

CHICAGO TITLE COMPANY,

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City Clerk
City of Newport Beach
P.O. Box 1768
3300 Newport Boulevard
Newport Beach, CA, 92658-1768

Recorded in the County of Orange, California
Gary L. Granville, Clerk/Recorder



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Space Above This Line for Recorder's Use Only

DEVELOPMENT AGREEMENT NO. 10
BETWEEN THE CITY OF NEWPORT BEACH
AND
NEWPORT HARBOR LUTHERAN CHURCH

48

This document filed for record as an accommodation only. It has not been examined as to its execution or as to its effect upon the title.

Ordinance No. 97-22

Approved June 23, 1997

This Development Agreement is entered into between the City of Newport Beach (City) and the Newport Harbor Lutheran Church (Church).

1. RECITALS

1.1 Purpose of Agreement. This Agreement is intended to:

- a. Grant vested development rights to Church for the expansion of its facilities and uses on Church Property;
- b. Provide for Church's conveyance to City of approximately .65 acres of Church Property for use as a public parking facility to serve Bob Henry Park and the Castaways Park in consideration of City's conveyance to Church of at least .65 acres of City Property;
- c. Provide for the construction of parking areas and other improvements on Church Property to, among other things, replace existing parking spaces located on the property conveyed to City, restore or replace other Church improvements impacted by City's project and/or in consideration for the exchange of property.

- d. Provide public benefits to City and its residents by facilitating the conveyance of Church Property which, when improved, will provide parking for, and access to, Bob Henry Park and Castaways Park.
 - e. Document the understandings pursuant to which City and Church shall work cooperatively to assure that the respective development plans of both Parties are compatible with the objectives and interests of the other.
- 1.2 Authorization. This Agreement is authorized by, and is consistent with, the provisions of Section 65864 et seq. of the Government Code of the State of California, and Chapter 15.45 of the Newport Beach Municipal Code.
- 1.3 Interests of Church. Church is the legal and/or equitable owner of approximately 3.0 acres of real property located in City and more particularly described in **Exhibit "A"**.
- 1.4 Planning Commission/City Council Hearings. The Planning Commission, after giving appropriate notice, held public hearings to consider this Agreement on June 23, 1997. The City Council conducted public hearings on this Agreement on June 23, 1997.
- 1.5 Consistency. This Agreement is consistent with the various elements of the Newport Beach General Plan, and other applicable ordinances, plans, and policies of City. This Agreement is also consistent with the purpose and intent of State and local laws authorizing development agreements in that this Agreement: (a) provides significant public benefits (as more fully described in Section 1.6); (b) provides certainty relative to Church's expansion of facilities on its Property; (c) reduces the economic cost of development by Church and reduces the cost to City of acquiring Church-owned property and constructing public improvements; (d) provides assurance to Church that it may proceed with expansion of its facilities in accordance with Existing General Regulations and the Terms of this Agreement and; (e) provides assurance to adjoining property owners that future development and expansion of Church facilities will occur in accordance with the Terms of this Development Agreement.
- 1.6 Public Benefits: The City Council finds that this Agreement provides significant public benefits including the following:
- a. The Property transfer provisions of this Agreement will facilitate construction of the City Project and enable City to provide easier access to, and more parking for, Castaways Park and Bob Henry Park;
 - b. The Property transfer provisions of this Agreement will enable City to protect an area of open space adjacent to Dover Drive;

- c. The potential to further increase parking for Bob Henry Park and parking for Church members through the mutual use of parking facilities subject to further agreement of the Parties
- 1.7 Police Power. City Council has determined that this Agreement is in the best interests of the health, safety and general welfare of City, its residents and the public, was entered into pursuant to, and represents a valid exercise of, City's police power, and has been approved in accordance with the provisions of State and local law that establish procedures for the approval of development agreements.
- 1.8 City Ordinance. On June 23, 1997, the City Council approved this Agreement and conducted the first reading of Ordinance No. 97-22 approving and authorizing City to enter into this Agreement (the "Adopting Ordinance"). On June 23, 1997, the City Council completed adoption of the Adopting Ordinance. The Adopting Ordinance became effective on July 23, 1997.

