Exhibit A

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

City of Union City
34009 Alvarado-Niles Road
Union City, CA 94587
Attn: ECD Director

Exempt from Recording Fees
Pursuant to Government
Code Sections 6103 and 27383

APN: 087-340-002 (Space Above This Line Reserved for Recorder's Use Only)

**DEVELOPMENT AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF UNION CITY**

**AND**

**WINDFLOWER PROPERTIES, LLC**

**FOR WINDFLOWER PROJECT – BLOCK 2**

**DEVELOPMENT AGREEMENT**

THIS DEVELOPMENT AGREEMENT (this "**Development Agreement**" or this "**Agreement**") is entered into as of _____, 2022 (the "**Agreement Date**") by and between the City of Union City, a municipal corporation ("**City**"), and Windflower Properties, LLC, a California limited liability company ("**Developer**"). City and Developer are referred to individually as "**Party**," and collectively as the "**Parties**."

**RECITALS**

This Agreement is entered upon the basis of the following facts, understandings and intentions of City and Developer.

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

B. In order to strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs and risk of development, the Legislature of the State of California enacted Section 65864 et seq. of the Government Code (the "Development Agreement Legislation"), which authorizes City to enter into a development agreement for real property with any person having a legal or equitable interest in such property in order to establish certain development rights in the property.

C. The City is the owner of certain real property located within the City and bounded by Cheeves Way, Berger Way, 11th Street, and Galliano Way, known as Alameda County Assessor's Parcel No. 087-340-002 ("**Block 2**") as more particularly described in Exhibit A attached hereto and incorporated herein by reference. Block 2 is referred to herein as the "**Property**."

D. The City and Developer previously entered into that certain Disposition and Development Agreement dated June 13, 2017 (as amended by the First Amendment, the "**DDA**") pursuant to which the City agreed to sell the Property to the Developer, subject to the terms and conditions contained in the DDA. The City and Developer subsequently entered into that certain First Amendment to Disposition and Development Agreement dated June 11, 2019 (the "First Amendment"). Pursuant to the DDA, Developer has a legal or equitable interest in the Property as required by the Development Agreement Legislation. The State Department of Housing and Community Development has determined that pursuant to Government Code Section 54221(b)(2), disposition of the land to Developer pursuant to the DDA does not constitute disposition of surplus land.

E. Pursuant to the terms of the terms of the DDA, the Developer agreed to develop between approximately four hundred and forty-five (445) to five hundred and five (505) units of market-rate rental housing on the Property (the "**Project**").

F. Under the DDA, the deadline for commencement of Project construction is December 31, 2024.

G. Developer has applied for, and City has granted, the Project Approvals (as defined in Section 1.5) in order to protect the interests of its residents in the quality of their community and environment. The Project Approvals (as defined herein) were issued by the City Council on November 14, 2017, and were originally scheduled to expire on November 14, 2018. The Project Approvals were subsequently extended to November 14, 2020 in accordance with the provisions the Union City Municipal Code. Thereafter, Assembly Bill 1561 (2020) automatically extended the Project Approvals by 18 months. The Project Approvals are currently scheduled to expire on May 14, 2022, unless the Project Approvals are amended or exercised before that date.

H. The City and Developer desires to ensure that the Project Approvals do not expire before the deadline for the commencement of construction of the Project under the DDA to ensure that the Project can proceed as originally approved by the City Council.

I. The complexity, magnitude and long-range nature of the Project would be difficult for Developer to undertake if City had not determined, through this Development Agreement, to inject a sufficient degree of certainty in the land use regulatory process to justify the substantial financial investment associated with development of the Project. As a result of the execution of this Development Agreement, both Parties can be assured that the Project can proceed without disruption caused by a change in City planning and development policies and requirements, and such assurance will thereby reduce the actual or perceived risk of planning, financing and proceeding with construction of the Project.

J. City has determined that by entering into this Development Agreement: (1) City will ensure the productive use of property and foster orderly growth and a quality development project in the City; (2) development will proceed in accordance with the goals and policies set forth in the City of Union City's General Plan (the "**General Plan**") and will implement City's stated General Plan policies; (3) City will receive increased property tax revenues; and (4) City will benefit from increased housing for residents of the City that is created by the Project.

K. City has also undertaken, pursuant to the California Environmental Quality Act (Public Resources Code Section 21000 *et seq*., hereinafter "**CEQA**"), the required analysis of the environmental effects that would be caused by the Project and has determined those feasible mitigation measures which will eliminate, or reduce to a less than significant level, the adverse environmental impacts of the Project. Those mitigation measures for which Developer is responsible are incorporated into, and required by, the Project Approvals.

L. In addition to the Project Approvals, the Project may require various additional land use and construction approvals, termed Subsequent Approvals (as defined in Section 1.5.4), in connection with development of the Project.

M. City has given the required notice of its intention to adopt this Development Agreement and has conducted public hearings thereon pursuant to Government Code Section 65867. As required by Government Code Section 65867.5, City has found that the provisions of this Development Agreement and its purposes are consistent with the goals, policies, standards and land use designations specified in City's General Plan.

N. On , 2022, the City of Union City's Planning Commission (the "**Planning Commission**"), the initial hearing body for purposes of development agreement review, recommended approval of this Development Agreement pursuant to Resolution No. ____.

O. On , 2022, the City Council of the City of Union City (the "**City Council**") adopted its Ordinance No. ____ (the "**Approving Ordinance**") approving this Development Agreement and authorizing its execution. The Approving Ordinance will take effect on , 2022 (the "**Effective Date**").

P. For the reasons recited herein, City and Developer have determined that the Project is a development for which this Development Agreement is appropriate. This Development Agreement will eliminate uncertainty regarding Project Approvals (including the Subsequent Approvals), thereby encouraging planning for, investment in and commitment to develop the Property in a manner beneficial to the City and surrounding properties. Continued use and development of the Property will in turn provide substantial employment and property tax benefits, and contribute to the provision of needed infrastructure enhancements and public benefits, thereby achieving the goals and purposes for which the Development Agreement Legislation was enacted and ensuring consistency with the City's General Plan.

Q. The terms and conditions of this Development Agreement have undergone extensive review by City staff, the Planning Commission and the City Council at publicly noticed meetings and have been found to be fair, just and reasonable and in conformance with the City's General Plan and the Development Agreement Legislation, and, further, the City Council finds that the economic interests of City's residents and the public health, safety and welfare will be best served by entering into this Development Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, City and Developer agree as follows:

## ARTICLE 1.
## GENERAL PROVISIONS

1.1 Parties.

1.1.1. City. City is a California municipal corporation, with offices located at 34009 Alvarado-Niles Road, Union City, CA 94587. "**City**," as used in this Development Agreement, includes the City of Union City and any assignee of or successor to its rights, powers and responsibilities.

1.1.2. Developer. Developer is limited liability company located at 666 Post Street, Suite 1700, San Francisco, CA 94109. "**Developer**," as used in this Development Agreement, refers to Windflower Properties, LLC and includes any permitted assignee or successor-in-interest as herein provided.

1.2. Property Subject to this Development Agreement.

The Property known as Alameda County Assessor's Parcel No. 087-340-002, as more particularly described in Exhibit A, is subject to this Development Agreement.

1.3. Term of the Agreement.

The term ("Term") of this Development Agreement will commence upon the Effective Date and shall continue in full force and effect for a period of five (5) years, unless earlier terminated as provided in this Agreement. The Term has been established by the Parties as a reasonable estimate of the time required to develop the Project and obtain the benefits of the Project. Nothing in this Section shall extend or change the deadline for the commencement of construction of the Project, or any other deadline, set forth in the DDA.

1.4. The Project.

1.4.1. General. The Project includes those improvements as more fully set forth and described in those plans and other information approved by the City Council on November 14, 2017 by Resolution No._____, unless modified by Subsequent Approvals (defined below). The Parties agree that the exact number of residential units, parking spaces, and the square footage of ground floor space shall be as set forth in the Project Approvals. Construction of the Project includes construction of several on- and off-site improvements, described in this Section 1.4.

