

CITY COUNCIL ORDINANCE NO. 19-15

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF IRVINE, CALIFORNIA, APPROVING DEVELOPMENT AGREEMENT 00771503-PDA WITH ELEMENTS 1 LEASEHOLD, LLC, FOR ELEMENTS RESIDENTIAL MIXED-USE PROJECT LOCATED NORTH OF CAMPUS DRIVE BETWEEN BARDEEN AVENUE AND JAMBOREE ROAD IN PLANNING AREA 36 (IRVINE BUSINESS COMPLEX)

WHEREAS, an application has been filed by Elements 1 Leasehold, LLC, requesting approval of Development Agreement 00771503-PDA for the Elements residential mixed-use project located north of Campus Drive between Jamboree Road and Bardeen Avenue (Assessor's Parcel Numbers 445-041-03, 445-041-07, 445-031-09, and 445-031-10) in the Irvine Business Complex (IBC); and

WHEREAS, the Irvine Planning Commission granted approvals for the Elements residential mixed-use project consisting of 1,600 residential units; publicly-accessible and private recreation areas; between 8,500 to 17,000 square feet of primary retail/restaurant uses; and between 8,000 to 22,000 square feet of accessory retail uses on 23.78 acres; and

WHEREAS, the Development Agreement applicability is limited to the 23.78 acres located north of Campus Drive between Jamboree Road and Bardeen Avenue that include future entitlements and existing approvals granted through Master Plan 00575136-PMP, Park Plan 00575148-PPP, Conditional Use Permit 00596485-PCPU, Vesting Tentative Tract Map 17641 (00578884-PTT), Conditional Use Permit 00634493-PCPU, and Vesting Tentative Tract Map 17862 (00634486-PTT); and

WHEREAS, the Development Agreement does not append, rescind or revise any approvals or conditions for development of the subject parcels at the subject property. Instead, the Agreement vests the approvals noted above for a period of ten (10) years and provides a public benefit in the form of agreed upon terms regarding:

1. Pre-Payment of the following Development Impact Fees over the first five years:
 - Community Park
 - IBC Neighborhood Infrastructure Improvement Program
 - Systems Development Charge
2. Enhancements to the 1.7-acre public neighborhood park located within the project site;
3. Installation of "Irvine" gateway monument signage at the northwest corner of Jamboree Road and Campus Drive subject to the approval by Planning Commission;
4. Submittal of subcontractors working or anticipated to be working on the project at time of permit issuance pursuant to Section 5-9-205.H of the Irvine Municipal Code.

The Developer agrees to provide an updated subcontractor list every six months to the City during the entire course of project construction; and

WHEREAS, Irvine City Council Resolution No. 82-68 established procedures and requirements for the consideration of approval, amendment, and/or cancellation of a statutory development agreement in accordance with Govt. Code Title 7, Division 1, Chapter 4, Article 2.5 Development Agreements, Section 65865; and

WHEREAS, Govt. Code Section 65867 and Irvine City Council Resolution No. 82-68 require a hearing by the Planning Commission, after which, it shall make a recommendation to the City Council; and

WHEREAS, the Planning Commission of the City of Irvine considered information presented by the applicant, the Community Development Department, and other interested parties at a duly-noticed public hearing held on September 19, 2019 and recommended City Council approval of the Development Agreement; and

WHEREAS, the City Council has considered information presented by the applicant, the Community Development Department, and other interested parties at a duly-noticed public hearing held on October 22, 2019.

NOW, THEREFORE, the City Council of the City of Irvine DOES HEREBY ORDAIN as follows:

SECTION 1. That the above recitals are true and correct and are incorporated herein.

SECTION 2. Pursuant to Section 6 of the City of Irvine CEQA Procedures and Sections 15162, 15168, and 15378 of the State CEQA Guidelines, the Commission finds that: (1) the development vested by this Agreement conforms in all respects to development studied in and contemplated by the certified Irvine Business Complex Vision Plan and Mixed Use Overlay Zoning Code Environmental Impact Report (SCH No. 2007011024) prepared for the Irvine Business Complex and as refined through the Addendum prepared for the project (the "EIR") and (2) that this Agreement will not have any new or different environmental impacts from the development which is the subject of the EIR; and (3) that there are no changes to the project, changes in circumstances or new information that would require the preparation of subsequent or supplemental environmental review for the matters covered by the Agreement under CEQA Guideline Section 15162 and Public Resources Code Section 21166, and, therefore, this action falls within the scope of the EIR and its corresponding approved project.

SECTION 3. That the findings required by City Council Resolution No. 82-68 regarding City Council's determination as to whether the development agreement proposed:

- A. Is consistent with the objectives, policies, general land uses and programs specified in the General Plan and any applicable specific plan.

Development Agreement 00771503-PDA is consistent with the Irvine General Plan in that the uses and development intensities described in the master plan and conditional use permits vested by the Agreement correspond to the land uses and maximum square footage as regulated in the General Plan for Planning Area 36. As there are no applicable specific plans affecting the subject site, that portion of the required finding is not applicable. Therefore, the proposed development agreement is consistent with the objectives, policies, general land uses and programs specified in the General Plan.

- B. Is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the real property is located.

Development Agreement 00771503-PDA is consistent with the uses within the land use district and surrounding areas in which the real property is located.

The City Council has determined that the project is compatible with the uses authorized in, and the regulation prescribed for the land use district in which the property is located, therefore it is in the best interest of the City of Irvine that the Development Agreement be approved as an integral part of that application.

- C. Is in conformity with public convenience, general welfare and good land use practices.

The Development Agreement is in conformity with the City of Irvine's standards for public convenience, general welfare and good land use practices in that the Development Agreement does not independently set or revise any land use approvals. The Development Agreement sets forth the public benefit contributions agreed to by the applicant.

- D. Will not be detrimental to the health, safety and general welfare.

All future development proposed on the subject site is required to comply with all applicable local, regional, state and federal regulations regarding health and safety matters.

- E. Will not adversely affect the orderly development of property or the preservation of property values.

The Development Agreement will not adversely affect the orderly development of property and will preserve property values in that it promotes a quality residential mixed-use project using sustainable development practices. The development agreement will vest underlying approvals for a period of 10 years. Future residential development will replace an underutilized property consisting of one-story light industrial/retail/institutional buildings, and revitalize the subject property which should have beneficial effects on property values in the area.

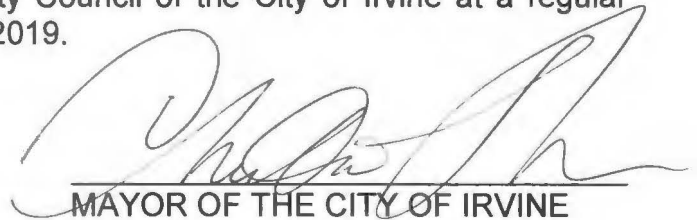
SECTION 4. That Development Agreement 00771503-PDA vests development approvals for Elements 1 Leasehold, LLC, and/or subsequent owners for the 23.78 acre project site located north of Campus Drive between Jamboree Road and Bardeen Avenue for a period of ten (10) years.