2. DEFINITIONS

- 2.1 "Adopting Ordinance" refers to City Ordinance No. 97-22 adopted by the City Council on June 23, 1997, authorizing City to enter into this Agreement.
- 2.2 "Agreement" refers to this "Development Agreement between the City of Newport Beach and Newport Harbor Lutheran Church." This Agreement is also identified by City as City's Development Agreement No. 10.
- 2.3 "Annual Review" refers to the review of good faith in compliance by the Parties with this Agreement as set forth in Section 6.
- 2.4 "Approval Date" shall mean July 23, 1997, the date on which the City Council voted to approve this Agreement.
- 2.5 All forms of use of the verb "assign" and the nouns "assignment" and "assignee" shall include all contexts of hypothecations, sales, conveyances, transfers, leases, and assignments.
- 2.6 "Bob Henry Park" shall mean the active recreational facility owned and maintained by City which is located on the north side of Castaways Lane and east of Dover Drive.
- 2.7 "Castaways Park" is the sixteen (16) acre parcel owned and maintained by City and which is situated to the south of Church Property and east of Dover Drive
- 2.8 "CEQA" and the "CEQA Guidelines" refers to the California Environmental Quality Act and the CEQA Guidelines promulgated by the Secretary of Resources of the State of California.

- 2.9 "Church" refers to the Newport Harbor Lutheran Church and "Church Property" refers to the property owned by Church after the conveyances contemplated by this Agreement are recorded.
- 2.10 "City" refers to the City of Newport Beach, California.
- 2.11 "City Council" refers to the City Council of City.
- 2.12 "City Project" means the construction of various public improvements in the vicinity of Church that are related to Bob Henry Park, the Castaways Park, or the Castaways' residential project.
- 2.13 "Cure Period" refers to the period of time during which a Default may be cured pursuant to Section 9.
- 2.14 "Day" or "Days" refers to a calendar day, unless expressly stated to be a business day.
- 2.15 "Default" refers to any material default, breach, or violation of the provisions of this Agreement. A "City Default" refers to a Default by City, while a "Church Default" refers to a default by Church.
- 2.16 "Development Permit(s)" shall mean building permits, grading permits and other permits authorizing construction activity.
- 2.17 The "Effective Date" refers to the effective date of the Adopting Ordinance and is the effective date of this Agreement.
- 2.18 An "Estoppel Certificate" is the document required by Section 6.5.
- 2.19 An "Exhibit" refers to an Exhibit to this Agreement. All Exhibits are incorporated as a substantive part of this Agreement. The Exhibits to this Agreement are:
- Exhibit "A"** Description of Church-owned property prior to the transfer of property required by this Agreement (Pre-transfer Church Property)
- Exhibit "B"** Planned Community Development Plan (the "Development Plan")
- Exhibit "C"** Description Church Property and all improvements to be constructed by City on Church Property pursuant to this Agreement
- Exhibit "D"** Description of the property to be conveyed by City to Church
- Exhibit "E"** Description of the property to be conveyed by Church to City

- 2.20 "Existing General Regulations" shall mean those General Regulations approved by City on or before the Approval Date (irrespective of their effective date) and not rescinded or superseded by City action taken on or before the Approval Date.
- 2.21 "Future General Regulations" shall mean those General Regulations (see Section 2.22 below) adopted by City after the Approval Date.
- 2.22 "General Regulations" shall mean those ordinances, rules, regulations, policies, and guidelines of City which are generally applicable to the use of land and/or construction within City and include, the Fair Share Traffic Contribution Fee Ordinance, the Uniform Building Code, the Uniform Fire Code, other Uniform Codes, and water and sewer connection fee ordinances.
- 2.23 "General Plan" refers to City's General Plan in effect on the Approval Date, plus all amendments to the General Plan adopted by City on or before the Approval Date as part of the Development Plan.
- 2.24 "Improvements" shall mean all of the physical changes to Church Property required by this Agreement as more specifically described in Section 5 and depicted on Exhibit "C".
- 2.25 "Includes" and all contexts and forms of the words "includes" and "including" shall be interpreted to also state "but not limited to."
- 2.26 "Mortgagee" refers to the holder of a beneficial interest under any mortgage, deed of trust, sale-leaseback agreement, or other transaction under which all or a portion of the Property, including those portions acquired by assignees, is used as security (a "Mortgage") or the owner of any interest in all or any portion of the Property under a Mortgage, including those portions acquired by assignees.
- 2.27 "Notice" refers to any written notice or demand between the Parties required or permitted by this Agreement.
- 2.28 "Parties" refers to City and Church and a "Party" shall refer to either of the Parties.
- 2.29 "Planning Commission" refers to the Planning Commission of the City of Newport Beach.

