ORDINANCE NO. 1985

AN ORDINANCE OF THE CITY OF SANTA CLARA, CALIFORNIA, APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF SANTA CLARA AND BENTON AND EL CAMINO, LP FOR THE PROPERTY LOCATED AT 575 BENTON STREET, SANTA CLARA

SCH#2015032076
CEQ2015-01188 (Mission Town Center FEIR Addendum#1)
PLN2017-12489 (General Plan Amendment)
PLN2017-12574 (Application for Rezoning)
PLN2017-12575 (Vesting Tentative Parcel Map)
PLN2017-12837 (Development Agreement)

BE IT ORDAINED BY THE CITY OF SANTA CLARA AS FOLLOWS:

WHEREAS, California Government Code Sections 65864 through 65869.51 ("Development Agreement Act") authorize cities to enter into binding development agreements with owners of real property and these agreements govern the development of the property;

WHEREAS, Benton and El Camino, LP ("Developer") has requested that the City of Santa Clara ("City") enter into the type of agreement contemplated by the Development Agreement Act;

WHEREAS, City staff negotiated and recommended for approval a Development Agreement subject to specific conditions of approval, all attached hereto as Exhibit "Development Agreement" and incorporated herein by this reference, with Developer in connection with the proposed development located at 575, 611, 625, 645, 675 Benton Street, 3330, 3350, 3390, 3410 The Alameda; 1188, 1250 Sherman Street; 602 Fremont Street ("Project");

WHEREAS, the Project approvals will include Addendum #1 to the Mission Town Center FEIR; a General Plan Amendment from Santa Clara Station High Density Residential to Santa Clara Station Very High Density Residential; a rezoning of the Project Site from Light Industrial (ML), Single Family (RI-61), Duplex (R2-7L), and Thoroughfare Commercial (CT) to a Planned Development (PD) zone; the vacation and sale of a portion of Fremont Street east of the

Alameda and a portion of Sherman Street north of Benton Street; along with the adoption of a Development Agreement Ordinance;

WHEREAS, pursuant to Santa Clara City Code ("SCCC") § 17.10.120, on May 23 and June 13, 2018, the Planning Commission held a duly noticed public hearing to consider the proposed Development Agreement, at the conclusion of which the Commission recommended that the City Council adopt the Development Agreement Ordinance;

WHEREAS, before considering the Development Agreement, the City Council reviewed and considered the information contained in the Addendum #1 to the Mission Town Center FEIR (SCH#2015032076);

WHEREAS, Santa Clara City Code § 17.10.160 requires the City Council to hold a public hearing before approving a Development Agreement;

WHEREAS, notice of the public hearing on the proposed Development Agreement Amendment was published in the *Santa Clara Weekly*, a newspaper of general circulation for the City, on June 13, 2018;

WHEREAS, notices of the public hearing on the Development Agreement were mailed to all property owners within 1,000 feet of the Project Site, according the most recent assessor's roll, on June 15, 2018; and

WHEREAS, the City Council has reviewed the Development Agreement, and on June 26 and July 17, 2018, conducted a public hearing, at which time all interested persons were invited to provide testimony and evidence, both in support and in opposition to the proposed Development Agreement.

NOW THEREFORE, BE IT FURTHER ORDAINED BY THE CITY OF SANTA CLARA, AS FOLLOWS:

SECTION 1: The City Council hereby approves the Development Agreement substantially in the form attached hereto as Exhibit "Development Agreement" subject to such minor and clarifying

changes consistent with the terms thereof as may be approved by the City Attorney prior to execution thereof.

SECTION 2: Pursuant to Government Code Section 65867.5, the City Council hereby finds that the provisions of the Development Agreement are consistent with the General Plan, in that the proposed project creates a mixed-use development of the scale and character that complements and is supportive of the surrounding uses; and creates a mixed-use development that maximizes density with accessibility to alternative transportation modes, and integrates pedestrian, bicycle, transit, open space and outdoor uses to encourage active centers.

SECTION 3: Pursuant to Government Code Section 65865.2, the City Council hereby finds that the Development Agreement complies with all requirements of the Government Code Section 65865.2, in that the Agreement specifies the duration of the Agreement (10 years), lists the permitted uses of the property (residential/mixed use), sets the density and intensity of the proposed uses (61.7 dwelling units per acre with 19,985 sf of retail), sets the maximum height and size of the proposed buildings (86'6" tall, and as depicted on the attached Development Plans), and includes provisions for the dedication of land for public purposes (a 0.14 acre public park).

SECTION 4: This ordinance, including the Development Agreement approval described in Section 1 above, is based in part on the findings set forth above, and the CEQA Findings Related to Approval of the Certification of the FEIR, the General Plan Amendment, and the Rezoning.

SECTION 5: The City Manager and/or her designee is hereby authorized and directed to perform all acts to be performed by the City in the administration of the Development Agreement pursuant to the terms of the Development Agreement, including but not limited to conducting annual review of compliance as specified therein. The City Manager is further authorized and directed to perform all other acts, enter into all other agreements and execute all other

documents necessary or convenient to carry out the purposes of this Ordinance and the Development Agreement.

SECTION 6: Except as specifically set forth herein, this ordinance suspends and supercedes all conflicting resolutions, ordinances, plans, codes, laws and regulations.

SECTION 7: This Ordinance shall not be codified in the Santa Clara City Code.

SECTION 8: Effective date. This ordinance shall take effect thirty (30) days after its final adoption; however, prior to its final adoption it shall be published in accordance with the requirements of Section 808 and 812 of "The Charter of the City of Santa Clara, California."

PASSED FOR THE PURPOSE OF PUBLICATION this 17th day of JULY, 2018, by the following vote:

AYES:	COUNCILORS:	Davis, Kolstad, O'Neill, and Watanabe
NOES:	COUNCILORS:	None
ABSENT:	COUNCILORS:	None
ABSTAINED:	COUNCILORS:	None

ATTEST: _____
For JENNIFER YAMAGUMA
ACTING CITY CLERK
CITY OF SANTA CLARA

Attachments incorporated by reference:
1. Development Agreement

RECORD WITHOUT FEE
PURSUANT TO GOVERNMENT CODE § 6103

RECORDING REQUESTED BY AND WHEN RECORDED MAIL TO:
City of Santa Clara
City Clerk's Office
1500 Warburton Avenue
Santa Clara, California 95050

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)

BETWEEN

THE CITY OF SANTA CLARA,

a chartered California municipal corporation,

AND

Benton and El Camino, LLC

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EXHIBITS

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)

This DEVELOPMENT AGREEMENT ("**Agreement**"), dated for reference purposes as of _____, is entered into by and between the CITY OF SANTA CLARA ("**City**"), a chartered California municipal corporation, and BENTON AND EL CAMINO, LP, a California limited partnership ("**Developer**"), (collectively the "**Parties**") and is effective on the date set forth in Recital N.

RECITALS

Developer and City enter into this Agreement on the basis of the following facts, understandings and intentions, and the following recitals are a substantive part of this Agreement:

A. Sections 65864 through 65869.5 of the California Government Code authorize the City to establish procedures to enter into binding development agreements with persons having legal or equitable interests in real property located within the City for development of property.

B. The Code of the City of Santa Clara, California ("**SCCC**"), Section 17.10.010 and following, establishes the authority and procedure for review and approval of proposed development agreements.

C. Developer has a legal or equitable interest in the property ("**Property**") governed by this Agreement in that, as of the Effective Date hereof, Developer is, or will become, the lessee of the Property under one or more long-term ground leases of the Property. The Property consists of twelve (12) separate assessor parcel numbers (230-07-002, 004, 009, 010, 013, 029, 031, 034, 038, 053, 059; and 060) and portions of Fremont Street and Sherman Street, totaling approximately 5.8 acres, as further described and depicted in **Exhibit A-1** and **Exhibit A-2**, attached hereto and incorporated by this reference.

D. Developer has submitted the following application(s) to the City (each such application being referenced herein as modified and finally approved by the City Council): (i) A General Plan Amendment to change the land use designation of the Property from *Santa Clara Station High Density Residential* to *Santa Clara Station Very High Density Residential* (#PLN 2017-12489, CEQ 2015-01188) ("**General Plan Amendment**"); (ii) a rezoning of the Property ("**Rezoning**") to PD-Planned Development (#PLN 2017-12574, CEQ 2015-01188) ("**PD**"); (iii) a vesting tentative parcel map (#PLN 2015-10982, CEQ 2017-12575) ("**VTM**"); (iv) the vacation of portions of Fremont Street and Sherman Street ("**Street Vacation**") and (v) this Development Agreement, for development of the Property (#PLN 2017-12837, CEQ 2015-01188). The application(s) request that Developer be allowed to develop the Property with an infill, mixed-use residential project including up to 355 rental apartment units; a parking garage; approximately 5,000 to 6,000 gross square feet ("**gsf**") of conditioned amenity space located on the roof level of the garage including a pool, spa, club room and fitness room; three (3) distinct private open space areas, pet spa and leasing office on grade; approximately 22,300 gsf of commercial space comprised of approximately 20,000 gsf of ground floor retail and

approximately 2,300 gsf of live/work commercial space; site-serving infrastructure; landscaping; and related facilities (collectively, the "**Project**").

F. The Project, including but not limited to the height and configuration of buildings, access and parking facilities, landscaping, and infrastructure improvements, is depicted on the development plans submitted by Developer prior to the Effective Date and on file with City (as may be modified consistent with the Approvals for the Project and this Agreement prior to final architectural approval by City pursuant to **Section 2.9** below, and as may be further modified pursuant to the Minor Change process as set forth in **Section 11.2.b** below) and on **Exhibit B** attached hereto and incorporated herein by this reference (collectively, the "**Development Plan**").

G. Through this Agreement, the Parties intend to preserve the size and density of development as set forth in the General Plan Amendment, Rezoning, VTM, Street Vacation, and Development Plan. City and Developer each acknowledge that development and construction of the Project is a large-scale undertaking involving major investments by Developer and City, and assurances that the Project can be developed and used in accordance with the terms and conditions set forth herein and the existing rules governing development of the Property will benefit both Developer and City.

H. City is willing to enter this Agreement for the reasons enumerated in SCCC 17.10.010 to (i) eliminate uncertainty in the comprehensive development planning of large-scale projects in the City, such as the Project; (ii) secure orderly development and fiscal benefits for public services, improvements and facilities planning in the City; (iii) meet the goals of the General Plan; and (iv) plan for and concentrate public and private resources for the mutual benefit of both Developer and City.

I. Developer acknowledges and recognizes that material inducements for the City to enter into this Agreement are:

(i) the opportunity to:

(A) create a well-designed, economically feasible residential community that consists of a variety of residential products and unit types and incorporates smart growth elements that will help achieve the City's vision for the Santa Clara Station Focus Area as set forth in the General Plan, including the redevelopment of underutilized properties, implementation of higher-density development along established transit corridors, and the inclusion of pedestrian oriented retail to serve the Santa Clara Station and new development;

(B) provide high-density housing to assist in meeting the housing needs of the City and the region and improve the jobs/housing balance within the City;

(C) create a mixed-use development that is in proximity to and maximizes accessibility to alternate transportation modes and integrates pedestrian, bicycle, transit, recreation, open space and outdoor uses to encourage active centers and serve project residents;

(D) create a residential community of such design, scale and character that complements and enhances the character of the surrounding area and uses;

(E) develop a project with a mix of uses to provide goods and services to residents of the Project and residents in the surrounding area;

(F) attain a Project that includes sustainable elements, bicycle and pedestrian amenities; and the incorporation of green features into project design and construction to attain a minimum GPR Silver or greater equivalent standards; and

(G) provide additional affordable units and thereby improve the range of types and levels of affordability of residential units within the City of Santa Clara.

(ii) the contributions by Developer toward the construction of transportation and pedestrian improvements, trails, open space and parks and the provision of public services and facilities, such as police, fire, emergency response, school, and library, ensuring that City and future residents of the Project are adequately supported.

J. City's willingness to enter into this Agreement is a material inducement to Developer to implement the Project, and Developer proposes to enter this Agreement in order (i) to obtain assurances from City that the Property may be developed, constructed, completed and used pursuant to this Agreement, and in accordance with existing policies, rules and regulations of the City, subject to the exceptions and limitations expressed herein and the term of this Agreement; and (ii) to provide for a coordinated and systematic approach to funding the cost of certain public improvements and facilities planned by the City, and to establish the timing and extent of contributions required from Developer for these purposes.

