

ORDINANCE NO. 16-4

1
2 **AN ORDINANCE APPROVING AND ADOPTING A DEVELOPMENT**
3 **AGREEMENT BY AND BETWEEN THE CITY OF CONCORD AND SWIFT**
4 **REALTY PARTNERS, LLC, REGARDING THE DEVELOPMENT OF**
5 **PROPERTY LOCATED IN DOWNTOWN CONCORD DESCRIBED AS**
6 **ASSESSOR’S PARCEL NUMBERS: 126-103-001, 126-103-015, 126-103-016**
7 **AND 126-103-017.**

8 **WHEREAS**, California Government Code section 65864 *et seq.* authorizes a city and a
9 developer having a legal or equitable interest in real property to enter into a binding, long-term
10 development agreement establishing certain development rights in the property; and

11 **WHEREAS**, the City Council of the City of Concord enacted Municipal Code Chapter 18.460
12 Development Agreements, which authorize the execution of development agreements and set forth the
13 required contents and form of those agreements; and

14 **WHEREAS**, Swift Realty Partners, LLC (“Developer”) is the owner of that certain real
15 property located in Downtown Concord with the following Assessor’s Parcels Numbers: 126-103-
16 001, 126-103-015, 126-103-016 and 126-103-017 (the “Property”); and

17 **WHEREAS**, the current land use designation for the Property is Downtown Mixed Use and
18 the current zoning for the Property is Downtown Mixed Use; and

19 **WHEREAS**, Developer intends to apply to the City for approvals to develop the Property in
20 accordance with existing land use and zoning (“Project”) and has applied for a Development
21 Agreement to vest the existing regulations; and

22 **WHEREAS**, City and Developer have reached mutual agreement on the terms of the
23 Development Agreement to facilitate development of the Project subject to the conditions and
24 requirements set forth therein, in the form attached hereto as Exhibit A (the “Development
25 Agreement”); and

26 **WHEREAS**, the Planning Commission, after giving all public notices required by State Law
27 and the Concord Municipal Code, held a duly noticed public hearing April 20, 2016 on the proposed
28 Development Agreement; and

1 **WHEREAS**, at such public hearing, the Planning Commission considered all oral and written
2 information, testimony, and comments received during the public review process, including
3 information received at the public hearing, the oral report from City staff, the written report from City
4 staff dated April 20, 2016 materials, exhibits presented, and all other information that constitutes the
5 record of proceedings on which the Planning Commission has based its decision that are maintained at
6 the offices of the City of Concord Planning Division (collectively, “PC Information”); and

7 **WHEREAS**, on April 20, 2016, the Planning Commission, after consideration of all pertinent
8 plans, documents, and testimony, adopted Resolution No. 16-07PC and did recommend City Council
9 approval of the Development Agreement by a 3-1 vote; and

10 **WHEREAS**, pursuant to the California Environmental Quality Act of 1970, Public Resources
11 Code § 21000, et seq. and implementing State CEQA Guidelines, Title 14, Chapter 3 of the California
12 Code of Regulations, all as amended (collectively, “CEQA”), the Development Agreement does not
13 constitute a “project” within the meaning of Public Resources Code Section 21065, 14 Cal Code Regs.
14 Section 15060(c)(2), 15060(c)(3), or 15378 because it has no potential for resulting in either a direct
15 physical change in the environment, or a reasonably foreseeable indirect physical change in the
16 environment, as it does not amend or alter the existing land use of the Property and merely vests
17 existing zoning. Even if the Development Agreement did constitute a project under CEQA, the
18 Development Agreement falls within the “common sense” exemption set forth in 14 Cal. Code Regs.
19 Section 15061(b)(3), excluding projects where “it can be seen with certainty that there is no possibility
20 that the activity in question may have a significant effect on the environment...”; and

21 **WHEREAS**, the City Council, after giving all public notices required by State Law and the
22 Concord Municipal Code, held a duly noticed public hearing on June 7, 2016 on the Development
23 Agreement; and

24 **WHEREAS**, at such public hearing, the City Council considered all oral and written
25 information, testimony, and comments received during the public review process, the oral report from
26 City staff, the written report from City staff dated June 7, 2016 materials, exhibits presented, the PC
27
28

1 Information, and all other information that constitutes the record of proceedings on which the City
2 Council has based its decision that are maintained at the offices of the City of Concord City Clerk.

3 **NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF CONCORD DOES**
4 **ORDAIN AS FOLLOWS:**

5 **Section 1.** Pursuant to the California Environmental Quality Act of 1970, Public Resources
6 Code §21000, et seq., as amended and implementing State CEQA Guidelines, Title 14, Chapter 3 of
7 the California Code of Regulations (collectively, “CEQA”), the Development Agreement does not
8 constitute a “project” within the meaning of Public Resources Code Section 21065, 14 Cal Code Regs.
9 Section 15060(c)(2), 15060(c)(3), or 15378 because it has no potential for resulting in either a direct
10 physical change in the environment, or a reasonably foreseeable indirect physical change in the
11 environment. Even if the Development Agreement did constitute a project under CEQA, the
12 Development Agreement falls within the “common sense” exemption set forth in 14 Cal. Code Regs.
13 Section 15061(b)(3), excluding projects where “it can be seen with certainty that there is no possibility
14 that the activity in question may have a significant effect on the environment...”. Any future project
15 resulting from the Development Agreement will be subject to CEQA and evaluated on a case-by-case
16 basis. The determination that these exemptions apply to the Development Agreement reflects the
17 independent judgment and analysis of the City as the lead agency.

18 **Section 2.** The City Council hereby finds that: (a) the recitals above are true and correct and
19 are incorporated herein by reference; (b) the Development Agreement is consistent with the goals,
20 objectives, and policies of the Concord General Plan and any applicable specific plan; (c) the
21 Development Agreement is in conformity with public convenience, general welfare, and good land
22 use practices; (d) the Development Agreement will not be detrimental to the health, safety, and
23 general welfare of persons residing in the immediate area nor be detrimental or injurious to property
24 or persons in the general neighborhood or to the general welfare of the residents of the City as a
25 whole; (e) the Development Agreement will not adversely affect the orderly development of property
26 or the preservation of property values; and (f) the Development Agreement is consistent with
27 California Government Code sections 65864 through 65869.5 .

1 Ordinance No. 16-4 was duly and regularly introduced at a regular meeting of the City Council
2 of the City of Concord held on June 7, 2016, and was thereafter duly and regularly passed and adopted
3 at a regular meeting of the City Council of the City of Concord on July 12, 2016, by the following
4 vote:

5 **AYES:** Councilmembers -

6 **NOES:** Councilmembers -

7 **ABSTAIN:** Councilmembers -

8 **ABSENT:** Councilmembers -

9 **I HEREBY CERTIFY** that the foregoing is a true and correct copy of an ordinance duly and
10 regularly introduced, passed, and adopted by the City Council of the City of Concord, California.

11
12
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14 _____
Joelle Fockler, MMC
City Clerk

15 Exhibit A: Development Agreement
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RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

City of Concord
1950 Parkside Drive, MS/03
Concord, CA 94519
Attention: City Clerk

Record Without Fee
*Pursuant to Government Code
Section 27383*

Space Above Reserved for Recorder's Use Only

DEVELOPMENT AGREEMENT

BY AND BETWEEN

CITY OF CONCORD

AND

SWIFT REALTY PARTNERS, LLC

Effective Date: ____ __, 2016

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DEVELOPMENT AGREEMENT

This Development Agreement (“**Agreement**”), dated as ____ __, 2016 (the “**Effective Date**”) is entered into by and between the City of Concord, a California municipal corporation (“**City**”) and Swift Realty Partners, LLC, a Delaware limited liability corporation (“**Developer**”). Developer and City may be referred to individually in this Agreement as a “**Party**” and collectively as the “**Parties**.”

R E C I T A L S

This Agreement is entered into on the basis of the following facts, understandings and intentions of the Parties. The following recitals are a substantive part of this Agreement; capitalized terms used herein and not otherwise defined are defined in Article 1 of this Agreement.

