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~~When Recorded Return To:~~ _____
First American Title Insurance Company
National Commercial Services
18500 Von Karman Avenue, Suite 600
Irvine, CA 92612
File No: NCS ____ ACCM2019-SA1

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660
Attn: City Clerk

ORIGINAL

(Space Above This Line Is for Recorder's Use Only)

This Agreement is recorded at the request and for the benefit of the City of Newport Beach and is exempt from the payment of a recording fee pursuant to Government Code §§ 27383.

DEVELOPMENT AGREEMENT

between

CITY OF NEWPORT BEACH

and

VIVANTE NEWPORT CENTER, LLC

concerning

VIVANTE SENIOR LIVING
850 AND 856 SAN CLEMENTE DRIVE

THIS INSTRUMENT FILED FOR RECORD BY
FIRST AMERICAN TITLE COMPANY AS AN ACCOMMODATION
ONLY IT HAS NOT BEEN EXAMINED AS TO ITS EXECUTION
OR AS TO ITS EFFECTS UPON THE TITLE

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DEVELOPMENT AGREEMENT

(Pursuant to Newport Beach Municipal Code Chapter 15.45 and California Government Code Sections 65864-65869.5)

This DEVELOPMENT AGREEMENT ("Agreement" or "Development Agreement") is dated for reference purposes as of the 10th day of September, 2019 (" Agreement Date"), and is being entered into by and between the CITY OF NEWPORT BEACH ("City") a California municipal corporation and charter city, organized and existing under and by virtue of its Charter and the Constitution, and the laws of the State of California, and VIVANTE NEWPORT CENTER, LLC, a Delaware limited liability company ("Developer"). City and Developer are sometimes collectively referred to in this Agreement as the "Parties" and individually as a "Party."

RECITALS

A. Developer is fee simple owner of that certain real property located in the City of Newport Beach, County of Orange, State of California commonly referred to as 850 and 856 San Clemente Drive, Newport Beach, California (APN #442-261-05 and #442-261-17) ("Property) and therefore is authorized to enter into this Agreement pursuant to Government Code Section 65865 and Newport Beach Municipal Code Chapter 15.45. The Property is more particularly described in the legal description attached hereto as Exhibit A and is depicted on the site map attached hereto as Exhibit B.

B. To encourage investment in, and commitment to, comprehensive planning and public facilities financing, strengthen the public planning process and encourage private implementation of the local general plan, provide certainty in the approval of projects to avoid waste of time and resources, and reduce the economic costs of development by providing assurance to property owners that they may proceed with projects consistent with existing land use policies, rules, and regulations, the California Legislature adopted California Government Code Sections 65864-65869.5 ("Development Agreement Statute") authorizing cities and counties to enter into development agreements with persons or entities having a legal or equitable interest in real property located within their jurisdiction.

C. On March 13, 2007, the City Council adopted Ordinance No. 2007-6, entitled "Ordinance Amending Chapter 15.45 of City of Newport Beach Municipal Code Regarding Development Agreements" ("Development Agreement Ordinance"). This Agreement is consistent with the Development Agreement Ordinance.

D. As detailed in Section 4 of this Agreement and the Development Plans (as defined herein), and in consideration of the significant benefits outlined in this Agreement, Developer has agreed to pay a total Public Benefit Fee (as defined herein) in the sum of Three Million One Hundred Fifty Thousand Dollars and 00/100 ($3,150,000.00). Developer shall pay the Public Benefit Fee to the City at the time of the City's issuance of the first building permit for the Project (as defined herein).

E. This Agreement is consistent with the City of Newport Beach General Plan, including, without limitation, the Property's proposed "MU-H3 (Mixed-Use Horizontal)" General Plan designation that is being adopted and approved by the City Council concurrently

with its approval of this Agreement to establish appropriate standards to regulate land use and development of the Property consistent with the General Plan.

G. In recognition of the significant public benefits that this Agreement provides, the City Council has found that this Agreement: (i) is consistent with the City of Newport Beach General Plan as of the date of this Agreement; (ii) is in the best interests of the health, safety, and general welfare of City, its residents, and the public; (iii) is entered into pursuant to, and constitutes a present exercise of, the City's police power; (iv) is consistent and has been approved consistent with the Project's Addendum to the Environmental Impact Report and final Environmental Impact Report (SCH# 2016021023) ("EIR") that was certified by the City Council on November 29, 2016, for the Museum House project, all of which analyze the environmental effects of the proposed development of the Project on the Property, and all of the findings, conditions of approval and mitigation measures related thereto; and (v) is consistent and has been approved consistent with provisions of California Government Code Section 65867 and City of Newport Beach Municipal Code Chapter 15.45.

H. On July 18, 2019, City's Planning Commission held a public hearing on this Agreement, made findings and determinations with respect to this Agreement, and recommended to the City Council that the City Council approve this Agreement.

I. On August 13, 2019, the City Council also held a public hearing on this Agreement and considered the Planning Commission's recommendations and the testimony and information submitted by City staff, Developer, and members of the public. On September 10, 2019 consistent with applicable provisions of the Development Agreement Statute and Development Agreement Ordinance, the City Council adopted Ordinance No. 2019-13 ("Adopting Ordinance"), finding this Agreement consistent with the City of Newport Beach General Plan and approving and adopting this Agreement.

AGREEMENT

NOW, THEREFORE, City and Developer agree as follows:

1. Definitions.

In addition to any terms defined elsewhere in this Agreement, the following terms when used in this Agreement shall have the meanings set forth below:

"Action" shall have the meaning ascribed in Section 8.10 of this Agreement.

"Adopting Ordinance" shall mean City Council Ordinance No. 2019-13 approving and adopting this Agreement.

"Agreement" shall mean this Development Agreement, as the same may be amended from time to time.

"Agreement Date" shall mean the date first written above, which date is the date the City Council adopted the Adopting Ordinance.

"CEQA" shall mean the California Environmental Quality Act (California Public Resources Code sections 21000-21177) and the implementing regulations promulgated thereunder by the Secretary for Resources (California Code of Regulations, Title 14, Division 6, Chapter 3, Section 15000 *et seq.*), as the same may be amended from time to time.

"City" shall mean the City of Newport Beach, a California municipal corporation and charter city, and any successor or assignee of the rights and obligations of the City of Newport Beach hereunder.

"City Council" shall mean the governing body of City.

"City's Affiliated Parties" shall have the meaning ascribed in Section 10.1 of this Agreement.

"Claim" shall have the meaning ascribed in Section 10.1 of this Agreement.

"CPI Index" shall mean the Consumer Price Index published from time to time by the United States Department of Labor for all urban consumers (all items) for the smallest geographic area that includes the City or, if such index is discontinued, such other similar index as may be publicly available that is selected by City in its reasonable discretion.

"Cure Period" shall have the meaning ascribed in Section 8.1 of this Agreement.

"Default" shall have the meaning ascribed to that term in Section 8.1 of this Agreement.

"Develop" or "Development" shall mean to improve or the improvement of the Property for the purpose of completing the structures, improvements, and facilities comprising the Project, including but not limited to: grading; the construction of infrastructure and public facilities related to the Project, whether located within or outside the Property; the construction of all of the private improvements and facilities comprising the Project; the preservation or restoration, as required of natural and man-made or altered open space areas; and the installation of landscaping. The terms "Develop" and "Development," as used herein, do not include the maintenance, repair, reconstruction, replacement, or redevelopment of any structure, improvement, or facility after the initial construction and completion thereof.

"Developer" shall mean Vivante Newport Center, LLC, a Delaware limited liability company, and any successor or assignee to all or any portion of its right, title, and/or interest in and to ownership of all or a portion of the Property and/or the Project.

"Development Agreement Ordinance" shall mean Chapter 15.45 of the City of Newport Beach Municipal Code.

"Development Agreement Statute" shall mean California Government Code Sections 65864-65869.5, inclusive.

"Development Exactions" shall mean any requirement of City in connection with or pursuant to any ordinance, resolution, rule, or official policy for the dedication of land, the construction or installation of any public improvement or facility, or the payment of any fee or

charge in order to lessen, offset, mitigate, or compensate for the impacts of Development of the Project on the environment or other public interests.

"Development Plan" shall mean all of the land use entitlements, approvals and permits approved by the City for the Project on or before the Agreement Date, as the same may be amended from time to time consistent with this Agreement. Such land use entitlements, approvals and permits include, without limitation, the following: (1) the Development rights as provided under this Agreement; (2) General Plan Amendment No. GP2018-003 to amend Anomaly No. 49 of Table LU2 and to change the land use category from PI (Private Institutions) to MU-H3 (Mixed-Use Horizontal); (3) Planned Community Development Plan Amendment No. PC2018-001 to modify the San Joaquin Plaza Planned Community Development Plan (PC-19) to include development and design standards to allow for 90 senior dwelling units and 27 memory care beds and an increase in the height limit from 65 feet to 69 feet with an additional 10 feet for rooftop appurtenances; (4) Development Agreement No. DA 2018-005 to provide public benefits should the Project be approved; (5) Conditional Use Permit No. UP2018-19 to allow the operation of the proposed senior housing and memory care facility, alcohol service for dining hall and lounge areas in the form of a Type 47 (On Sale General) and Type 57 (Special On Sale General), and ensure land use compatibility; (6) Major Site Development Review No. SD2018-003 to allow the construction of 90 senior dwelling units and a 27 bed memory care facility; (7) Lot Merger No. LM2018-004 to merge the two existing parcels into one development site; (8) Addendum to Environmental Impact Report No. ER2016-002 (SCH#2016021023); (9) the EIR (State Clearinghouse No. 2016071062); and (10) all conditions of approval and all mitigation measure approved for the Project on or before the Agreement Date.