1.4.2. Improvements.

a. City Use of Ground Floor Space in Lieu of Public Art. The Parties agree that Developer may satisfy the requirements of Municipal Code Chapter 12.40 for the Project by one of the following alternatives mutually agreed upon by the City and Developer: (i) paying the applicable Art Fee to City, (ii) installing public art reasonably approved by City, or (iii) providing the City with the right to use the Community Art Space (defined below) in accordance with a Community Art Agreement to be executed by Developer and City prior to the issuance of a final certificate of occupancy for the Project (**"Community Art Agreement").** If City and Developer mutually agree upon the Community Art Space alternative, the Community Art Agreement shall provide that City shall be entitled to use the approximately 2,000 square feet of ground floor space to be located on 11th Street shown in the Project Approvals as "Commercial Space" (referred to herein as the "**Community Art Space**") for display of artworks, workshops, and public events. The Community Art Agreement shall address the obligations of City and Developer with respect to the installation of interior improvements, utility charges, maintenance, repairs, and other expenses relating to the Community Art Space, as well as the exact size of the Community Art Space. The value of any below-market rate rent for the Community Art Space and the cost of any Developer obligations regarding installation of improvements, maintenance, utilities, and other expenses for the Community Art Space shall be equivalent in value to the Art Fee that Developer would otherwise be obligated to pay pursuant to Union City Municipal Code Chapter 12.40. Prior to issuance of the first building permit for the project, if the City and Developer are unable to mutually agree upon the terms of the Community Art Agreement, consistent with the provisions listed in Chapter 12.40 of the Union City Municipal Code, Developer shall either (i) pay the applicable Art Fee to City, or (ii) submit a proposal for public art to the City and receive approval by the City's Art and Culture

Commission. In the case of the latter, public art shall be installed prior to issuance of final certificate of occupancy for the project. If the City and Developer are unable to mutually agree upon the terms of the Community Art Agreement, building area that was to be used as Community Art Space shall revert to use identified in Project Approvals.

b. Nuisance. Developer shall not use or permit the use of any portion of the Project for any, noisy or dangerous trade, business manufacturing activity or occupation; for any activity which constitutes a nuisance or violated public policy; in violation of any law, ordinance rule or regulation of any governmental authority with jurisdiction over any portion of the Project.

c. DDA. Unless expressly provided otherwise, nothing herein is intended to amend or otherwise alter any term or condition contained in the DDA.

1.5. Project Approvals.

Developer has obtained, and will apply for and obtain, various environmental and land use approvals and entitlements related to the development of the Project and the Property, as described below. For purposes of this Development Agreement, the term "**Project Approvals**" means all of the approvals, plans and agreements pertaining to development of the Project and the Property that are approved by City prior to, concurrently with, or subsequent to, City's approval of this Agreement, including without limitation, those described in this Section 1.5 and the subsections thereof, and shall include all Project Approvals and Subsequent Approvals pertaining to development of the Project and the Property, as such Project Approvals may be amended from time to time during the term of this Agreement. Unless modified by Subsequent Approvals (defined below), the Parties agree that the Project will include those improvements as more fully set forth and described in those plans and other information approved by the City Council on November 14, 2017 by Resolution No._____. City and Developer agree to work diligently and in good faith toward appropriate planning entitlements and building permit approvals for each phase of construction.

1.5.1. Environmental Review. The Project is within the scope of the Station District Mixed-Use Development Project EIR (certified in November 2010 by City Council Resolution No. 4072-10) and the 2040 Union City General Plan Update EIR (certified on December 10, 2019 by City Council Resolution No. ). No new information of substantial importance has been discovered requiring revisions to the impacts, mitigation measures or alternatives that were provided in either EIR. Additionally, there have not been any substantial changes with respect to City policies or requirements that would require additional environmental analysis, which determined that the project would not result in any significant environmental impacts with the incorporation of mitigation measures. All adopted mitigation measures continue to apply to the Project. Thus, pursuant to Section 15162 and 15168 of the CEQA Guidelines, the City has determined that no further analysis is required.

1.5.2. Development Agreement. On , 2022, following Planning Commission review and recommendation, and after a duly noticed public hearing, the City Council, by Ordinance No. _____, approved this Development Agreement and authorized its execution.

1.5.3. Other Project Approvals. In order to develop the Project as contemplated in this Development Agreement, the following land use approvals have been issued:

a. Site Development Review. Site Development Review is required for the construction of the Project pursuant to Chapter 18.76 of the Union City Zoning Code. The City Council has approved Site Development Review SD-17003 for the Project.

b. Use Permit. A Conditional Use Permit is required for the Project pursuant to Chapter 18.44 of the Union City Municipal Code because the Project includes development of high density residential uses and live/work units, buildings over 65 feet in height, and a variation from the development standards to allow a reduction in storage space. The City Council has approved Conditional Use Permit UP-17-005 for the Project.

c. Disposition and Development Agreement. On June 13, 2017 the City and Developer entered into the DDA (as subsequently amended and as defined above). Among other provisions, the DDA provides that the Project is exempt from the City's inclusionary affordable housing requirements because the requirements that would otherwise be applicable to the Project have already been satisfied by construction of affordable housing within the City's Station District.

1.5.4. Amendments and Subsequent Approvals. In order to develop the Project as contemplated in the DDA and this Development Agreement, the Project may require issuance of land use approvals, entitlements, development permits, and use and/or construction approvals in addition to those listed in this Section 1.5, which may include, without limitation: conditional use permits, variances, subdivision approvals, street abandonments, design review approvals, demolition permits, improvement agreements, infrastructure agreements, grading permits, building permits, right-of-way permits, lot line adjustments, site plans, sewer and water connection permits, certificates of occupancy, parcel maps, lot splits, landscaping plans, master sign programs, transportation demand management programs, encroachment permits, and may require amendments to the foregoing and/or to the existing Project Approvals (all of the foregoing new and amended permits, documents, and approvals, collectively, "Subsequent Approvals"). At such time as any Subsequent Approval applicable to the Property is approved by the City, then such Subsequent Approval shall become subject to all the terms and conditions of this Development Agreement applicable to Project Approvals, including without limitation, Developer's vested right thereto, and shall be treated as a "Project Approval" under this Development Agreement.

1.5.5 Proposed Modifications. The Parties acknowledge that Developer intends to apply for modifications to the existing Site Development Review and the existing Use Permit for the Project to address certain aspects of the Project in order to increase Project feasibility. These include the relocation of certain amenities within the site, the reconfiguration of parking facilities, a reduction in height of certain buildings, a modification to the scope of on-site

parking and storage, and changes to unit types and the total number of residential units, provided that the total number of residential units will not exceed 504 units. Without limiting the generality of the provisions of Section 1.5, if approved, such modifications shall be treated as "Project Approvals" and during the term of this Agreement, Developer shall have the vested right to develop the Project in accordance with them. Nothing in this section shall be interpreted as a promise or representation regarding the City's review of the anticipated modifications or as otherwise limiting the City's discretion to approve, deny, or modify an application to modify the existing Site Development Review and the existing Use Permit for the Project.

## ARTICLE 2.
## DEVELOPMENT OF THE PROPERTY

### 2.1. Project Development.

Developer shall have a vested right to develop the Project on the Property, in accordance with the Vested Elements (defined in Section 2.2). The vested right granted by this Article 2 shall terminate December 31, 2024, unless Developer has commenced construction of the Project. Unless otherwise agreed to by City in a written instrument, this Section is not intended to extend any deadline for commencement of Project construction set forth in the DDA.

### 2.2. Vested Elements.

The permitted uses of the Property, the minimum and maximum density, the intensity of use, the maximum height and size of the proposed buildings, provisions for reservation or dedication of land for public purposes, the conditions, terms, restrictions, and requirements for subsequent discretionary actions, the provisions for public improvements and financing of public improvements, and the other terms and conditions of development applicable to the Property are as set forth in:

a. The City of Union City General Plan as of the Effective Date, including any General Plan Amendments in effect as of the Effective Date ("**Applicable General Plan**");

b. The Zoning Ordinance of City on the Effective Date ("Applicable Zoning Ordinance");

c. Other rules, regulations, ordinances and policies of City applicable to development of the Property on the Effective Date, except for any and all fees applicable to the development, which shall be as set forth in Section 2.6.2 of this Agreement, (collectively, together with the Applicable General Plan and the Applicable Zoning Ordinance, the "Applicable Rules"); and

d. The Project Approvals, as they may be amended from time to time with Developer's consent;

and all of the foregoing are hereby vested in Developer, subject to, and as provided in, the provisions of this Development Agreement (the "**Vested Elements**"). City hereby

agrees to be bound with respect to the Vested Elements, subject to Developer's compliance with the terms and conditions of this Development Agreement.

2.3. Development Construction Completion.

2.3.1. Timing of Development; Pardee Finding. Because the California Supreme Court held in Pardee Construction Co. v. City of Camarillo, 37 Cal.3d 465 (1984), 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 the parties' agreement, it is the Parties' intent to address that deficiency by acknowledging and providing that, subject to any infrastructure phasing requirements that may be required by the Project Approvals or as otherwise explicitly set forth herein, Developer shall have the right (without obligation) to develop the Property in such order and at such rate and at such times as Developer deems appropriate within the exercise of its subjective business judgment.