SECTION 5. That the above recitals are true and correct and are incorporated herein.

SECTION 6. That the City Clerk shall enter the Ordinance into the book or original Ordinances.

SECTION 7. That based on the above recitals, the City Council of the City of Irvine DOES HEREBY APPROVE Development Agreement 00771503-PDA (See Exhibit 1).

PASSED AND ADOPTED by the City Council of the City of Irvine at a regular meeting held on the 12th day of November 2019.



MAYOR OF THE CITY OF IRVINE

ATTEST:



CITY CLERK OF THE CITY OF IRVINE

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS
CITY OF IRVINE)

I, MOLLY M. PERRY, City Clerk of the City of Irvine, HEREBY DO CERTIFY that the foregoing ordinance was introduced for first reading on the 22nd day of October, 2019, and duly adopted at a regular meeting of the City Council of the City of Irvine held on the 12th day of November, 2019.

AYES:	5	COUNCILMEMBERS:	Carroll, Fox, Khan, Kuo, and Shea
NOES:	0	COUNCILMEMBERS:	None
ABSENT:	0	COUNCILMEMBERS:	None
ABSTAIN:	0	COUNCILMEMBERS:	None



CITY CLERK OF THE CITY OF IRVINE

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Irvine
One Civic Center Plaza
Irvine, CA 92623-9575
Attn: City Manager

[SPACE ABOVE THIS LINE FOR RECORDER'S USE]
[EXEMPT FROM RECORDING FEE PER GOVERNMENT CODE SECTION 27383]

[Elements]

DEVELOPMENT AGREEMENT

This Development Agreement (hereinafter "Agreement") is entered into effective as of _____, 2019, (hereinafter the "Effective Date") by and between the CITY OF IRVINE (hereinafter "CITY"), and ELEMENTS 1 LEASEHOLD, LLC, a California limited liability company (hereinafter "OWNER").

RECITALS

A. OWNER owns all of the real property ("Property") described on Exhibit "A" and depicted on Exhibit "B." On April 17, 2014, the City's Planning Commission approved the Project allowing for development of the Property with 1,600 dwelling units and up to 17,000 square feet of restaurant retail and 22,000 square feet of resident-serving retail (the "Project") through the following entitlements: a Master Plan (00575136-PMP), a Conditional Use Permit (00596485-PCPU), Vesting Tentative Tract Map 17641 (00578884-PTT) and a Park Plan (00575148-PPP). Subsequently, on November 5, 2015, the Planning Commission approved Vesting Tentative Tract Map 17862 (00634486-PTT) and another Conditional Use Permit (00634493-PCPU). Presently, 700 dwelling units (of the 1,600 units approved) have received ministerial permits and are under construction.

B. Government Code Sections 65864 et seq. ("Development Agreement Law") authorize CITY to enter into binding development agreements with persons having a legal or equitable interest in real property for the development of such property, all for the purpose of strengthening the public planning process, encouraging private participation and comprehensive planning and reducing the economic costs of such development. OWNER has therefore asked, and CITY has agreed, that a Development Agreement should be approved and adopted for this Property in order to memorialize and secure the respective expectations of CITY and OWNER.

C. The City Council of the CITY (hereinafter "City Council") has found that this Agreement is in the best public interest of the CITY and its residents, that adopting this Agreement constitutes a present exercise of the CITY's police power, and that the Project is consistent with the goals and policies of the CITY's General Plan and imposes appropriate standards and requirements with respect to the development of the Property in order to maintain the overall quality of life and of the environment within the CITY. Prior to its approval of this Agreement,

CITY considered the environmental impacts of the Project and completed its environmental review of the Project.

D. On September 19, 2019, the Planning Commission of CITY held a public hearing on the OWNER's application for approval of this Agreement, made certain findings and determinations with respect thereto, and recommended to the City Council that this Agreement be approved. On October 22, 2019, the City Council also held a public hearing on the OWNER'S application for approval of this Agreement, considered the recommendations of the Planning Commission, and found that this Agreement is consistent with CITY's General Plan.

COVENANTS

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS AND EXHIBITS.

1.1 **Definitions.** This Agreement uses a number of terms having specific meanings, as defined below. These specially defined terms are distinguished by having the initial letter capitalized, or all letters capitalized, when used in the Agreement. The defined terms include the following:

1.1.1 "*Agreement*" means this Development Agreement.

1.1.2 [Intentionally deleted.]

1.1.3 "*CITY*" means the City of Irvine, a California charter city.

1.1.4 "*City Council*" means the City Council of the CITY.

1.1.5 "*Development*" means the improvement of the Property for the purposes of completing the structures, improvements and facilities comprising the Project including, but not limited to: grading; the construction of infrastructure and public facilities related to the Project whether located within or outside the Property; the construction of buildings and structures; and the installation of landscaping and park facilities and improvements. "Development" also includes the maintenance, repair, reconstruction or redevelopment of any building, structure, improvement, landscaping or facility after the construction and completion thereof.

1.1.6 "*Development Approvals*" means all permits, licenses, consents, rights and privileges, and other actions subject to approval or issuance by CITY in connection with Development of the Property issued by CITY on or before the Effective Date of this Agreement, including but not limited to:

- (a) General plans and general plan amendments;
- (b) Specific plans and specific plan amendments;

- (c) Zoning and rezoning;
- (d) Tentative and final subdivision and parcel maps;
- (e) Variances, conditional use permits, master plans, park plans, public use permits and plot plans; and
- (f) Grading and building permits.

1.1.7 “*Development Fees*” means the monetary consideration charged by CITY in connection with a development project for the purpose of defraying all or a portion of the cost of mitigating the impacts of the project and development of the public facilities related to development of the project.

1.1.8 [Intentionally deleted.]

1.1.9 “*Development Requirement*” means any requirement of CITY in connection with or pursuant to any Development Approval for the dedication of land, the construction or improvement of public facilities, the payment of fees or assessments in order to lessen, offset, mitigate or compensate for the impacts of Development on the environment, or the advancement of the public interest.

1.1.10 “*Effective Date*” means the date this Agreement is recorded with the County Recorder.

1.1.11 “*Land Use Regulations*” means all ordinances, resolutions, codes, rules, regulations and official policies of CITY adopted and effective on or before the Effective Date of this Agreement governing Development and use of land, including, without limitation, the permitted use of land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement and construction standards and specifications applicable to the Development of the Property. “*Land Use Regulations*” does not include any CITY ordinance, resolution, code, rule, regulation or official policy governing:

- (a) the conduct of businesses, professions, and occupations;
- (b) taxes and assessments;
- (c) the control and abatement of nuisances;
- (d) the granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property;
- (e) the exercise of the power of eminent domain; and
- (f) the amount of processing fees or Development impact fees.

1.1.12 "*OWNER*" means ELEMENTS 1 LEASEHOLD, LLC, a California limited liability company, and, where specified in this Agreement, its successors in interest to all or any part of the Property.

1.1.13 [Intentionally deleted.]