"Development Regulations" shall mean the following regulations as they are in effect as of the Effective Date and to the extent they govern or regulate the development of the Property, but excluding any amendment or modification to the Development Regulations adopted, approved, or imposed after the Effective Date that affects the Development of the Property, unless such amendment or modification is expressly authorized by this Agreement or is agreed to by Developer in writing: the General Plan; the Development Plan; and, to the extent not expressly superseded by the Development Plan or this Agreement (see Section 4.3 in particular), all other land use and subdivision regulations governing the permitted uses, density and intensity of use, design, and improvement, procedures for obtaining required City permits and approvals for development, and similar matters that may apply to the Development of the Project on the Property during the Term of this Agreement that are set forth in Title 15 of the Municipal Code (buildings and construction), Title 19 of the Municipal Code (subdivisions and inclusionary housing), and Title 20 of the Municipal Code (planning, zoning and density bonus), but specifically excluding all other sections of the Municipal Code, including without limitation Title 5 of the Municipal Code (business licenses and regulations). Notwithstanding the foregoing, the term "Development Regulations," as used herein, does not include any City ordinance, resolution, code, rule, regulation or official policy governing any of the following: (i) the conduct of businesses, professions, and occupations; (ii) taxes and assessments; (iii) the control and abatement of nuisances; (iv) the granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property; or (v) the exercise of the power of eminent domain.

"Effective Date" shall mean the latest of all of the following occurring: (i) the date that is thirty (30) calendar days after the Agreement Date; (ii) if a referendum concerning the Adopting

Ordinance, the Development Plan, or any of the Development Regulations approved on or before the Agreement Date is timely qualified for the ballot and a referendum election is held concerning the Adopting Ordinance or any of such Development Regulations, the date on which the referendum is certified resulting in upholding and approving the Adopting Ordinance and the Development Regulations; or (iii) if a lawsuit is timely filed challenging the validity or legality of the Adopting Ordinance, this Agreement, the Development Plan, and/or any of the Development Regulations approved on or before the Agreement Date, the date on which said challenge is finally resolved in favor of the validity or legality of the Adopting Ordinance, this Agreement, the Development Plan, and/or the applicable Development Regulations, whether such finality is achieved by a final non-appealable judgment, voluntary or involuntary dismissal (and the passage of any time required to appeal an involuntary dismissal), or binding written settlement agreement. Promptly after the Effective Date occurs, the Parties agree to cooperate in causing an appropriate instrument to be executed and recorded against the Property memorializing the Effective Date.

"Environmental Laws" means all federal, state, regional, county, municipal, and local laws, statutes, ordinances, rules, and regulations which are in effect as of the Agreement Date, and all federal, state, regional, county, municipal, and local laws, statutes, rules, ordinances, rules, and regulations which may hereafter be enacted and which apply to the Property or any part thereof, pertaining to the use, generation, storage, disposal, release, treatment, or removal of any Hazardous Substances, including without limitation the following: the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. Sections 9601, et seq., as amended ("CERCLA"); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Sections 6901, et seq., as amended ("RCRA"); the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. Sections 11001 et seq., as amended; the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., as amended; the Clean Air Act, 42 U.S.C. Sections 7401 et seq., as amended; the Clean Water Act, 33 U.S.C. Section 1251, et seq., as amended; the Toxic Substances Control Act, 15 U.S.C. Sections 2601 et seq., as amended; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sections 136 et seq., as amended; the Federal Safe Drinking Water Act, 42 U.S.C. Sections 300f et seq., as amended; the Federal Radon and Indoor Air Quality Research Act, 42 U.S.C. Sections 7401 et seq., as amended; the Occupational Safety and Health Act, 29 U.S.C. Sections 651 et seq., as amended; and California Health and Safety Code Section 25100, et seq.

"General Plan" shall mean City's 2006 General Plan adopted by the City Council on July 25, 2006, by Resolution No. 2006-76, and any amendments to the 2006 General Plan that became effective before the Effective Date. The term "General Plan" shall exclude any amendments that became effective after the Effective Date unless such amendment is expressly authorized by this Agreement, or is specifically agreed to by Developer. The Land Use Plan of the Land Use Element of the General Plan was approved by City voters in a general election on November 7, 2006.

"Hazardous Substances" means any toxic substance or waste, pollutant, hazardous substance or waste, contaminant, special waste, industrial substance or waste, petroleum or petroleum-derived substance or waste, or any toxic or hazardous constituent or additive to or breakdown component from any such substance or waste, including without limitation any

substance, waste, or material regulated under or defined as "hazardous" or "toxic" under any Environmental Law.

"Mortgage" shall mean a mortgage, deed of trust, sale and leaseback arrangement, or any other form of conveyance in which the Property, or a part or interest in the Property, is pledged as security and contracted for in good faith and for fair value.

"Mortgagee" shall mean the holder of a beneficial interest under a Mortgage or any successor or assignee of the Mortgagee.

"Notice of Default" shall have the meaning ascribed in Section 8.1 of this Agreement.

"Party" or "Parties" shall mean either City or Developer or both, as determined by the context.

"Project" shall mean all on-site and off-site improvements, as provided in this Agreement and the Development Regulations, as the same may be modified or amended from time to time consistent with this Agreement and applicable law.

"Property" is located at 850 and 856 San Clemente Drive in the City, as described in Exhibit A and depicted on Exhibit B.

"Public Benefit Fee" shall have the meaning ascribed in Section 3.1 of this Agreement.

"Subsequent Development Approvals" shall mean all discretionary development and building approvals that Developer is required to obtain to Develop the Project on and with respect to the Property after the Agreement Date consistent with the Development Regulations and this Agreement.

"Term" shall have the meaning ascribed in Section 2.4 of this Agreement.

"Termination Date" shall have the meaning ascribed in Section 2.4 of this Agreement.

"Transfer" shall have the meaning ascribed in Section 11 of this Agreement.

2. General Provisions.

2.1 Plan Consistency, Zoning Implementation.

This Agreement is consistent with the General Plan and the San Joaquin Plaza Planned Community District ("PC-19") as amended by the approvals in the Development Plan adopted concurrently herewith (including but not limited to Planned Community Development Plan Amendment No. PC2018-001).

2.2 Binding Effect of Agreement.

The Property is hereby made subject to this Agreement. Development of the Property is hereby authorized and shall be carried out in accordance with the terms of this Agreement.

2.3 Developer Representations and Warranties Regarding Ownership of the Property and Related Matters Pertaining to this Agreement.

Developer and each person executing this Agreement on behalf of Developer hereby represents and warrants to City as follows: (i) that Developer is the fee simple owner to the Property; (ii) if Developer or any co-owner comprising Developer is a legal entity that such entity is duly formed and existing and is authorized to do business in the State of California; (iii) if Developer or any co-owner comprising Developer is a natural person that such natural person has the legal right and capacity to execute this Agreement; (iv) that all actions required to be taken by all persons and entities comprising Developer to enter into this Agreement have been taken and that Developer has the legal authority to enter into this Agreement; (v) that Developer's entering into and performing its obligations set forth in this Agreement will not result in a violation of any obligation, contractual or otherwise, that Developer or any person or entity comprising Developer has to any third party; and (vi) that neither Developer nor any co-owner comprising Developer is currently the subject of any voluntary or involuntary bankruptcy or insolvency petition; and (vii) that Developer has no actual knowledge of any pending or threatened claims of any person or entity affecting the validity of any of the representations and warranties set forth in clauses (i)-(vi), inclusive.

2.4 Term.

The term of this Agreement ("Term") shall commence on the Effective Date and shall terminate on the "Termination Date."

Notwithstanding any other provision set forth in this Agreement to the contrary, if any Party reasonably determines that the Effective Date of this Agreement will not occur because, for example, (i) the Adopting Ordinance or any of the Development Regulations approved on or before the Agreement Date for the Project has/have been disapproved by City's voters at a referendum election or (ii) a final non-appealable judgment is entered in a judicial action challenging the validity or legality of the Adopting Ordinance, this Agreement, and/or any of the Development Regulations for the Project approved on or before the Agreement Date such that this Agreement and/or any of such Development Regulations is/are invalid and unenforceable in whole or in such a substantial part that the judgment substantially impairs such Party's rights or substantially increases its obligations or risks hereunder or thereunder, then such Party, in its sole and absolute discretion, shall have the right to terminate this Agreement upon delivery of a written notice of termination to the other Party, in which event neither Party shall have any further rights or obligations hereunder except that Developer's indemnity obligations set forth in Article 10 shall remain in full force and effect and shall be enforceable, and the Development Regulations applicable to the Project and the Property only (but not those general Development Regulations applicable to other properties in the City) shall be repealed by the City after delivery of said notice of termination except for the Development Regulations that have been disapproved by City's voters at a referendum election and, therefore, never took effect.

