

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

City Attorney
City of Alameda
2263 Santa Clara Avenue, Room 280
Alameda, CA 94501
Attention: City Attorney

Document exempt from payment of a recording fee pursuant to California Government Code Section 27383, and Building Homes and Jobs Act Fee pursuant to California Government Code Section 27388.1(a)(2).

[Space Above for Recorder's Use]

DEVELOPMENT AGREEMENT (ENCINAL TERMINALS PROJECT)

This DEVELOPMENT AGREEMENT (ENCINAL TERMINALS PROJECT) ("Development Agreement" or "Agreement") is entered into by and between the City of Alameda, a municipal corporation ("City"), and North Waterfront Cove LLC, a Delaware limited liability company ("Developer") regarding the Encinal Terminals project. City and Developer are each a "Party" and collectively are the "Parties". Unless otherwise defined herein, capitalized terms used in this Agreement shall have the meaning given them in the Tidelands Exchange Master Plan (defined in Recital __).

RECITALS

This Development Agreement is based on the following facts, understandings and intentions of City and Developer:

A. In order to strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs and risk of development, the Legislature of the State of California enacted Section 65864 et seq. of the Government Code (the "Development Agreement Legislation") which authorizes City 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. Pursuant to Government Code Section 65864, City has adopted rules and regulations establishing procedures and requirements for consideration of development agreements, which procedures and requirements are contained in Alameda Municipal Code ("AMC") Sections 30-91 through 30-95 (the "City Development Agreement Regulations"). This Development Agreement has been processed in accordance with the City Development Agreement Regulations.

C. The Developer owns approximately 26 acres of real property, consisting of approximately 17.33 acres of land and 8.58 acres of submerged lands, located along the Oakland Estuary, north of Entrance Road, commonly known as Encinal Terminals, with an address of 1521 Buena Vista Avenue, City of Alameda, County of Alameda (APNs 72-0382-001, 72-0382-002 and

72-0383-003), as more specifically described in Exhibit A, attached hereto and incorporated herein (“**Encinal Terminals Parcel**”).

D. City holds in trust approximately 6.4 acres of property located adjacent to the Encinal Terminals Parcel, identified as APN 072-0382-009, as more specifically described in Exhibit B, attached hereto and incorporated herein (“**City Parcel**”). The City Parcel and the Encinal Terminals Parcel are referred to collectively herein as the “**Property**”.

E. The current configuration of the Encinal Terminals Parcel and the City Parcel renders the Encinal Terminals Parcel infeasible to develop for housing at this time. The Encinal Terminals Parcel is irregularly shaped and bisected by the City Parcel, necessitating an inefficient building pattern. The configuration of the parcels also limits the ability of the City to make productive use of the City Parcel for the purposes for which it is held. The City Parcel consists of filled former tidelands that are subject to the public trust for commerce, navigation and fisheries (“**Public Trust**”) but are largely situated away from the waterfront. The Encinal Terminals Parcel consists in part of dredged former uplands that are now submerged, and uplands that are on the waterfront or are otherwise useful to the Public Trust, but that are not (or may not be) subject to the Public Trust.

F. In order to permit the development of housing on the site within the next 10 years, and to obtain City ownership of the site’s waterfront and adjacent waters for the benefit of the public, the Parties wish to enter into an agreement with the State of California (“**State**”), acting by and through the State Lands Commission (“**SLC**”) to exchange lands and settle boundary disputes in a manner that improves the configuration of Public Trust lands at the site and terminates the Public Trust in lands not needed for trust purposes (“**State Exchange Agreement**”). The State Exchange Agreement will permit City, via conveyances through the SLC, to convey a portion of the City Parcel to Developer, and for Developer to convey a portion of the Encinal Terminals Parcel to City as shown in Exhibit C, attached hereto and incorporated herein. (the “**Public Trust Exchange**”). The State Exchange Agreement will permit the exchange to occur in phases, which will proceed in accordance with the phasing plan set forth in the Tidelands Exchange Master Plan as implemented by the Disposition and Development Agreement (“**Disposition and Development Agreement**” or “**DDA**”) between City and Developer.

