and (iii) is binding upon each Party and each successor in interest during ownership of the Property or any portion thereof.

7.10 Cooperation and Implementation.

(1) Processing. Upon Developer's completion of all required preliminary actions and the tender of payment (whether under protest or not) of appropriate Processing Fees, including the fee for processing this Agreement, the City shall promptly commence and thereafter diligently process all required steps necessary for the implementation of this Agreement. Developer shall, in a timely manner, provide the City with all documents, plans and other information required under the Applicable Rules which are necessary for the City to carry out its processing obligations. The provisions of this Agreement require a close degree of cooperation between City and Developer and the refinement and further development of the Project may demonstrate that clarifications are appropriate with respect to the details of performance of City and Developer. If and when, from time to time, during the term of this Agreement, City and Developer agree that such clarifications are necessary or appropriate, they shall effectuate such clarifications through operating memoranda approved by City and Developer, which, after execution, shall be attached hereto. No such operating memoranda shall

constitute an amendment to this Agreement, requiring public notice or hearing. The City Attorney shall be authorized to make the determination whether a requested clarification may be effectuated pursuant to this Section or whether the requested clarification is of such a character as to require an amendment hereof. The City Manager may execute any operating memoranda hereunder without Council or Planning Commission action.

(2) Other Governmental Permits. Developer shall apply for such other permits and approvals as may be required from other governmental or quasi-governmental agencies having jurisdiction over the Project in connection with the development of, or provision of services to, the Project. The City shall reasonably cooperate with Developer in its endeavors to obtain such permits.

(3) Legal Challenges. In the event of a legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the Parties hereby agree to affirmatively cooperate with one another in defending said action. If litigation is filed contesting the validity of this Agreement or the right of Developer to construct the Project in accordance with the provisions of this Agreement, the City, as well as Developer, shall be entitled to appear and defend against the allegations made in such litigation provided that Developer shall reimburse City for all of its expenditures actually incurred in the defense of such litigation, including, but not limited to, City's reasonable attorneys' fees and shall indemnify, defend and hold City and its representatives harmless from any such claim, action or proceeding and all costs arising therefrom or any judgment obtained in such action or proceeding. In connection with the conduct of such litigation, the City, the City Attorney and Developer shall meet and confer upon the request of the other party to formulate legal strategy for the conduct of such litigation and to control its cost. Developer shall have the right to provide input on the reasonableness of strategy and methods to ensure such costs are efficiently controlled as litigation pursuant to this subsection (3) proceeds, but any final decisions with respect to strategy and staffing of the City shall be made by City.

7.11 Relationship of the Parties. The Parties acknowledge and agree that Developer is not an agent, joint venturer or partner of the City.

7.12 Notices. Whenever notices are required to be given pursuant to the provisions of this Agreement, the same shall be in written form and shall be served upon the Party to whom addressed by personal service as required in judicial proceedings, or by deposit of the same in the custody of the United States Postal Service or its lawful successor in interest, postage prepaid, Registered or Certified Mail, or by reputable overnight courier or by electronic transmittal addressed to the Parties as follows:

CITY: City of San Dimas
245 East Bonita Avenue
San Dimas, CA 91773
Attn: City Manager and Director
Planning & Community Development
Facsimile:

WITH A COPY TO: McKenna Long & Aldridge LLP
300 South Grand Avenue, Suite 1400
Los Angeles, CA 90071-3124
Attn: J. Kenneth Brown, Esq.
Facsimile: (213) 687-2149

DEVELOPER: NJD, LTD., a Texas limited partnership
3300 East First Avenue, Suite 510
Denver, CO 80206
Facsimile: (303) 399-3929

WITH A COPY TO: Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626
Attn: Michael R. W. Houston, Esq.
Facsimile: (714) 546-9035

Notices shall be deemed, for all purposes, to have been given and received on the date of (i) personal service or (ii) three (3) consecutive calendar days following the deposit of the same in the United States mail as provided above or (iii) the next business day after deposit with the overnight courier or (iv) upon receipt of a electronic transmittal confirmation, provided such transmittal occurs on a business day before 5:00 p.m. at the location of the Party receiving notice, otherwise such transmittal shall be deemed to occur at 9:00 a.m. the following business day., and provided such electronic transmittal is followed by a notice sent within forty-eight (48) hours thereafter by one of the methods provided above.