K. Developer requested City enter into a development agreement, and proceedings have been taken in accordance with State law, as set forth below.

L. On February 23, 2016, the City Council, by adoption of Resolution 16-8293, approved and certified a Final Environmental Impact Report for the 2016 Project ("EIR") pursuant to the California Environmental Quality Act ("CEQA"), made findings with respect thereto, and adopted a Mitigation Monitoring and Reporting Program, a copy of which is attached hereto as **Exhibit C** and incorporated herein by this reference ("**Mitigation Monitoring and Reporting Program**").

M. On May 23, 2018, City's Planning Commission held a duly noticed public hearing on the Project, where following public testimony, the Planning Commission recommended that the City Council: (i) approve an addendum to the EIR ("Addendum"); (ii) approve the General Plan Amendment; (iii) approve the Rezoning, subject to conditions of approval; and (iv) approve this Agreement. The Planning Commission also determined that the Street Vacation would be in conformance with the General Plan.

N. On June 12, 2018, the City Council held a duly noticed public hearing on the Project, where following public testimony, the City Council: (i) approved the EIR Addendum; (ii) approved the General Plan Amendment; (iii) approved the Rezoning, subject to Conditions of Approval which are attached hereto as **Exhibit D** and incorporated herein by this reference

("**Conditions of Approval**"); (iv) approved the VTM, subject to Conditions of Approval; (v) determined that this Agreement is consistent with the City's General Plan; and (vi) introduced Ordinance No. _____ approving this Agreement. On _____, the City Council adopted Ordinance No. [add] , enacting this Agreement, and the Ordinance became effective thirty (30) days later on _____ ("**Effective Date**").

O. Certain improvements as set forth in the Conditions of Approval are necessary to provide infrastructure support for the Project.

AGREEMENT

NOW, THEREFORE, pursuant to the authority contained in California Government Code section 65864 and following, and SCCC 17.10.010 and following, and in consideration of the mutual representations, covenants and promises of the Parties, the Parties hereto agree as follows:

1. TERM

1.1 Effective Date.

a. **Term.** The term ("**Term**") of this Agreement shall commence on the date set forth in the first paragraph of this Agreement, or on the effective date of Ordinance No. [add] approving this Agreement, whichever is later in time (the "**Effective Date**"), and shall continue for a period of ten (10) years after the Effective Date, unless sooner terminated or extended as hereinafter provided.

b. **One-Time Extension.** Notwithstanding the provisions of **Section 1.1.a**, if a building permit(s) ("**Building Permit**") has been issued for residential buildings within the Project ("**Residential Buildings**") containing a total of at least one hundred (100) residential units, and construction thereof has commenced within ten (10) years from the Effective Date, then the Term of this Agreement shall be automatically extended, one time only, by five (5) years for a total Term of fifteen (15) years.

1.2 Expiration. Following expiration of the Term or any extension, or if sooner terminated, this Agreement shall have no force and effect, subject, however, to post-termination obligations of Developer and City.

2. DEVELOPMENT OF THE PROPERTY

2.1 Property. The Property that is the subject of this Agreement is that certain real property described in **Exhibit A -1** attached hereto.

2.2 Binding Covenants. It is intended and agreed that the provisions of this Agreement shall constitute covenants that shall run with the Property, and the benefits and burdens hereof shall bind and inure to all successors in interest to the Parties hereto.

2.3 Life of Approvals. Pursuant to Government Code section 66452.6(a) and this Agreement, the life of the Project approvals, including but not limited

to certification of the EIR, adoption of the General Plan Amendment, approval of the Resolution to rezone the Property to a PD zoning, approval of the Development Agreement Ordinance and this Development Agreement, approval of the VTM, and architectural approval of the Project (collectively, "**Approvals**") shall automatically be extended to and until the later of the following: (1) the end of the Term of this Agreement; or (2) the end of the term or life of any such Approval. Notwithstanding the foregoing, the vested elements secured by Developer under this Agreement shall have a life no greater than the Term of this Agreement, and any extension thereof.

2.4 Vested Elements. The permitted uses of the Property, the maximum density and intensity of use, the maximum heights, locations, numbers and gross square footage of the proposed buildings, the provisions for vehicular access and parking, reservation or dedication of land for public purposes or fees in-lieu thereof, provision for construction of public improvements and/or required fees associated with the Project as provided in, and limited by, the Approvals and this Agreement, shall be vested and are hereby vested and referred to as vested elements ("**Vested Elements**"). In addition to the foregoing Vested Elements, other terms and conditions of development applicable to the Project are set forth in the following documents as they exist as of the Effective Date:

a. The General Plan of the City of Santa Clara, current as of the Effective Date, the terms and conditions of which are incorporated herein by this reference;

b. SCCC, current as of the Effective Date, including the Rezoning of the Property to PD;

c. The Planned Development Zoning District and the Conditions of Approval imposed thereon;

d. The Development Plan, defined in Recital E, herein;

e. All other applicable City plans, policies, programs, regulations, ordinances and resolutions of the City in effect as of the Effective Date, which regulate development of the Property and implementation of the Project, and which are not inconsistent with the terms of this Agreement ("**Other Regulations**");

f. Any permits and/or subsequent approvals, including but not limited to additional subdivision maps or lot line adjustments, if any, final maps (which may be phased with the concurrence of the Parties), site and architectural review, demolition permits, Building Permits, grading permits, and infrastructure improvement plans processed in accordance with the terms of this Agreement. Upon approval, such subsequent approvals shall be incorporated into this Agreement and vested hereby; and,

g. In the event this Project includes a subdivision as defined by Government Code § 66473.7, the tentative map for this Project will comply with the provisions of § 66473.7, as it may be amended from time to time.

2.5 Permitted Uses. The permitted uses for the Property and the Project include the following:

a. Up to 355 apartment units in an apartment complex including Residential Building(s) ranging in height from three (3) to five (5) stories and as shown on **Exhibit B**;

b. A freestanding parking garage ("**Parking Garage**")

c. Up to 22,300 gsf of commercial space comprised of approximately 20,000 gsf of ground floor retail and approximately 2,300 gsf of live/work commercial space located in one or more Residential Building(s) ("**Retail Space**");

d. Up to 6,000 gsf of amenity space located at the roof level of the garage, including pool, spa, club room and fitness room, and leasing space located on grade in the Residential Buildings and,

e. Outdoor amenity space dispersed throughout the Project;

all of which must be implemented in accordance with the Development Plan and the Conditions of Approval. The number of residential units and amount of square footage for each use are subject to the Minor Change process as set forth in **Section 11.2.b**.

2.6 Present Right to Develop. Subject to Developer's fulfillment of the provisions of this Agreement, the Development Plan and the Conditions of Approval, the City hereby grants to Developer the present vested right to develop and construct on the Property all the improvements authorized by, and in accordance with, this Agreement and the Vested Elements, including in particular the terms of the Development Plan and the Rezoning. To the extent permitted by law, no future modification (including by later-adopted initiative and/or referendum) of the City's General Plan, SCCC, ordinances, policies or regulations that purport to (i) limit the rate or timing of development, size of buildings or other improvements (including developable square footage), or amount of development of the portions of the Project to be built; or (ii) impose fees, exactions or conditions upon development, occupancy or use of the Property other than as provided in the Development Plan or Conditions of Approval or pursuant to this Agreement, shall apply to the Property; provided, however, that nothing in this Agreement shall prevent or preclude City from adopting any fees or land use regulations or amendments thereto, expressly permitted herein.

2.7 Timing of Improvements. Developer shall have the right to develop the Project at such time as Developer deems appropriate subject to **Section 2.3** and this **Section 2.7** within the exercise of its subjective business judgment and no annual (or other) limit, moratoria, or other limitation upon the number of, or pacing of, buildings which may be constructed, or Building Permits which may be obtained, or the like shall apply to the Project.

2.8 Agreement and Comprehensive Development Plan. The Parties acknowledge that, except as specifically set forth herein, this Agreement, the Development Plan, the Mitigation Monitoring and Reporting Program and the Conditions

of Approval set forth a comprehensive schedule of the specific types and amounts of all development terms and conditions, development mitigation measures and fees, special assessments, special taxes, exactions, fees in-lieu, charges and dedications required in the public interest to be contributed, paid or constructed due to development of the Property as defined in the Development Plan. All fees referred to herein, may be subject to an annual increase until paid, but only if such increase is applied equally to similarly situated projects on a Citywide or area-wide basis, and any such annual increase shall be limited in the manner specified in **Section 4**.

2.9 Design of On-Site and Off-Site Improvements. Development of the Property shall be subject to final architectural and design review by City pursuant to the policies, regulations and ordinances in effect as of the Effective Date, and subject to the Development Plan, the Conditions of Approval, Mitigation Monitoring and Reporting Program, and this Agreement. No such architectural and design review shall, without Developer's consent, require development of the Property inconsistent with the Development Plan, the Conditions of Approval, the Mitigation Monitoring and Reporting Program, and this Agreement, unless City determines it is necessary to protect against conditions which create a risk to the physical health or safety of residents or users of the Project or the affected surrounding region. The Development Plan, Mitigation Monitoring and Reporting Program, and Conditions of Approval, and all improvement plans prepared in accordance thereof, shall govern the design and scope of all on-site and off-site improvements benefiting or to be constructed on the Property. In no event shall final architectural and design approval by City be conditioned on or require any change in the Development Plan, Mitigation Monitoring and Reporting Program or Conditions of Approval, without Developer's consent.

2.10 Development of the Site. In consideration for the City entering into this Agreement, Developer agrees to perform all of its obligations contained in this Agreement in the time and manner set out in this Agreement and the Development Plan, Mitigation Monitoring and Reporting Program, and Conditions of Approval.

2.11 Integrated Development. City and Developer acknowledge that the Project is, and shall be considered, an integrated development. It is thus the intention of the Parties that, if construction on one component of the Project is commenced, any additional development of the Property will adhere to the Development Plan. However, nothing in this Agreement is intended: (i) to prevent Developer from individually commencing and completing development of any portion of the Project, even if development on other portions thereof has not been commenced and/or completed; (ii) to prevent Developer from independently marketing, selling, renting or occupying all, or any portion of, such developed space, pursuant to **Section 12** provided that all current obligations under this Agreement and the Development Plan and all infrastructure requirements for the existing developed space have been met; and (iii) to require Developer to develop any portion of the Project (even if development on another portion of the Project has been commenced and/or completed).

2.12 Building Standards. Developer hereby agrees to employ all reasonable efforts such that the Project will be built to GPR Silver or greater equivalent standards.

3. EFFECT OF AGREEMENT

3.1 Subsequent State or Federal Laws or Regulations. As provided in California Government Code section 65869.5, this Agreement shall not preclude the application to the Project of changes in laws, regulations, plans or policies, to the extent that such changes required by changes in county, regional, State or federal laws or regulations ("**Changes in the Law**"). In the event Changes in the Law prevent or preclude compliance with one or more material provisions of this Agreement, Developer may request that such material provisions be modified or suspended, or performance delayed, as may be necessary to comply with Changes in the Law, and City may take such action as it deems necessary to be consistent with the intent of this Agreement.

3.2 Changes to Existing Regulations. Except as otherwise specifically provided, only the following changes to the Vested Elements, including such changes adopted by the electorate through the powers of initiative, or otherwise, shall apply to the development of the Property:

a. Subject to **Section 4** herein, Citywide regulations, ordinances, policies, programs, resolutions or fees adopted after the Effective Date that are not in conflict with the Vested Elements and the terms and conditions for development of the Property established by this Agreement, or otherwise applicable regulations existing as of the Effective Date. Changes to the General Plan, SCCC or other regulations shall be deemed to conflict with the approvals and this Agreement ("**Conflicting City Law**") if such changes prevent development of the Property in substantial accordance with the Approvals; requires significant changes in the development of the Property from what is contemplated by the Approvals; significantly delay, rations or imposes a moratorium on development of the Property; or require the issuance of discretionary or nondiscretionary permits or approvals by the City other than those required as of the Effective Date. A fee shall be deemed to conflict with this Agreement if it is an increase in an existing fee by more than the amount permitted pursuant to **Section 4** below.

b. Any law, regulation or policy which would otherwise be Conflicting City Law, but through this Agreement or by later separate document, application to the Property has been consented to in writing by the Developer.

