

AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY  
AND JOINT ESCROW INSTRUCTIONS

CITY OF SAN PABLO,  
a California municipal corporation,  
as Seller

&

CAPITAL PARTNERS DEVELOPMENT COMPANY, LLC,  
a California limited liability company  
as Buyer

**AGREEMENT FOR PURCHASE AND SALE OF REAL  
PROPERTY AND JOINT ESCROW INSTRUCTIONS**

**SPECIFIC PROVISIONS**

Date, for reference purposes only: \_\_\_\_\_, 2017

Seller ("**Seller**"): **CITY OF SAN PABLO**, a California municipal corporation

Seller's address for notice: 13831 San Pablo Avenue  
San Pablo, CA 94806  
Attn: City Manager  
Attn: City Attorney  
Telephone: (510) 215-3000  
Fax: (510) 215-3011

With a copy to:

Jarvis, Fay, Doportto & Gibson, LLP  
492 Ninth Street, Suite 301  
Oakland, CA 94607  
Attn: Daniel P. Doportto  
Telephone: (510) 238-1400  
Fax: (510) 238-1404

Buyer ("**Buyer**"): **CAPITAL PARTNERS DEVELOPMENT COMPANY LLC**,  
a California limited liability company

Buyer's address for notice: 2890 Kilgore Road, Suite 175  
Rancho Cordova, CA 95670  
Attn: Rod Johnson  
Telephone: (916) 851-9800  
Fax: (916) 851-9850

Property address: 13831 San Pablo Avenue  
San Pablo, Contra Costa County ("**County**"),  
State of California ("**State**")

Total purchase price ("**Purchase Price**"): Two Million Five Hundred Thousand Dollars (\$2,500,000)

Amount of Buyer's earnest money deposit ("**Deposit**"): One Hundred Thousand Dollars (\$100,000)

Effective date of this Agreement ("**Effective Date**"): The last date upon which both Buyer and Seller have signed this Agreement, and the same has been delivered to each Party.

Closing date ("**Closing Date**"): Per section 10(b)

Escrow holder's name ("**Escrow Holder**"): Fidelity National Title, Kristi Adan

Escrow Holder's address: 1375 Exposition Boulevard, Suite 240  
Sacramento, CA 95815  
916-646-6046  
Kristi.adan@fnf.com

Title insurer's name ("**Title Insurer**"): Fidelity National Title

Title Insurer's address: 1375 Exposition Blvd., Suite 240  
Sacramento, CA 95815

PLEASE NOTICE that this document shall not have, nor be construed as having, any binding effect on the Parties unless fully executed by both Seller and Buyer.

**THIS AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY AND JOINT ESCROW INSTRUCTIONS ("Agreement")** is entered into as of the Effective Date by Seller and Buyer.

**RECITALS**

**A.** The City is the owner of certain real property located at 13831 San Pablo Avenue in the City of San Pablo, which is more particularly described in Exhibit A-1 and depicted on Exhibit A-2 (the "**Property**"). The Property comprises approximately 3.56 acres and is currently part of three (3) separate parcels designated by Assessor's Parcel Numbers 411-330-037, 411-330-038 and 411-330-039. The City intends to complete a lot line adjustment prior to the Closing Date such that the entire Property will occupy one Assessor's Parcel and carry one unique Assessor's Parcel Number.

**B.** The City also owns that certain real property located on Gateway Avenue in the City of San Pablo comprised of approximately 2.50 acres and constituting a portion of that parcel identified by Assessor's Parcel Number 417-310-005, and which property is currently undeveloped (the "**Gateway Property**").

**C.** In March of 2014, the City received a grant through the Contra Costa Transportation Authority to conduct a Targeted Industries Study ("**Study**") which assessed the City's residential, retail, and office markets and identified the Property as one of four opportunity sites in the City that had high potential for development and/or redevelopment.

**D.** The Study recommended that the Property be redeveloped with commercial and residential uses to better conform to the existing surrounding uses and to accommodate the City's increasing need for commercial and residential uses on San Pablo Avenue, a major transportation corridor in the West County region.

**E.** The City's housing target under ABAG's Regional Housing Needs Allocation ("**RHNA**") during the period of 2015 - 2023 is 449 units and the Redevelopment Project (defined below) will help the City meet this target.

**F.** On or about June 14, 2016, the City published a joint Request for Qualifications and Request for Proposals ("**RFQ/RFP**"), inviting interested parties to submit qualifications and proposals to purchase and redevelop the Property with commercial and residential uses (the "**Redevelopment Project**"), and to design and construct new city hall facilities on the Gateway Property (the "**City Hall Project**") as part of the consideration for the purchase of the Property.

**G.** The City received four proposals and based on the proposals, presentation, interview and references, determined that Capital Partners Development Company, LLC best demonstrated the experience, expertise and qualifications necessary to carry out both the Redevelopment Project and the City Hall Project.

**H.** As material inducements to the City to enter into this Agreement, Developer promises to complete the City Hall Project, purchase the Property, and complete or facilitate the completion of the Redevelopment Project, as provided for herein.

**I.** The General Plan land use designation and San Pablo Avenue Specific Plan land use designation for the Property is Public/Institutional and the General Plan land use designation and San Pablo Avenue Specific Plan land use designation for the Gateway Property is SP-2, San Pablo Avenue Specific Plan/Mixed-Use Center South. The City is currently undertaking the necessary environmental review to change the General Plan and San Pablo Specific Plan land use designations for the Property and the Gateway Property to allow residential and commercial uses on the Property, and to allow public uses on the Gateway Property, and the anticipated uses on both of these properties are consistent with these

designations. The proposed land use designations for the Property would allow commercial, office, medical, institutional and hotel uses, and at least 50 residential units per acre, on the Property.

J. In consideration of the mutual covenants and agreements contained in this Agreement, the receipt, adequacy, and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### **AGREEMENT**

1. **Definitions.** As used in this Agreement the following terms have the following meanings (the meanings to be applicable to both the singular and plural forms of the defined terms):

**"Agreement"** means this Agreement for Purchase and Sale of Real Property and Joint Escrow Instructions.

**"Buyer"** is defined in the Specific Provisions.

**"CEQA"** means the California Environmental Quality Act set forth at Sections 21000 through 21189.57 of the California Public Resources Code.

**"CEQA Guidelines"** means the CEQA implementing regulations set forth at Title 14, Chapter 3, Sections 15000 through 15387 of the California Code of Regulations.

**"City"** means the City of San Pablo, a municipal corporation.

**"City Hall Contract"** means a contract for the construction of new City Hall facilities on the Gateway Property in substantially the form of Exhibit C hereto.

**"City Manager"** means the City Manager of the City,

**"Closing"** means the consummation of the transactions contemplated under this Agreement.

**"Closing Date"** is defined in the Specific Provisions.

**"Deposit"** is defined in the Specific Provisions.

**"Development Agreement"** and **"DA"** mean a development agreement between City and Buyer processed and approved pursuant to and in compliance with all applicable provisions of California Government Code sections 65864 through 65869.5, CEQA and the CEQA Guidelines, and all other applicable laws and regulations, in substantially the form of Exhibit D hereto, and that provides for, among other things: (i) vesting the General Plan land use and Zoning Ordinance designations for the Property described in Recital I for a period of at least five (5) years; and (ii) construction of improvements to the "Preservation Park" portion of the Property and dedication of the improved portions of the Property to the City. Preservation Park is shown on Exhibit A-2, attached hereto. The improvements to the "Preservation Park" portion of the Property must include, at a minimum, improvements to the (a) public access, (b) landscaping, (c) hardscaping, (d) the path connecting both parks, (e) relocation of the Holy Ghost monument, (f) parking, and (g) utilities, as further described in the Development Agreement.

**"Development Agreement Laws"** means California Government Code sections 65864 through 65869.5, inclusive.

**"Effective Date"** is defined in the Specific Provisions.

**"Escrow Holder"** is defined in the Specific Provisions.

**"Exceptions"** means, collectively, conditions, easements, encumbrances, restrictions, exceptions, rights-of-way, Title Defects (defined below) and other matters of record.

**"FIRPTA Affidavit"** is defined in Section 10(c)(ii).

**"Gap Notice"** is defined in Section 6(a)(ii).

**"Governmental Authority"** means the United States of America, the State, the County, the City, and any agency, authority, court, department, commission, board, bureau or instrumentality of any of them.

**"Grant Deed"** means a grant deed in substantially the form attached hereto as Exhibit B, or such other form as may be acceptable to Buyer and Title Insurer.

**"Intervening Lien"** is defined in Section 6(a)(ii).

**"Objections"** is defined in Section 6(a)(i).

**"Parking Parcel"** is that approximately .9 acre parking area depicted in Exhibit A-2 that, as of the date of the execution of this Agreement, is a part of Assessor's Parcel Number 411-330-039-8. The City intends to complete a lot line adjustment prior to the Closing Date such that the entire Parking Parcel will occupy one Assessor's Parcel and carry one unique Assessor's Parcel Number.

**"Party"** or **"Parties"** means Buyer and/or Seller, as applicable.

**"Permitted Delay"** means any delay resulting from acts of God; fire; earthquake; flood; explosion; action of the elements; war; invasion; insurrection; riot; mob violence; sabotage; malicious mischief; inability (notwithstanding good faith and diligent efforts) to procure (or general shortage of) labor, equipment, facilities, materials, or supplies in the open market; failure of transportation; strikes (other than any strike resulting from acts of Seller or Buyer, as applicable); lockouts; action of labor unions; condemnation laws; requisition or order of government or civil or military or naval authorities; litigation involving a Party or others relating to zoning, subdivision, or other governmental action or inaction pertaining to the Property or any portion of it; inability (notwithstanding good faith and diligent efforts) to obtain, or unexpected delays in obtaining, Permits or governmental approvals; or any other cause, whether similar or dissimilar to those stated above, not within Seller's or Buyer's reasonable control. Notwithstanding anything to the contrary contained herein, in no event shall financial inability constitute Permitted Delay.

**"Permitted Exceptions"** means the Exceptions listed on Exhibit F attached hereto, and all real estate taxes and assessments for the Property not yet due and payable.

**"Person"** means any corporation, partnership, limited liability company, co-tenancy, joint venture, individual, business trust, real estate investment trust, trust, banking association, federal or state savings and loan institution, or any other legal entity, whether or not a Party to this Agreement.

**"Property"** is defined in Recital A and consists of that land described in Recital A and Exhibits A-1 and A-2.

**"Purchase Price"** is defined in the Specific Provisions.

**"Seller's Title Notice"** is defined in Section 6(a)(i).

**"Specific Provisions"** means those provisions set forth on pages 1 and 2 of this Agreement.

**"Supplemental Instructions"** is defined in Section 10(a).

**"Title Commitment"** means that certain Preliminary Report issued by Title Insurer for the property in San Pablo, California, bearing Assessor's Parcel Numbers 411-330-039, 411-330-038, and 411-330-037, with an Effective Date of November 8, 2016 at 07:30 a.m., as updated by Title Insurer prior to the Closing, disclosing, among other things, all Exceptions.

**"Title Defect"** means any lien, claim of lien, encumbrance, deed of trust, security agreement, tenancy, encroachment, restriction, covenant, assessment, charge, agreement, license, taxes, easements, right of possession, or any other matter, thing, or defect of any kind except for Permitted Exceptions.

**"Title Documents"** is defined in Section 6.(a)(i).

**"Title Inspection Period"** is defined in Section 6.(a)(i).

**"Title Insurer"** is defined in the Specific Provisions.

**"Title Policy"** means a 2006 ALTA Owner's policy of title insurance with extended coverage, with survey modification coverage, and such additional endorsements (including, as specified elsewhere herein, one or more modified CLTA 103.3 endorsements) as may be reasonably requested by Buyer, issued by Title Insurer to Buyer at the Closing pursuant to the Title Commitment. The Title Policy will be dated not earlier than the date of recordation of the Grant Deed from Seller to Buyer, will name Buyer as the insured, and will insure Buyer's fee simple title to the Property (including all easements and appurtenances thereto), subject only to the Permitted Exceptions, in an amount equal to at least the Purchase Price. Notwithstanding anything to the contrary set forth herein, if Title Insurer has agreed to issue a modified CLTA 103.3 endorsement (as specified in this Section 1 under the definition of "Permits"), shall be for a coverage amount equal to the Purchase Price.

**"1031 Exchange"** is defined in Section 40.

All initially capitalized terms used in this Agreement that are not defined in this Section 1 will have the meanings set forth elsewhere in this Agreement.

2. **Purchase and Sale.** Upon the terms and conditions set forth in this Agreement, Seller will sell to Buyer, and Buyer will purchase from Seller, the Property.

3. **Purchase Price and Deposit.**

(a) The total Purchase Price for the Property will be the sum set forth in the Specific Provisions.

(b) Within five (5) business days after the Effective Date of this Agreement, Buyer shall deposit with Escrow Holder the Deposit. The Deposit shall promptly be invested and, if appropriate, re-invested from time to time by the Escrow Holder in an interest-bearing account acceptable to Buyer and the interest earned thereon shall be considered part of the "Deposit". If the sale of the Property contemplated herein is consummated in accordance with the terms hereof, the Deposit shall be applied against the Purchase Price. If the sale is not consummated in accordance with the terms hereof, the Deposit shall be delivered as provided elsewhere in this Agreement. Forty-nine thousand nine hundred dollars (\$49,900) of the Deposit shall become non-refundable upon the expiration of the Title Inspection Period except in the event of: (i) a default by Seller which results in a termination of this Agreement, (ii) a condemnation of the Property, or (iii) as otherwise provided herein. Fifty thousand dollars (\$50,000) of the Deposit shall remain fully refundable should this Agreement be terminated for any reason other than an event of default by Buyer, as specified herein, prior to the Closing.

(i) Notwithstanding anything in this Agreement to the contrary, One Hundred and No/100ths Dollars (\$100.00) of the Deposit is delivered to the Escrow Holder for delivery to Seller as non-refundable "**Independent Contract Consideration**", and the Deposit is hereby reduced by and shall no longer include the amount of the Independent Contract Consideration so delivered to Seller, which amount has been bargained for and agreed to as consideration for Seller's execution and delivery of this Agreement and for the rights and privileges granted to Buyer herein, including any and all rights granted to Buyer to terminate this Agreement during certain periods hereunder.

(c) Buyer shall deposit the balance of the Purchase Price with the Escrow Holder on or before the Closing Date, provided that each of the conditions precedent set forth in Sections 5 and 6 have been satisfied or waived and all other contingencies to the Closing have been met.

(d) Seller may, not earlier than sixty (60) days prior to the Closing Date, and in Seller's sole and exclusive discretion, reduce the Purchase Price, in whole or part, which price reduction may be applied by Seller as payment to Buyer of equivalent amounts due from Seller under the terms of the City Hall Contract. Pursuant to the City Hall Contract, Seller shall have the right to (i) apply such Purchase Price reduction as payment of an equivalent amount due from Seller under that City Hall Contract, and (ii) verify any amounts due from Seller under that City Hall Contract in a manner acceptable to the City. If Seller elects to reduce the Purchase Price of the Property, then any amounts due under the City Hall Contract that are satisfied by such reduction of the Purchase Price shall not accrue interest to the detriment of Seller. If Seller elects to reduce the Purchase Price of the Property pursuant to this Section 3(d), then in addition to the deposit required by Section 3(c) above (or in lieu of such deposit if the balance of the Purchase Price has been reduce to zero dollars (\$0.00)), Buyer shall deposit with the Escrow Holder a written statement, in a form reasonably acceptable to Seller and signed by Buyer and duly notarized, declaring that Buyer has accepted the Purchase Price reduction as payment by Seller of an equivalent amount under the City Hall Contract and that Buyer has credited Seller with a payment in that amount under the terms of the City Hall Contract.

4. **Liquidated Damages. IF BUYER FAILS TO COMPLETE THE PURCHASE PROVIDED FOR IN THIS AGREEMENT BY REASON OF ANY DEFAULT OF BUYER, SELLER SHALL BE RELEASED FROM SELLER'S OBLIGATION TO SELL THE PROPERTY TO BUYER. FURTHER, BY INITIALING THIS SECTION 4 BUYER AND SELLER AGREE AND UNDERSTAND THAT IN EVENT OF DEFAULT BY BUYER, (A) IT WOULD BE IMPRACTICAL OR EXTREMELY DIFFICULT TO FIX ACTUAL DAMAGES; (B) FIFTY THOUSAND DOLLARS (\$50,000) OF THE DEPOSIT, PLUS DELIVERY TO SELLER OF ALL PLANS, SPECIFICATIONS, AND OTHER MATERIALS PREPARED BY BUYER AND RELATING TO THE CONSTRUCTION OF THE NEW CITY HALL PROJECT, HAS BEEN AGREED UPON, AFTER NEGOTIATION, AS THE PARTIES' REASONABLE ESTIMATE OF SELLER'S DAMAGES IF THE CLOSING DOES NOT OCCUR BY REASON OF BUYER'S DEFAULT HEREUNDER AND SHALL CONSTITUTE LIQUIDATED DAMAGES PAYABLE AND DELIVERABLE TO SELLER; (C) THE PAYMENT AND DELIVERY OF THE LIQUIDATED DAMAGES TO SELLER SHALL CONSTITUTE THE EXCLUSIVE AND SOLE REMEDY OF SELLER AT LAW OR IN EQUITY; (D) SELLER MAY RETAIN SUCH PAYMENT AND MATERIALS ON ACCOUNT OF THE PURCHASE PRICE FOR THE PROPERTY AS LIQUIDATED DAMAGES; AND (E) PAYMENT OF THOSE SUMS AND DELIVERY OF THOSE MATERIALS TO SELLER AS LIQUIDATED DAMAGES IS NOT INTENDED AS A FORFEITURE OR PENALTY WITHIN THE MEANING OF CALIFORNIA CIVIL CODE SECTIONS 3275 OR 3369, BUT INSTEAD, IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO SELLER PURSUANT TO SECTIONS 1671, 1676 AND 1677 OF THE CALIFORNIA CIVIL CODE. THE PARTIES HAVE FREELY NEGOTIATED THE FOREGOING LIQUIDATED DAMAGES PROVISION IN GOOD FAITH.**

(Initials of Seller)

(Initials of Buyer)

5. **Closing Conditions.**

(a) **Conditions to Buyer's Obligations:** Buyer will have no obligation to purchase the Property and consummate the Closing unless each of the following conditions precedent has been satisfied or waived by Buyer as of the Closing Date. If Buyer waives any of the following conditions precedent and consummates the Closing, then Seller shall be relieved of any further obligation or liability, including any representation or warranty, in connection with such conditions.

(i) Seller owns fee title to the Property and has the legal authority to convey the same to Buyer pursuant to the terms of the Agreement;

(ii) Title Insurer shall issue or be unconditionally and irrevocably committed to issue to Buyer the Title Policy dated no earlier than the date of recordation of the Grant Deed insuring title to the Property vested in Buyer, subject only to the Permitted Exceptions, in an amount equal to at least the Purchase Price;

(iii) Seller shall not have made an assignment for the benefit of creditors, filed a petition in bankruptcy, been adjudicated insolvent or bankrupt, petitioned a court for the appointment of any receiver of or trustee for it or any substantial part of its property, or have commenced any proceeding relating to Seller under any reorganization, arrangement, readjustment of debt, dissolution, or liquidation law or statute of any jurisdiction, whether now or later in effect. There shall not have been commenced or be pending against Seller any proceeding of the nature described in the first sentence of this Subsection. No order for relief shall have been entered with respect to either Seller under the U.S. Bankruptcy Code or similar statute(s);

(iv) There shall exist no lease, tenancy, or occupancy agreement affecting the Property or any part of the Property. On or prior to the Closing Date, Seller shall have terminated all maintenance, management, security, and other service contracts, if any, with respect to the Property that are, or will be, binding obligations of Buyer or could create a lien, leasehold or other possessory interest, security interest, or encumbrance in or against the Property or any part thereof after Closing;

(v) On or prior to the Closing Date, Seller shall ensure that the Parking Parcel has been created;

(vi) On or prior to the Closing Date, the General Plan land use designation and the San Pablo Avenue Specific Plan land use designation for the Property allows for residential and commercial uses on the Property consistent with the use proposed by Buyer in the Capital Partners Development Company, LLC response to the City's RFQ/RFP;

(vii) On or prior to the Closing Date, Seller shall have removed all personal property that Seller is not abandoning on the Property, except it may not abandon personal property that requires special removal, handling, or disposal, broom cleaned all premises and improvements remaining on the Property, and vacated the Property. If Seller desires to remove any tangible property in addition to the personal property, such as, without limitation, fixtures, appliances, artwork, statuary, solar panels, and appliances, appurtenances, and equipment related to solar panels, then Seller shall remove the tangible property prior to Closing. Notwithstanding the proceeding sentence, Seller shall not remove or disturb tangible property that is necessary for the delivery of utility services (potable and recycled water, electricity, and sewer services), except those necessary for the solar panels;

(viii) Seller shall not be in default of the City Hall Construction Contract;

(ix) Seller and Escrow Holder, respectively, shall have performed all of their covenants and obligations set forth in this Agreement;

(x) Each of the representations and warranties of Seller in this Agreement will be materially true and correct as of the Closing Date;

(xi) Between the execution of this Agreement and the Closing Date, there shall have been no adverse changes in the zoning for or environmental or physical condition of the Property; provided, however, that neither the Development Agreement nor the zoning changes described in Recital I (and subsection (vi) of this section) shall constitute adverse zoning changes subject to this Closing Condition No. 5(a)(vii); and

(xii) There shall not be pending any action or proceeding before any Governmental Authority, the outcome of which could prohibit the use of the Property for Buyer's intended use.

If any of the conditions precedent in favor of Buyer set forth in Section 5(a) are neither satisfied nor waived by Buyer by the Closing Date and said failure continues for ten (10) business days after notice thereof from Buyer to Seller, then, Buyer (at its option) may terminate this Agreement by giving a notice of termination to Seller on or before all of the applicable conditions have been satisfied. In such case, (i) the escrow shall terminate, (ii) Buyer will have no further obligation to purchase the Property from Seller, (iii) Seller will have no further obligation to sell the Property to Buyer, and (iv) the Parties will have no further obligation to one another, except as otherwise expressly provided herein. In the event of such a termination due to a failure of any one of the conditions precedent set forth in Section 5(a) the full Deposit, less the Independent Contract Consideration, shall be returned to Buyer. Notwithstanding anything to the contrary contained herein, in the event of a failure of any condition precedent specified in this Section 5(a) that is caused by a breach or default hereunder on the part of Seller, then in lieu of terminating this Agreement and escrow pursuant to this Section 5(a), Buyer shall be entitled to exercise its rights pursuant to the provisions of Section 22 below.

**(b) Conditions to Seller's Obligations:** Seller shall have no obligation to sell the Property and consummate the Closing unless each of the following conditions precedent has been satisfied or waived by Seller as of the Closing Date:

(i) Buyer shall have performed all of its covenants and obligations set forth in this Agreement;

(ii) Each of the representations and warranties of Buyer in this Agreement will be materially true and correct as of the Closing Date;

(iii) Buyer shall have executed a City Hall Contract with the City, in substantially the form of Exhibit C hereto, which City Hall Contract shall survive any termination of this Agreement, and Buyer shall have fully satisfied all Buyer's obligations thereunder, such that City can occupy and operate the City Hall Project on the improved Gateway Property;

(1) If the City Hall Contract is Terminated for Convenience (as defined therein), this Agreement may be terminated by the Seller in its sole discretion. If the Seller elects to terminate this Agreement, then the Seller will deliver a notice of termination to the Buyer, and this Agreement will terminate fifteen days thereafter;

(2) If the City Hall Contract is Terminated for Default (as defined therein), this Agreement may be terminated by the Seller in its sole discretion. If the Seller elects to terminate this Agreement, then the Seller will deliver a notice of termination to the Buyer, and this Agreement will terminate fifteen days thereafter. A termination for default of the City Hall Contract is an event of default by Buyer under this Agreement, and the Deposit will not be refundable;

(iv) Buyer shall have executed a Development Agreement as defined in Section 1, in substantially the form of Exhibit D hereto and as otherwise acceptable to both of the Parties;

(v) The City Hall Project is "Substantially Complete," as that term is defined in the General Conditions of and used in the City Hall Contract;

(vi) The Assured Guaranty Municipal Corporation, the trustee for the City's bond insurer for the City bonds that are outstanding as of the Effective Date of this Agreement has consented to the release of the Property supporting such outstanding City bonds;

(vii) The sixty (60) day time period for initiating validating proceedings set forth in Sections 860 and 863 of California Code of Civil Procedure has expired and no such proceeding has been initiated to determine the validity of this Agreement or the City Hall Contract;

(viii) The thirty (30) day time periods for initiating an action or proceeding set forth in Section 21167(b) and (e) of CEQA has expired and no such action or proceeding has been initiated to challenge the determination that Seller's approval, execution and implementation of the City Hall Contract is not subject to further environmental review pursuant to Section 21166 of CEQA and Section 15183 of the CEQA Guidelines; and

(ix) Seller has determined that the disposition of the Property conforms to the City of San Pablo General Plan.

If any of the conditions precedent in favor of Seller set forth in this Section 5(b) are neither satisfied nor waived by Seller by the Closing Date and said failure continues for ten (10) business days after notice thereof from Seller to Buyer, then Seller (at its option) may cancel and terminate this Agreement by giving a notice of termination to Buyer on or before all of the applicable conditions have been satisfied. In such case, (a) the escrow shall terminate, (b) Seller will have no further obligation to sell the Property to Buyer, (c) Buyer will have no further obligation to purchase the Property from Seller; (d) Seller shall be entitled to all design and construction plans, specifications and other materials prepared by Buyer and Buyer's agents for the City Hall Project; and (e) the Parties will have no further obligation to one another, except as otherwise expressly provided herein. In the event of a termination pursuant to 5(b)(i) and 5(b)(ii) fifty thousand dollars (\$50,000) of the Deposit shall be returned to Buyer. In the event of a termination pursuant to subsection 5(b)(iii)(1), 5(b)(vi), 5(b)(vii), 5(b)(viii), or 5(b)(ix) the Deposit, less the Independent Contract Consideration, shall be returned to the Buyer. In the event of a termination pursuant to 5(b)(iii)(2) Seller shall be entitled to retain the deposit. Notwithstanding anything to the contrary contained herein, in the event of a failure of any condition precedent specified in this Section 5(b) that is caused by a breach or default hereunder on the part of Buyer, then in addition to terminating this Agreement and escrow pursuant to this Section 5(b), Seller shall be entitled to retain the Deposit and all materials described in clause (d) of the second sentence of this paragraph above as liquidated damages in accordance with Section 4 above.

6. **Title Inspection: Financing Contingency: City Permitting Discretion.**

(a) **Title Inspection by Buyer: Acceptance of Property Conditions.**

(i) The Title Commitment, and all Exceptions to title set forth on the Title Commitment are collectively referred to below as the "**Title Documents**". Buyer shall have ten (10) days from the Effective Date to give Seller written notice of Buyer's objections to or disapproval of any Exception(s) disclosed by the Title Documents (the "**Objection(s)**"). Within ten (10) days after its receipt of the Objections, with respect to each Objection, Seller shall notify Buyer whether Seller (i) will cure or eliminate such Objection from title on or prior to Closing or (ii) is unwilling or unable to cure or have such Objection eliminated from title to the Property on or prior to Closing ("**Seller's Title Notice**"). If Seller notifies Buyer that it is unwilling or unable to cure or eliminate an Objection from title, then Buyer shall have ten (10) days from receipt of such notification to elect, via written notification to Seller, to terminate this Agreement. If it does not so notify Seller, then the Buyer is deemed to have accepted the Objection. This process shall be known as the "**Title Inspection Period**", and it shall expire on the tenth day after Buyer's receipt of Seller's notification of its intent to cure or not cure an Objection. Seller shall cure or eliminate from title to the Property prior to Closing any Objection Seller has agreed (or is deemed to have agreed) to cure or eliminate. Buyer and Seller agree that as of the expiration of the Title Inspection Period and subject to Section 6(a)(ii) below, the Permitted Exceptions are listed on Exhibit F attached hereto.

(ii) Buyer may, at or prior to Closing, notify Seller in writing (the "**Gap Notice**") of any Objections it may have to any Exceptions to title: (a) raised by the Title Insurer between the expiration of the Title Inspection Period and the Closing, and (b) not disclosed by the Title Insurer or otherwise actually disclosed in writing to Buyer at least ten (10) business days prior to the expiration of the Title Inspection Period (each, an "**Intervening Lien**"). Buyer must notify Seller of such Objection to title within ten (10) business days of being made aware of the existence of such Intervening Lien. If Buyer sends a Gap Notice to Seller regarding any Intervening Lien, then Buyer and Seller shall have the same rights and obligations with respect to such notice as apply to an Objection under Section 6(a)(i) above.

(iii) Buyer hereby acknowledges and agrees that Buyer has no objections to the condition of the Property or the description of the Property for sale as set forth herein, and desires to purchase the Property in its existing condition consistent with the provisions of Section 38 of this Agreement.

(iv) A copy of the Grant Deed and any other instruments to be reflected in the Title Policy shall be submitted to Buyer within a reasonable period of time prior to the Closing Date for Buyer's and Escrow Holder's approval.

**(b) Seller Financing Contingency.**

Seller shall have the right, in its sole discretion, to terminate this Agreement if Seller has not determined, in its sole discretion and by October 1, 2017, that Seller can successfully complete its financing for construction of the new City Hall on the Gateway Property, then Seller may terminate this Agreement by giving written notice to Buyer of such determination. In the event that Seller terminates this Agreement due to its inability to successfully finance the construction of the new City Hall, Buyer shall be entitled to the return of one hundred percent (100%) of the Deposit, and Seller shall be entitled to ownership of all designs, construction plans, specifications and other materials (the "Design Materials") prepared by Buyer for the new City Hall, subject to Seller's payment to Buyer of an amount equal to the actual costs to Buyer of such Design Materials, as reasonably determined by Seller and Buyer and without adjusting or otherwise providing for a profit to Buyer on the preparation of such Design Materials.