1.1.14 "*Mortgagee*" means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device, a lender or each of their respective successors and assigns.

1.1.15 "*Project*" means the Development of the Property consistent with the Development Approvals.

1.1.16 "*Property*" means the real property described in Exhibit "A" and shown on Exhibit "B" to this Agreement.

1.1.17 "*Reservation of Authority*" means the rights and authority excepted from the assurances and rights provided to OWNER under this Agreement and reserved to CITY.

1.1.18 "*Subsequent Development Approvals*" means all Development Approvals issued subsequent to the Effective Date in connection with Development of the Property.

1.1.19 "*Subsequent Land Use Regulations*" means any Land Use Regulations adopted and effective after the Effective Date of this Agreement, other than the Development Approvals.

1.1.20 "*Term*" shall mean the period of time from the Effective Date until the termination of this Agreement as provided in subsection 12.1, or earlier termination as provided in Sections 8.4 and 8.5.

1.2 **Exhibits.** The following documents are attached to, and by this reference made a part of, this Agreement:

Exhibit "A" Legal Description of the Property.

Exhibit "B" Map showing Property and its location.

2. GENERAL PROVISIONS.

2.1 **Binding Effect of Agreement.** From and following the Effective Date, Development and CITY actions on applications for Subsequent Development Approvals respecting the Property shall be subject to the terms and provisions of this Agreement.

2.2 **Ownership of Property.** OWNER represents and covenants that it is the owner of the fee simple title to the Property.

2.3 Assignment.

2.3.1 *Right to Assign.* OWNER shall have the right to sell, transfer or assign the Property in whole or in part (provided that no such partial transfer shall violate the Subdivision Map Act, Government Code Section 66410, *et seq.*), and in so doing assign its rights and obligations under this Agreement as the same may relate solely to the portion of the Property being sold, transferred, or assigned to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement.

2.3.2 *Release of Transferring OWNER.* Upon the sale, transfer or assignment of all or a portion of the Property, the transferring OWNER shall be released of all obligations under this Agreement that relate solely to the portion of the Property being sold, transferred, or assigned; provided that the obligations under this Agreement that relate to the portion of the Property being sold, transferred, or assigned are assumed by and enforceable against the transferee. Notwithstanding the foregoing sentences of this Subsection, transferring OWNER shall remain responsible for all obligations set forth in the Development Approvals that do not relate solely to the portion of the Property being sold, transferred, or assigned.

3. DEVELOPMENT OF THE PROPERTY.

3.1 **Rights to Develop.** Subject to the terms of this Agreement, OWNER shall have a vested right to develop the Property in accordance with, and to the extent of, the Development Approvals and any Subsequent Development Approvals. Development allowed under the Development Approvals and any Subsequent Development Approvals is hereby vested specifically with the Property, and OWNER retains the right to apportion development rights between itself and any subsequent OWNER, upon the sale, transfer, or assignment of any portion of the Property, so long as such apportionment is consistent with the Development Approvals, any Subsequent Development Approvals, and the Land Use Regulations. The anticipated applications for non-ministerial Subsequent Development Approvals for Phase 3 of the Project shall be subject to the substantive development standards and requirements (such as standards for density, setbacks, floor area ratio, maximum heights, etc.) set forth in the Development Approvals and Land Use Regulations in effect as of the Effective Date of this Agreement. Applications for Subsequent Development Approvals shall be subject to the procedural requirements in effect at the time the application is processed.

3.2 **Effect of Agreement on Land Use Regulations.** Except as otherwise provided under the terms of this Agreement, the rules, regulations and official policies governing permitted uses of the Property, the density and intensity of use of the Property, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications applicable to Development of the Property, shall be those contained in the Development Approvals and those Land Use Regulations not inconsistent with the Development Approvals.

3.3 **Subsequent Development Approvals.** CITY shall accept for processing, review and action all applications for Subsequent Development Approvals, and such applications shall be processed in the normal manner for processing such matters, for all or a portion of the Property at OWNER's option. The CITY further agrees that, unless otherwise requested by OWNER or as

authorized by this Agreement, it shall not, without good cause, amend or rescind any Subsequent Development Approvals respecting the Property after such approvals have been granted by the CITY, and that pursuant to Section 66452.6 (a) of the California Government Code, any tentative subdivision map approved for the Property, or any portion thereof, shall also be extended for a period equal to the Term of this Agreement.

3.4 Timing of Development. The parties acknowledge that OWNER cannot at this time predict when or the rate at which phases of the Property will be developed. Such decisions depend upon numerous factors which are not within the control of OWNER, such as market orientation and demand, interest rates, absorption, completion and other similar factors. Since the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal. 3d 465, that the failure of the parties therein to provide for the timing of Development resulted in a later-adopted initiative restricting the timing of Development to prevail over such parties' agreement, it is the intent of the parties to this Agreement to cure that deficiency by acknowledging and providing that OWNER shall have the right to develop the Property in such order and at such rate and at such times as OWNER deems appropriate within the exercise of its subjective business judgment. Nothing in this Section is intended to alter the standard durational limits of any applicable permits issued to OWNER.

3.5 Changes and Amendments. The parties acknowledge that Development of the Project will likely require Subsequent Development Approvals, and that in connection therewith OWNER may determine that changes are appropriate and desirable in the existing Development Approvals. In the event OWNER finds that such a change is appropriate or desirable, OWNER may apply in writing for an amendment to prior Development Approvals to effectuate such change, and CITY shall process and act on such application notwithstanding anything in this Agreement that may be to the contrary. CITY shall have no obligation to grant any such application by OWNER that modifies the overall intensity or density of Development, or otherwise is a substantial modification of the Development Approvals. If approved in a form to which OWNER has consented in writing, any such change in the Development Approvals shall be incorporated herein as an addendum and may be further changed from time to time as provided in this Section. Any change in the Development Approvals made in accordance with the procedures required by the Land Use Regulations and with the written consent of the OWNER shall be conclusively deemed to be consistent with this Agreement, without any further need for any amendment to this Agreement or any of its Exhibits. Notwithstanding the foregoing, minor modifications to the Development Approvals may be approved in accordance with Chapter 2-19 of the Irvine Zoning Ordinance, which shall not require recordation but shall be retained by the City as a public record. A minor modification shall not increase unit count, significantly reduce parking requirements, or reduce the Development Fees approved by this Agreement.

3.6 Reservation of Authority.

3.6.1 Limitations, Reservations and Exceptions. Notwithstanding any other provision of this Agreement, the following Subsequent Land Use Regulations shall apply to the Development of the Property:

- (a) Processing fees and charges of every kind and nature imposed by CITY to cover the estimated actual costs to CITY of processing applications for

Development Approvals or for monitoring compliance with any Subsequent Development Approvals granted or issued.

(b) Procedural regulations not inconsistent with this Agreement relating to hearing bodies, petitions, applications, notices, findings, records, hearing, reports, recommendations, appeals and any other matter of procedure.