3.3 Further Reviews. Developer acknowledges that existing land use regulations, the Vested Elements and this Agreement contemplate the possibility of further reviews of elements or portions of the Project by the City including potential CEQA analysis if required. Nothing in this Agreement shall be deemed to limit the legal authority of City with respect to these reviews as provided by, and otherwise consistent with, this Agreement. In no event shall such further review by City revisit the Development Plan, Conditions of Approval, or the Approvals or be conditioned on or require any change in the Project except as contemplated by the Development Plan, Conditions of Approval or this Agreement.

3.4 Local Rules. Future development on the Property shall be subject to all the official rules, regulations and policies (collectively "**Local Rules**") of the City which govern uses, architectural design, landscaping, public improvements and construction standards, and which are contained in the Development Plan or are in effect

as of the Effective Date, with the exception that revisions or amendments to the Local Rules necessitated by reasonable public health or fire and life-safety considerations shall apply as though the rules were in effect as of the Effective Date. Notwithstanding any other provision of this Agreement, and without limitation as to any other exceptions contained in this Agreement, City shall retain the authority to take the following actions, so long as such action is applied on a Citywide basis to similarly situated projects:

a. Adopt and apply property transfer taxes and/or excise taxes;

b. Adopt and apply utility charges;

c. Adopt updates to building and/or fire codes;

d. Maintain the right of voters to act by initiative or referendum, but only to the extent that the initiative or referendum does not affect or interfere with any vested rights acquired by the Developer in this Agreement; except that this Agreement itself is subject to referendum; and,

e. Take other actions not expressly prohibited by the terms or provisions of this Agreement.

3.5 Future Exercise of Discretion by City. This Agreement shall not be construed to limit the authority or obligation of City to hold necessary public hearings, or, except as provided herein, to limit discretion of the City or any of its officers or officials with regard to rules, regulations, ordinances or laws which require the exercise of discretion by City or any of its officers or officials. Except as provided herein, this Agreement shall not prevent City from applying new rules, regulations and policies, or from conditioning future Project development approval applications on new rules, regulations and policies that do not conflict with the terms of the Development Plan or this Agreement.

4. DEVELOPMENT FEES, EXACTIONS AND DEDICATIONS.

4.1 Development Fees, Exactions and Dedications. The types and amounts of fees, special assessments, special taxes, exactions and dedications (collectively "**Fees**") payable due to the development, build out, occupancy and use of the Property pursuant to this Agreement shall be exclusively those set forth in the Conditions of Approval and the Development Plan and as specified in this Agreement. Notwithstanding any amendments to the Fees or the adoption or imposition of any new or increased City fees, taxes, special assessments or other exactions after the Effective Date, the Fees and the types and amounts thereof set forth in this Agreement, Conditions of Approval and the Development Plan shall be the only fees, charges, special assessments, special taxes, dedications and exactions payable to City due to development of the Property.

4.2 Processing Fees. Processing fees, including without limitation Building Permit fees ("**Processing Fees**"), may be increased if the increase is applicable Citywide and reflects the reasonable cost to City of performing the administrative

processing or other service for which the particular Processing Fee is charged. New Processing Fees may be imposed if the new Processing Fees apply to all similarly situated projects or works within the City and if the application of these Processing Fees to the Property is prospective only. Developer shall pay the costs associated with the planning, processing and environmental review process for the Project, provided that such costs shall be limited to (i) reasonable costs directly associated with the preparation of the EIR; (ii) fees ordinarily charged by City for processing land use applications and permits, provided that such fees and costs are applied to Developer in the same manner as other similarly situated applicants seeking similar land use approvals and are not limited in applicability to the Project or to related uses; and (iii) fees associated with third-party permit plan checking, if applicable, above those normally charged by the City. Developer shall reimburse City for reasonable staff overtime expenses incurred by City in processing review, approval, inspection and completion of the Project provided that such overtime expenses are (a) reasonably necessary for the completion of the Project in accordance with Developer's schedule; and (b) applied to Developer in the same manner as similarly situated project applicants.

4.3 Reimbursement. Reserved.

4.4 Dedications. Developer shall offer to dedicate to City, upon request by City, all portions of the Property designated in the Conditions of Approval for public easements, or public areas.

4.5 Mitigations. Developer agrees to contribute to the costs of public facilities and services in the amounts set forth in the Development Plan, Mitigation Monitoring and Reporting Program and Conditions of Approval, as required to mitigate impacts of the development of the Property ("**Mitigations**"); provided, however, that to the extent this Agreement sets forth the specific types and amounts of such contributions, such provisions of this Agreement shall control. City and Developer recognize and agree that but for Developer's contributions to mitigate the impacts arising as a result of the entitlements granted pursuant to this Agreement, City would not and could not approve the development of the Property as provided by this Agreement. City's approval of development of the Property is in reliance upon, and in consideration of, Developer's agreement to make contributions toward the cost of public improvements and public services as provided to mitigate the impacts of development of the Property.

a. Historic Architectural Resources. The two (2) historic single family homes located as of the Effective Date at 3410 The Alameda and 3370 The Alameda (together, the "**Historic Architectural Resources**") will remain on-site. Developer shall maintain the Historic Architectural Resources in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties.

b. Curation of Archeological Resources. Developer agrees at its cost to curate, or cause to be curated, pre-colonial and historic era archeological resources and will facilitate the respectful treatment of human remains as described in and in accordance with Mitigation Measures CUL-2a.C.2. and CUL-2b which are included in the Mitigation Monitoring and Reporting Program. Developer may partner with one or more private or public institutions, including but not limited to Santa Clara University, to curate.

4.6 Voluntary Affordability Provisions. The Parties acknowledge that pursuant to Section 5.A of Resolution No. 17-8482, the requirements for the provision of affordable rental dwelling units set forth in SCCC Chapter 17.40 do not apply to the Project. Nevertheless, Developer voluntarily agrees to comply with the provisions set forth on attached **Exhibit E** regarding the provision of affordable rental dwelling units (collectively, the "Affordability Provisions").

4.7 Relocation of Other Buildings. As of the Effective Date, there exists on the Property eight (8) buildings, other than the Historic Architectural Resources described in **Section 4.5.a** above, that are more than fifty (50) years old (collectively "**Other Buildings**"). Within one hundred eighty (180) days after the Effective Date, Developer shall place, or cause to be placed, a notice or advertisement in a newspaper of general circulation in the City that offers the Other Buildings for purchase and relocation by a third party to an offsite location, and provides any interested party with at least thirty (30) days from the date of such the newspaper notice/advertisement to notify Developer of its interest in purchasing and relocating the Other Building(s). Developer shall furnish a copy of the notice to the Director within seven days of publication. Developer shall also utilize commonly available online real estate services to publicize the availability of the Other Buildings. Relocation of the Other Buildings shall be at the third party purchaser's sole expense. If any Other Buildings are not relocated by a third party for any reason whatsoever (including but not limited to inability of such third party and the Developer to enter into a mutually agreeable purchase and sale and relocation agreement) before the date of application by Developer to City for a demolition permit for any such Other Buildings, Developer shall have the right to demolish any such Other Buildings and City shall not withhold or delay any demolition permits in connection therewith. Nothing herein shall be deemed to obligate Developer to relocate, or cause or pay to be relocated, any Other Buildings.

4.8 Dedications and Contribution to Trails, Open Space and Parks; Maintenance. Notwithstanding the preceding provisions of **Section 4** or any other provisions in this Agreement to the contrary, the provisions of this **Section 4.8** shall exclusively govern the dedication and maintenance of parkland and the payment of fees due in-lieu of parkland dedication, and the credits against the amount of such parkland dedication and/or such in-lieu fees, with respect to the Project. The parkland to be dedicated hereunder will be subject to Mitigation Measure HAZ-2, which requires that the Project be developed under a project-specific site management plan or similar response plan approved by Regional Water Quality Control Board ("**RWQCB**") "that is protective of construction workers, the general public, the environment, and future site occupants from known and unknown environmental conditions that may be present at the site." In accordance with Mitigation Measure HAZ-2, portions of such parkland may be subject to the provisions of a recorded land use covenant acceptable to the RWQCB. Developer reserves the right during the Term of this Agreement to allow access to any dedicated parklands for the purposes of monitoring any groundwater monitoring wells that may be situated at any time thereon.

a. Parkland Dedication.

(i) **Public Park.** Developer shall grant an easement to the City of approximately 0.1428 acres within the Project, to be deemed to be parkland under SCCC Chapter 17.35 consisting of: (A) approximately [add] square feet delineated on the Development Plan and located at the corner of [add] and [add]; (collectively the "**Public Park**"), by means of an easement shown on the final map for the Project or in a separate instrument, and the City shall accept such easement exclusively for use as public park upon the completion by Developer of all initial landscaping and other improvements to the Public Park as described in **Section 4.8.c** below.

(ii) **Modification of Acreages.** Pursuant to **Section 11.2.b**, the Director of Planning & Inspection may authorize minor modifications to the individual or total area of the Public Park listed in **Section 4.8.a(i)** above if the Developer applies to modify the number of dwelling units (as of the Effective Date, such areas are based upon 355 dwelling units), but any such modification shall require a corresponding recalculation of the fees due in lieu of parkland dedication.

(iii) **Indemnification.** Developer agrees to protect, defend, indemnify and hold harmless, City, its officers, employees, representatives, and agents, from and against any and all claims, costs, losses, demands, debts, liens, liabilities, causes of action, suits, legal or administrative proceedings, interest, fines, charges, penalties and expenses, including without limitation, attorneys' fees and court costs, of whatever kind or nature (collectively, "**Claims**"), whether paid, incurred, suffered, alleged, asserted, or related thereto arising directly or indirectly from or attributable to Developer's use at any time of, or conditions existing or alleged to exist as of the date the easement is granted to the City in, on, under, above, or about the Public Park, including but not limited to: any repair, cleanup or detoxification, or preparation and implementation of any removal, remedial, response, closure or other plan concerning any Hazardous Materials on, under or about the Public Park, regardless of whether undertaken due to governmental action, or otherwise, or any latent or patent defect in the Public Park, including any improvements located thereon. To the fullest extent permitted by law, the foregoing hold harmless and indemnification provision shall apply except where such claim is the result of sole active negligence or willful misconduct of City, its officers, employees, representatives, or agents. Without limiting the generality of this indemnity and hold harmless provision in any way, this provision is intended to operate as an agreement pursuant to 42 U.S.C. Section 9607(e) and California Health and Safety Code Section 25364 in order to indemnify, defend, protect and hold harmless City for any liability hereunder pursuant to such sections. Developer and City agree that for purposes of this Agreement, the term "Hazardous Materials" shall have the definition set forth in **Exhibit F** attached hereto and incorporated by this reference.

b. Fees Due In-Lieu of Parkland Dedication. Developer shall pay to the City fees due in-lieu of parkland dedication in the total amount of five million, five hundred seventy-two thousand, eight hundred thirty-two dollars ($5,572,832) for the improvement and acquisition of trails, open space and parks in the City and otherwise in accordance with SCCC Chapter 17.35, which shall be paid at the time of issuance of the first Building Permit for vertical construction of a Residential Building within the Project, excluding demolition and grading permits and excluding any Building Permit for the Parking Garage ("**Vertical Construction**"). The amount of the fee due in-lieu of parkland dedication has been calculated pursuant to applicable provisions of SCCC Chapter 17.35 based upon:

(i) a total parkland dedication requirement for the Project (prior to the application of applicable credit for Private Open Space at the Project) of approximately 2.0119 acres; LESS

(ii) total public parkland dedication of approximately 0.1428 acres, LESS

(iii) a credit (against the required parkland dedication for the Project) equal to approximately 0.4257 acres, for fifty percent (50%) of the total private open space and recreational facilities to be included within the Project ("**Private Open Space**") (50% of the total of approximately 0.8514 acres of private open space courtyards, pool areas and other recreational facilities and amenities to be included within the Project). Developer agrees to maintain the Private Open Space as private open space and recreational facilities for the life of the Project. Prior to the Effective Date, City has made, and there is hereby incorporated herein in full, all findings pursuant to SCCC Section 17.35.070 necessary to support application to the Project of the credit for Private Open Space described herein.

c. Voluntary Parkland Improvements. Developer, on a voluntary basis and not as a Mitigation measure, and at no cost to City, shall construct or install the initial landscaping and other improvements to the Public Park as specified on the Development Plan.

d. Parkland Maintenance. Developer or its successors and permitted assigns hereunder shall be responsible, at no cost to City, for the maintenance and repairs of the Public Park. Developer agrees to execute a separate park maintenance agreement with the City, for a term of not less than forty (40) years, which commits Developer to maintaining the Public Park, indemnifies the City with respect to such maintenance, and is subject to standard City insurance requirements. Maintenance and repairs shall be to a level comparable to the level of maintenance and repairs performed by City within public parks located elsewhere within the City.

e. Timing of Easement Grant and Construction. Developer shall offer the parkland easement upon the approved final map for the Project, or grant the same by separate instrument thereafter upon request by City; provided, however, that City shall not accept the same until completion of construction thereon by Developer of all improvements required hereunder. Developer shall complete construction of improvements to the Public Park such that they shall be open to the general public prior to the issuance of the Certificate of Occupancy for the last Residential Building to be constructed within the Project.