**(c) Buyer Acknowledgement of City Permitting Discretion.**

Buyer understands, acknowledges and agrees that the execution of this Agreement does not constitute the grant of any required land use entitlement or permit, and all land use entitlements and permits contemplated by this Agreement and required from the City, including but not limited to the Development Agreement, shall be granted, denied, or conditionally granted in accordance with the City's established procedures and in compliance with all applicable laws, rules, regulations and requirements including but not limited to the requirements of CEQA, the CEQA Guidelines, and the Development Agreement Laws. Notwithstanding any language in this Agreement that may be construed to the contrary, the City retains its full discretion to grant, deny or conditionally grant any and all entitlements or permits sought by Buyer for the Property, including but not limited to the Development Agreement, and such discretion includes but is not limited to the discretion to exercise its independent judgment and impose on such approvals all mitigation measures and conditions that City determines are required or appropriate under CEQA and the CEQA Guidelines. No action by Seller or the City with reference to this Agreement shall be deemed a representation or warranty to Buyer, or to any other person or entity, that the City will issue or approve any entitlements or permits, including but not limited to the Development Agreement, nor constitute a waiver of any state or City requirements that are applicable to the Property or to Buyer, or any successor-in-interest of Buyer, or any successor owner of the Property.

7. **Seller's Covenants.** In addition to the other obligations, promises, and covenants of Seller set forth in this Agreement, Seller covenants with Buyer that, through and including the Closing Date:

(a) From and after the Effective Date of this Agreement, Seller shall not, directly or indirectly, alienate, transfer, option, lease, assign, sell, or convey, whether absolutely or to secure a debt, any interest or any portion of such interest in the Property or any portion thereof, or enter into any agreement to do so. Neither the Property nor any part of it or any interest in this Agreement, nor any revenues, rents, issues, or profits from the Property, nor any interest in Seller, will be sold, transferred, assigned, leased, mortgaged, pledged, or in any other way encumbered or conveyed without Buyer's prior written consent, which consent may be given or withheld in Buyer's sole discretion.

(b) Seller shall timely discharge, prior to the Closing, any and all obligations relating to work performed on or conducted at or materials delivered to the Property from time to time by Seller, or at Seller's direction or on its behalf, in order to prevent the filing of any claim or mechanic's lien with respect to such work or materials, and shall indemnify and hold Buyer and the Property harmless from any liens filed or otherwise claimed, in connection with any work, labor, and/or materials performed on or furnished by, through or under Seller or its affiliates prior to the Closing.

(c) Seller will not take or permit any action that would be inconsistent with or adversely affect the consummation of the purchase and sale of the Property in accordance with this Agreement.

(d) Seller shall maintain the Property in substantially the same condition as it exists as of the Effective Date of this Agreement. Seller shall not encumber the Property or permit the Property to be encumbered.

(e) Seller hereby agrees to keep in full force and effect all existing insurance policies affecting the Property, or any portion thereof.

(f) Seller shall pay and/or remove from title to the Property at or prior to the Closing Date (i) any delinquent taxes and assessments, (ii) any mechanic's or other Monetary Liens and (iii) any Exception caused by the voluntary acts of Seller after the Effective Date and not approved by Buyer. Seller shall also terminate, prior to the Closing Date, all leases, licenses, occupancy agreements, operating agreements and contracts encumbering or otherwise affecting the Property.

8. **Seller's Representations and Warranties.** Seller hereby makes the following representations and warranties for the benefit of Buyer and its successors and assigns for a period of one year from and after the Closing Date, after which Seller's representations and warranties will be of no further force or effect. Seller shall notify Buyer in writing within ten (10) business days after Seller's City Manager receives actual knowledge that any representation or warranty has become untrue or misleading in light of information obtained by Seller after the Effective Date of this Agreement, and if such ten (10) business day period would expire after the Closing, then the Closing shall be extended until the expiration of the ten (10) business day period. As used herein, "Seller's knowledge" shall mean the actual knowledge of Seller's current City Manager, Matt Rodriguez. All representations and warranties contained in the Agreement shall be deemed remade at Closing except as otherwise disclosed to Buyer in writing, shall survive the Closing for the prescribed six-month period and shall not merge with the Grant Deed.

(a) As of the Closing, there will be no outstanding contracts made by Seller for any improvements to the Property which have not been fully paid for, and Seller shall cause to be discharged all mechanics' and materialmen's liens arising from any labor and material furnished prior to Closing.

(b) To Seller's knowledge, there is no litigation, arbitration or proceeding pending, or threatened, before any court or administrative agency or any other condition that relates to or affects the Property, Seller's performance hereunder, Buyer's intended use of the Property, or which will result in a lien, charge, encumbrance or judgment against any part of or any interest in the Property, except as otherwise disclosed to Buyer.

(c) To Seller's knowledge, the Property is not in violation of any federal, state or local law, statute, regulation, code or ordinance.

(d) Seller is not a foreign person, foreign corporation, foreign partnership, foreign trust or foreign estate, as those terms are defined in the Internal Revenue Code Section 1145 and any related regulations and Seller is exempt from the withholding obligations imposed by California Revenue and Taxation Code Sections 18805, 18815, and 26131.

(e) To Seller's knowledge, Seller has not granted to any person or entity any ground lease, site control lease or similar agreement regarding the Property, nor any option to purchase or lease all or any portion of the Property except in accordance with this Agreement, nor any right of first refusal or right of first offer to purchase or lease all or any portion of the Property except in accordance with this Agreement. To Seller's knowledge, as of the Effective Date there are no tenants or any existing leases affecting the Property, nor any use, license or occupancy agreements giving anybody a right to possess all or any portion of the Property.

9. **Buyer's Representations and Warranties**. As a material inducement to Seller, Buyer represents and warrants to Seller that, as of the Effective Date of this Purchase and Sale Agreement, and again as of the Closing Date:

(a) Buyer is duly organized, validly existing, in good standing in the State of California, has all requisite power and authority to purchase and own property and conduct business in the state where the Property is located, and this Agreement is enforceable against Buyer in accordance with its terms;

(b) The individuals executing this Agreement on behalf of Buyer have been duly authorized to execute and deliver this Agreement on behalf of Buyer.

10. **Escrow and the Closing.**

(a) **Escrow Instructions**. To accomplish the sale and transfer of the Property, the Parties will establish an escrow with Escrow Holder. Promptly following the Effective Date, the Parties shall deposit with Escrow Holder a copy of this Agreement. By its execution and acceptance of delivery of this Agreement, Escrow Holder agrees to be bound by the terms and conditions of this Agreement to the extent applicable to its duties, liabilities and obligations as "Escrow Holder." Escrow Holder shall hold and dispose of the Deposit in accordance with the terms of this Agreement. The Escrow Holder's General Provisions are attached hereto as **Exhibit G** and made a part hereof. Buyer and Seller may execute and deliver such supplemental escrow instructions and closing documents consistent with this Agreement as they may deem necessary or desirable ("**Supplemental Instructions**"). The Supplemental Instructions shall not modify or amend the provisions of this Agreement unless otherwise set forth in a separate written document signed by duly authorized representatives of both Buyer and Seller.

(b) **Closing Date**. Subject to the fulfillment of the conditions to Closing and other delays allowed for hereunder, the Closing shall take place 30 days after the recording of the Notice of Completion of the City Hall Project pursuant to the City Hall Contract, which 30<sup>th</sup> day shall be the Closing Date. The Closing will occur at the offices of Escrow Holder, or at any other place and time mutually agreed on by the Parties.

(c) **Seller's Deposits into Escrow.** Seller will deposit with Escrow Holder on or prior to the Closing Date the following:

- (i) The Grant Deed duly executed and acknowledged;
- (ii) A duly executed Seller's affidavit of non-foreign status as contemplated by Section 1445 of the Internal Revenue Code of 1986, as amended, in form and substance reasonably acceptable to Buyer ("**FIRPTA Affidavit**"), and any applicable State or local law equivalent;
- (iii) All prorations, fees and other amounts to be paid by Seller at Closing;
- (iv) To the extent reasonably required by Escrow Holder, proof of Seller's authority and authorization to enter into this Agreement;
- (v) Such evidence as the Title Insurer may reasonably require as to the authority of the person or persons executing documents on behalf of Seller;
- (vi) Such duly executed affidavits as may be required by the Title Insurer to issue the Title Policy at Closing;
- (vii) An executed closing statement reasonably acceptable to Seller;
- (viii) If Seller has not waived Seller's Closing Condition No. 5(b)(iv), a fully executed copy of the Development Agreement, for recording by the Escrow Holder following closing.
- (ix) Such additional documents as shall be reasonably required to consummate the transaction contemplated by this Agreement.

(d) **Buyer's Deposits into Escrow.** Buyer will deposit with Escrow Holder on or prior to the Closing Date the following:

- (i) Sufficient immediately available wire transfer funds which, when added to the Deposit and accrued interest, and all other amounts hereunder to be applied against the Purchase Price, are sufficient to pay the Purchase Price (subject to any Purchase Price reduction pursuant to Section 3(d) above) and Buyer's share of closing costs, less any amounts, if any, to be reimbursed to Buyer by Seller pursuant to the terms of this Agreement;
- (ii) To the extent reasonably required by Escrow Holder, proof of Buyer's authority and authorization to enter into this Agreement;
- (iii) An executed closing statement reasonably acceptable to Buyer;
- (iv) A duly executed City Hall Contract Document determined by the City to satisfy Section 15.(a);
- (v) Such additional documents as shall be reasonably required to consummate the transaction contemplated by this Agreement.

(e) **Closing Costs and Adjustments.** Seller shall pay all applicable documentary transfer taxes and recording fees payable in connection with the purchase and sale of the Property. Seller shall also pay for the cost of the premium for the Title Policy and any endorsements required to cure or eliminate any Objections Seller has agreed to cure or eliminate pursuant to Section 6(b) above and Buyer shall pay for the costs of additional endorsements requested by Buyer. Buyer and Seller shall each pay one-half (1/2) of all escrow fees in connection with the purchase and sale of the Property. Unless specified elsewhere in this Agreement, all other closing costs related to the transaction shall be

paid by the Parties in the manner consistent with customary practice for the County in which the Property is located. Escrow Holder shall notify Buyer and Seller in writing of their respective shares of such costs at least five (5) business days prior to the Closing Date.

(f) **Prorations.**

(i) All expenses of the Property shall be apportioned as of 12:01 a.m., on the day of Closing as if Buyer were vested with title to the Property during the entire day upon which Closing occurs.

(ii) Notwithstanding the generality of Section 10.(f)(i) above, specific items of expense shall be prorated as follows:

(1) All real property taxes for the year immediately preceding the year in which the Closing Date occurs which are payable in the year the Closing Date occurs, and for years prior thereto, shall be paid by Seller on or before the Closing Date. Real property taxes for the year in which the Closing Date occurs shall be prorated on the basis of the most recent assessment and levy.

(2) All installments of assessments, special assessments, and other like charges now or hereafter imposed against the Property, or any part thereof, by reason of roadways, utility lines, streets, alleys or other improvements in existence or under construction as of the Closing Date, shall be prorated between Seller and Buyer. All such installments of assessments, special assessments, and other charges that are due and payable prior to Closing shall be paid by Seller prior to the Closing Date (or a credit given to Buyer therefor at Closing). All such installments of assessments, special assessments, and other charges due and payable after the Closing Date shall be prorated between Seller and Buyer.

(3) Prepaid water, sewer, and other utility charges shall be credited to Seller, and accrued water, sewer, and other utility charges shall be credited to Buyer. Buyer shall credit to the account of Seller all refundable cash or other deposits posted with utility companies serving the Property or, at Buyer's option, Seller shall be entitled to receive and retain such refundable cash and deposits.

(4) Any other operating expense or other items pertaining to the Property which are customarily prorated between buyers and sellers of real property in the County shall be prorated between Seller and Buyer in accordance with local custom.

(iii) Except as otherwise provided herein, any expense amount which cannot be ascertained with certainty as of the Closing Date shall be prorated on the basis of the Parties' reasonable estimates of such amount, and shall be the subject of a final proration ninety (90) days after the Closing Date, or as soon thereafter as the precise amounts can be ascertained. Buyer shall promptly notify Seller when it becomes aware that any such estimated amount has been ascertained. Once all expense amounts have been ascertained, Buyer shall prepare, and certify as correct, a final proration statement as to Seller which shall be subject to Seller's approval. Upon Seller's acceptance and approval of any final proration statement submitted by Buyer, such statement shall be conclusively deemed to be accurate and final.

(g) **Immediately Prior To Closing.** As soon as possible prior to the Closing Date, Escrow Holder shall (i) prepare and deliver to Buyer and Seller a preliminary closing statement; and (ii) advise Buyer of the amount of funds Buyer must deposit for the Closing.

(h) **Closing.** On the Closing Date, Escrow Holder will close escrow as follows:

(i) record the Grant Deed (marked for return to Buyer) with the County Recorder of the County, which will be deemed delivery to Buyer; provided, however, that the Separate Statement of Documentary Transfer Tax attached to the Grant Deed shall not be recorded;

(ii) issue the Title Policy, and cause the Title Policy to be delivered to Buyer;

(iii) charge Buyer for those costs and expenses to be paid by Buyer pursuant to this Agreement and disburse any net funds remaining after the preceding disbursements to Buyer;

(iv) disburse to Seller the Purchase Price remaining after payment of Monetary Liens on the Property and any prorated amounts and charges to be paid by or on behalf of Seller, and disburse to Buyer the balance of any remaining funds in Escrow;

(v) prepare and deliver to both Buyer and Seller one signed copy of Escrow Holder's closing statement showing all receipts and disbursements of the Escrow;

(vi) deliver to Buyer the FIRPTA Affidavit and any applicable State or local law equivalent;

(vii) deliver any other documents and complete such other acts as required of Escrow Holder hereunder; and

(viii) close escrow within the meaning of Section 6045 of the Internal Revenue Code of 1986, as amended (the "Code"), and promptly file all necessary information reports and returns regarding this transaction as required by the Code, including, without limitation, the returns required pursuant to Section 6045 of the Code.

(i) **Cancellation.** Upon cancellation of this Agreement pursuant to exercise of a right to cancel given in this Agreement, Escrow Holder shall disburse the Deposit in accordance with the terms of this Agreement, and shall return to the Parties such other funds and documents they deposited with Escrow Holder. Upon cancellation, Buyer and Seller shall each pay the other one-half of Escrow Holder's expenses and thereafter, except for those obligations that expressly state that they survive the termination of this Agreement, the Parties shall have no further rights or duties under this Agreement. Notwithstanding the above, if this Agreement is terminated due to a default of any Party hereunder, the defaulting Party shall pay any and all Escrow Holder's expenses then due or owed.

11. **Possession.** Seller covenants to deliver sole, exclusive, and actual possession of the Property to Buyer on the Closing Date, free and clear of all tenancies and parties in possession and other Exceptions, subject only to the Permitted Exceptions.

12. **Notices.** Any notice pursuant to this Agreement shall be given in writing by (a) personal delivery, (b) reputable overnight delivery service with proof of delivery, (c) United States Mail, postage prepaid, registered or certified mail, return receipt requested, or (d) legible facsimile transmission, sent to the intended addressee at the address set forth in the Specific Provisions, or to such other address or to the attention of such other person as the addressee shall have designated by written notice sent in accordance herewith. Any notice so given shall be deemed to have been given upon receipt or refusal to accept delivery, or, in the case of facsimile transmission, as of the date of the facsimile transmission provided that an original of such facsimile is also sent to the intended addressee by means described in clauses (a), (b) or (c) above.

13. **Brokerage Claims.** Buyer is a licensed broker and Buyer warrants to Seller that no real estate agents or other brokers have been involved in negotiating this transaction or the execution of this Agreement on Buyer's behalf. To the extent that any broker or agent claims to be entitled to a commission, fee, or other form of compensation relating to the negotiation, execution or implementation of this Agreement, Buyer shall pay all such commissions, fees or other compensation, and Buyer hereby agrees to indemnify, defend, and hold Seller harmless from and against all claims for commissions, fees, or compensation in connection with this transaction.

14. **Condemnation.**

(a) Seller will bear the risk of loss for any condemnation that may occur prior to Closing. If any portion of the Property is condemned or taken prior to Closing, Buyer may elect to terminate this Agreement.

(b) Buyer's election under this Section with respect to any condemnation or taking will be exercised by written notice to Seller within twenty (20) days after written notice from Seller of such condemnation or taking. Notwithstanding any provision to the contrary herein, the Closing Date will be extended as necessary to give Buyer time to make such election.

(c) If Buyer elects to terminate this Agreement under this Section, the provisions of Section 3(b) above shall apply. If Buyer does not elect to terminate this Agreement, this Agreement will remain in full force and effect and the purchase contemplated in this Agreement, less any interest taken by condemnation, will be effected, and at the Closing, Seller will set over to Buyer all of Seller's rights, title, and interest in and to any condemnation awards or insurance proceeds that have been or that may later be made for the taking or destruction.

15. **Assignment.** Buyer may not assign its rights, duties, and obligations under this Agreement without the consent of Seller, which consent shall not be unreasonably withheld or delayed. If Buyer purports to make an assignment of all or any portion of its rights, duties and obligations under this Agreement without the City's consent, such assignment shall not release or discharge Buyer from any obligation or liability hereunder.

16. **Amendments.** No amendment to this Agreement will be binding on any of the Parties to this Agreement unless the amendment is in writing and executed by all Parties. No acts or omission of any employee or agent of the Parties or any broker, if any, shall alter, change or modify any of the provisions of this Agreement.

17. **Severability.** If any term, covenant, or condition of this Agreement or the application of them to any Person or circumstance is, to any extent, invalid or unenforceable, the remainder of this Agreement or the application of the terms, covenants, and conditions to Persons or circumstances other than those as to which it is held invalid or unenforceable, will not be affected, and each term, covenant, or condition of this Agreement will be valid and be enforced to the fullest extent permitted by law.

18. **No Waiver.** No failure of any Party to exercise any power given that Party under this Agreement or to insist on strict compliance by any other Party to its obligations, and no custom or practice of the Parties in variation with the terms of this Agreement will constitute a waiver of any Party's right to demand exact compliance with such terms.

19. **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties and no representation, inducement, promise, or agreement, oral or written, between the Parties not embodied in this Agreement will be of any effect. This Agreement supersedes and cancels any and all prior or contemporaneous negotiations, arrangements, representations and understandings, oral or written, if any, between the Parties.

20. **Binding Effect.** The provisions of this Agreement will be binding on and will inure to the benefit of Buyer, Seller, and their respective heirs, executors, administrators, successors, and to the extent permitted hereunder, assigns, and shall run with the land.

21. **Survival.** The representations, warranties, covenants, and other terms of this Agreement will survive the Closing, the delivery of the Grant Deed, and the payment of all required sums and will not be deemed to have merged in the Grant Deed delivered to Buyer at the Closing.

22. **Seller's Default.** Seller and Buyer mutually agree that the Property is of a special and unique character which gives it a peculiar value, and that Buyer cannot be reasonably or adequately compensated in damages in an action at law in the event Seller breaches its obligation to sell the Property to Buyer. Therefore, Seller expressly agrees that Buyer shall be entitled to injunctive and other equitable relief (including the right to specifically enforce Seller's obligation to sell the Property to Buyer) in the event of such breach, in addition to any other rights or remedies which Buyer may possess.

23. **Notice of Default: Cure Period.** With respect to a default by either Party hereunder, neither Party will be in default under this Agreement unless and until the other Party gives the defaulting Party written notice specifying the default or defaults and such default or defaults have not been cured within five (5) business days from the defaulting Party's receipt of such notice.

24. **No Third-Party Beneficiaries.** The provisions of this Agreement and of the documents to be executed and delivered at Closing are and will be for the benefit of Seller and Buyer only and are not for the benefit of any third-party; and, accordingly, no third-party shall have the right to enforce the provisions of this Agreement or of the documents to be executed and delivered at the Closing.

25. **No Fiduciary Relationships.** Seller is not the agent or representative of Buyer and Buyer is not the agent or representative of Seller, and nothing in this Agreement will be construed to make Buyer liable to anyone for goods delivered or services performed on the Property or for debts or claims accruing against Seller. Nothing in this Agreement will be construed to create any privity of contract or other relationship between Buyer and anyone supplying labor or materials to the Property. Nothing in this Agreement, nor the acts of the Parties, will be construed to create a partnership or joint venture between Seller and Buyer.

26. **Supersedes and Replaces Prior Agreement.** This Agreement sets forth the entire understanding of the Parties with respect to the purchase and sale of the Property.

27. **Recordation.** This Agreement is an obligation against the Property and an executed memorandum may, at the option of either Party, be filed of record in the County Records of the County in which the Property is located.

28. **Authority to Sign.** The submission of this document for examination and negotiation does not constitute an offer to purchase or a reservation of or option for the Property, and this document will become effective and binding only upon the due execution and delivery by Buyer and Seller.

29. **Applicable Law.** This Agreement will be interpreted and construed under and governed by the laws of the State of California.

30. **Time of Essence.** Time is of the essence as to each and every obligation contained in this Agreement, and the Parties shall use good faith and diligent efforts to complete the transaction contemplated by this Agreement without delay and as expeditiously as is reasonably practical.

31. **Attorneys' Fees.** In any legal action brought to interpret, enforce the performance of any term or condition of this Agreement, or to recover damages for the breach of this Agreement, as between Seller and Buyer, the prevailing Party therein will be entitled to recover from the other Party, as an element of its costs of suit and not as damages, reasonable attorneys' fees and costs from the Party not prevailing. The prevailing Party shall be the Party who is entitled to costs of suit, whether or not suit proceeds to final judgment.

32. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which will be deemed an original and all, taken together, will constitute one and the same instrument.

33. **Facsimile/pdf Signatures.** In order to expedite the transaction contemplated herein, facsimile and/or .pdf signatures may be used in place of original signatures on this Agreement. Seller and Buyer intend to be bound by the signatures on the electronically transmitted document, are aware that the other Party will rely on such signatures, and hereby waive any defenses to the enforcement of the terms of this Agreement based on the form of signature.

34. **Construction.** The Section headings and captions of this Agreement are, and the arrangement of this instrument is, for the sole convenience of the Parties to this Agreement. The Section headings, captions, and arrangement of this instrument do not in any way affect, limit, amplify, or modify the terms and provisions of this Agreement. The singular form will include plural, and vice versa. Each term, condition or provision hereof has been freely negotiated and shall be equally binding upon Seller and Buyer and no such term, condition or provision shall be construed against either Party hereto solely because such term, condition or provision was initially drafted or prepared by such Party. Unless otherwise indicated, all references to Sections are to this Agreement. All exhibits, schedules, addenda and attachments referred to in this Agreement are attached to it and incorporated in it by this reference. Any gender used shall be deemed to refer to any other gender more grammatically applicable to the Party to whom such use of gender relates.

35. **Dates.** If, pursuant to this Agreement, any date indicated herein falls on an official United States or State of California holiday, or a Friday, Saturday or Sunday, the date so indicated shall mean the next business day following such date.

36. **Dispute Resolution: Judicial Reference.** Any dispute, controversy or claim arising out of or relating to this Agreement, including any dispute relating to interpretation of or performance under this Agreement ("Dispute"), shall be resolved in the manner set forth in this Section 37.

(a) **Negotiation.** The Parties will attempt in good faith to resolve the Dispute promptly by negotiations between senior representatives of the Parties who have authority to settle the Dispute (each a "Representative").

(b) **Judicial Reference.** In the event the Representatives are not able to resolve the Dispute within fifteen (15) days following the date one Party first notifies the other Party of the Dispute in writing (the "Reference Date"), the Dispute shall be resolved by a reference proceeding in accordance with the provisions of California Code of Civil Procedure Section 638, et seq. (or any similar successor statute) for a determination to be made, which determination shall be binding upon the Parties as if tried before a court or jury. The Parties agree specifically as to the following:

(i) Within five (5) business days after service of a demand by a Party hereto, the Parties shall agree upon a single referee who shall then try all issues, whether of fact or law, and then report a finding and judgment thereon. The referee shall be a retired judge of the Superior Court of California or any federal district court, and shall not have previously been retained by either Party in any capacity. If the Parties are unable to agree upon a referee, either Party may seek to have a referee appointed pursuant to California Code of Civil Procedure Section 640 (or any similar successor statute), by the presiding judge or any other sitting judge of the Superior Court of the County.

(ii) The compensation of the referee shall be such charge as is customarily charged by the referee for like services. The cost of the referee and any facilities used for the proceeding, which are charged to the Parties, shall be borne equally by the Parties. However, the prevailing Party in such proceedings shall be entitled, in addition to costs recoverable by law, which are not expressly allocated hereunder, to recover its/his/her reasonable attorney's fees and any reporter fees for the cost of the proceeding as an item or items of damages and/or recoverable costs.

(iii) If a reporter is requested by either Party, then a reporter shall be present at all proceedings, and the fees of such reporter initially shall be borne equally by the Parties, subject to adjustment as provided for above. Such fees shall be an item of recoverable costs. Only a Party shall be authorized to request a reporter.

(iv) The referee shall apply all California Rules of Civil Procedure and Evidence and shall apply the substantive law of California in deciding the issues to be heard. Notice of any motions before the referee shall be given, and all matters shall be set at the convenience of the referee.

(v) The referee's decision under California Code of Civil Procedure Section 644 shall stand as the judgment of the court, subject to appellate review as provided by the laws of the State of California.

(vi) The Parties agree that they shall in good faith endeavor to cause any such Dispute to be decided within ninety (90) days after the Reference Date. The date of hearing for any proceeding shall be determined by agreement of the Parties and the referee, or if the Parties cannot agree, then by the referee alone. The venue for any such hearing shall be in the City of San Pablo, unless the Parties jointly agree otherwise.

(vii) The referee shall have the power to award declaratory and injunctive relief and damages pursuant to California law, subject to such limitations thereon as are specified in this Agreement.

(c) **No Money Damages Against Seller.** The Parties acknowledge and agree that it is a material part of Buyer's consideration to Seller that Seller shall not be at any risk whatsoever to liability for money damages relating to or arising from this Agreement, and that Buyer, for itself and for all successors and assignees, hereby releases Seller and all of its agents, employees, representatives, council members, board members, consultants, and all offices and departments of Seller from any and all claims seeking to impose money damages on Seller as a result of Seller's negotiation, drafting, execution or performance of this Agreement.

37. **Waiver of Trial By Jury.** To the extent permitted by applicable law, each Party voluntarily and with knowledge of its rights waives all rights to trial by jury in all proceedings for which a trial by jury would otherwise be available or required and involve any matter arising out of or connected with this Agreement.

38. **AS-IS Sale.** Notwithstanding anything to the contrary in this Agreement, Buyer agrees that, subject to Seller's express representations and warranties contained herein, Buyer is purchasing the Property "as-is", "where-is" and "with all faults", has made its own independent investigation and examination of the Property and conditions associated therewith, and Buyer has not relied and will not rely on, and Seller is not liable for or bound by, any expressed or implied warranties, guaranties or representations pertaining to the Property made or furnished by Seller or any employee of Seller, to whomever made or given, directly or indirectly, orally or in writing, unless such warranty, guaranty or representation is specifically set forth in this Agreement.

39. **Buyer's Election of 1031 Exchange.** Notwithstanding anything to the contrary in this Agreement, Buyer may elect to acquire the Property from Seller in the form of a tax-deferred exchange pursuant to Section 1031 of the Internal Revenue Code of 1986, as amended ("1031 Exchange"), either as a simultaneous exchange or a non-simultaneous exchange (i.e., either a so-called "Starker deferred exchange" or a "reverse Starker deferred exchange"). In the event that Buyer shall so elect, Buyer shall give written notice to Seller and Escrow Holder of such election at least two (2) days prior to the Closing Date. Seller shall fully cooperate with any such 1031 Exchange, including executing and delivering

additional documents requested or approved by Buyer (including, without limitation, any assignment documentation effectuating an assignment of Buyer's rights under this Agreement to a third-party participating in such 1031 Exchange); provided that Seller shall not be required to incur any additional costs or liabilities or financial obligation as a consequence of any of the foregoing exchange transactions nor shall the same delay the Closing.

**IN WITNESS WHEREOF**, the undersigned have executed this Agreement as of the date(s) and year set forth below.

**"SELLER"**

**CITY OF SAN PABLO**, a California municipal corporation,

Dated \_\_\_\_\_, 2017

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

**APPROVED AS TO FORM:**

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

**"BUYER"**

**CAPITAL PARTNERS DEVELOPMENT COMPANY, LLC** a California limited liability company

Dated \_\_\_\_\_, 2017

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

**APPROVED AS TO FORM:**

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

ACCEPTANCE BY ESCROW HOLDER

Fidelity National Title Insurance Company hereby acknowledges that it has received a fully executed counterpart of the foregoing AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY AND JOINT ESCROW INSTRUCTIONS ("**Agreement**") and agrees to act as Escrow Holder or agent under the Agreement and to be bound by and perform the terms thereof as such terms apply to Escrow Holder.