G. Developer proposes to develop the Property into a transit-oriented residential mixed-use development, consistent with the Tidelands Exchange Master Plan and Density Bonus application (PLN _____) approved on _____, 2021 by City of Alameda Resolution No. _____, which allow for development of 589 housing units (including eighty (80) deed restricted affordable units), up to 50,000 square feet of retail/commercial space, and approximately 4.5 acres of public open space that will be publicly accessible from dawn to dusk (“**Project**”).

H. On July 17, 2007, City adopted Resolution Nos. 14134 and 14135 certifying the Final Environmental Impact Report for the Northern Waterfront General Plan Amendment (“**Northern Waterfront EIR**”) pursuant to the California Environmental Quality Act (“**CEQA**”), and on December 19, 2017, City adopted Resolution No. 15337 certifying a Focused Supplemental Environmental Impact Report for the Project (“**Focused Supplemental EIR**”, and with the Northern Waterfront EIR, “**Previous CEQA Documents**”). City wishes to make the site available for housing development in order to maximize opportunities for City to meet its Housing Element obligations for the period 2023-2031. City is also desirous of advancing the socioeconomic interests of City and its residents by promoting the productive use of underdeveloped property and

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encouraging quality development and economic growth, thereby enhancing employment opportunities for residents and expanding City's property tax base. City is also desirous of gaining the Public Benefits described in Section __, some of which are in addition to those dedications, conditions and exactions required by laws or regulations and as set forth in this Development Agreement, and which advance the planning objectives of, and provide benefits to, City.

I. This Development Agreement will eliminate uncertainty regarding Project Approvals (defined in Section 4 below), thereby encouraging planning for, investment in, and commitment to use and develop the Property. Continued use and development of the Property in accordance with this Agreement is anticipated to, in turn, provide substantial benefits and contribute to the provision of needed infrastructure for area growth, thereby achieving the goals and purposes for which the State enacted the Development Agreement Legislation.

J. This Agreement will help ensure (1) the productive use of underdeveloped property and foster orderly growth and quality development in City; (2) that development will provide market rate and affordable residential housing units during an unprecedented housing crisis; (3) that City will receive substantially increased property tax and sales tax revenues; (4) that development will proceed in accordance with the goals and policies set forth in the City of Alameda General Plan (“General Plan”) and will implement City's stated General Plan policies and transition former vacant industrial lands to mixed use, waterfront development; (5) that development will remove blight, inaccessible waterfront, inaccessible shoreline, inaccessible submerged lands, and pollution; (6) that City will benefit from increased public open space with an improved and accessible public shoreline which will be maintained in perpetuity at no cost to City, and commercial recreational opportunities, and employment opportunities for Alameda residents created by businesses in the commercial space within the Project; (7) that the waterfront and adjacent submerged lands will be placed under public ownership for the use and enjoyment of the people of California; and (8) that City will receive the Public Benefits provided by the Project for Alameda residents.

K. The terms and conditions of this Agreement have undergone extensive review by City, Developer and their respective legal counsel. The Planning Board, at a duly noticed public hearing on May __, 2021, determined that the Agreement is consistent with the objectives, policies, general land uses and programs specified in the General Plan, and is compatible with applicable regulations pertaining to the use of land. In adopting its Resolution, the Planning Board reviewed and heard the report of City staff on Developer's application for this Development Agreement and considered all other evidence heard and submitted the public hearing, including the matters to be considered pursuant to the Development Agreement Legislation and the City Development Agreement Regulations, in recommending adoption of the Development Agreement to the City Council.

L. On _____, 2021, the City Council, at a duly noticed public hearing, and after consideration of all matters in the record, including without limitation City staff's report on Developer's application for this Agreement, the Planning Board's recommendations thereon, all other evidence heard and submitted at such public hearing found that approval of the Development Agreement is in compliance with CEQA and consistent with the General Plan and other regulations prescribed for the use of land, and that the economic interests of Alameda residents and the public health, safety and welfare will be best served by entering into this Agreement, and introduced the ordinance approving this Development Agreement (“Ordinance”). On _____, 2021, the City Council adopted the Ordinance enacting this Development Agreement.