3. VESTED RIGHTS

- 3.1 Vested Rights Church shall have the vested right, subject only to the conditions specified in this Agreement, to construct a total of forty thousand (40,000) square feet of floor area, inclusive of structures existing on Pre-Transfer Church Property as of the Adoption Date, in accordance with the Development Plan and subject to provisions of the Coastal Development Permit issued by the California Coastal

Commission or its successor. Church shall also have the vested right to install temporary buildings in the lawn area behind the sanctuary, the side lawn west of the sanctuary and/or the preschool yard (as specified in the Development Plan) at any time during the Term of this Agreement. Church shall also have the right to install temporary buildings in the area specified in the Development Plan (Main Parking Lot) prior to, and during, construction of permanent structures subject to the following: (a) Church has provided City with proof of its ability to fund construction of permanent structures within the area permitted by the Development Plan and; (b) Church has filed a complete application for a building permit with City or has received a building permit and has diligently pursued construction authorized by the permit.

- 3.2 Development Plan. Church's vested right to construct the floor area authorized in Section 3.1 is subject to compliance with the Development Plan including provisions relating to height, location, parking spaces, the use of structures and Site Plan Review.
- 3.3. Compliance with General Regulations. Church is required to comply with existing General Regulations. As to those Existing General Regulations which require the payment of fees, costs, and expenses, the applicable fee, cost, or expense shall be waived if City is the beneficiary of the fee and has the authority to do so. Church shall also comply with any Future General Regulation that does not impair or affect its ability to develop Church Property in accordance with the Terms of this Agreement. Church shall also comply with all provisions of the Uniform Building Code, whether adopted before or after the Approval Date, which are in effect at the time applications for specific development permits are submitted. Church also acknowledges and agrees that City may be required to prepare additional environmental documentation in the future and prior to the issuance of any development permit, license or approval as necessary to comply with the provisions of the CEQA and the CEQA Guidelines.
- 3.4 Public Health and Safety/Uniform Codes. This Agreement does not prevent City from adopting, and Church shall comply with, Future General Regulations (including Uniform Building Codes and Uniform Fire Codes) which are based on recommendations of a multi-state professional organization and become applicable throughout City. This Agreement does not prevent City from imposing conditions inconsistent with this Agreement on future discretionary approvals, where such actions directly result from findings by the City Council that those actions are necessary to avoid consequences which are injurious or detrimental to the public health and safety so long as City does not refuse to issue or approve any application or permit or apply to Church or Church Property any conditions or Future General Regulations if such action would prevent, preclude, delay, alter, or in any way materially affect (in a manner not satisfactory to Church) the development of Church Property in accordance with this Agreement unless and until the City Council makes a finding that such action is the only reasonably necessary means to correct or avoid the injurious or detrimental condition. Any

action taken pursuant to this Section shall apply only to the extent and for the duration necessary to correct or avoid the injurious or detrimental condition.

- 3.5 Coastal Act Compliance. The Property is located in the Coastal Zone of City as defined by the California Coastal Act codified at Section 30000 et seq. of the Public Resources Code of the State of California. Prior to commencing any "development" on the Property, Church must obtain a Coastal Development Permit.

4. TRANSFERS OF PROPERTY

- 4.1 Transfer of City Property to Church. City shall grant to Church, in fee, at least 0.65 acres of City-owned Property which is depicted and described on **Exhibit "D"**. Transfer of this Property is in partial consideration of Church's commitments pursuant to this Agreement.
- 4.2 Transfer of Church Property to City. Church shall grant to City, in fee, approximately 0.65 acres of Pre-Transfer Church Property which is depicted and described on **Exhibit "E"**. Transfer of this Property is full consideration for City's commitments pursuant to this Agreement.

5. CITY IMPROVEMENTS/COMMITMENTS

- 5.1 City Required Improvements. City will construct a number of improvements for the benefit of Church,. These improvements are necessary to compensate for the loss of parking spaces caused by implementation of the City Project and to compensate for the difference in value, if any, between the parcels to be exchanged by the Parties. City shall construct all of the improvements described in this Agreement and all of the improvements depicted and described in **Exhibit "C"**. In the event of any conflict between the provisions of **Exhibit "C"** relative to the location of improvements, the provisions of **Exhibit "C"** shall prevail. In the event of any conflict between the provisions of this Agreement and **Exhibit "C"** as to any other issue, including whether a particular improvement is to be constructed, the prevailing provision shall be the one which benefits Church to the greatest extent. All improvements shall be constructed in conformance with all City standards, rules and regulations.
- 5.2 Parking Facilities. City shall construct or reconstruct, as appropriate, a primary parking facility on a portion of the existing Church parking lot and the major portion of the Property to be dedicated to Church pursuant to Section 4.1 (the Main Parking Lot). The Main Parking Lot shall consist of at least one hundred forty (140) spaces constructed in compliance with **Exhibit "C"** and all applicable City standards. City shall also construct or reconstruct, as appropriate, a secondary parking facility which is generally located to the rear of the sanctuary in the northeast corner of Church Property (the Secondary Parking Lot). The Secondary