Dated: \_\_\_\_\_

Fidelity National Title Insurance Company

By: \_\_\_\_\_  
Kristi Adan, Escrow Officer

Exhibit List

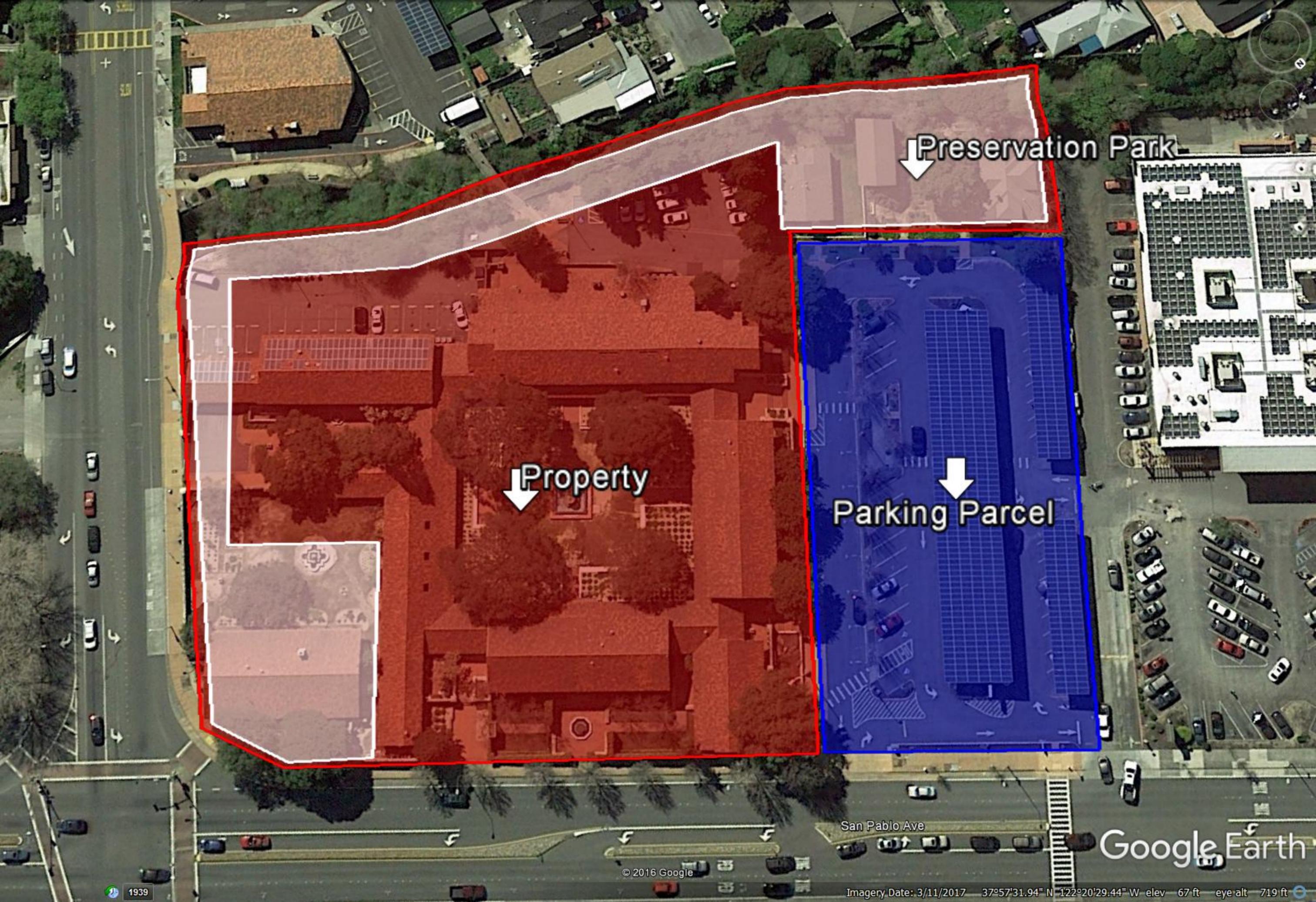
Exhibit A-1	Legal Description of Property
Exhibit A-2	Depiction of Property with Preservation Park area and Parking Parcel
Exhibit B	Form of Grant Deed
Exhibit C	Form of City Hall Contract
Exhibit D	Form of Development Agreement
Exhibit E	Title Commitment
Exhibit F	Permitted Exceptions
Exhibit G	Escrow Holder's General Provisions

**EXHIBIT A-1**

**Legal Description of the Property**

**EXHIBIT A-2**

**Graphic Depiction of Property (with Preservation Park) and Parking Parcel**



Preservation Park

Property

Parking Parcel

San Pablo Ave

Google Earth

© 2016 Google

Imagery Date: 3/11/2017 37°57'31.94" N 122°20'29.44" W elev 67 ft eye alt 719 ft

1939

**EXHIBIT B**

**Form of Grant Deed**

RECORDED AT THE REQUEST OF:

WHEN RECORDED MAIL TO:

City of San Pablo  
13831 San Pablo Avenue  
San Pablo, CA 94806  
ATTN: City Manager  
City Attorney

---

*Exempt from recording fees pursuant to Government Code Section 6103*

GRANT DEED

For valuable consideration, the receipt of which is hereby acknowledged,

THE CITY OF SAN PABLO, a public body, corporate and politic, of the State of California (herein called "Grantor"), hereby grants to CAPITAL PARTNERS DEVELOPMENT COMPANY, LLC, a Delaware limited liability company (herein called "Grantee"), the real property (the "Property") legally described in the document attached hereto, labeled Exhibit A, and incorporated herein by this reference.

1. The Property is conveyed pursuant to a Purchase and Sale Agreement (the "PSA") entered into by and between the Grantor and the Grantee and dated \_\_\_\_\_, 2017.

2. The Property is the subject of a Development Agreement (the "Development Agreement") entered into by and between the Grantor and the Grantee and dated \_\_\_\_\_, 2017, recorded as instrument \_\_\_\_\_ on \_\_\_\_\_, 2017. Section 2.1 of the Development Agreement requires that the Grantee perform certain improvements to portions of the Property (the "Preservation Park Improvements", defined therein) and, upon completion of the required Preservation Park Improvements, dedicate the improved Preservation Park portion of the Property and the Preservation Park Improvements to the Grantor (the "Dedication").

3. The Grantee hereby covenants and agrees, for itself and its successors and assigns, that the Property is subject to the requirements of the Development Agreement with regard to the Preservation Park Improvements and the Dedication, and any conveyance of the Property by Grantee, and any subsequent Grantee, to a third party will include a covenant to perform the specified Preservation Park Improvements and Dedication, regardless of whether the Development Agreement remains in force and effect.

4. The covenant and provisions of Paragraph 3, herein, will terminate upon the recordation of acceptance of the Dedication by the Grantor or its successor and assign.

5. The covenants contained in paragraph 3 of this Grant Deed will be binding for the benefit of the Grantor, its successors and assigns, and such covenants will run in favor of the Grantor for the entire period during which such covenants shall be in force and effect. The Grantor, in the event of any breach of any such covenants, will have the right to exercise all of the rights and remedies, and to maintain any actions at law or suits in equity or other proper proceedings to enforce the curing of such breach. The covenants contained in this Grant Deed will be for the benefit of and will be enforceable only by the Grantor, its successors and assigns.

6. The Property is conveyed subject to the covenants contained herein and all matters of title or of record or any matters that would be disclosed by an accurate survey, in fee simple.

IN WITNESS THEREOF, the Grantor and Grantee have caused this instrument to be executed on their behalf by their respective officers thereunto duly authorized, this \_\_ day of \_\_\_\_\_, 2017

THE CITY OF SAN PABLO

By: \_\_\_\_\_  
City Manager

The provisions of this Grant Deed are hereby approved and accepted by the Grantee.

CAPITAL PARTNERS DEVELOPMENT COMPANY, LLC

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

[INSERT ACKNOWLEDGMENT]

Exhibit A

LEGAL DESCRIPTION OF PROPERTY

**EXHIBIT C**

**Form of City Hall Contract**



**CITY OF SAN PABLO**  
*City of New Directions*

## **CITY HALL CONTRACT**

**City Hall Contract  
And Contract Documents**

**TABLE OF CONTENTS**

<b>CONTRACT</b> .....	<b>4</b>
<b>PAYMENT BOND</b> .....	<b>14</b>
<b>PERFORMANCE BOND</b> .....	<b>17</b>
<b>GENERAL CONDITIONS</b> .....	<b>20</b>
<b>Article 1</b> .....	<b>20</b>
1.1 Definitions .....	20
<b>Article 2</b> .....	<b>24</b>
2.1 Relationship of Trust and Confidence .....	24
2.2 Scope of Services .....	25
2.3 Design Services.....	25
2.4 Construction Services.....	26
2.5 Developer’s Subcontractors.....	29
2.6 Coordination of Work.....	30
2.7 Developer's Representative.....	30
<b>Article 3</b> .....	<b>30</b>
3.1 The Contract Documents .....	30
3.2 Order of Precedence .....	31
3.3 Project Scope .....	<b>31</b>
3.4 For Reference Only .....	31
<b>Article 4</b> .....	<b>30</b>
4.1 Payment and Performance Bonds .....	31
4.2 Warranty Bond.....	<b>32</b>
4.3 Indemnity and Liability .....	32
4.4 Insurance.....	35
<b>Article 5</b> .....	<b>36</b>
5.1 Time is of the Essence.....	36
5.2 Schedule Requirements.....	36
5.3 Delay and Extensions of Contract Time.....	38
5.4 Liquidated Damages .....	40
<b>Article 6</b> .....	<b>41</b>
6.1 Changes in Work .....	41
6.2 Developer Change Order Requests.....	42
6.3 Adjustments to Contract Price .....	43
6.4 Unilateral Change Order .....	43
6.5 Non-Compliance Deemed Waiver .....	44
<b>Article 7</b> .....	<b>44</b>
7.1 Permits and Taxes .....	44
7.2 Temporary Facilities .....	44
7.3 Signs.....	45
7.4 Protection of Work and Property.....	45
7.5 Noninterference .....	45

7.6	Materials and Equipment .....	45
7.7	Substitutions .....	46
7.8	Testing and Inspection.....	47
7.9	Clean up .....	48
7.10	Instructions and Manuals .....	49
7.11	As-built Drawings.....	49
7.12	Existing Utilities.....	50
7.13	Notice of Excavation .....	50
7.14	Trenching and Excavations.....	50
7.15	Trenching of Five Feet or More.....	51
7.16	New Utility Connections .....	51
7.17	Lines and Grades. ....	51
7.18	Historic or Archeological Items .....	51
7.19	Environmental Control .....	52
7.20	Sound Control Requirements.....	52
<b>Article 8</b>	.....	<b>53</b>
8.1	Payment for Services.....	53
8.2	Schedule of Values .....	53
8.3	Progress Payments .....	53
8.4	Adjustment of Payment Application. ....	54
8.5	Acceptance of Work.....	55
8.6	Retention .....	55
8.7	Setoff .....	55
8.8	Payment to Subcontractors and Suppliers.....	55
8.9	Final Payment.....	55
8.10	Release of Claims.....	55
8.11	Warranty of Title .....	55
<b>Article 9</b>	.....	<b>55</b>
9.1	Discrimination Prohibited .....	55
9.2	Labor Code Requirements.....	56
9.3	Prevailing Wages.....	56
9.4	Payroll Records .....	56
<b>Article 10</b>	.....	<b>57</b>
10.1	Safety Precautions and Programs .....	57
10.2	Hazardous Materials.....	58
10.3	Material Safety .....	58
<b>Article 11</b>	.....	<b>59</b>
11.1	Substantial Completion.....	59
11.2	Final Completion.....	59
11.3	Warranty .....	60
11.4	Use Prior to Completion.....	61
<b>Article 12</b>	.....	<b>62</b>
12.1	Claims.....	62
12.2	Claims Submission .....	63
12.3	City's Response.....	65
12.4	Meet and Confer .....	65

12.5	Mediation and Government Code Claims .....	66
12.6	Tort Claims .....	66
12.7	Arbitration .....	66
12.8	Damages .....	66
12.9	Suspension or Termination .....	67
<b>Article 13</b>	<b>.....</b>	<b>67</b>
13.1	Suspension for Cause .....	67
13.2	Suspension for Convenience .....	67
13.3	Termination for Default .....	68
13.4	Termination for Convenience.....	68
13.5	Provisions Remaining in Effect .....	69
<b>Article 14</b>	<b>.....</b>	<b>69</b>
14.1	Assignment of Unfair Business Practice Claims .....	69
14.2	Provisions Deemed Inserted.....	69
14.3	Waiver.....	70
14.4	Titles, Headings, and Groupings.....	70
14.5	Statutory and Regulatory References .....	70
<b>SPECIAL CONDITIONS</b>	<b>.....</b>	<b>71</b>
<b>PROJECT SCOPE</b>	<b>.....</b>	<b>79</b>

## CITY HALL CONTRACT

This City Hall Contract (“**Contract**”) is entered into by and between the City of San Pablo (“**City**”), a general law city in California, and Capital Partners Development Company, LLC (“**Developer**”), a California limited liability corporation for design and construction of a new City Hall (the “**Project**”), as a condition of sale for the current City Hall site.

### RECITALS

**A.** City and Developer have entered into an *Agreement for Purchase and Sale of Real Property and Joint Escrow Instructions*, dated <[REDACTED]> (the “**PSA**”), pursuant to which Developer has promised to purchase and develop certain real property located at 13831 San Pablo Avenue in the City of San Pablo (Assessor’s Parcel Number 411-330-039-8), which is the site of the City’s current City Hall (the “**Civic Center Site**”), and to design and construct a new City Hall on a separate undeveloped parcel owned by the City located at the corner of Gateway Avenue and Chattleton Lane in the City of San Pablo (Assessor’s Parcel Number 417-310-005) (the “**Gateway Property**”) as a condition of sale of the Property.

**B.** This Contract is intended to effectuate two of the conditions to the City’s sale of the Civic Center Site to Developer, as set forth in section 5(b) of the PSA.

**C.** The City is relying upon both the proceeds from sale of the Civic Center Site pursuant to the PSA and on bond financing to pay for the Project.

**D.** The purchase price of the Civic Center Site is \$2,500,000 (the “**Property Price**”).

**E.** The City’s bond financing for the Project is pursuant to the *Indenture by and Between City of San Pablo Financing Authority and Wells Fargo Bank, National Association, as Trustee*, dated <month of sale of bonds>, including any subsequent supplements or amendments thereto (the “**Indenture**”).

**F.** The parties agree that design and construction of the Project has been undertaken in substantial compliance with applicable legal requirements, and that the construction work may be performed without further public bidding, as more fully set forth in City Resolution No. <[REDACTED]>, adopted by the San Pablo City Council on <[REDACTED]>, to approve the PSA, including design and construction of the Project pursuant to this Contract.

**G.** All capitalized terms herein which are not otherwise defined in this Contract have the meanings provided in Article 1 of the Contract General Conditions.

## **TERMS AND CONDITIONS**

The parties agree as follows:

- 1. Contract Documents.** The following documents, which are fully incorporated herein, constitute the “**Contract Documents**” for the Project: the Contract and any duly authorized and executed amendments or Change Orders thereto; the General Conditions; the Special Conditions; the Notice to Proceed with Design Services; the Notice to Proceed with Construction Services; the Project Scope; the Construction Documents, upon approval by City; the RFQ/RFP and any addenda thereto; the Proposal and attachments thereto; and the Payment and Performance Bonds to be submitted by Contractor.
  
- 2. Developer’s Responsibilities.** Subject to the contingencies specified in section 2.4, below, Developer will procure and provide the Services necessary to design and construct the Project as specified by the Contract Documents.
  - 2.1 Design and Construction Services.** Developer will retain a licensed, qualified design professional to provide the Design Services required for the Project, and will retain a qualified, licensed general contractor to provide the Construction Services required for this Project, both at Developer’s sole expense, and subject to City’s approval, which will not unreasonably be withheld. City has approved Perkins, Williams & Cotterill Architects (“**Design Professional**”) to provide Design Services and Ascent Builders, Inc. (“**Contractor**”), to provide Construction Services for the Project.
  
  - 2.2 Compliance with Contract Documents.** Developer will require Design Professional to comply with all provisions in the Contract Documents which are applicable to delivery of the Design Services, to the City’s satisfaction. Developer will require Contractor and its Subcontractor(s) to comply with all provisions in the Contract Documents which are applicable to delivery of the Construction Services, to the City’s satisfaction.
  
  - 2.3 Service Standards.** Developer will require that Design Professional and Contractor exercise reasonable skill and judgment in the performance of Services required by the Contract Documents. Developer will require provision of all things necessary and incidental for the timely design and construction of the Project, including all

necessary labor, materials, equipment, transportation, and utilities, unless otherwise specified in the Contract Documents. Developer will require the Design Professional and the Contractor to use their best efforts to complete the Services in a professional and expeditious manner and to meet or exceed the performance standards required by the Contract Documents.

**2.4 Contingencies.** This Contract will not become effective unless or until the City provides written notice to Developer that each of the following contingencies have been satisfied:

(A) **Validation Contingency.** The 60-day period for filing a validation action pursuant to sections 860 et seq. of the Code of Civil Procedure has expired, and no such action has been filed regarding the validity of this Contract or the PSA.

(B) **Financing Contingency.** City has determined, in its sole discretion, that City has successfully completed the financing arrangements necessary to pay for the Project by October 1, 2017.

**3. Payment.**

**3.1 Contract Price.** Developer will cause the Project to be performed and completed in strict accordance with the terms and conditions of the Contract Documents for a total Contract Price of \$14,950,000. The final Contract Price is subject to adjustment based on authorized Change Orders, Allowance expenditures, and as further provided in the Contract Documents. The Contract Price is not subject to adjustment due to inflation or due to the increased cost of labor, material, or equipment following execution of this Contract.

(A) **Allowances.** The Contract Price includes the following Allowances, as further specified in the Project Scope and Article of 8 of the General Conditions:

(1) Maple Hall Kitchen	\$250,000
(2) Madeira Room Kitchen	\$ 50,000
(3) Cabling	\$150,000
(4) Monument Sign	\$ 25,000
(5) Entry Seal	\$ 3,500
(6) STMP Fees	\$147,000

(B) **Offset.** The Property Price of \$2,500,000 will be offset against the Contract Price of \$14,950,000 (as adjusted), as further specified in the PSA. City will be responsible for cash payments on the Contract Balance of \$12,450,000, as further specified herein. The Contract

Balance will be adjusted by an amount equal to each adjustment to the Contract Price pursuant to the Contract Documents.

- 3.2 Progress Payments.** City will compensate Developer on a monthly basis for Services satisfactorily provided during the preceding calendar month as further specified in Article 8 of the General Conditions. City will withhold five percent from each progress payment as retention which City may apply to adjustments to the Contract Price and Contract Balance, including overpayment to Developer if the total paid out for progress payments exceeds the adjusted Contract Balance. The total amount paid out as progress payments will be capped at 95% of the Contract Balance pending Final Completion and all final adjustments to the Contract Price. The parties agree that this retention from progress payments to Developer is not subject to the provisions of Public Contract Code section 22300.
- 3.3 Final Payment.** Conveyance of the Civic Center Site and any unpaid Contract Balance remaining due to Developer, subject to any applicable adjustments, will operate as Final Payment.
- 3.4 Taxes.** The Contract Price includes all applicable federal, state, and local taxes.
- 3.5 Developer's Payments.** Developer is solely responsible for full and timely payments to Design Professional and Contractor in accordance with the terms of their respective contracts with Developer and in compliance with all applicable laws.
- 4. Time for Completion.** The Project must achieve Final Completion within 485 calendar days from the construction commencement date given in the City's Notice to Proceed with Construction Services, unless modified by a Change Order ("**Contract Time**"). By signing below, Developer expressly waives any claim for delayed early completion of the Project.
- 5. Liquidated Damages for Delay.**

  - 5.1 Substantial Completion.** The Project must be Substantially Complete within 425 calendar days from the construction commencement date given in the City's Notice to Proceed with Construction Services, unless modified pursuant to a Change Order (the "**Substantial Completion Deadline**"). If the Project is not Substantially Complete by the Substantial Completion Deadline, City will assess liquidated damages for delay in the amount of \$2,500 per day for each day of unexcused delay in achieving Substantial Completion. Accrued liquidated damages will be payable to the Trustee pursuant to the Indenture.

**5.2 Final Completion.** If Developer fails to achieve Final Completion within the Contract Time, City will assess liquidated damages in the amount of \$1,500 per day for each day of unexcused delay in achieving Final Completion, and the Contract Price will be reduced by that amount.

## **6. Labor Requirements.**

**6.1 General.** The Construction Services are subject to all applicable requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, including requirements pertaining to wages, working hours, and workers' compensation insurance.

**6.2 Prevailing Wages.** The Construction Services provided for this Project are subject to the prevailing wage requirements applicable to the region in which the City is located for each craft, classification, or type of worker needed to perform the Work, including employer payments for health and welfare, pension, vacation, apprenticeship, and similar purposes. Copies of these prevailing rates are available online at <http://www.dir.ca.gov/DLSR>.

**6.3 DIR Registration.** Contractors and Subcontractors performing work on the Project must be registered with the California Department of Industrial Relations (“**DIR**”) to perform public work under Labor Code Section 1725.5. This Contract is subject to compliance monitoring and enforcement by the DIR pursuant to Labor Code section 1771.4.

**6.4 Skilled and Trained Workforce.** Contractor and Subcontractors of every tier must use a “skilled and trained workforce,” as that term is defined in subdivision (d) of Section 2601 of the Public Contract Code, to perform all Work on the Project that falls within an apprenticeable occupation in the building and construction trades. Developer will provide City with evidence on a monthly basis during the Construction phase that Contractor and its Subcontractors are complying with this requirement.

### **6.5 Local Employment and Contracting.**

(A) *New Apprentices.* Developer will require that Contractor and/or its Subcontractors sponsor and employ at least two New Apprentice(s) to perform at least 800 total construction work hours on the Project. A “**New Apprentice**” is a San Pablo resident who enrolls in a state-registered construction apprenticeship program for the first time at the outset of his or her work on the Project. Developer or Contractor must pay the fees related to enrollment and/or sponsorship of such New Apprentice(s). Upon City’s request,

Developer must obtain from Contractor and its Subcontractors information sufficient to determine compliance with this paragraph. Developer will require Contractor and its Subcontractors to work cooperatively with the San Pablo Economic Development Corporation (“**EDC**”) to identify local workers available to work and interested in becoming a New Apprentice. Because damages for failure to satisfy the requirements of this paragraph would be difficult to determine, Developer must pay to EDC liquidated damages in the amount of \$30 per hour for each hour short of the 800-hour target. If Developer fails to make the required payment to EDC for non-compliance with the 800-hour target, City will pay the liquidated damages to EDC and the Contract Price will be adjusted by that amount.

(B) **Local Subcontractors.** Developer must require that while soliciting bids or quotes from Subcontractors for Work on the Project, including subcontracts for security services, Contractor will work cooperatively with the EDC to contact qualified local contractors to provide a reasonable opportunity to bid on such subcontracts, and will make commercially reasonable efforts to maximize use of local contractors.

7. **Workers’ Compensation Certification.** Under Labor Code Section 1861, by signing this Contract, Developer certifies as follows: “I am aware of the provisions of Labor Code Section 3700 which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work on this Contract.” Developer will require this statutory certification to be included in the Construction Contract for certification by Contractor.

8. **Project Contracts.**

8.1 **Project Contracts.** Developer will ensure that Design Professional, Contractor, and all Subcontractors will be legally bound by the applicable provisions in the Contract Documents, and will comply with all applicable provisions of federal, state, and local laws, statutes, regulations, rules, and ordinances while providing services. Upon request by City, Developer will promptly provide copies of its contracts with Design Professional and with Contractor (collectively, the “**Project Contracts**”) as evidence that it has complied with this provision. Developer will require that Contractor provide a payment bond and performance bond, using the forms provided with this Contract, each for an amount equal to the amount of the Construction Contract.

**8.2 Third Party Beneficiary Obligations.** Developer will require that the Project Contracts expressly identify the City and the Trustee as third-party beneficiaries of the performance due under each such Project Contract. Developer must further require that each Project Contract require that any Subconsultant agreement or Subcontractor agreement to provide Services for the Project must also expressly identify the City and the Trustee as third-party beneficiaries to each such Subconsultant or Subcontractor agreement. Developer will require that each Project Contract require that the City have the benefit of any and all contractual or statutory warranties, guaranties, and indemnity obligations in each Project Contract. If any of the warranties, guarantees, or indemnity obligations in any Project Contract is not enforceable by City as a third-party beneficiary, then Developer will, at the City's request, enforce such warranties, guaranties, indemnities, or other rights for the benefit of City. Except as specified herein, there are no other intended third-party beneficiaries to this Contract.

**8.3 Assignment Obligations.** Upon written notice from City to Developer of the occurrence of an Event of Default under the Indenture, Developer will assign this Contract and all Project Contracts to Trustee for such time as the Event of Default, in the sole judgment of Trustee, remains uncured.

- 9. Notice.** Any notice, billing, or payment required by the Contract Documents must be made in writing, and sent to the other party by personal delivery, Certified U.S. Mail, or by a reliable overnight delivery service. Notice is deemed effective upon delivery unless otherwise specified. Notice for each party must be given as follows:

**CITY:**

City of San Pablo  
13831 San Pablo Avenue, Bldg. #1  
San Pablo, CA 94806  
Attn: City Manager

With copies to:

Barbara Hawkins  
Director of Public Works  
13831 San Pablo Avenue, Bldg. #3  
San Pablo, CA 94806

**DEVELOPER:**

Capital Partners Development  
Company, LLC

2890 Kilgore Road, Suite 175  
Rancho Cordova, CA 95670  
Attn: Rod Johnson

With copies to:

<Name>  
<Address>  
<Address>

**TRUSTEE:**

Wells Fargo Bank, N.A.  
333 Market Street, 18<sup>th</sup> Floor  
San Francisco, CA 94105  
Attn: Kerri Jones, Vice President

**10. Disclosures and Investigation.** By signing below, Developer confirms that City has provided Developer, Design Professional, and Contractor with adequate access to the Project Site to enable Developer to determine to Developer's satisfaction that the Project can be completed for the Contract Price, within the Contract Time, and in conformance with the Contract Documents. Developer is solely responsible for ensuring that Developer, Design Professional, and Contractor conduct a thorough review of the Contract Documents, and investigation of the Project Site and surrounding area. Developer, Design Professional, and Contractor are each responsible for knowledge of conditions and requirements affecting the Project, which reasonable review and investigation would have disclosed. City expressly disclaims responsibility for any assumptions that Developer, Design Professional, or Contractor might draw from the presence or absence of information provided or made available by City, including documents provided For Reference Only (as that term is used in Section 3.5 of the General Conditions). Developer also confirms receipt of the following, which the City has provided For Reference Only: *Geotechnical Evaluation and Recommendations, Women, Infant, and Children (WIC) Program Building, San Pablo, California* (ENGEO September 30, 2016).

**11. General Provisions.**

**11.1 Assignment and Successors.** Developer may not assign its rights or obligations under this Contract, in part or in whole, without City's written consent. This Contract is binding on Developer's successors and permitted assigns.

- 11.2 Governing Law and Venue.** This Contract will be governed by California law and venue will be in the Superior Court of Contra Costa County, and no other place.
- 11.3 Amendment.** No amendment or modification of this Contract will be binding unless it is in a writing duly authorized and signed by the parties to this Contract.
- 11.4 Integration; Severability.** This Contract, including the Recitals set forth above; the Contract Documents incorporated herein, including authorized amendments or Change Orders thereto; and the PSA together constitute the final, complete, and exclusive terms of the agreement between City and Developer with regard to design and construction of the Project. If any provision of the Contract Documents, or portion of a provision, is determined to be illegal, invalid, or unenforceable, the remaining provisions of the Contract Documents will remain in full force and effect.
- 11.5 Authorization.** Each individual signing below warrants that he or she is authorized to do so by the party that he or she represents, and that this Contract is legally binding on that party. If Developer is a corporation, signatures from two officers of the corporation are required pursuant to California Corporation Code Section 313.

*[Signatures are on the following page.]*

The parties agree to this Contract as witnessed by the signatures below:

CITY:

Approved as to form:

City of San Pablo

s/ \_\_\_\_\_  
Matt Rodriguez  
City Manager

s/ \_\_\_\_\_  
Lynn Tracy Nerland  
City Attorney

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Attest:

s/ \_\_\_\_\_  
Ted Denney  
City Clerk

Date: \_\_\_\_\_

DEVELOPER:  
Capital Partners Development Company LLC

s/ \_\_\_\_\_

Name/Title [print]

Date: \_\_\_\_\_

s/ \_\_\_\_\_

Name/Title [print]

Date: \_\_\_\_\_

END OF CONTRACT

## CITY HALL PROJECT

### PAYMENT BOND

Pursuant to the City Hall Contract, dated < [REDACTED] >, 2017, entered into by the City of San Pablo (“**City**”) and Capital Partners Development Company LLC, (“**Developer**”), Developer and Ascent Builders, Inc., a licensed general contractor (“**Contractor**”) have entered into a separate construction contract, dated < [REDACTED] >, 2017, (“**Construction Contract**”), pursuant to which Contractor will provide the construction services (“**Construction Services**”) required for the City Hall Development Project (“**Project**”) for \$< [REDACTED] > (the “**Construction Contract Price**”). The City Hall Contract and the Construction Contract are incorporated by reference into this Payment Bond (“**Bond**”).