(c) Changes adopted by the International Conference of Building Officials as part of the then most current versions of the Uniform Building Code, Uniform Fire Code, Uniform Plumbing Code, Uniform Mechanical Code, Uniform Solar Energy Code, Uniform Swimming Pool, Spa and Hot Tub Code, Uniform Housing Code, Uniform Administrative Code, or National Electrical Code, and also adopted by CITY as Subsequent Land Use Regulations.

(d) Regulations which may be in conflict with the Development Approvals but which are reasonably necessary to protect the public health, safety, and welfare. To the extent possible, any such regulations shall be applied and construed consistent with Section 3.6.4 below so as to provide OWNER with the rights and assurances provided under this Agreement.

(e) Regulations which are not in conflict with the Development Approvals and this Agreement. Any regulation, whether adopted by initiative or otherwise, limiting the rate or timing of Development of the Property, or attempting to assess any additional fees or taxes on Development of the Property, or imposing architectural or landscaping requirements or reviews, shall be deemed to conflict with the Development Approvals and this Agreement and shall therefore not be applicable to Development of the Property.

(f) Regulations which are in conflict with the Development Approvals provided OWNER has given written consent to the application of such regulations to Development of Property.

(g) Federal and State laws and regulations which CITY is required to enforce as against the Property or the Development of the Property.

3.6.2 *Future Discretion of CITY.* This Agreement shall not prevent CITY, in acting on Subsequent Development Approvals, from applying Subsequent Land Use Regulations which do not conflict with the Development Approvals, nor shall this Agreement prevent CITY from denying or conditionally approving any Subsequent Development Approval on the basis of the existing Land Use Regulations or any Subsequent Land Use Regulation not in conflict with the Development Approvals.

3.6.3 *Modification or Suspension by State or Federal Law.* In the event that State or Federal laws or regulations, enacted after the Effective Date of this Agreement, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations, and this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to

the extent such laws or regulations do not render such remaining provision impractical to enforce.

3.6.4 *Intent.* The CITY acknowledges that OWNER has reasonably entered into this Agreement and will proceed with the Project on the assumption that CITY has adequately provided for the public health, safety and welfare through the Land Use Regulations. In the event that any future, unforeseen public health or safety emergency arises, CITY agrees that it shall attempt to address such emergency in such a way as not to impact Development of the Property in accordance with the Development Approvals, and if that is not possible, to select that option for addressing the emergency which has the least adverse impact on Development of the Property in accordance with the Development Approvals. CITY specifically also agrees that it will not adopt any Development moratorium applicable to the Property except as a last resort response to such an emergency, and then shall maintain any such moratorium with respect to the Property only for so long as required for the CITY to address the emergency in such a way as to permit the Project to be completed according to OWNER's timetable.

3.6.5 *Taxes, Assessments and Fees.* This Agreement shall not prevent the CITY from enacting, levying or imposing any new or increased tax, assessment or fee that is levied or imposed on a CITY-wide basis.

3.7 **Regulation by Other Public Agencies.** It is acknowledged by the parties that other public agencies not subject to control by CITY possess authority to regulate aspects of the Development of the Property, and this Agreement does not limit the authority of such other public agencies.

3.8 **Vesting Tentative Maps.** If any tentative or final subdivision map, or tentative or final parcel map, heretofore or hereafter approved in connection with Development of the Property, is a vesting map under the Subdivision Map Act (Government Code Section 66410, et seq.), and if this Agreement is determined by a final judgment to be invalid or unenforceable insofar as it grants a vested right to develop to OWNER, then and to that extent the rights and protection afforded OWNER under the laws and ordinances applicable to vesting maps shall supersede the provisions of this Agreement. Except as set forth immediately above, Development of the Property shall occur only as provided in this Agreement, and the provisions in this Agreement shall be controlling over any conflicting provision of law or ordinance concerning vesting maps.

3.9 **OWNER's Right to Construct Facilities.** It is understood and agreed that, subject to CITY review and approval of plans and specifications, the OWNER may elect, and reserves the right, to construct, or cause the construction of, any public or quasi-public facility for which the CITY intends to collect a fee, and to dedicate the completed facility to the CITY, in lieu of payment of the fee. Additionally, subject to CITY review and approval of plans and specifications, OWNER may elect, and reserves the right, to construct or cause the construction of any public or quasi-public facility for which the CITY intends to form a Community Facilities District ("CFD"), in which case the CFD shall be formed for purposes of acquiring rather than constructing such public facilities.

3.10 Provision of Real Property Interests by CITY. In any instance where OWNER is required to construct any public improvement on land not owned by OWNER, CITY shall first have acquired the necessary real property interests to allow OWNER to construct such public improvements. Costs associated with such acquisition or condemnation proceedings, if any, shall be OWNER's responsibility, and may be included in the assessment district on a fair share basis.

3.11 Cooperation in Completing Development Approvals. CITY agrees to cooperate with OWNER as necessary for the successful completion of the Development Approvals and fulfillment of Development Requirements and all other requirements or conditions that may be imposed on the Development by other public agencies.

3.12 Disclosure of Subcontractors. At the time of permit issuance and every six months after until completion of Project construction, OWNER shall complete and submit to the CITY a form provided by the CITY's Division of Building and Safety, which lists all subcontractors, and shows verification of workers' compensation insurance, state contractor license and license category, City business license and federal tax identification number for each subcontractor. In the event that OWNER cannot provide a complete list of valid subcontractors at the time of permit issuance or every six months thereafter, OWNER shall provide an explanation to the CITY for the delay in obtaining such information and shall provide such information to the CITY within a reasonable period of time. Failure to provide timely, complete, valid and current sub-contractor listings shall result in OWNER paying a penalty for default to the CITY in an amount equal to the original permit fee for each subcontractor violation in order to defray City costs of enforcement of this Section. Failure to remit penalty payment shall constitute a violation of this Agreement and Section 5-9-205.H of the Irvine Municipal Code, punishable as a misdemeanor under the City charter.

4. REVIEW FOR COMPLIANCE.

4.1 Periodic Review. During the Term, the City Council shall review this Agreement annually, on or before the anniversary of the Effective Date, in order to ascertain the good faith compliance by OWNER with the terms of the Agreement. As part of that review, OWNER shall submit an annual monitoring review statement describing its actions in compliance with this Agreement, in a form acceptable to the City Manager, within 30 days after written notice from the City Manager requesting that statement. The statement shall be accompanied by an annual review and administration fee sufficient to defray the estimated costs of review and administration of the Agreement during the succeeding year. The amount of the annual review and administration fee shall be set by resolution of the City Council.

4.2 Special Review. The City Council may order a special review of compliance with this Agreement at any time at CITY's sole cost. OWNER shall cooperate with the CITY in the conduct of such special reviews.