4.9 Regional Traffic Fees. Developer agrees to the fixed sum of Two Dollars Fifty Cents ($2.50) per square foot of Retail Space ("**Regional Traffic Fees**") payable to the City at the time of issuance of each Building Permit for Vertical Construction of each Residential Building within the Project containing Retail Space, based upon the square footage of such Retail Space. Regional Traffic Fees are non-refundable.

4.10 Local Traffic Improvements. Notwithstanding the preceding provisions of **Section 4** or any other provisions in this Agreement to the contrary, the provisions of this **Section 4.10** shall exclusively govern the installation and/or

maintenance of the following local traffic and transit and related improvements with respect to the Project.

a. Dedication of Right of Way. Developer shall dedicate an additional right of way at the corner of El Camino Real and Benton Street as shown in the Development Plan.

b. Installation of Local Traffic, Pedestrian and Bicycle Improvements. Developer, at its sole cost, shall construct or install the following local traffic, pedestrian, and bicycle and related improvements, all as set forth in the Development Plan and Conditions of Approval and otherwise meeting all applicable City standards and specifications:

(i) Upgrade to the signalized intersection of El Camino Real and Benton Street;

(ii) Widening of sidewalks along El Camino Real, Benton Street and The Alameda;

(iii) Inclusion of landscape strip within public right way along all Project frontages;

(iv) Provide Class III "sharrow" along The Alameda frontage up to Harrison Street;

(v) Provide Class II Bike Lane starting at El Camino Real/Benton intersection along project frontage on Benton Street.

All the improvements included in this **Section 4.10 b.** shall be completed prior to the issuance of the first Certificate of Occupancy for a Residential Building.

4.11 Voluntary Transportation Contribution. Developer agrees to make transportation-related improvements totaling up to Three Hundred Ten Thousand Dollars ($310,000) ("**Voluntary Transportation Contribution**") which may include by way of example, enhanced crosswalks, street beautification, and bicycle lockers serving the Project.

4.12 Voluntary TDM Program. Developer agrees, on a voluntary basis and not as a Mitigation Measure, to prepare and implement a Transportation Demand Management program for the Project ("**TDM Program**"). The parties acknowledge that the overall goal of the Project is to achieve a twenty percent (20%) reduction in Vehicle Miles Traveled ("**VMT**") to the Project, and the goal of the TDM Program will be to achieve one half of the reduction (i.e. the goal of the TDM Program will be to achieve a ten percent (10 %) reduction in VMT). The TDM Program will provide for certain amenities and incentives to encourage residents and employees of the Project to use carpooling, transit, bicycling, and walking instead of driving their private automobiles. Developer's proposed TDM Program shall be subject to approval by the Planning Director, and Developer shall submit an annual report to the City evidencing compliance with the City-approved TDM Program. The TDM Program shall not provide for any unbundled parking for residents of the Project.

4.13 Utility Improvements. Developer agrees to pay for and/or perform or cause to be performed the following improvement to City-owned utilities in the vicinity of the Project:

a. Upgrade the existing sixty inch (60") diameter storm drain located as of the Effective Date inside the portion of the Sherman Street right of way to be vacated to a new seventy two inch (72") diameter storm drain that will be rerouted to run the length of Project frontage along El Camino Real (within the public right of way) and a portion of Benton Street (within the public right of way), and as shown in the Development Plan;

b. Relocate the eight inch (8") gas line located as of the Effective Date inside the abandoned portions of Fremont Street and Sherman Street to be vacated to El Camino Real (within the public right of way) and as shown in the Development Plan;

c. Extend the recycled water line for five hundred (500) feet from the intersection of Alviso Street and Fremont Street to the Project frontage on The Alameda within Fremont Street (within the public right of way) and as shown on the as shown in the Development Plan;

d. Underground all overhead power lines around the Project perimeter existing as of the Effective Date pursuant to the provisions of a mutually agreeable Special Facilities Agreement between Developer and City, doing business as Silicon Valley Power and approved by the City Council.

e. Construct a twelve (12) inch water main and a twenty four (24) inch water main within The Alameda (within the public right of way) and within Harrison Street (within the public right of way), and as shown in the Development Plan.

All work required pursuant to this **Section 4.13** shall be performed to applicable City standards and upon completion, all improvements described in this **Section 4.13** shall be dedicated to and thereafter maintained and repaired by City.

4.14 Sewer Connection Fee. If the City should adopt an ordinance subsequent to the Effective Date of this Agreement that permits reduced Sewer Connection Fees as a result of onsite conservation measures, the Developer may apply for consideration of such reductions toward the Sewer Connection Fees paid on behalf of the Project.

4.15 Vacation of Fremont Street and Sherman Street Right of Way and Conveyance to Developer. City agrees to approve the vacation of portions of Fremont Street and Sherman Street, including a portion of APN 230-07-060, as shown on attached **Exhibit G** (collectively the "**Vacated Street Areas**") and may utilize any applicable procedure permissible under the City Charter and/or the SCCC to effectuate the vacation of the streets and the conveyance of the Vacated Street Areas to Developer and/or Developer's designee(s) (the "**Street Vacationing**"). The Street Vacationing is subject to the reservation of a public utility easement therein until the relocation of such utilities pursuant to this **Section 4.15**. The Street Vacationing shall be completed within ninety (90) days following the Effective Date. Subject to any applicable provisions of the

City Charter and/or the SCCC and as part of the Street Vacationing, City agrees to convey to Developer and/or Developer's designee(s), and Developer and/or such designee(s) shall accept, fee title ownership of the Vacated Street Areas subject to such reserved public utility easement. As additional consideration for the Vacated Street Areas, Developer shall pay to City an amount equal to or greater than the fair market value of the Vacated Street Areas ("**FMV**"). Developer shall not be required to pay an amount above FMV unless there are multiple bidders upon the sale of the land, in which case Developer will pay the amount of Developer's successful bid. The FMV shall be determined as of the Effective Date in accordance with any applicable provision of the City Charter and/or the SCCC, and shall be based upon the value of the land comprising the Vacated Street Areas and its continued use as a public street encumbered by public utilities and as determined in accordance with the third party appraisal methodology set forth in **Exhibit H** attached hereto ("**FMV Appraisal Methodology**"). The payment for the Vacated Street Areas shall be made at the time of conveyance of the Vacated Street Areas to Developer and/or Developer's designee(s). Following conveyance of the Vacated Street Areas by City to Developer, Developer shall, at its cost, relocate or cause to be relocated all public utilities existing within the Vacated Street Areas as of the Effective Date. Promptly following the completion of such relocation, the City shall vacate the reserved public utility easement within the Vacated Street Areas pursuant to the summary vacation procedures set forth in Streets and Highways Code Section 8300 et seq.

4.16 Lot Tie Agreement. In the event that the final parcel map for the Project will create more than one legal parcel within the portion of the Property to be developed with the Residential Buildings and/or Parking Garage, all owners of such portions of the Property shall execute and deliver to City a "Covenant and Agreement To Hold Property As One Parcel" in form reasonably satisfactory to the City ("**Lot Tie Agreement**"). In such event, the executed Lot Tie Agreement shall be recorded at the time of City's approval of the final parcel map for the Project. The final parcel map for the Project may include and create up to four (4) parcels as long as it is otherwise consistent with the vesting tentative map.

4.17 Historic Pena Adobe of the Santa Clara Woman's Club. Developer agrees on a voluntary basis and not as a Mitigation Measure and at its cost, to perform a pre-construction and post-construction visual inspection of the condition of the Historic Pena Adobe located at 3260 The Alameda (the "**Adobe**") in order to determine whether any damage to the Adobe may have occurred as a result of construction of the Project. Developer shall memorialize the results of each inspection in writing in a form acceptable to the Director, who may require an additional inspection or inspections if the initial inspections are found to be insufficient. Developer further agrees to promptly repair, or pay all reasonable verified costs of repair of, any such damage. Developer and City agree to communicate with representatives of the Santa Clara Woman's Club ("**SCWC**") regarding any concerns of SCWC in this regard that may arise during construction of the Project.

5. STANDARD OF REVIEW OF PERMITS

5.1 Standard of Review of Permits. All permits ("**Permits**") required by Developer to develop the Property, excepting the Rezoning, but including (i) road construction permits, (ii) grading permits, (iii) Building Permits, (iv) fire permits, and (v) Certificates of Occupancy, shall be issued by City after City's review and approval of Developer's applications, provided that City's review of the applications is limited to determining whether the following conditions are met:

a. The application is complete; and,

b. The application demonstrates that Developer has complied with this Agreement, the Development Plan, the Mitigation Monitoring and Reporting Program, the Conditions of Approval and the applicable Local Rules.

6. PRIORITY

6.1 Priority. In the event of conflict between the General Plan, this Agreement, SCCC, Other Regulations and Local Rules, all as they exist on the Effective Date, the Parties agree that the following sequence establishes the relative priority of each item: (1) the General Plan, as existing on the Effective Date; (2) this Agreement; (3) the Development Plan; (4) Mitigation Monitoring and Reporting Program; (5) the Approvals; and (6) SCCC, Other Regulations and Local Rules.

7. COOPERATION IN IMPLEMENTATION

7.1 Cooperation in Implementation. Upon Developer's satisfactory completion of all required preliminary actions provided in the Development Plan, and payment of required fees, if any, City shall proceed in a reasonable and expeditious manner, in compliance with the deadlines mandated by applicable agreements, statutes or ordinances, to complete all steps necessary for implementation of this Agreement and development of the Property in accordance with the Development Plan, including the following actions:

a. Scheduling all required public hearings by the Planning Commission and City Council; and

b. Processing and checking all maps, plans, land use and architectural review permits, permits, building plans and specifications and other plans relating to development of the Property filed by Developer as necessary for complete development of the Property. Developer, in a timely manner, shall provide City with all documents, applications, plans and other information necessary for the City to carry out its obligations hereunder and to cause City's planners, engineers and all other consultants to submit in a timely manner all necessary materials and documents. It is the Parties' express intent to cooperate with one another and diligently work to implement all land use and building approvals for development of the Property in accordance with the Development Plan and the terms hereof. At Developer's request and sole expense, City shall retain outside building consultants to review plans or otherwise assist City's efforts in order to expedite City processing and approval work. City shall cooperate with Developer, and assist

Developer in obtaining any third-party governmental or private party permits, approvals, consents, rights of entry, or encroachment permits, needed for development of the Project or any other on or offsite improvements.

8. PERIODIC REVIEW

8.1 Annual Review. City and Developer shall review all actions taken pursuant to the terms of this Agreement annually during each year of the Term, within thirty (30) days prior to each anniversary of the Effective Date unless the City and Developer agree in writing to conduct the review at another time pursuant to SCCC 17.10.220(a).

8.2 Developer's Submittal. Within ninety (90) days before each anniversary of the Effective Date, Developer shall submit a letter ("**Compliance Letter**") to the Director, along with a copy directed to the City Attorney's Office, describing Developer's compliance with the terms of the Conditions of Approval and this Agreement during the preceding year. The Compliance Letter shall include a statement that the Compliance Letter is submitted to the City pursuant to the requirements of Government Code section 65865.1, this Agreement, and SCCC.