7.13 Recordation. As provided in Government Code Section 65868.5, the City Clerk shall record a copy of this Agreement with the Registrar-Recorder of the County of Los Angeles within ten (10) days following its execution by both Parties. Developer shall reimburse the City for all costs of such recording, if any.

7.14 Severability. If any provision of this Agreement is determined by a court to be invalid or unenforceable, or if any provision of this Agreement is superseded or rendered unenforceable according to any applicable law which becomes effective after the Effective Date of this Agreement, the validity of the remaining parts, terms, portions or provisions, or the application thereof to other persons or circumstances, shall be deemed severable and the same shall remain enforceable and valid to the fullest extent permitted by law.

7.15 Time of the Essence. Time is of the essence for each provision of this Agreement of which time is an element.

7.16 Waiver. No waiver of any provision of this Agreement shall be effective unless in writing and signed by the Party against whom enforcement of a waiver is sought. No waiver of any right or remedy in respect to any occurrence or event shall be deemed a waiver of any right or remedy in respect to any other occurrence or event.

7.17 No Third Party Beneficiaries. The only Parties to this Agreement are the City and Developer and their respective successors-in-interest. There are no third party

beneficiaries and this Agreement is not intended and shall not be construed to benefit or be enforceable by any other person whatsoever.

7.18 Entire Agreement. This Agreement contains the entire understanding and agreement of the Parties with respect to the subject matter expressly contained in this Agreement. The Parties specifically acknowledge that this Agreement and the Project Approvals shall constitute the implementation and satisfaction in full of the City's responsibilities and obligations under Sections 2 and 5 of the Settlement Agreement. Developer hereby reaffirms the NJD Release set forth in Section 6a of the Settlement Agreement and agrees that such release is hereby extended to any claims for compensation for any interest in real or personal property, improvements to the realty, fixtures, equipment, inventory, lost business goodwill, relocation benefits, severance damage, precondemnation damages, litigation expenses, attorneys' fees, or any other compensation or damage resulting from any acts, omissions, events or circumstances occurring on or before the Effective Date of this Agreement. The Parties agree however that this Section, does not affect the rights of the Parties relative to the allocation of costs that may be subject to the provisions of the Settlement Agreement as provided in Sections 10 (2) and (3) of the Developer Reimbursement Agreement dated June 11, 2010.

7.19 Advice; Neutral Interpretation. Each Party has received independent legal advice from its attorneys with respect to the advisability of executing this Agreement and the meaning of the provisions hereof. This Agreement has been drafted through a joint effort of the Parties and their counsel and therefore shall not be construed against either of the Parties in its capacity as draftsman, but in accordance with its fair meaning.

7.20 Certificate of Compliance. At any time during the term of this Agreement, any lender or Party may request the other Party to this Agreement to confirm that (i) this Agreement is unmodified and in full force and effect (or if there have been modifications hereto, that this Agreement is in full force and effect as modified and stating the date and nature of such modifications) and that (ii) to the best of such Party's knowledge, no defaults exist under this Agreement or if defaults do exist, to describe the nature of such defaults, and (iii) any other information reasonably requested. Each Party hereby agrees to provide a certificate to such lender or other Party within ten (10) business days of receipt of the written request therefor.