2.3.2. Moratorium. No City-imposed moratorium or other limitation (whether relating to the rate, timing or sequencing of the development or construction of all or any part of the Property, whether imposed by ordinance, initiative, resolution, policy, order or otherwise, and whether enacted by the City Council, an agency of City, the electorate, or otherwise) affecting parcel or subdivision maps (whether tentative, vesting tentative or final), building permits, occupancy certificates or other entitlements to use or service (including, without limitation, water and sewer) approved, issued or granted within City, or portions of City, shall apply to the Property to the extent such moratorium or other limitation is in conflict with this Development Agreement. The provisions of this Section 2.3.2 shall not affect City's compliance with moratoria or other limitations mandated by other governmental agencies or court-imposed moratoria or other limitations; provided however, the Term of this Agreement shall be extended for the period of time during which any such moratorium or other limitation prevents or delays construction of the Project.

2.3.3. No Other Requirements. Nothing in this Development Agreement is intended to create any affirmative development obligations to develop the Project at all, or liability in Developer under this Development Agreement if the development fails to occur. Notwithstanding the foregoing, failure of Developer to develop the Project may result in a termination of the DDA.

2.4. Effect of Project Approvals and Applicable Rules; Future Rules.

2.4.1. Governing Rules. Except as otherwise explicitly provided in this Development Agreement, development of the Property shall be subject to (a) the Project Approvals (defined in Section 1.5) and (b) the Applicable Rules (defined in Section 2.2).

2.4.2. Changes in Applicable Rules; Future Rules.

a. To the extent any changes in the Applicable Rules, or any provisions of future General Plans, Specific Plans, Zoning Ordinances or other rules, regulations, ordinances or policies (whether adopted by means of ordinance, initiative, referenda, resolution, policy, order, moratorium, or other means, adopted by the City Council, Planning Commission, or any other board, commission, agency, committee, or department of City, or any officer or employee

thereof, or by the electorate) of City (collectively, "**Future Rules**") are not in conflict with the Vested Elements (defined in Section 2.2), such Future Rules shall be applicable to the Project.

b. No Future Rule shall invalidate or prevail over all or any part of this Development Agreement or the Project Approvals, and City shall cooperate with Developer and shall undertake such actions as may be necessary to ensure this Development Agreement remains in full force and effect. City shall not support, adopt or enact any Future Rule, or take any other action which would violate the express provisions or spirit and intent of this Development Agreement or the Project Approvals. Developer reserves the right to challenge in court any Future Rule that would conflict with the Vested Elements or this Development Agreement or reduce the development rights provided by this Development Agreement.

c. A Future Rule that conflicts with the Vested Elements shall nonetheless apply to the Property if, and only if (i) consented to in writing by Developer; (ii) it is determined by City and evidenced through findings adopted by the City Council confirming that the change or provision is reasonably required in order to prevent a condition dangerous to the public health or safety, that there are no feasible alternatives to the imposition of such change or provision and how such change or provision would alleviate the dangerous condition; (iii) it is required by changes in State or Federal law as set forth in Section 2.4.3 below; (iv) it consists of changes in, or new fees permitted by, Section 2.6; or (v) it is otherwise expressly permitted by this Development Agreement.

d. Prior to the Effective Date, the Parties shall have prepared two (2) sets of the Project Approvals and Applicable Rules, one (1) set for City and one (1) set for Developer. If it becomes necessary in the future to refer to any of the Project Approvals or Applicable Rules, the contents of these sets are presumed for all purposes of this Development Agreement, absent clear clerical error or similar mistake, to constitute the Project Approvals and Applicable Rules.

2.4.3. Changes in State or Federal Laws. In accordance with California Government Code Section 65869.5, in the event that state or federal laws or regulations enacted after the Effective Date ("**State or Federal Law**") prevent or preclude compliance with one or more provisions of this Development Agreement or render compliance with this Agreement substantially more expensive or time consuming, the Parties shall meet in good faith to determine the feasibility of any modification or suspension of this Development Agreement that may be necessary to comply with such State or Federal Law and to determine the effect such modification or suspension would have on the purposes and intent of this Development Agreement and the Vested Elements. Following the meeting between the Parties, the provisions of this Development Agreement may, to the extent feasible, and upon mutual agreement of the Parties, be modified or suspended, but only to the minimum extent necessary to comply with such State or Federal Law. In such an event, this Development Agreement, together with any required modifications, shall continue in full force and effect. In the event that the State or Federal Law operates to frustrate irremediably and materially the vesting of rights as set forth in this Agreement, Developer may terminate this Agreement. In addition, Developer shall have the right to challenge (by any method, including litigation) the State or Federal Law preventing compliance with, or performance of, the terms of this Development Agreement and, in the event that such challenge is successful, this Development Agreement shall remain unmodified and in full force and effect, unless (i) Developer fails to commence

construction of the Project by December 31, 2024, or (ii) Developer fails to submit a written request to City prior to the expiration date of any construction permits for an extension of time as allowed under the Zoning Ordinance. The Term of this Development Agreement may be extended for the duration of the period during which any new State or Federal Law prevents or precludes compliance with the provisions of this Development Agreement.

2.4.4. Conflicts. In the event of an irreconcilable conflict between the provisions of the Project Approvals (on the one hand) and the Applicable Rules (on the other hand), the provisions of the Project Approvals shall apply. In the event of a conflict between the Project Approvals (on the one hand) and this Development Agreement, in particular, (on the other hand), the provisions of this Development Agreement shall control.

2.5. Processing Subsequent Approvals. City will accept, make completeness determinations, and process, promptly and diligently, to completion all applications for Subsequent Approvals for the Project, in accordance with the terms of this Development Agreement.

2.5.1. Scope of Review of Subsequent Approvals. By approving the Project Approvals, City has made a policy decision that the Project is in the best interests of the public health, safety and general welfare. Accordingly, City shall not use its authority in considering any application for a discretionary Subsequent Approval to prevent or delay development of the Project provided that such application is in substantial conformity with the original Project Approvals. Instead, the Subsequent Approvals shall be deemed to be tools to implement those policy decisions. The scope of the review of applications for Subsequent Approvals shall be limited to a review of substantial conformity with the Vested Elements and the Applicable Rules (except as otherwise provided by Section 2.4), and compliance with CEQA. Where such substantial conformity/compliance exists, City shall not deny an application for a Subsequent Approval for the Project.

2.6. Development Fees, Exactions; and Conditions.

All fees, exactions, or other monetary impositions to which the Project would be subject, but for this Development Agreement, are referred to in this Development Agreement either as "**Processing Fees**" (as defined in Section 2.6.1) or "**Impact Fees**" (as defined in Section 2.6.2).

2.6.1. Processing Fees. "Processing Fees" mean fees charged on a citywide basis to cover the cost of City review of applications for any permit or other review by City departments. Applications for Subsequent Approvals for the Project shall be charged Processing Fees applicable at the time of application per City's Master Fee Schedule to allow City to recover its actual and reasonable costs of processing Developer's Subsequent Approvals with respect to the Project.

2.6.2. Impact Fees. "Impact Fees" means monetary fees, monetary exactions or impositions, other than taxes or assessments, whether established for or imposed upon the Project individually or as part of a class of projects, that are imposed by City on the Project in connection with any Project Approval for any purpose, including, without limitation, defraying all or a portion of the cost of public services and/or facilities construction, improvement, or

operation and maintenance attributable to the burden created by the Project. Any fee, or monetary exaction or imposition imposed on the Project which is not a Processing Fee is an Impact Fee. Developer shall pay the Impact Fees in existence at the time the Impact Fee is assessed and payable, including any Impact Fees adopted after the Effective Date. Developer shall pay the Impact Fees at the rate in effect at the time the Impact Fee is assessed and payable. Impact fees shall be paid at the time required by the Union City Municipal Code, unless a different time is specified by this Agreement or the Project Approvals.

2.6.3. Conditions of Subsequent Approvals. In connection with any Subsequent Approvals, City shall have the right to impose reasonable conditions necessary for the Project including, without limitation, normal and customary dedications for rights of way or easements for public access, utilities, water, sewers, and drainage ; provided, however, such conditions and dedications shall not be inconsistent with the Applicable Rules or Project Approvals, nor inconsistent with the development of the Project as contemplated by this Agreement. Notwithstanding the foregoing, no conditions imposed on Subsequent Approvals shall require dedications of, or reservations for, or construction or funding of, public infrastructure or public improvements beyond those included in the previously-approved Project Approvals. In addition, any and all conditions imposed on Subsequent Approvals for the Project must comply with Sections 2.6.1 and 2.6.2 herein.