8.3 City's Findings. Within sixty (60) days after receipt of the Compliance Letter, the Director shall determine whether, for the year under review, Developer has demonstrated good faith substantial compliance with the terms of this Agreement. If the Director finds and determines that Developer has complied substantially with the terms of this Agreement, or does not determine otherwise within sixty (60) days after delivery of the Compliance Letter, the annual review shall be deemed concluded, Developer shall be deemed to have complied in good faith with the terms and conditions of this Agreement during the year under review, and this Agreement shall remain in full force and effect. Upon a determination of compliance, the Director shall, if requested by Developer, issue a recordable certificate confirming Developer's compliance through the year under review. Developer may record the certificate with the Santa Clara County Recorder's Office. If the Director initially determines the Compliance Letter to be inadequate in any respect, he/she shall provide notice to that effect to Developer as provided in SCCC 17.10.220. If, after a duly noticed public hearing thereon, the City Council finds and determines based on substantial evidence that Developer has not complied substantially in good faith with the terms of this Agreement for the year under review, the City Council shall give written notice thereof to Developer specifying the noncompliance and such notice shall serve as a notice of default under **Section 10.1**. If Developer fails to cure the noncompliance within a reasonable period of time as established by the City Council, the City Council, in its discretion, may (i) grant additional time for compliance by Developer, or (ii) following the hearing described in SCCC 17.10.250, modify this Agreement to the extent necessary to remedy or mitigate the non-compliance, or (iii) terminate this Agreement. Except as affected by the terms hereof, the terms of SCCC 17.10.240(b)(2), and following, shall govern the City's compliance review process. During any review, Developer shall bear the burden of proof to demonstrate good faith compliance with the terms of this Agreement. If the City Council does not hold a hearing and make its determination within one hundred and twenty (120) days after delivery of the Compliance Letter for a given year, then it shall

be deemed conclusive that Developer has complied in good faith with the terms and conditions of this Agreement during the period under review.

9. REIMBURSEMENTS

9.1 Reimbursements. The Parties agree that Developer shall not be entitled to any reimbursement for the construction of any private or public improvement required by this Agreement, unless explicitly provided by this Agreement or the Conditions of Approval.

10. DEFAULT AND REMEDIES

10.1 Default. Failure by either Party to perform any material term or provision of this Agreement shall constitute a default, provided that the Party alleging the default gave the other Party advance written notice of the default and thirty (30) days to cure the condition, or, if the nature of the default is such that it cannot be cured within thirty (30) days, the Party receiving notice shall not be in default if the Party commences performance of its obligations within the thirty (30) day period and diligently completes that performance. Written notice shall specify in detail the nature of the obligation to be performed by the Party receiving notice. Notwithstanding any provision to the contrary in this Agreement, only the owner of such portion of the Property with respect to which such a default exists shall be responsible or liable for such default and the remedies hereunder for such default.

10.2 Remedies. It is acknowledged by the Parties that City and Developer would not have entered into this Agreement if City or Developer were to be liable in damages under, or with respect to, this Agreement or the application thereof. City and Developer shall not be liable in damages to each other, or to any assignee, transferee or any other person, and Developer and City covenant not to sue for or claim damages from the other. Upon Developer's or City's material default, and failure to cure within a reasonable time depending on the nature of the default after demand by the non-defaulting Party, the non-defaulting Party shall institute mediation under **Section 26** of this Agreement. If mediation fails to resolve the dispute, each Party shall have the right, in addition to all other rights and remedies available under this Agreement, to (i) bring any proceeding in the nature of specific performance, injunctive relief or mandamus, and/or (ii) bring any action at law or in equity as may be permitted by law or this Agreement. The Parties acknowledge that monetary damages and remedies at law generally are inadequate upon the occurrence of a default. Therefore, specific performance or other extraordinary equitable relief (such as injunction) is an appropriate remedy for the enforcement of this Agreement, other remedies at law being inadequate under all the circumstances pertaining as of the Effective Date of this Agreement and any such equitable remedy shall be available to the Parties.

10.3 Default by Developer/Withholding of Building Permit. City may, at its discretion, without submitting to mediation, refuse to issue a Building Permit for any structure within the Property, if Developer has materially failed and refused to complete any requirement that is a Condition of Approval, or that is applicable to the Building Permit requested. In addition, where City has determined that Developer is in

default as described above, City may also refuse to issue the Developer any permit or entitlement for any structure or property located within the Project. This remedy shall be in addition to any other remedies provided for by this Agreement.

11. AMENDMENT OR TERMINATION

11.1 Agreement to Amend or Terminate. Subject to **Section 22** regarding operating memoranda and **Section 11.2** regarding future actions and minor changes, City and Developer, by mutual agreement, may terminate or amend the terms of this Agreement, pursuant to **Section 24**.

11.2 Modifications to Approvals. City and Developer anticipate that the Project will be implemented in accordance with the Approvals, the Development Plan, Mitigation Monitoring and Reporting Program, and the Conditions of Approval. The foregoing actions and other necessary or convenient implementation actions shall not require an amendment to this Agreement.

a. City and Developer understand and acknowledge that changes to the Project, other than Minor Changes set forth in **Section 11.2.b**, which would not, in the discretion of the City, substantially comply with the Approvals, Development Plan, Mitigation Monitoring and Reporting Program, and/or the Conditions of Approval would necessitate subsequent review and approval which will not be unreasonably withheld or delayed. Upon the written request of Developer, City may agree to make a substantive amendment or modification to the Development Plan (or any of the individual Approvals or documents comprising the Development Plan) in compliance with procedural provisions of the zoning or other land use ordinances and regulations in effect on the date of application for amendment or modification. The amendment or modification of the Development Plan shall be done pursuant to a Development Agreement Amendment pursuant to Government Code provisions and **Sections 11.1** and **24**, unless treated as a minor change as described in **Section 11.2.b** below. The remaining portions of this Agreement shall remain in full force and effect subsequent to the Amendment.

b. If Developer seeks an amendment or modification to the Approvals, the Development Plan, the Mitigation Monitoring and Reporting Program, or the Conditions of Approval, the Director or his/her designee shall determine: (i) whether the requested amendment or modification is minor when considered in light of the Project as a whole; and (ii) whether the requested amendment or modification is consistent with this Agreement and Applicable Law. If the Director or his/her designee finds, in his or her sole discretion, that the proposed amendment or modification is minor, consistent with this Agreement and Applicable Law, and will result in no new significant impacts not addressed and mitigated in the EIR, the amendment or modification shall be determined to be a "Minor Change" and shall not be considered an amendment to the applicable Approvals, the Development Plan, the Mitigation Monitoring and Reporting Program, or the Conditions of Approval, and shall not require a Development Agreement Amendment. Upon the Director's approval, these actions shall become part of the applicable Approvals, the Development Plan, the Mitigation Monitoring Program, and/or the Conditions of Approval, and this Agreement, and shall be deemed Vested Elements. Without limiting the generality of the foregoing, lot line adjustments, reductions in the density, intensity, scale or scope of the Project, minor alterations to vehicle circulation patterns or vehicle access

points, substitutions of comparable landscaping for any landscaping shown on any final development plan or landscape plan, variations in the configuration or location of structures or building heights that do not substantially alter the design concepts of the Project, variations in the location or installation of utilities and other infrastructure connections or facilities that do not substantially alter the design concepts of the Project, and minor adjustments to the Project Site diagram or Project Site legal description, and relocation of non-residential uses within the Project. Notwithstanding the foregoing, Minor Changes shall not exceed twenty-five percent (25%) of the number proposed for modification.

11.3 Enforceability of Agreement. The City and Developer agree that unless this Agreement is amended or terminated pursuant to its terms, this Agreement shall be enforceable by either Party notwithstanding any subsequent change in any applicable General Plan, Redevelopment Plan, Specific Plan, SCCC, Other Regulation or Local Rule adopted by City, with the exceptions listed in this Agreement.

12. MORTGAGEE PROTECTION: CERTAIN RIGHTS OF CURE

12.1 Mortgagee Protection. This Agreement shall be superior and senior to all liens placed upon the Property or any portion thereof after the date on which this Agreement or a memorandum thereof is recorded, including the lien of any deed of trust or mortgage ("**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 Agreement shall be binding upon and effective against all persons and entities, including all deed of trust beneficiaries or mortgagees ("**Mortgagees**") who acquire title to the Property or any portion thereof by foreclosure, trustee's sale, deed in-lieu-of foreclosure, voluntary transfer or otherwise.

12.2 Mortgagee Obligations. City, upon receipt of a written request from a foreclosing Mortgagee, shall permit the Mortgagee to succeed to the rights and obligations of Developer under this Agreement, provided that all defaults by Developer hereunder that are reasonably susceptible of being cured are cured by the Mortgagee as soon as reasonably possible, provided, however, that in no event shall such Mortgagee personally be liable for any defaults or monetary obligations of Developer arising prior to acquisition of possession of such property by such Mortgagee. The foreclosing Mortgagee shall have the right to find a substitute developer to assume the obligations of Developer, which substitute shall be considered for approval by the City pursuant to **Section 13** of this Agreement, but shall not, itself, be required to comply with all of the provisions of this Agreement.

12.3 Notice of Default to Mortgagee. If City receives notice from a Mortgagee requesting a copy of any notice of default given to Developer and specifying the address for service thereof, City shall endeavor to deliver to the Mortgagee, concurrently with service thereof to Developer, all notices given to Developer describing all claims by the City that Developer has defaulted hereunder. If City determines that Developer is not in compliance with this Agreement, City also shall endeavor to serve notice of noncompliance on the Mortgagee concurrently with service 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 condition of default claimed or the areas of noncompliance set forth in City's notice.

13. ASSIGNABILITY

13.1 Assignment. Neither Party shall convey, assign or transfer ("**Transfer**") any of its interests, rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. In no event shall the obligations conferred upon Developer under this Agreement be transferred except through a transfer of all or a portion of the Property. Should Developer transfer any of its interests, rights or obligations under this Agreement, it shall nonetheless remain liable for performance of the obligations for installation of public improvements and payment of fees, unless the transferee executes an Assumption Agreement in a form reasonably acceptable to the City whereby the transferee agrees to be bound by the relevant terms of the Agreement, including the obligations for installation of public improvements and payment of fees. During the Term, Developer shall provide City with written notice of a request to Transfer any interest in this Agreement forty-five (45) days prior to any such contemplated Transfer. Any such request for a Transfer shall be accompanied by quantitative and qualitative information that substantiates, to the City's satisfaction, that the proposed transferee has the capability to fulfill the rights and obligations of this Agreement. Within thirty (30) days of such a request and delivery of information, the City Manager shall make a determination, in his or her sole discretion, as to whether the Transfer shall be permitted or whether such Transfer necessitates an Amendment to this Agreement, subject to approval by the City Council. Each successor in interest to Developer shall be bound by all of the terms and provisions applicable to the portion of the Property acquired. This Agreement shall be binding upon and inure to the benefit of the Parties' successors, assigns and legal representatives. This Agreement shall be recorded by the City in the Santa Clara County Recorder's Office promptly upon execution by each of the Parties.

13.2 Covenants Run With The Land. The terms of this Agreement, the PD Zoning, the General Plan Amendment, and this Development Agreement are legislative in nature, and apply to the Property as regulatory ordinances. Subject to **Section 13.1** above, all of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this Agreement shall run with the land and shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and permitted assigns, devisees, administrators, representatives, lessees and all other persons or entities acquiring the Property, any lot, parcel or any portion thereof and any interest therein, whether by sale, operation of law or other manner, and shall inure to the benefit of the Parties and their respective successors.

13.3 Pre-Approved Transfers. The following Transfers shall not require approval by the City, and shall automatically, upon the satisfaction of the applicable conditions in **Section 13.1** above, result in the release of Developer of its obligations hereunder as they may relate specifically to the specific property or asset sold or transferred: (a) sale or lease of all or any portion of the Property to any other Party to this Agreement or to any affiliate of Developer; (b) sale or lease of one or more buildings to any other Party to this Agreement or to any affiliate of Developer, and (c) a loan or

mortgage pertaining to the Property. As used herein, an "affiliate of Developer" means any entity that directly or indirectly controls or is controlled by or under common control with Developer, whether through the ownership or control of voting interests, by contract, or otherwise.

13.4 Release Upon Transfer. Upon the transfer, sale or assignment of Developer's rights and interests hereunder pursuant to the preceding subparagraph of this Agreement, Developer shall be released from the obligations under this Agreement with respect to the Property transferred, sold or assigned, arising subsequent to the date of City approval of such transfer, sale or assignment; provided, however, that any transferee, purchaser or assignee approved by the City expressly assumes the obligations of Developer under this Agreement. In any event, the transferee, purchaser or assignee shall be subject to all the provisions hereof and shall provide all necessary documents, certifications and other necessary information prior to City approval.