7.21 Mortgagee Protection. This Agreement shall not prevent or limit Developer, in any manner, at its sole discretion, from encumbering the portion of the Property owned by it, or any portion thereof or any improvement thereon, by any mortgage, deed of trust, or other security device securing financing with respect to such portion of the Property. The City acknowledges that the lenders providing such financing may require certain Agreement interpretations and/or modifications and agrees, upon request from time to time, to meet with the Developer and the representatives of such lenders to negotiate in good faith any such request for interpretation or modification. Subject to compliance with applicable laws, the City will not unreasonably withhold its consent to any such requested interpretation or modification provided City determines, in its sole good faith judgment, that such interpretation or modification is consistent with the intent and purposes of this Agreement and does not adversely impact the City's rights or obligations hereunder. Any Mortgagee of the Property, or any portion thereof, shall be entitled to the following rights and privileges:

(1) Neither the entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any mortgage or deed of trust on the Property, or any portion thereof, made in good faith and for value.

(2) The Mortgagee of any mortgage or deed of trust encumbering the Property, or any part thereof, who has submitted a request in writing to the City in the manner specified herein for giving notices, shall be entitled to receive written notification from the City of any default or noncompliance by the Developer in the performance of its obligations under this Agreement.

(3) If the City timely receives a request from a Mortgagee requesting a copy of any notice of default or notice of non-compliance given to Developer under the terms of this Agreement, the City shall provide a copy of that notice to the Mortgagee within ten (10) calendar days of sending the notice of default to Developer. The Mortgagee shall have the right, but not the obligation, to cure the default during the period that is the longer of (i) the remaining cure period allowed Developer under this Agreement, or (ii) sixty (60) days from delivery of the notice to Mortgagee.

(4) Any Mortgagee who comes into possession of the Property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Property, or part thereof, subject to the terms of this Agreement, provided, however, in no event shall such Mortgagee or its successors and assigns be (a) liable for any monetary defaults of Developer under the Agreement arising prior to acquisition of title to the Property, or portion thereof, by such Mortgagee, or (b) obligated to complete construction of the Project or any component thereof, except as expressly provided in Section 7.3 above; provided, however, if such Mortgagee does not elect to cure any such default, the City shall have the rights and remedies set forth in this Agreement, including the right to terminate this Agreement. In the event any Mortgagee seeks to develop or use portion of the Property acquired by such Mortgagee, such Mortgagee shall strictly comply with all of any the terms, conditions and requirements of this Agreement and the Project Approvals applicable to the Property or such part thereof acquired by the Mortgagee.

7.22 Processing of Modification. The Developer shall reimburse the City for its actual costs incurred in connection with any modification to this Agreement initiated by Developer or its Mortgagee.

7.23 Indemnity.

7.23.1 General. Developer shall indemnify the City, its officers, employees, and agents against, and will hold and save each of them harmless from, any and all actions, suits, claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions, or liabilities (herein "claims or liabilities") that may be asserted or claimed by any person, firm, or entity arising out of or in connection with the work, operations, or activities of Developer, its agents, employees, subcontractors, or invitees, hereunder, upon the Property, except to the extent such claims are excepted as provided below in Section 7.23.2.

(a) Developer will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith;

(b) Developer will promptly pay any final judgment (subject to Developer's or City's rights to appeal from such final judgment) rendered against the City, its officers, agents, or employees for any such claims or liabilities arising out of or in connection with the indemnity in this Section 7.23.1, and Developer agrees to save and hold the City, its officers, agents, and employees harmless therefrom.

(c) In the event the City, its officers, agents, or employees is made a party to an action or proceeding filed or prosecuted for claims or liabilities described in the indemnity in this Section 7.23.1, the City shall promptly tender its defense to Developer, who pursuant to (a) above will defend the City, its officers, agents, or employees with attorneys selected by Developer and reasonably approved by City; Developer shall bear any and all costs and expenses in such action or proceeding, including but not limited to legal costs and attorneys' fees incurred in defending the City.

7.23.2 Exceptions. The foregoing indemnity shall not include claims or liabilities arising solely from the gross negligence or willful misconduct of the City, its officers, agents, or employees.