4.3 Procedure. In connection with any periodic or special review, each party shall have a reasonable opportunity to assert matters which it believes have not been undertaken in accordance with the Agreement, to explain the basis for such assertion, and to receive from the other party a justification of its position on such matters. If on the basis of the parties' review of any terms of the Agreement, either party concludes that the other party has not complied in good

faith with the terms of the Agreement, then such party may issue a written "Notice of Non-Compliance" specifying the grounds therefor and all facts demonstrating such non-compliance. The party receiving a Notice of Non-Compliance shall have thirty (30) days to respond in writing to said Notice. If the response to the Notice of Non-Compliance has not been received in the offices of the party alleging the non-compliance within the prescribed time period, the Notice of Non-Compliance shall be conclusively presumed to be valid. If a Notice of Non-Compliance is contested, the parties shall have up to sixty (60) days to arrive at a mutually acceptable resolution of the matters) occasioning the Notice. In the event that the parties are not able to arrive at a mutually acceptable resolution of the matter(s) by the end of the sixty (60) day period, the party alleging the non-compliance may thereupon pursue the remedies provided in Section 8.

4.4 Certificate of Agreement Compliance. If, at the conclusion of a periodic or special review, OWNER is found to be in compliance with this Agreement, CITY shall, upon request by OWNER, issue a Certificate of Agreement Compliance ("Certificate") to OWNER stating that after the most recent Periodic or Special Review and based upon the information known or made known to the City Manager and City Council that (1) this Agreement remains in effect and (2) OWNER is in compliance. The Certificate shall be in recordable form, shall contain information necessary to communicate constructive record notice of the finding of compliance, shall state whether the Certificate is issued after a Periodic or Special Review and shall state the anticipated date of commencement of the next Periodic Review. OWNER may record the Certificate with the County Recorder. Additionally, OWNER may at any time request from the CITY a Certificate stating, in addition to the foregoing, which obligations under this Agreement have been fully satisfied with respect to the Property, or any lot or parcel within the Property.

5. PREVAILING WAGES.

5.1 OWNER shall comply with all applicable provisions of Chapter 1 of Part 7 of Division 2 of the California Labor Code with respect to development of the Property. Nothing in this Agreement constitutes a representation or warranty by CITY that the development of the Property is not subject to Chapter 1 of Part 7 of the California Labor Code, and all applicable statutory regulatory provisions related thereto. OWNER knowingly and voluntarily agrees that OWNER shall have the obligation to provide any and all disclosures or identifications as required by Labor Code Section 1781, as the same may be amended from time to time, or any other similar law or regulation. In addition to any other OWNER indemnifications of the CITY set forth in this Agreement, OWNER shall indemnify, protect, pay for, defend (with legal counsel reasonably acceptable to CITY) and hold harmless the CITY from and against any and all loss, liability, damage, claim, cost, expense and/or "increased costs" (including reasonable attorneys' fees, court and litigation costs, and fees of expert witnesses) which, in connection with the development, construction (as defined by applicable law) and/or operation of the Property, including, without limitation, any and all public works (as defined by applicable law), results or arises in any way from any of the following: (i) the noncompliance by OWNER with any applicable local, state and/or federal law or regulation, including, without limitation, any applicable federal and/or state labor laws or regulations (including, without limitation, if applicable, the requirement to pay state and/or federal prevailing wages); (ii) the implementation of Section 1781 of the Labor Code, as the same may be amended from time to time, or any other similar law or regulation; and/or (iii) failure by OWNER to provide any required disclosure or identification as required by Labor Code Section 1781, as the same may be amended from time to time, or any other similar law or

regulation. It is agreed by the parties that, in connection with the development and construction (as defined by applicable law or regulation) of the Property, including, without limitation, any and all public works (as defined by applicable law or regulation), OWNER shall bear all risks of payment or non-payment of prevailing wages under applicable federal, state and local law or regulation and/or the implementation of Labor Code Section 1781, as the same may be amended from time to time, and/or any other similar law or regulation. "Increased costs," as used in this Section shall have the meaning ascribed to it in Labor Code Section 1781, as the same may be amended from time to time. The foregoing indemnity shall survive termination of this Agreement and shall continue after completion of the construction and development of the Property by OWNER.

6. DEVELOPMENT FEES AND PUBLIC BENEFITS.

6.1 **Development Fees.** During the Term of this Agreement, CITY shall not levy or require with respect to Development of the Property any Property-specific Development Fees (i.e., Development Fees that are not of general application and are imposed only on the Property) except those set forth in this Agreement and those in effect on the Effective Date of this Agreement. It is understood that the preceding limitation on CITY's imposition of Development Fees shall not limit CITY from levying against the Property additional Development Fees to the extent such Development Fees are imposed by CITY on a city-wide basis.

6.2 **Park Fees.** Based on the approved Park Plan for the Project, OWNER shall pay development impact fees for community parks ("Park Fee"), in the total amount of 2.28 acres, through equal annual installments over five (5) years, with the first payment due ninety (90) days after the Effective Date. The exact amount of the Park Fee will be based on the current fair market value ("FMV") at time of each payment as initially determined by a land appraisal dated as of the Effective Date and approved by the CITY's Planning Commission. All initial appraisal costs, including the cost for the CITY-hired appraiser, shall be paid by OWNER prior to CITY-approval of the appraisal. Appraisals shall expire twelve (12) months from the date the appraisal was approved by the CITY. After the most recent appraisal has expired, either the CITY or OWNER may request that the remaining Park Fees be adjusted at the time of payment of the fees based on the average regional construction cost index for the past year for the Los Angeles region ("CCI"). As an alternative to the use of the CCI, either the CITY or the OWNER may request that the remaining fees are re-calculated using a new appraisal, where the party requesting the appraisal will bear the cost of the appraisal. OWNER may propose to use a previously approved, non-expired FMV determination for land which is similar in nature, at the discretion of the Director of Community Services. Items, including but not limited to, terrain, physical features, and zoning density, will be evaluated to determine eligibility. On each anniversary of the Effective Date, OWNER shall request in writing that the City provide either an updated subsequent appraisal or the adjusted valuation of the last appraisal based on the construction cost index, and OWNER shall make its regular annual payment within ninety (90) days of the City's provision of such information. Every annual payment of the Park Fee that OWNER makes shall be deemed to apply to and satisfy payment towards the total required park acreage of the Project, such that the corresponding acreage paid will be deducted from the total required park acreage amount. After each annual payment, subsequent adjustments to the Park Fee shall be made to only those number of units that are yet unpaid. OWNER further reserves the right to prepay in whole or any portion

of the total remaining Park Fee balance at the then current FMV as determined by the last anniversary appraisal or construction cost index adjustment.

6.3 Neighborhood Infrastructure Fee. OWNER shall pay development impact fees for the IBC Neighborhood Infrastructure Improvement Program ("IBC Program" or "Neighborhood Infrastructure Fee") through equal annual installments over five (5) years for the remaining 900 dwellings units, with the first payment due ninety (90) days after the Effective Date. The exact amount of the Neighborhood Infrastructure Fee will be based on the City's legally-established, city-wide-applicable (i.e., Planning Area 36 of the CITY) fee schedule for the IBC Program at time of each payment. On each anniversary of the Effective Date, OWNER shall request in writing that the CITY provide the effective Neighborhood Infrastructure Fee schedule, and OWNER shall make its regular annual payment within ninety (90) days of the City's provision of such information. Every annual payment of the Neighborhood Infrastructure Fee that OWNER makes shall be deemed to apply to and pay for a number of dwelling units of the Project equal to the payment, such that the amount owed will have been paid and extinguished as to a specific number of dwelling units of the Project with each payment. After each annual payment, adjustments to the Neighborhood Infrastructure Fee applicable to the Project shall be made to only those number of units that are yet unpaid. OWNER further reserves the right to prepay in whole or any portion of the total remaining Neighborhood Infrastructure Fee balance at the then-effective fee schedule before the date of the City's next adjustment to the fee schedule.