A. In order to strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs and risks of development, the Legislature of the State of California enacted section 65864 *et seq.* of the Government Code (“**Development Agreement Statute**”) which authorizes a city and a developer having a legal or equitable interest in real property to enter into a binding, long-term development agreement establishing certain development rights in the property.

B. In accordance with the Development Agreement Statute, the City Council of the City of Concord enacted the provisions of Municipal Code Chapter 18.460 Development Agreements (“**Development Agreement Regulations**”), which authorize the execution of development agreements and set forth the required contents and form of those agreements. The provisions of the Development Agreement Statute and the Development Agreement Regulations are collectively referred to herein as the “**Development Agreement Law**.”

C. Developer is the owner of that certain real property located in Downtown Concord with the following Assessor’s Parcels Numbers: 126103001, 126103015, 126103016 and 126103017, as more particularly described and depicted in Exhibits A and B attached hereto and incorporated herein (“**Property**”).

D. Developer intends to apply to the City for approvals to develop the Property in accordance with existing land use and zoning (“**Project**”) and has applied for a Development Agreement to vest the existing regulations.

E. It is the intent of City and Developer to establish certain conditions and requirements related to review and development of the Project, which are or will be the subject of subsequent development applications and land use entitlements.

F. City finds that the Agreement is consistent with the City’s General Plan and any applicable specific plan; is in conformity with public convenience, general welfare, and good land use practices; will not be detrimental to the health, safety, and general welfare of persons residing in the immediate area nor be detrimental or injurious to property or persons in the general neighborhood or to the general welfare of the residents of the City as a whole; will not

adversely affect the orderly development of property or the preservation of property values; and is consistent with California Government Code sections 65864 through 65869.5.

G. City and Developer have reached mutual agreement and desire to voluntarily enter into this Agreement to facilitate development of the Project subject to the conditions and requirements set forth herein.

H. City has given the required notice of its intention to adopt this Agreement and has conducted public hearings thereon pursuant to Government Code section 65867 and Municipal Code section 18.460.040. The City has reviewed and evaluated this Agreement in accordance with the Development Agreement Law and found that the provisions of this Agreement and its purposes are consistent with the Development Agreement Law and the goals, policies, standards and land use designations specified in the General Plan.

I. On _____, 2016 the City Council introduced Ordinance No. 16-4 approving this Agreement and authorizing its execution, and adopted that Ordinance on _____, 2016. That Ordinance became effective on _____, 2016.

A G R E E M E N T

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other valuable consideration, the Parties hereby agree as follows:

ARTICLE 1 DEFINITIONS

1.1 Definitions.

“*Affiliated Party*” is defined in Section 10.1.

“*Agreement*” shall mean this Development Agreement between City and Developer, including all Exhibits hereto.

“*Applicable Law*” is defined in Section 3.2.

“*Assignee*” is defined in Section 10.1.

“*Assignment*” is defined in Section 10.1.

“*CEQA*” means the California Environmental Quality Act of 1970, California Public Resources Code section 21000, *et seq.* together with and implementing State CEQA Guidelines, Title 14, Chapter 3 of the California Code of Regulations, all as amended from time to time.

“*Changes in the Law*” is defined in Section 3.7.

“*City*” means the City of Concord, a municipal corporation.

“*City Council*” means the City Council of the City of Concord.

“**City Parties**” means and includes City and its elected and appointed officials, officers, employees, agents, volunteers, attorneys, contractors and representatives.

“**Claims**” means any and all liabilities, obligations, judgments, orders, claims, damages, fines, penalties and expenses, actions, causes of action, claims, cross-claims, disputes, demands, losses, taxes, costs, loss of service, expenses, liabilities, debts whatsoever, in law or in equity, whether known or unknown, of any kind or character, including attorneys’ fees and costs.

“**Connection Fee(s)**” means any fees charged by City on a citywide basis or by a utility provider to utility users as a cost for connecting water, sanitary sewer, and other applicable utilities, except for any such fee or portion thereof that constitutes an Impact Fee, as defined below.

“**Default**” is defined in Section 12.1.

“**Developer**” means Swift Realty Partners, LLC, and its permitted successors and assigns.

“**Development Agreement Law**” is defined in Recital B.

“**Development Agreement Regulations**” is defined in Recital B.

“**Development Agreement Statute**” is defined in Recital A.

“**Effective Date**” means the date that this Agreement becomes effective as determined under Section 2.1.

“**Enacting Ordinance**” refers to the Ordinance identified in Recital I.

“**Exactions**” means exactions that may be imposed by the City as a condition of developing the Project, including requirements for acquisition, dedication or reservation of land; and obligations to construct on-site or off-site public and private infrastructure improvements such as roadways, utilities or other improvements necessary to support the Project, whether such exactions constitute subdivision improvements, mitigation measures in connection with environmental review of the Project, or impositions made under Applicable City Regulations. For purposes of this Agreement, Exactions do not include Impact Fees.

“**First Extension Term**” is defined in Section 2.2.2.

“**Impact Fee(s)**” means any monetary amount charged by City in connection with a development project for the purpose of defraying all or a portion of the cost of mitigating the impacts of the development project or development of the public facilities related to the development project, including, any “fee” as that term is defined by Government Code section 66000(b). For purposes of this Agreement, a fee that meets both the definitions of an Impact Fee and an Exaction will be considered to be an Impact Fee.

“**Initial Term**” is defined in Section 2.2.1.

“Litigation Challenge” is defined in Section 9.3.

“Major Amendment” is defined in Section 8.2.

“Minor Amendment” is defined in Section 8.3.

“Mortgage” means any mortgage, deed of trust, security agreement, and other like security instrument encumbering all or any portion of the Property or any of the Developer’s rights under this Agreement

“Mortgagee” means the holder of any Mortgage, and any successor, assignee or transferee of any such Mortgage holder.

“Municipal Code” means and refers to the City of Concord’s Municipal Code, as amended from time to time.

“New City Laws” means and includes any ordinances, resolutions, orders, rules, official policies, standards, specifications, guidelines or other regulations, which are promulgated or adopted by the City (including but not limited to any City agency, body, department, officer or employee) or its electorate (through their power of initiative or otherwise) after the Effective Date.

“Notice of Breach” is defined in Section 12.1.

“Other Agency Fees” is defined in Section 4.3.

“Permitted Delay” is defined in Section 13.3.

“Plans and Approvals” is defined in Section 3.2.2.

“Processing Fees” is defined in Section 4.3.

“Project Approval(s)” is defined in Section 7.1.

“Project” is defined in Recital D.

“Property” is defined in Recital C.

“Second Extension Term” is defined in Section 2.2.3.

“Term” is defined in Section 2.2.4.

ARTICLE 2 EFFECTIVE DATE AND TERM

2.1 Effective Date. The Effective Date of this Agreement shall be the later of (a) the date that is 30 days after the date that the Enacting Ordinance is adopted, or (b) the date this Agreement is fully executed by the Parties. The Effective Date is inserted at the beginning of this Agreement. The Parties acknowledge that section 65868.5 of the Development Agreement

Statute requires that this Agreement be recorded with the County Recorder no later than 10 days after the City enters into this Agreement, and that 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, subject to the assignment provisions in Article 10 below.

2.2 Term of Agreement.

2.2.1 Initial Term. The “**Initial Term**” of this Agreement shall commence on the Effective Date and shall expire on the fifth anniversary of the Effective Date, unless earlier terminated.

2.2.2 First Extension. The Initial Term of this Agreement may be extended by City until the date which is five years from the date of expiration of the Initial Term (the “**First Extension Term**”), provided that at the end of the Initial Term: (a) Developer is not, at the time, in Default of any of its obligations hereunder following notice and expiration of applicable cure periods; (b) the applicable Developer warranties and representations in Section 2.4 below continue to be true and correct; (c) no event has occurred which with the passage of time or giving of notice or both would constitute a Default by Developer hereunder; and (d) Developer has demonstrated progress toward the development of the Property by submitting a complete planning application for the Project in accordance with Applicable Law or entering into a purchase and sale agreement for the Property with a future developer. Upon City’s approval of the First Extension Term, which approval shall not be unreasonably withheld, the Initial Term shall be extended an additional five years.