7.23.3 Loss and Damage. Except as provided in Section 7.23.2, City shall not be liable for any damage to property of Developer or of others located on the Property, nor for the loss of or damage to any property of Developer or of others by theft or otherwise. Except as provided in Section 7.23.2, City shall not be liable for any injury or damage to persons or property resulting from fire, explosion, steam, gas, electricity, water, rain, dampness or leaks from any part of the Property or from the pipes or plumbing, or from the street, or from any environmental or soil contamination or hazard, or from any other latent or patent defect in the soil, subsurface or physical condition of the Property, or by any other cause of whatsoever nature.

7.23.4 Period of Indemnification. The obligations for indemnity under this Section 7.23 shall begin upon the Effective Date of this Agreement and shall terminate upon termination of this Agreement; provided, that any obligations that have accrued as of the date of such termination shall survive that termination and remain enforceable by the City.

7.23.5 Waiver of Subrogation. Developer agrees that it shall not make any claim against, or seek to recover from City or its agents, servants, or employees, for any claims, liabilities or damages suffered or incurred by Developer or any other person or property, except as specifically provided in this Agreement and Developer shall give notice to any insurance carrier of the foregoing waiver of subrogation, and obtain from such carrier, a waiver of right to recovery against City, its agents and employees.

7.24 Insurance.

7.24.1 Types of Insurance.

(a) Public Liability Insurance. Prior to commencement and until completion of construction by Developer on the Property, Developer shall at its sole cost and expense keep or cause to be kept in force for the mutual benefit of City and Developer broad form commercial general public liability insurance against claims and liability for personal injury or death arising from the use, occupancy, disuse or condition of the Property, improvements or adjoining areas or ways, affected by such use of the Property or for property damage, providing protection of a least Three Million Dollars (\$3,000,000) per occurrence for bodily injury, death or property damage combined for any one accident or occurrence, which limits shall be subject to increases in amount as City may reasonably require from time to time.

(b) Insurance Policy Form, Sufficiency, Content and Insurer. All insurance required by express provisions hereof shall be carried only by responsible insurance companies licensed to do business by California, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only if they are of a financial category Class VIII or better, unless waived by City. All such policies shall be nonassessable and shall contain language, to the extent obtainable, to the effect that (1) any loss shall be payable notwithstanding any act of negligence (but not willful or intentional violations of law) of City or Developer that might otherwise result in the forfeiture of the insurance, (2) the insurer waives the right of subrogation against City and against City's agents and representatives; (3) the policies are primary and noncontributing with any insurance that may be carried by City; and (4) the policies cannot be canceled or materially changed except after thirty (30) days' written notice by the insurer to City or City's designated representative. Developer shall furnish City with copies of all such policies promptly on receipt of them or with certificates evidencing the insurance. City shall be named as an additional insured on all policies of insurance required to be procured by the terms of this Agreement. The City's Risk Manager acknowledges and agrees that the insurance requirements above have been established based on contemplated use and activities on the Property. In the event the City's Risk Manager determines that the use, activities or condition of the Property, improvements or adjoining areas or ways, affected by such use of the Property under this Agreement creates an increased risk of loss to the City other than what the Parties hereby acknowledge to be duly satisfied by the insurance requirements as above, then Developer agrees that the minimum limits of the insurance policies required by this Section 7.24 may be changed accordingly upon receipt of written notice from the City's Risk Manager; provided that Developer shall have the right to appeal a determination of increased coverage to the City Council of City within thirty (30) days of receipt of notice from the City's Risk Manager.

7.24.2 Failure to Maintain Insurance and Proof of Compliance. Developer shall deliver to City, in the manner required for notices, copies of certificates of all insurance policies required hereunder together with evidence satisfactory to City of payment required for procurement and maintenance of each policy within the following time limits:

(a) For insurance required above, within thirty (30) days after the Effective Date.

(b) For any renewal or replacement of a policy already in existence, at least thirty (30) days prior to expiration of the existing policy.