Parking Lot shall be also be constructed in compliance with Exhibit "C" and all applicable City standards. In addition, the Main Parking Lot and the Secondary Parking Lot will contain customary improvements including:

- a. Typical parking lot pavement sections including subbase, asphalt concrete surfacing, concrete curbs and/or gutters. A portion of the Secondary Parking Lot will be constructed with a heavier subbase and surface (4" over 8" as opposed to 3" over 6") to accommodate refuse trucks and other heavy vehicles using the facility;
- b. Parking lot striping, consistent with City and ADA requirements;
- c. Landscaping of parking lot medians and barrier area with trees, shrubs and ground cover as well as a new irrigation system for the landscaping;
- d. Lighting of the Main Parking Lot, the Secondary Parking Lot, the new walkway between the Secondary Parking Lot and the administration building, and the periphery of these areas so that illumination is consistent with current City standards for City owned parking lots;
- e. Drainage facilities, including a subsurface drainage system for the Main Parking Lot which will connect to City's storm drain system. The Secondary Parking Lot shall be graded and improved to provide for surface drainage onto Castaways Lane;
- f. Grading and all site preparation necessary to the construction of the improvements described above including, without limitation, removal of trees, landscaping, decorative wall and appurtenances, existing parking lot pavement, and removal as well as replacement of irrigation systems;
- g. In addition to the construction and/or reconstruction of the parking facilities, City shall construct three (3) new driveways to provide access, including access to Church and City parking facilities from Castaways Lane. City shall also construct certain concrete walkways and sidewalks, including ramps to provide access from the Main Parking Lot and the Secondary Parking Lot to existing walkways adjacent to Church building all in conformance with the requirements of State and Federal law, including the Americans with Disabilities Act, provided, however, City's commitment does not include any alterations to structures or internal walkways unaffected by the construction of improvements by City.

5.3. Other Improvements. City shall also make, or cause to be made, the following improvements:

- a. Grading and re-landscaping of the existing playground adjacent to Church's pre-school, including the replacement of shade trees, turf, irrigation systems, fencing (style consistent with existing material) and slope stabilization;

- b. Fencing and/or screen walls along common property lines that are consistent with the style of link fencing at Bob Henry Park, with the fencing on the south side of Church to contain a gate which can be used by Church members or employees to gain access to the Castaways Park.
- c. Landscaping of the area adjacent to Church/Castaways Residential Community property line, including the removal of trees designated for removal by Church, the installation of replacement trees, and landscaping that provides an aesthetically pleasing area. In addition, a new irrigation system shall be installed as necessary to service this area. Retaining walls necessary to account for changes in grade in this area shall be constructed on property owned or controlled by the Castaways Community Association and/or its member(s). Retaining walls constructed on Church Property by City shall not exceed three (3) feet in height.
- d. Landscaping and irrigation of the Castaways Lane median and parking strip in an aesthetically pleasing manner with maintenance by the City or the Castaways Community Association.
- e. Installation of a subsurface sewer lateral in the Main Parking Lot, and extending from the terminus of the existing sewer lateral to a point approximately twenty (20) feet south of the Council Room and as shown in **Exhibit "C"**. With the exception of this sewer lateral, City shall not be required to install any electrical, gas, water, or other service facility on or adjacent to Church Property, provided, however, City shall be responsible for the relocation of the existing gas meter for Church Property to a location acceptable to Church and Southern California Gas Company.
- f. Installation of landscaping and irrigation improvements along Castaways Lane and Dover Drive consistent with all City standards.
- g. Installation of an aesthetically pleasing trash enclosure capable of accommodating two (2) bins as well as an access pad at the southeast end of the Secondary Parking Lot.
- h. Installation of a memorial plaque in honor of Bob Henry within City right-of-way (parkway) and a related bench with low level landscaping on Church Property in proximity to the memorial plaque.
- i. Construction of a retaining wall at the easterly corner of Main Parking Lot adjacent to Lot 6 of the Castaways Residential Development as shown on Exhibit "C".