2.7. Life of Project Approvals.

2.7.1. Life of Project Approvals. The term of all Project Approvals shall be automatically extended such that the Project Approvals remain in effect until December 31, 2024. Thereafter the Project Approvals shall expire, unless Developer has commenced construction of the Project. Nothing in this Section is intended to extend the deadline for commencement of Project construction set forth in the DDA. or create an expectation that the City will agree to amend the DDA.

2.7.2. Termination of Agreement. In the event that this Development Agreement is terminated prior to the expiration of the Term, the term of any Project Approval shall be the term otherwise applicable to the approval (including any extensions).

2.8. Further CEQA Environmental Review.

2.8.1. Reliance on EIRs. The EIRs referenced in Section 1.5.1 address the potential environmental impacts of the entire Project as it is described in the Project Approvals. It is agreed that, in acting on any discretionary Subsequent Approvals for the Project, City will rely on those EIRs to satisfy the requirements of CEQA to the fullest extent permissible by CEQA and City will not require a new initial study, negative declaration, EIR or subsequent or supplemental EIR unless required by CEQA and will not impose on the Project any mitigation measures or other conditions of approval other than those specifically imposed by the Project Approvals or specifically required by the Applicable Rules.

2.8.2. Subsequent CEQA Review. In the event that any additional CEQA documentation is legally required for any discretionary Subsequent Approval for the Project, then the scope of such documentation shall be focused, to the extent possible consistent with

CEQA, on the specific subject matter of the Subsequent Approval, and the City shall conduct such CEQA review as expeditiously as possible.

2.9. Developer's Right to Rebuild. Developer may renovate or rebuild the Project within the Term of this Agreement should it become necessary due to natural disaster, casualty, changes in seismic requirements, or should the buildings located within the Project become functionally outdated, within Developer's sole discretion, due to changes in technology. Any such renovation or rebuilding shall be processed as a Subsequent Project Approval, shall be subject to the Vested Elements, and shall comply with the Project Approvals, the building regulations existing at the time of such rebuilding or reconstruction, and the requirements of CEQA.

## ARTICLE 3.
## ANNUAL REVIEW

3.1. Annual Review.

The annual review required by California Government Code Section 65865.1 will be conducted for the purposes and in the manner stated in those laws as further provided herein. As part of that review, City and Developer shall have a reasonable opportunity to assert action(s) that either Party believes have not been undertaken in accordance with the other Party a justification for the other Party's position with respect to such action(s), and to take such actions as permitted by law. The procedure set forth in this Article shall be used by Developer and City in complying with the annual review requirement. The City and Developer agree that the annual review process will review compliance by Developer and City with the obligations under this Development Agreement but will not review compliance with other Project Approvals or other agreements between City and Developer.

3.2. Commencement of Process; Developer Compliance Letter.

At least fifteen (15) days prior to the anniversary of the Effective Date each year, Developer shall submit a letter to the Director of City's Economic & Community Development Department demonstrating Developer's good faith compliance with the material terms and conditions of this Development Agreement and shall include in the letter a statement that the letter is being submitted to City pursuant to the requirements of Government Code Section 65865.1.

3.3. Economic & Community Development Director Review.

Within thirty (30) days after the receipt of Developer's letter, the Economic & Community Development Director shall review Developer's submission and determine whether Developer has, for the year under review, demonstrated good faith compliance with the material terms and conditions of this Development Agreement. If Developer has demonstrated good faith compliance, than the Economic & Community Development Director shall make such a finding and send a letter back to Developer describing the Economic & Community Development Director's finding and any comments.

3.4. Economic & Community Development Director Noncompliance Finding.

If the Economic & Community Development Director finds and determines that there is substantial evidence that Developer has not complied in good faith with the material terms and conditions of this Development Agreement and that Developer is in material breach of this Development Agreement for the year under review, the Economic & Community Development Director shall issue and deliver to Developer a written "Notice of Default" specifying in detail the nature of the failures in performance that the Economic & Community Development Director claims constitutes material noncompliance, all facts demonstrating substantial evidence of material noncompliance, and the manner in which such noncompliance may be satisfactorily cured in accordance with the Development Agreement. In the event that the material noncompliance is an Event of Default pursuant to ARTICLE 5 herein, the Parties shall be entitled to their respective rights and obligations under both ARTICLE 3 and 5 herein, except that the particular entity allegedly in default shall be accorded only one of the 60-day cure periods referred to in Sections 3.5 and 5.1 herein.

3.5. Cure Period.

If the Economic & Community Development Director finds that Developer is not in compliance, the Economic & Community Development Director shall grant a reasonable period of time for Developer to cure the alleged noncompliance. The Economic & Community Development Director shall grant a cure period of at least sixty (60) days and shall extend the sixty (60) day period if Developer is proceeding in good faith to cure the noncompliance and additional time is reasonably needed. At the conclusion of the cure period, the Economic & Community Development Director shall either (i) find that Developer is in compliance; or (ii) find that Developer is not in compliance.

3.6. Referral of Noncompliance to City Council.

If Developer fails to cure the alleged noncompliance to the Economic & Community Development Director's reasonable satisfaction during the prescribed cure period and any extensions thereto, the Economic & Community Development Director shall refer the alleged noncompliance to the City Manager who shall forward to the City Council if Developer requests a hearing before the City Council. The Economic & Community Development Director shall prepare a staff report to the City Council which shall include, in addition to Developer's letter, (i) demonstration of City's good faith compliance with the terms and conditions of this Development Agreement; (ii) the Notice of Default; and (iii) a description of any cure undertaken by Developer during the cure period.

3.7. Delivery of Documents.

At least ten (10) business days prior to any City hearing regarding Developer's compliance with this Development Agreement, City shall deliver to Developer all staff reports and all other relevant documents pertaining to the hearing.

3.8. City Council Compliance Finding.

If the City Council, following a noticed public hearing pursuant to Section 3.6, determines that Developer is in compliance with the material terms and conditions of this Development Agreement, the annual review shall be deemed concluded. City shall, at

Developer's request, issue and have recorded a Certificate of Compliance indicating Developer's compliance with the terms of this Development Agreement.

3.9. City Council Noncompliance Finding.

If the City Council, at a properly noticed public hearing pursuant to Section 3.6, finds and determines, on the basis of substantial evidence, that Developer has not complied in good faith with the material terms or conditions of this Development Agreement and that Developer is in material breach of this Development Agreement, Developer will have a reasonable time determined by the City Council to meet the reasonable terms of compliance approved by the City Council, which time shall be not less than fifteen (15) days. If Developer does not complete the terms of compliance within the time specified, the City Council shall hold a public hearing regarding termination or modification of this Development Agreement. Notification of intention to modify or terminate this Development Agreement shall be delivered to Developer by certified mail containing: (i) the time and place of the City Council hearing; (ii) a statement as to whether City proposes to terminate or modify this Development Agreement and the terms of any proposed modification; and (iii) any other information reasonably necessary to inform Developer of the nature of the proceedings. At the time of the hearing, Developer shall be given an opportunity to be heard. The City Council may impose conditions to the action it takes as necessary to protect the interests of City; provided that any modification or termination of this Development Agreement pursuant to this provision shall bear a reasonable nexus to, and be proportional in severity to the magnitude of the alleged breach, and in no event shall termination be permitted except in accordance with ARTICLE 5 herein.

3.10. Relationship to Default Provisions.

The above procedures supplement and do not replace that provision of Section 5.1 of this Development Agreement whereby either City or Developer may, at any time, assert matters which either Party believes have not been undertaken in accordance with this Development Agreement by delivering a written Notice of Default and following the procedures set forth in Section 5.1.

3.12. Reimbursement of City's Costs Incurred in Bringing About Cure

Developer shall be obligated to reimburse to City all reasonable costs, expenses, damages and reasonable attorneys' fees incurred as a result of any Developer default including all costs incurred in bringing about Developer's cure of any such default.

## ARTICLE 4.
## AMENDMENTS

4.1. Amendments to Development Agreement Legislation.

This Development Agreement has been entered into in reliance upon the provisions of the Development Agreement Legislation as those provisions existed at the Effective Date. No amendment or addition to those provisions or any other State or Federal Law (defined in Section

2.4.3) that would materially adversely affect the interpretation or enforceability of this Development Agreement or would prevent or preclude compliance with one or more provisions of this Development Agreement shall be applicable to this Development Agreement or render compliance with this Agreement substantially more expensive or time consuming, unless such amendment or addition is specifically required by the change in law, or is mandated by a court of competent jurisdiction. In the event of the application of such a change in law, the Parties shall meet in good faith to determine the feasibility of any modification or suspension that may be necessary to comply with such new law or regulation and to determine the effect such modification or suspension would have on the purposes and intent of this Development Agreement and the Vested Elements. Following the meeting between the Parties, the provisions of this Development Agreement may, to the extent feasible, and upon mutual agreement of the Parties, be modified or suspended but only to the minimum extent necessary to comply with such new law or regulation. If such amendment or change is permissive (as opposed to mandatory), this Development Agreement shall not be affected by same unless the Parties mutually agree in writing to amend this Development Agreement to permit such applicability. Developer and/or City shall have the right to challenge any new law or regulation preventing compliance with the terms of this Development Agreement, and in the event such challenge is successful, this Development Agreement shall remain unmodified and in full force and effect. The Term of this Development Agreement may be extended for the duration of the period during which such new law or regulation precludes compliance with the provisions of this Development Agreement.