The Termination Date shall be the earliest of the following dates: (i) the tenth (10th) anniversary of the Effective Date; (ii) such earlier date that this Agreement may be terminated in accordance with Articles 5, 7, and/or Section 8.3 of this Agreement and/or Sections 65865.1 and/or 65868 of the Development Agreement Statute; or (iii) completion of the Project in accordance with the terms of this Agreement, including Developer's complete satisfaction,

performance, and payment, as applicable, of all Development Exactions, the issuance of all required final occupancy permits, and acceptance by City or applicable public agency(ies) or private entity(ies) of all required offers of dedication.

Notwithstanding any other provision set forth in this Agreement to the contrary, the provisions set forth in Article 10 and Section 14.11 (as well as any other Developer obligations set forth in this Agreement that are expressly written to survive the Termination Date) shall survive the Termination Date of this Agreement.

3. Public Benefits.

3.1 Public Benefit Fee.

As consideration for City's approval and performance of its obligations set forth in this Agreement, Developer shall pay to City a fee in the amount of three million one hundred fifty thousand dollars and 00/100 ($3,150,000.00), which shall be in addition to any other fee or charge to which the Property and the Project would otherwise be subject.

The Developer shall pay the Public Benefit Fee to the City sixty (60) days after the City's issuance of the Project's first building permit. Should the Developer fail to pay the Public Benefit Fee at the time of the City's issuance of the Project's first building permit, the Developer shall be in default of the Agreement, as further described in Section 8 of this Agreement.

The City has not designated a specific project or purpose for the Public Benefit Fee. Developer acknowledges by its approval and execution of this Agreement that it is voluntarily agreeing to pay the Public Benefit Fee, that its obligation to pay the Public Benefit Fee is an essential term of this Agreement and is not severable from City's obligations and Developer's vested rights to be acquired hereunder, and that Developer expressly waives any constitutional, statutory, or common law right it might have in the absence of this Agreement to protest or challenge the payment of the Public Benefit Fee on any ground whatsoever, including without limitation pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, California Constitution Article I Section 19, the Mitigation Fee Act (California Government Code Section 66000 *et seq.*), or otherwise. In addition to any other remedy set forth in this Agreement for Developer's default, if Developer shall fail to timely pay any portion of the Public Benefit Fee when due, City shall have the right to withhold issuance of any further building permits, occupancy permits, or other development or building permits for the Project.

3.1.1 Public Benefit Fee Allocation

The City Council retains sole and absolute discretion to determine how the Public Benefit Fee shall be allocated and no final decisions have been made as of the Agreement Date.

3.2 Reserved

3.3 Reserved

4. Development of Project.

4.1 Applicable Regulations; Developer's Vested Rights and City's Reservation of Discretion With Respect to Subsequent Development Approvals.

Other than as expressly set forth in this Agreement, during the Term of this Agreement, (i) Developer shall have the vested right to Develop the Project on and with respect to the Property in accordance with the terms of the Development Regulations and this Agreement and (ii) City shall not prohibit or prevent development of the Property on grounds inconsistent with the Development Regulations or this Agreement. Notwithstanding the foregoing, nothing herein is intended to limit or restrict the City's discretion with respect to (i) those review and approval requirements contained in the Development Regulations, (ii) the exercise of any discretionary authority City retains under the Development Regulations, (iii) the approval, conditional approval, or denial of any Subsequent Development Approvals that are required for Development of the Project as of the Effective Date, or (iv) any environmental approvals that may be required under CEQA or any other federal or state law or regulation in conjunction with any Subsequent Development Approvals that may be required for the Project, and in this regard, as to future actions in connection with the Subsequent Development Approvals, the City reserves its full discretion to the same extent that it would have such discretion in the absence of this Agreement. In addition, it is understood and agreed that nothing in this Agreement is intended to vest Developer's rights with respect to any laws, regulations, rules, or official policies of any other (*i.e.*, non-City) governmental agency or public utility company with jurisdiction over the Property or the Project; or any applicable federal or state laws, regulations, rules, or official policies that may be inconsistent with this Agreement and that override or supersede the provisions set forth in this Agreement, and regardless of whether such overriding or superseding laws, regulations, rules, or official policies are adopted or applied to the Property or the Project prior or subsequent to the Agreement Date.

Developer has expended and will continue to expend substantial amounts of time and money planning and preparing for Development of the Project. Developer represents, and City acknowledges, that Developer would not make these expenditures without this Agreement, and that Developer is and will be making these expenditures in reasonable reliance upon its vested rights to Develop the Project as set forth in this Agreement.

Developer may apply to City for permits or approvals necessary to modify or amend the Development specified in the Development Regulations, without amending this Agreement, provided that the request does not propose an increase in the maximum density, intensity, height, or size of proposed structures, or a change in use that generates more peak hour traffic or more daily traffic and, in addition, Developer may apply to City for approval of minor amendments to the existing tentative tract map, if any, or associated conditions of approval, consistent with City of Newport Beach Municipal Code Section 19.12.090. This Agreement does not constitute a promise or commitment by City to approve any such permit or approval, or to approve the same with or without any particular requirements or conditions, and City's discretion with respect to such matters shall be the same as it would be in the absence of this Agreement.

4.2 No Conflicting Enactments.

Except to the extent City reserves its discretion as expressly set forth in this Agreement, during the Term of this Agreement City shall not apply to the Project or the Property any ordinance, policy, rule, regulation, or other measure relating to Development of the Project that is enacted or becomes effective after the Effective Date to the extent it conflicts with this Agreement or Developer consents in writing. This Section 4.2 shall not restrict City's ability to enact an ordinance, policy, rule, regulation, or other measure applicable to the Project pursuant to California Government Code Section 65866 consistent with the procedures specified in Section 4.3 of this Agreement. In *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, the California Supreme Court held that a construction company was not exempt from a city's growth control ordinance even though the city and construction company had entered into a consent judgment (tantamount to a contract under California law) establishing the company's vested rights to develop its property consistent with the zoning. The California Supreme Court reached this result because the consent judgment failed to address the timing of development. The Parties intend to avoid the result of the *Pardee* case by acknowledging and providing in this Agreement that Developer shall have the vested right to Develop the Project on and with respect to the Property at the rate, timing, and sequencing that Developer deems appropriate within the exercise of Developer's sole subjective business judgment, provided that such Development occurs in accordance with this Agreement and the Development Regulations, notwithstanding adoption by City's electorate of an initiative to the contrary after the Effective Date. No City moratorium or other similar limitation relating to the rate, timing, or sequencing of the Development of all or any part of the Project and whether enacted by initiative or another method, affecting subdivision maps, building permits, occupancy certificates, or other entitlement to use, shall apply to the Project to the extent such moratorium or other similar limitation restricts Developer's vested rights in this Agreement or otherwise conflicts with the express provisions of this Agreement.

4.3 Reservations of Authority.

Notwithstanding any other provision set forth in this Agreement to the contrary, the laws, rules, regulations, and official policies set forth in this Section 4.3 shall apply to and govern the Development of the Project on and with respect to the Property.

4.3.1 Procedural Regulations. Unless otherwise specified in this Agreement, procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, and any other matter of procedure shall apply to the Property, provided that such procedural regulations are adopted and applied City-wide or to all other properties similarly situated in City.

4.3.2 Processing and Permit Fees. City shall have the right to charge, and Developer shall be required to pay, all applicable processing and permit fees to cover the reasonable cost to City of processing and reviewing applications and plans for any required Subsequent Development Approvals, building permits, excavation and grading permits, encroachment permits, and the like, for performing necessary studies and reports in connection therewith, inspecting the work constructed or installed by or on behalf of Developer, and monitoring compliance with any requirements applicable to Development of the Project, all at the rates in effect at the time fees are due.

4.3.2.1 Vested Development Impact Fees. All City development impact fees shall be fixed at the rates in place on the Agreement Date as shown on attached Exhibit C. Fees and charges levied by any other (*i.e.*, non-City) governmental agency or public utility company with jurisdiction over the Property or the Project shall not be fixed in place by the Development Agreement.

4.3.3 Consistent Future City Regulations. City ordinances, resolutions, regulations, and official policies governing Development which do not conflict with the Development Regulations, or with respect to such regulations that do conflict, where Developer has consented in writing to the regulations, shall apply to the Property.

4.3.4 Development Exactions Applicable to Property. During the Term of this Agreement, Developer shall be required to satisfy and pay all Development Exactions at the time performance or payment is due to the same extent and in the same amount(s) that would apply to Developer and the Project in the absence of this Agreement; provided except where the extent the timing, value, scope and/or extent of a particular Development Exaction for the Project has been established and fixed by City in this Agreement, the Project's conditions of approval, or the Development Regulations. City shall not alter, increase, or modify said Development Exaction in a manner that is inconsistent with this Agreement, the Project's conditions of approval, or the Development Regulations without Developer's prior written consent or as may be otherwise required pursuant to overriding federal or state laws or regulations (Section 4.3.5 below). In addition, nothing in this Agreement is intended or shall be deemed to vest Developer against the obligation to pay any of the following (which are not included within the definition of "Development Exactions") in the full amount that would apply in the absence of this Agreement: (i) City's normal fees for processing, environmental assessment and review, tentative tract and parcel map review, plan checking, site review and approval, administrative review, building permit, grading permit, inspection, and similar fees imposed to recover City's costs associated with processing, reviewing, and inspecting project applications, plans, and specifications, including CEQA review; (ii) fees and charges levied by any other public agency, utility, district, or joint powers authority, regardless of whether City collects those fees and charges; or (iii) community facility district special taxes or special district assessments or similar assessments, business license fees, bonds or other security required for public improvements, transient occupancy taxes, sales taxes, property taxes, sewer lateral connection fees, water service connection fees, new water meter fees, and the Property Development Tax payable under Section 3.12 of City's Municipal Code.