2.2.3 Second Extension. The Term of this Agreement may be extended until the date which is five years from the date of expiration of the First Extension Term (the “**Second Extension Term**”), provided that at the end of the First Extension Term: (a) Developer is not, at the time, in Default of any of its obligations hereunder following notice and expiration of applicable cure periods; (b) the applicable Developer warranties and representations in Section 2.4 below continue to be true and correct; (c) no event has occurred which with the passage of time or giving of notice or both would constitute a Default by Developer hereunder; and (d) Developer has demonstrated continued progress toward the development of the Property beyond that demonstrated as required for approval of the First Extension Term. Upon City’s approval of the Second Extension Term, which approval shall not be unreasonably withheld, the Initial Term as extended by the First Extension Term shall be extended an additional five years.

2.2.4 Term. The Initial Term, together with the First Extension Term (if any) and the Second Extension Term (if any) shall be defined as the “**Term**.” In no event shall there be a First Extension Term if this Agreement has been terminated on or before the fifth (5th) anniversary of the Effective Date. In no event shall there be a Second Extension Term if this Agreement has been terminated on or before the date of expiration of the First Extension Term. Unless earlier terminated, following the expiration of the Term or the earlier completion of development of the Project and satisfaction of all of Developer’s obligations in connection therewith, this Agreement shall be deemed terminated and of no further force and effect, except for the provisions of this Agreement that survive termination.

2.2.5 Memorandum of Extension. If the First Extension Term or the Second Extension Term is granted, City and Developer agree to execute, acknowledge and record in the Official Records of Contra Costa County a memorandum evidencing approval of such extension.

2.3 City Representations and Warranties. City represents and warrants to Developer that, as of the Effective Date:

2.3.1 City is a municipal corporation, and has all necessary powers under the laws of the State of California to enter into and perform the undertakings and obligations of City under this Agreement.

2.3.2 The execution and delivery of this Agreement and the performance of the obligations of the City hereunder have been duly authorized by all necessary City Council action and all necessary approvals have been obtained.

2.3.3 This Agreement is a valid obligation of City and is enforceable in accordance with its terms.

During the Term of this Agreement, City shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section 2.3 not to be true, immediately give written notice of such fact or condition to Developer.

2.4 Developer Representations and Warranties. Developer represents and warrants to City that, as of the Effective Date:

2.4.1 Developer is duly organized and validly existing under the laws of the State of Delaware, and is in good standing and has all necessary powers under the laws of the State of California to own property interests and in all other respects enter into and perform the undertakings and obligations of Developer under this Agreement.

2.4.2 The execution and delivery of this Agreement and the necessary performance of the obligations of Developer hereunder have been duly authorized by all necessary corporate action and all necessary approvals have been obtained.

2.4.3 This Agreement is a valid obligation of Developer and is enforceable in accordance with its terms.

2.4.4 Developer has not (a) made a general assignment for the benefit of creditors; (b) filed any voluntary petition in bankruptcy or suffered the filing of any involuntary petition by Developer's creditors; (c) suffered the appointment of a receiver to take possession of all, or substantially all, of Developer's assets; (d) suffered the attachment or other judicial seizure of all, or substantially all, of Developer's assets; or (e) admitted in writing its inability to pay its debts as they come due.

During the Term of this Agreement, Developer shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section 2.4 not to be true, immediately give written notice of such fact or condition to City.

ARTICLE 3
DEVELOPMENT OF THE PROPERTY

3.1 Vested Rights. The Property is hereby made subject to the provisions of this Agreement. Developer shall have the vested right to develop the Property in accordance with and subject to Applicable Law, the Project Approvals, and this Agreement, which shall control the permitted uses, density and intensity of use of the Property and the maximum height and size of buildings on the Property.

3.2 Applicable Law. City and Developer acknowledge and agree that City is restricted in its authority to limit its police power by contract and that the limitations, reservations and exceptions contained in this Agreement are intended to reserve to City all of its police power that cannot be so limited. Notwithstanding the foregoing reservation of City, it is the intent of City and Developer that this Agreement be construed to provide Developer with rights afforded by law, including but not limited to, the Development Agreement Statute. Therefore, the laws, rules, regulations, official policies, standards and specifications of City applicable to the development of the Property and/or the Project shall be (collectively, “**Applicable Law**”):

3.2.1 Those rules, regulations, official policies, standards and specifications of the City set forth in this Agreement;

3.2.2 With respect to matters not addressed by and not otherwise inconsistent with the this Agreement, those laws, rules, regulations, official policies, standards and specifications (including City ordinances and resolutions) governing land use, including permitted uses, densities and intensities of uses, maximum building heights and sizes, requirements for on- and off-site infrastructure and public improvements (“**Plans and Policies**”), including the 2030 General Plan (including the Complete Streets Text Amendment to the Transportation and Circulation Element of the Concord 2030 General Plan adopted on December 10, 2013 and the Housing Element Update 2014-2022 General Plan Amendment adopted on January 6, 2015), the Concord Trails Master Plan, the Downtown Specific Plan approved as of June 24, 2014, and zoning provisions set forth in the Municipal Code (including Chapter 18 thereof, commonly referred to as the “**Development Code**”), the Concord Citywide Climate Action Plan adopted in July 2013, and any other Plans and Policies in force and effect on the Effective Date;

3.2.3 New City Laws set forth in the General Plan and Municipal Code that relate to any provision of law except for those laws, rules, regulations, official policies, standards and specifications (including City ordinances and resolutions) governing land use set forth in Section 3.2.2 above, provided such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of development projects and properties;

3.2.4 New City Laws that relate to or impose Impact Fees, provided such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of development projects and properties;

3.2.5 New City Laws that relate to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure

imposed at any time, provided such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of development projects and properties;

3.2.6 New City Laws that revise City's uniform construction codes, including City's building code, plumbing code, mechanical code, electrical code, fire code, grading code and other uniform construction codes, as of the date of permit issuance, provided, that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of development projects and properties;

3.2.7 New City Laws that are necessary to protect physical health and safety of the public; provided, that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of development projects and properties;

3.2.8 New City Laws that do not conflict with this Agreement or the Project Approvals, provided such new City Laws are uniformly applied on a City-wide basis to all substantially similar types of development projects and properties; and

3.2.9 New City Laws that do not apply to the Property and/or the Project due to the limitations set forth above, but only to the extent that such New City Laws are accepted in writing by Developer in its sole discretion.

3.3 Acknowledgement of Receipt of City Fee Schedule and Development Code. City has provided Developer, and Developer acknowledges receipt of, the Municipal Code and the City's fee schedule (<http://www.cityofconcord.org/citygov/municode/feescharges/fees-charges.pdf>), which are in force and effect as of the Effective Date. Copies of both documents are available in the City Clerk's office and are incorporated herein by this reference.

3.4 Development Timing. City and Developer acknowledge that Developer cannot at this time predict what portions of the Project will be included within any phase of the Project, when or the rate at which the phases will be developed or the order in which each phase will be developed. Such decisions depend upon numerous factors that are not within the control of Developer, such as market orientation and demand, interest rates, absorption, completion, availability of financing and other similar factors. In particular, and not in any limitation of any of the foregoing, since the California Supreme Court held in *Pardee Construction Co. v. The City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the parties therein to consider and expressly provide for the timing of development resulted in a later-adopted initiative restricting the timing of development prevailing over such parties' agreement, it is the desire to avoid that result by acknowledging that, unless otherwise provided for in this Agreement, Developer's vested rights under this Agreement include the right to develop the Property and the Project in such order and at such rate and at such times as Developer deems appropriate in the exercise of its discretion, subject to the terms, requirements and conditions of the Project Approvals and this Agreement.