4.2 Amendments to or Cancellation of Development Agreement.

This Development Agreement may be amended from time to time or canceled in whole or in part by mutual consent of both Parties in writing in accordance with the provisions of the Development Agreement Legislation. Review and approval of an amendment to this Development Agreement shall be strictly limited to consideration of only those provisions to be added or modified. No amendment, modification, waiver or change to this Development Agreement or any provision hereof shall be effective for any purpose unless specifically set forth in writing that expressly refers to this Development Agreement and signed by the duly authorized representatives of both Parties. Except as provided in Section 4.3, 4.4.1 or 4.4.2, all amendments to this Development Agreement shall be recommended for approval by the Planning Commission and approved by the City Council and, upon such approval, will become part of the Project Approvals.

4.3. Operating Memoranda.

The provisions of this Development Agreement require a close degree of cooperation between City and Developer and development of the Property hereunder may demonstrate that refinements and clarifications are appropriate with respect to the details of performance of City and Developer. If and when, from time to time, during the Term of this Development Agreement, City and Developer agree that such clarifications are necessary or appropriate, City and Developer shall effectuate such clarifications through operating memoranda approved by City and Developer, which, after execution, shall be attached hereto as addenda and become a part hereof, and may be further clarified from time to time as necessary with future approval by City and Developer. No such operating memoranda shall constitute an

amendment to this Development Agreement requiring public notice or hearing. The City Manager, in consultation with the City Attorney, shall make the determination on behalf of City whether a requested clarification may be effectuated pursuant to this Section 4.3 or whether the requested clarification is of such a character to constitute an amendment hereof pursuant to Section 4.2 above. The City Manager shall be authorized to execute any operating memoranda hereunder on behalf of City.

4.4. Amendments to Project Approvals.

Notwithstanding any other provision of this Development Agreement, Developer may seek and City may review and grant amendments or modifications to the Project Approvals (including the Subsequent Approvals) subject to the following (except that the procedures for amendment of this Development Agreement are set forth in Section 4.2 herein).

4.4.1. Amendments to Project Approvals. Project Approvals (except for this Development Agreement the amendment process for which is set forth in Section 4.2) may be amended or modified from time to time, but only at the written request of Developer or with the written consent of Developer (at its sole discretion) and in accordance with Section 2.4. All amendments to the Project Approvals shall automatically become part of the Project Approvals; provided however, if an amendment to the Project Approvals constitutes a "Major Amendment" as defined in Section 4.4.1or as reasonably determined by the Economic & Community Development Director, Developer consents to the review of such Major Amendment's before the Planning Commission for approval or recommendation to the City Council, whose review and approval or denial shall be final, subject to any applicable appeal rights of Developer. The permitted uses of the Property, maximum unit count, the maximum height and size of the proposed buildings, any material variations from development standards identified in Section 18.38.250 of the Zoning Ordinance, the conditions, terms, restrictions and requirements for subsequent discretionary actions, the provisions for public improvements and financing of public improvements, and the other terms and conditions of development as set forth in all such amendments, except those constituting a Major Amendment shall be automatically vested pursuant to this Development Agreement, without requiring an amendment to this Development Agreement. Amendments to the Project Approvals shall be governed by the Project Approvals and the Applicable Rules, subject to Section 2.4. City shall not request, process or consent to any amendment to the Project Approvals that would affect the Property or the Project without Developer's prior written consent. As used in this Agreement, the term "**Major Amendment**" means a modification that affects (a) the Term of this Agreement, (b) permitted uses of the Property, (c) provisions for reservation or dedication of land, (d) the density or intensity of use of the Property, (e) the maximum height or size of proposed buildings, (f) the location and maintenance of on-site or off-site public improvements, (g) any exceptions to applicable development standards as allowed by Section 18.38.250 of the Union City Municipal Code, or (h) such other modification Economic & Community Development Director reasonably determines to constitute a significant change in the Project.

4.4.2. Administrative Amendments. Upon the request of Developer for an amendment or modification of any Project Approval, the Economic & Community Development Director or his/her designee shall determine: (a) whether the requested amendment or modification is minor when considered in light of the Project as a whole; and (b) whether the requested amendment or

modification substantially conforms with the material terms of this Development Agreement and the Applicable Rules. If the Economic & Community Development Director or his/her designee finds that the requested amendment or modification is both minor and substantially conforms with the material terms of this Development Agreement Project Approvals, and the Applicable Rules, the amendment or modification shall be determined to be an "**Administrative Amendment**," and the Economic & Community Development Director or his or her designee may approve the Administrative Amendment, without public notice or a public hearing. Without limiting the generality of the foregoing, lot line adjustments, minor alterations in vehicle circulation patterns or vehicle access points, variations in the location of structures that do not substantially alter the design concepts of the Project Approvals, ; minor changes to architectural features required to comply with applicable Building Code provisions or to address supply issues, substitution of comparable landscaping for any landscaping shown on any development plan or landscape plan, variations in the location or installation of utilities and other infrastructure connections and facilities that do not substantially alter design concepts of the Project Approvals, and minor adjustments to the Property legal description, approved building façade colors and/or exterior materials, courtyard dimensions, and location and square footage of common area amenities shall be deemed to be minor amendments or modifications that may be approved by the Economic & Community Development Director without review by the Planning Commission or City Council. Any request of Developer for an amendment or modification to a Project Approval that is determined not to be an Administrative Amendment as set forth above shall be subject to review, consideration and action pursuant to the Applicable Rules and this Agreement.

## ARTICLE 5.
## DEFAULT, REMEDIES AND TERMINATION

5.1 Events of Default.

Subject to any extensions of time by mutual consent of the Parties in writing, and subject to the provisions of Section 9.2 hereof regarding permitted delays and a Mortgagee's right to cure pursuant to Section 8.3 hereof, any failure by either Party to perform any material term or provision of this Development Agreement (not including any failure by Developer to perform any term or provision of any other Project Approvals) shall constitute an "**Event of Default**," (i) if such defaulting Party does not cure such failure within sixty (60) days (such sixty (60) day period is not in addition to any (60) day cure period under Section 3.6, if Section 3.6 is applicable) following written notice of default from the other Party, where such failure is of a nature that can be cured within such sixty (60) day period, or (ii) if such failure is not of a nature which can be cured within such sixty (60) day period, the defaulting Party does not within such sixty (60) day period commence substantial efforts to cure such failure, or thereafter does not within a reasonable time prosecute to completion with diligence and continuity the curing of such failure.

Any notice of default given hereunder shall specify in detail the nature of the failures in performance that the noticing Party claims constitutes the Event of Default, all facts constituting substantial evidence of such failure, and the manner in which such failure may be satisfactorily cured in accordance with the terms and conditions of this Development Agreement. During the time periods herein specified for cure of a failure of performance, the Party charged therewith

shall not be considered to be in default for purposes of (a) termination of this Development Agreement, (b) institution of legal proceedings with respect thereto, or (c) issuance of any approval with respect to the Project. The waiver by either Party of any default under this Development Agreement shall not operate as a waiver of any subsequent breach of the same or any other provision of this Development Agreement.

5.2. Meet and Confer.

During the time periods specified in Section 5.1 for cure of a failure of performance, the Parties shall meet and confer in a timely and responsive manner, to attempt to resolve any matters prior to litigation or other action being taken, including without limitation any action in law or equity; provided, however, nothing herein shall be construed to extend the time period for this meet and confer obligation beyond the 60-day cure period referred to in Section 5.1 (even if the 60-day cure period itself is extended pursuant to Section 5.1) unless the Parties agree otherwise in writing.

5.3. Remedies and Termination.

If, after notice and expiration of the cure periods and procedures set forth in Sections 5.1 and 5.2, the alleged Event of Default is not cured, the non-defaulting Party, at its option, may institute legal proceedings pursuant to Section 5.4 of this Development Agreement and/or terminate this Development Agreement pursuant to Section 5.5 herein. In the event that this Development Agreement is terminated pursuant to Section 5.5 herein and litigation is instituted that results in a final decision that such termination was improper, then this Development Agreement shall immediately be reinstated as though it had never been terminated.