1. **General.** Under this Bond, Contractor as principal and \_\_\_\_\_, its surety (“**Surety**”), which Surety is authorized by the California Insurance Commissioner to transact surety insurance in the State of California, are bound to City as obligee in an amount not less than 100% of the amount of the Construction Contract Price pursuant to California Civil Code Sections 9550, et seq. Surety represents and warrants that it has assets exceeding its liabilities in an amount equal to or in excess of the amount of the bonds; and acts in compliance with Insurance Code Section 12090.
2. **Surety’s Obligation.** If Contractor or any of its Subcontractors fails to pay any of the persons named in California Civil Code Section 9100 amounts due under the Unemployment Insurance Code with respect to work or labor performed under the Construction Contract, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Contractor and its Subcontractors, under California Unemployment Insurance Code Section 13020, with respect to the work and labor, then Surety will pay for the same.
3. **Beneficiaries.** This Bond inures to the benefit of any of the persons named in California Civil Code Section 9100, so as to give a right of action to those persons or their assigns in any suit brought upon this Bond. Contractor must promptly provide a copy of this Bond upon request by any person with legal rights under this Bond.
4. **Duration.** If Contractor promptly makes payment of all sums for all labor, materials, and equipment furnished for use in the performance of the Construction Services required by the City Hall Contract, in conformance with the time requirements set forth in the City Hall Contract and as required by California law, Surety’s obligations under this Bond will be null and void. Otherwise, Surety’s obligations will remain in full force and effect.

5. **Waivers.** Surety waives any requirement to be notified of alterations to the City Hall Contract or extensions of time for performance of the Construction Services under the City Hall Contract. Surety waives the provisions of Civil Code Sections 2819 and 2845. City waives requirement of a new bond for any supplemental contract under Civil Code Section 9550. Any notice to Surety may be given in the manner specified in the Contract and delivered or transmitted to Surety as follows:

Attn: \_\_\_\_\_  
Address: \_\_\_\_\_  
City/State/Zip: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_  
Email: \_\_\_\_\_

6. **Law and Venue.** This Bond will be governed by California law, and any dispute pursuant to this Bond will be venued in the Superior Court of Contra Costa County, and no other place. Surety will be responsible for City's attorneys' fees and costs in any action to enforce the provisions of this Bond.

7. **Effective Date; Execution.** This Bond is entered into and is effective on \_\_\_\_\_, 20\_\_\_. Three identical counterparts of this Bond, each of which is deemed an original for all purposes, are hereby executed and submitted.

SURETY:

\_\_\_\_\_

s/ \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

(Attach Acknowledgment with Notary Seal and Power of Attorney)

Contractor:

Ascent Builders, Inc.

s/ \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

END OF PAYMENT BOND

**CITY OF SAN PABLO  
CITY HALL CONTRACT**

**PERFORMANCE BOND**

Pursuant to the City Hall Contract, dated < [REDACTED] >, 2017, entered into by the City of San Pablo (“**City**”) and Capital Partners Development Company LLC, Developer (“**Developer**”), Developer and Ascent Builders, Inc., a licensed general contractor (“**Contractor**”) have entered into a separate construction contract, dated < [REDACTED] >, 2017 (“**Construction Contract**”), pursuant to which Contractor will provide the construction services (“**Construction Services**”) required for the City Hall Development Project (“**Project**”) for \$< [REDACTED] > (the “**Construction Contract Price**”). The City Hall Contract and the Construction Contract are incorporated by reference into this Performance Bond (“**Bond**”).

1. **General.** Under this Bond, Contractor as principal and \_\_\_\_\_, its surety (“**Surety**”), which Surety is authorized by the California Insurance Commissioner to transact surety insurance in the State of California, are bound to City as obligee in an amount not less than 100% of the Construction Contract Price. Surety represents and warrants that it has assets exceeding its liabilities in an amount equal to or in excess of the amount of the bonds; and acts in compliance with Insurance Code Section 12090.
2. **Surety’s Obligations; Waiver.** If Contractor fully performs its obligations under the City Hall Contract and the Construction Contract, including its warranty obligations under the City Hall Contract, Surety’s obligations under this Bond will become null and void upon recordation of the notice of completion, provided Contractor has timely provided a warranty bond as required under the City Hall Contract. Otherwise Surety’s obligations will remain in full force and effect until expiration of the one year warranty period under the City Hall Contract. Surety waives any requirement to be notified of and further consents to any alterations to the City Hall Contract made under the applicable provisions of the City Hall Contract, including changes to the scope of the Construction Services or extensions of time for performance of the Construction Services. Surety waives the provisions of Civil Code Sections 2819 and 2845.
3. **Application of Contract Balance.** Upon making a demand on this Bond, City will make the Contract Balance for the City Hall Contract available to Surety for completion of the Construction Services under the City Hall Contract and the Construction Contract. For purposes of this provision, the “Contract Balance” is defined as the total amount payable by City to the Developer for the Construction Services price minus amounts already paid to Developer for the Construction Services, and minus any liquidated damages, allowance adjustments, credits, change order adjustments, or

backcharges to which City is entitled under the terms of the City Hall t Contract.

- 4. Contractor Default.** Upon written notification from City that Contractor is in default under Article 13 of the Contract General Conditions for the City Hall Contract, time being of the essence, Surety must act within the time specified in Article 13 to remedy the default through one of the following courses of action:

**4.1** Arrange for completion of the Construction Services by Contractor, with the City's consent, but only if Contractor is in default solely due to its financial inability to complete the Construction Services;

**4.2** Arrange for completion of the Construction Services under the Contract by a qualified contractor acceptable to City, and secured by performance and payment bonds issued by an admitted surety as required by the City Hall Contract, at Surety's expense, or

**4.3** Waive its right to complete the Construction Services under the City Hall Contract and reimburse City the amount of City's costs to have the remaining Construction Services completed.

- 5. Surety Default.** If Surety defaults on its obligations under the Bond, City will be entitled to recover all costs it incurs due to Surety's default, including legal, design professional, or delay costs.

- 6. Notice.** Any notice to Surety may be given in the manner specified in the Contract and delivered or transmitted to Surety as follows:

Attn: \_\_\_\_\_

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

- 7. Law and Venue.** This Bond will be governed by California law, and any dispute pursuant to this Bond will be venued in the Superior Court for Contra Costa County, and no other place. Surety will be responsible for City's attorneys' fees and costs in any action to enforce the provisions of this Bond.

- 8. Effective Date; Execution.** This Bond is entered into and effective on \_\_\_\_\_, 20\_\_\_. Three identical counterparts of this Bond, each of which is deemed an original for all purposes, are hereby executed and submitted.

SURETY:

\_\_\_\_\_

s/ \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

(Attach Acknowledgment with Notary Seal and Power of Attorney)

Developer

\_\_\_\_\_

s/ \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

END OF PERFORMANCE BOND

**CITY OF SAN PABLO  
CITY HALL CONTRACT**

**GENERAL CONDITIONS**

**Article 1  
Definitions**

**1.1 Definitions.** The following definitions apply to all of the Contract Documents unless otherwise indicated. Defined terms and titles of documents are capitalized in the Contract Documents, with the exception of the words “day,” “furnish,” “including,” “install,” “work day” or “working day.”

**Allowance** means an amount allocated for a specific Project component included within the Contract Price.

**Architect of Record** means Perkins, Williams & Cotterill Architects, the Design Professional retained by Developer.

**Article** means a numbered Article of the General Conditions, unless otherwise indicated by the context.

**Building** means the new City Hall building to be designed and constructed pursuant to the Contract Documents and Construction Documents.

**Change Order** means a written document duly approved and executed by City, which changes the scope of Work, the Contract Price, or the Contract Time.

**City** means the City of San Pablo, acting through its City Council, officers, employees, and authorized representatives.

**Civic Center Site** has the meaning provided in Recital A of the Contract.

**Claim** has the meaning provided in Article 12 on Dispute Resolution.

**Construction Contract** means the contract for Construction Services entered into between the Developer and Ascent Builders (Contractor), to provide the Construction Services for the Project.

**Construction Documents** means the Design Documents prepared by Developer, which have been approved by City for construction of the Project.

**Construction Manager** means < [REDACTED] >, the firm retained by City to provide construction management services on City’s behalf during the Design Phase and the Construction Phase of the Project.

**Construction Phase** means the period during which the Construction Services are performed to construct the Project, beginning with City's issuance of the notice to proceed with Construction Services and concluding upon City acceptance of the Project following Final Completion.

**Construction Services** means all of the Work required to construct the Project pursuant to the Construction Documents, including all Services required to be provided by or customarily provided by or under the direction of a licensed general contractor during the Construction Phase, and excluding the Design Services.

**Contract** means the signed agreement between City and Developer for the City Hall Development Project and the Contract Documents incorporated therein.

**Contract Balance** means the balance due on the Contract Price, as adjusted, minus the purchase price for the Property, as further specified in Section 3 of the Contract.

**Contract Documents** means, collectively, all of the documents listed in Section 1 of the Contract.

**Contract Price** means the total amount due from City to the Developer for Final Completion of the Project as set forth in Section 3 of the Contract, subject to all authorized adjustments.

**Contract Time** means the time specified for achieving Final Completion of the Work, as set forth in the Contract and as may be amended by Change Order.

**Contractor** means Ascent Builders, Inc., the duly licensed and qualified general contractor retained by Developer to perform the Construction Services required for this Contract.

**Day** means a calendar day unless otherwise specified.

**Design Documents** means the plans and specifications based on the Project Scope for construction of the Project which are developed by Design Professional.

**Design Phase** means the period during which the Design Documents are developed, concluding upon City approval of the Construction Documents.

**Design Professional** means Perkins, Williams & Cotterill Architects, the Architect of Record.

**Design Services** means all Services necessary during the Design Phase and the Construction Phase to design the Project in conformance with the Project

Scope, including, but not limited to all Services required to be provided by or customarily provided under the direction of a licensed architect or other design professional, and excluding the Construction Services.

**Developer** means Capital Partners Development Company, LLC.

**DIR** means the California Department of Industrial Relations.

**Engineer** means the City Engineer/Director of Public Works for the City of San Pablo and his other authorized delegee(s), which may include the Construction Manager.

**Event of Default** has the same meaning as that term is defined in the Indenture.

**FF&E** means the fixtures, furnishings, and equipment to be installed in the Building prior to occupancy.

**Final Completion** means the Contractor has fully completed all of the Work required by the Contract Documents, including all punch list items and commissioning, and has provided all required submittals, including the warranty bond, instructions and manuals, and as-built drawings to the City's satisfaction.

**Final Payment** means City's conveyance of the Property to Developer.

**Furnish**, whether or not capitalized, means to purchase and deliver to the Site designated for installation.

**Hazardous Materials** means any substance or material identified now or in the future as hazardous under any federal, state, or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal, or cleanup.

**Including**, whether or not capitalized, means "including, but not limited to," unless the context requires otherwise.

**Indenture** means the *Indenture by and Between City of San Pablo Financing Authority and Wells Fargo Bank, National Association, as Trustee*, referenced in the Contract Recitals.

**Inspector** means the individual(s) or firm(s) retained by City, including the Construction Manager, to inspect the workmanship, materials, and manner of construction of the Project and its components to ensure compliance with the Contract Documents and all applicable codes, regulations, and permits.

**Install** means to fix in place for materials, and to fix in place and connect for equipment.

**Project** means the City Hall Development Project for the design and construction of a new City Hall, as specified in the Contract.

**Project Schedule** means the schedule, subject to City's approval, for providing all Services necessary for Final Completion of the Project, including approved schedule updates.

**Project Scope** means, collectively, the document titled "Project Scope" and the attachments incorporated therein, which describe the City's intended Project Scope.

**Property** means the Civic Center Site.

**Proposal** means the Proposal dated July 5, 2016, submitted by Developer in response to the City's RFQ/RFP.

**Request for Qualifications/Request for Proposals (RFQ/RFP)** means the Request for Qualifications/Request for Proposals issued by City on June 14, 2016, soliciting proposals, for purchase and development of the Property and development of new City Hall facilities on a separate parcel.

**Schedule of Values** means the itemized breakdown of the Contract Price as specified in Section 8.2 of the General Conditions.

**Section** as used in these General Conditions, means a numbered Section of the General Conditions, unless otherwise indicated by the context.

**Services** means, collectively, all of the Design Services and all of the Construction Services which must be performed to completely design and construct the Project in accordance with the Contract Documents.

**Site** means the place where the Project is constructed, as further specified in the Project Scope.

**Specifications**, whether or not capitalized, means the Technical Specifications.

**Subcontractor** means any licensed contractor, of any tier, retained by Contractor to provide Construction Services.

**Subconsultant** means any licensed design professional retained by Design Professional to provide Design Services.

**Substantially Complete** or **Substantially Completed** means that the Project, has achieved Substantial Completion.

**Substantial Completion** means the Project has been constructed in accordance with the Construction Documents, with the exception of any punch list items, and the City has issued a certificate of occupancy (or comparable written approval) authorizing initial occupancy and beneficial use of the Building, including installation of the FF&E.

**Substantial Completion Deadline** means the time by which the Project must be Substantially Complete, as further specified in Section 5 of the Contract.

**Technical Specifications** means the technical specifications in the Construction Documents.

**Trustee** means Wells Fargo Bank, National Association, in its capacity as trustee under the Indenture.

**Weather Delay Day** means a Working Day during which Developer and its forces, including Subcontractors, are unable to perform more than 40% of the critical path Work scheduled for that day due to adverse weather conditions which impair the ability to safely or effectively perform the schedule critical path Work that day.

**Work** means all of the Construction Services necessary or incidental to completing the Project in conformance with the requirements of the Construction Documents.

**Work Day or Working Day**, whether or not capitalized, means a weekday which is not a holiday observed by City.

## **Article 2 Developer's Role and Responsibilities**

**2.1 Relationship of Trust and Confidence.** Developer accepts the relationship of trust and confidence established between it and City under this Contract. Developer agrees to furnish the Services necessary for the design and completion of the Project and agrees to use its best efforts to cause the Project to be designed and constructed in compliance with all applicable codes, laws, and regulations in effect at the time and in conformance with the Construction Documents stamped by the Architect of Record.

(A) ***Acting on Behalf of City Prohibited.*** Neither Developer nor any of its agents or employees may act on behalf of or in the name of City except as specifically authorized in writing by City.

(B) **Conflicts of Interest.** Developer must perform its obligations with integrity, ensuring that conflicts of interest are avoided.

**2.2 Scope of Services.** Developer is responsible for procuring the Services for the Project consistent with the Contract Documents as a whole. Developer must exercise reasonable skill and judgment in the procurement of the Services, consistent with the applicable industry practices and the terms and conditions of the Contract Documents.

**2.3 Design Services.**

(A) **Architectural and Engineering Services.** Architectural and engineering services must be provided by the Design Professional retained by Developer or by its Subconsultants. Developer may not engage the services of any Design Professional for this Project, without obtaining the City's prior written approval, which approval will not be unreasonably withheld. All Design Services must be guided by the Project Scope and on further refinements to the Design Documents as they are approved by City.

(B) **Project Schedule.** Within ten (10) days following full execution of the Contract, Developer must prepare and submit for City's review and approval a preliminary Project Schedule showing the timing and sequencing of the Design Services and Construction Services required to design and construct the Project. The preliminary Project Schedule should include completion of Construction Documents; procurement of Subcontractors; Construction Services; final close out; as well as any other milestones applicable to this Project. The Project Schedule must be updated for City's review and approval upon completion of each milestone included in the Project Schedule.

(C) **Construction Documents.** Within ninety (90) days following execution of the Contract, Developer must prepare and submit for City's review and approval, a complete set of Design Documents based on the Project Scope as modified by any City-approved changes, including changes approved and conditions required by the City Council. The Design Documents must set forth in detail the quality levels of and the requirements for construction of the Project, and consisting of drawings and specifications that comply with applicable codes, laws, and regulations in effect at the time of their preparation at the location of the Project. The Design Documents must incorporate all requirements for Construction Services set forth in Contract Documents. When submitting the Design Documents for City's approval, the Developer must identify in writing all material changes and deviations that have taken place since approval of any modifications to the Project Scope or any Preliminary

Design Documents, if any. Upon approval by City, and subject to any City-directed changes, the approved Design Documents will serve as the Construction Documents for the Construction Phase, and will be deemed fully incorporated into the Contract Documents. Two printed sets and one reproducible set of the final Construction Documents must be provided to the City.

(D) ***Ownership of Documents.***

(1) *Ownership of Tangible Documents.* City must receive ownership of all Design Documents and Construction Documents prepared by the Design Professional and Developer including documents, drawings, specifications, electronic data and information describing or depicting the Project or any aspect thereof as part of the Design Services.

(2) *Use of Documents in Event of Termination.* In the event of a termination of this Contract, City will have the right to use, to reproduce, and to make derivative works of the Design Documents or Construction Documents to complete the Project, regardless of whether there has been a transfer of copyright to City.

(3) *City's Use of Documents After Completion of Project.* After completion of the Project, City may reuse, reproduce or make derivative works from the Design Documents or Construction Documents solely for the purposes of maintaining, renovating, remodeling or expanding the Project at the Site.

(4) *Right to Use.* Developer will obtain from its Design Professional and subconsultants rights of use that correspond to the rights given by Developer to City in this Article and Developer must provide evidence that such rights have been secured.

(E) ***Subconsultants.*** Design Professional may use qualified and competent Subconsultants as necessary to perform and timely complete the Design Services in accordance with the Contract Documents.

(F) ***Insurance.*** Developer must require Design Professional and its Subconsultants to carry professional liability insurance as further specified in Article 4.

**2.4 Construction Services.**

(A) ***General.*** The Construction Services may not begin until the City has approved the Construction Documents, pursuant to Section 2.3; received and accepted the payment and performance bonds required

pursuant to Section 4.1; and issued a written notice to proceed with Construction Services. Developer must retain Contractor to provide the Construction Services, including all labor, materials, equipment and services necessary to perform and timely complete the Work including commissioning and close-out submittals, in strict accordance with the Construction Documents. Contractor must be bound and must comply with all applicable provisions of the Contract Documents, including the Construction Documents.

(B) **Responsibility for the Work.** Contractor is responsible for supervising and directing all aspects of the Work to facilitate the efficient and timely completion of the Work. Contractor is solely responsible for, and required to exercise full control over, construction means, methods, techniques, sequences, procedures, and coordination of all portions of the Work, except to the extent that the Contract Documents provide other specific instructions.

(C) **Subcontractors and employees.** Contractor must provide sufficient and competent Subcontractors, administration, staff, and skilled workforce necessary to perform and timely complete the Construction Services in accordance with the Contract Documents.

(D) **Superintendent Required.** Contractor must, at all times during performance of the Construction Services, provide a qualified full-time superintendent, acceptable to City, and assistants, as necessary, who must be physically present at the Project Site while any aspect of the Work is being performed.

(E) **Standards; Compliance.** Contractor must, at all times, ensure that the Work is performed in a good workmanlike manner and in full compliance with the Contract Documents and all applicable laws, regulations, codes, standards, and permits.

(F) **Responsible Party.** Developer is solely responsible to City for Contractor's and its Subcontractors' acts or omissions with regard to the Construction Services.

(G) **Correction of Defects.** Contractor must promptly correct, at no cost to City, any Work that is deficient or defective in workmanship, materials, and equipment.

(H) **Daily Reports.** Contractor must keep such full and detailed accounts as may be necessary for proper financial management under this Contract. City must be afforded access to all Contractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda, and similar data relating to Change Order work performed on

the basis of actual cost. Contractor must preserve all such records for a period of three years after the final payment or longer where required by law.

(I) **Contractor's Reports.** Contractor must provide periodic written reports to the Construction Manager on the progress of the Work in such detail as is required by City.

(J) **Project Meetings.** Contractor's project manager, project superintendent, and, as applicable, key Subcontractors, must attend a pre-construction conference and weekly Project meetings, which will be scheduled by the Developer.

(K) **Project Records.** Developer and Contractor must each maintain all of its records relating to the Project in any form, including paper documents, photos, videos and electronic records. Project records subject to this provision include, but are not limited to, daily reports, Project cost records and records relating to preparation of Developer's Proposal.

(1) Developer must require that Contractor's cost records include all supporting documentation, including original receipts, invoices, and payroll records, evidencing direct costs to perform the Work, including, but not limited to, costs for labor, materials and equipment. Each cost record should include, at a minimum, a description of the expenditure with references to the applicable requirements of the Contract Documents, the amount actually paid, the date of payment, and whether the expenditure is part of the original Contract Price, related to an executed Change Order, or otherwise categorized by Contractor as extra work. Contractor's failure to comply with this provision as to any claimed cost operates as a waiver of any rights to an adjustment to the Contract Price based on the claimed cost.

(2) Developer and Contractor must each continue to maintain its Project records in an organized manner for a period of four years after City's acceptance of the Project or following termination, whichever occurs first. Subject to prior notice to Contractor, City is entitled to inspect or audit any of Developer's or Contractor's Project records relating to the Project or to investigate Developer's or Contractor's plant or equipment during Contractor's normal business hours.

(L) **Local Preference.** In addition to the local hiring and contracting requirements set forth in the Contract, Developer must require that Contractor use materials, equipment and supplies from local vendors

when the price, fitness and quality are substantially equal to those available elsewhere without compromising fitness and quality.

(M) **Permits and Licenses.** Developer is responsible for timely obtaining at Developer's sole expense any permits or licenses required to perform the Work, unless otherwise specified in the Contract Documents.

## 2.5 Subcontractors.

(A) **General.** All Work which is not performed by Contractor with its own forces will be performed by qualified, licensed Subcontractors. Contractor must provide each Subcontractor with a complete set of the Construction Documents and any approved modifications thereto. City reserves the right to approve or reject any and all Subcontractors proposed to perform the Work.

(B) **Contractual Obligations.** Contractor must require every Subcontractor to be bound to the provisions of the Contract Documents as they apply to the Subcontractor's portion(s) of the Work, and to likewise bind their subcontractors or suppliers. Each subcontract must include the following:

(1) Provisions requiring all Subcontractors to be registered with the DIR and to comply with all applicable Labor Code provisions including Article 9, Labor Provisions, herein;

(2) Provisions for initiating, maintaining and providing supervision of safety precautions and programs in connection with the construction of the Project, including compliance with Article 10, Safety Provisions;

(3) Provisions for indemnifying City against any and all claims arising out of the negligence or willful misconduct of such Subcontractor and its employees or agents, consistent with the indemnity requirements in Article 4; and

(4) Provisions for assignment to the City and the Trustee upon an Event of Default under the Indenture for which Developer has received written notice from the City.

(C) **Termination.** If the Contract is terminated, each Subcontractor's agreement must be assigned to City and the Trustee, subject to the prior rights of any surety, provided that the City and Trustee each accept the assignment by written notification, and jointly assume all rights and obligations of Contractor pursuant to each such subcontract agreement.

## 2.6 Coordination of Work.

(A) **Concurrent Work.** City reserves the right to perform or to have performed other work on or adjacent to the Project Site while the Work is being performed, including installation of FF+E prior to Final Completion. Contractor and other contractors or subcontractors performing work on or adjacent to the Project Site are responsible for coordinating all work being performed, and must avoid hindering, delaying, or interfering with each other or the work of any other contractors and subcontractors. Developer is responsible for damages arising from Contractor's negligent or willful hindrance of, delay to, or interference with the work of another contractor or subcontractor.

(B) **Defects.** Before proceeding with any portion of the Work affected by the construction or operations of others, Contractor must give the City prompt written notification of any defects Contractor discovers which will prevent the proper execution of the Work. Failure to give notice of any such known defects will be deemed acknowledgement by Developer that the work of others is not defective and will not prevent the proper execution of the Work.

**2.7 Contractor Representative.** Contractor must designate a person to be Contractor's authorized representative, subject to City's approval, which will not unreasonably be withheld.

## Article 3 Contract Documents

**3.1 The Contract Documents.** The Contract Documents are comprised of the following:

- (A) Duly authorized and executed Change Orders;
- (B) The Contract and any duly authorized and executed amendments thereto;
- (C) The Special Conditions;
- (D) The General Conditions;
- (E) The City-approved Construction Documents;
- (F) The Project Scope and attachments thereto;
- (G) Notice to Proceed with Construction Services;

- (H) Notice to Proceed with Design Services;
- (I) The payment and performance bonds provided by the Contractor pursuant to the Construction Contract;
- (J) City's RFQ/RFP, dated June 14, 2016, and all addenda thereto; and
- (K) The Proposal, dated July 5, 2016.

**3.2 Order of Precedence.** Information included in one Contract Document but not in another will not be considered a conflict or inconsistency. In case of any conflict or inconsistency among the Contract Documents, the order of precedence will follow the order in which the Contract Documents are listed in Section 3.1, above, which are listed from highest to lowest.

**3.3 Project Scope.** The Project Scope includes a narrative description of the Project, and attaches and incorporates preliminary Design Documents and details. The Project Scope expresses the general intent for the final Project design. The Developer is responsible to hire and coordinate all associated Design Services (architectural, structural, MEP, civil engineering, landscape architecture, etc.), for the structures and systems whether shown or implied in the Project Scope and Design Criteria or required for a complete Project built to current governing codes. The Project Scope attaches and includes the following, listed in descending order of precedence:

- (A) Attachment 1: The preliminary Design Documents prepared by Perkins, William & Cotterill Architects, including preliminary drawings, floor plans, and elevations; and
- (B) Attachment 2: Preliminary Details.

**3.4 For Reference Only.** Developer, Design Professional, and Contractor are responsible for the careful review of any document, study, or report appended to the Contract Documents solely for informational purposes and identified as "For Reference Only." Nothing in any document, study, or report so appended and identified is intended to supplement, alter, or void any provision of the Contract Documents. However, City or its representatives may be guided by information or recommendations included in such reference documents, particularly when making determinations as to the acceptability of proposed materials, methods, or changes in the Work.

## **Article 4**

### **Bonds, Indemnity, and Insurance**

**4.1 Payment and Performance Bonds.** Within ten days following City's final approval of the Construction Documents, Contractor is required to provide a payment bond and a performance bond, each in the penal sum of not less than 100% of the Construction Contract price, using the bond forms included with the Contract Documents. Each bond must be issued by a surety admitted in California. If an issuing surety cancels the bond or becomes insolvent, within seven days following written notice from City, Contractor must substitute a surety acceptable to City. If Contractor fails to substitute an acceptable surety within the specified time, City may, at its sole discretion, withhold payment from Developer until the surety is replaced to City's satisfaction, or terminate the Contract for default.

**4.2 Warranty Bond.** Upon Final Completion, Contractor is required to provide a warranty bond, in a form approved by City's City Attorney, in the amount of fifty percent (50%) of the Construction Contract price, as a full guarantee for the one (1) year warranty requirement set forth in Article 11 herein.

**4.3 Insurance.** Within ten days following execution of the Contract, Developer must submit proof that Developer and Design Professional have obtained the insurance coverage required for Developer and for Design Professional pursuant to this Section in the form of certificates and endorsements acceptable to City. The required insurance must cover the activities of Developer and Design Professional, respectively, relating to or arising from providing the Services, and must remain in full force and effect at all times during the period covered by the Contract, through the date of the City's acceptance of the Project, except as otherwise specified. In addition, the Construction Contract must require that no later than ten days following City's final approval of the Construction Documents, Contractor is required to procure and provide proof of the insurance coverage required by this Section in the form of certificates and endorsements acceptable to City. The insurance required for the Construction Contract must cover activities of Contractor and its Subcontractors relating to or arising from the performance of the Work, and must remain in full force and effect at all times during the period covered by the Construction Contract, through the date of the City's acceptance of the Project. All insurance coverage required pursuant to this Section must be issued by a company licensed to do business in the State of California, and each such insurer must have an A.M. Best's financial strength rating of "A" or better and a financial size rating of "VIII" or better. If Developer, Design Professional, or Contractor fails to provide any of the required coverage in full compliance with the requirements of the Contract Documents, City may, at its sole discretion, purchase such coverage at Developer's expense and deduct the cost from the Contract Price. The procurement of the required insurance will not be construed to limit Developer's, Design Professional's, or Contractor's respective liability under this Contract or to fulfill any indemnification obligations under the Contract.

(A) ***Policies and Limits.*** The following insurance policies and limits are required for this Project:

(1) *Commercial General Liability Insurance ("CGL"):* Developer, Design Professional, and Contractor must each be covered by a separate CGL policy, each of which must be issued on an occurrence basis, written on a comprehensive general liability form, and must include coverage for liability arising from the insured's operations in the performance of the Work, including insured's protected coverage, blanket contractual, completed operations, vehicle coverage and employer's non-ownership liability coverage. For Developer and Contractor the minimum policy limits are at least \$5,000,000 per occurrence, and \$10,000,000 aggregate. For Design Professional the minimum policy limits are at least \$1,000,000 per occurrence, and \$2,000,000 aggregate.

(2) *Builder's Risk Insurance:* Developer must obtain a Builder's Risk Insurance policy issued on occurrence basis, for all-risk coverage on a 100% completed value basis on the insurable portion of the Project for the benefit of City.

(3) *Workers' Compensation Insurance and Employer's Liability:* Contractor must carry workers' compensation coverage in full compliance with the requirements of the California Workers' Compensation Insurance and Safety Act, with coverage of at least \$1,000,000.00. If Contractor is self-insured, Contractor must provide its Certificate of Permission to Self-Insure, duly authorized by the Department of Industrial Relations.

(4) *Automobile Liability.* Developer, Design Professional, and Contractor must each be covered by a separate automobile liability policy that provides coverage of at least \$1,000,000 combined single-limit per accident for bodily injury, death or property damage.

(5) *Professional Liability.* During the entire period that the Contract is in effect, including the Design Phase and the Construction Phase, Design Professional must carry professional liability insurance that insures against its negligent errors or omissions in providing Design Services, with coverage limits of at least \$2,000,000 combined single limit. The professional liability insurance must include prior acts coverage sufficient to cover all Design Services provided by Design Professional for the Project, which must remain in effect for four years following City's acceptance of the Project as complete.