4.3.5 Overriding Federal and State Laws and Regulations. Federal and state laws and regulations that override Developer's vested rights set forth in this Agreement shall apply to the Property, together with any City ordinances, resolutions, regulations, and official policies that are necessary to enable City to comply with the provisions of any such overriding federal or state laws and regulations, provided that (i) Developer does not waive its right to challenge or contest the validity of any such purportedly overriding federal, state, or City law or regulation; and (ii) upon the discovery of any such overriding federal, state, or City law or regulation that prevents or precludes compliance with any provision of this Agreement, City or Developer shall provide to the other Party a written notice identifying the federal, state, or City law or regulation, together with a copy of the law or regulation and a brief written statement of the conflict(s) between that law or regulation and the provisions of this Agreement. Promptly thereafter, City and Developer shall meet and confer in good faith in a reasonable attempt to

determine whether a modification or suspension of this Agreement, in whole or in part, is necessary to comply with such overriding federal, state, or City law or regulation. In such negotiations, City and Developer agree to preserve the terms of this Agreement and the rights of Developer as derived from this Agreement to the maximum feasible extent while resolving the conflict. City agrees to cooperate with Developer at no cost to City or Developer in resolving the conflict in a manner which minimizes any financial impact of the conflict upon Developer. City also agrees to process in a prompt manner Developer's proposed changes to the Project and any of the Development Regulations as may be necessary to comply with such overriding federal, state, or City law or regulation; provided, however, that the approval of such changes by City shall be subject to the discretion of City, consistent with this Agreement.

4.3.6 Public Health and Safety. Any City ordinance, resolution, rule, regulation, program, or official policy that is necessary to protect persons on the Property or in the immediate vicinity from conditions dangerous to their health or safety, as reasonably determined by City, shall apply to the Property, even though the application of the ordinance, resolution, rule regulation, program, or official policy would result in the impairment of Developer's vested rights under this Agreement.

4.3.7 Uniform Building Standards. Existing and future building and building-related standards set forth in the uniform codes adopted and amended by City from time-to-time, including building, plumbing, mechanical, electrical, housing, swimming pool, and fire codes, and any modifications and amendments thereof shall all apply to the Project and the Property to the same extent that the same would apply in the absence of this Agreement.

4.3.8 Public Works Improvements. To the extent Developer constructs or installs any public improvements, works, or facilities, the City standards in effect for such public improvements, works, or facilities at the time of City's issuance of a permit, license, or other authorization for construction or installation of same shall apply.

4.3.9 No Guarantee or Reservation of Utility Capacity. Notwithstanding any other provision set forth in this Agreement to the contrary, nothing in this Agreement is intended or shall be interpreted to require City to guarantee or reserve to or for the benefit of Developer or the Property any utility capacity, service, or facilities that may be needed to serve the Project, whether domestic or reclaimed water service, sanitary sewer transmission or wastewater treatment capacity, downstream drainage capacity, or otherwise, and City shall have the right to limit or restrict Development of the Project if and to the extent that City reasonably determines that inadequate utility capacity exists to adequately serve the Project at the time Development is scheduled to commence. Notwithstanding the foregoing, City covenants to provide utility services to the Project on a non-discriminatory basis (*i.e.*, on the same terms and conditions that City undertakes to provide such services to other similarly situated new developments in the City of Newport Beach as and when service connections are provided and service commences).

5. Amendment or Cancellation of Agreement

This Agreement may be amended or canceled in whole or in part only by mutual written and executed consent of the Parties in compliance with California Government Code Section 65868 and Newport Beach Municipal Code Section 15.45.070 or by unilateral termination by City in the event of an uncured default of Developer.

6. Enforcement.

Unless amended or canceled pursuant to California Government Code Section 65868, Newport Beach Municipal Code Section 15.45.070, or modified or suspended pursuant to Newport Beach Municipal Code Chapter 15.45 or California Government Code Section 65869.5, and except as otherwise provided in subdivision (b) of Section 65865.3, this Agreement shall be enforceable by any Party despite any change in any applicable general or specific plan, zoning, subdivision, or building regulation or other applicable ordinance or regulation adopted by City (including by City's electorate) that purports to apply to any or all of the Property.

7. Annual Review of Developer's Compliance With Agreement.

7.1 General.

City shall review this Agreement once during every twelve (12) month period following the Effective Date for compliance with the terms of this Agreement as provided in Government Code section 65865.1. Developer (including any successor to the owner executing this Agreement on or before the date of the Adopting Ordinance) shall pay City a reasonable fee in an amount City may reasonably establish from time-to-time to cover the actual and necessary costs for the annual review. City's failure to timely provide or conduct an annual review shall not constitute a Default hereunder by City.

7.2 Developer Obligation to Demonstrate Good Faith Compliance.

During each annual review by City, Developer is required to demonstrate good faith compliance with the terms of the Agreement. Developer agrees to furnish such evidence of good faith compliance as City, in the reasonable exercise of its discretion, may require, thirty (30) calendar days prior to each anniversary of the Effective Date during the Term.

7.3 Procedure.

The Zoning Administrator shall conduct a duly noticed hearing and shall determine, on the basis of substantial evidence, whether or not Developer has, for the period under review, complied with the terms of this Agreement. If the Zoning Administrator finds that Developer has so complied, the annual review shall be concluded. If the Zoning Administrator finds, on the basis of substantial evidence, that Developer has not so complied, written notice shall be sent to Developer by first class mail of the Zoning Administrator's finding of non-compliance, and Developer shall be given at least ten (10) calendar days to cure any noncompliance that relates to the payment of money and thirty (30) calendar days to cure any other type of noncompliance. If a cure not relating to the payment of money cannot be completed within thirty (30) calendar days for reasons which are beyond the control of Developer, Developer must commence the cure within such thirty (30) calendar days and diligently pursue such cure to completion. If Developer fails to cure such noncompliance within the time(s) set forth above, such failure shall be considered to be a Default and City shall be entitled to exercise the remedies set forth in Article 8 below.

7.4 Annual Review a Non-Exclusive Means for Determining and Requiring Cure of Developer's Default.

The annual review procedures set forth in this Article 7 shall not be the exclusive means for City to identify a Default by Developer or limit City's rights or remedies for any such Default.

8. Events of Default.

8.1 General Provisions.

In the event of any material default, breach, or violation of the terms of this Agreement ("Default"), the Party alleging a Default shall deliver a written notice (each, a "Notice of Default") to the defaulting Party. The Notice of Default shall specify the nature of the alleged Default and a reasonable manner and sufficient period of time (twenty (20) calendar days if the Default relates to the failure to timely make a monetary payment due hereunder and not less than thirty (30) calendar days in the event of non-monetary Defaults) in which the Default must be cured ("Cure Period"). During the Cure Period, the Party charged shall not be considered in Default for the purposes of termination of this Agreement or institution of legal proceedings. If the alleged Default is cured within the Cure Period, then the Default thereafter shall be deemed not to exist. If a non-monetary Default cannot be cured during the Cure Period with the exercise of commercially reasonable diligence, the defaulting Party must promptly commence to cure as quickly as possible, and in no event later than thirty (30) calendar days after it receives the Notice of Default, and thereafter diligently pursue said cure to completion. Notwithstanding the foregoing, the City is not required to give Developer notice of default and may immediately pursue remedies for a Developer Default that result in an immediate threat to public health, safety or welfare.

8.2 Default by Developer.

If Developer is alleged to have committed Default and it disputes the claimed Default, it may make a written request for an appeal hearing before the City Council within ten (10) calendar days of receiving the Notice of Default, and a public hearing shall be scheduled at the next available City Council meeting to consider Developer's appeal of the Notice of Default. Failure to appeal a Notice of Default to the City Council within the ten (10) calendar day period shall waive any right to a hearing on the claimed Default. If Developer's appeal of the Notice of Default is timely and in good faith but after a public hearing of Developer's appeal the City Council concludes that Developer is in Default as alleged in the Notice of Default, the accrual date for commencement of the thirty (30) calendar day Cure Period provided in Section 8.1 shall be extended until the City Council's denial of Developer's appeal is communicated to Developer in writing.

8.3 City's Option to Terminate Agreement.

In the event of an alleged Developer Default, City may not terminate this Agreement without first delivering a written Notice of Default and providing Developer with the opportunity to cure the Default within the Cure Period, as provided in Section 8.1, and complying with Section 8.2 if Developer timely appeals any Notice of Default. A termination of this Agreement by City shall be valid only if good cause exists and is supported by evidence presented to the

City Council at or in connection with a duly noticed public hearing to establish the existence of a Default. The validity of any termination may be judicially challenged by Developer. Any such judicial challenge must be brought within ninety (90) calendar days of service on Developer, by first class mail, postage prepaid, of written notice of termination by City or a written notice of City's determination of an appeal of the Notice of Default as provided in Section 8.2.