6.4 SDC. OWNER shall pay two thousand, five hundred twenty-one dollars (\$2,521) per unit as prepayment of estimated Systems Development Charges ("SDC") through equal annual installments over five (5) years for the remaining 900 dwellings units, with the first prepayment due ninety (90) days after the Effective Date. The per unit charge for pre-paid estimated SDC is eighty-five percent (85%) of the per unit amount of SDC that OWNER paid for Phase 1 of the Project, which was two thousand, nine hundred sixty-six dollars (\$2,966) per unit. The exact amount of the SDC owed by OWNER shall be determined at the time of issuance of each of the Project's building permits for the number of dwelling units authorized to be built in such building permit. Once the exact SDC amount is determined for a specified number of dwelling units, OWNER shall pay any difference between the earlier prepaid estimated amount and later exact amount of the SDC within ninety (90) days of such building permit issuance. The parties acknowledge and agree that the prepayment of estimated SDC is unlikely to exceed the exact amount of SDC owed at the time of building permit issuance; however, in the unlikely event that the parties discover that prepayment of SDC is greater than the exact amount of the SDC, OWNER hereby agrees to waive any right to reimbursement of SDC. The parties agree that an overpayment of SDC for residential units may be credited towards SDC owed for retail development.

6.5 Other Fees and Charges. Except as specifically set forth in Sections 6.1 through 6.4, nothing set forth in this Agreement is intended or shall be construed to limit or restrict CITY's authority to impose new fees, charges, assessments, or taxes for the Development of the Property or to increase any existing fees, charges, assessments, or taxes, and nothing set forth herein is intended or shall be construed to limit or restrict whatever right the OWNER might otherwise have to challenge any fee, charge, assessment, or tax either not set forth in this Agreement or not in effect as of the Effective Date. In connection therewith, OWNER shall timely pay all applicable fees, charges, assessments, and special and general taxes validly imposed in accordance with the

Constitution and laws of the State of California, including without limitation school impact fees in accordance with Government Code Sections 65995, et seq.

6.6 Valet/Rideshare Concierge. Development of the Project shall include the development of a designated pick-up and drop-off area intended for a potential valet parking or rideshare concierge service that is designed to be pedestrian safe and aesthetically pleasing subject to the satisfaction of the Director of Community Development.

6.7 Public Neighborhood Park. Development of the Project shall include the development of a public neighborhood park that includes an enlarged dog park (i.e., off-leash areas) with separate areas for small and large dogs and outdoor technology enhanced seating furniture with provided Wi-Fi internet access by modifying the Park Plan/Design subject to the satisfaction of the Director of Community Development.

6.8 Gateway Signage. Development of the Project shall include the development of a landscaped "IRVINE" gateway monument sign at the corner of Jamboree Boulevard and Campus Drive in addition to the Project's signage subject to the approval by the Planning Commission.

7. [Intentionally deleted.]

8. DEFAULT AND REMEDIES.

8.1 Specific Performance Available. The parties acknowledge that money damages and remedies at law generally are inadequate and that specific performance is a particularly appropriate remedy for the enforcement of this Agreement and should be available to OWNER and CITY. Due to the size, nature and scope of the Project, it may not be practical or possible to restore the Property to its natural condition once implementation of this Agreement has begun. After such implementation, OWNER and/or CITY may be foreclosed from other choices it may have had to utilize or condition the uses of the Property or portions thereof. OWNER and CITY have invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement, such that it would be extremely difficult to determine the sum of money which would adequately compensate OWNER and/or CITY for such efforts.

8.2 Money Damages Unavailable. Except as provided in the Section 8.3 below, neither OWNER nor CITY shall be entitled to any money damages, including attorney fees, from the other party by reason of, arising out of, based upon, or relating to (a) the interpretation, enforcement, performance, or breach of any provision of this Agreement, or (b) the respective rights or duties of any of the parties under the Development Approvals, the Subsequent Development Approvals, any Development Requirement, the Land Use Regulations, or the Subsequent Land Use Regulations.

8.3 Restitution of Improper Development Fees. In the event any Development Fees or taxes are imposed on Development of the Property other than those authorized pursuant to this Agreement, OWNER shall be entitled to recover from CITY restitution of all such improperly assessed fees or taxes, together with interest thereon at the rate specified in Article XV, Section 1 of the California Constitution from the date such sums were paid to CITY to the date of restitution.

This Section shall not be construed to require CITY to provide a refund to OWNER in the event the amount of prepaid Park Fees, Neighborhood Infrastructure Fees, and/or SDC OWNER paid pursuant to Section 6 above exceed the amount of Park Fees, Neighborhood Infrastructure Fees, and/or SDC that would have actually been due.

8.4 Termination of Agreement.

8.4.1 *Termination of Agreement for Default of OWNER.* CITY in its discretion may terminate this Agreement for any failure of OWNER to perform any material duty or obligation of OWNER hereunder or to comply in good faith with the terms of this Agreement (hereinafter referred to as "default"); provided, however, CITY may terminate this Agreement pursuant to this Section only after following the procedure set forth in Section 4.3 and thereafter providing written notice to OWNER of the default setting forth the nature of the default and the actions, if any, required by OWNER to cure such default and, where the default can be cured, OWNER has failed to take such actions and cure such default within 30 days after the effective date of such notice or, in the event that such default cannot be cured within such 30 day period but can be cured within a longer time, as reasonably determined by the CITY in its sole discretion, OWNER has failed to commence the actions necessary to cure such default within such 30 day period and to diligently proceed to complete such actions and cure such default.

8.4.2 *Termination of Agreement for Default of CITY.* OWNER in its discretion may terminate this Agreement for any default by CITY; provided, however, OWNER may terminate this Agreement pursuant to this Section only after following the procedure set forth in Section 4.3 and thereafter providing written notice by OWNER to the CITY of the default setting forth the nature of the default and the actions, if any, required by CITY to cure such default and, where the default can be cured, the failure of CITY to cure such default within 30 days after the effective date of such notice or, in the event that such default cannot be cured within such 30 day period, the failure of CITY to commence to cure such default within such 30 day period and to diligently proceed to complete such actions and to cure such default.

8.4.3 *Rights and Duties Following Termination.* Upon the termination of this Agreement, no party shall have any further right or obligation hereunder except with respect to (i) any obligations to have been performed prior to said termination, or (ii) any default in the performance of the provisions of this Agreement which has occurred prior to said termination.