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NOW, THEREFORE, pursuant to the authority contained in the Development Agreement Legislation and the City Development Agreement Regulations, and in consideration of the foregoing Recitals and the mutual covenants and promises of the Parties herein contained, the amount and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **The Property**. The Property which is the subject of this Agreement is defined in Recitals C and D and more particularly described in Exhibit A and Exhibit B.
2. **The Project**. Developer shall develop and use the Property for a 589-unit residential housing development, including eighty (80) deed restricted affordable units, up to 50,000 square feet of retail/commercial space, and approximately 4.5 acres of public open space, in conformance with the Project Approvals, as defined in Section 4.
3. **Effective Date; Term**. The Effective Date of this Development Agreement shall be the later of: (a) thirty (30) days after the date the Ordinance approving this Development Agreement is adopted by the City Council; or (b) if a referendum petition is timely and duly circulated and filed to challenge the Ordinance, the date the election results on the ballot measure by City voters approving this Development Agreement are certified by the City Council in the manner provided by the Elections Code. Not later than five (5) days after the Effective Date, Developer shall execute and acknowledge this Development Agreement and return the Development Agreement to City; not later than ten (10) days after the Effective Date, City shall execute and acknowledge this Development Agreement; and upon receipt of such executed and acknowledged Development Agreement, Developer shall cause this Development Agreement to be recorded in the Official Records of the County of Alameda (“**Official Records**”) as provided in Government Code Section 65868.5 and Section 30-94.4 of the City Development Agreement Regulations.
 - a. **Term**. The term of this Development Agreement (“**Term**”) is fifteen (15) years, beginning on the Effective Date, and shall expire on _____ of the calendar year in which the 15th anniversary of the Effective Date falls, unless sooner terminated pursuant to the applicable provisions of this Development Agreement. The Term has been established by the Parties as a reasonable estimate of the time required to develop the Project and obtain the Public Benefits of the Project. Notwithstanding the foregoing, it is Parties’ intent to use best efforts to accelerate the buildout in a ten (10) year time period.
 - b. **Termination**. This Development Agreement shall terminate and be of no further force and effect (subject to Section 3.e) on the earliest of (1) the expiration of the Term; (2) the completion of the Project and all of Developer’s obligations in connection therewith; (3) an action to terminate by the City Council pursuant to Annual Review (see Section 10); (4) termination or cancellation pursuant to AMC Sections 30-94.3, 30-95.2; (5) failure to execute a State Exchange Agreement within 24 months of the Effective Date that provides for a Public Trust Exchange in substantial conformance with the property boundaries described in Exhibit C; or (6) failure to adopt an assessment district or equivalent funding source acceptable to both parties within 24 months of the Effective Date for the maintenance of the Public Trust Lands in perpetuity.
 - c. **Termination for Default**. In the event of a Default by a breaching Party, the non-breaching Party may terminate this Development Agreement as provided for in Section 15.

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d. **Subsequent Amendments or Termination.** If the Parties amend, modify or terminate this Development Agreement as herein provided, or as otherwise provided in the City Development Agreement Regulations (AMC §§ 94.3, 95.2), or this Development Agreement is modified or terminated pursuant to any provision hereof, then Developer shall, within ten (10) days after such action takes effect, cause an appropriate notice of such action to be recorded in the Official Records.

e. **Effect of Expiration of Term or Termination.** Upon expiration of the Term or earlier termination of this Development Agreement, this Development Agreement and all of the rights, duties and obligations of the Parties hereunder shall terminate and be of no further force or effect, except for obligations under this Development Agreement that expressly survive expiration or termination, accrued obligations of a Party, and obligations to comply with Project Approvals and other laws. The expiration or termination of the Development Agreement shall not affect the effectiveness of the Project Approvals except as may be expressly provided therein.