13.5 Non-Assuming Transferees. Except as otherwise required by a transferor, the burdens, obligations and duties of such transferor under this Agreement shall not apply to any purchaser of any individual lot (parcel) that will not require any additional on-site or off-site infrastructure or to any purchaser of an individual condominium offered for sale. The transferee in a transaction described above and the successors and assigns of such a transferee shall be deemed to have no obligations under this Agreement, but shall continue to benefit from the vested rights provided by this Agreement for the duration of the Term hereof. Nothing in this Section shall exempt any property transferred to a non-assuming transferee from payment of applicable fees, taxes and assessments or compliance with applicable conditions of approval.

13.6 Foreclosure. Nothing contained in this **Section 13** shall prevent a transfer of the Property, or any portion thereof, to a lender as a result of a foreclosure or deed in lieu of foreclosure, and any lender acquiring the Property, or any portion thereof, as a result of foreclosure or a deed in lieu of foreclosure shall take such Property subject to the rights and obligations of Developer under this Agreement; provided, however, in no event shall such lender be liable for any defaults or monetary obligations of Developer arising prior to acquisition of title to the Property by such lender, and provided further, in no event shall any such lender or its successors or assigns be entitled to a building permit or occupancy certificate until all fees due under this Agreement (relating to the portion of the Property acquired by such lender) have been paid to City.

14. CONTROLLING LAW

14.1 Controlling Law. This Agreement shall be governed by the laws of the State of California, and the exclusive venue for any disputes or legal actions shall be the County of Santa Clara. Developer shall comply with all requirements of State and federal law, in addition to the requirements of this Agreement, including, without limitation, the payment of prevailing wages, if required. In any event, Developer shall pay prevailing wages for all work on off-site public improvements related to the Project.

15. GENERAL

15.1 Construction of Agreement. The language in this Agreement in all cases shall be construed as a whole and in accordance with its fair meaning.

15.2 No Waiver. No delay or omission by either Party in exercising any right or power accruing upon the other Party's noncompliance or failure to perform under the provisions of this Agreement shall impair or be construed to waive any right or power. A waiver by either Party of any of the covenants or conditions to be performed by Developer or City shall not be construed as a waiver of any succeeding breach of the same or other covenants and conditions.

15.3 Agreement is Entire Agreement. This Agreement and all exhibits attached hereto or incorporated herein, together with the Development Plan, Mitigation Monitoring and Reporting Program, and the Conditions of Approval, are the sole and entire Agreement between the Parties concerning the Property. The Parties acknowledge and agree that they have not made any representation with respect to the subject matter of this Agreement or any representations inducing the execution and delivery, except representations set forth herein, and each Party acknowledges that it has relied on its own judgment in entering this Agreement. The Parties further acknowledge that all statements or representations that heretofore may have been made by either of them to the other are void and of no effect, and that neither of them has relied thereon in its dealings with the other. To the extent that there is any conflict between the approved Development Plan and this Agreement, the approved Development Plan shall govern the Parties' respective rights and obligations.

15.4 Estoppel Certificate. Either Party from time to time may deliver written notice to the other Party requesting written certification that, to the knowledge of the certifying Party, (i) this Agreement is in full force and effect and constitutes a binding obligation of the Parties, (ii) this Agreement has not been amended or modified either orally or in writing, or, if it has been amended or modified, specifying the nature of the amendments or modifications, and, (iii) the requesting Party does not have knowledge of default in the performance of its obligations under this Agreement, or if in known default, describing therein the nature and monetary amount, if any, of the default. A Party receiving a request shall execute and return the certificate within thirty (30) days after receipt thereof. The City Manager shall have the right to execute the certificates requested by Developer. At the request of Developer, the certificates provided by City establishing the status of this Agreement with respect to any lot or parcel shall be in recordable form, and Developer shall have the right to record the certificate for the affected portion of the Property at its cost.

15.5 Severability. Each provision of this Agreement which is adjudged by a court of competent jurisdiction to be invalid, void or illegal shall in no way shall affect, impair or invalidate any other provisions hereof, and the other provisions shall remain in full force and effect.

15.6 Further Documents. Each Party shall execute and deliver to the other all other instruments and documents as may be reasonably necessary to carry out this Agreement.

15.7 Time of Essence. Time is of the essence in the performance of each and every covenant and obligation to be performed by the Parties hereunder.

15.8 Defense and Indemnification Provisions. Developer, and with respect to the portion of the Property transferred to them, each Developer Transferee, hereby releases and agrees to protect, defend, hold harmless and indemnify City, its City Council, its officers, employees, agents and assigns (the "**Indemnified Parties**") from and against all Claims, injury, liability, loss, cost and expense or damage, however same may be caused, including all costs and reasonable attorney's fees in providing the defense to any claim arising from the performance or non-performance of this Agreement by Developer. This provision is intended to be broadly construed and extends to, among other things, any challenge to the validity of this Agreement, environmental review for the Project, entitlements, or anything related to the passage of the Agreement by the City.

15.9 Construction. This Agreement has been reviewed and revised by legal counsel for both the City and Developer and no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement.

16. TERMINATION

16.1 Termination. This Agreement shall terminate upon the earlier of (i) expiration of the Term, or (ii) when the Property has been fully developed and all of Developer's obligations have been fully satisfied as reasonably determined by City, or (iii) after all appeals have been exhausted before a final court of judgment, or issuance of a final court order directed to the City to set aside, withdraw, or abrogate the City's approval of this Agreement or any material part thereof. Upon termination of this Agreement as to all of the Property, at the request of Developer the City shall record a Notice of Termination for each affected parcel in a form satisfactory to the City Attorney in the Office of the Santa Clara County Recorder.

16.2 Effect Upon Termination on Developer Obligations. Termination of this Agreement as to the Developer shall not affect any of the Developer's obligations to comply with the City's General Plan, SCCC, Conditions of Approval (including any environmental mitigation measures) or any terms and conditions of any applicable zoning, or subdivision map or other land use entitlement approved with respect to the Project, nor shall it affect any other covenants or development requirements in this Agreement specified to continue after the termination of this Agreement, or obligations to pay assessments, liens, fees or taxes, nor shall it affect Developer's obligations pursuant to **Section 4.8.a (iii)** ("**Indemnification**").

16.3 Effect Upon Termination on City. Upon any termination of this Agreement as to all or a portion of the Property, the Approvals, Development Plan, Conditions of Approval, limitations on fees and all other terms and conditions of this Agreement shall no longer be vested with respect to the Property, or portion thereof, and the City shall no longer be limited by this Agreement, to make any changes or modifications to the Approvals, conditions or fees applicable to the Property or portion thereof.

17. NOTICES

17.1 Notices. Except as otherwise expressly provided herein, all notices and demands pursuant to this Agreement shall be in writing and delivered in person, by commercial courier or by first-class certified mail, postage prepaid. Except as otherwise expressly provided herein, notices shall be considered delivered when personally served, upon delivery if delivered by commercial courier, or two (2) days after mailing if sent by mail. Notices shall be sent to the addresses below for the respective parties; provided, however, that either Party may change its address for purposes of this Section by giving written notice to the other Party. These addresses may be used for service of process:

City:	City Clerk City of Santa Clara 1500 Warburton Avenue Santa Clara, CA 95050
With copy to:	City Attorney City of Santa Clara 1500 Warburton Avenue Santa Clara, CA 95050
Developer	Benton and El Camino, LP c/o Prometheus Real Estate Group, Inc. 1900 S. Norfolk Street Suite 150 San Mateo, CA 94403 Attention: Rick Jacobsen
With copies to:	Philip J. Levine, Esq. Morrison & Foerster, LLP 755 Page Mill Road Palo Alto, CA 94304

The provisions of this Section shall be deemed directive only and shall not detract from the validity of any notice given in a manner that would be legally effective in the absence of this Section.

18. DEVELOPER AS INDEPENDENT CONTRACTOR

18.1 Developer is an Independent Contractor. Developer is not an agent or employee of City, but is an independent contractor with full rights to manage its employees subject to the requirements of the law. All persons employed or utilized by Developer in connection with this Agreement are employees or contractors of Developer and shall not be considered employees of City in any respect.

19. PROJECT AS A PRIVATE UNDERTAKING

19.1 Project as a Private Undertaking. It is specifically understood and agreed that the Project is a private development. No partnership, joint venture or other association of any kind between City and Developer is formed by this Agreement.

20. NONDISCRIMINATION

20.1 Nondiscrimination. Developer shall not discriminate, in any way, against any person on the basis of race, color, national origin, gender, marital status, sexual orientation, age, creed, religion or disability in connection with or related to the performance of this Agreement.

21. FORCE MAJEURE

21.1 Force Majeure. In addition to any specific provisions of this Agreement, performance of obligations hereunder shall be excused and the term of this Agreement shall be extended during any period of delay caused at any time by reason of: floods, earthquakes, fires or similar catastrophes; wars, riots or similar hostilities; strikes and other labor difficulties beyond the Party's reasonable control; the enactment of new laws or restrictions imposed by other governmental or quasi governmental entities preventing this Agreement from being implemented; or litigation involving this Agreement or the Approvals, which delays any activity contemplated hereunder, unless such action is brought by Developer. City and Developer shall promptly notify the other Party of any delay hereunder as soon as possible after the delay has been, or should have been, known.

22. OPERATING MEMORANDA

22.1 Operating Memoranda. The provisions of this Agreement require a close degree of cooperation between City and Developer, and refinements and further development of the Project may demonstrate that clarifications with respect to the details of performance of City and Developer or minor revisions to the Project are appropriate. If and when, from time to time, during the term of this Agreement, City and Developer agree that such clarifications or minor modifications are necessary or appropriate, they may effectuate such clarifications through operating memoranda approved by City and Developer, which, after execution, shall be attached hereto. No such operating memoranda shall constitute an Amendment to this Agreement requiring public notice or hearing. The City Attorney shall be authorized in his/her sole discretion to determine whether a requested clarification may be effectuated pursuant to this Section or whether the requested clarification is of such a character to require an amendment of the Agreement pursuant to **Section 25** hereof. The City Manager may execute any operating memoranda without City Council action.

23. THIRD PARTIES

23.1 Third Parties. If any person or entity not a party to this Agreement initiates an action at law or in equity to challenge the validity of any provision of this Agreement or the Approvals, the Parties shall reasonably cooperate in defending such action. Developer shall bear its own costs of defense as a real party in interest in any such action, and shall reimburse City for all reasonable costs and attorneys' fees expended by City in defense of any such action or other proceedings.

24. AMENDMENTS

24.1 Amendments. No alterations or changes to the terms of this Agreement shall be valid unless made in writing and signed by both Parties, and completed in compliance with the procedures listed in SCCC and/or the Government Code for Development Agreement Amendments.

25. NO THIRD PARTY BENEFICIARY

25.1 No Third Party Beneficiary. This Agreement shall not be construed or deemed to be an Agreement for the benefit of any third party or parties, and no third party or parties shall have any claim or right of action hereunder for any cause whatsoever.

26. DISPUTE RESOLUTION

26.1 Any controversies between Developer and City regarding the construction or application of this Agreement, and claims arising out of this Agreement or its breach, shall be submitted to mediation within thirty (30) days of the written request of one Party after the service of that request on the other Party.

26.2 The Parties may agree on one mediator. If they cannot agree on one mediator, the Party demanding mediation shall request the Superior Court of Santa Clara County to appoint a mediator. The mediation meeting shall not exceed one day (eight (8) hours). The Parties may agree to extend the time allowed for mediation under this Agreement.

26.3 The costs of the mediator shall be borne by the Parties equally; however, each Party shall bear its own attorney, consultant, staff and miscellaneous fees and costs.

26.4 Mediation under this Section is a condition precedent to filing an action in any court, but it is not a condition precedent to the City's refusal to issue a Building Permit or any other entitlement under **Section 5**.

27. CONSENT

27.1 Consent. Where consent or approval of a Party is required or necessary under this Agreement, the consent or Agreement shall not be unreasonably withheld or delayed.

28. COVENANT OF GOOD FAITH AND FAIR DEALING

28.1 Covenant of Good Faith and Fair Dealing. Neither Party to this Agreement shall do anything which shall have the effect of harming or injuring the right of the other Party to receive benefits of this Agreement; each Party shall refrain from doing anything which would render its performance under this Agreement impossible; and, each Party shall do everything which this Agreement contemplates to accomplish the objectives and purpose of this Agreement.