8.5 **OWNER's Right To Terminate Upon Specified Events.** Notwithstanding any other provisions of this Agreement to the contrary, OWNER retains the right to terminate this Agreement upon thirty (30) days written notice to CITY in the event that OWNER reasonably determines that continued Development of the Project consistent with the Development Approvals has become economically infeasible due to changed market conditions, increased Development costs, burdens imposed by the CITY or other governmental entity as conditions to future discretionary approvals of the Project consistent with this Agreement, the CITY's exercise of its Reserved Authority in a way deemed by OWNER to be inconsistent with the Development Approvals, third party litigation, or similar factors. In the event OWNER exercises this right, it

shall nonetheless be responsible for mitigation of impacts to CITY resulting from Development that may have occurred on the Property prior to the notice of termination, on a fair share or nexus basis, and within the thirty (30) day notice period CITY and OWNER shall meet to identify any such mitigation obligation that may remain to be satisfied. If the parties are in disagreement at the end of the thirty (30) day notice period, the Agreement shall be terminated as to all matters except for the remaining mitigation obligation in dispute, and with respect thereto the parties shall have the remedies provided in Section 8.

9. THIRD PARTY LITIGATION.

CITY shall promptly notify OWNER of any claim, action or proceeding filed and served against CITY to challenge, set aside, void, annul, limit or restrict the approval and continued implementation and enforcement of this Agreement (collectively, an "Action"). OWNER agrees to reimburse the CITY for its reasonable attorneys' fees incurred in connection with the defense of the Action, and to fully defend and indemnify CITY for all costs of defense and/or judgment obtained in any such Action. In the event of an Action and upon request of CITY, OWNER shall make an initial refundable deposit to CITY of fifty thousand dollars (\$50,000) to secure payment of costs and expenses of defense of the Action, including reasonable attorneys' fees. OWNER shall replenish the deposit so that the amount of the deposit is maintained and restored to the minimum required by CITY and in such amounts as CITY, from time to time may require in connection with any Action filed and served against CITY to challenge, set aside, void, annul, limit or restrict the approval and continued implementation and enforcement of this Agreement. CITY and OWNER agree to cooperate in the defense of such Action(s); provided however, as an alternative to defending the Agreement, OWNER may elect to terminate the Agreement in accordance with Section 8.5 above and all applicable State and local laws governing termination of development agreements (such as Irvine City Council Resolution 82-68). Any costs associated with termination shall be borne by OWNER.

10. MORTGAGEE PROTECTION.

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

- (a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Property made in good faith and for value, unless otherwise required by law.

(b) The Mortgagee of any mortgage or deed of trust encumbering the Property, or any part thereof, which Mortgagee has submitted a request in writing to the CITY in the manner specified herein for giving notices, shall be entitled to receive written notification from CITY of any default by OWNER in the performance of OWNER's obligations under this Agreement.

(c) If CITY timely receives a request from a Mortgagee requesting a copy of any notice of default given to OWNER under the terms of this Agreement, CITY shall make a good faith effort to provide a copy of that notice to the Mortgagee within ten (10) days of sending the notice of default to OWNER. The mortgagee shall have the right, but not the obligation, to cure the default during the remaining cure period allowed such party under this Agreement.

(d) Any Mortgagee who comes into possession of the Property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Property, or part thereof, subject to the terms of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, no Mortgagee shall have an obligation or duty under this Agreement to perform any of OWNER's obligations or other affirmative covenants of OWNER hereunder, or to guarantee such performance; except that (i) to the extent that any covenant to be performed by OWNER is a condition precedent to the performance of a covenant by CITY, the performance thereof shall continue to be a condition precedent to CITY's performance hereunder, and (ii) in the event any Mortgagee seeks to develop or use any portion of the Property acquired by such Mortgagee by foreclosure, deed of trust, or deed in lieu of foreclosure, such Mortgagee shall strictly comply with all of the terms, conditions and requirements of this Agreement and the Development Approvals applicable to the Property or such part thereof so acquired by the Mortgagee.

11. INDEMNIFICATION.

OWNER agrees to indemnify, defend, and hold harmless the CITY, the CITY's Designee, and their respective elected and appointed councils, boards, commissions, officers, agents, contractors and employees from and against any and all actions, suits, claims, liabilities, losses, damages, penalties, obligations, and expenses (including but not limited to attorneys' fees and costs) which may arise under or relate to, directly or indirectly, either/both (i) the approval of this Development Agreement or the Entitlements (including without limitation the effect that the approval of this Development Agreement may have on the entitlements and/or developability of any neighboring or nearby properties), or/and (ii) the acts, omissions, or operations of OWNER or OWNER'S agents, contractors, subcontractors, or employees pursuant to this Development Agreement. Notwithstanding the foregoing, CITY shall have the right to select and retain counsel to defend any such action or actions and OWNER shall pay the cost thereof. The indemnity provisions set forth in this Development Agreement shall survive termination of this Development Agreement.

MISCELLANEOUS PROVISIONS.

11.1 **Term of Agreement.** Unless earlier terminated as provided in Section 8.4 or 8.5 hereof, this Agreement shall continue in full force and effect for a period of ten (10) years from the Effective Date. The terms of all Development Approvals and any Subsequent Development Approvals shall be automatically extended such that they terminate at the end of the Term of this Agreement. OWNER agrees that, notwithstanding any provisions in State or local law allowing for extensions of the term of land use entitlements (such as Section 2-9-9.C of the Irvine Zoning Ordinance), the term of the Development Approvals and any Subsequent Development Approvals shall not be extended beyond the Term of this Agreement.

11.2 **Recordation of Agreement.** This Agreement shall be recorded with the County Recorder by the City Clerk within the period required by Section 65868.5 of the Government Code. Amendments approved by the parties, and any cancellation, shall be similarly recorded.

11.3 **Entire Agreement.** This Agreement sets forth and contains the entire understanding and agreement of the parties, and there are no oral or written representations, understandings or ancillary covenants, undertakings or agreements which are not contained or expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.

11.4 **Severability.** If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, then this Agreement shall terminate in its entirety, unless the parties otherwise agree in writing, which agreement shall not be unreasonably withheld.

11.5 **Interpretation and Governing Law.** This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. 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 hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting party or in favor of CITY shall not be employed in interpreting this Agreement, all parties having been represented by counsel in the negotiation and preparation hereof.

11.6 **Section Headings.** All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

11.7 **Singular and Plural.** As used herein, the singular of any word includes the plural.

11.8 **Time of Essence.** Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.

11.9 **Waiver.** Failure of a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

11.10 No Third Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit for the parties and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

11.11 Force Majeure. Neither party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by earthquakes, other Acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond the party's control (including the party's employment force), government regulations, court actions (such as restraining orders or injunctions), or other causes beyond the party's control. If any such events shall occur, the term of this Agreement and the time for performance shall be extended for the duration of each such event, provided that the term of this Agreement shall not be extended under any circumstances for more than five (5) years.

11.12 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed hereunder by such benefited party.