8.4 Default by City.

If Developer alleges a City Default and alleges that the City has not cured the Default within the Cure Period, Developer may pursue any legal or equitable remedy available to it, including, without limitation, an action for a writ of mandamus, injunctive relief, or specific performance of City's obligations set forth in this Agreement. Upon a City Default, any resulting delays in Developer's performance hereunder shall neither be a Developer Default nor constitute grounds for termination or cancellation of this Agreement by City and shall, at Developer's option (and provided Developer delivers written notice to City within thirty (30) calendar days of the commencement of the alleged City Default), extend the Term for a period equal to the length of the delay.

8.5 Waiver.

Failure or delay by any Party in delivering a Notice of Default shall not waive that Party's right to deliver a future Notice of Default of the same or any other Default.

8.6 Specific Performance Remedy.

Due to the size, nature, and scope of the Project, it will not be practical or possible to restore the Property to its pre-existing condition once implementation of this Agreement has begun. After such implementation, both Developer and City may be foreclosed from other choices they may have had to plan for the development of the Property, to utilize the Property or provide for other benefits and alternatives. Developer and City have invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement. It is not possible to determine the sum of money which would adequately compensate Developer or City for such efforts. For the above reasons, except as set forth in Section 8.7, City and Developer agree that damages would not be an adequate remedy if either City or Developer fails to carry out its obligations under this Agreement. Therefore, except as set forth in Section 8.7, specific performance of this Agreement is necessary to compensate Developer if City fails to carry out its obligations under this Agreement or to compensate City if Developer falls to carry out its obligations under this Agreement.

8.7 Monetary Damages.

The Parties agree that monetary damages shall not be an available remedy for any Party for a Default hereunder by the other Party; provided, however, that (i) nothing in this Section 8.7 is intended or shall be interpreted to limit or restrict City's right to recover the Public Benefit Fees due from Developer as set forth herein; and (ii) nothing in this Section 8.7 is intended or shall be interpreted to limit or restrict Developer's indemnity obligations set forth in Article 10 or the right of the prevailing Party in any Action to recover its litigation expenses, as set forth in

Section 8.10. In no event shall damages be awarded against the City upon an event of default or upon termination of this Agreement. Developer expressly agrees that the City, any City agencies and their respective elected and appointed councils, boards, commissions, officers, agents, employees, volunteers and representatives (collectively, for purposes of this Section 8.7, "City") shall not be liable for any monetary damage for a Default by the City or any claims against City arising out of this Agreement. Developer hereby expressly waives any such monetary damages against the City. The sole and exclusive judicial remedy for Developer in the event of a Default by the City shall be an action in mandamus, specific performance, or other injunctive or declaratory relief.

8.8 Additional City Remedy for Developer's Default.

In the event of any Default by Developer, in addition to any other remedies which may be available to City, whether legal or equitable, City shall be entitled to receive and retain any Development Exactions applicable to the Project or the Property, including any fees, grants, dedications, or improvements to public property which it may have received prior to Developer's Default without recourse from Developer or its successors or assigns.

8.9 No Personal Liability of City Officials, Employees, or Agents.

No City official, employee, or agent shall have any personal liability hereunder for a Default by City of any of its obligations set forth in this Agreement.

8.10 No Recovery of Legal Expenses by Prevailing Party in Any Action.

In any judicial proceeding, arbitration, or mediation (collectively, an "Action") between the Parties that seeks to enforce the provisions of this Agreement or arises out of this Agreement, the prevailing Party shall not recover any of its costs and expenses, regardless of whether they would be recoverable under California Code of Civil Procedure section 1033.5 or California Civil Code section 1717 in the absence of this Agreement. These costs and expenses include, but are not limited to, court costs, expert witness fees, attorneys' fees, City staff costs (including overhead), and costs of investigation and preparation before initiation of the Action.

9. Force Majeure.

No Party shall be deemed to be in Default where failure or delay in performance of any of its obligations under this Agreement is caused, through no fault of the Party whose performance is prevented or delayed, by floods, earthquakes, other acts of God, fires, wars, riots or similar hostilities, strikes or other labor difficulties, state or federal regulations, or court actions. Except as specified above, nonperformance shall not be excused because of the act or omission of a third person. In no event shall the occurrence of an event of force majeure operate to extend the Term of this Agreement. In addition, in no event shall the time for performance of a monetary obligation, including without limitation Developer's obligation to pay Public Benefit Fees, be extended pursuant to this Section.

10. Indemnity Obligations of Developer.

10.1 Indemnity Arising From Acts or Omissions of Developer.

Except to the extent caused by the intentional misconduct or gross negligent acts, errors or omissions of City or one (1) or more of City's officials, employees, agents, attorneys, and contractors (collectively, the "City's Affiliated Parties"), Developer shall indemnify, defend, and hold harmless City and City's Affiliated Parties from and against all suits, claims, liabilities, losses, damages, penalties, obligations, and expenses (including but not limited to reasonable attorneys' fees and costs) (collectively, a "Claim") that may arise, directly or indirectly, from the acts, omissions, or operations of Developer or Developer's agents, contractors, subcontractors, agents, or employees in the course of Development of the Project or any other activities of Developer relating to the Property or Project, or pursuant to this Agreement. City shall be entitled to retain separate counsel to represent City against the Claim and the City's reasonable defense costs for its separate counsel shall be included in Developer's indemnity obligation, provided that such counsel shall reasonably cooperate with Developer in an effort to minimize the total litigation expenses incurred by Developer. In the event either City or Developer recovers any attorney's fees, expert witness fees, costs, interest, or other amounts from the party or parties asserting the Claim, Developer shall be entitled to retain the same (provided it has fully performed its indemnity obligations hereunder). The indemnity provisions in this Section 10.1 shall commence on the Agreement Date, regardless of whether the Effective Date occurs, and shall survive the Termination Date.

10.2 Third Party Litigation.

In addition to its indemnity obligations set forth in Section 10.1, Developer shall indemnify, defend, and hold harmless City and City's Affiliated Parties from and against any Claim against City or City's Affiliated Parties seeking to attack, set aside, void, or annul the approval of this Agreement, the Adopting Ordinance, any of the Development Plan approvals for the Project (including without limitation any actions taken pursuant to CEQA with respect thereto), any Subsequent Development Approval, or the approval of any permit granted pursuant to this Agreement. Said indemnity obligation shall include payment of reasonable attorney's fees, expert witness fees, City staff costs (including overhead), and court costs. City shall promptly notify Developer of any such Claim and City shall cooperate with Developer in the defense of such Claim. Developer shall not be responsible to indemnify, defend, and hold City harmless from such Claim until Developer is so notified and if City fails to cooperate in the defense of a Claim Developer shall not be responsible to defend, indemnify, and hold harmless City during the period that City so fails to cooperate or for any losses attributable thereto. City shall be entitled to retain separate counsel to represent City against the Claim and the City's reasonable defense costs for its separate counsel shall be included in Developer's indemnity obligation, provided that such counsel shall reasonably cooperate with Developer in an effort to minimize the total litigation expenses incurred by Developer. In the event either City or Developer recovers any attorney's fees, expert witness fees, costs, interest, or other amounts from the party or parties asserting the Claim, Developer shall be entitled to retain the same (provided it has fully performed its indemnity obligations hereunder). No settlement of any Claim against City or City's Affiliated Parties shall be executed without the written consent of both the City and Developer. The indemnity provisions in this Section 10.2 shall commence on the Agreement Date, regardless of whether the Effective Date occurs, and shall survive the Termination Date.

10.3 Environmental Indemnity.

In addition to its indemnity obligations set forth in Section 10.1, from and after the Effective Date Developer shall indemnify, defend, and hold harmless City and City's Affiliated Parties from and against any and all Claims for personal injury or death, property damage, economic loss, statutory penalties or fines, and damages of any kind or nature whatsoever, including without limitation reasonable attorney's fees, expert witness fees, and costs, based upon or arising from any of the following: (i) the actual or alleged presence of any Hazardous Substance on or under any of the Property in violation of any applicable Environmental Law; (ii) the actual or alleged migration of any Hazardous Substance from the Property through the soils or groundwater to a location or locations off of the Property; and (iii) the storage, handling, transport, or disposal of any Hazardous Substance on, to, or from the Property and any other area disturbed, graded, or developed by Developer in connection with Developer's Development of the Project. The indemnity provisions in this Section 10.3 shall commence on the Effective Date occurs, and shall survive the Termination Date.