29. AUTHORITY TO EXECUTE

29.1 Authority to Execute. The person or persons executing this Agreement on behalf of Developer warrant and represent that they have the authority to execute this Agreement on behalf of Developer, and further represent that they have the authority to bind Developer to the performance of its obligations in this Agreement.

30. COUNTERPARTS

30.1 Counterparts. This Agreement may be executed in multiple originals, each of which is deemed an original, and may be signed in Counterparts. The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

CITY OF SANTA CLARA, CALIFORNIA,
a chartered California municipal corporation

APPROVED AS TO FORM:

BRIAN DOYLE
City Attorney

ATTEST:

JENNIFER YAMAGUMA
Acting City Clerk

DEANNA J. SANTANA
City Manager
1500 Warburton Avenue
Santa Clara, CA 95050
Telephone: (408) 615-2210
Fax: (408) 241-6771

"CITY"

DEVELOPER
BENTON AND EL CAMINO, LP

By: _____
Signature of Person executing the Agreement on behalf of Developer

Name: _____

Title: _____

Local Address: _____

Email Address: _____

Telephone: ( ) _____

Fax: ( ) _____

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT A-1

LEGAL DESCRIPTION OF PROPERTY

ALL THAT CERTAIN REAL PROPERTY SITUATE IN THE CITY OF SANTA CLARA, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA DESCRIBED AS FOLLOWS:

BEING A PORTION BLOCKS 2 & 3 NORTH, RANGE 4 EAST AND BLOCKS 2 & 3 NORTH, RANGE 5 EAST TOGETHER WITH A PORTION OF FREMONT STREET AND SHERMAN STREET (BOTH BEING A PUBLIC STREET 70 FEET IN WIDTH) AS SHOWN ON THAT CERTAIN OFFICIAL MAP OF SANTA CLARA ENTITLED "MAP OF THE TOWN OF SUB-LOTS OF SANTA CLARA, SANTA CLARA COUNTY, CALIFORNIA, SURVEYED BY J.J. BOWEN, COUNTY SURVEYOR, JULY 1866", RECORDED AUGUST 22ND, 1866 IN BOOK B OF MAPS, PAGE 103 RECORDS OF SAID SANTA CLARA COUNTY, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE NORTHWESTERLY LINE OF FREMONT STREET AND THE NORTHEASTERLY LINE OF THE ALAMEDA (A PUBLIC STREET 70 FEET IN WIDTH), AS THE ALAMEDA IS ALSO SHOWN ON SAID OFFICIAL MAP FILED IN BOOK B, PAGE 103;

THENCE NORTH 24° 02' 05" WEST ALONG SAID NORTHEASTERLY LINE OF THE ALAMEDA, A DISTANCE OF 75.00 FEET;

THENCE NORTH 65° 53' 15" EAST, A DISTANCE OF 150.50 FEET;

THENCE NORTH 24° 02' 05" WEST, A DISTANCE OF 77.75 FEET;

THENCE NORTH 65° 53' 15" EAST, A DISTANCE OF 150.94 FEET;

THENCE NORTH 24° 00' 15" WEST, A DISTANCE OF 70.96 FEET;

THENCE SOUTH 56° 31' 00" EAST, A DISTANCE OF 130.24 FEET;

THENCE SOUTH 24° 00' 15" EAST, A DISTANCE OF 18.61 FEET;

THENCE SOUTH 56° 31' 00" EAST, A DISTANCE OF 505.37 FEET TO THE BEGINNING OF A TANGENT CURVE;

THENCE SOUTHEASTERLY ALONG LAST MENTIONED CURVE TO THE RIGHT, HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 122º 29’ 26”, AN ARC DISTANCE OF 42.76 FEET;

THENCE SOUTH 42° 53’ 20” WEST, A DISTANCE OF 37.97;

THENCE SOUTH 65° 56’ 26” WEST, A DISTANCE OF 219.84 FEET;

THENCE NORTH 24° 00’ 15” WEST, A DISTANCE OF 6.34 FEET;

THENCE SOUTH 66° 22’ 56” WEST, A DISTANCE OF 120.20 FEET;

THENCE SOUTH 24° 01’ 05” EAST, A DISTANCE OF 7.26 FEET;

THENCE SOUTH 65° 57’ 00” WEST, A DISTANCE OF 100.00 FEET;

THENCE NORTH 24° 01’ 05” WEST, A DISTANCE OF 8.01 FEET;

THENCE SOUTH 66° 22’ 56” WEST, A DISTANCE OF 51.00 FEET;

THENCE SOUTH 24° 01’ 05” EAST, A DISTANCE OF 8.40 FEET;

THENCE SOUTH 65° 57’ 00” WEST, A DISTANCE OF 79.96 FEET TO THE BEGINNING OF A TANGENT CURVE;

THENCE WESTERLY ALONG LAST MENTIONED CURVE TO THE RIGHT, HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 90º 00’ 55”, AN ARC DISTANCE OF 31.42 FEET;

THENCE NORTH 24° 02’ 05” WEST, A DISTANCE OF 356.48 FEET TO THE POINT OF BEGINNING.

CONTAINING AN AREA OF 254,466 SQUARE FEET (5.84 ACRES) OF LAND, MORE OR LESS.

THE BEARING OF NORTH 65º 53’ 15” EAST ON THE MONUMENT LINE OF FREMONT STREET BETWEEN THE ALAMEDA AND SHERMAN STREET AS SHOWN UPON THAT CERTAIN PARCEL MAP FILED IN BOOK 386 PAGE 8, OF RECORDS OF SAID SANTA CLARA COUNTY WAS USED AS THE BASIS OF ALL BEARINGS FOR THIS DESCRIPTION.

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT A-2

DIAGRAM OF PROPERTY

[See attached]

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT B

HEIGHT PLAN

[See attached]

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT C

MITIGATION MONITORING AND REPORTING PROGRAM

[See attached]

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT D

CONDITIONS OF APPROVAL

[See attached]

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT E

AFFORDABILITY PROVISIONS

Developer shall provide opportunities for the rental of affordable residential units, within the Project and/or at one or more sites within the City, in accordance with the provisions of this **Exhibit E** (collectively, the "**Affordability Provisions**").

1. Affordable Units within Project. Subject to the provisions of **Section 2** and **Section 3** below, ten percent (10%) of the Total Number of Residential Units within the Project shall be affordable to households meeting the income levels specified in this **Section 1** below and subject to all other applicable Affordability Provisions (collectively, the "**Project Affordable Units**"). As used in **Exhibit E**, the phrase "**Total Number of Residential Units within the Project**" means the total number of residential units within the Project for which Building Permits have been issued, up to a maximum total of 355 residential units.

1.1. Low Income Units. Thirty percent (30%) of the Project Affordable Units (collectively, the "**Low Income Project Units**") shall be restricted to occupancy by households with income that does not exceed eighty percent (80%) of the Area Median Income for Santa Clara County ("**AMI**") adjusted for household size and as established and amended from time to time by the United States Department of Housing and Urban Development ("**HUD**") pursuant to Section 8 of the United States Housing Act of 1937 or any successor statute. The mix of unit types for the Low Income Project Units shall be subject to mutual agreement between City and Developer. The monthly rent for each of the Low Income Project Units shall not exceed one twelfth ($1/12^{th}$) of thirty percent (30%) of eighty percent (80%) of AMI adjusted for the following assumed household sizes (collectively, the "**Assumed Household Sizes**"):

Unit Type	**Assumed Household Size**
Studio	One (1) person household
1 Bedroom	Two (2) person household
2 Bedroom	Three (3) person household

1.2. Moderate Income Units. Seventy percent (70%) of the Project Affordable Units (collectively, the "**Moderate Income Project Units**") shall be restricted to occupancy by households with income that does not exceed one hundred twenty percent (120%) of the AMI.

The mix of unit types for the Moderate Income Project Units shall be subject to mutual agreement between City and Developer. The monthly rent for each of the Moderate Income Project Units shall not exceed one twelfth ($1/12^{th}$) of thirty percent (30%) of one hundred twenty percent (120%) of AMI adjusted for the Assumed Household Sizes.

1.3. Other Affordability Provisions Applicable to Project Affordable Units.

1.3.1. In the event that the number of Project Affordable Units calculated as set forth in **Section 1** above results in the inclusion of a decimal, the Project Affordable Units required to be provided hereunder by Developer shall be rounded down to the nearest lower whole number in the event the decimal is less than .5 and shall be rounded up to the nearest higher whole number in the event the decimal equals or exceeds .5.

1.3.2. Rent for Project Affordable Units shall be based on the AMI for the County of Santa Clara at the time of City issuance of Certificates of Occupancy and shall adjust consistent with adjustments in the AMI. If HUD fails to issue revised AMI/household income statistics for Santa Clara County within fifteen (15) months of the previous revision, rents for the Project Affordable Units may be adjusted based on the annual percentage increase in the San Jose-Sunnyvale-Santa Clara Consumer Price Index for Urban Wage Earners and Clerical Workers.

1.3.3. The rent described herein shall exclude charges for utilities in the broadest sense, including but not limited to gas, electricity, water, garbage, television, cable, telephone, and internet service; provided, however, that if any or all of such utilities are offered at no cost to market rate units, they shall also be offered at no cost to Project Affordable Units.

1.3.4. The proposed location(s) of the Project Affordable Units shall be designated by Developer at the time of issuance of the Building Permit for Vertical Construction of the Residential Building(s) proposed to include any Project Affordable Units, which location(s) shall be subject to City's consent, which shall not be unreasonably withheld, delayed or conditioned by City.

1.3.5. The Project Affordable Units shall be of comparable quality to the market rate units.

1.3.6. Tenants of Project Affordable Units shall have equal access to and enjoyment of all common facilities of the Project.

1.3.7. Developer shall accept Section 8 vouchers as a means of assisting qualified applicants/residents.

1.3.8. A minimum of one (1) Project Affordable Unit shall be fully accessible to households with a physically impaired member.

1.3.9. Developer will obtain, complete and maintain on file, immediately prior to initial occupancy and annually thereafter, income certifications from each occupant renting any of the Project Affordable Units. Developer shall make a good faith reasonable effort to verify that the income certification provided by an applicant or occupying household is accurate.

1.3.10. If, upon recertification of the income of a tenant of a Low Income Project Unit, Developer determines that such income exceeds the qualifying income for a Low Income Project Unit, but does not exceed the qualifying income for a Moderate Income Project Unit, then, upon expiration of such tenant's lease, such tenant's unit shall be considered a Moderate Income Project Unit, such tenant's rent may be increased to the rent then in effect for Moderate Income Project Units upon not less than sixty (60) days' written notice, and Developer shall rent the next available Project Affordable Unit as a Low Income Project Unit or Moderate Income Project Unit, as applicable, to meet the provisions of **Section 1.1** and **Section 1.2** above.

1.3.11. If, upon recertification of the income of a tenant of a Low Income Project Unit or Moderate Income Unit, Developer determines that such income exceeds the qualifying income for a Moderate Income Project Unit, then, upon expiration of such tenant's lease, Developer shall have the option to: (a) rent such Project Affordable Unit as a Low Income Project Unit or Moderate Income Project Unit, as applicable, to meet the provisions of **Section 1.1** and **Section 1.2** above; or (b) permit such tenant to continue occupying such unit and, upon not less than sixty (60) days' written notice, such tenant's rent may be increased to the fair market rent and Developer shall rent the next available residential unit as a Low Income Project Unit or Moderate Income Project Unit, as applicable, to meet the provisions of **Section 1.1** and **Section 1.2** above.

1.3.12. Upon termination of occupancy of a Project Affordable Unit by a tenant, such Project Affordable Unit shall be deemed to be continuously occupied by a household of the same income level (e.g., low income or moderate income) as the income level of the vacating tenant, until such Project Affordable Unit is reoccupied, at which time the income character of the Project Affordable Unit (e.g., Low Income Project Unit or Moderate Income Project Unit) shall be re-established. In any event, Developer shall maintain the occupancy requirements set forth in **Section 1** above.

1.3.13. Once each year, Developer (or Developer's successor in interest) shall provide City with a written report detailing the average annual income of tenants occupying the Project Affordable Units in each of the income categories described in **Sections 1.1** and **1.2** above, the number of persons in each household occupying the Project Affordable Units, and the number of vacancies and new rentals during the year for the Project Affordable Units.

1.3.14. Developer, with City consultation, shall assume all responsibility for marketing of the Project Affordable Units. Marketing material, lease forms, rent-up schedules and other similar printed material related to the Project Affordable Units shall be subject to City approval, which shall not be unreasonably withheld, delayed or conditioned.