3.5 Regulation by Other Public Agencies. City and Developer acknowledge and agree that other governmental or quasi-governmental entities not within the control of City possess authority to regulate aspects of the development of the Property and the Project and that this Agreement does not limit the authority of such other public agencies. City shall reasonably

cooperate with Developer in Developer's effort to obtain such permits and approvals as may be required by other governmental or quasi-governmental entities in connection with the development of, or the provision of services to, the Property and/or the Project; provided, however, City shall have no obligation to incur any costs, without compensation or reimbursement, or to amend any City policy, regulation or ordinance in connection therewith.

3.6 Life of Project Approvals. The term of any and all Project Approvals shall automatically be extended for the longer of the Term or the term otherwise applicable to such Project Approval.

3.7 Regional, State and Federal Law. As provided in Section 65869.5 of the Development Agreement Statute, this Agreement shall not preclude the applicability to the Project of changes in laws, regulations, plans or policies, to the extent that such changes are specifically mandated and required by changes in State or Federal laws or by changes in laws, regulations, plans or policies of special districts or other governmental entities, other than City, created or operating pursuant to the laws of the State of California, such as changes to the National Pollution Discharge Elimination System (NPDES) permit ("**Changes in the Law**"). In the event Changes in the Law prevent or preclude, or render substantially more expensive or time consuming, compliance with one or more provisions of this Agreement, the City and Developer shall meet and confer in good faith in order to determine whether such provisions of this Agreement shall be modified or suspended, or performance thereof delayed, as may be necessary to comply with Changes in the Law. Nothing in this Agreement shall preclude City or Developer from contesting by any available means (including administrative or judicial proceedings) the applicability to the Project of any such Changes in the Law. If Changes in the Law preclude, substantially prevent, or render substantially more expensive or time consuming, performance of this Agreement in a manner that makes the Project economically infeasible, Developer, in its sole and absolute discretion, may terminate this Agreement by providing written notice thereof to City.

ARTICLE 4 FEES AND EXACTIONS

4.1 Impact Fees; Exactions; Taxes and Assessments. Developer shall pay all Impact Fees in place as of the Effective Date, at the rate in effect as of the Effective Date, with annual increases in accordance with the Consumer Price Index for the San Francisco Bay Area. In addition, City may charge and Developer shall pay any and all new Impact Fees imposed by City, including new Impact Fees, such as sewer fees, adopted after the Effective Date, at the rate in effect at the time of payment; provided, however, City shall only require Developer to pay new Impact Fees that are uniformly applied by City to all substantially similar types of development projects and properties. Further, City may impose and Developer shall comply with those Exactions required by this Agreement and the Project Approvals. Lastly, Developer shall pay any and all taxes and assessments imposed on the Project or Property, at the rate in effect at the time of payment.

4.2 Processing Fees. "**Processing Fees**" means all fees for processing development project applications, including any required supplemental or other further environmental review, plan checking (time and materials) and inspection and monitoring for land use approvals, design

review, peer review, grading and building permits, General Plan maintenance fees, and other permits and entitlements required to implement the Project, which are in effect at the time those permits, approvals or entitlements are applied for, and which are intended to cover the actual costs of processing the foregoing. Subject to Developer's right to protest and/or pursue a challenge in law or equity to any new or increased Processing Fee, City may charge and Developer agrees to pay all Processing Fees, at the rate in effect as of the Effective Date, with annual increases in accordance with San Francisco-Oakland-San Jose Consumer Price Index, All Items (1982-84=100) for All Urban Consumers (CPI-U), published by the Bureau of Labor Statistics for the U.S. Department of Labor Consumer Price Index for the San Francisco Bay Area.

4.3 Other Agency Fees. Nothing in this Agreement shall preclude City from collecting fees from Developer that are lawfully imposed on the Project or Property by another agency having or asserting jurisdiction over the Project or Property, which the City is required to collect or impose ("**Other Agency Fees**").

4.4 Connection Fees. Subject to Developer's right to protest and/or pursue a challenge in law or equity to any new or increased Connection Fee, City may charge and Developer shall pay any Connection Fee that is lawfully adopted.

ARTICLE 5 DEVELOPER OBLIGATIONS

5.1 Developer Obligations. In consideration of the rights and benefits conferred by City to Developer under this Agreement, Developer shall perform the obligations set forth in this Article 5.

5.1.1 Developer shall maintain the Property in a good, clean and orderly condition, at Developer's sole cost and expense. If Developer does not maintain the Property in such condition, City shall have the right to maintain the Property, or to contract for such maintenance, after written notice to Developer. However, prior to taking any such action, City shall notify Developer in writing identifying the deficiencies. Upon notification of any deficiency, Developer shall have 30 days within which to correct, remedy or cure the deficiency. If the written notification states that any deficiency is urgent and relates to the public health and safety, then Developer shall have a reasonable time not to exceed three business days to rectify the problem. If Developer fails to cure any such deficiencies following written notice and an opportunity to cure as provided above, or should an emergency require immediate action, City, at its option, may perform the necessary maintenance or other work at Developer's expense, and Developer shall reimburse City, as applicable, all such costs, plus a 20 percent administrative fee, within 30 days of City's demand therefor. If such costs and fees are not paid within the prescribed time period, City may assess Developer the cost of the work, and said assessment shall be a lien against the Property or may be placed on the property tax bill and collected as ordinary taxes by the City.

5.1.2 Developer shall cooperate with City and the Bay Area Rapid Transit (BART) in their efforts to increase pedestrian connectivity between the Concord BART Station and the City Downtown. Developer shall work with the City to incentivize BART to expend resources to

update the Concord BART Station and make improvements, such as pedestrian improvements and signage, to the surrounding area, including the area adjacent to and near the Property.

5.1.3 Developer shall work with City to assess interim parking opportunities to attract investors and major tenants to the Property and adjacent properties owned by Developer.

5.2 City of Concord Business License. Developer, at its expense, shall obtain and maintain a City of Concord business license at all times during the Term, and shall include a provision in all general contractor agreements for the Project requiring each such general contractor to obtain and maintain a City of Concord business license during performance of the work of construction.

5.3 Sales Tax Point of Sale Designation. Developer shall use good faith, diligent efforts to the extent allowed by law to require all persons and entities providing bulk lumber, concrete, structural steel and pre-fabricated building components, such as roof trusses, to be used in connection with the construction and development of, or incorporated into, the Project, to: (a) obtain a use tax direct payment permit; (b) elect to obtain a subcontractor permit for the job site of a contract valued at Five Million Dollars (\$5,000,000) or more; or (c) otherwise designate the Property as the place of use of material used in the construction of the Project in order to have the local portion of the sales and use tax distributed directly to City instead of through the county-wide pool. Developer shall instruct its general contractor(s) for the Project to, and cause such general contractor(s) to instruct its/their subcontractors to, cooperate with City to ensure the local sales/use tax derived from construction of the Project is allocated to City to the fullest extent possible. To assist City in its efforts to ensure that such local sales/use tax is so allocated to City, Developer shall on an annual basis provide City with such information as shall be reasonably requested by City regarding subcontractors working on the Project with contracts in excess of the amount set forth above, including a description of all applicable work and the dollar value of such subcontracts. City may use such information to contact each subcontractor who may qualify for local allocation of use taxes to City.

ARTICLE 6 ANNUAL REVIEW

6.1 Annual Review.

6.1.1 Purpose. As required by California Government Code section 65865.1 and Municipal Code section 18.460.090, City and Developer shall review this Agreement and all actions taken pursuant to the terms of this Agreement with respect to the development of the Project every 12 months from the date this Agreement is recorded to determine good faith compliance with this Agreement.