11. Assignment.

Developer shall have the right to sell, transfer, or assign (hereinafter, collectively, a "Transfer") Developer's interest in or fee title to the Property, in whole or in part, to a "Permitted Transferee" (which successor, as of the effective date of the Transfer, shall become the "Developer" under this Agreement) at any time from the Agreement Date until the Termination Date; provided, however, that no such Transfer shall violate the provisions of the Subdivision Map Act (Government Code Section 66410 *et seq.*) or City's local subdivision ordinance and any such transfer shall include the assignment and assumption of Developer's rights, duties, and obligations set forth in or arising under this Agreement as to the Property or the portion thereof so Transferred and shall be made in strict compliance with the following conditions precedent: (i) no transfer or assignment of any of Developer's rights or interest under this Agreement shall be made unless made together with the Transfer of all or a part of Developer's interest in the Property; and (ii) prior to the effective date of any proposed Transfer, Developer (as transferor) shall notify City, in writing, of such proposed Transfer and deliver to City a written assignment and assumption, executed in recordable form by the transferring and successor Developer and in a form subject to the reasonable approval of the City Attorney of City (or designee), pursuant to which the transferring Developer assigns to the successor Developer and the successor Developer assumes from the transferring Developer all of the rights and obligations of the transferring Developer with respect to the Property and this Agreement, or interest in the Property, or portion thereof to be so Transferred, including in the case of a partial Transfer the obligation to perform such obligations that must be performed outside of the Property so Transferred that are a condition precedent to the successor Developer's right to develop the portion of the Property so Transferred. Any Permitted Transferee shall have all of the same rights, benefits, duties, obligations, and liabilities of Developer under this Agreement with respect to the portion of, or interest in, the Property sold, transferred, and assigned to such Permitted Transferee; provided, however, that in the event of a Transfer of less than all of the Property, or interest in the Property, no such Permitted Transferee shall have the right to enter into an amendment of this Agreement that jeopardizes or impairs the rights or increases the obligations of the Developer with respect to the balance of the Property, without Developer's written consent.

Notwithstanding any Transfer, the transferring Developer shall continue to be jointly and severally liable to City, together with the successor Developer, to perform all of the transferred

obligations set forth in or arising under this Agreement unless there is full satisfaction of all of the following conditions, in which event the transferring Developer shall be automatically released from any and all obligations with respect to the portion of the Property so Transferred: (i) the transferring Developer no longer has a legal or equitable interest in the portion of the Property so Transferred other than as a beneficiary under a deed of trust; (ii) the transferring Developer is not then in Default under this Agreement and no condition exists that with the passage of time or the giving of notice, or both, would constitute a Default hereunder; (iii) the transferring Developer has provided City with the notice and the fully executed written and recordable assignment and assumption agreement required as set forth in the first paragraph of this Section 11; and (iv) the successor Developer either (A) provides City with substitute security equivalent to any security previously provided by the transferring Developer to City to secure performance of the successor Developer's obligations hereunder with respect to the Property, or interest in the Property, or the portion of the Property so Transferred, as determined in the City's sole discretion, or (B) if the transferred obligation in question is not a secured obligation, the successor Developer either provides security reasonably satisfactory to City or otherwise demonstrates to City's reasonable satisfaction, as determined in the City's sole discretion, that the successor Developer has the financial resources or commitments available to perform the transferred obligation at the time and in the manner required under this Agreement and the Development Regulations for the Project. Any determination by the City in regards to the second paragraph of Section 11, subpart (iv) (A), (B), shall be documented in writing.

12. Mortgagee Rights.

12.1 Encumbrances on Property.

The Parties agree that this Agreement shall not prevent or limit Developer in any manner from encumbering the Property, any part of the Property, or any improvements on the Property with any Mortgage securing financing with respect to the construction, development, use, or operation of the Project.

12.2 Mortgagee Protection.

This Agreement shall be superior and senior to the lien of any Mortgage. Nevertheless, no breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any Mortgage made in good faith and for value. Any acquisition or acceptance of title or any right or interest in the Property or part of the Property by a Mortgagee (whether due to foreclosure, trustee's sale, deed in lieu of foreclosure, lease termination, or otherwise) shall be subject to all of the terms and conditions of this Agreement. Any Mortgagee who takes title to the Property or any part of the Property shall be entitled to the benefits arising under this Agreement.

12.3 Mortgagee Not Obligated.

Notwithstanding the provisions of this Section 12.3, a Mortgagee will not have any obligation or duty under the terms of this Agreement to perform the obligations of Developer or other affirmative covenants of Developer, or to guarantee this performance except that: (i) the Mortgagee shall have no right to develop the Project under the Development Regulations without fully complying with the terms of this Agreement; and (ii) to the extent that any covenant to be

performed by Developer is a condition to the performance of a covenant by City, that performance shall continue to be a condition precedent to City's performance.

12.4 Notice of Default to Mortgagee; Right of Mortgagee to Cure.

Each Mortgagee shall, upon written request to City, be entitled to receive written notice from City of: (i) the results of the periodic review of compliance specified in Article 7 of this Agreement, and (ii) any default by Developer of its obligations set forth in this Agreement.

Each Mortgagee shall have a further right, but not an obligation, to cure the Default within thirty (30) calendar days after receiving a Notice of Default with respect to a monetary Default and within sixty (60) calendar days after receiving a Notice of Default with respect to a non-monetary Default. If the Mortgagee can only remedy or cure a non-monetary Default by obtaining possession of the Property, then the Mortgagee shall have the right to seek to obtain possession with diligence and continuity through a receiver or otherwise, and to remedy or cure the non-monetary Default within sixty (60) calendar days after obtaining possession and, except in case of emergency or to protect the public health or safety, City may not exercise any of its judicial remedies set forth in this Agreement to terminate or substantially alter the rights of the Mortgagee until expiration of the sixty (60) calendar day period. In the case of a non-monetary Default that cannot with diligence be remedied or cured within sixty (60) calendar days, the Mortgagee shall have additional time as is reasonably necessary to remedy or cure the Default, provided the Mortgagee promptly commences to cure the non-monetary Default within sixty (60) calendar days and diligently prosecutes the cure to completion.

13. Bankruptcy. The obligations of this Agreement shall not be dischargeable in bankruptcy.

14. Miscellaneous Terms.

14.1 Reserved

14.2 Notices.

Any notice or demand that shall be required or permitted by law or any provision of this Agreement shall be in writing. If the notice or demand will be served upon a Party, it either shall be personally delivered to the Party; deposited in the United States mail, certified, return receipt requested, and postage prepaid; or delivered by a reliable courier service that provides a receipt showing date and time of delivery with courier charges prepaid. The notice or demand shall be addressed as follows:

TO CITY:	City of Newport Beach 100 Civic Center Drive Newport Beach, California 92660 Attn: City Manager
With a copy to:	City Attorney City of Newport Beach 100 Civic Center Drive Newport Beach, California 92660

TO DEVELOPER:	Robert Eres Vivante Newport Center, LLC 1 MacArthur Place, Suite 300 Santa Ana, CA 92707
With a copy to:	Sean Matsler, Esq. Cox, Castle & Nicholson LLP 3121 Michelson Drive, Ste. 200 Irvine, CA 92612

Any Party may change the address stated in this Section 14.2 by delivering notice to the other Parties in the manner provided in this Section 14.2, and thereafter notices to such Party or Parties shall be addressed and submitted to the new address. Notices delivered in accordance with this Agreement shall be deemed to be delivered upon the earlier of: (i) the date received, or (ii) three business days after deposit in the mail as provided above.

14.3 Project as Private Undertaking.

The Development of the Project is a private undertaking. Neither the Developer nor the City is acting as the agent of the other in any respect, and each is an independent contracting entity with respect to the terms, covenants, and conditions set forth in this Agreement. This Agreement forms no partnership, joint venture, or other association of any kind. The only relationship between the Parties is that of a government entity regulating the Development of private property by the owner of the property.

14.4 Cooperation.

Each Party shall cooperate with and provide reasonable assistance to the other Party to the extent consistent with and necessary to implement this Agreement. Upon the request of a Party at any time, the other Party shall promptly execute, with acknowledgement or affidavit if reasonably required, and file or record the required instruments and writings and take any actions as may be reasonably necessary to implement this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

14.5 Estoppel Certificates.

At any time, any Party may deliver written notice to the other Party requesting that that Party certify in writing that, to the best of its knowledge: (i) this Agreement is in full force and effect and is binding on the Party; (ii) this Agreement has not been amended or modified either orally or in writing or, if this Agreement has been amended, the Party providing the certification shall identify the amendments or modifications; and (iii) the requesting Party is not in Default in the performance of its obligations under this Agreement and no event or situation has occurred that with the passage of time or the giving of Notice or both would constitute a Default or, if such is not the case, then the other Party shall describe the nature and amount of the actual or prospective Default.

The Party requested to furnish an estoppel certificate shall execute and return the certificate within thirty (30) calendar days following receipt.

14.6 Rules of Construction.

The singular includes the plural; the masculine and neuter include the feminine; "shall" is mandatory; and "may" is permissive.

14.7 Time Is of the Essence.

Time is of the essence regarding each provision of this Agreement as to which time is an element.

14.8 Waiver.

The failure by a Party to insist upon the strict performance of any of the provisions of this Agreement by the other Party, and failure by a Party to exercise its rights upon a Default by the other Party, shall not constitute a waiver of that Party's right to demand strict compliance by the other Party in the future.

14.9 Counterparts.

This Agreement may be executed in two (2) or more counterparts, each of which shall be identical and may be introduced in evidence or used for any other purpose without any other counterpart, but all of which shall together constitute one (1) and the same agreement.

14.10 Entire Agreement.

This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter addressed in this Agreement.