(B) **Notice.** Each certificate of insurance must state that the coverage afforded by the policy or policies will not be reduced, cancelled or allowed to expire without at least 30 days written notice to City, unless due to non-payment of premiums, in which case ten days written notice must be made to City.

(C) **Waiver of Subrogation.** Each policy required pursuant to this Section must include an endorsement providing that the carrier agrees to waive any right of subrogation it may have against City.

(D) **Required Endorsements.** The CGL policies and the Builder's Risk Policy must include the following specific endorsements:

(1) Each required CGL policy must name City as an additional insured for all liability arising out of the operations by or on behalf of the named insured, and must protect City, its officers, employees, and agents against any and all liability for personal injury, death, or property damage or destruction arising directly or indirectly in the performance of the Services. The additional insured endorsement must be provided using ISO form CG 20 10 11 85 alone, or both forms CG 20 10 10 01 and CG 20 37 10 01.

(2) The inclusion of more than one insured will not operate to impair the rights of one insured against another, and the coverages afforded will apply as though separate policies have been issued to each insured.

(2) The insurance provided by the insured is primary and no insurance or self-insurance held or owned by City, its officers, officials, employees or volunteers may be called upon to contribute to a loss. Any insurance or self-insurance held or owned by City, its officers, officials, employees and volunteers is excess to the insured's insurance and may not be called on to cover or contribute to any loss covered by insured's insurance.

(3) This policy does not exclude explosion, collapse, underground excavation hazard, or removal of lateral support.

(E) **Subcontractors.** Developer and Contractor must ensure that each Subcontractor is required to maintain the same insurance coverage required under this Section 4.3, with respect to its performance of Work on the Project, including those requirements related to the additional insureds and waiver of subrogation, except, however, that the CGL coverage limits for Subcontractors are at least \$1,000,000 per occurrence, and \$2,000,000 aggregate. The Construction Contract must require that Contractor confirm that each Subcontractor has complied with these

insurance requirements before the Subcontractor is permitted to begin Work on the Project. Upon request by the City, Developer must provide certificates and endorsements submitted by each Subcontractor to prove compliance with this requirement. The insurance requirements for Subcontractors do not replace or limit Developer's or the Contractor's insurance obligations.

(F) ***Deductibles and Self-Insured Retentions.*** Any deductibles or self-insured retentions that apply to the required insurance (collectively, "deductibles") are subject to approval by City, acting in its sole discretion, and must be declared by each insured party when it submits its certificates of insurance and endorsements pursuant to this Section 4.3. If City determines that the deductibles for any required policy are unacceptably high, Developer must provide a financial guarantee, to City's satisfaction, guaranteeing payment of losses and related investigation, claim administration, and legal expenses.

#### **4.4 Indemnity and Liability.**

(A) ***Developer's Indemnity Obligation.*** To the fullest extent permitted by law, Developer must indemnify, defend, and hold harmless City and Trustee and their respective officers, employees, agents, and consultants (individually, an "Indemnitee," and collectively the "Indemnitees") from and against any and all liability, loss, damage, claims, expenses (including, without limitation, attorney fees, expert witness fees, paralegal fees, and fees and costs of litigation or arbitration) (collectively, "Liability") arising out of or in connection with the Project, including the operations of Developer, Contractor, Design Professional, Subconsultants, and Subcontractors, and their respective employees, representatives, or agents, in performing the Services or their failure to comply with any of its obligations under the Contract, except such Liability caused by the active negligence, sole negligence, or willful misconduct of an Indemnitee. Developer's failure or refusal to timely accept a tender of defense pursuant to this provision will be deemed a material breach of this Contract.

(B) ***Third Party Claims.*** City will timely notify Contractor upon receipt of any third-party claim relating to the Construction Services, as required by Public Contract Code Section 9201.

(C) ***No Personal Liability.*** No member of the City Council or any individual officer, employee or authorized agent of the City will be personally liable to Developer, Design Professional, Contractor, or to any Subcontractor for any liability arising under this Contract.

## **Article 5 Contract Time**

**5.1 Time is of the Essence.** Time is of the essence in Developer's performance and completion of the Services, and Developer must ensure that Design Professional and Contractor diligently prosecute the Services to ensure the Project is completed within the Contract Time.

(A) **General.** Developer must ensure that Design Professional and Contractor fully complete the Services in strict compliance with all requirements of the Contract Documents, and within the Contract Time.

(B) **Rate of Progress.** Design Professional and Contractor must, at all times, provide Subconsultants, Subcontractors, staff, workers, materials, and equipment sufficient to maintain the rate of progress necessary to ensure full completion of the Services within the Contract Time. If City determines that Design Professional or Contractor is failing to prosecute the Services at a sufficient rate of progress, City may, in its sole discretion, direct Developer to require Design Professional or Contractor to provide additional workers, materials, or equipment, or to work additional hours or days without additional cost to City, in order to achieve a rate of progress in conformity with the Project Schedule as modified by permitted delays. If Developer, Design Professional or Contractor fails to comply in this regard, City may separately contract for additional workers, materials, or equipment or use City's own forces to achieve the necessary rate of progress, the cost of which may be deducted from the Contract Price. Alternatively, City may terminate the Contract based on Developer's default.

**5.2 Schedule Requirements for Construction Services.** All schedules must be prepared using standard scheduling software acceptable to the Engineer, and Contractor must provide schedules in electronic and paper form as requested.

(A) **As-Planned (Baseline) Schedule.** Within 15 calendar days following City's approval of Construction Documents, Developer must submit to City for review and approval Contractor's as-planned Project Schedule showing in detail how Contractor plans to perform and fully complete the Construction Services within the Contract Time using critical path methodology. The as-planned schedule must include the work of all trades required for the Work, and must be sufficiently comprehensive and detailed to enable progress to be monitored on a day-by-day basis. For each activity, the as-planned schedule must be dated and must include, at a minimum, a description of the activity, the start and completion dates, and the duration.

(B) **Progress Schedules.** No later than the fifth day of each calendar month during which Construction Services are in progress, Contractor must submit an updated progress schedule and three-week look-ahead schedule to Construction Manager for review and acceptance. The progress schedule must show how the actual progress of the Work to date compares to the as-planned schedule, and must identify any actual or potential impacts to the critical path affecting Substantial Completion or Final Completion.

(C) **Recovery Schedule.** If City determines that the Work is more than one week behind schedule, within seven days following written notice of such determination, Contractor must submit a recovery schedule, showing how the Contractor intends to perform and complete the Work within the Contract Time, based on actual progress to date.

(D) **City Review.** Contractor and its Subcontractors must perform the Work in accordance with the most current schedule that has been accepted by City. City's review of a schedule prepared by Developer or Contractor does not operate to extend the time for completion of the Work or any component of the Work, and will not affect City's right to assess liquidated damages for Contractor's unexcused delay in completing the Work within the Contract Time.

(E) **Posting.** Contractor must at all times maintain a copy of the most current approved progress or recovery schedule posted prominently in its on-Site office.

(F) **Reservation of Rights.** Developer and Contractor will coordinate with City to facilitate the performance of work by City or others, or to facilitate City's use of its property. The Contract Time or Contract Price may be adjusted to the extent such changes in sequence actually increase or decrease the time or cost to perform the Work.

(G) **Authorized Working Days and Times.** Contractor is limited to working Monday through Friday, excluding holidays, during City's normal business hours, except as expressly provided in the Special Conditions, or as authorized in writing by City. Additional costs incurred by City due to Work performed on days or during hours not expressly authorized in these Contract Documents, including reimbursement of costs incurred for inspection, testing, and construction management services may be deducted from the Contract Price.

### **5.3 Delay and Extensions of Contract Time for Construction Services.**

(A) **Excusable Delay.** The Contract Time may be extended if Contractor encounters an unavoidable delay in completing the Work within

the Contract Time due to causes completely beyond Contractor's control, and which Contractor could not have avoided or mitigated through planning, foresight, and diligence ("**Excusable Delay**"). Grounds for Excusable Delay may include fire, earthquake, acts of terror or vandalism, epidemic, unforeseeable adverse government actions, unforeseeable actions of third parties, encountering unforeseeable hazardous materials, unforeseeable site conditions, suspension for convenience under Article 13, or unusually severe weather. Developer is not entitled to any extension of the Contract Time or Increase to the Contract Price for Excusable Delay that is concurrent with Non-Excusable Delay.

(B) **Non-Excusable Delay.** Non-Excusable Delay includes delay to Final Completion that Contractor could have avoided or mitigated through planning, foresight and diligence, and includes delay caused by:

(1) Normal Weather Delay Days, which are deemed to be a total of 20 Weather Delay Days during the Construction Phase of the Work;

(2) Contractor's failure to order equipment and materials sufficiently in advance of the time needed for timely completion of the Work;

(3) Contractor's failure to provide adequate notification to utility companies for connections or services necessary for the timely performance and completion of the Work;

(4) foreseeable conditions Contractor could have ascertained from reasonably diligent inspection of the Site or review of the Construction Documents; or

(5) Contractor's financial inability to perform the Work, including insufficient funds to pay its Subcontractors or suppliers.

(C) **Request for Extension.** A request for an extension of and the Contract Time or an adjustment to the Contract Price based on associated delay costs must be submitted in writing to the City within ten calendar days of the date the delay is first encountered, even if the duration of the delay is not yet known at that time, or will be deemed waived. In addition to complying with the requirements of this Article 5, the request must be submitted in compliance with the Change Order request procedures in Article 6, below. Strict compliance with these requirements is necessary to ensure that any delay or delay costs may be mitigated as soon as possible, and to facilitate cost-efficient administration of the Project and timely performance of the Work. Any request for an extension of time or an adjustment to the Contract Price for delay costs that does not strictly

comply with the requirements of Article 5 and Article 6 will be deemed waived.

(1) *Required Contents.* The request must include a detailed description of the cause(s) of the delay, and must also describe the measures that Contractor has taken to mitigate the delay and/or its effects, including efforts to mitigate the cost impact of the delay, e.g., by workforce management, change in sequencing, etc. If the delay is still ongoing at the time the request is submitted, the request should also include Contractor's plan for continued mitigation of the delay or its effects.

(2) *Delay Days and Costs.* The request must specify the number of days of Excusable Delay claimed, or provide a realistic estimate if the duration of the delay is not yet known. The request must specify the amount of any delay-related costs that are claimed, or provide a realistic estimate if the amount is not yet known. Any estimate of delay duration or cost must be updated in writing and submitted with all required supporting documentation as soon as the actual time and cost is known.

(3) *Supporting Documentation.* The request must also include any and all supporting documentation necessary to evidence the delay and its actual impacts, including schedule and cost impacts, including a time impact analysis using critical path methodology, and demonstrating unavoidable delay to Substantial Completion, Final Completion, or both, as applicable. The time impact analysis must be submitted in a form or format acceptable to City.

(4) *Burden of Proof.* Developer has the burden of proving 1) that the delay was an Excusable Delay, as defined above, 2) that Contractor has made reasonable efforts to mitigate the delay and its schedule and cost impacts, 3) that the delay will unavoidably result in delaying Substantial Completion, Final Completion, or both, and 4) that any delay costs claimed by Contractor were actually incurred and were reasonable under the circumstances.

(5) *Recoverable Costs.* If Developer is granted an extension of time for Excusable Delay, recompense for delay costs will be limited to actual, direct, reasonable, and substantiated costs, and will not include home office overhead, or markup for overhead and profit.

(6) *Legal Compliance.* Nothing in this provision is intended to require the waiver, alteration, or limitation of the applicability of Public Contract Code Section 7102.

(7) *No Waiver.* Any grant of an extension of time or delay costs due to an Excusable Delay will not operate as a waiver of City's right to assess liquidated damages for unexcused delay.

(8) *Dispute Resolution.* In the event of a dispute over entitlement to an extension of time or delay costs, Contractor may not stop working pending resolution of the dispute, but must continue to comply with its duty to diligently prosecute the performance and timely completion of the Work. Developer's sole recourse for an unresolved dispute based on City's rejection of a Change Order request for an extension of time or delay costs is to comply with the Dispute Resolution provisions set forth in Article 12, below.

**5.4 Liquidated Damages.** It is expressly understood that if Substantial Completion is not achieved by the Substantial Completion Deadline, or if Final Completion is not achieved within the Contract Time, City will suffer damages which are difficult to determine and accurately specify. Pursuant to Public Contract Code 7203, if Project fails to achieve Substantial Completion by the Substantial Completion Deadline or if it fails to achieve Final Completion within the Contract Time, City will charge Developer in the amounts specified in the Contract for each day that Substantial Completion is delayed beyond the Substantial Completion Deadlines, and for each day that Final Completion is delayed beyond the Contract Time, as liquidated damages and not as a penalty.

(A) ***Excusable Delay.*** Liquidated damages will not be assessed for any Excusable Delay, as set forth above.

(B) ***Concurrent Assessment.*** Liquidated damages may be assessed concurrently. Liquidated damages assessed for delay in achieving Substantial Completion will continue to be assessed until Substantial Completion has been achieved, in addition to any concurrent liquidated damages, if any, for failure to achieve Final Completion.

(C) ***Setoff.*** City is entitled to deduct the amount of liquidated damages assessed from the Contract Balance. If there are insufficient retention funds remaining to cover the full amount of liquidated damages assessed, City is entitled to recover the balance from Contractor's performance bond surety.

(D) ***Occupancy or Use.*** Occupancy or use of the Project in whole or in part prior to Substantial Completion does not constitute City's acceptance of Project and will not operate as a waiver of City's right to assess liquidated damages for Developer's unexcused delay in achieving Substantial Completion or Final Completion.

## **Article 6 Contract Modification**

**6.1 Changes in Work.** City reserves the right to make changes to the Project Scope or to the Construction Documents without invalidating the Contract. City may direct, or Developer or Contractor may request, changes in the Work, and any such changes will be formalized in a Change Order, which may include commensurate changes in the Contract Price or Contract Time as applicable. Contractor must promptly comply with City-directed changes in the Work in accordance with the intent of the original Contract Documents, even if Developer and City have not yet reached agreement as to adjustments to the Contract Price or Contract Time.

(A) **City-Directed Change.** The Engineer is authorized to direct minor changes to the Work which do not involve a change in Contract Time or a change in Contract Price; and, in the event of an emergency, the Engineer is also authorized to direct extra work needed to avoid imminent harm to persons or property. The Engineer will provide its direction to the Developer. In the event of a dispute over entitlement to or the amount of a change in Contract Time or a change in Contract Price related to a City-directed change, Contractor must perform the Work as directed and may not delay its work or cease work pending resolution of the dispute, but must continue to comply with its duty to diligently prosecute the performance and timely completion of the Work, including the Work in dispute. If the Construction Manager requests a cost proposal for extra Work from the Developer, the Developer must respond within five working days, or as soon as reasonably practicable given the scope or complexity of the proposal.

(B) **Developer's Obligations.** In the event that City and Developer dispute whether a portion or portions of the Work are already required by the Contract Documents as opposed to changed or extra Work, Contractor must perform the Work as directed by City to Developer and may not delay its Work or cease Work pending resolution of the dispute, but must continue to comply with its duty to diligently prosecute the performance and timely completion of the Work, including the Work in dispute.

(C) **Remedy for Non-Compliance.** If Contractor fails to promptly comply with a City-directed change, City may, at its sole discretion, hire another contractor or use its own forces to complete the disputed Work at Developer's sole expense, and may deduct the added cost to the City to hire another contractor to perform Work included in the Contract Price from the Contract Price.

**6.2 Developer Change Order Requests.** Developer must submit a request or proposal for a change in the Work or a change in the Contract Price or Contract Time as a written Change Order request or proposal.

(A) **Time for Submission.** Any request for a change in the Contract Price must be submitted in writing to the Engineer within ten calendar days of the date that Developer first learns of the circumstances, information or conditions giving rise to the Change Order request, even if the total amount of the requested change in the Contract Price or impact on the Contract Time is not yet known at that time.

(B) **Required Contents.** Any Change Order request or proposal must include a complete breakdown of actual or estimated costs and credits, and must itemize labor, materials, equipment, taxes, insurance, and subcontract amounts. Any estimated cost must be updated in writing as soon as the actual amount is known.

(C) **Required Documentation.** All claimed costs must be fully documented, and any related request for an extension of time or delay-related costs must be included at that time and in compliance with the requirements of Article 5 of the General Conditions.

(D) **Required Form.** The City's form must be used for submitting all Change Order requests or proposals, unless otherwise specified by City. City forms may be requested or obtained at the pre-construction conference.

(E) **Certification.** All Change Order requests must be signed by Developer and must include the following certification:

“The undersigned Developer certifies under penalty of perjury that its statements and representations in this Change Order request are true and correct. Developer warrants that this Change Order request is comprehensive and complete, and agrees that any costs, expenses, or time extension request known at the time of the request and not included herein will be deemed waived. Developer understands that submission of claims which have no basis in fact or which Developer knows to be false may violate the False Claims Act, as set forth in Government Code Sections 12650 et seq., and Chapter 3.17 of the San Pablo Municipal Code.”

**6.3 Adjustments to Contract Price.** The amount of any increase or decrease to the Contract Price for Change Order Work will be determined by the City based on one of the following methods in the order provided:

- (A) **Lump Sum.** A mutually agreed upon lump sum.
- (B) **Time and Materials.** On a time and materials basis, which may be subject to a not-to-exceed limit, calculated as the total of the following sums:
- (1) All of Contractor's direct labor costs, excluding superintendence, plus 15% for overhead and profit;
  - (2) All of Contractor's direct material costs, including sales tax, plus 15% for overhead and profit;
  - (3) All of Contractor's direct plant and equipment rental costs, plus 15% for overhead and profit;
  - (4) All direct subcontract costs plus 5% for overhead and profit;  
and
  - (5) Increased bond or insurance premium costs computed at 1.5% of total of the previous four sums.
  - (6) All direct costs for Design Services, if required for the Change Order Work (excluding costs to correct Design Professional's errors or omissions); and any direct costs for additional permitting, also with no added markup.

**6.4 Unilateral Change Order.** If City disagrees with the amount of compensation or extension of time that Developer has requested, City may elect to issue a unilateral Change Order, directing performance of the Work, and authorizing a change in the Contract Price or Contract Time in the amount City believes is merited.

**6.5 Non-Compliance Deemed Waiver.** Developer waives its entitlement to any increase in the Contract Price or Contract Time if Developer fails to fully comply with the provisions of this Article. The Contract Price or Contract Time will not be increased for unauthorized extra work.

## **Article 7 General Construction Provisions**

### **7.1 Permits and Taxes.**

- (A) **General.** As part of the Contract Price, Developer or Contractor must obtain and all permits, fees, or licenses required to perform the Work, unless otherwise indicated in the Contract Documents, including a

building permit from the City. Contractor must cooperate with and provide notifications to government agencies with jurisdiction over the Project, as may be required. Contractor must provide City with copies of all notices, permits, licenses, and renewals required for the Work.

(B) **Federal Excise Tax.** The Contract Price includes all taxes on labor, material and equipment, except federal excise tax, but only to the extent that City is exempt from federal excise tax.

**7.2 Temporary Facilities.** Contractor must provide any and all temporary facilities, including onsite office, sanitary facilities, storage, scaffolds, barricades, walkways, and any other temporary structure required to safely perform the Work along with any utility services incidental thereto.

(A) **Standards.** Such structures must be safe and adequate for the intended use, and installed and maintained in accordance with all applicable federal, state, and local laws, codes, and regulations.

(B) **Removal and Repair.** Contractor must promptly remove all such temporary facilities when they are no longer needed or upon completion of the Work, whichever comes first. Contractor must promptly repair any damage to City's property caused by the installation, use, or removal of the temporary facilities, and must promptly restore the property to its original or intended condition.

(C) **Additional Requirements.** Additional provisions pertaining to temporary facilities may be included in the Special Conditions, or the Construction Documents.

**7.3 Signs.** No signs may be displayed on or about City's property, except signage which is required by law or by the Contract Documents, without City's prior written approval as to type of content, size, design, and location.

**7.4 Protection of Work and Property.**

(A) **General.** Contractor is responsible at all times for protecting the Work and materials and equipment to be incorporated into the Work from damage until the Project has been accepted by the City following Final Completion. Except as specifically authorized by City, Contractor must confine its operations to the area of the Project Site indicated in the Construction Documents. Contractor is liable for any damage caused to City's real or personal property, the real or personal property of adjacent property owners, or the work or personal property of other contractors working for City. Any existing facilities that are broken or damaged by the installation of Work must be repaired or replaced with the same kind of material, the same finish, and in not less than the same dimensions as the

original work. All such repairs or replacements must match the appearance of the existing facilities as nearly as possible.

(B) **Unforeseen Conditions.** If Contractor encounters facilities, utilities, or other unknown conditions not shown on or reasonably inferable from the drawings or apparent from inspection of the Project Site, Contractor must promptly notify the City, and must avoid taking any action which could cause damage to the facilities or utilities pending further direction from the City. If the City's subsequent direction to Contractor affects Contractor's cost or time to perform the Work, Developer may submit a Change Order request as set forth in Article 6, above.

(C) **Support; Adjacent Properties.** Contractor must provide, install, and maintain all shoring, bracing, underpinning, etc., necessary to provide support to City's property and adjacent properties and improvements thereon. Developer must provide notifications to adjacent property owners as may be required by law.

**7.5 Noninterference.** Contractor must take reasonable measures to avoid interfering with City's use of its property at or adjacent to the Project site, including use of roadways, entrances, parking areas, walkways, and structures.

#### **7.6 Materials and Equipment.**

(A) **General.** Unless otherwise specified, all materials and equipment required for the Work must be new and of the best grade for the intended purpose, and furnished in sufficient quantities to ensure the proper and expeditious performance of the Work. Unless otherwise specified, all materials and equipment required for the Work are deemed to include all components required for complete installation and intended operation, and must be installed in accordance with the manufacturer's recommendation. Contractor is responsible for all shipping, handling, and storage costs associated with the materials and equipment required for the Work, and is responsible for protecting the Work and all of the required materials, supplies, tools and equipment at no additional cost to City until City accepts the Project.

(B) **City-Provided.** If the Work includes installation of materials or equipment to be provided by City, Contractor is solely responsible for the proper examination, handling, storage, and installation of such items in accordance with the Contract Documents. Contractor must promptly notify City of any defects discovered in City-provided materials or equipment. Developer is solely responsible for any loss of or damage to such items which occurs while the items are in Contractor's custody and control, the cost of which may be offset from the Contract Price and deducted from any payment(s) due to Developer.

(C) **Intellectual Property Rights.** Developer or Contractor must obtain any authorization required for use of patented or copyright protected materials, equipment, devices or processes that are incorporated into the Work. The Contract Price includes the cost, if any, of such required authorizations. Developer's indemnity obligation in Article 4, applies to any claimed violation of intellectual property rights in violation of this provision.

## 7.7 Substitutions.

(A) **"Or Equal."** Any specification in the Project Scope or Construction Documents designating a material, product, thing, or service by specific brand or trade name, followed by the words "or equal," is intended only to indicate quality and type of item desired, and Developer may request use of any equal material, product, thing, or service.

(B) **Request for Substitution.** A request for substitution must be submitted to the City for approval as soon as reasonably possible following discovery of need for substitution.

(C) **Substantiation.** All data substantiating the proposed substitute as an "equal" item must be submitted with the written request for substitution. Developer's failure to timely provide necessary substantiation is ground for rejection of the proposed substitution, without further review.

(D) **Burden of Proving Equality.** Developer has the burden of proving the equality of the proposed substitution. The Engineer has sole discretion to determine whether a proposed substitution is "equal," and the Engineer's determination is final.

(E) **Developer's Obligations.** The City's review of a proposed substitution will not relieve Developer or Contractor from any of their obligations under the Construction Documents. In the event Contractor makes an unauthorized substitution, Developer will be solely responsible for all resulting cost impacts, including the cost of removal and replacement and the impact to other design elements.

## 7.8 Testing and Inspection.

(A) **General.** All materials, equipment, and workmanship used in the Work are subject to inspection by Construction Manager or Inspector at all times and locations during construction and/or fabrication. All manufacturers' application or installation instructions must be made available to the Inspector at least ten days prior to the first such application or installation. Contractor must, at all times, make the Work available for inspection. During or prior to the preconstruction conference,

Developer, Construction Manager, and Engineer may propose that mutually acceptable revisions to this Section 7.8 may be submitted for City-approval as a no-cost Change Order, provided that any such revisions will not operate to limit the City's right to ensure that the Work is completed in accordance with applicable requirements and standards.

(1) The Inspector may not be available on the Project Site at all times during construction. Contractor must plan ahead and schedule inspections at least two working days before the inspections are needed.

(2) The Construction Manager and the Inspector are each authorized to inform Contractor if any portion of the Work does not conform to the requirements of the Construction Documents. If Contractor fails to take timely action to correct any such nonconformance, the Construction Manager and Inspector are each authorized to act on behalf of City to stop the Work affected by the nonconformance until the appropriate correction has been made. Construction Manager and Inspector also have authority to stop the Work based upon an unsafe condition or emergency. Developer is not entitled to an extension of the Contract Time or increase in the Contract Price for Work stopped due to unsafe conditions created by Contractor.

(3) The Contract Price will be adjusted by deducting inspection costs, at City's established rates, for inspection time lost because the Work is not ready or Contractor fails to appear for a scheduled inspection.

(B) **Scheduling and Notification.** Contractor must be required to schedule all inspection and testing required under the Contract Documents. Contractor must schedule all inspection and tests required by the Contract Documents in time to avoid any delay to the progress of the Work. Contractor must provide timely notice to all necessary parties as specified in the Contract Documents.

(C) **Responsibility for Costs.** City will bear the initial cost of testing or inspection to be performed by independent testing or inspection consultants retained by City, subject to the following exceptions:

(1) The Contract Price will be adjusted by deducting the costs of any subsequent tests or inspections which are required to substantiate compliance with the Contract Documents, and any associated remediation costs.

(2) In addition, if any portion of the Work which is subject to testing or inspection is covered or concealed by Contractor prior to testing, the Contract Price will be adjusted by deducting the cost of making that portion of the Work available for the testing or inspection required by the Contract Documents, and any associated repair or remediation costs.

(D) **Developer's Obligations.** Any Work that fails to comply with the requirements of the Contract Documents must be promptly repaired, replaced, or corrected by Contractor, at its further expense to City, even if that Work was previously inspected or included in a progress payment. Developer is solely responsible for any delay occasioned by remediation of noncompliant Work. Inspection of the Work does not in any way relieve Contractor of its obligations to perform the Work as specified.

(E) **Final Inspection.** The provisions of this Section 7.8 apply to final inspection under Article 11, Completion and Warranty Provisions.

**7.9 Clean up.** Contractor must be required to regularly remove debris and waste materials and maintain the Site in clean and neat condition.

(A) **General.** Prior to discontinuing work in an area, Contractor must clean the area and remove all rubbish along with its construction equipment, tools, machinery, waste and surplus materials. Contractor must, at all times, minimize and confine dust and debris resulting from construction activities.

(B) **Completion.** At the completion of the Work, Contractor must remove from the Site all of its equipment, tools, surplus materials, waste materials and debris. Before demobilizing from the Site, Contractor must ensure that all surfaces are cleaned, sealed, waxed, or finished as applicable, and that all marks, stains, paint splatters, and the like have been properly removed from the completed Work and the surrounding areas.

(C) **Non-Compliance.** If Contractor fails to commence compliance with its cleanup obligations within two business days following written notification from City or its representative, City may undertake appropriate cleanup measures without further notice and the cost will be deducted from the Contract Price.

**7.10 Instructions and Manuals.** Contractor must provide three copies each of all instructions and manuals required by the Contract Documents, unless otherwise specified. These must be complete as to drawings, details, parts lists, performance data, and other information that may be required for City to easily maintain and service the materials and equipment installed for this Project.

(A) **Submittal Requirements.** All manufacturers' application or installation instructions must be provided to the Inspector at least ten days prior to the first such application. The instructions and manuals, along with any required guarantees, must be delivered to the Engineer for review.

(B) **Instruction of Personnel.** Contractor or its Subcontractors must instruct City's personnel in the operation and maintenance of any complex equipment, if required in the Construction Documents, as a condition precedent to Final Completion.

**7.11 As-built Drawings.** Contractor and its Subcontractors must maintain on the Site a separate complete set of the Contract drawings which will be used solely for the purpose of recording changes made in any portion of the Work in order to create accurate record drawings at the end of the Project.

(A) **Duty to Update.** The as-built drawings must be updated as changes occur, on a daily basis if necessary. Progress payments may be delayed, in whole or in part, until the as-built drawings are brought up to date to the satisfaction of the Engineer. Actual locations to scale must be identified on the as-built drawings for all runs of mechanical and electrical work, including all site utilities, etc., installed underground, in walls, floors, or otherwise concealed. Deviations from the original Drawings in the Construction Documents must be shown in detail. The location of all main runs, whether piping, conduit, ductwork, drain lines, etc., must be shown by dimension and elevation.

(B) **Final Completion.** Contractor must verify that all changes in the Work are depicted in the as-built drawings and must deliver the complete set of as-built drawings to the City for review and approval as a condition precedent to Final Completion.

**7.12 Existing Utilities.** As required by Government Code Section 4215, if, during the performance of the Work, Contractor discovers utility facilities not identified by City in the Contract Documents, Contractor must immediately provide written notice to City and the utility. Developer assumes responsibility for the timely removal, relocation, or protection of existing main or trunkline utility facilities located on the Project site, if those utilities are not identified in the Construction Documents. Contractor must be compensated by Developer, at no additional cost to the City, for the costs of locating, repairing damage not due to Contractor's failure to exercise reasonable care, and removing or relocating such utility facilities not indicated in the Construction Documents with reasonable accuracy, and for equipment on the Project necessarily idled during such work. Developer will not be assessed liquidated damages for delay in completion of the Work, to the extent such delay was caused by City's failure to meet any

obligation it may have, if any, to provide for removal or relocation of the utility facilities.