6.1.2 Conduct of Annual Review. The annual review shall be conducted as provided in this Section 6.1.2 and Municipal Code section 18.460.090. If the Planning Division finds and determines that Developer has not complied in good faith with the terms and conditions of this Agreement, a public hearing shall be held by the City Council, at which time Developer must demonstrate good faith compliance with the terms and conditions of this Agreement. The burden of proof of compliance is on Developer. The City Council shall determine, upon the basis of substantial evidence, whether or not Developer has, for the time period under review, complied

in good faith with the terms and conditions of this Agreement. If the City Council finds and determines, based upon substantial evidence, that Developer has complied in good faith with the terms and conditions of this Agreement during the period under review, no further action is required. If the City Council finds and determines, based upon substantial evidence, that Developer has not complied in good faith with the terms and conditions of this Agreement during the period under review, the City Council may modify or terminate the Agreement or extend the time or waive compliance upon a showing of good cause. The decision to terminate or modify the Agreement is final. As part of that final determination, the City Council may impose conditions as necessary to protect the interests of the City. The decision of the City Council shall be final and any court action or proceeding to attack, review, set aside, void, or annul any decision of the determination by the City Council shall be commenced within the time period specified in California Government Code section 65009.

6.1.3 Failure to Conduct Annual Review. Failure of City to conduct an annual review shall not constitute a waiver by the City of its rights to otherwise enforce the provisions of this Agreement nor shall Developer have or assert any defense to such enforcement by reason of any such failure to conduct an annual review.

ARTICLE 7 COOPERATION AND IMPLEMENTATION

7.1 Project Approvals. Certain subsequent land use approvals, entitlements, and permits will be necessary or desirable for implementation of the Project (each a “**Project Approval**” and collectively the “**Project Approvals**”). The Project Approvals may include, without limitation, the following: use permits, design review permits, lot line adjustments, site plans, development plans or permits, building permits, parcel maps and/or subdivision maps, and any amendments to, or repealing of, any of the foregoing. Except as otherwise expressly provided herein, the City shall not impose requirements or conditions upon the development and construction of the Project that are inconsistent with the terms and conditions of this Agreement.

7.2 Processing Applications for Project Approvals.

7.2.1 Timely Submittals by Developer. Developer acknowledges that City cannot begin processing applications for Project Approvals until Developer submits complete applications on a timely basis. Developer shall use diligent good faith efforts to: (a) provide to City in a timely manner any and all documents, applications, plans, and other information necessary for City to carry out its obligations hereunder; and (b) cause Developer’s planners, engineers, and all other consultants to provide to City in a timely manner all such documents, applications, plans and other materials required under Applicable Law. It is the express intent of the Parties to cooperate and diligently work to pursue and process any and all Project Approvals.

7.2.2 Expedited Processing by City. Upon submission by Developer of all appropriate applications and Processing Fees for any pending Project Approval, City shall, to the full extent allowed by Applicable Law, promptly and diligently, subject to City ordinances, policies and procedures regarding hiring and contracting, commence and complete all steps necessary to expeditiously act on Developer’s currently pending Project Approval applications including: (a) providing at Developer’s sole cost and expense, third-party consultants for planning and

processing of each pending Project Approval application (Developer shall pay such costs at cost plus 20 percent for administrative costs incurred); and (b) if legally required, providing notice and holding public hearings.

ARTICLE 8 AMENDMENT OF AGREEMENT AND PROJECT APPROVALS

8.1 Amendment by Written Consent. Except as otherwise expressly provided herein (including Section 6.1 relating to City’s annual review and Section 12.1 relating to termination in the event of a breach), this Agreement may be terminated, modified or amended only by mutual written consent of the Parties hereto or their successors in interest or assignees and in accordance with the provisions of Government Code sections 65967, 65867.5 and 65868.

8.2 Major Amendments. Any amendment to this Agreement which affects or relates to: (a) the Term except as provided in Section 2.2 (Term of Agreement); (b) permitted uses of the Property; (c) provisions for the reservation or dedication of land; (d) conditions, terms restrictions or requirements for subsequent discretionary actions; (e) the density or intensity of the use of the Property or the maximum height or size of proposed buildings; or (f) monetary contributions by Developer, shall be deemed a “**Major Amendment**” and shall require giving of notice and a public hearing before the Planning Commission and City Council. Any amendment which is not a Major Amendment shall be deemed a “**Minor Amendment**” and shall not, except to the extent otherwise required by Applicable Law, require notice of public hearing before the Parties may execute an amendment hereto. The City Manager or his or her designee shall have the authority to determine if an amendment is a Major Amendment or a Minor Amendment.

8.3 Minor Amendment. The City Manager or his or her designee shall have the authority to review and approve Minor Amendments.

8.4 Requirement for Writing. No modification, amendment, or other change to this Agreement or any provision hereof shall be effective for any purpose unless specifically set forth in a writing which refers expressly to this Agreement and is signed by duly authorized representatives of both Parties or their successors in interest.

8.5 CEQA Review. Developer agrees and acknowledges that additional CEQA review will be legally required for any discretionary Project Approval. The City, at Developer’s sole cost and expense, shall conduct such CEQA review as expeditiously as possible. Developer agrees and acknowledges that it will subject to any and all mitigation measures adopted in connection with such CEQA review and the provisions of any Mitigation and Monitoring Plan. Further, if the CEQA review requires an Environmental Impact Report and the City determines that a Statement of Overriding Considerations is required for Developer to move forward with the Project Approval, the City reserves its absolute discretion to consider adoption of the findings required by CEQA and the Statement of Overriding Considerations. If the City does not adopt the Statement of Overriding Considerations, Developer may choose to modify its Project and submit an amended application or may terminate this Agreement upon written notice to City.

ARTICLE 9
INSURANCE, INDEMNITY AND COOPERATION IN THE EVENT OF
LEGAL CHALLENGE

9.1 Insurance Requirements. Developer shall, at its own expense, procure and maintain in full force at all times during the term of this Agreement the following insurance:

9.1.1 Commercial General Liability Coverage. Developer shall maintain commercial general liability insurance with limits of no less than one million dollars (\$1,000,000) combined single limit per occurrence or two million dollars (\$2,000,000) aggregate limit for bodily injury, personal injury, and property damage.

9.1.2 Automobile Liability Coverage. Developer shall maintain automobile liability insurance covering all vehicles used in the performance of this Agreement providing a one million dollar (\$1,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage.

9.1.3 Professional Liability Coverage (Errors and Omissions). Developer shall maintain professional liability insurance with coverage for all negligent errors, acts or omissions committed by Developer, its agents and employees in the performance of this Agreement. The amount of this insurance shall be not less than one million dollars (\$1,000,000) on a claims made annual aggregate basis or a combined single limit per occurrence basis.

9.1.4 Compliance with State Workers' Compensation Requirements. Developer covenants that it will insure itself against liability for Workers' Compensation pursuant to the provisions of California Labor Code §3700, et seq. Developer shall, at all times, upon demand of the City, furnish proof that Workers' Compensation Insurance is being maintained by it in force and effect in accordance with the California Labor Code. The insurer shall also agree to waive all rights of subrogation against the City, its officers, officials, employees and volunteers for losses arising from work performed by Developer for City. This provision shall not apply upon written verification by Developer that Developer has no employees.

9.1.5 Other Insurance Provisions. The policies are to contain, or be endorsed to contain the following provisions:

(a) Additional Insured. City, its officers, agents, employees, and volunteers are to be covered as an additional insured as respects: Liability arising out of activities performed by or on behalf of Developer and operations of Developer, premises owned, occupied, or used by Developer. The coverage shall contain no special limitations on the scope or protection afforded to City, its officers, officials, employees, or volunteers. Except for worker's compensation and professional liability insurance, the policies mentioned in this subsection shall name City as an additional insured and provide for notice of cancellation to City. Developer shall also provide timely and prompt notice to City if Developer receives any notice of cancellation or nonrenewal from its insurer.

(b) Primary Coverage. Developer's insurance coverage shall be primary insurance with respect to City, its officers, officials, employees, and volunteers. Any insurance,

risk pooling arrangement, or self-insurance maintained by City, its officers, officials, employees, or volunteers shall be in excess of Developer's insurance and shall not contribute with it.

(c) **Reporting Provisions.** Any failure to comply with the reporting provisions of the policy shall not affect the coverage provided to the City, its officers, officials, employees, or volunteers.