5.4 Other City Commitments. In addition to City improvement commitments in Sections 5.2 and 5.3, City makes the following additional commitments to Church:

- a. City shall maintain, during the Term of this Agreement, signage, left turn pockets, and other improvements necessary to maintain and facilitate ingress to Church from vehicles proceeding southbound on Dover Drive and egress for vehicles exiting Church Property and Castaways Lane to proceed southbound on Dover Drive.
- b. City shall construct identification sign walls on City property in proximity to the new City parking lot for Castaways Park as generally depicted on **Exhibit "C"**. Church shall provide City with plans and specifications for the sign walls and shall be responsible for all maintenance. Church shall have the right to install an additional identification sign, at Church's expense, along Castaway Lane as specified in the Development Plan. The size and style of the signs shall be consistent with the Development Plan. The signs shall not be installed in a manner which is inconsistent with the sight distance standards of City.
- c. City parking lot to be constructed west of the Main Parking Lot shall be available for parking by members of the general public, including members of, and visitors to, Church.
- d. Except as expressly provided in this Agreement, no dedications or reservations of Church Property shall be required in conjunction with the application or issuance of any permit authorizing development, construction, use, or operation of Church Property.
- e. The exchanges of land contemplated by this Agreement will effectively modify the boundaries of the Parcels owned by the Parties. City is required, at its sole cost and expense, to conduct appropriate field work and surveys, prepare required maps, records, and documents, and process, through and including approval and recordation by the County of Orange, all maps, records of surveys or legal descriptions necessary to insure that Church Property constitutes a legal parcel with an accurate legal description. Church shall cooperate with City by, among other things, providing requested information and necessary signatures.

6. ANNUAL REVIEW

- 6.1 **City and Church Responsibilities.** At least every twelve (12) months during the Term, City shall review the Party's good faith substantial compliance with this Agreement (the "Annual Review"). After the Annual Review, City's finding of good faith compliance by Church shall be conclusive for the purposes of future Annual Reviews or legal action between the Parties. Either Party may address any requirements of this Agreement during the Annual Review. However, fifteen (15) days written Notice of any requirement to be addressed shall be given to the other Party by the requesting Party. If, at the time of the review, an issue not previously identified in writing is required to be addressed, the review shall be

continued for no more than sixty (60) days at the request of either Party to afford sufficient time for analysis and preparation of a response.

- 6.2 Opportunity to be Heard. Church shall be permitted an opportunity to be heard orally and in writing at any noticed public hearing or meeting relating to the Annual Review.
- 6.3 Notice to Church. City shall provide Church with at least fifteen (15) days written notice of the Annual Review. The written notice provided to Church by City shall include a copy of any City staff report, document or exhibit proposed to be submitted to the City Council in conjunction with the Annual Review of this Agreement.
- 6.4 Review Letter.
 - a. After Finding of Compliance. If Church is found to be in compliance with this Agreement after the Annual Review, City shall issue, within ten (10) days of Church's written request, a letter to Church stating that this Agreement remains in effect and Church is not in Default.
 - b. After Cure of Default. If Church is found to be in Default under this Agreement at the Annual Review, but subsequently cures that Default in the manner provided by this Agreement, City shall issue, within ten (10) days of Church's written request, a letter to Church stating that this Agreement remains in effect and Church is not in Default.
- 6.5 Estoppel Certificate. Either Party may at any time deliver a written Notice to the other Party requesting an Estoppel certificate (the "Estoppel Certificate") stating the following:
 - a. This Agreement is in full force and effect and is a binding obligation of the Parties.
 - b. This Agreement has not been amended or modified either orally or in writing or, if so amended, identifies the amendments.
 - c. To the best of the signing Party's knowledge, no Default in the performance of the requesting Party's obligations under this Agreement exists or, if a Default does exist, the nature and amount of any Default.
 - d. A Party receiving a request for an Estoppel Certificate shall provide a signed certificate to the requesting Party within thirty (30) days after receipt of the request. The Planning Director may sign Estoppel Certificates on behalf of City. An Estoppel Certificate may be relied on by assignees and Mortgagees.

- 6.6 Failure to Conduct Annual Review. City's failure to conduct an Annual Review shall not constitute or be asserted by City as Church's Default or asserted by Church as a City Default.