1.3.15. Notwithstanding any provision to the contrary in **Section 1** ("**Term**") of the Development Agreement to which this **Exhibit E** is attached, the term of the Affordability Provisions with respect to the Project Affordable Units (the "**Project Affordability Provisions Term**") shall commence upon the issuance of the first Certificate of Occupancy for a Residential Building within the Project and shall continue for a period of thirty (30) years thereafter. Subject to the preceding sentence, the Affordability Provisions shall run with the land comprising the Property and shall be binding upon all successors in title to the Property. Prior to expiration of the Term of the Development Agreement and upon City's request, Developer and City shall enter into and record against the Property a mutually acceptable written instrument that

carries forward the provisions of this **Exhibit E** for the remainder of the Project Affordability Provisions Term. In the event that the Parties fail to enter into such an instrument, then the provisions of this **Exhibit E** shall continue to be in effect for the Project Affordability Provisions Term.

2. Offsite Affordable Units.

2.1. Developer Election. Not later than three (3) three years of the commencement of the Term of the Development Agreement or by such later date agreed to by City (the "**Developer Election Period**"), Developer shall provide written notice to City of Developer's election ("**Developer's Election Notice**") to either: (a) provide the Project Affordable Units pursuant to **Section 1** above or (b) provide or cause to be provided at one or more locations offsite from the Property a number of residential units equal to ten percent (10%) of the Total Number of Residential Units within the Project (subject to the rounding provisions in **Section 1.3.1** and the provisions of **Section 3** below), affordable to low income and moderate income households meeting the income levels specified in this **Section 2** below and subject to all other applicable Affordability Provisions (collectively, the "**Offsite Affordable Units**"). The number of any Offsite Affordable Units provided hereunder by Developer shall be in addition to the Total Number of Residential Units within the Project, and the development of any such Offsite Affordable Units shall be subject to City's entitlement review process, including appropriate review under CEQA. If Developer fails to provide a Developer's Election Notice within the Developer Election Period, Developer shall be deemed to have elected to provide the Project Affordable Units pursuant to **Section 1** above.

2.2. Offsite Affordable Units Program. If Developer provides a Developer's Election Notice pursuant to clause (b) of **Section 2.1** above, then the following Affordability Provisions shall apply:

2.2.1. Within one hundred twenty (120) days following the date of Developer's Election Notice, Developer shall use good faith commercially reasonable efforts to secure appropriate rights (whether by means of an option agreement, purchase and sale agreement, or such other means reasonably acceptable to City), and to provide written evidence thereof to City, for the acquisition of one or more parcels of property offsite from the Property and at one or more locations within the City reasonably acceptable to City and suitable for the potential development of the Offsite Affordable Units in accordance with the applicable Affordable Provisions (collectively, the "**Offsite Location**").

2.2.2. If Developer does not intend to develop the Offsite Affordable Units on its own, then within one hundred twenty (120) days following the date of Developer's Election Notice, Developer shall use good faith commercially reasonable efforts to enter into (or cause an affiliate of Developer reasonably acceptable to City to enter into) one or more partnership and/or other written agreements with one or more Qualified Partners (as hereinafter defined) (the "**Offsite Affordability Partnership Agreement**") for the formation (if applicable), financing and operations of a partnership or other entity (which may be a Qualified Partner) for the development of the Offsite Affordable Units (the "**Offsite Affordability Partnership**"). The Offsite Affordability Partnership Agreement shall obligate Developer (or such affiliate of Developer) to contribute to the Offsite Affordability Partnership the Offsite Location and/or provide or assist the Offsite Affordability Partnership in securing equity, grants, loans, subsidies and/or other financing

(collectively, the "**Partnership Contribution**") to help assure the successful development of the Offsite Affordable Units in accordance with the applicable Affordability Provisions. As used herein "Qualified Partner" means an entity with an established history of at least five (5) years' experience in developing, owning and operating multifamily affordable housing and reasonably acceptable to City.

2.2.3. Subject to the provisions of **Sections 2.21** and **2.2.2**, and provided that all land use approvals and other permits and entitlements to allow development of the Offsite Affordable Units shall have first been timely issued, the Offsite Affordable Units shall be developed within the later to occur of: (a) thirty-six (36) months after the date of Developer's Election Notice; or (b) thirty-six (36) months after the issuance by City of the final (last) Certificate of Occupancy for the Residential Buildings within the Project. Such dates shall be automatically extended for the period of any "force majeure" events.

2.2.4. The Offsite Affordable Units shall be restricted to occupancy by households with the following income levels: (a) thirty percent (30%) of the Offsite Affordable Units shall be restricted to occupancy by households with income that does not exceed eighty percent (80%) of the AMI (collectively, the "**Low Income Offsite Units**"); and (b) seventy percent (70%) of the Offsite Affordable Units shall be restricted to occupancy by households with income that does not exceed one hundred twenty percent (120%) of the AMI (collectively, the "**Moderate Income Offsite Units**"). The mix of unit types for the Offsite Affordable Units shall be subject to mutual agreement between City and Developer. The monthly rent for each of the Low Income Offsite Units shall not exceed one twelfth ($1/12^{th}$) of thirty percent (30%) of eighty percent (80%) of AMI adjusted for the Assumed Household Sizes. The monthly rent for each of the Moderate Income Offsite Units shall not exceed one twelfth ($1/12^{th}$) of thirty percent (30%) of one hundred twenty percent (120%) of AMI adjusted for the Assumed Household Sizes.

2.2.5. Subject to the preceding provisions of this **Section 2**, the provisions of **Section 1.3** above also shall apply with respect to the Offsite Affordable Units, excepting that, as applicable and appropriate: (a) all references therein to the "Project Affordable Units" shall be deemed to refer to the "Offsite Affordable Units;" (b) all references therein to the "Low Income Project Units" and "Moderate Income Project Units" shall be deemed to refer to the "Low Income Offsite Units" and "Moderate Income Offsite Units; and (c) the term of the Affordability Provisions with respect to the Offsite Affordable Units shall commence upon the issuance of the first Certificate of Occupancy for an Offsite Affordable Unit and shall continue for a period of fifty-five (55) years thereafter.

3. Mix of Project Affordable Units and Offsite Affordable Units.

Notwithstanding any provision herein to the contrary, and subject to mutual agreement between City and Developer, Developer shall be allowed to meet its obligations under these Affordability Provisions by providing a mix of Project Affordable Units and Offsite Affordable Units such that the sum of the Project Affordable Units and Offsite Affordable Units equals ten percent (10%) of the Total Number of Residential Units within the Project (subject to the rounding provisions in **Section 1.3.1**).

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT F

HAZARDOUS MATERIALS

The term "Hazardous Material(s)" shall mean any toxic or hazardous substance, material or waste or any pollutant or contaminant or infectious or radioactive material, including but not limited to, those substances, materials or wastes regulated now or in the future under any of the following statutes or regulations and any and all of those substances included within the definitions of "hazardous substances," "hazardous waste," "hazardous chemical substance or mixture," "imminently hazardous chemical substance or mixture," "toxic substances," "hazardous air pollutant," "toxic pollutant" or "solid waste" in the (a) "CERCLA" or "Superfund" as amended by SARA, 42 U.S.C. Sec. 9601 et seq., (b) RCRA, 42 U.S.C. Sec. 6901 et seq., (c) CWA., 33 U.S.C. Sec. 1251 et seq., (d) CAA, 42 U.S.C. 78401 et seq., (e) TSCA, 15 U.S.C. Sec. 2601 et seq., (f) The Refuse Act of 1899, 33 U.S.C. Sec. 407, (g) OSHA, 29 U.S.C. 651 et seq. (h) Hazardous Materials Transportation Act, 49 U.S.C. Sec. 1801 et seq., (i) USDOT Table (40 CFR Part 302 and amendments) or the EPA Table (40 CFR Part 302 and amendments), (j) California Superfund, Cal. Health & Safety Code Sec. 25300 et seq., (k) Cal. Hazardous Waste Control Act, Cal. Health & Safety Code Section 25100 et seq., (l) Porter-Cologne Act, Cal. Water Code Sec. 13000 et seq., (m) Hazardous Waste Disposal Land Use Law, Cal. Health & Safety Code Sec. 25220 et seq., (n) "Proposition 65," Cal. Health and Safety Code Sec. 25249.5 et seq., (o) Hazardous Substances Underground Storage Tank Law, Cal. Health & Safety Code Sec. 25280 et seq., (p) California Hazardous Substance Act, Cal. Health & Safety Code Sec. 28740 et seq., (q) Air Resources Law, Cal. Health & Safety Code Sec. 39000 et seq., (r) Hazardous Materials Release Response Plans and Inventory, Cal. Health & Safety Code Secs. 25500-25541, (s) TCPA, Cal. Health and Safety Code Secs. 25208 et seq. and (t) regulations promulgated pursuant to said laws or any replacement thereof, or as similar terms are defined in the federal, state and local laws, statutes, regulations, orders or rules. Hazardous Materials shall also mean any and all other substances, materials and wastes which are, or in the future become regulated under applicable local, state or federal law for the protection of health or the environment, or which are classified as hazardous or toxic substances, materials or wastes, pollutants or contaminants, as defined, listed or regulated by any federal, state or local law, regulation or order or by common law decision, including, without limitation, (i) trichloroethylene, tetracholoethylene, perchloroethylene and other chlorinated solvents, (ii) any petroleum products or fractions thereof, (iii) asbestos, (iv) polychlorinated biphenyls, (v) flammable explosives, (vi) urea formaldehyde, and (vii) radioactive materials and waste.

The term “Environmental Laws” shall mean and include all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational, health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, and all Hazardous Materials, including without limitation, all federal or state superfund or environmental clean-up statutes.

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTON AND EL CAMINO, LP

EXHIBIT G

VACATED STREET AREAS

[See attached]

DEVELOPMENT AGREEMENT
FOR
575 BENTON
(MIXED USE)
BETWEEN
THE CITY OF SANTA CLARA,
a chartered California municipal corporation,
AND
BENTIN AND EL CAMINO, LP

EXHIBIT H

FMV APPRAISAL METHODOLOGY FOR VACATED STREET AREAS

The fair market value of the Vacated Street Areas ("**Fair Market Value**") shall be determined in the following manner:

1. Within ninety (90) days following the Effective Date, Developer and City shall each appoint an appraiser and notify the other in writing of such appointment and of the name and address of the appraiser so appointed. Developer and City shall instruct the appraisers to determine in writing the Fair Market Value within thirty (30) days after their appointment. If within forty five (45) days after their appointment the two appraisers do not agree on the Fair Market Value, the Fair Market Value shall be determined as follows:

1.1. If the higher appraisal is not more than ten percent (10%) higher than the lower appraisal, then the Fair Market Value shall equal the average of the determinations made by the two appraisers, and shall be binding on Developer and City.

1.2. If the higher appraisal is more than ten percent (10%) higher than the lower appraisal, the appraisers shall then appoint a third appraiser within fifteen (15) days after the original two appraisers complete their determination of the Fair Market Value. The third appraiser shall make a determination of Fair Market Value within sixty (60) days after such appointment. The Fair Market Value shall equal the average of the three appraisals, except as set forth below in **Section 2.3**, and shall be binding on Developer and City. If (a) the third appraiser fails to determine the Fair Market Value within sixty (60) days of appointment and as provided above; or (a) the appraisers selected by Developer and City are unable to agree on a third appraiser, then in such event the Fair Market Value shall be the average of the determinations of Fair Market Value made by the two appraisers.

1.3. If three appraisals have been made as set forth above, if the highest of the three appraisals of the Fair Market Value is more than 10 percent (10%) higher than the next closest appraisal it shall be disregarded in determining the average. If the lowest of the three appraisals of the Fair Market Value is more than 10 percent (10%) below the next closest appraisal, it shall be disregarded in determining the average.

2. Each Appraiser appointed pursuant to this Exhibit H must be an MAI appraiser (or equivalent) with at least 10 years continuous and active experience in Santa Clara County, and licensed in California. Each appraiser shall be independent and shall have no financial interest in the Property other than to earn a customary fee.

3. The charges for the services of each appraiser, if any, shall be borne by the party who selected that appraiser and the charges for the third appraiser, if required, shall be borne equally by Developer and City.

4. If either Developer or City fails to appoint an appraiser as provided above, the appraiser appointed by the other party shall alone determine the Fair Market Value and such determination shall be binding on the Parties.