(d) **Verification of Coverage.** Developer shall furnish City with certificates of insurance and the original endorsements effecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The aforementioned policies shall be issued by an insurance carrier having a rating of Best A-7 or better which is satisfactory to the City Attorney and shall be delivered to City at the time of the execution of this Agreement or before work commences. Such policies and certificates shall be in a form approved by the City Attorney. City reserves the right to require complete certified copies of all required insurance policies at any time.

9.2 **Indemnity and Hold Harmless.** Developer shall indemnify, defend (with counsel reasonably acceptable to City) and hold harmless City Parties from and against any and all Claims, including but not limited to Claims for any bodily injury, death, or property damage, resulting directly or indirectly from, arising out of, or connected in any way with the Property, the development or construction of the Project by or on behalf of Developer, third party Claims, and/or from any other acts or omissions of Developer under this Agreement, whether such acts or omissions are by Developer or any of Developer's contractors, subcontractors, agents, or employees, except to the extent such Claims arise from the sole or gross negligence or willful misconduct of City or City Parties. This Section 9.2 shall survive expiration or other termination of this Agreement.

9.3 **Defense and Cooperation in the Event of a Litigation Challenge.** At Developer's sole cost and expense, City and Developer shall cooperate in the defense of any court action or proceeding instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, or the Project Approvals ("**Litigation Challenge**"). To the extent Developer desires to contest or defend such Litigation Challenge, Developer shall take the lead role defending such Litigation Challenge and shall indemnify, defend (with legal counsel reasonably acceptable to the City Attorney) and hold harmless, City Parties, from and against any and all Claims raised in connection with the Litigation Challenge. City may, in its sole discretion, elect to be separately represented by the legal counsel of its choice in any such action or proceeding with the reasonable costs of such representation to be paid by Developer, in which case Developer shall reimburse City, within ten (10) business days following the date of City's written demand therefor (City may make multiple demands from time to time during the course of such Litigation Challenge), all actual costs incurred by City in connection with the Litigation Challenge, including City's fully loaded administrative, legal, expert, witness, consultant, and court costs and City Attorney oversight expenses. Developer shall indemnify, defend, and hold harmless City Parties from and against any and all Claims, including attorneys' fees awarded under Code of Civil Procedure section 1021.5, assessed or awarded against City by way of judgment, settlement, or stipulation. Any proposed settlement of a Litigation Challenge shall be subject to City's approval not to be unreasonably withheld, conditioned or delayed. If

the terms of the proposed settlement would constitute an amendment or modification of this Agreement or any Project Approval, the settlement shall not become effective unless such amendment or modification is approved by City in accordance with Applicable Law, and City reserves its full legislative discretion with respect thereto. If Developer opts not to contest or defend such Litigation Challenge, City shall have no obligation to do so. This Section 9.39.2 shall survive expiration or other termination of this Agreement.

ARTICLE 10 ASSIGNMENT, TRANSFER AND NOTICE

10.1 Assignment. Because of the necessity to coordinate development of the entirety of the Property pursuant to plans for the Project, certain restrictions on the right of Developer to assign or transfer its interest under this Agreement with respect to the Property, or any portion thereof, are necessary in order to assure the achievement of the goals, objectives and public benefits of the Project and this Agreement. Developer agrees to and accepts the restrictions set forth in this Section 10.1 as reasonable and as a material inducement to City to enter into this Agreement. Developer shall have the right to sell or transfer its fee interest, or ground lease its interests in the Property, in whole or in part to any person, partnership, joint venture, firm, company, corporation or other entity (any of the foregoing, an “**Assignee**”) subject to the written consent of City, which consent shall not be unreasonably withheld ; provided that Developer may assign its rights under this Agreement without the consent of City to any corporation, limited liability company, partnership or other entity which is controlling of, controlled by, or under common control with Developer, and “control,” for purposes of this definition, means effective management and control of the other entity, subject only to major events requiring the consent or approval of the other owners of such entity (“**Affiliated Party**”). Developer shall provide the City with written notice of any proposed transfer or assignment of Developer’s rights or obligations hereunder (each, an “**Assignment**”) at least 30 days prior to such Assignment. Each such notice of proposed Assignment shall be accompanied by evidence of Assignee’s agreement to assume Developer’s obligations hereunder. Developer shall pay the actual costs borne by City in connection with its review of the proposed Assignment, including the costs incurred by the City Attorney’s Office. If City consents to such Assignment, a written assignment and assumption agreement, in a form approved by City, shall be recorded in the Official Records of Contra Costa County. Assignee shall succeed to the rights, duties and obligations of Developer only with respect to the parcel or parcels, or portion of the Property so purchased, transferred, ground leased or assigned, and Developer shall continue to be obligated under this Agreement with respect to any remaining portions of the Property retained by Developer and not assigned.

10.2 Successive Assignment. In the event there is more than one Assignment under the provisions of this Article 10, the provisions of this Article 10 shall apply to each successive Assignment and Assignee.

ARTICLE 11 MORTGAGEE PROTECTION

11.1 Mortgagee Protection. Neither entering into this Agreement nor a breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value. Nothing in this Agreement shall prevent or limit Developer, at its sole discretion, from

granting one or more Mortgages encumbering all or a portion of Developer's interest in the Property or portion thereof or improvement thereon as security for one or more loans or other financing, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of Mortgagee who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure or otherwise. Developer shall provide the City with a copy of the deed of trust or mortgage within 10 days after its recording in the official records of Contra Costa County; provided, however, that Developer's failure to provide such document shall not affect any Mortgage, including without limitation, the validity, priority or enforceability of such Mortgage.

11.2 Mortgagee Not Obligated. No Mortgagee (including one who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure or otherwise) shall have any obligation to construct or complete construction of improvements, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property to any use except in full compliance with this Agreement and the other Project Approvals nor to construct any improvements thereon or institute any uses other than those uses or improvements provided for or authorized by this Agreement, or otherwise under the Project Approvals. Except as otherwise provided in this Section 11.2, all of the terms and conditions contained in this Agreement and the other Project Approvals shall be binding upon and effective against and shall run to the benefit of any person or entity, including any Mortgagee, who acquires title or possession to the Property, or any portion thereof.

11.3 Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any Notice of Default given Developer hereunder and specifying the address for service thereof, then City agrees to use its diligent, good faith efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any Notice of Default given to Developer. Each Mortgagee shall have the right during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the event of Default claimed or the areas of noncompliance set forth in City's Notice of Default. If a Mortgagee is required to obtain possession in order to cure any Default, the time to cure shall be tolled so long as the Mortgagee is attempting to obtain possession, including by appointment of a receiver or foreclosure, but in no event may this period exceed 120 days from the date the City delivers the Notice of Default to Developer.

11.4 No Supersedure. Nothing in this Article 11 shall be deemed to supersede or release a Mortgagee or modify a Mortgagee's obligations under any subdivision or public improvement agreement or other obligation incurred with respect to the Project outside this Agreement, nor shall any provision of this Article 11 constitute an obligation of City to such Mortgagee, except as to the notice requirements of Section 11.3.

ARTICLE 12 DEFAULT; REMEDIES; TERMINATION

12.1 Breach and Default. Subject to a Permitted Delay or by mutual consent in writing, and except as otherwise provided by this Agreement, breach of, failure, or delay by either Party to perform any term or condition of this Agreement shall constitute a "**Default.**" In the event of any alleged Default of any term, condition, or obligation of this Agreement, the Party alleging such Default shall give the defaulting Party notice in writing specifying the nature of the alleged

Default and the manner in which the Default may be satisfactorily cured (“**Notice of Breach**”). The defaulting Party shall cure the Default within 30 days following receipt of the Notice of Breach, provided, however, if the nature of the alleged Default is non-monetary and such that it cannot reasonably be cured within such 30-day period, then the commencement of the cure within such time period, and the diligent prosecution to completion of the cure thereafter, provided that if the cure is not diligently prosecuted to completion, then no additional cure period shall be provided. If the alleged failure is cured within the time provided above, then no Default shall exist and the noticing Party shall take no further action to exercise any remedies available hereunder. If the alleged failure is not cured, then a Default shall exist under this Agreement and the non-defaulting Party may exercise any of the remedies available under this Agreement.