7. GENERAL PROVISIONS

- 7.1 Effective Date. This Agreement and the obligations of the Parties shall be effective as of the Effective Date. However, this Agreement shall bind the Parties as of the Approval Date, subject only to the Adopting Ordinance becoming effective pursuant to California law.
- 7.2 Term of Agreement. The Term of this Agreement (the "Term") shall begin on the Effective Date and continue for twenty-five (25) years unless otherwise terminated or modified pursuant to this Agreement.
- 7.3 Assignment. Church has the absolute right to assign its rights and/or delegate its obligations under this Agreement as part of an assignment of all or a portion of the Property. Any assignment shall be subject to the provisions of this Agreement. As long as Church, or its parent body, the Evangelical Lutheran Church in America, owns any part of the Property, Church may assign the benefits of this Agreement without delegating the obligations for the portion of the Property assigned. If that occurs, however, the benefits assigned shall remain subject to the performance by Church of the corresponding obligations.
- a. Where an assignment includes the delegation of the corresponding obligations, those obligations become solely the obligations of the assignee. If an assignee is in Default, then as to Church or any assignees not in Default, the Default shall not constitute their Default, give grounds for termination of their rights under this Agreement or be a basis for an enforcement action against them.
 - b. Under no circumstances, shall Church be relieved of its obligations under Section 4.2.
- 7.4 Amendment of Agreement. This Agreement may be amended from time to time by the mutual consent of the Parties, or their successors in interest, but only in the manner provided by the Government Code, the Newport Beach Municipal Code and/or this Agreement. After any amendment, the Term "Agreement" shall refer to the amended Agreement.
- 7.5 Enforcement. This Agreement is enforceable by each of the Parties and their respective successors and assigns.
- 7.6 Termination. This Agreement shall be deemed terminated and of no further effect upon the occurrence of any of the following events:
- a. Expiration of the twenty-five (25) year term;

- b. Entry, after all appeals have been exhausted, of a final judgment or issuance of a final order directing City to set aside, withdraw, or abrogate City's approval of this Agreement; or
- c. The effective date of a Party's election to terminate this Agreement as provided in Section 9.3 of this Agreement.

8. CONFLICTS OF LAW

8.1 Conflict with State and Federal Laws and Regulations. Where State or Federal laws or regulations prevent compliance with one or more provisions of this Agreement, those provisions shall be modified, through revision or suspension, to the extent necessary to comply with such State or Federal laws or regulations and the modified Agreement shall remain in effect, subject to the following:

- a. City shall not request modification of this Agreement pursuant to this provision unless and until the City Council makes a finding that such modification is required (as opposed to permitted) by State and federal laws or regulations;
- b. The modifications must be limited to those required (as opposed to permitted) by the State or Federal laws;
- c. The modified Agreement must be consistent with the State or Federal laws or regulations required modification or suspension;
- d. The intended material benefits of this Agreement must still be received by each of the Parties after modification;
- e. Neither the modification nor any applicable local, State, or Federal laws or regulations, may render the modified Agreement impractical to enforce; and
- f. Church consents in writing to the modification.
- g. Church shall have the right to seek judicial review of any proposed modification to ensure compliance with this Section.

9. DEFAULT, REMEDIES AND TERMINATION

9.1 General Provisions. In the event of a Default (see Section 6.1), the Party alleging a Default shall give the other Party a written Notice of Default. The Notice of Default shall specify the nature of the alleged Default, and a reasonable manner and sufficient period of time (not less than thirty (30) days) in which the Default must be cured (the "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 a Default shall be deemed not to exist.