If Developer fails or refuses to procure or maintain insurance as required hereby or fails or refuses to furnish City with required proof that that insurance has been procured and is in force and paid for, such failure or refusal shall be a default hereunder after giving notice and an opportunity to cure.

7.25 Consideration. The City and Developer acknowledge and agree that there is good, sufficient and valuable consideration flowing to the City and to Developer pursuant to this Agreement. The Parties further acknowledge and agree that the exchanged consideration hereunder is fair, just and reasonable.

7.26 Periodic Reviews.

(1) Annual Reviews. City shall conduct annual reviews to determine whether Developer is acting in good faith compliance with the provisions of this Agreement as provided in the Enabling Resolution (“Annual Review(s)”). The cost of each annual review conducted during the term of this Agreement shall be reimbursed to City by Developer. Such reimbursement shall include all direct and indirect expenses reasonably incurred in such annual reviews. The Developer shall deposit with the City the costs estimated by the City for the Annual Review; any excess deposit above the actual cost of the review shall be promptly refunded to the Developer and, if the deposit is insufficient to pay the actual cost of the review, then the Developer shall pay the difference to the City within 15 days of Notice by the City to the Developer of the insufficiency.

(2) Special Reviews. In addition, the City Council of the City may order a special periodic review of Developer’s compliance with this Agreement at any time (“Special Review(s)”). The cost of such Special Reviews shall be borne by the City, unless the City Council determines as a result of such Special Review that Developer is not acting in good faith compliance with the material provisions of this Agreement. In such cases, Developer shall reimburse City for costs, direct and indirect, incurred in conjunction with such a Special Review.

(3) Conduct of Reviews. The City Manager, or designee, or the City Council, shall cause the Annual and Special Reviews to be conducted. City’s failure to timely conduct any Annual review shall not constitute or be construed as a breach or default under this Agreement. Any review by a party other than the City Council shall be provided to the City Council. A review concluding the Developer has complied with the terms of this Agreement may be considered by the City Council as a consent calendar item. Any review that recommends a finding that the Developer has not acted in good faith compliance with the provisions of this Agreement shall require City Council ratification and adoption at a public meeting at which the Developer shall be entitled to appear.

7.27 Record of Applicable Rules. Prior to the Effective Date of this Agreement, City and Developer shall use reasonable efforts to identify two identical sets of the Applicable Rules, one set for City and one set for Developer, so that if it becomes necessary in the future to refer to any of the Applicable Rules, there will be a common set of the Applicable Rules available to both Parties.

7.28 Eminent Domain. No provision of this Agreement shall be construed to limit or restrict the exercise by City of its power of eminent domain.

7.29 Binding Effect. All of the terms, covenants and conditions of this Agreement shall be binding upon and shall inure to the benefit of the City and Developer, and any lawful successor in interest of the Parties. Whenever the term "Developer" is used herein, such term shall include any other lawfully approved successor in interest of Developer. Nothing in this Section shall limit or waive the restrictions in Section 7.7 above.

7.30 Conflicts of Interest. The City represents and warrants that, to the actual knowledge of the City Manager, no member, official or employee of the City has any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his/her personal interest or the interest of any corporation, partnership, or association in which he/she is directly or indirectly interested.

7.31 Counterparts. This Agreement may be executed in multiple counterparts, each of which is deemed to be an original, but all of which shall constitute one and the same Agreement.

ATTEST:

_____, City Clerk

CITY:

CITY OF SAN DIMAS,
a municipal corporation

By: _____

Name: _____

Title: _____

APPROVED AS TO FORM:

McKenna Long & Aldridge LLP

By: _____

DEVELOPER:

NJD, LTD., a Texas limited partnership

By: _____

Name: _____

Title: _____

EXHIBITS

Exhibit A Description of the Property

Exhibit B Location Map

EXHIBIT A

Description of the Property

EXHIBIT B

Location Map

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

On _____ , before me, _____ , Notary Public, personally appeared _____ , who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

On _____ , before me, _____ , Notary Public, personally appeared _____ , who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)