5.4. Legal Action by Parties.

5.4.1. Remedies. Either Party may, in addition to any other rights or remedies, institute legal action to cure, correct or remedy any default, enforce any covenant or agreement herein, enjoin any threatened or attempted violation thereof, enforce by specific performance the obligations and rights of the Parties hereto or to obtain any remedies consistent with the purpose of this Development Agreement. All remedies shall be cumulative and not exclusive of one another, and the exercise of any one or more of these remedies shall not constitute a waiver or election with respect to any other available remedy. Without limiting the foregoing, Developer reserves the right to challenge in court any Future Rules that would conflict with the Vested Elements or the Subsequent Approvals for the Project or reduce the development rights provided by the Project Approvals.

5.4.2. No Damages. In no event shall either Party, or its boards, commissions, officers, agents or employees, be liable in damages for any default under this Development Agreement, it being expressly understood and agreed that the sole legal remedy available to either Party for a breach or violation of this Development Agreement by the other Party shall be an action in mandamus, specific performance or other injunctive or declaratory relief to enforce the provisions of this Development Agreement by the other Party, or to terminate this Development Agreement. This limitation on damages shall not preclude actions by a Party to enforce payments of monies or the performance of obligations requiring an obligation of

money from the other Party under the terms of this Development Agreement including, but not limited to obligations to pay attorneys' fees and obligations to advance monies or reimburse monies. In connection with the foregoing provisions, each Party acknowledges, warrants and represents that it has been fully informed with respect to, and represented by counsel of such Party's choice in connection with, the rights and remedies of such Party hereunder and the waivers herein contained, and after such advice and consultation has presently and actually intended, with full knowledge of such Party's rights and remedies otherwise available at law or in equity, to waive and relinquish such rights and remedies to the extent specified herein, and to rely to the extent herein specified solely on the remedies provided for herein with respect to any breach of this Development Agreement by the other Party.

5.5.Termination.

5.5.1. Expiration of Term. Except as otherwise provided in this Development Agreement, this Development Agreement shall be deemed terminated and of no further effect upon the expiration of the Term of this Development Agreement as set forth in Section 1.3.

5.5.2. Survival of Obligations. Upon the termination or expiration of this Development Agreement as provided herein, neither Party shall have any further right or obligation with respect to the Property under this Development Agreement except with respect to any obligation that is specifically set forth as surviving the termination or expiration of this Development Agreement. The termination or expiration of this Development Agreement shall not affect the validity of the Project Approvals (other than this Development Agreement) for the Project.

5.5.3. Termination by City. Notwithstanding any other provision of this Development Agreement, City shall not have the right to terminate this Development Agreement with respect to all or any portion of the Property before the expiration of its Term unless City complies with all termination procedures set forth in the Development Agreement Legislation and there is an alleged Event of Default by Developer and such Event of Default is not cured pursuant to ARTICLE 3 herein or this ARTICLE 5 and Developer has first been afforded an opportunity to be heard regarding the alleged default before the City Council and this Development Agreement is terminated only with respect to that portion of the Property to which the default applies.

## ARTICLE 6.
## COOPERATION AND IMPLEMENTATION

6.1. Further Actions and Instruments.

Each Party to this Development Agreement shall cooperate with and provide reasonable assistance to the other Party and take all actions necessary to ensure that the Parties receive the benefits of this Development Agreement, subject to satisfaction of the conditions of this Development Agreement. Upon the request of any Party, 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 Development Agreement to carry out the intent and to fulfill the provisions of this

Development Agreement or to evidence or consummate the transactions contemplated by this Development Agreement.

6.2. Regulation by Other Public Agencies.

Other public agencies not within the control of City may possess authority to regulate aspects of the development of the Property separately from or jointly with City, and this Development Agreement does not limit the authority of such other public agencies. Nevertheless, City shall be bound by, and shall abide by, its covenants and obligations under this Development Agreement in all respects when dealing with any such agency regarding the Property. To the extent that City, the City Council, the Planning Commission or any other board, agency, committee, department or commission of City constitutes and sits as any other board, agency, commission, committee, or department, it shall not take any action that conflicts with City's obligations under this Agreement unless required to by any State or Federal law.

6.3. Other Governmental Permits and Approvals; Grants.

Developer shall apply in a timely manner in accordance with Developer's construction schedule for the permits and approvals from other governmental or quasi-governmental agencies having jurisdiction over the Project as may be required for the development of, or provision of services to, the Project. Developer shall comply with all such permits, requirements and approvals. City shall cooperate with Developer in its endeavors to obtain (a) such permits and approvals and (b) any grants or other financing for the Project for which Developer applies.

6.4. Cooperation in the Event of Legal Challenge.

6.4.1. The filing of any third party lawsuit(s) against City or Developer relating to this Agreement, the Project Approvals or other development issues affecting the Property shall not delay or stop the development, processing or construction of the Project or approval of any Subsequent Approvals, unless the third party obtains a court order preventing the activity. City shall not stipulate to or cooperate in the issuance of any such order.

6.4.2. In the event of any administrative, legal or equitable action instituted by a third party challenging the validity of any provision of this Development Agreement, the procedures leading to its adoption, the Project Approvals for the Project ("**Initial Litigation Challenge**"), Developer and City each shall have the right, in its sole discretion, to elect whether or not to defend such action, to select its own counsel, and to control its participation and conduct in the litigation in all respects permitted by law. If an Initial Litigation Challenge is filed, upon receipt of the petition, the Parties will have 20 days to meet and confer regarding the merits of such Initial Litigation Challenge and to determine whether to defend against the Initial Litigation Challenge, which period may be extended by the Parties' mutual agreement so long as it does not impact any litigation deadlines.

If, after meeting and conferring, the Parties mutually agree to defend against the Initial Litigation Challenge, then the following shall apply: (i) the Parties hereby agree to affirmatively cooperate in defending said action and to execute a joint defense and confidentiality agreement in order to share and protect information, under the joint defense privilege recognized under applicable law; (ii) for the purposes of cost-efficiency and

coordination, the Parties shall first consider defending the Initial Litigation Challenge jointly, with counsel and under terms of joint representation mutually acceptable to the City and Developer (each in its sole discretion), at the Developer's sole cost and expense; and (iii) if the Parties cannot reach timely and mutual agreement on a joint counsel, and Developer continues to elect (in its sole discretion) to defend against the Initial Litigation Challenge, then Developer shall take the lead role defending such Initial Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice, in which case, City may elect to be separately represented by the outside legal counsel of its choice in any such action or proceeding. The City Manager is authorized to negotiate and enter into a joint defense agreement in a form acceptable to the City Attorney. Such joint defense agreement shall also provide that any proposed settlement of an Initial Litigation Challenge shall be subject to City's and Developer's approval, each in its reasonable discretion.

As part of the cooperation in defending an action, City and Developer shall coordinate their defense in order to make the most efficient use of legal counsel and to share and protect information. Developer and City shall each have sole discretion to terminate its defense at any time. If Developer elects, in its sole and absolute discretion, not to defend against the Initial Litigation Challenge, it shall deliver written notice to the City regarding such decision. If Developer elects not to defend, the City has the right, but not the obligation, to proceed to defend against the Initial Litigation Challenge and shall take the lead role defending such Initial Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice, at its sole cost and expense. If Developer elects not to defend, the City has the right, but not the obligation, to terminate this Agreement and consider the Developer's application for any related Project Approvals withdrawn. The City shall not settle any third party litigation of Project Approvals without Developer's consent, which consent shall not be unreasonably withheld, conditioned or delayed.

6.5. Indemnification

Developer shall indemnify, defend (with counsel reasonably acceptable to City) and hold harmless City and any City Councilmembers, commissioners and staff acting in their official capacity ("**City Parties**") from and against any and all claims, costs, liabilities and damages (collectively, "**Claims**"), including Claims for any bodily injury, death, or property damage, arising or resulting directly or indirectly from an Initial Litigation Challenge, the development or construction of the Project or any portion thereof by or on behalf of Developer, or from any acts, omissions, negligence or willful misconduct of Developer, whether such acts, omissions, negligence or willful misconduct are by Developer or any of Developer's contractors, subcontractors, agents or employees. The foregoing indemnity shall not apply to any Claims to the extent arising or resulting from the gross negligence or willful misconduct of City or the City Parties. Developer's obligations under this Section shall survive the termination of this Agreement.