14.11 Severability.

The Parties intend that each and every obligation of the Parties is interdependent and interrelated with the other, and if any provision of this Agreement or the application of the provision to any Party or circumstances shall be held invalid or unenforceable to any extent, it is the intention of the Parties that the remainder of this Agreement or the application of the provision to persons or circumstances shall be rendered invalid or unenforceable. The Parties intend that no Party shall receive any of the benefits of the Agreement without the full performance by such Party of all of its obligations provided for under this Agreement. Without limiting the generality of the foregoing, the Parties intend that Developer shall not receive any of the benefits of this Agreement if any of Developer's obligations are rendered void or unenforceable as the result of any third party litigation, and City shall be free to exercise its legislative discretion to amend or repeal the Development Regulations applicable to the Property and Developer shall cooperate as required, despite this Agreement, should third party litigation result in the nonperformance of Developer's obligations under this Agreement. The provisions of this Section 14.11 shall apply regardless of whether the Effective Date occurs and after the Termination Date.

14.12 Construction.

This Agreement has been drafted after extensive negotiation and revision. Both City and Developer are sophisticated parties who were represented by independent counsel throughout the negotiations or City and Developer had the opportunity to be so represented and voluntarily chose to not be so represented. City and Developer each agree and acknowledge that the terms of this Agreement are fair and reasonable, taking into account their respective purposes, terms, and conditions. This Agreement shall therefore be construed as a whole consistent with its fair meaning, and no principle or presumption of contract construction or interpretation shall be used to construe the whole or any part of this Agreement in favor of or against any Party.

14.13 Successors and Assigns; Constructive Notice and Acceptance.

The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the Parties to this Agreement. Except for those provisions relating to indemnity in Section 10, all other provisions of this Agreement shall, from and after the Effective Date hereof, be enforceable as equitable servitudes and constitute covenants running with the land. Subject to occurrence of the Effective Date, each covenant to do or refrain from doing some act hereunder with regard to Development of the Property: (i) is for the benefit of and is a burden upon every portion of the Property; (ii) runs with the Property and each portion thereof; and (iii) is binding upon each Party and each successor in interest during its ownership of the Property or any portion thereof. Every person or entity who now or later owns or acquires any right, title, or interest in any part of the Project or the Property is and shall be conclusively deemed to have consented and agreed to every provision of this Agreement. This Section 14.13 applies regardless of whether the instrument by which such person or entity acquires the interest refers to or acknowledges this Agreement and regardless of whether such person or entity has expressly entered into an assignment and assumption agreement as provided for in Section 11.

14.14 No Third Party Beneficiaries.

The only Parties to this Agreement are City and Developer. This Agreement does not involve any third party beneficiaries, and it is not intended and shall not be construed to benefit or be enforceable by any other person or entity.

14.15 Applicable Law and Venue.

This Agreement shall be construed and enforced consistent with the laws of the State of California, without regard to conflicts of law principles. Any action at law or in equity arising under this Agreement or brought by any Party for the purpose of enforcing, construing, or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Orange, State of California, or the United States District Court for the Central District of California. The Parties waive all provisions of law providing for the removal or change of venue to any other court.

14.16 Section Headings.

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

14.17 Incorporation of Recitals and Exhibits.

All of the Recitals are incorporated into this Agreement by this reference.

14.18 Recordation.

The City Clerk of City shall record this Agreement and any amendment, modification, or cancellation of this Agreement in the Office of the County Recorder of the County of Orange within the period required by California Government Code section 65868.5 and City of Newport Beach Municipal Code section 15.45.090. The date of recordation of this Agreement shall not modify or amend the Effective Date or the Termination Date.

[SIGNATURE PAGE FOLLOWS]

SIGNATURE PAGE TO DEVELOPMENT AGREEMENT

"DEVELOPER"

VIVANTE NEWPORT CENTER, LLC, a Delaware limited liability company

By: _____
Name: Curtis R. Olson
Title: President

By: _____
Name: Matthew B. Kaufman
Title: Secretary & Treasurer

"CITY"

CITY OF NEWPORT BEACH, a municipal corporation and charter city

_____
Diane B. Dixon, Mayor

ATTEST:

_____
Leilani I. Brown, City Clerk

APPROVED AS TO FORM:

for _____
Aaron C. Harp, City Attorney

_____
Sean Matsler, Attorney for Developer

ACKNOWLEDGEMENTS

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

STATE OF CALIFORNIA
COUNTY OF Orange

On September 4, 2019, before me, Lisa E. Empting **NOTARY PUBLIC**
(here insert name and title of the officer)

personally appeared Curtis Ryan Olson

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

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

WITNESS my hand and official seal.

Lisa E Empting
Signature (Seal)

LISA E. EMPTING
Notary Public - California
Orange County
Commission # 2294076
My Comm. Expires Jun 20, 2023

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

STATE OF CALIFORNIA
COUNTY OF Orange

On September 4, 2019, before me, Lisa E. Empting **NOTARY PUBLIC**
(here insert name and title of the officer)

personally appeared Matthew Brett Kaufman

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

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

WITNESS my hand and official seal.

Lisa E. Empting
Signature (Seal)

LISA E. EMPTING
Notary Public - California
Orange County
Commission # 2294076
My Comm. Expires Jun 20, 2023

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

PARCEL A:

PARCEL 2, IN THE CITY OF NEWPORT BEACH, COUNTY OF ORANGE, STATE OF CALIFORNIA, AS
SHOWN ON A MAP FILED IN BOOK 81, PAGES 8 AND 9 OF PARCEL MAPS, IN THE OFFICE OF
THE COUNTY RECORDER OF ORANGE COUNTY, CALIFORNIA.

EXCEPTING THEREFROM ALL OIL, OIL RIGHTS, GAS, MINERALS, MINERAL RIGHTS, NATURAL
GAS RIGHTS, AND OTHER HYDROCARBON SUBSTANCES IN AND UNDER SAID LAND, AND THE
RIGHT TO GRANT AND TRANSFER THE SAME, TOGETHER WITH ALL NECESSARY AND
CONVENIENT RIGHTS TO EXPLORE FOR, DEVELOP, PRODUCE AND EXTRACT AND TAKE THE
SAME, SUBJECT TO THE EXPRESS LIMITATION THAT ANY AND ALL OPERATIONS FOR THE
EXPLORATION, DEVELOPMENT, PRODUCTION, EXTRACTION AND TAKING OF ANY OF SAID
SUBSTANCES SHALL BE CARRIED ON AT LEVELS BELOW THE DEPTH OF FIVE HUNDRED (500)
FEET FROM THE SURFACE OF SAID LAND BY MEANS OF WELLS, DERRICK AND/OR OTHER
EQUIPMENT FROM SURFACE LOCATIONS ON ADJOINING OR NEIGHBORING LAND, AND
SUBJECT FURTHER TO THE EXPRESS LIMITATION THAT THE FOREGOING RESERVATION SHALL
IN NO WAY BE INTERPRETED TO INCLUDE ANY RIGHT OF ENTRY IN AND UPON THE SURFACE
OF SAID LAND, AS RESERVED BY THE IRVINE COMPANY, A CORPORATION ORGANIZED UNDER
THE LAWS OF THE STATE OF WEST VIRGINIA IN A DEED RECORDED FEBRUARY 28, 1977 AS
INSTRUMENT NO. 35908 IN BOOK 12085, PAGE 1561 OF OFFICIAL RECORDS.

APN: 442-261-05

PARCEL B:

PARCEL 2 AS SHOWN ON EXHIBIT 'B' OF NEWPORT BEACH LOT LINE ADJUSTMENT NO. 95-3

RECORDED OCTOBER 31, 1995 AS INSTRUMENT NO. 19950483821 OF OFFICIAL RECORDS OF ORANGE COUNTY, CALIFORNIA, IN THE CITY OF NEWPORT BEACH, COUNTY OF ORANGE,
STATE OF CALIFORNIA.

EXCEPTING THEREFROM ALL OIL, OIL RIGHTS, MINERALS, MINERAL RIGHTS, NATURAL GAS
RIGHTS AND OTHER HYDROCARBONS BY WHATSOEVER NAME KNOWN, GEOTHERMAL STEAM,
AND ALL PRODUCTS DERIVED FROM ANY OF THE FOREGOING, THAT MAY BE WITHIN OR
UNDER THE LAND, TOGETHER WITH THE PERPETUAL RIGHT OF DRILLING, MINING,
EXPLORING AND OPERATING THEREFOR, AND STORING IN AND REMOVING THE SAME FROM
SAID LAND OR ANY OTHER LAND, INCLUDING THE RIGHT TO WHIPSTOCK OR DIRECTIONALLY
DRILL AND MINE FROM LANDS OTHER THAN THE LAND, OIL OR GAS WELLS, TUNNELS AND
SHAFTS INTO, THROUGH OR ACROSS THE SUBSURFACE OF THE LAND, AND TO BOTTOM SUCH
WHIPSTOCKED OR DIRECTIONALLY DRILLED WELLS, TUNNELS AND SHAFTS UNDER AND
BENEATH OR BEYOND THE EXTERIOR LIMITS THEREOF, AND TO REDRILL, RETUNNEL, EQUIP,
MAINTAIN, REPAIR, DEEPEN AND OPERATE ANY SUCH WELLS OR MINES, WITHOUT,
HOWEVER, THE RIGHT TO DRILL, MINE, STORE, EXPLORE AND OPERATE THROUGH THE
SURFACE OR THE UPPER 500 FEET OF THE SUBSURFACE OF THE LAND, AS RESERVED BY THE
IRVINE COMPANY, A MICHIGAN CORPORATION IN A DEED RECORDED NOVEMBER 22, 1995 AS
INSTRUMENT NO. 19950519960 OF OFFICIAL RECORDS.