**7.13 Notice of Excavation.** Government Code Section 4216.2, requires that except in an emergency, Contractor must contact the appropriate regional notification center, or Underground Services Alert at 800-642-2444 (for Northern California), at least two working days, but not more than 14 calendar days before starting any excavation if the excavation will be conducted in an area that is known, or reasonably should be known, to contain subsurface installations, and if practical, Contractor must delineate with white paint or other suitable markings the area to be excavated.

**7.14 Trenching and Excavations.**

(A) **Duty to Notify.** Contractor must promptly, and before the following conditions are disturbed, provide written notice to City if the Contractor finds any of the following conditions:

(1) Material that Contractor believes may be a hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with the provisions of existing law;

(2) Subsurface or latent physical conditions at the Site differing from those indicated by information about the Site made available to bidders prior to the deadline for submitting bids; or

(3) Unknown physical conditions at the Site of any unusual nature, materially different from those ordinarily encountered and generally recognized as inherent in work of the character required by the Construction Documents.

(B) **City Investigation.** City will promptly investigate the conditions and if City finds that the conditions do materially differ or do involve hazardous waste, and cause a decrease or increase in the cost of, or the time required for, providing for performance of any part of the Work, City will issue a Change Order.

(C) **Disputes.** In the event that a dispute arises between the City and the Developer regarding any of the conditions specified in subsection (A) above, Contractor will not be excused from any scheduled completion date provided for in the Contract Documents, but must proceed with all Work to be performed under the Contract. Contractor will retain any and all rights provided either by the Contract or by law which pertain to the resolution of disputes between Contractor and Developer or City.

**7.15 Trenching of Five Feet or More.** As required by Labor Code Section 6705, if the Work includes the excavation of any trench or trenches of five feet or more in depth, a detailed plan must be submitted to City or its civil or structural engineer, for acceptance in advance of the excavation. The detailed plan must show the design of shoring, bracing, sloping, or other provisions to be made for worker protection from the hazard of caving ground during the excavation. If the plan varies from the shoring system standards, it must be prepared by a registered civil or structural engineer. Use of a shoring, sloping, or protective system less effective than that required by the Construction Safety Orders is prohibited.

**7.16 New Utility Connections.** The Contract Price includes connection charges and meter costs for new permanent utilities required for the Project. Contractor must notify Contract Manager sufficiently in advance of the time needed to request service from each utility provider so that connections and services are initiated in accordance with the Project schedule and do not delay Substantial Completion.

**7.17 Lines and Grades.** Contractor is required to use any benchmark provided by the City or in the Construction Documents. Unless otherwise specified in the Contract Documents, Contractor must provide all lines and grades required to execute the Work.

**7.18 Historic or Archeological Items.**

(A) **Notification.** Contractor must ensure that all persons performing Work at the Project site are required to immediately notify the Inspector or Engineer upon discovery of any potential historic or archeological items, including historic or prehistoric ruins, burial grounds, archaeological or vertebrate paleontological site, including fossilized footprints or other archeological, paleontological or historical feature on the Project site (collectively, "Historic or Archeological Items").

(B) **Cessation of Work.** Upon discovery of any potential Historic or Archeological Items, Work must be stopped within an 85-foot radius of the find and may not resume until authorized in writing by Engineer. If required by City, Contractor must assist in protecting or recovering the Historic or Archeological Items, any such assistance to be compensated as extra work on a time and materials basis under Article 6, Contract Modification. Any suspension of Work required due to discovery of Historic or Archeological Items will be treated as a suspension for convenience under Article 13.

**7.19 Environmental Control.** Contractor must not pollute any drainage course or its tributary inlets with fuels, oils, bitumens, acids, insecticides, herbicides or other harmful materials. Contractor and its Subcontractors must at all times in

the performance of the Work comply with all applicable federal, state, and local laws and regulations concerning pollution of waterways.

(A) **Stormwater Permit.** Contractor must comply with all applicable conditions of the State Water Resources Control Board National Pollutant Discharge Elimination System General Permit for Waste Discharge Requirements for Discharges of Stormwater Runoff Associated with Construction Activity (“Stormwater Permit”).

(B) **Contractor’s Obligations.** If required for the Work, a copy of the Stormwater Permit is on file in City’s principal administrative offices, and the Contractor must comply with the same without adjustment of the Contract Price or the Contract Time. The Contractor must timely and completely submit required reports and monitoring information required by the conditions of the Stormwater Permit, the Contractor must comply with all other applicable state, municipal or regional laws, ordinances, rules or regulations governing discharge of stormwater, including applicable municipal stormwater management programs.

**7.20 Sound Control Requirements.** Contractor must comply with the City's Noise Control ordinance (San Pablo Municipal Code Chapter 9.12). The noise level from the Contractor’s operations between the hours of 10:00 p.m. and 7:00 a.m. (if such hours are allowed by City Engineer), must not exceed 86 DbA at a distance of 50 feet. This requirement does not relieve the Contractor from responsibility for complying with other laws regulating noise levels. The noise level requirement applies to all equipment on the job or related to the job, including but not limited to trucks, transit mixers or transient equipment that may or may not be owned by the Contractor. The use of loud sound signals will be avoided in favor of light warnings except those required by safety laws for the protection of personnel.

## **Article 8 Payment**

**8.1 Payment for Services.** For all Services, the City will compensate Developer on a monthly basis pursuant to the Contract and this Article 8 in an amount not to exceed the Contract Balance, as adjusted by approved Change Orders, Allowance expenditures, or other adjustments authorized under the Contract Documents.

(A) **Allowances.** With respect to each Allowance described in the Project Scope, the amount specified for the Allowance is included in the Contract Price. The Allowance amount reflects the estimated cost the parties have allocated for that Allowance item. If the final cost for an Allowance item is less or greater than the amount of the Allowance, the Contract Price and Contract Balance will be decreased or increased by an

amount equal to the difference between the amount of the Allowance and the total amount expended for that Allowance item. Any expenditure in excess of the Allowance amount for an item is subject to prior written authorization by City, and Developer will be solely responsible for any excess expenditures that were not expressly authorized by City.

**8.2 Schedule of Values.** Prior to submitted the first application for progress payment, Developer must prepare and submit to City an updated Schedule of Values apportioned to the various divisions and phases of the Work, and including cost allocations for both the Design Services and the Construction Services and all Allowances. Each line item contained in the Schedule of Values must be assigned a value such that the total of all items required for the Services equals the Contract Price. The items must be sufficiently detailed to enable accurate evaluation of the percentage of completion claimed in each application for a progress payment.

**8.3 Progress Payments.** Following the last day of each month, Developer will submit to City for approval, a monthly application for payment for Services performed during the preceding month based on the estimated value of the Services performed during that preceding month.

(A) **Application for Payment.** Each application for payment will identify the percentage of Work completed during the preceding calendar month for each item on the Schedule of Values, including portions of Work performed pursuant to authorized and approved Change Orders. Each pay application must be supported by the Developer's Schedule of Values and any other substantiating data required by the Contract Documents.

(B) **Payment of Undisputed Amounts.** City will pay the undisputed amount due, as certified by the Engineer, within thirty (30) days after Developer has submitted a complete and accurate payment application. City will deduct five percent from each progress payment as retention, as set forth in Section 8.6, below, and may deduct additional amounts as set forth in Section 8.4, below. The total amount paid out as progress payments will not exceed 95% of the Contract Balance.

**8.4 Adjustment of Payment Application.** City may adjust or reject a payment application, in whole or in part, or withhold payment based upon any of the circumstances listed below.

(A) Costs incurred by City due to Contractor's unexcused failure to perform the Work as required by the Construction Documents, including correction or completion of punch list items;

(B) Cost to repair or replace loss or damage caused by Contractor or its Subcontractor(s) arising out of or relating to performance of the Work;

- (C) Uncorrected rejected, nonconforming, or defective Work;
- (D) Any unreleased stop notice, retained as 125% of the amount claimed, as required by law;
- (E) Contractor's failure to submit any required schedule, schedule update or daily reports in the manner and within the time specified in the Contract Documents;
- (F) Contractor's failure to maintain or submit as-built documents in the manner and within the time specified in the Contract Documents;
- (G) Fines imposed by law for violation of Labor Code requirements; and
- (H) Any other costs or charges that may be offset against payments due, as provided in the Contract Documents, including liquidated damages.

**8.5 Acceptance of Work.** Neither City's payment of a progress payment nor its partial or full use or occupancy of the Project constitutes acceptance of any part of the Work.

**8.6 Retention.** City will retain five percent of the amount due on each progress payment as retention, which may be applied at Project close out by City to offset any overpayment of progress payments to Developer. Any remaining retention, less any amounts that may be assessed as liquidated damages, retained for stop notices, or otherwise withheld under Sections 8.4 or 8.7 will be released to Developer no sooner than 35 days, but no later than 45 days, following recordation of the notice of completion.

**8.7 Setoff.** City is entitled to set off any amounts due from Developer against any payments due to Developer.

**8.8 Payment to Subcontractors and Suppliers.** Each month, Contractor must promptly pay each Subcontractor and supplier the value of the portion of labor, materials, and equipment incorporated into the Work or delivered to the Site by the Subcontractor or supplier during the preceding month. Such payments must be made in compliance with the requirements of the law, and in compliance with the Contract Documents and applicable subcontract or supplier contract.

**8.9 Final Payment.** City's conveyance of the Civic Center Site to Developer, pursuant to the terms of the PSA, will constitute Final Payment.

**8.10 Release of Claims.** Subject to the requirements and limitations of Public Contract Code section 9204, City may, at any time, require that payment of the undisputed portion of any progress payment be contingent upon Developer, Contractor, or both, furnishing City with a written release of all claims against City arising from or related to the portion of Work covered by those undisputed amounts. Any disputed amounts may be specifically excluded from the release.

**8.11 Warranty of Title.** Developer warrants that title to all work, materials, or equipment incorporated into the Work and included in a request for payment will pass over to City free of any claims, liens, or encumbrances upon Final Payment to Developer.

## **Article 9 Labor Provisions**

**9.1 Discrimination Prohibited.** Discrimination against any prospective or present employee engaged in the Work on grounds of race, color, ancestry, national origin, ethnicity, religion, sex, sexual orientation, age, disability, or marital status is strictly prohibited. Developer, Design Professional, Contractor, and its Subcontractors are required to comply with all applicable federal and California laws including the California Fair Employment and Housing Act (Government Code Sections 12900 et seq.), Government Code Section 11135, and Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

**9.2 Labor Code Requirements.** The following requirements apply to the Construction Services:

(A) ***Eight Hour Day.*** Under Labor Code Section 1810, eight hours of labor constitute a legal day's work under this Contract.

(B) ***Penalty.*** Under Labor Code Section 1813, Contractor will forfeit as a penalty, the sum of \$25.00 for each day during which a worker employed by Contractor or any Subcontractor is required or permitted to work more than eight hours in any one calendar day or more than 40 hours per calendar week, except if such workers are paid overtime under Labor Code Section 1815.

(C) ***Apprentices.*** Contractor is responsible for compliance with the requirements governing employment and payment of apprentices, as set forth in Labor Code Section 1777.5, which is fully incorporated by reference.

(D) ***Notices.*** Under Labor Code Section 1771.4, Contractor is required to post all job site notices prescribed by law or regulation.

**9.3 Prevailing Wages.** Each worker performing Work under this Contract that is covered under Labor Code Section 1720 or 1720.9, including cleanup at the Project Site, must be paid at a rate not less than the prevailing wage as defined in Sections 1771 and 1774 of the Labor Code. The prevailing wage rates are available online at <http://www.dir.ca.gov/dlsr>. Contractor must post a copy of the applicable prevailing rates at the Site.

(A) **Penalties.** Under Labor Code Section 1775, Contractor and any Subcontractor will forfeit as a penalty up to \$200.00 for each calendar day, or portion a day, for each worker paid less than the applicable prevailing wage rate. Contractor must also pay each worker the difference between the applicable prevailing wage rate and the amount actually paid to that worker.

**9.4 Payroll Records.** At all times during performance of the Construction Services, Contractor must comply with the provisions of Labor Code Sections 1776 and 1812, which are fully incorporated by this reference.

(A) **Contractor and Subcontractor Obligations.** Contractor and each Subcontractor must keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed in connection with the Work. Each payroll record must contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The Contractor or Subcontractor has complied with the requirements of Labor Code Sections 1771, 1811, and 1815 for any Work performed by its employees on the Project.

(B) **Certified Record.** A certified copy of an employee's payroll record must be made available for inspection or furnished to the employee or his or her authorized representative on request, to City, or to the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations, and as further provided by the Labor Code.

(C) **Enforcement.** Upon notice of noncompliance with Labor Code Section 1776, Contractor or Subcontractor has ten days in which to comply with requirements of this section. If Contractor or Subcontractor fails to do so within the ten-day period, Contractor or Subcontractor will forfeit a penalty of \$100.00 per day, or portion a day, for each worker for

whom compliance is required, until strict compliance is achieved. Upon request by the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, these penalties will be withheld from progress payments then due to Contractor or Subcontractor.

## **Article 10 Safety Provisions**

**10.1 Safety Precautions and Programs.** Developer, Contractor, and its Subcontractors are fully responsible for safety precautions and programs, and for the safety of persons and property in the performance of the Work. Developer must require that Contractor and its Subcontractors comply with all applicable safety laws, rules and regulations and seek to avoid injury, loss, or damage to persons or property by taking reasonable steps to protect its employees and other persons at the Site, materials and equipment stored on or off site, and property at or adjacent to the Site.

(A) **Reporting Requirements.** Contractor must immediately provide a written report to Construction Manager of all recordable accidents and injuries occurring at the Site. If Contractor is required to file an accident report with a government agency, Contractor will provide a copy of the report to City.

(B) **Legal Compliance.** Contractor's safety program must comply with the applicable legal and regulatory requirements. Contractor must provide City with copies of all notices required by law or regulation.

(C) **Contractor's Obligations.** Any damage or loss caused by Contractor arising from the Work which is not insured under property insurance must be promptly remedied by Contractor.

(D) **Remedies.** If City determines, in its sole discretion, that any part of the Work or Site is unsafe, City may, without assuming responsibility for Contractor's safety program, require Contractor or its Subcontractor to cease performance of the Work or to take corrective measures to the City's satisfaction. If Contractor fails to promptly take the required corrective measures, City may perform them and deduct the cost from the Contract Price. Developer agrees it is not entitled to submit a Claim for damages, for an increase in Contract Price, or for a change in Contract Time based on with the City's request for corrective measures pursuant to this provision.

**10.2 Hazardous Materials.** Unless otherwise specified, this Contract does not include the removal, handling, or disturbance of any asbestos or other Hazardous Materials. If Contractor encounters materials on the Site that

Contractor reasonably believes to be asbestos or other Hazardous Materials, and the asbestos or other Hazardous Materials have not been rendered harmless, Contractor may continue Work in unaffected areas reasonably believed to be safe, but must immediately cease work on the area affected and report the condition to the City. No asbestos, asbestos-containing products or other Hazardous Materials may be used in performance of the Work.

**10.3 Material Safety.** Contractor must maintain Material Safety Data Sheets (“MSDS”) at the Site, as required by law, for materials or substances used or consumed in the performance of the Work. The MSDS must be accessible and available to Contractor’s employees, Subcontractors, and the City.

(A) **Contractor Obligations.** Contractor is solely responsible for the proper delivery, handling, use, storage, removal, and disposal of all materials brought to the Site and/or used in the performance of the Work.

(B) **Labeling.** Contractor must ensure proper labeling on any material brought onto the Site so that any persons working with or in the vicinity of the material may be informed as to the identity of the material, any potential hazards, and requirements for proper handling, protections, and disposal.

## **Article 11 Completion and Warranty Provisions**

**11.1 Substantial Completion.** Developer must notify City when the Project is believed to be Substantially Complete. The City or its Construction Manager will inspect the Project to determine whether Substantial Completion has been achieved. If the City is satisfied that the Project is Substantially Complete, it will issue a certificate of occupancy or comparable written authorization for initial occupancy and beneficial use of the Building. If City is not satisfied that the Project is Substantially Complete, the Construction Manager will issue a punch list identifying the items that must be completed to achieve Substantial Completion.

### **11.2 Final Completion.**

(A) **Final Inspection.** When the Work required by this Contract is fully performed, Contractor must provide written notification to the City requesting final inspection. Based on this inspection, the City will prepare a punch list of items that are incomplete, incorrectly installed, or not operating as required by the Contract Documents. The omission of any such item from this punch list will not relieve the Contractor from fulfilling all requirements of the Contract Documents. If Contractor requests final inspection and City determines that Work exceeding five percent of the

total value of the Contract, as adjusted, remains unfinished, Developer will be responsible for the City's costs, including staff time, for performance of the final inspection on a premature basis.

(B) **Punch List.** The City will deliver the punch list to Contractor and will specify the time by which all of the punch list items must be completed or corrected. The City may include its estimated cost to complete each punch list item if Contractor fails to do so within the specified time.

(C) **Requirements for Final Completion.** Final Completion will be achieved upon completion or correction of all punch list items, as verified by inspection, and upon satisfaction of all other Contract requirements, including any commissioning required under the Contract Documents, and submission of all final submittals, including a warranty bond as required under Section 4.4, instructions and manuals as required under Section 7.10, and as-built drawings as required under Section 7.11, all to City's satisfaction.

(D) **Acceptance.** Following Final Completion, the Project is considered accepted once the City Council takes action during a public meeting to accept the Project. If the City Council authorizes the Engineer to accept the Project, the Project is considered accepted upon the Engineer's issuance of a written notice of acceptance. After the Project has been formally accepted by City, City will file a notice of completion with the County Recorder.

### 11.3 Warranty.

(A) **General.** Contractor must warrant that all materials and equipment will be new unless otherwise specified, of good quality, in conformance with the Construction Documents, and free from defective workmanship and materials. Contractor further warrants that the Work will be free from material defects not intrinsic in the design or materials required in the Construction Documents. At City's request, Contractor must furnish satisfactory evidence of the quality and type of materials and equipment furnished. Contractor's warranty does not extend to damage caused by normal wear and tear, or improper use or maintenance. Developer is directly responsible for any non-compliance with the warranty requirements in this Section.

(B) **Warranty Period.** Contractor's warranty must guarantee its Work for a period of one year from the date of recordation of the notice of completion (the "**Warranty Period**"), except when a longer guarantee is provided by a supplier or manufacturer or is required by the Specifications or Special Conditions. Contractor must obtain from its Subcontractors,

suppliers and manufacturers any special or extended warranties required by the Construction Documents.

(C) **Warranty Documents.** As a condition precedent to acceptance, Contractor must supply City with all warranty and guarantee documents relevant to equipment and materials incorporated into the Work and guaranteed by their suppliers or manufacturers.

(D) **Subcontractors.** The warranty obligations in the Contract Documents apply to Work performed by Subcontractors, and Contractor expressly agrees to act as co-guarantor of such Work.

(E) **Contractor's Obligations.** The Construction Contract must require that upon written notice from City to Developer of any defect in the Work discovered during the Warranty Period, Contractor or its responsible Subcontractor must promptly correct the defective Work at no cost to City. Contractor's obligation to correct defects discovered during the Warranty Period will continue past the expiration of the Warranty Period as to any defects in Work for which Contractor was notified prior to expiration of the Warranty Period.

(F) **City's Remedies.** If Contractor and/or its responsible Subcontractor fails to correct defective Work within ten days following notice by City, or sooner, if required by the circumstances, Developer expressly agrees that City may correct the defects to conform with Contract Documents at Developer's sole expense, and Developer agrees to reimburse City for its costs within 30 days following City's submission of a demand for payment pursuant to this provision. If City is required to initiate legal action to compel compliance with this provision, and City is the prevailing party in such action, Developer is solely responsible for all of City's attorney's fees and legal costs expended to enforce the warranty obligations herein in addition to any and all costs incurred by City to correct the defective Work.

**11.4 Use Prior to Completion.** City reserves the right to occupy or make use of the Project, or any portions of the Project, prior to Substantial Completion or Final Completion if City has determined that the Project or portion of it is in a condition suitable for the proposed occupation or use, and that it is in its best interest to occupy or make use of the Project, or any portions of it, prior to Substantial Completion or Final Completion. City will notify Developer in writing of its intent to occupy or make use of the Project or any portions of the Project, pursuant to this provision.

(A) **Non-Waiver.** Occupation or use prior to Substantial Completion or Final Completion will not operate as acceptance of the Work or any portion of it, nor will it operate as a waiver of any of City's rights or

Contractor's duties pursuant to these Contract Documents, and will not affect nor bear on the determination of the time of Substantial Completion.

(B) **City's Responsibility.** City will be responsible for the cost of maintenance and repairs due to normal wear and tear with respect to those portions of the Project that are being occupied or used before Substantial Completion or Final Completion. The Contract Price or the Contract Time may be adjusted pursuant to the applicable provisions of these Contract Documents if, and only to the extent that, any occupation or use under this Section actually adds to Developer's cost or time to have the Services completed.

## **Article 12 Dispute Resolution**

**12.1 Claims.** This Article applies solely to and provides the exclusive procedures for any Claim arising from or related to Contractor's performance of the Construction Services, and is intended to ensure that any Contractor claims are addressed in accordance with the provisions of Public Contract Code Sections 9204 and 20104 et seq., which are incorporated by reference herein. Any dispute between City and Developer that is not subject to this Article 12 will be resolved in accordance with the dispute resolution provisions in the PSA.

(A) **Definition. "Claim"** means a separate written demand by Developer sent to City by registered mail or certified mail with return receipt requested, for one or more of the following:

- (1) An extension of the Contract Time extension, including for relief from liquidated or other damages for delay assessed by City, which arises from or relates to the time for performing Construction Services;
- (2) An increase to the Contract Price which arises from or relates to additional payment to Contractor for performing the Construction Services; or
- (3) Payment of any amount that has previously been submitted to City as a Change Order request in accordance with the requirements of the Contract Documents, and which has been rejected by City, in whole or in part.

(B) **Limitations.** A Claim may only include the portion of a previously submitted and rejected demand or request that remains in dispute between Developer and City.

(C) **No Work Delay.** Notwithstanding the submission of a Claim or any other dispute between the parties related to the Project or the Contract Documents, Developer may not cause the Construction Services to cease or to be delayed, pending resolution of the Claim or other dispute, but must ensure that Contractor continues to diligently prosecute the performance and timely completion of the Project, including any Work pertaining to the Claim or other dispute.

**12.2 Claims Submission.** The following requirements apply to any Claim subject to this Article:

(A) **Substantiation.** A Claim must be submitted to City in writing, and clearly identified as a “Claim” submitted pursuant to this Article 12, and must include all of the documents necessary to substantiate the Claim including the Change Order request that was rejected in whole or in part, and a copy of City’s written rejection that is in dispute. The Claim must clearly identify and describe the dispute, including relevant references to applicable portions of the Contract Documents, and a chronology of relevant events. Any Claim for additional payment must include a complete, itemized breakdown of all labor, materials, taxes, insurance, and subcontract, or other costs. Substantiating documentation such as payroll records, receipts, invoices, or the like, must be submitted in support of each claimed cost. Any Claim for an extension of time, delay costs, or liquidated damages must also be substantiated with schedule analysis and narrative depicting and explaining claimed time impacts. Any claim for lost productivity or efficiency must be supported with a detailed analysis, using verifiable data and current industry standard forensic practices.

(B) **Subcontractor Claims.** Upon request by Contractor, Developer may present a Claim on behalf of a Subcontractor as specified in Public Contract Code Section 9204(d)(5).

(C) **Claim Format.** A Claim must be submitted in the following format:

(1) General introduction, specifically identifying the submission as a “Claim” submitted under this Article 12.

(2) Relevant background information, including identification of the specific demand at issue, and the date of City’s rejection of that demand.

(3) Detailed explanation of the issue(s) in dispute. For multiple issues, separately number and identify each issue and include the following for each separate issue:

- a) The background of the issue, including references to relevant provisions of the Contract Documents;
- b) A succinct statement of the matter in dispute, including Developer's position and the basis for that position;
- c) A chronology of relevant events;
- d) The identification and attachment of all supporting documents (see subsection (A), above, on Substantiation); and
- e) Use of a separate page for each issue.

(4) Summary of issues and damages.

(5) The following certification, executed on behalf of Developer by an authorized officer:

"The undersigned certifies under penalty of perjury that its statements and representations in this Claim are true and correct, and warrants that this Claim is comprehensive and complete as to the matters in dispute, and agrees that any costs, expenses, or delay claim not included herein are deemed waived. Developer and Contractor understand that submission of a Claim which has no basis in fact or which the claimant knows to be false may violate the False Claims Act (Government Code Section 12650 et seq.)."

(D) ***Submission Deadlines.***

(1) A Claim must be submitted within 15 days following the date that City notified Developer in writing that a request for a change in the Contract Time or Contract Price, duly submitted in compliance with Article 5 and Article 6, has been rejected in whole or in part.

(2) With the exception of any dispute regarding the amount of the final Contract Balance, any Claim must be filed on or before the date that City will release all undisputed retention to Developer pursuant to Section 8.6, or will be deemed waived.

(3) A Claim disputing the amount of retention released to Developer must be submitted within 15 days following City's payment of undisputed retention, under Section 8.6, above.

(4) Strict compliance with these Claim submission deadlines is necessary to ensure that any dispute may be mitigated as soon as possible, and to facilitate cost-efficient administration of the Project. Any Claim that is not submitted within the specified deadlines will be deemed waived by Developer.

**12.3 City's Response.** City will respond within 45 days of receipt of the Claim with a written statement identifying which portion(s) of the Claim are disputed, unless the 45-day period is extended by mutual agreement of City and Developer. However, the City may first request, in writing, within 30 days of receipt of the Claim, any additional documentation supporting the Claim or relating to defenses to the Claim that City may have against Developer.

(A) **Additional Information.** If additional information is thereafter required, it may be requested and provided upon mutual agreement of City and Developer.

(B) **City's Response.** City's written response to the Claim, as further documented, will be submitted to Developer within 15 days after receipt of the further documentation or within a period of time no greater than that taken by Developer in producing the additional information, whichever is greater.

(C) **Non-Waiver.** Any failure by City to respond within the times specified above may not be construed as acceptance of the Claim in whole or in part, or as a waiver of any provision of these Contract Documents.

**12.4 Meet and Confer.** If Developer disputes City's written response or if City fails to respond within the specified time, Developer must notify the City in writing, either within 15 days of receipt of City's response, or within 15 days of City's failure to respond within the specified time, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. If Developer fails to dispute City's response, in writing, within 30 days of receipt of the City's response, Developer's Claim will be deemed waived.

(A) **Schedule Meet and Confer.** Upon receipt of the demand to meet and confer, City will schedule the meet and confer conference to be held within 30 days, or later if needed to ensure the mutual availability of all of the individuals that each party requires to represent its interests at the meet and confer conference, which may include representatives of the Contractor.

(B) **Location for Meet and Confer.** The meet and confer conference will be scheduled at a location at or near the Project Site or at City's business offices.

(C) **Written Statement After Meet and Confer.** Within 10 working days after the meet and confer has concluded, City will issue a written statement identifying which portion(s) of the Claim remain in dispute, if any.

(D) **Submission to Mediation.** If the Claim or any portion remains in dispute following the meet and confer conference, within 10 working days after City issues the written statement identifying any portion(s) of the Claim remaining in dispute, the disputed portion(s) will be submitted for mediation as set forth below.

## **12.5 Mediation and Government Code Claims.**

(A) **Mediation.** Mediation under this Article will be scheduled within 60 days following conclusion of the meet and confer process, with a mediator that the parties mutually agreed upon. The mediation itself may take place more than 60 days following conclusion of the meet and confer process to ensure the mutual availability of the selected mediator and all of the individuals that each party requires to represent its interests. The parties must share the costs of mediation equally, except costs incurred by each party for representation by legal counsel or any other consultant.

(B) **Government Code Claims.**

(1) Timely presentment of a Government Code Claim is a condition precedent to filing any legal action based on or arising from the Contract.

(2) The time for filing a Government Code Claim will be tolled from the time the Developer submits its written Claim under section 12.2, above, until the time that Claim is denied as a result of the meet and confer process, including any period of time used by the meet and confer process. If the parties agree to mediation, the time for filing a Government Code Claim will be tolled until conclusion of the mediation if the Claim is not fully resolved by mutual agreement of the parties during the mediation or any continuation of the mediation.

**12.6 Tort Claims.** This Article does not apply to tort claims and nothing in this Article is intended nor will be construed to change the time periods for filing tort-based Government Code Claims.

**12.7 Arbitration.** It is expressly agreed, under California Code of Civil Procedure Section 1296, that in any arbitration to resolve a dispute relating to

this Contract, the arbitrator's award must be supported by law and substantial evidence.

**12.8 Damages.** Developer bears the burden of proving entitlement to and the amount of any claimed damages. Developer is not entitled to damages calculated on a total cost basis, but must prove actual damages. Developer is not entitled to recovery of any alleged home office overhead on its own behalf or on behalf of the Contractor or any Subcontractor. The Eichleay Formula or similar formula may not be used for any recovery under the Contract. Developer is not entitled to consequential damages, including home office overhead or any form of overhead not directly incurred at the Site; lost profits by Developer, Contractor, or any Subcontractor; loss of productivity in performing the Construction Services; lost opportunity by Developer, Contractor, or any Subcontractor to work on other projects; diminished bonding capacity of Contractor or any Subcontractor; increased cost of financing for the Project by Developer, Contractor, or any Subcontractor; extended capital costs; non-availability of labor, material or equipment due to delays; or any other indirect loss arising from the Contract.