6.6. Prevailing Wage

If required by applicable State or Federal Laws, Developer and its contractors and agents shall comply with California Labor Code Section 1720 *et seq*, and the regulations adopted pursuant thereto ("**Prevailing Wage Laws**") with respect to the Project, and shall be responsible

for carrying out the requirements of such provisions. Developer shall indemnify, defend (with counsel approved by City) and hold the City Parties harmless from any Claims which directly or indirectly, in whole or in part, are caused by, arise in connection with, result from the payment or requirement of payment of prevailing wages in the construction of the Project, the failure to comply with any state or federal labor laws, regulations or standards in connection with this Agreement, including but not limited to the Prevailing Wage Laws, or any act or omission of Developer related to this Agreement with respect to the payment or requirement of payment of prevailing wages or the requirement of competitive bidding, whether or not any insurance policies shall have been determined to be applicable to any such Claims. The foregoing indemnity shall not apply to any Claims to the extent arising or resulting from the gross negligence or willful misconduct of City or the City Parties.

6.7. Revision to Project.

In the event of a court order issued as a result of a successful legal challenge, City shall, to the extent permitted by law or court order, in good faith seek to comply with the court order in such a manner as will maintain the integrity of the Project Approvals and avoid or minimize to the greatest extent possible (i) any impact to the development of the Project as provided for in, and contemplated by, the Vested Elements, or (ii) any conflict with the Vested Elements or frustration of the intent or purpose of the Vested Elements.

6.8. State, Federal or Case Law.

Where any state, federal or case law allows City to exercise any discretion or take any action with respect to that law, City shall, in an expeditious and timely manner, at the earliest possible time, (a) exercise its discretion in such a way as to be consistent with, and carry out the terms of, this Development Agreement and (b) take such other actions as may be necessary to carry out in good faith the terms of this Development Agreement.

6.9. Defense of Agreement.

City shall take all actions that are necessary or advisable to uphold the validity and enforceability of this Development Agreement. If this Development Agreement is adjudicated or determined to be invalid or unenforceable, City agrees, subject to all legal requirements, to consider modifications to this Development Agreement to render it valid and enforceable to the extent permitted by applicable law. Developer shall pay all of City's reasonable costs, including reasonable attorneys' fees and experts' costs, incurred to modify or defend this Development Agreement.

## ARTICLE 7.
## TRANSFERS AND ASSIGNMENTS

7.1. Right to Assign.

During any time that the City is the owner of the Property, Developer may not sell, assign or transfer in whole or in part its rights, duties and obligations under this Agreement ("Transfer"), to any person or entity at any time during the Term of this Development

Agreement without the prior consent of City, which consent shall not be unreasonably withheld. This prohibition shall not apply to (a) transfers of Developer's interest in this Agreement to a limited partnership in which Developer or its affiliate is a general partner, (b) transfers of Developer's interest in this Agreement to a limited liability company in which Developer or its affiliate is a manager or managing member, (c) transfers of limited partnership interests or membership interests in such limited partnership or limited liability company, or (d) transfers to an entity that is majority owned or controlled by the Developer or the members or affiliates of the Developer. In the event of a transfer of a portion of the Property, Developer shall have the right to Transfer its rights, duties and obligations under this Development Agreement that are applicable to the transferred portion, and to retain all rights, duties and obligations applicable to the retained portions of the Property. Upon Developer's request, City shall cooperate with Developer and any proposed transferee to allocate rights, duties and obligations under this Development Agreement and the Project Approvals among the transferred Property and the retained Property.

7.2. Release upon Transfer.

Upon the Transfer of Developer's rights and interests under this Development Agreement pursuant to Section 7.1, Developer shall automatically be released from its obligations and liabilities under this Development Agreement with respect to that portion of the Property transferred, and any subsequent default or breach with respect to the transferred rights and/or obligations shall not constitute a default or breach with respect to the retained rights and/or obligations under this Development Agreement, provided that (i) Developer has provided to City written notice of such Transfer, and (ii) the transferee executes and delivers to City a written agreement in which (a) the name and address of the transferee is set forth and (b) the transferee expressly and unconditionally assumes all of the obligations of Developer under this Development Agreement with respect to that portion of the Property transferred. Upon any transfer of any portion of the Property and the express assumption of Developer's obligations under this Development Agreement by such transferee, City agrees to look solely to the transferee for compliance by such transferee with the provisions of this Development Agreement as such provisions relate to the portion of the Property acquired by such transferee. A default by any transferee shall only affect that portion of the Property owned by such transferee and shall not cancel or diminish in any way Developer's rights hereunder with respect to any portion of the Property retained by Developer. The transferor and the transferee shall each be solely responsible for the reporting and annual review requirements relating to the portion of the Property owned by such transferor/transferee, and any amendment to this Development Agreement between City and a transferor or a transferee shall only affect the portion of the Property owned by such transferor or transferee. Failure to deliver a written assumption agreement hereunder shall not affect the running of any covenants herein with the land, as provided in Section 7.3 below, nor shall such failure negate, modify or otherwise affect the liability of any transferee pursuant to the provisions of this Development Agreement.

7.3. Covenants Run with the Land.

All of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this Development Agreement shall be binding upon the Parties and their respective successors (by merger, reorganization, consolidation, or otherwise) and

assigns, devisees, administrators, representatives, lessees, and all of the persons or entities acquiring the Property or any portion thereof, or any interest therein, whether by operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective successors (by merger, consolidation or otherwise) and assigns. All of the provisions of this Development Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including but not limited to, Section 1468 of the Civil Code of the State of California. Each covenant to do, or refrain from doing, some act on the Property hereunder (i) is for the benefit of such Property and is a burden upon such Property, (ii) runs with such Property, (iii) is binding upon each Party and each successive owner during its ownership of such Property or any portion thereof, and (iv) each person or entity having any interest therein derived in any manner through any owner of such Property, or any portion thereof, and shall benefit the Property hereunder, and each other person or entity succeeding to an interest in such Property. The provisions of this Section 7.3 shall be in effect until the expiration of the Term or sooner termination of this Agreement.

# ARTICLE 8.
# MORTGAGEE PROTECTION; CERTAIN RIGHTS OF CURE

## 8.1. Mortgagee Protection.

This Development Agreement shall not prevent or limit Developer in any manner, at Developer'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 ("**Mortgage**"). This Development Agreement shall be superior and senior to any lien placed upon the Property or any portion thereof after the date of recording this Development Agreement, including the lien of any Mortgage. Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Development Agreement shall be binding upon and effective against and inure to the benefit of any person or entity, including any deed of trust beneficiary or mortgagee ("**Mortgagee**") who acquires title to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

## 8.2. Mortgagee Not Obligated.

Notwithstanding the provisions of Section 8.1 above, no Mortgagee shall have any obligation or duty under this Development Agreement to perform Developer's obligations or other affirmative covenants of Developer hereunder; provided, however, that a Mortgagee shall not be entitled to devote the Property to any uses or to construct any improvements thereon other than those uses or improvements provided for or authorized by this Development Agreement, or by the Project Approvals and Applicable Rules.

## 8.3. Notice of Default to Mortgagee; Right of Mortgagee to Cure.

If City receives a notice from a Mortgagee requesting a copy of any Notice of Default given to Developer hereunder and specifying the address for service thereof, then City shall deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to

Developer with respect to any claim by City that Developer has committed a default, and if City makes a determination of noncompliance hereunder, City shall likewise serve notice of such noncompliance on such Mortgagee concurrently with service thereof on Developer. Each Mortgagee shall have the right (but not the obligation) during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the Event of Default claimed or the areas of noncompliance set forth in City's notice.

8.4. No Supersedure.

Nothing in this ARTICLE 8 shall be deemed to supersede or release a Mortgagee or modify a Mortgagee's obligations under any subdivision improvement agreement or other obligation incurred with respect to the Project outside this Development Agreement, nor shall any provision of this ARTICLE 8 constitute an obligation of City to such Mortgagee, except as to the notice requirements of Section 8.3.

8.5. Technical Amendments.

City agrees to reasonably consider and approve interpretations and/or technical amendments to the provisions of this Agreement that are required by lenders or equity investors providing financing for the acquisition of the Property and construction of the improvements on the Property or any refinancing thereof and to otherwise cooperate in good faith to facilitate Developer's negotiations with lenders and investors.

## ARTICLE 9.
## MISCELLANEOUS PROVISIONS

9.1. Limitation on Liability.

Notwithstanding anything to the contrary contained in this Development Agreement, in no event shall any member, officer, agent or employee of City be personally liable for any breach of this Development Agreement by City or for any amount which may become due to Developer under the terms of this Development Agreement.