4. **The Project Approvals.** Developer has applied for and obtained various environmental and land use approvals and entitlements related to the development of the Project, as described below. For purposes of this Development Agreement, “**Project Approvals**” shall mean the Initial Project Approvals and the Subsequent Approvals (each as defined herein). The permitted uses of the Property, the density and intensity of use, the maximum height and size of proposed buildings, and provisions for reservation of dedication of land for public purposes shall be those set forth in the Project Approvals, including this Development Agreement. The Applicable Law (as defined below), including the requirements of this Development Agreement, shall control the overall design, development, and construction of the Project, and all on- and off-site improvements and appurtenances in connection therewith, in the manner specified in this Development Agreement.

a. The term “**Initial Project Approvals**” shall mean all of the following approvals, plans and agreements.

i. **CEQA.** The Previous CEQA documents including the Northern Waterfront EIR (State Clearinghouse No. 2002102118), which was recommended for certification by the Planning Board on March 26, 2007, and certified with findings by the City Council on July 17, 2007, by Resolution No. 14134 (certifying Northern Waterfront EIR) and Resolution No. 14135 (adopting findings), and the Focused Supplemental EIR, which was recommended for certification by the Planning Board on July 17, 2017, and certified with findings by the City Council on December 19, 2017, by Resolution No. 15337 (adopting the Focused Supplemental EIR and adopting a mitigation monitoring and reporting program and findings).

ii. **Tidelands Exchange Master Plan.** On _____, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Ordinance No. _____, approved the Encinal Terminals Project Tidelands Exchange Master Plan.

iii. **Density Bonus Application.** On {same date as Master Plan approval in 2021} _____, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Resolution No. _____,

approved the density bonus application for the Project (the “**Density Bonus Application**”).

iv. **Disposition and Development Agreement:** On {date}, after a duly noticed public hearing, the City Council, by Ordinance No. , approved the Encinal Terminals Project Disposition and Development Agreement.

v. **Development Agreement.** On {date}, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Ordinance No. , approved this Development Agreement and authorized its execution.

b. **Subsequent Approvals.** The term “**Subsequent Approvals**” shall mean any additional permit or authorization that is required to develop the Project consistent with the Initial Approvals and is finally approved by City in accordance with Applicable Law (defined below). Subsequent Approvals may include, without limitation: development plans, conditional use permits, variances, subdivision approvals, subdivision improvement agreements, architectural design review approvals, demolition permits, infrastructure agreements, grading permits, building permits, right-of-way permits, lot line adjustments, sewer and water connection permits, certificates of occupancy, parcel maps, landscaping plans, master sign programs, affordable housing agreement, and encroachment permits. Subsequent Approvals shall not include any substantial amendment or other change to the Initial Approvals, unless expressly authorized by amendment to this Agreement approved by the City. At such time as any Subsequent Approval applicable to the Project is approved by the City, then such Subsequent Approval shall become subject to all the terms and conditions of this Development Agreement applicable to the Initial Project Approvals and shall be treated as a “**Project Approval**” under this Development Agreement.

5. **The Public Benefits.** In consideration of, and in reliance on, City agreeing to the provisions of this Development Agreement, Developer shall construct the public improvements identified in the Tidelands Exchange Master Plan, which includes without limitation the following public benefits, some of which improvements are over and above those dedications, conditions and exactions required by laws or regulations:

a. Removal of blighted and dangerous structures, wharfs, and waterfront improvements and the orderly development of the property consistent with the General Plan objectives to transition former underutilized and vacant industrial land in the Northern Waterfront to residential, maritime serving, and public waterfront access.

b. Conveyance to City in trust for public use of approximately 4.5 acres of privately owned shoreline property, and improvement of the property for public use, including construction and maintenance of a public Bay Trail and public promenade along approximately a half mile of currently inaccessible waterfront shoreline; and conveyance of approximately 13 acres of privately owned submerged lands to City in trust for public use.

c. Construction of up to 589 housing units including 80 units of deed restricted affordable housing and 10 units of middle-income housing during a local and regional housing crisis. Provision of employment opportunities and well-paying jobs.

- d. Increased property tax revenue for city, county, school district and other public taxing entities and county.
- e. New economic development and tideland lease opportunities to develop a marina and water based recreational uses and facilities on new submerged Public Trust lands.
- f. New transportation infrastructure, including the Bay Trail, Clement Avenue Extension and a water shuttle landing and annual funding for improved transportation service.