ALSO EXCEPTING THEREFROM ANY AND ALL WATER, WATER RIGHTS OR INTERESTS THEREIN
APPURTENANT OR RELATING TO THE LAND OR OWNED OR USED BY THE IRVINE COMPANY IN
CONNECTION WITH OR WITH RESPECT TO THE LAND (NO MATTER HOW ACQUIRED BY THE
IRVINE COMPANY), WHETHER SUCH WATER RIGHTS SHALL BE RIPARIAN, OVERLYING,
APPROPRIATIVE, LITTORAL, PERCOLATING, PRESCRIPTIVE, ADJUDICATED, STATUTORY OR
CONTRACTUAL, TOGETHER WITH THE RIGHT AND POWER TO EXPLORE, DRILL, REDRILL,

REMOVE AND STORE THE SAME FROM OR IN THE LAND OR TO DIVERT OR OTHERWISE
UTILIZE SUCH WATER, RIGHTS OR INTERESTS ON ANY OTHER PROPERTY OWNED OR LEASED
BY THE IRVINE COMPANY; BUT WITHOUT, HOWEVER, ANY RIGHT TO ENTER UPON THE
SURFACE OF THE LAND IN THE EXERCISE OF SUCH RIGHTS, AS RESERVED BY THE IRVINE
COMPANY, A MICHIGAN CORPORATION IN A DEED RECORDED NOVEMBER 22, 1995 AS
INSTRUMENT NO. 19950519960 OF OFFICIAL RECORDS.

APN: 442-261-17

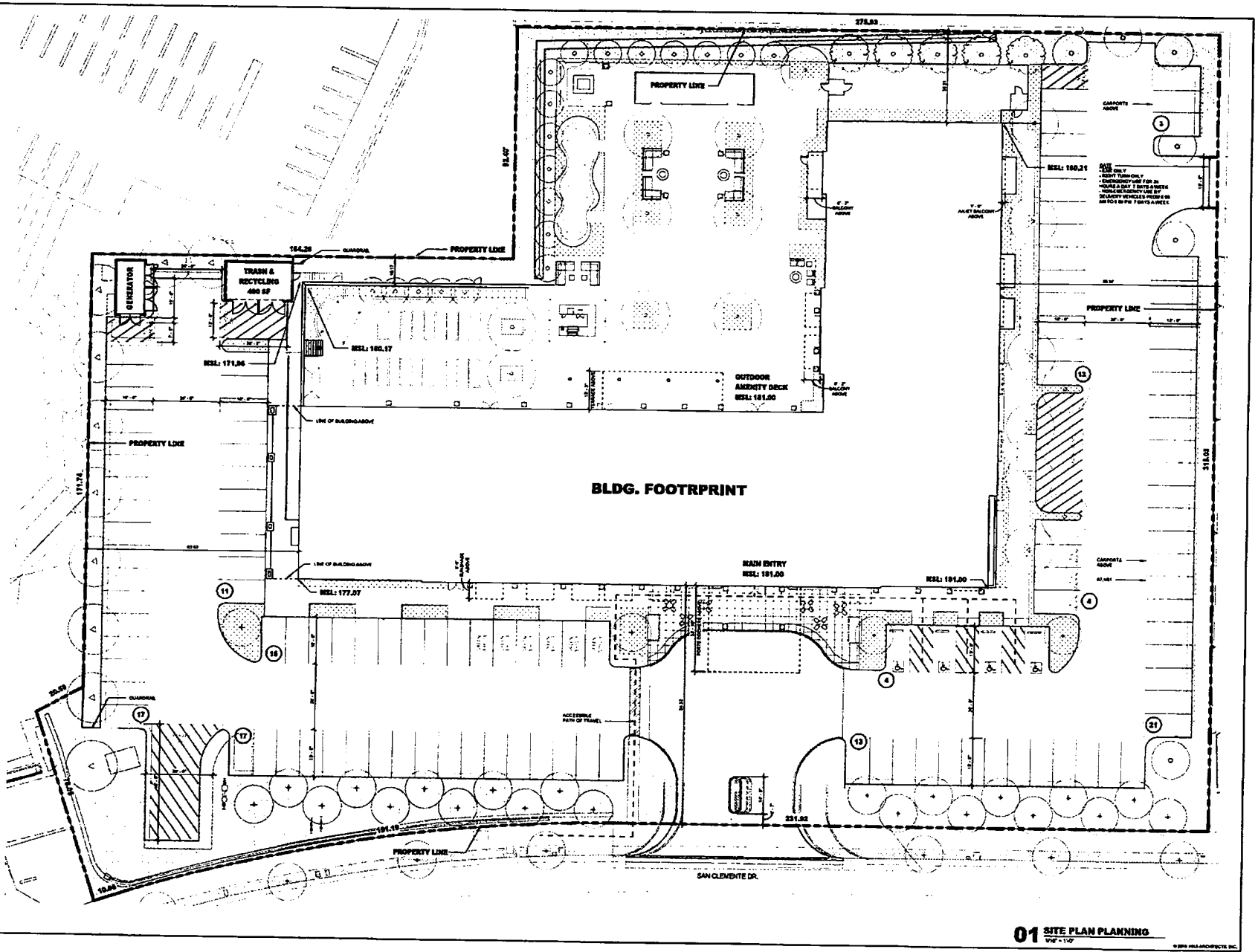
PARCEL B1:

AN APPURTENANT NON-EXCLUSIVE JOINT ACCESS EASEMENT FOR ACCESS, INGRESS AND
EGRESS OVER THAT PORTION OF PARCEL 1 AS SHOWN ON EXHIBIT "B" OF NEWPORT BEACH
LOT LINE ADJUSTMENT NO. 95-3 RECORDED OCTOBER 31, 1995 AS INSTRUMENT NO.
19950483821 OF OFFICIAL RECORDS, AS MORE FULLY DESCRIBED IN THE DECLARATION OF
EASEMENTS RECORDED OCTOBER 31, 1995 AS INSTRUMENT NO. 19950484848 OF OFFICIAL
RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT THE MOST SOUTHERLY SOUTHEASTERLY CORNER OF SAID PARCEL 1; THENCE
NORTHERLY ALONG THE EASTERLY PARCEL LINE OF SAID PARCEL 1 NORTH 07° 03' 01" WEST
55.00 FEET; THENCE SOUTH 82° 56' 59" WEST 65.00 FEET; THENCE SOUTH 07° 03' 01" EAST
55.00 FEET TO A POINT ON THE MOST SOUTHERLY LINE OF SAID PARCEL 1, SAID POINT
BEING ALSO ON THE MOST NORTHERLY RIGHT OF WAY LINE OF SAN CLEMENTE DRIVE;
THENCE EASTERLY ALONG SAID SOUTHERLY LINE AND SAID RIGHT OF WAY LINE NORTH 82°
56' 59" EAST 65.00 FEET TO THE POINT OF BEGINNING.

EXHIBIT B

SITE MAP



01 SITE PLAN PLANNING
1/16" = 1'-0"

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HKS

ARCHITECT
HKS ARCHITECTS, INC.
SAN FRANCISCO CA 94107

LANDSCAPE
PERRY DUNN & ASSOCIATES
SAN RAFAEL, CA 94901

STRUCTURAL ENGINEER
SAN FRANCISCO CA 94111

MEP ENGINEER
SCHWAGEL ENGINEERS
PASADENA, CA 91104

OWNER
NEXUS COMPANIES
SANTA ANA, CA 92707

OWNER CONSULTANTS

CIVIL ENGINEER
TAIT & ASSOCIATES, INC
SANTA ANA, CA 92705

UTILITY ENGINEER
ASSOCIATES, INC
TEMECULA, CA 92590

GEOTECHNICAL ENGINEER
GEOTECHNICAL PROFESSIONALS INC. (GPI)
CYPRESS, CA 90630

VIVANTE - SENIOR ASSISTED LIVING
NEWPORT BEACH, CA

REVISION
NO DESCRIPTION DATE

HKS PROJECT NUMBER
22222
DATE
06/28/19
ISSUE
ENTITLEMENT
RESUBMITTAL 3
SHEET TITLE
SITE PLAN

SHEET NO
A2.0

EXHIBIT C

VESTED DEVELOPMENT IMPACT FEES

Impact Fee Estimate:

- **Fair Share Fees**

  $895 per dwelling unit (elderly residential) x 90 DU
  =$80,550
  Credit applied for existing nonresidential floor area

- **San Joaquin Transportation Corridor Fees-Zone B**

  $2,595/DU x 0.5 x 99DU = **$128,452.50 (in accordance with interpretation 87-1, fees for congregate care are charged at the multi-family rate times one half of the total number of dwelling units)**

  No credit applied for existing floor area since property is currently tax exempt