12.2 Withholding of Permits. In the event of a Default by Developer, or following Notice of Breach to Developer pursuant to Section 12.1 above and during the cure period provided therein, upon a finding by the Planning Division that Developer is in breach, City shall have the right to refuse to issue any permit or Project Approval to which Developer would otherwise have been entitled pursuant to this Agreement until such Default or breach is cured. This provision is in addition to and shall not limit any actions that City may take to enforce the conditions of the Project Approvals.

12.3 Termination. In the event of a Default by Developer, in addition to the right to terminate under Article 6, the City shall have the right to terminate this Agreement upon giving notice of intent to terminate pursuant to Government Code section 65868. Following notice of intent to terminate, the matter shall be scheduled for consideration and review in the manner set forth in Government Code section 65867. Following consideration of the evidence presented in said review before the City Council, the City may give written notice of termination of this Agreement to the Developer. Termination of this Agreement shall be subject to the provisions of Section 12.8. In the event of a Default by City, Developer may terminate this Agreement upon written notice to City.

12.4 Specific Performance for Violation of a Condition. If City issues a Project Approval pursuant to this Agreement in reliance upon a specified condition being satisfied by Developer in the future, and if Developer then fails to satisfy such condition, City shall be entitled to specific performance for the purpose of causing Developer to satisfy such condition.

12.5 Legal Actions.

12.5.1 Institution of Legal Actions. In addition to any other rights or remedies and subject to the limitation of damages in Section 12.7, a Party may institute legal action to cure, correct or remedy any Default, to enforce any covenants or agreements herein, to enjoin any threatened or attempted violation thereof, or to obtain any other remedies consistent with the purpose of this Agreement. Any such legal action shall be brought in the Superior Court for Contra Costa County, California, except for actions that include claims in which the Federal District Court for the Northern District of the State of California has original jurisdiction, in which case the Northern District of the State of California shall be the proper venue.

12.5.2 Governing State Law. This Agreement shall be construed in accordance with the laws of the State of California, without reference to its choice of law provisions.

12.5.3 Acceptance of Service of Process. In the event that any legal action is commenced by Developer against City, service of process on City shall be made by personal service upon the City Clerk of City or in such other manner as may be provided by law. In the event that any legal action is commenced by City against Developer, service of process on Developer shall be made by personal service upon David Gold, Developer's registered agent for service of process, or in such other manner as may be provided by law.

12.6 Rights and Remedies Are Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by a Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same Default or any other Default by the other Party, except as otherwise expressly provided herein.

12.7 No Damages. In no event shall a Party, or its boards, commissions, officers, agents or employees, or any City Parties, be liable in damages, including without limitation, actual, consequential or punitive damages, for any Default under this Agreement. It is expressly understood and agreed that the sole legal remedy available to a Party for a breach or violation of this Agreement by the other Party shall be an action in mandamus, specific performance or other injunctive or declaratory relief to enforce the provisions of this Agreement by the other Party, or to terminate this Agreement. This limitation on damages shall not preclude actions by a Party to enforce payments of monies or the performance of obligations requiring an obligation of money from the other Party under the terms of this Agreement including, but not limited to, obligations to pay attorneys' fees and obligations to advance monies or reimburse monies. In connection with the foregoing provisions, each Party acknowledges, warrants and represents that it has been fully informed with respect to, and represented by counsel of such Party's choice in connection with, the rights and remedies of such Party hereunder and the waivers herein contained, and after such advice and consultation has presently and actually intended, with full knowledge of such Party's rights and remedies otherwise available at law or in equity, to waive and relinquish such rights and remedies to the extent specified herein, and to rely to the extent herein specified solely on the remedies provided for herein with respect to any Default of this Agreement by the other Party. By waiving and relinquishing rights and remedies hereunder regarding Claims both known and unknown, Developer expressly waives on behalf of itself and its successors and assigns any rights under California Civil Code Section 1542, which provides:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

Developer Initials

12.8 Surviving Provisions. In the event this Agreement is terminated, the obligations of Developer set forth in Article ARTICLE 12 shall survive.

**ARTICLE 13
GENERAL PROVISIONS**

13.1 Covenants Binding on Successors and Assigns and Run with Land. Except as otherwise more specifically provided in this Agreement, this Agreement and all of its provisions, rights, powers, standards, terms, covenants and obligations, shall be binding upon the Parties and their respective successors (by merger, consolidation, or otherwise) and assigns, and all other persons or entities acquiring the Property, or any interest therein, and shall inure to the benefit of the Parties and their respective successors and assigns, as provided in Government Code section 65868.5.

13.2 Notice. Any notice, demand or request which may be permitted, required or desired to be given in connection herewith shall be given in writing and directed to the City and Developer as follows:

If to the City: City Clerk
 City of Concord
 1950 Parkside Drive
 Concord, CA 94519
 Telephone: (925) 671-3390

with a copy to: City Attorney
 City of Concord
 1950 Parkside Drive, M/S 08
 Concord, CA 94519
 Telephone: (925) 671-3160

If to Developer: Swift Realty Partners
 One Concord Center
 2300 Clayton Road, Suite 110
 Concord, CA 94520
 Attn: Willard M. Lund
 Telephone: (925) 969-1000

with a copy to: David A. Gold
 Morrison & Foerster LLP
 425 Market Street
 San Francisco, California 94105-2482
 415-268-7000

Notices are deemed effective if delivered by certified mail, return receipt requested, or commercial courier, with delivery to be effective upon verification of receipt. Any Party may change its respective address for notices by providing written notice of such change to the other Parties.

13.3 Permitted Delays. Performance by either Party of an obligation hereunder shall be excused during any period of “**Permitted Delay.**” Permitted Delay shall mean delay beyond the reasonable control of a Party caused by: (a) calamities, including without limitation earthquakes, floods, and fire; (b) civil commotion; (c) riots or terrorist acts; (d) strikes or other forms of material labor disputes; (e) shortages of materials or supplies; or (f) vandalism. A Party’s financial inability to perform or obtain financing or adverse economic conditions generally shall not be grounds for claiming a Permitted Delay. The Party claiming a Permitted Delay shall notify the other Party of its intent to claim a Permitted Delay, the specific grounds of the same and the anticipated period of the Permitted Delay within 30 business days after the occurrence of the conditions which establish the grounds for the claim. If notice by the Party claiming such extension is sent to the other Party more than 30 days after the commencement of the cause, the period shall commence to run only 30 days prior to the giving of such notice. The period of Permitted Delay shall last no longer than the conditions preventing performance. In no event shall any Permitted Delay extend the Term of this Agreement.

13.4 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.5 Waivers. Notwithstanding any other provision in this Agreement, any failures or delays by any Party in asserting any of its rights and remedies under this Agreement shall not operate as a waiver of any such rights or remedies, or deprive any such Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies. A Party may specifically and expressly waive in writing any condition or breach of this Agreement by the other Party, but no such waiver shall constitute a further or continuing waiver of any preceding or succeeding breach of the same or any other provision. Consent by one Party to any act by the other Party shall not be deemed to imply consent or waiver of the necessity of obtaining such consent for the same or similar acts in the future.

13.6 Construction of Agreement. All Parties have been represented by counsel in the preparation and negotiation of this Agreement, and this Agreement shall be construed according to the fair meaning of its language. The rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in interpreting this Agreement. Unless the context clearly requires otherwise: (a) the plural and singular numbers shall each be deemed to include the other; (b) the masculine, feminine, and neuter genders shall each be deemed to include the others; (c) “shall,” “will,” or “agrees” are mandatory, and “may” is permissive; (d) “or” is not exclusive; (e) “includes” and “including” are not limiting; and (f) “days” means calendar days unless specifically provided otherwise.

13.7 Headings. Section headings in this Agreement are for convenience only and are not intended to be used in interpreting or construing the terms, covenants, or conditions of this Agreement.