- 9.2 Option to Institute Legal Proceedings or to Terminate. If an alleged Default is not cured within the Cure Period, the noticing Party must give the defaulting Party a Notice of Intent to Terminate this Agreement if that Party intends to terminate this Agreement. Within thirty (30) days after giving of the Notice, the City Council shall hold a public hearing in the manner set forth in Government Code Sections 65865, 65867, and 65868, as amended, to consider and review the matter. This hearing shall utilize the procedures outlined for the Annual Review in Section 6.
- 9.3 Notice of Termination. After the City Council hearing described in Section 9.2, the Party alleging the Default, at its option, may give written Notice of Termination of this Agreement to the other Party and this Agreement shall be terminated immediately upon giving the Notice. A termination shall be valid only if good cause exists and clear and convincing evidence was presented to the City Council to establish the continued existence of a Default after the Cure Period. The findings of the City Council as to the existence of a Default shall have no weight in any legal proceeding brought to determine the existence of a Default. The validity of any termination may be challenged pursuant to Section 11.16, in which case the court shall render an independent judgment as to the existence of a Default and good cause for termination. Termination may result only from a material Default of a material provision of this Agreement.
- 9.4 Waiver. Failure or delay in giving Notice of Default shall not waive a Party's right to give future Notice of the same or any other Default.
- 9.5 Default by Church. Subject to all other provisions of this Agreement, and after termination of this Agreement in compliance with Sections 9.1 through 9.3, if Church defaults, City shall have no obligation to perform any of City's obligations under this Agreement, unless otherwise ordered by a Court of law. City's election not to perform as permitted by this provision shall not constitute a Default.
- 9.6 Default by City. Subject to all other provisions of this Agreement, and after termination of this Agreement in compliance with Sections 9.1 through 9.3, if City Defaults, Church shall have no obligation to perform any of Church's obligations under this Agreement, unless otherwise ordered by a Court of law. Church's election not to perform as permitted by this provision shall not constitute a Default.
- 9.7 Specific Performance. The Parties agree that the loss of any of their respective rights under this Agreement may not be compensable by an award of monetary damages. Therefore, except as otherwise specifically provided in this Agreement, the remedy for a Default for each Party shall be limited to specific performance and/or injunctive relief. This provision applies only to actions related

to the Parties' performance under this Agreement and does not limit the remedies of either Party under any other provision of law.

10. ENCUMBRANCES AND RELEASES ON PROPERTY

- 10.1 Discretion to Encumber. Church may encumber all or any portion of Church Property in any manner. City acknowledges that lenders providing financing may require technical modifications to this Agreement which do not materially alter the intent of the Parties. City agrees to meet, upon request, with Church and/or lenders to negotiate in good faith any lender request for modification. City agrees not unreasonably to withhold its consent to such modification, provided the proposed modification does not materially alter the Terms and provisions of this Agreement, the obligations imposed upon either Party, or the benefits received by either Party.
- 10.2 Entitlement to Written Notice of Default. Any Mortgagee and its successors and assigns, upon written request to City, shall be entitled to receive from City written Notice of any Church Default at the same time Church is provided with Notice pursuant to Section 6.3.

11. MISCELLANEOUS PROVISIONS

- 11.1 Notices. All Notices shall be written and delivered by personal delivery (including Federal Express and other commercial express delivery services providing acknowledgments or receipt), registered, certified, or express mail, or telegram to the addresses set forth below. Receipt shall be deemed complete as follows:
- a. For personal delivery, upon actual receipt;
 - b. For registered, certified, or express mail, upon the delivery date or attempted delivery date as shown on the return receipt; and

Notices shall be addressed as follows:

To City: City Clerk
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92660
Attention: City Attorney
Attention: Planning Director

To Church: Reverend Bill Kirlin-Hackett
Newport Harbor Lutheran Church
798 Dover Drive
Newport Beach, CA 92663

President of the Church Council
Newport Harbor Lutheran Church
798 Dover Drive
Newport Beach, CA 92663

The addresses to which Notices shall be sent may be changed by giving Notice of a new address.

- 11.2 Enforced Delay; Extension of Time of Performance. Neither Party shall be deemed to be in Default where delays or non-performance are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, oil spills, casualties, acts of nature, unavailability of materials, governmental restrictions imposed or mandated by governmental entities, suspension of rights in accordance with the existence of unforeseen circumstances, litigation, or similar bases for excused performance. An extension of time for performance shall be deemed granted for the period of the delay, or longer as may be mutually agreed upon.
- 11.3 Severability. If any material part of this Agreement is found by a Court to be invalid, void, or illegal, the Parties shall modify this Agreement to implement the original intent of the Parties. These steps may include the waiver by either of the Parties of their rights under the unenforceable provision. If, however, this Agreement objectively cannot be modified to implement the original intent of the Parties and the Party substantially benefited by the material provision does not waive its rights under the unenforceable provision, this entire Agreement shall become void. For purposes of this Section, and without excluding the possible materiality of other provisions of this Agreement, all provisions of Sections 4 and 5 are deemed "material."
- 11.4 Entire Agreement. This Agreement constitutes the entire understanding and Agreement of the Parties regarding the subject matter of this Agreement. This Agreement supersedes all negotiations and previous agreements between the Parties regarding that subject matter.
- 11.5 Waivers. All waivers of the provisions of this Agreement must be in writing and signed by the Party making the waiver.
- 11.6 Incorporation of Recitals. The Recitals set forth in Section 1 are part of this Agreement.
- 11.7 Covenant of Good Faith and Fair Dealing. Neither Party shall do anything which shall have the effect of harming or injuring the right of the other Party to receive the benefits of this Agreement.
- 11.8 Covenant of Cooperation. City shall help Church obtain any permits from either City or other public agencies which may be required for development of the