11.13 Successors in Interest. As provided in Section 65868.5 of the Government Code, and except as otherwise provided in this Agreement, all of the terms, provisions, covenants and obligations contained in this Agreement shall be binding upon, and inure to the benefit of, CITY and OWNER, and their respective successors and assigns.

11.14 Counterparts. This Agreement may be executed by the parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the parties had executed the same instrument.

11.15 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by any party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Orange, State of California, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

11.16 Project as a Private Undertaking. It is specifically understood and agreed by and between the parties hereto that the Development of the Project is a private Development, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement. The only relationship between CITY and OWNER is that of a government entity regulating the Development of private property and the owner of such property.

11.17 Further Actions and Instruments. Each of the parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. Upon the request of either party at any time, the other party shall promptly execute, with acknowledgment or affidavit if reasonably required, and file or record such required instruments and writings and take any actions as may be reasonably necessary under the terms of this

Agreement to carry out the intent and to fulfill the provisions of this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

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

11.19 **Amendments in Writing/Cooperation.** This Agreement may be amended only by written consent of both parties specifically approving the amendment and in accordance with the Government Code provisions for the amendment of Development Agreements. The parties shall cooperate in good faith with respect to any amendment proposed in order to clarify the intent and application of this Agreement, and shall treat any such proposal on its own merits, and not as a basis for the introduction of unrelated matters.

11.20 **Authority to Execute.** The person or persons executing this Agreement on behalf of OWNER warrants and represents that he/they have the authority to execute this Agreement on behalf of his/their corporation, partnership or business entity and warrants and represents that he/they has/have the authority to bind OWNER to the performance of its obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first set forth above.

“City”

CITY OF IRVINE, a California
municipal corporation and charter city

By: _____
Its: Christina Shea, Mayor

ATTEST:

By _____
Molly M. Perry, City Clerk

APPROVED AS TO FORM:

By  _____
Jeffrey T. Melching, City Attorney

(SEAL)

OWNER: ELEMENTS 1 LEASEHOLD,
LLC, a California limited liability
company

By _____

Name _____

Title _____

By _____

Name _____

Title _____

[ALL SIGNATURES SHALL BE NOTARIZED. EXECUTION ON BEHALF OF ANY
CORPORATION SHALL BE BY TWO CORPORATE OFFICERS.]

EXHIBIT "A"

LEGAL DESCRIPTION

Real property in the City of Irvine, County of Orange, State of California, described as follows:

LOTS 1 AND 2 OF TRACT NO. 17641, AS SHOWN ON A MAP RECORDED IN BOOK 947, PAGES 1 THROUGH 9 OF MISCELLANEOUS MAPS, RECORDS OF ORANGE COUNTY, CALIFORNIA.

EXCEPTING THEREFROM ALL OIL, OIL RIGHTS, MINERALS, MINERAL RIGHTS, NATURAL GAS, NATURAL GAS RIGHTS, AND OTHER HYDROCARBONS BY WHATSOEVER NAME KNOWN THAT MAY BE WITHIN OR UNDER THE PARCEL OF LAND HEREINABOVE DESCRIBED, TOGETHER WITH THE PERPETUAL RIGHT OF DRILLING, MINING, EXPLORING AND OPERATING THEREFOR AND STORING IN AND REMOVING THE SAME FROM SAID LAND OR ANY OTHER LAND, INCLUDING THE RIGHT TO WHIPSTOCK OR DIRECTIONALLY DRILL AND MINE FROM LANDS OTHER THAN THOSE HEREINABOVE DESCRIBED, OIL OR GAS WELLS, TUNNELS AND SHAFTS INTO, THROUGH OR ACROSS THE SUBSURFACE OF THE LAND HEREINABOVE DESCRIBED AND TO BOTTOM SUCH WHIPSTOCKED OR DIRECTIONALLY DRILLED WELLS, TUNNELS, AND SHAFTS UNDER AND BENEATH OR BEYOND THE EXTERIOR LIMITS THEREOF, AND TO REDRILL, RETUNNEL, EQUIP, MAINTAIN, REPAIR, DEEPEN AND OPERATE ANY SUCH WELLS OR MINES, WITHOUT HOWEVER, THE RIGHT TO DRILL, MINE, STORE, EXPLORE AND OPERATE THROUGH THE SURFACE OR THE UPPER FIVE HUNDRED (500) FEET OF THE SUBSURFACE OF THE LAND HEREINABOVE DESCRIBED, AS RESERVED IN THE DEED FROM THE IRVINE INDUSTRIAL COMPLEX, RECORDED JUNE 26, 1968 IN BOOK 8641, PAGE 488, OFFICIAL RECORDS.

APN: 445-031-09 and 445-031-10

AND

TENTATIVE TRACT NO. 17862, BEING A SUBDIVISION OF THE FOLLOWING:

LOTS 1, 2 AND 3 OF TRACT NO. 5902, AS SHOWN ON A MAP RECORDED IN BOOK 219, PAGES 28 AND 29 OF MISCELLANEOUS MAPS, RECORDS OF ORANGE COUNTY, CALIFORNIA.

EXCEPTING THEREFROM ALL OIL, OIL RIGHTS, MINERALS, MINERAL RIGHTS, NATURAL GAS, NATURAL GAS RIGHTS, AND OTHER HYDROCARBONS BY WHATSOEVER NAME KNOWN THAT MAY BE WITHIN OR UNDER THE PARCEL OF LAND HEREINABOVE DESCRIBED, TOGETHER WITH THE PERPETUAL RIGHT OF DRILLING, MINING, EXPLORING AND OPERATING THEREFOR AND STORING IN AND REMOVING THE SAME FROM SAID LAND OR ANY OTHER LAND, INCLUDING THE RIGHT TO WHIPSTOCK OR DIRECTIONALLY DRILL AND MINE FROM LANDS OTHER THAN THOSE HEREINABOVE DESCRIBED, OIL OR GAS WELLS, TUNNELS

AND SHAFTS INTO, THROUGH OR ACROSS THE SUBSURFACE OF THE LAND HEREINABOVE DESCRIBED AND TO BOTTOM SUCH WHIPSTOCKED OR DIRECTIONALLY DRILLED WELLS, TUNNELS, AND SHAFTS UNDER AND BENEATH OR BEYOND THE EXTERIOR LIMITS THEREOF, AND TO REDRILL, RETUNNEL, EQUIP, MAINTAIN, REPAIR, DEEPEN AND OPERATE ANY SUCH WELLS OR MINES, WITHOUT HOWEVER, THE RIGHT TO DRILL, MINE, STORE, EXPLORE AND OPERATE THROUGH THE SURFACE OR THE UPPER FIVE HUNDRED (500) FEET OF THE SUBSURFACE OF THE LAND HEREINABOVE DESCRIBED, AS RESERVED IN THE DEED FROM THE IRVINE INDUSTRIAL COMPLEX, RECORDED JUNE 26, 1968 IN BOOK 8641, PAGE 488, OFFICIAL RECORDS.

APN: 445-041-03 and 445-041-07

EXHIBIT "B"