13.8 Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a specific situation, is found to be invalid, or unenforceable, in whole or in part for any reason, the remaining terms and provisions of this Agreement shall

continue in full force and effect unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provisions, in which case any Party may terminate this Agreement by providing written notice thereof to the other Party.

13.9 Time is of the Essence. Time is of the essence of this Agreement.

13.10 Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of and bind the respective legal entities of Developer and City with their signatures.

13.11 Entire Agreement. This Agreement (including all exhibits attached hereto, each of which is fully incorporated herein by reference), integrates all of the terms and conditions mentioned herein or incidental hereto, and constitutes the entire understanding of the Parties with respect to the subject matter hereof, and all prior or contemporaneous oral agreements, understandings, representations and statements, and all prior written agreements, understandings, representations, and statements are terminated and superseded by this Agreement.

13.12 Estoppel Certificate. Developer or its lender may, at any time, and from time to time, deliver written notice to the City requesting the City to certify in writing that: (a) this Agreement is in full force and effect; (b) this Agreement has not been amended or modified or, if so amended or modified, identifying the amendments or modifications; and (c) Developer is not in Default of the performance of its obligations, or if in Default, to describe therein the nature and extent of any such Defaults. Developer shall pay, within 30 calendar days following the date of City's invoice, the actual costs incurred, expended, or otherwise borne by City in connection with its review of the proposed estoppel certificate, including the actual costs incurred, expended, or otherwise borne by the City Attorney's Office in connection therewith. The City Manager shall be authorized to execute any certificate requested by Developer hereunder. The form of estoppel certificate shall be in a form reasonably acceptable to the City Attorney. The City Manager shall endeavor to execute and return such certificate within 30 days or as soon as reasonable practicable following Developer's request therefor. Developer and City acknowledge that a certificate hereunder may be relied upon by tenants, transferees, investors, partners, bond counsel, underwriters, bond holders and Mortgagees. Notwithstanding anything in any estoppel certificate to the contrary no estoppel certificate shall waive or amend, and no estoppel certificate shall be deemed to waive or amend, any of the provisions of this Agreement, it being understood and agreed that all of the rights of the Parties under this Agreement are hereby expressly reserved and it being further understood that this Agreement will control in the event of any conflict between this Agreement and any estoppel certificate.

13.13 Recordation of Termination. Upon completion of performance of the Parties or termination of this Agreement, a written statement acknowledging such completion or termination shall be recorded by City in the Official Records of Contra Costa County.

13.14 City Approvals and Actions. Whenever a reference is made herein to an action or approval to be undertaken by City, the City Manager or his or her designee is authorized to act on behalf of City, unless specifically provided otherwise or the context requires otherwise.

13.15 Negation of Partnership. The Parties specifically acknowledge that the Project is a private development, that no Party to this Agreement is acting as the agent of any other in any respect hereunder, and that each Party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. None of the terms or provisions of this Agreement shall be deemed to create a partnership between or among the Parties in the businesses of Developer, the affairs of the City, or otherwise, or cause them to be considered joint venturers or members of any joint enterprise.

13.16 No Third Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit of the signatory Parties and their successors and assigns, including Mortgagees. No other person shall have any right of action based upon any provision in this Agreement.

13.17 Exhibits. The following exhibits are attached to this Agreement and are hereby incorporated herein by this reference for all purposes as if set forth herein in full:

Exhibit A: Property Description

Exhibit B: Site Map

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

CITY:

CITY OF CONCORD, a municipal corporation

By: _____
Valerie J. Barone, City Manager
[Signature must be notarized]

ATTEST:

By: _____
Joelle Fockler, CMC, City Clerk

APPROVED AS TO FORM:

By: _____
Susanne Brown, City Attorney

DEVELOPER:

SWIFT REALTY PARTNERS, LLC, a Delaware limited liability corporation

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

[Signatures must be notarized]

Exhibit A

Property Description

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF CONCORD,
COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA, AND IS DESCRIBED AS
FOLLOWS:**

**Lots 1, 2, 3 and 4, Block 1, as shown on the Map of Foskett Addition, Block 1, filed June 10, 1909,
Map Book 2, Page 33, Contra Costa County Records**

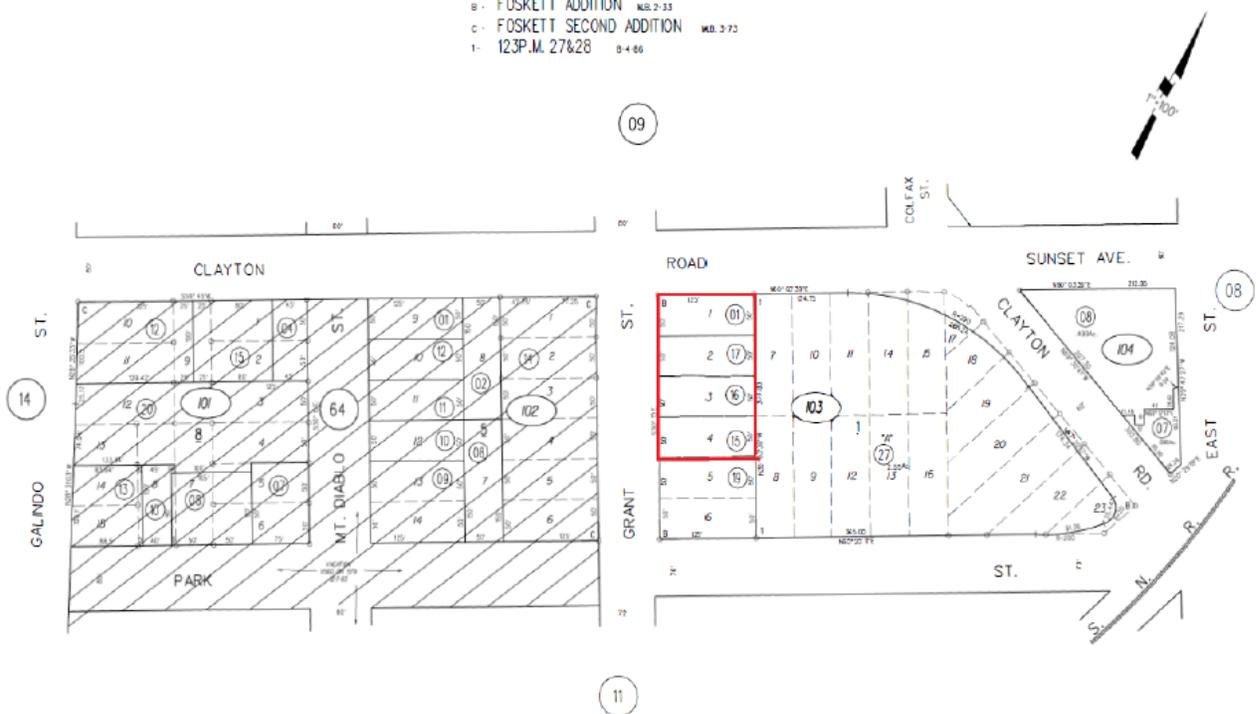
**APNs: 126-103-001
126-103-015
126-103-016
126-103-017**

Exhibit B

EXHIBIT B

- A - ESTATE OF FRANCISCO GALINDO N.B. 9-35
- B - FOSKETT ADDITION N.B. 2-33
- C - FOSKETT SECOND ADDITION N.B. 3-73
- 1- 123P.M. 27&28 D-4-86

H-15



NOTE: THIS MAP WAS PREPARED FOR ASSESSMENT PURPOSES ONLY. NO LIABILITY IS ASSUMED FOR THE ACCURACY OF THE INFORMATION DELINEATED HEREON. ASSESSOR'S PARCELS MAY NOT COMPLY WITH LOCAL LOT SPLIT OR BUILDING SITE ORDINANCES.

- 101
- 102
- 103
- 104

4-2-83
ASSESSOR'S MAP
BOOK 126 PAGE 10
CONTRA COSTA COUNTY, CALIF.