**12.9 Suspension or Termination.** Nothing in this Article is intended to delay suspension or termination under Article 13.

### **Article 13 Suspension and Termination**

**13.1 Suspension for Cause.** In addition to all other remedies available to City, if Developer fails to perform or correct Work in accordance with the Contract Documents, City may immediately order the Work, or any portion of it, suspended until the cause for the suspension has been eliminated to City's satisfaction.

(A) **Failure to Comply.** Developer will not be entitled to an increase in Contract Time or Contract Price for a suspension occasioned by Developer's failure to comply with the Contract Documents.

(B) **No Duty to Suspend.** City's right to suspend the Work will not give rise to a duty to suspend the Work, and City's failure to suspend the Work will not constitute a defense to Developer's failure to comply with the requirements of the Contract Documents.

**13.2 Suspension for Convenience.** City reserves the right to suspend, delay, or interrupt the performance of the Work in whole or in part, for a period of time determined to be appropriate for City's convenience, and not due to any act or omission by Developer or its Subcontractors. Upon notice by City pursuant to this provision, Developer must immediately suspend, delay, or interrupt the Work

as directed by City. The Contract Price and the Contract Time will be equitably adjusted by Change Order to reflect the cost and delay impact occasioned by such suspension for convenience. Developer may submit application for payment for all work performed up to effective date of suspension and City will pay undisputed amounts within 30 days. The Parties recognize that there may be unforeseen consequences to a suspension. If there is a suspension in excess of 10 Working Days then the Parties agree to meet and confer to address equitable adjustment of the Contract Price or Contract Time, as stated above.

**13.3 Termination for Default.** Developer may be deemed in default for a material breach of or inability to perform the Contract, including Developer's refusal or failure to supply sufficient skilled workers, proper materials, or equipment to perform the Work within the Contract Time; refusal or failure to make prompt payment to its employees, Subcontractors, or suppliers or to correct rejected work; disregard of laws, regulations, ordinances, rules, or orders of any public agency with jurisdiction over the Project; or if Developer lacks financial capacity to complete the Work within the Contract Time; or is otherwise responsible for a material breach of the Contract requirements.

(A) **Notice.** Upon City's determination that Developer is in default, City may provide Developer and the performance bond surety written notice of default and intent to terminate the Contract.

(B) **Termination.** Within 14 calendar days after notice of intent to terminate for default has been given, unless the default is cured or arrangements to cure the default have been made and memorialized in writing, to City's satisfaction, not to be unreasonably withheld, City may terminate the Contract by written notice to Developer with a copy to the performance bond surety.

(C) **Waiver.** Time being of the essence in the performance of the Work, if Developer's surety fails to arrange for completion of the Work in accordance with the Performance Bond, within seven calendar days from the date of the notice of termination, the performance bond surety will be deemed to have waived its right to complete the Work under the Contract, and City may immediately make arrangements for the completion of the Work through use of its own forces, by hiring a replacement contractor, or by any other means that City determines advisable under the circumstances. Developer and the performance bond surety will be jointly and severally liable for any additional cost incurred by City to complete the Work following termination. In addition, City will have the right to use any materials, supplies, and equipment belonging to Developer and located at the Site for the purposes of completing the remaining Work.

(D) **Wrongful Termination.** If a court of competent jurisdiction or an arbitrator later determines that the termination for default was wrongful, the termination will be deemed to be a termination for convenience, and Developer's damages will be strictly limited to the compensation provided for termination for convenience, in Section 13.4, below. Developer waives any claim for any other damages for wrongful termination including consequential damages, lost opportunity costs or lost profits, except for those surety expenditures, if any, under subsection (C) herein that Developer is obligated to reimburse to Surety.

**13.4 Termination for Convenience.** City reserves the right to terminate all or part of the Contract for convenience upon written notice to Developer. Upon receipt of such notice, Developer must immediately direct Contractor to stop the Work, comply with City's instructions to protect the completed Work and materials, and use its best efforts to minimize further costs. In the event of termination for convenience, the parties agree that the following will constitute full and fair compensation to Developer, and that Developer will not be entitled to any additional compensation:

(A) **Completed Work.** The value of its Work satisfactorily performed to date, including Project overhead and profit based on Developer's Schedule of Values;

(B) **Demobilization.** Actual and substantiated demobilization costs; and

(C) **Markup.** Five percent of the total value of the Work performed as of the date of notice of termination or five percent of the value of the Work yet to be completed, whichever is less.

**13.5 Provisions Remaining in Effect.** Upon termination pursuant to this Article, the provisions of the Contract Documents remain in effect as to any claim, indemnity obligation, warranties, guarantees, submittals of as-built drawings, instructions, or manuals, or other such rights and obligations arising from or related to Work performed prior to the termination date.

## **Article 14 Miscellaneous Provisions**

**14.1 Assignment of Unfair Business Practice Claims.** Under Public Contract Code Section 7103.5, Developer must require Contractor and its Subcontractors to agree to assign to City all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Section 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising

from purchases of goods, services, or materials pursuant to the Construction Contract or subcontract. This assignment will be effective at the time City tenders Final Payment to Developer, without further acknowledgement by the parties.

**14.2 Provisions Deemed Inserted.** Every provision of law required to be inserted in the Contract Documents is deemed to be inserted, and the Contract Documents will be construed and enforced as though such provision has been included. If it is discovered that through mistake or otherwise that any required provision was not inserted, or not correctly inserted, the Contract Documents will be amended accordingly.

**14.3 Waiver.** No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of the Contract Documents will be effective unless it is in writing and signed by the party waiving the breach, failure, right, or remedy. No waiver of any breach, failure, right, or remedy will be deemed a waiver of any other breach, failure, right, or remedy, whether or not similar, nor will any waiver constitute a continuing waiver unless specified in writing by the waiving party.

**14.4 Titles, Headings, and Groupings.** The titles and headings used and the groupings of provisions in the Contract Documents are for convenience only and may not be used in the construction or interpretation of the Contract Documents or relied upon for any other purpose.

**14.5 Statutory and Regulatory References.** With respect to any amendments to any statutes or regulations referenced in these Contract Documents, the reference is deemed to be the version in effect on the date the Contract was fully executed by both parties.

END OF GENERAL CONDITIONS

**CITY OF SAN PABLO  
CITY HALL CONTRACT**

**SPECIAL CONDITIONS**  
<Provisional: to be refined.>

**1. Submittals.** The submittals checked below must be submitted to the Construction Manager at or before the pre-construction conference to be reviewed for general conformance with the Contract Documents. If exceptions are taken, re-submittal may be required before the Work may begin. The Construction Manager's or City's review or acceptance of a submittal does not relieve the Developer, Contractor or its Subcontractors of responsibility for verifying dimensions, coordination, performance, or accuracy.

- Baseline (as-planned) schedule. (See General Conditions section 5.2.)
- Name and contact information for Contractor's superintendent and any other authorized onsite representative, including cell phone, email address and home phone number.
- Emergency contact list with names and phone numbers, including cell phone numbers, for at least three representatives of Contractor who can be reached after hours.
- The names and titles of each individual authorized to sign Change Orders and any other legally binding documents on behalf of Developer.
- The name and address of each Subcontractor, including a description and cost information for the portion of the Work by each Subcontractor and the Subcontractor's DIR registration number.
- An equipment list which includes a description, identification number, make, model number, and other relevant information for each piece of equipment to be used on the Project.
- Proposed truck and hauling routes.
- A draft copy of any proposed notification to residents or businesses within the Project area.
- Water Pollution Control Program.
- Submittal schedule, listing description, supplier, source, and target dates for submission of all required submittals. The dates must be coordinated

with the baseline schedule and related items should be submitted at the same time.

- Other: <Insert provisions re materials, etc., here>

**2. Entry to Private Property.** Work on this Project will require entry onto private property at <Address or addresses of properties requiring entry>. The City's right of entry is subject to the following written contract(s) between City and the private property owner(s): <List of property owners>.

**2.1 Compliance.** Developer and its employees, Design Professional, Contractor, subcontractors, and suppliers must strictly comply with the limitations of the above contract(s) when entering onto the private property during the Design Phase and the Construction Phase. Full copies of the contract(s) may be obtained by <Method of obtaining Contract(s)>.

**3. Public Property.** The street right of way may be used only for purposes that are necessary to perform the Construction Services. The Contractor or its Subcontractors may not occupy the right of way, or allow others to occupy the right of way, for purposes which are not necessary to perform the Construction Services. No area is available within the Site for the exclusive use as a staging area of the Contractor or Subcontractors. However, temporary storage of equipment and materials on City property is available as shown in < >. Use of the Contractor work areas and other City-owned property is at the Developer's own risk, and the City is not liable for damage to or loss of materials or equipment located within such areas. If Developer or Contractor desires to use the City property indicated in < >, it must execute the "Form Letter of Agreement for Use of City Property" provided by the City. If additional area is required, the Developer or Contractor must secure, with no increase to the Contract Price, areas required for storage of equipment or materials or for other purposes, and provide documentation of the right of such use. Before final inspection of the Work, the Contractor must clean the material sites and all ground occupied by the Contractor of all rubbish, excess materials, falsework, temporary structures and equipment. All parts of the Work must be left in a neat and presentable condition.

**4. Hours of Work:** Working hours and days are defined as the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday. Night work is not allowed. Work on Saturdays, Sundays and established City Holidays is not allowed without prior written consent by the City.

**4.1** Business hours and days are defined as normal City Hall office hours (7:30 a.m. to 6:00 p.m., Monday through Thursday). City inspections, procurement of permits, submittals and other City related businesses will be provided during this time.

4.2 Other restrictions on hours will remain in effect, including lane closure time limitations as required by the Contract Documents and Labor Code requirements.

5. **Weather Delays.** This provision is intended to supplement the requirements of General Conditions Section 5.2 on Schedule Requirements and Section 5.3 on Delays and Extensions of Contract Time.

5.1 **“Weather Delay Day.”** A **“Weather Delay Day”** is a Working Day during which Developer and its forces, including Subcontractors, are unable to perform more than 40% of the critical path Work scheduled for that day due to adverse weather conditions which impair the ability to safely or effectively perform the scheduled critical path Work that day. Adverse weather conditions may include rain, saturated soil, and Site clean up required due to adverse weather. Determination of what constitutes critical path Work scheduled for that day will be based on the most current, City-approved schedule.

5.2 **Normal Weather Delay Days.** Based on historic records for the Project location, Developer’s schedule should assume the following number of normal Weather Delay Days for each month:

Month	# Normal Weather Delay Days
January	—
February	—
March	—
April	—
May	—
June	—
July	—
August	—
September	—
October	—
November	—
December	—

5.3 **Extension of Time.** Developer will be entitled to a non-compensable extension of the Contract Time for each Weather Delay Day in excess of the normal Weather Delay Days within a given month, as set forth in Section 5.2 above, subject to the following limitations:

- (A) Developer must fully comply with the applicable procedures in Article 5 and 6 of the General Conditions regarding requests to modify the Contract Time.

- (B) Weather Delay Days which do not occur during a given month do not carry over to another month.
- (C) Developer will not be entitled to an extension of time for a Weather Delay Day to the extent Developer is responsible for concurrent delay on that day.

**6. Minimum Standards and Inspection.** The standards referenced in the Contract Documents are minimum standards. If federal, state or other governing codes or standards are more stringent, the more stringent requirements will apply. Notwithstanding that Work or materials have been previously inspected by the Construction Manager or Inspector or included in a progress payment, Developer is not relieved from constructing the Project in conformance with applicable codes and standards.

**6.1** The City may also arrange for the Contra Costa County Traffic Signal Maintenance Department to inspect and provide technical consultation on Work related to a traffic signal. The County Traffic Signal representative's role is limited to making recommendations to the City, and he or she does not have the authority to approve or reject Work, or interpret the Contract Documents.

**6.2** The City may also arrange for an Independent Testing Lab to perform quality assurance work and/or Special Inspections, where required by the Contract Documents. The Testing Lab or Special Inspector's role is limited to making recommendations to the City, and the Testing Lab or Special Inspector does have authority to approve or reject Work, or interpret the Contract Documents.

**6.3** The City may require building, electrical or other inspections by City Building Officials for code compliance.

**6.4** Inspections may also be required by water, sewer, telephone and other utility companies. Such inspectors have the authority to inform the Contractor of any failure of the Work or materials to conform to their standards. In the event the Contractor does not take action to correct any such failures, the Inspector has the authority to stop the Work in question. Developer is not entitled to an extension of the Contract Time or increase in the Contract Price for Work stopped due to failure to comply with applicable utility company requirements.

**7. Monument Protection.** Monuments placed by surveyors must be preserved, in accordance with Business & Professions Code section 8771. If the Construction Documents indicate a known monument will be disturbed and replaced, the existing monument, typically consisting of a concrete core and

brass tack, nail or other marking device located inside of a survey monument cover with frame, will not be disturbed until Contractor has arranged for establishment of reference points to preserve the location of the monument by a licensed surveyor. Contractor will not disturb other monuments that may/may not be shown on the plans including railroad spikes, brass tacks, nails or other markers set by surveyors, and must advise City upon discovery of these monuments to determine how they will be preserved. Contractor must exercise caution to avoid disturbing monuments. During milling, grinding, excavation or other operations, Contractor must work around survey monuments unless specifically otherwise indicated in the Construction Documents. If a monument is disturbed or damaged by Contractor's or and Subcontractor's operations, Developer is responsible for all costs associated with the reestablishment of the monument, including any survey performed by a licensed surveyor, filing required documents with Contra Costa County, or constructing a new monument in accordance with appropriate Contra Costa County Standards, with no increase in the Contract Price.

**8. Dust Control.** Contractor must comply with air pollution control laws, rules, regulations, ordinances, and statutes that apply to the Work. Contractor must prevent and alleviate dust by applying water, dust palliative or both, and by covering active and inactive stockpiles. All dust control must be in conformance with State Standards Specifications Section 14-9.03, Dust Control.

**9. Notification of Residents and Businesses.** Prior to the start of work, the Contractor must notify in writing each residence and each business located in the Project area of the planned Work schedule. Notices must be approved by City prior to delivery, and must be written in both English and Spanish, and delivered at least 3 working days prior to the start of any Work which may affect access to the residence or business for traffic, deliveries, workers or pedestrians. Contractor must submit to Construction Manager signed confirmation that all notices were delivered as specified to all applicable addresses.

**9.1** Notices must include the planned Project schedule, the extent of the Project and names and contact information for the Contractor and the City.

**9.2** Temporary NO PARKING signs will be set up 72 hours in advance (but no earlier than 96 hours in advance) of any parking restrictions, and will be removed promptly when no longer needed, including periods when Work will not be occurring for one week or more. The Contractor will provide, erect, and maintain NO PARKING signs.

**10. As-Built Drawings.** This provision is intended to supplement the requirements of Section 7.11 (As-Built) of the General Conditions. The as-built drawings to be maintained by Contractor pursuant to General Conditions Section 7.11 include the drawings, wiring diagrams contained in the Construction

Documents, as well as shop drawings. Contractor must update the as-built drawings daily, and review changes to the drawings with the Construction Manager or Engineer at the end of each week during the Construction Phase. Contractor must clearly mark the as-built drawings to show changes from the Construction Documents, and exact as-built locations for all of the improvements constructed for the Project. Dimensions must be shown from a minimum of 2 permanent points of reference (such as building corners or monuments) for the following items:

- New and existing underground utilities, including sewer laterals;
- Monuments and benchmarks;
- Water meters and connections to water source;
- Irrigation pipelines, valves, conduit, wiring and controllers;
- Electric meters;
- Electrical conduits and wiring;
- Traffic signal conduits, wiring, loops and controllers; and
- Other items as directed by the Engineer or Construction Manager.

Contractor must submit current prints of the current as-built drawings to the Construction Manager no later than the fifth day of each calendar month during the Construction Phase. As a condition precedent to Final Completion, the Contractor must submit the final as-built drawings to City in legible format, utilizing red markings to show all changes or corrections to the original drawings in the Construction Documents and to show the final as-built dimensions and conditions. The final as-built drawings must be submitted on untorn, clean, full-size Project plans (blueprints or bond copies).

**11. Controller Charts.** As a condition precedent to Final Completion, Contractor must submit charts showing the areas covered by each irrigation controller. The area of each valve coverage will be color-coded, and the valve sequence will be enlarged to be readable when the drawing is reduced in size. These drawings will be reduced to 8-1/2x11 inches in size and sealed between two 20-mil plastic sheets. Two copies of each controller chart must be submitted to the Construction Manager upon completion of the irrigation system(s).

**12. Water Pollution Controls.** A Water Pollution Control Program must be submitted and accepted by the City Engineer prior to the start of the Construction Services, unless a SWPPP is required per these Special Conditions. Contractor will take all measures necessary to keep all substances used in or resulting from its work out of the gutters, storm drains and creeks. To this effect, Contractor will employ the "Best Management Practices (BMP's) for Construction and New Development" required by the City, and, when a SWPPP is included in these Special Conditions, Contractor must comply with the SWPPP. Contractor must maintain all temporary erosion and/or sediment controls, including removing sediment trapped at storm drain inlets as needed after rain so that said inlets remain functional. A fine of \$500 will be assessed to the Developer for each

calendar day when the measures are not properly installed or maintained, as determined by the Engineer.

**13. Maintaining Traffic, Public Convenience and Public Safety.**

Contractor must comply with the following provisions of the <20\_\_>State Standard Specifications as modified by this provision: Sections 7.1.03, "Public Convenience;" 7.1.04, "Public Safety;" and 12, "Temporary Traffic Control."

**13.1** Specifications Section 12-1.03, "Flagging Costs" is modified here to provide that all flagging costs will be included in the Contract Price and no additional compensation will be allowed therefor.

**13.2** Two lanes of traffic (one lane in each direction minimum 10 feet per lane) must be open to vehicular traffic for the entire length of the project at all times, unless otherwise approved by the Engineer. Striping and/or cones and barricades properly marked must be used to delineate the traffic lanes. Access to driveways must be maintained at all times. No traffic lanes may be closed before 9:00 a.m. or after 3:30 p.m. without written permission from the Engineer.

**13.3** When entering or leaving roadways which bear public traffic, the Contractor's equipment, whether empty or loaded, must yield to public traffic.

**13.4** The use of florescent traffic cones to direct traffic away from excavations will be considered lane closure. When traffic cones or delineators are used to delineate a temporary edge of traffic lane, the line of cones or delineators will be considered to be the edge of traffic lane, however, the Contractor will not reduce the width of an existing lane to less than 10 feet without written approval from the Engineer.

**13.5** When Work is not in progress on a trench or other excavation that requires closure of an adjacent lane, the traffic cones or portable delineators used for the lane closure will be placed off of and adjacent to the edge of the traveled way. The spacing of the cones or delineators will be not more than the spacing used for the lane closure.

**13.6** Contractor must maintains public facilities and roadways adjacent to the Project Site free of all construction debris. Dirt, gravel, asphalt, or other materials from delivery or haul trucks will be removed from such facilities and roadways on a daily basis, or as directed by the Engineer.

**13.7** The provisions in this section may be modified or altered if, in the opinion of the Engineer, public traffic will be better served and Work expedited. Such modifications or alterations will not be adopted until

approved in writing by the Engineer or by a Change Order. All hauling on City streets will be on a haul route approved by the Engineer.

**14. Permits and Licenses.** For public right-of-way construction work, the Developer or Contractor must procure all permits and licenses, pay all required charges and fees and give all notices necessary and incidental to and necessary to the lawful performance of the Work with no increase to the Contract Time or Contract Price.

**14.1 City Permits.** City of San Pablo permits which may be required include a building permit, overload or transportation permit, encroachment permit, grading permit, C.3 permit, NPDES permit, certificate of occupancy. Contractor is responsible for scheduling inspections for each permit, if applicable.

**14.2 Other Agencies.** When permits from other agencies (e.g. Caltrans, Contra Costa County, Dept. of Fish & Game) or Utility companies (e.g. PG&E, EBMUD, WCWD) are required for the Work, Developer and Contractor must comply with all permit conditions and inspection requirements. Upon completion of the Work, Developer or Contractor must submit to City documentation from each such agency or utility company confirming that permit is finalized/closed out and accepted.

**14.3 Temporary Use Permits.** Contractor must obtain temporary use permits for the use of any private property as a staging area, equipment and/or material storage yard, etc. No Work may commence on private property without an appropriate permit. Contractor must comply with all conditions of such permits.

**15. Construction Staking.** Construction staking will be provided by the Contractor and all costs related thereto are included in the Contract Price. The Engineer is the sole judge of need for and the sufficiency of any construction stakes. All construction staking must be provided under the direction of a professional land surveyor licensed in the State of California, who will submit evidence of such license to Engineer.

## PROJECT SCOPE

### Summary of Project Scope

Sale and redevelopment of the Civic Center Site is conditioned upon design and construction of a turnkey new City Hall on the City's Gateway Property. Pursuant to the Contract, Developer will cause the Project to be designed and constructed consistent with this Project Scope, except and only to the extent that City waives any requirement in a duly authorized writing.

The Project Scope includes a 42,000-square-foot City Hall Building on lot number 5 in the former Circle S focus area, now called the Mixed Use Center South area (the "**Gateway Property**").

The Project requires development of the Gateway Property site south of Chattleton Lane, and adjacent to the West County Health Center. The Project Site is approximately 110,000 square feet and is currently vacant, except for cracked concrete pavement and patches of dirt and grass.

The Building will be designed and constructed as a two-story LEED Silver building, to be located on the northern side of the Project Site, and surrounded by landscaping and a fountain by the entrance of the Building. The Building will include a covered entry plaza marking the Building entrance and facing the driveway. The south side of the Project Site will be paved as a parking lot with at least 120 parking spaces. The Building interior will be designed to support all current City services.

The Project Site will be developed with two vehicle entrances and one pedestrian entrance. The main vehicle entrance will be located on Chattleton Lane with a designated vehicle driveway adjacent to the west side of the Building. A monument sign designating the City Hall Building will be located on the east side of the driveway. The second vehicle entrance will be located on Gateway Avenue, across from the existing West County Health Center multilevel parking garage. ADA-compliant pedestrian access will be provided via Gateway Avenue between the West County Health Center and the multilevel parking garage. The intersection will be marked with three pedestrian crosswalks to promote pedestrian safety.

A 10-foot-wide pedestrian walkway will be included to provide access from the southwest corner of the Building to Wildcat Creek and a storage shed.

Project Construction Services will include site preparation, grading, Building construction, asphalt and hardscape paving, landscaping, and architectural coating (i.e., painting).

Developer will assist and coordinate with the City for the design, selection, procurement, and installation and the FF&E.

## **Allowances**

The Project Scope and Contract Price include six Allowances, described below (collectively, the “**Allowances**”). The Developer is not required to use the full amount of any of the Allowance amounts. If, and to the extent that, the Developer’s total expenditures under any Allowance is less or greater than the amount of the Allowance, the Contract Price will be decreased or increased by an amount equal to the difference between the amount of the Allowance and the total amount actually expended. However, any expenditure in excess of an Allowance amount is subject to prior City approval.

**Maple Hall Kitchen:** The Contract Price includes an Allowance of \$250,000 for the procurement and installation of the Maple Hall Kitchen equipment (the “**Maple Hall Kitchen Allowance**”). The City has the exclusive right to approve the design and kitchen equipment to be paid for by the Maple Hall Kitchen Allowance.

**Madeira Room Kitchen:** The Contract Price includes an Allowance of \$50,000 for the procurement and installation of the Madeira Room Kitchen equipment (the “**Madeira Room Kitchen Allowance**”). The City has the exclusive right to approve the design and kitchen equipment to be paid for by the Madeira Room Kitchen Allowance.

**Cabling:** The Contract Price includes an Allowance of \$150,000 for design [and installation] of cabling for IT and security for the New City Hall (the “**Cabling Allowance**”). The City has the exclusive right to approve the cabling design to be paid for by the Cabling Allowance.

**Monument Sign:** The Contract Price includes an Allowance of \$25,000 for the design, procurement, and installation of a monument sign on Chattleton Lane by the driveway (the “**Monument Sign**”) into the New City Hall (the “**Monument Sign Allowance**”). The City has the exclusive right to approve the design of the Monument Sign to be paid for by the Monument Sign Allowance.

**Entry Seal:** The Contract Price includes an Allowance of \$3,500 for the design, procurement, and installation of the City’s seal (the “**Entry Seal**”) at the main entry into the New City Hall (the “**Entry Seal Allowance**”). The City has the exclusive right to approve the design of the Entry Seal to be paid for by the Entry Seal Allowance.

**STMP Fees:** The Contract Price includes an Allowance of \$147,000 for the West County Subregional Transportation Mitigation Program (“**STMP**”).

fees charged by the West Contra Costa Transportation Advisory Committee for the New City Hall (the “**STMP Fee Allowance**”).

### **Design Criteria**

The Project must be designed and constructed consistent with the preliminary Design Documents attached hereto and incorporated herein as **Attachment 1**. The Project design and construction must incorporate the design details attached and incorporated herein as **Attachment 2**. It must also be designed and constructed in conformance with the relevant General Plan and Specific Plan policies identified in Table 3 of June 7, 2017 CEQA evaluation prepared by Michael Baker International, attached hereto and incorporated herein as **Attachment 3**.

## ATTACHMENT 1

### Preliminary Design Documents

<insert preliminary design documents>

## **ATTACHMENT 2**

### **Preliminary Details**

<insert preliminary details>

**ATTACHMENT 3**

**General Plan/Specific Plan Policies**

<insert Table 3 from CEQA document>

**EXHIBIT D**

**Form of Development Agreement**

This document is recorded  
for the benefit of the City  
of San Pablo, which is entitled  
to have it recorded free of charge  
in accordance with Section 6103  
of the Government Code.

After Recordation, mail to:

City Manager  
City of San Pablo  
13831 San Pablo Avenue  
San Pablo, CA 94806

---

**DEVELOPMENT AGREEMENT**

by and between the

CITY OF SAN PABLO

and

CAPITAL PARTNERS DEVELOPMENT COMPANY, LLC,  
a Delaware limited liability company

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (“**Agreement**”), dated for the convenience of the Parties this \_\_\_ day of \_\_\_\_\_, 2017, is entered into by and between the CITY OF SAN PABLO (the “**City**”), and CAPITAL PARTNERS DEVELOPMENT COMPANY, LLC, a California limited liability company (“**Developer**”). City and Developer may each be referred to herein as a “**Party**,” and may together be referred to herein as the “**Parties**.”

### RECITALS

A. City is the owner of that certain real property located at 13831 San Pablo Avenue in the City of San Pablo, which comprises approximately 3.56 acres and is currently part of three (3) separate parcels designated by Assessor’s Parcel Numbers 411-330-037, 411-330-038 and 411-330-039 (the “**Property**”). Upon the Effective Date of this Agreement, as defined in Section 1.1.10, Developer will be the owner of the Property. The Property is more particularly described in Exhibit A, attached hereto.

B. In March of 2014, the City received a grant through the Contra Costa Transportation Authority to conduct a Targeted Industries Study (“**Study**”) which assessed the City’s residential, retail, and office markets and identified the Property as one of four opportunity sites within the City that had high potential for development or redevelopment.

C. The Study recommended that the Property be redeveloped with commercial and residential uses to better conform to the existing surrounding uses and to accommodate the City’s increasing need for commercial and residential uses on San Pablo Avenue, a major transportation corridor in the West County region.

D. In June of 2016, the City published a joint Request for Qualifications and Request for Proposals (“**RFQ/RFP**”), inviting interested parties to submit qualifications and proposals to (a) purchase and redevelop the Property with residential and commercial uses consistent with the recommendations of the Study, and (b) construct or facilitate the construction of a new city hall on a different property owned by the City.

E. The City received four proposals in response to the RFQ/RFP. Based on the proposals, presentations, interviews and references of the proposers, including but not limited to the proposal submitted by Developer on July 5, 2016 (“**Developer’s Proposal**”), the City determined that (i) Developer best possesses the experience, expertise and qualifications necessary to successfully carry out both the redevelopment of the Property and the construction of the new city hall, and (ii) of the four proposals, Developer’s was in the best interests of the City because, among other things, it provided for construction of the new city hall on terms that were most favorable to the City.

F. In exchange for Developer’s agreement to construct the new city hall on terms that would be favorable to the City, Developer seeks to purchase the Property and secure the vested right to redevelop the Property, consistent with the recommendations of the Study, for a period of up to five (5) years. The City has agreed to consider and approve such applications

from Developer as may be required to secure and vest such rights in Developer, subject to all normal limits on the City's discretion and subject to compliance with all applicable laws and regulations, including but not limited to the state Planning and Zoning Laws and the California Environmental Quality Act ("CEQA").

G. To facilitate Developer's proposal, the City has approved amendments to the City's General Plan and to the San Pablo Specific Plan change the land use designations for the Property to **[insert correct designation(s)]**. Developer's proposed development of the Property would be consistent with these land use designations.

H. The City's housing target under ABAG's Regional Housing Needs Allocation ("RHNA") during the period of 2015 - 2023 is 449 units and Developer's redevelopment of the Property as contemplated by this Agreement will help the City meet this target.

I. To further facilitate Developer's proposal, on \_\_\_\_\_, 2017, the City and Developer entered into that certain City Hall Contract between Developer and the City (the "**City Hall Contract**") providing for Developer to design and construct new city hall facilities for the City on certain property owned by the City and located on Gateway Avenue in San Pablo, which property is designated with Assessor's Parcel Number 417-310-005. A copy of the City Hall Contract is attached hereto as Exhibit B.