Property or as a result of any modifications, suspensions, or alternate courses of action allowed by this Agreement. Church may challenge any such ordinance, measure, moratorium, or other limitation in a court of law if it becomes necessary to protect the development rights vested in Church Property pursuant to this Agreement.

- 11.9 Further Actions and Instruments. Upon the request of either Party, the other Party shall promptly execute, with acknowledgment or affidavit if reasonably required, and file or record such required instruments and writings and take any actions as may be reasonably necessary under the Terms of this Agreement or to evidence or consummate the transactions contemplated by this Agreement.
- 11.10 Successors and Assigns. Subject to Section 7.3 above, the burdens of this Agreement shall be binding upon, and the benefits of this Agreement inure to, all successors-in-interest and assigns of the Parties.
- 11.11 Construction of Agreement. All language in all parts of this Agreement shall be construed as a whole and given its fair meaning. The captions of the paragraphs and subparagraphs are for convenience only and shall not be considered or referred to in resolving questions of construction. This Agreement shall be governed by the laws of the State of California. This Agreement is not intended to impermissibly contract away the legislative and governmental functions of City, and in particular, City's police powers or to surrender or abrogate City's governmental powers over the Property.
- 11.12 Authority to Execute. The person executing this Agreement on behalf of Church warrants and represents that he/she has the authority to do so and the authority to bind Church to the performance of Church's obligations pursuant to Congregational approval of this Agreement.
- 11.13 Consent. Any consent required by the Parties in carrying out the Terms of this Agreement shall not unreasonably be withheld.
- 11.14 Effect on Title. This Agreement shall not continue as an encumbrance against any portion of Church Property as to which this Agreement is terminated.
- 11.15 Recording. The City Clerk shall cause a copy of this Agreement to be executed by City and recorded in the Official Records of Orange County no later than ten (10) days after the Effective Date. The recordation of this Agreement is deemed a ministerial act and the failure of City to record the Agreement as required by this Section and Government Code Section 65868.5 does not make this Agreement void or ineffective.
- 11.16 Institution of Legal Action. In addition to any other rights or remedies, either Party may institute legal action to cure, correct, or remedy any Default, to enforce any provision of this Agreement, to enjoin any threatened or attempted violation of this Agreement, to recover damages for any Default, or to obtain any remedies

consistent with the purpose of this Agreement. Legal actions shall be instituted in the Superior Court of the County of Orange, State of California, or in the Federal District Court in the Central District of California.

11.17 Attorneys' Fees. In any arbitration, quasi-judicial, administrative, or judicial proceeding between the Parties initiated with respect to this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and all costs, expenses, and disbursements in connection with such action.

11.18 No Third Party Beneficiaries. There are no third party beneficiaries to this Agreement or to any provision of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed on the day and year first below written.

APPROVED AS TO FORM:

By: [Signature]
City Attorney

CITY OF NEWPORT BEACH,
a municipal corporation

By: [Signature]

NEWPORT HARBOR
LUTHERAN CHURCH

By: [Signature]

ATTEST:

By: [Signature]
City Clerk

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STATE OF CALIFORNIA)ss.
COUNTY OF ORANGE)

On August 6 1997, before me, Shauna Lyn Oyler personally appeared Kevin Murphy & Lavonne Habkless personally known to me (or 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.

WITNESS my hand and official seal.

Shauna Lyn Oyler
Notary Public in and for said State

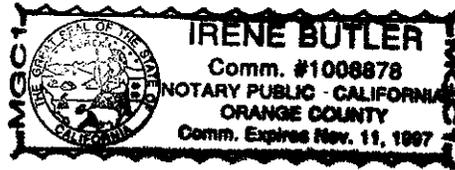


STATE OF CALIFORNIA)
) ss:
COUNTY OF ORANGE)

On 7-29-97, 1997, before me, IRENE BUTLER
_____, personally appeared Rev. Bill Kirk-Hatchett
_____, personally known to me (or 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.

WITNESS my hand and official seal

Signature Irene Butler



(This area for official notaries seal)