9.2. Force Majeure.

The Term of this Development Agreement and the Project Approvals and the time within which Developer shall be required to perform any act under this Development Agreement shall be extended by a period of time equal to the number of days during which performance of such act is delayed unavoidably and beyond the reasonable control of the Party seeking the delay by strikes, lock-outs and other labor difficulties, Acts of God, inclement weather, failure or inability to secure materials or labor by reason of priority or similar regulations or order of any governmental or regulatory body, changes in local, state or federal laws or regulations, any development moratorium or any action of other public agencies that regulate land use, development or the provision of services prevents, prohibits or delays construction of the Project, enemy action, civil disturbances, wars, terrorist acts, fire, unavoidable casualties, litigation involving this Agreement or the Project Approvals, or any other cause beyond the reasonable control of Developer which substantially interferes with

carrying out the development of the Project. Such extension(s) of time shall not constitute an Event of Default and shall occur at the request of any Party. In addition, the Term of this Development Agreement and any subdivision map or any of the other Project Approvals shall not include any period of time during which (i) a development moratorium including, but not limited to, a water or sewer moratorium, is in effect; (ii) the actions of public agencies that regulate land use, development or the provision of services to the Property prevent, prohibit or delay either the construction, funding or development of the Project; or (iii) there is any mediation, arbitration, litigation or other administrative or judicial proceeding pending involving the Vested Elements, or Project Approvals. The Term of the Project Approvals shall therefore be extended by the length of any development moratorium or similar action; the amount of time any actions of public agencies prevent, prohibit or delay the construction, funding or development of the Project; or the amount of time to finally resolve any mediation, arbitration, litigation or other administrative or judicial proceeding involving the Vested Elements, or Project Approvals. Furthermore, in the event the issuance of a building permit for any part of the Project is delayed as a result of Developer's inability to obtain any other required permit or approval, then the Term of this Development Agreement shall be extended by the period of any such delay.

9.3. Notices, Demands and Communications Between the Parties.

Formal written notices, demands, correspondence and communications between City and Developer shall be sufficiently given if delivered personally (including delivery by private courier), dispatched by certified mail, postage prepaid and return receipt requested, or delivered by nationally recognized overnight courier service to the offices of City and Developer indicated below. Such written notices, demands, correspondence and communications may be sent in the same manner to such persons and addresses as either Party may from time-to-time designate in writing at least fifteen (15) days prior to the name and/or address change and as provided in this Section 9.3.

| | |
|---|---|
| City: | City of Union City<br>34009 Alvarado-Niles Road<br>Union City, CA 94587<br>Attn: City Manager |
| with copies to: | City of Union City<br>34009 Alvarado-Niles Road<br>Union City, CA 94587<br>Attn: City Attorney |
| Developer: | Windflower Properties, LLC<br>666 Post Street, Suite 1700<br>San Francisco, CA 94109<br>Attn: Vivian Fei Tsen |

Notices personally delivered shall be deemed to have been received upon delivery. Notices delivered by certified mail, as provided above, shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addresses designated above as the Party to whom notices are to be sent, or (ii) within five (5) days after a certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. Notices delivered by overnight courier service as provided above shall be deemed to have been received twenty-four (24) hours after the date of deposit. Notices delivered by electronic

facsimile transmission shall be deemed received upon receipt of sender of electronic confirmation of delivery, provided that a "hard" copy is delivered as provided above.

9.4. Project as a Private Undertaking; No Joint Venture or Partnership.

The Project constitutes private development, neither City nor Developer is acting as the agent of the other in any respect hereunder, and City and Developer are independent entities with respect to the terms and conditions of this Agreement. Nothing contained in this Development Agreement or in any document executed in connection with this Development Agreement shall be construed as making City and Developer joint venturers or partners.

9.5. Severability.

If any terms or provision(s) of this Development Agreement or the application of any term(s)or provision(s) of this Development Agreement to a particular situation, is (are) held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of this Development Agreement or the application of this Development Agreement to other situations, shall remain in full force and effect unless amended or modified by mutual consent of the Parties. Notwithstanding the foregoing, if any material provision of this Development Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, Developer (in its sole and absolute discretion) may terminate this Development Agreement by providing written notice of such termination to City.

9.6. Section Headings.

Article and Section headings in this Development Agreement are for convenience only and are not intended to be used in interpreting or construing the terms, covenants or conditions of this Development Agreement. Except as otherwise expressly stated herein, any reference to a particular section or Article of this Agreement shall mean a reference to all subsections of such section or Article.

9.7. Construction of Agreement.

Both the Developer and City had the opportunity to review with this Agreement with legal counsel, and this Development Agreement is the result of negotiations between the Parties, and no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Development Agreement.

9.8. Entire Agreement.

This Development Agreement, including the Recitals, and exhibits attached hereto and incorporated by reference herein, together with the DDA and the other Project Approvals, constitutes the entire understanding and agreement of the Parties and supersedes all negotiations or previous agreements between the Parties with respect to all or any part of the subject matter hereof. The exhibits and appendices are as follows:

Exhibit A Legal Description of the Property

9.9. Estoppel Certificates.

Either Party may, at any time during the Term of this Development Agreement, and from time to time, deliver written notice to the other Party requesting such Party to certify in writing that, to the knowledge of the certifying Party, (i) this Development Agreement is in full force and effect and a binding obligation of the Parties, (ii) this Development Agreement has not been amended or modified either orally or in writing, or if amended; identifying the amendments, (iii) the requesting Party is not in default in the performance of its obligations under this Development Agreement, or if in default, to describe therein the nature and amount of any such defaults, and (iv) any other information reasonably requested. The Party receiving a request hereunder shall execute and return such certificate or give a written, detailed response explaining why it will not do so within twenty (20) days following the receipt thereof. The failure of either Party to provide the requested certificate within such twenty (20) day period shall constitute a confirmation that this Agreement is in full force and effect and no modification or default exists. Either the City Manager or her designee shall have the right to execute any certificate requested by Developer hereunder. City acknowledges that a certificate hereunder may be relied upon by transferees and Mortgagees.

9.10. Recordation.

Pursuant to California Government Code Section 65868.5, within ten (10) days after the later of the Parties' execution of this Development Agreement or the Effective Date, the City Clerk shall record this Development Agreement with the Alameda County Recorder. Thereafter, if this Development Agreement is terminated, modified or amended, the City Clerk shall record notice of such action with the Alameda County Recorder.

9.11. No Waiver.

No delay or omission by either Party in exercising any right or power accruing upon noncompliance or failure to perform by the other Party under any of the provisions of this Development Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by either Party of any of the covenants or conditions to be performed by the other Party shall be in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought, and any such waiver shall not be construed as a waiver of any succeeding breach or non-performance of the same or other covenants and conditions hereof.

9.12. Time Is of the Essence.

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

9.13. Applicable Law.

This Development Agreement shall be construed and enforced in accordance with the laws of the State of California.

9.14. Attorneys' Fees.

Should any legal action be brought by either Party because of a breach of this Development Agreement or to enforce any provision of this Development Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and such other costs as may be found by the court.

9.15. Third Party Beneficiaries.

Except as otherwise provided herein, City and Developer hereby renounce the existence of any third party beneficiary to this Development Agreement and agree that nothing contained herein shall be construed as giving any other person or entity third party beneficiary status.

9.16. Constructive Notice and Acceptance.

Every person who now or hereafter owns or acquires any right, title or interest in or to any portion of the Property is and shall be conclusively deemed to have consented and agreed to every provision contained herein, whether or not any reference to this Development Agreement is contained in the instrument by which such person acquired an interest in the Property.

9.17. Counterparts.

This Development Agreement may be executed in counterparts, all of which taken together shall constitute one single instrument.

9.18. Authority.

The persons signing below represent and warrant that they have the authority to bind their respective Party and that all necessary board of directors', shareholders', partners', city councils' or other approvals have been obtained.

IN WITNESS WHEREOF, City and Developer have executed this Development Agreement as of the date first set forth above.

**SIGNATURES ON FOLLOWING PAGE**

**DEVELOPER:**

**WINDFLOWER PROPERTIES, LLC**
a California limited liability company

By: _____
Vivian Fei Tsen
Its: Manager Member

**CITY:**

**CITY OF UNION CITY**
a municipal corporation

By: _____
Joan Malloy, City Manager

ATTESTATION:

By: _____
Anna Brown, City Clerk

APPROVED AS TO FORM:

By: _____
Kristopher Kokotaylo, City Attorney

**SIGNATURES MUST BE NOTARIZED**

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of _____

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

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

WITNESS my hand and official seal.

_____
Signature of Notary

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of _____

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

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

WITNESS my hand and official seal.

_____
Signature of Notary

# EXHIBIT A

## LEGAL DESCRIPTION OF PROPERTY

5063626.1