J. On \_\_\_\_\_, 2017, the City and the Developer entered into an Agreement for Purchase and Sale of Real Property and Joint Escrow Instructions for the sale of the Property from the City to the Developer (the "**PSA**").

J. On \_\_\_\_\_, 2017, the City Council of the City approved this Agreement. This Agreement is intended by City and Developer to constitute a development agreement as provided for and consistent with Sections 65864 through 65869.5 of the California Government Code and Section 17.22.020 of the City of San Pablo Municipal Code (collectively, the "**Development Agreement Laws**"), and is intended to further facilitate and implement Developer's proposal.

## **AGREEMENT**

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants contained in this Agreement, the parties hereto agree as follows:

### **1. ARTICLE 1: DEFINITIONS; TERM.**

1.1 Definitions. The following capitalized terms used in this Agreement shall have the meanings set forth below:

1.1.1 "Agreement" means this Development Agreement.

1.1.2 "Applicable Rules" means the City policies, ordinances, rules and regulations governing development of the Property in effect on the Effective Date.

The Applicable Rules include the City policies, ordinances, rules and regulations governing the permitted uses of the Property; the density and intensity of such uses; the maximum height and size of proposed buildings on the Property; standard conditions, terms, restrictions and requirements applied to property development in the City of San Pablo, including conditions and requirements for the reservation or dedication of land for public purposes; subdivision standards; park regulations; and impact and development fees; but subject to such limitations as are expressly set forth in this Agreement. The Applicable Rules do not include design and construction standards and requirements for public facilities and improvements or facilities and improvements to be acquired by a public entity, except where such requirements are explicitly addressed by this Agreement. The Applicable Rules do not include non-land use and development policies, ordinances, rules and regulations, including without limitation taxes.

1.1.3 “City” is defined in the preamble of this Agreement.

1.1.4 “City Manager” means the City Manager of the City.

1.1.5 “City Hall Contract” means that certain contract between the City and Developer for the design and construction of new city hall facilities on certain property owned by City and located on Gateway Avenue in the City of San Pablo, and designated with Assessor’s Parcel Number 417-310-005.

1.1.6 “Default” is defined in Section 3.2.

1.1.7 “Developer” is defined in the preamble of this Agreement.

1.1.8 “Developer’s Proposal” is defined in Recital E.

1.1.9 “Development Agreement Laws” is defined in Recital J.

1.1.10 “Effective Date” is defined as the date of the conveyance of the Property pursuant to the PSA (as defined in Section 10(b) therein.)

1.1.11 “Force Majeure Delay” is defined in Section 3.7.

1.1.12 “Improvements” means all buildings, landscaping, infrastructure, utilities, and other improvements to be built on the Property by Developer consistent with the General Plan and the San Pablo Specific Plan.

1.1.13 “Party” and “Parties” are defined in the preamble to this Agreement.

1.1.14 “Property” is defined in Recital A and the Property is described in Exhibit A of this Agreement.

1.1.15 “Transfer” is defined in Section 5.1.

1.1.16 “Transferee” is defined in Section 5.2.

1.2 Term of Agreement. This Agreement shall take effect on the Effective Date. It shall continue for a period of five (5) years from the Effective Date unless sooner terminated as provided herein. Following expiration of this 5-year period, this Agreement shall be of no further force and effect except as expressly provided for herein.

## **2. ARTICLE 2: DEVELOPMENT OF PROPERTY.**

### 2.1 Developer Obligations Regarding Development of Property.

2.1.1 Preservation Park Improvements and Dedication. Not later than ninety (90) days following the Effective Date of this Agreement, Developer shall submit to the City for the City's review and approval a site plan describing improvements to the "Preservation Park" portion of the Property (the "Preservation Park Improvements"), which site plan must include, at a minimum, improvements providing for and relating to public access, landscaping, hardscaping, paths and trails, relocation of the Holy Ghost monument, public parking, all necessary and desirable utilities, and a schedule for completion of the Preservation Park Improvements. The City shall review and approve or disapprove such site plan within thirty (30) days of submittal by Developer. Upon completion of the Preservation Park Improvements in conformance with the City-approved site plan, Developer shall dedicate the improved Preservation Park portion of the Property and the Preservation Park Improvements to the City.

2.1.1.1 Expected Preservation Park Improvements. Attached hereto as Exhibit D is a general site depiction of the improvements providing for and relating to public access, landscaping, hardscaping, paths and trails, relocation of the Holy Ghost monument, public parking, and all necessary and desirable utilities.

2.1.2 [RESERVED]

### 2.2 City Obligations Regarding Development of Property.

2.2.1 Vested Rights to Develop and Use the Property. The City hereby grants to Developer the vested right to develop and use the Property in accordance with the terms and conditions of the Applicable Rules and this Agreement.

- 2.2.2 Subsequent Rules. Nothing in this Agreement is intended to preclude the City from, or otherwise impair the City’s authority to, adopt new policies, ordinances, rules and regulations (“Subsequent Rules”) applicable to the Property, provided that the application of Subsequent Rules does not prevent development of the Property for the uses and to the density and intensity of development set forth in this Article 2 of this Agreement or otherwise be in conflict with the rights provided by this Agreement. To the extent that a Subsequent Rule (including a moratorium otherwise lawfully adopted by the City) conflicts with the Applicable Rules or this Agreement, it may be applied to the Property without the consent of the Developer only (i) if the City determines that application of such Subsequent Rule is necessary to protect against conditions that create a substantial and demonstrable risk to the physical health or safety of residents of the City or the affected surrounding region; or (ii) if such Subsequent Rule is mandated or required by supervening federal, state or regional statute or regulation; or (iii) if otherwise provided by this Agreement.
- 2.2.3 No Limit on Right of the City to Adopt and Modify Uniform Codes. This Agreement does not limit the right of the City, to the extent permitted by state law, to adopt Building, Plumbing, Electrical, Fire and similar uniform construction codes, and to adopt local modifications of those codes, from time to time.
- 2.2.4 Subsequent Approvals. The City shall timely process and consider in good faith all applications by Developer for subsequent discretionary approvals required to develop the Property as described in this Article 2, and the City shall not impose any conditions or restrictions on any such subsequent discretionary approval that would prevent the development of the Property for the uses and to the density and intensity of development set forth in this Article 2, or otherwise be in conflict with the rights provided by this Agreement.
- 2.2.5 Preservation Park Improvements and Dedication In Lieu of Park Fees. The City shall accept Developer’s timely improvement and dedication of the Preservation Park portion of the Property and the Preservation Park Improvements, consistent with Section 2.1.1 above, as full and complete satisfaction of Developer’s obligation to pay any fees or make any dedications of land as would otherwise be required under Chapter 16.20 (Dedications and Reservations) of Title 16 (Subdivisions) of the City of San Pablo Municipal Code.
- 2.2.6 [RESERVED]

### **3. PERIODIC COMPLIANCE REVIEW; DEFAULT, REMEDIES AND TERMINATION; CANCELLATION, MODIFICATION AND AMENDMENT**

3.1 Periodic Review. On an annual basis, Developer shall prepare a report to document its good faith compliance with the terms of this Agreement and submit this report to the City not later than the anniversary of the Effective Date. This periodic compliance report shall be conducted in accordance with the Development Agreement Laws.

3.2 Defaults - Definition. The occurrence of any of the following shall constitute a default (“Default”) under this Agreement:

3.2.1 Any failure by a Party to perform any obligation set forth in this Agreement, and the continuance of such failure for a period of thirty (30) days after receipt of written notice of such failure from the Party to whom performance is due; provided, however, if such failure to perform cannot reasonably be cured within such thirty (30) day period, then the Party that has failed to perform shall be deemed to be in Default only if such Party does not commence to cure such failure to perform within such thirty (30) day period and thereafter fails to diligently prosecute performance to completion;

3.2.2 Developer’s transfer, or the occurrence of any involuntary transfer, of any rights and obligations under the City Hall Contract in violation of the City Hall Contract; provided, however, that this Section 3.2.2 shall be of no further force or effect following a valid, City-approved Transfer (as defined in Section 5.1.1) to a City-approved Transferee (as defined in Section 5.1.2).

3.2.3 Developer’s failure or refusal to keep in force and effect any material permit or approval with respect to construction, and Developer’s failure to cure such breach within 15 calendar days after notice from City of Developer’s breach; provided, however, if such breach is not reasonably curable within such 15 day period, then Developer shall be deemed in Default only if Developer does not commence to cure such breach within such 15 day period and thereafter fails to diligently prosecute such breach to completion;

3.2.4 The filing of a petition in bankruptcy by or against Developer, or appointment of a receiver or trustee of Developer, or an assignment of rights in the Property by Developer for the benefit of creditors, and the failure of Developer to cause such petition, appointment, or assignment to be removed or discharged within 90 days;

3.2.5 An adjudication by a court that Developer is insolvent;

3.2.6 Developer’s failure to comply with any of the insurance or indemnity requirements of this Agreement.

3.2.7 Developer’s failure to maintain, or the cancellation of, any bonds or other form of security required of Developer in connection with its obligation to construct any public improvements or facilities under this Agreement or the City Hall Contract.

3.3 Remedies.

3.3.1 Remedies for Default. In the event of a Default by any Party, the non-defaulting party shall be entitled to the following remedies, as applicable:

(i) The non-defaulting Party may terminate this agreement (provided it is not in Default of any obligation under this Agreement), by delivering written notice of the Default to the defaulting Party in conformance with Section 6.1 of this Agreement, subject to the rights of the defaulting Party to cure such Default as provided in Section 3.2.1.

(ii) The non-defaulting Party may seek a court order for specific performance of this Agreement, or such other legal or equitable relief as may be available, subject to the terms and conditions of this Agreement.

3.3.2 No Money Damages. The Parties acknowledge and agree that it is a material part of Developer's consideration to the City that the City shall not be at any risk whatsoever to liability for money damages relating to or arising from this Agreement, and that Developer, for itself and for all successors and assignees, hereby releases the City and all of its agents, employees, representatives, council members, board members, consultants, and offices of the City from any and all claims seeking to impose money damages on the City as a result of the City's negotiation, drafting, execution or performance of this Agreement.

3.4 No Personal Liability. No representative, agent, attorney, consultant, or employee of the City shall personally be liable to Developer or any successor in interest of Developer, in the event of any Default or breach by the City under the terms of this Agreement.

3.5 Rights and Remedies are Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by such Party, at the same time or different times, of any other rights or remedies for the same default or any other default by the non-defaulting Party.

3.6 Inaction Not a Waiver of Default. Any failures or delays by either Party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies, or deprive either such Party of its rights to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies. The acceptance by a Party of less than the full amount due from the other Party shall not constitute a waiver of such Party's right to demand and receive the full amount due, unless such Party executes a specific accord and satisfaction.

3.7 Force Majeure. Following the Close of Escrow, and notwithstanding anything to the contrary in this Agreement, nonperformance shall be excused when performance is prevented or delayed by reason of any of the following forces reasonably beyond the control of such party (a "Force Majeure Delay"): (i) failure to perform by Developer due to a cause affecting all similar works of construction in the San Pablo, California, area, attributable to any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party hereto), civil disturbance, future order claiming jurisdiction, act of the public enemy, acts of terrorism, war, riot, sabotage, blockade, embargo, inability to secure customary materials,

supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; and (ii) delay attributable to severe weather, lightning, earthquake, fire, storm, hurricane, tornado, flood, washout, explosion, or any other similar industry-wide cause beyond the reasonable control of the party from whom performance is required, or any of its contractors or other representatives. Any prevention, delay or stoppage due to any Force Majeure Delay shall excuse the performance of the party affected for a period of time equal to any such prevention, delay or stoppage (except the obligations of either party to pay money to the other party or to close escrow); provided that the party claiming Force Majeure Delay notifies the other party within ten (10) business days after the commencement of the Force Majeure Delay if the Party claiming delay has no actual knowledge of the event of Force Majeure Delay, the Party claiming the Force Majeure Delay must nevertheless notify the other Party of the Force Majeure Delay within a reasonable time (not to exceed thirty days) after the commencement of the Force Majeure Delay.

3.8 Termination. Except as provided in Section 3.3.1 above relating to termination in the event of default, this Agreement may be terminated only by mutual written consent of the Parties and in accordance with the requirements of the Development Agreement Laws and this Agreement.

3.9 Procedure for Amendments. The procedures for amending this Agreement shall be those set forth in the Development Agreement Laws.

3.10 Recordation of Amendment. The City shall record an appropriate notice of any amendment or termination of this Agreement with the Contra Costa County Recorder not later than ten (10) days after the effective date of the amendment or termination, accompanied by a legal description of the Property.

#### **4. INDEMNITY**

4.1 Indemnity. From and after the execution of this Agreement, Developer hereby agrees to indemnify, defend, protect, and hold harmless the City and any and all agents, employees, representatives, council members, board members, consultants, and offices of the City, from and against all losses, liabilities, claims, damages (including foreseeable or unforeseeable consequential damages), penalties, fines, forfeitures, costs and expenses (including all reasonable out-of-pocket litigation costs and reasonable attorneys' fees) and demands of any nature whatsoever, related directly or indirectly to, or arising out of or in connection with:

(i) the execution and performance of this Agreement;

(ii) any of Developer's activities on the Property (or the activities of Developer's agents, employees, lessees, representatives, licensees, guests, invitees, contractors, subcontractors, or independent contractors on the Property), regardless of whether such losses and liabilities shall accrue or are discovered before or after termination or expiration of this Agreement, except to the extent such losses or liabilities are caused by the gross negligence or willful misconduct of the City. The City may in its discretion, and at Developer's cost, participate in the defense of any legal action naming the City as a party. The provisions of this

Section 4.1 shall survive the Close of Escrow and the termination of this Agreement; and

(iii) any breach or Default by Developer hereunder (subject to any liquidated damages provisions otherwise contained in this Agreement).

## **5. ASSIGNMENT AND TRANSFERS; MORTGAGES AND MORTGAGEES**

5.1 Right to Assign Subject to City Consent. No sale, transfer or assignment of this Agreement, or of any right or interest under this Agreement (“Transfer”), shall release Developer from its obligations under this Agreement without the prior written consent of the City, which consent may not be unreasonably withheld. Consistent with the foregoing, the City hereby consents to Developer’s Transfer (as defined below) of this Agreement to City Ventures Homebuilding, LLC, which, upon such assignment and transfer will be considered by the City as an approved Transferee (as defined below). Notwithstanding the City’s consent to a Transfer of this Agreement to City Ventures Homebuilding, LLC, Developer shall not be released from its obligations under this Agreement unless and until Developer has complied with the requirements of Sections 5.1.2 below.

5.1.1 Within thirty (30) days prior to any such sale, transfer or assignment of this Agreement (individually and collectively, a “Transfer”), Developer shall notify the City of such proposed Transfer and the name of the purchaser, transferee or assignee (“Transferee”). The City may request Developer to provide additional information relating to the proposed Transfer or to the proposed Transferee. The City shall review and approve or disapprove Developer’s request for the City’s consent to release Developer from its obligations under this Agreement within thirty (30) days following Developer’s satisfactory provision of any such additional information requested by the City. Factors that the City may consider with respect to any proposed Transfer may include, without limitation, the financial ability of the proposed Transferee to satisfy the Developer’s obligations under this Agreement, and the experience of the proposed Transferee in developing, constructing, operating and maintaining development projects similar to the Project. The City may, if the City determines in its reasonable discretion that it is necessary based upon the financial ability of the proposed Transferee to satisfy the Developer’s obligations under this Agreement, require that the Transferee provide the City with security reasonably satisfactory to the City to secure the performance of the transferred obligations under this Agreement. If the City approves Developer’s request for the City’s consent to release Developer from its obligations under this Agreement, such approval and consent shall not be effective unless made in a writing approved by the City Council and signed by the City Manager.

5.1.2 Prior to the effective date of any Transfer by Developer, Developer shall provide the City with an executed assignment agreement, in a form reasonably acceptable to the City, executed by the Transferee, providing that such Transferee expressly and unconditionally assumes all the duties and obligations of Developer under this Agreement as it relates to the Property subject to the Transfer. Notwithstanding the failure of any Transferee to execute such agreement, the burdens of this Agreement shall be binding upon such Transferee, but the benefits of this Agreement shall not inure to such Transferee until and unless such agreement has been executed by such Transferee.

5.1.3 In no event shall any rights, duties or obligations conferred upon Developer pursuant to this Agreement be at any time sold, transferred or assigned except in connection with a sale, transfer or assignment of an ownership interest in the Project and the Property.

5.1.4 Notwithstanding any Transfer by Developer of this Agreement or the Property, Developer shall continue to be obligated under this Agreement unless and until the City has consented in writing to release Developer from its obligations hereunder, in the manner set forth in Section 5.1.1 above.

5.2 Mortgages and Mortgagees. Nothing in this Agreement shall prevent a transfer of the Property to an institutional lender or Mortgagee as a result of a foreclosure of a Mortgage or deed in lieu of foreclosure, and any lender or Mortgagee acquiring the Property as a result of a foreclosure of a Mortgage or deed in lieu of foreclosure shall take the Property subject to the terms of this Agreement; provided, however, that in no event shall any such lender or Mortgagee be liable for any defaults or monetary obligations of Developer arising prior to acquisition of title to the Property by lender or Mortgagee; and provided further, that in no event shall any such lender or Mortgagee or its successors or assigns be entitled to a building permit or occupancy certificate for any portion of the Project until all obligations of Developer then due under this Agreement have been performed, and all outstanding defaults by Developer have been cured.

5.2.1 Holders of Deeds of Trust. Notwithstanding any provisions of Section 5 to the contrary, Developer shall have the right to hypothecate its interest in the Property and Project pursuant to one or more deeds of trust from an institutional lender approved by the City (which approval shall not unreasonably be withheld or delayed), for the purpose of securing loans of funds to be used for financing the direct and indirect costs of the Project (including land development costs, reasonable and customary developer fees, loan fees and costs, and other normal and customary project costs), or for refinancing the construction financing. Any institutional lender of record holding any such deed of trust, whose name and address shall have been provided by Developer to the City, shall be referred to herein as a "Holder."

5.2.2 Rights of Holders. The City shall deliver a copy of any notice or demand to Developer concerning any breach or default by Developer under this Agreement to each Holder who has previously made a written request to the City for special notice hereunder. Such Holder shall have the right at its option to cure or remedy any such default, within thirty (30) days after the later of the expiration of Developer's period to cure such default or the Holder's receipt of the default notice from City, and to add the cost thereof to the secured debt and the lien of its security interest. If such breach or default can only be remedied or cured by such Holder upon obtaining possession, such Holder may remedy or cure such breach or default within a reasonable period of time after obtaining possession, provided such Holder seeks possession with diligence through a receiver or foreclosure. Such Holder shall not undertake or continue the construction or completion of any improvements on the Property beyond the extent necessary to conserve or complete such improvements. Any Holder completing such improvements may assume all rights and obligations of Developer under this Agreement (but without any obligation to do so); provided that, in the event of any such assumption, (i) the City shall reasonably cooperate with the Holder and (ii) such Holder shall be entitled to a reasonable

extension of time to complete the Project in accordance with this Agreement. If a Holder should, as a condition of providing financing for development of all or a portion of the Project, request any modification of this Agreement in order to protect its interests in the Project or this Agreement, the City shall not unreasonably withhold its consent to such request consistent with the purpose and intent of this Agreement and the rights and obligations of the parties under this Agreement. As used in this Agreement, to the extent applicable, the term “Holder” shall include any successors and assigns of Holder and any person or entity acquiring the Property at or at any time after a foreclosure event.

5.2.3 Noninterference with Holders. The provisions of this Agreement do not limit the right of Holders (a) to foreclose or otherwise enforce any mortgage, deed of trust, or other security instrument encumbering all or any portion of the Property, and any improvements thereon, (b) to pursue any remedies for the enforcement of any pledge or lien encumbering such portions of the Property, or (c) to accept, or cause its nominee to accept, a deed or other conveyance in lieu of foreclosure or other realization. In the event of (i) a foreclosure sale under any such mortgage, deed of trust or other lien or encumbrance, (ii) a sale pursuant to any power of sale contained in any such mortgage or deed of trust, or (iii) a deed or other conveyance in lieu of any such sale, the purchaser or purchasers and their successors and assigns, and such portions of the Property shall be, and shall continue to be, subject to all of the conditions, restrictions and covenants of all documents and instruments recorded pursuant to this Agreement, including, without limitation, the restrictions set forth in the grant deed on such property from the City to Developer, subject to the provisions hereof. The City agrees to execute such further documentation regarding the rights of any Holder as set forth in this Section 5.2.

5.2.4 Right of City to Cure. In the event of a default or breach by the Developer of a loan by a Holder prior to the completion of the Project, the City may, upon prior written notice to the Developer, cure the default, prior to the completion of any foreclosure, in accordance with the terms of the Subordination Agreement described in Section 5.2.6 below.

5.2.5 Right of City to Satisfy Other Liens. After the Close of Escrow, and after the Developer has had a reasonable time to challenge, cure, or satisfy any liens or encumbrances on the Property or any portion thereof, and has failed to do so, in whole or in part, the City shall, upon prior written notice to the Developer, have the right to satisfy any such lien or encumbrances; however, nothing in this Agreement shall require the Developer to pay or make provision for the payment of any tax, assessment, lien or charge so long as the Developer in good faith shall contest the validity or amount therein and so long as such delay in payment shall not subject the Property or any portion thereof to forfeiture or sale.

5.2.6 Subordination. Upon the request of the Holder, the City shall enter into a subordination agreement, in a form which is reasonably acceptable to the City, to subordinate its rights under this Agreement, and the Grant Deed to the lien or encumbrance of any financing. The City, with its reasonable approval of form thereof, shall also execute such further documents as Holder may reasonably require to effectuate such subordination.

5.3 Agreement Binding on Successors. Subject to the limitations on sales, transfers and assignments set forth in this Section 5, the burdens of this Agreement shall be binding on, and the benefits of this Agreement shall inure to, all successors-in-interest to the City and Developer pursuant to Government Code section 65868.5.

## 6. GENERAL PROVISIONS

6.1 Notices. All notices and demands made pursuant to this Agreement shall be given in writing by certified mail, postage prepaid, and return receipt requested, or by reputable overnight messenger service. Notices shall be considered given upon the earlier of (i) personal delivery, or (ii) one business day following deposit or delivery with a nationally recognized overnight courier delivery charges prepaid, or (iii) date of delivery or attempted delivery shown on the return receipt if sent by mail, certified or return receipt requested. Notices shall be addressed as provided below for the respective Party; provided that if any Party gives notice in writing of a change of name or address, notices to such Party shall thereafter be given as provided in that notice:

City: City of San Pablo  
13831 San Pablo Avenue  
San Pablo, California 94806  
Attn: City Manager

With copy to: City of San Pablo  
13831 San Pablo Avenue  
San Pablo, California 94806  
Attn: City Attorney

Developer: Capital Partners Development Company, LLC  
2890 Kilgore Road, Suite 175  
Rancho Cordova, California 95670  
Attn: Rod Johnson, Managing Partner

6.2 Construction. The Parties agree that each Party and its counsel have reviewed and revised this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Agreement or any amendments or exhibits thereto. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties.

6.3 Interpretation. In this Agreement the neuter gender includes the feminine and masculine, and singular number includes the plural, and the words “person” and “party” include corporation, partnership, firm, trust, or association where ever the context so requires. Unless otherwise required by a specific provision of this Agreement, time hereunder is to be computed by excluding the first day and including the last day. If the date for performance by the City falls on a Friday, Saturday, Sunday, or legal holiday, the date for performance shall be extended to the next business day. If the date for performance by Developer falls on a Saturday, Sunday, or legal holiday, the date for performance shall be extended to the next business day. All references in this Agreement to a number of days in which either party shall have to consent approve or perform shall mean calendar days unless specifically stated to be business days.

6.4 Time of the Essence. Time is of the essence with respect to the performance of all obligations under this Agreement.

6.5 Warranty Against Payment of Consideration for Agreement. Developer hereby warrants that it has not paid or given, and will not pay or give, to any third person, any money or other consideration for obtaining this Agreement, other than normal costs of conducting business and costs of professional services such as architects, engineers and attorneys.

6.6 Headings. All section headings and subheadings are inserted for convenience only and shall have no effect on the construction or interpretation of this Agreement.

6.7 No Third Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit of the Parties, and their permitted successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

6.8 Governing Law; Jurisdiction; Service of Process. This Agreement and the rights of the Parties shall be governed by California law. The Parties consent to the exclusive jurisdiction of the California Superior Court for the County of Contra Costa. If any legal action is commenced by Developer against the City, or by the City against Developer, service of process on the City shall be made by personal service upon the City Manager or City Clerk, or in such other manner as may be provided by law. If any legal action is commenced by the City against Developer, service of process on Developer shall be made in any manner as may be provided by law. Developer agrees, for the benefit of the City, that it shall designate an agent for service of process in the State of California in the manner prescribed by law.

6.9 Survival. The provisions hereof shall not merge into, but rather shall survive, any conveyance hereunder (including, without limitation, the delivery and recordation of any Grant Deed) and the delivery of all consideration.

6.10 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed as original but all of which together shall constitute one and the same instrument.

6.11 Exhibits. The following exhibits are incorporated in and made a part of this Agreement by this reference:

- A. Legal Description of Property.
- B. City Hall Contract.
- C. PSA
- D. General Site Depiction of Expected Preservation Park Improvements

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

DEVELOPER:

CAPITAL PARTNERS DEVELOPMENT  
COMPANY, LLC, a Delaware limited  
liability company

By:

\_\_\_\_\_  
Rod Johnson, Managing Partner

CITY:

By: \_\_\_\_\_  
Matt Rodriguez, City Manager

ATTEST:

\_\_\_\_\_  
Ted Denney, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Lynn Tracy Nerland, City Attorney

**Exhibit A**

Legal Description of Property

**Exhibit B**

City Hall Contract

**Exhibit C**

PSA

**Exhibit D**

General Site Depiction of Expected Preservation Park Improvements  
*[Provide Image for Review by Parties to Ensure Accuracy]*

**EXHIBIT E**

**Title Commitment**

**EXHIBIT F**

**Permitted Exceptions**

(To be determined by Buyer and Seller and attached following completion of Title Inspection Period pursuant to Section 6(a)(i))

**EXHIBIT G**

**Escrow Holder's General Provisions**

## ESCROW HOLDER'S GENERAL PROVISIONS

1. All funds received in this escrow shall be deposited in a separate escrow fund or account or accounts of FIDELITY NATIONAL TITLE INSURANCE COMPANY (for the benefit of the Parties hereto) with one or more state or national banks duly qualified to do business in the State of California, so that each such account shall be fully insured at all times by the Federal Deposit Insurance Corporation, to the maximum extent permitted by law. All disbursements shall be made by check of FIDELITY NATIONAL TITLE INSURANCE COMPANY.

2. Escrow Holder is authorized to prepare, obtain, record and deliver the necessary instruments to carry out the terms and conditions of this escrow and to order to be issued at close of escrow the policy title insurance as called for in these instructions. "Close of escrow" shall mean the date instruments are recorded, unless otherwise specified by the parties.

3. All adjustments and prorations shall be made on the basis of a 365-day year and the actual number of days in the month in which the close of escrow occurs.

4. If applicable, Escrow Holder is instructed to assign any fire and casualty insurance policy delivered to you and to secure any endorsements required in the performance of these instructions. Escrow Holder may assume that said policy is in full force and effect and that all premiums due have been paid.

5. Escrow Holder shall have no responsibility by notifying any of the Parties to this escrow of any sale, resale, loan, exchange or other transaction involving any property herein described or of any profit realized by any person, firm or corporation in connection therewith, regardless of the fact that such transaction(s) may be handled by you in this escrow or in another escrow.

6. No notice, demand or change of instruction shall be of any effect in this escrow until given in writing by all parties affected thereby and except as otherwise specifically provided in the Agreement to which these General Provisions are attached.

7. If the conditions of this escrow have not been complied with at the time herein provided, Escrow Holder is nevertheless to complete the same as soon as the conditions (except as to time) have been complied with, unless any party hereto has made written demand upon you for the return of money and instruments deposited by it.

8. Unless the Agreement otherwise provides or unless otherwise instructed by either Buyer or Seller, Escrow Holder is authorized to furnish copies of these instructions, any supplements or amendments thereto, notices of cancellation and closing statements to the attorneys, real estate broker(s) lender(s), if any, named in this escrow.

9. Any funds abandoned or remaining unclaimed, after good faith efforts have been made by the Escrow Holder to return same to the Party(ies) entitled thereto, shall be assessed a holding fee of \$50.00 annually.

10. All documents, closing statements, and balances due the Parties to this escrow are to be wire transferred to said Parties pursuant to separate wire transfer instructions to be delivered to escrow, or if no such separate wire transfer instructions are given to escrow, by Priority U.S. Mail or FedEx as the addresses set forth in this Agreement of the parties for notices, unless otherwise instructed.

11. Notwithstanding the foregoing, if Escrow Holder is also acting as Title Insurer under the Agreement, nothing set forth in these General Provisions shall limit any liability set forth in the Title Policy(ies) provided in the Agreement.

12. For purposes of complying with Internal Revenue Code Section 6045(e), as amended effective January 1, 1991, Escrow Holder is hereby designated as the "person responsible for the transaction" and also the "reporting person," for purposes of filing any information returns with the Internal Revenue Service concerning this transaction, as required by law.

13. Escrow Holder shall assist the Parties in obtaining a waiver of withholding from the Franchise Tax Board with respect to the transactions contemplated by the Agreement in accordance with Section 18662 of the Revenue and Taxation Code of California.

14. Escrow Holder shall assist the Parties in complying with the provisions of Internal Revenue Code Section 1445 (FIRPTA withholding).