6. **Developer Obligations.** Developer shall timely comply with all requirements of the Project Approvals and Applicable Law, including without limitation, compliance with all conditions of approval and implementation of all required mitigation measures for the Project, and shall timely pay to City all fees that City is authorized to charge. In addition, Developer agrees to the following terms:

- a. **Property Conveyances.** Developer shall work in good faith with City to seek approval and execution of a State Exchange Agreement in substantial conformance with the property boundaries described in Exhibit C within 24 months of the Effective Date and shall thereafter implement the phased conveyances contemplated in the State Exchange Agreement consistent with the Disposition and Development Agreement.
- b. **Permits and Approvals.** Developer shall complete all required local, regional, state and federal permitting requirements necessary to begin site clearing and grading (i.e., demolition of existing improvements, mass grading, and construction of temporary Bay Trail) and begin site preparation and construction activities (“Site Preparatory Work”) consistent with the Tidelands Exchange Master Plan phasing schedule within 36 months of the Effective Date.
- c. **Construction and Maintenance of Public Improvements.** Developer shall construct and maintain public improvements on all lands to be exchanged into or confirmed in the Public Trust as part of the Public Trust Exchange (“**Public Trust Lands**”), consistent with the Tidelands Exchange Master Plan, at no cost to City, in accordance with the Tidelands Exchange Master Plan phasing schedule, including establishment of capital improvement reserves for maintenance of the Public Trust Lands in perpetuity. The maintenance obligation may be assumed by a community facilities district (“**CFD**”) and/or a geologic hazard abatement district (“**GHAD**”) or similar financing mechanism formed pursuant to Section __ below. Developer shall not be responsible for maintenance of a future marina developed by a future third party pursuant to a tideland lease with City. Developer’s maintenance obligation shall survive termination of this Agreement as to all improvements that have been completed at the time of termination.
- d. **Development Timing.** Developer shall commence and complete development of the Project in a regular, progressive and timely manner in accordance with the provisions and conditions of this Agreement, the Project Approvals, the Tidelands Exchange Master Plan construction phasing plan and schedule.

e. **“Day One” Public Access.** Prior to the issuance of the first building permit for a residential building or vertical improvement, Developer shall provide a temporary Bay Trail around perimeter of the site for public use, consistent with the Tidelands Exchange Master Plan. The temporary Bay Trail shall be a 16’ wide asphalt pathway. Fences shall be installed where necessary to protect the public from construction activities and/or unsafe wharf or shoreline conditions. The design of the fences shall be subject to the approval of the Planning Director.

f. **Affordable Housing.** Developer shall be responsible for constructing a total of eighty (80) affordable housing units as further described in the Tidelands Exchange Master Plan, in accordance with State Density Bonus Law and AMC Sections 30-16 and 30-17. Developer shall submit for City Manager review and approval in his/her reasonable discretion, an Affordable Housing Agreement for the provision of eighty (80) affordable housing units, consistent with the requirements of the Tidelands Exchange Master Plan and in a form in substantial conformance with Exhibit __, attached hereto and incorporated herein, and acceptable to the City Attorney. Prior to approval of the first final Map for the Project, Developer shall have received City Manager approval, in its reasonable discretion, of an Affordable Housing Agreement which is consistent with the requirements of this Master Plan and in a form acceptable to the City Attorney.

g. **Missing Middle Housing.** In addition to the affordable housing units required by Section 6.g, Developer shall provide a total of ten (10) “missing middle” affordable by design units (five 1-Bedroom and five 2-bedroom units) that will be provided to middle-income purchasers making between 120% and 180% of Alameda median income, within the following targeted demographic groups: Alameda Unified School District faculty and staff, first responders that work in Alameda (Alameda Police Department, Alameda Fire), front line medical personnel that work in Alameda County, and members of unions that are signatory to the Alameda County Building Trades Council. Buyers who purchase these homes will be restricted from selling their home for 5 years after purchase, or they will forfeit any accumulated equity. Prior to issuance of the first building permit or the first Final Map, whichever occurs sooner, Developer shall establish procedures for implementing the sales process and 5-year sale restriction for the middle-income units described above for review and approval by the City Manager, in consultation with the City Attorney.

h. **Universal Design.** Developer shall ensure that at least 50% of the units constructed meet the visit ability and universal design requirements contained in the City’s Universal Design ordinance, AMC Section 30-18.

i. **Labor Peace Agreement.** Developer shall execute an agreement to provide for labor peace, which will apply to a portion of the property mutually agreed to by Developer and Building Trades Council of Alameda Council.

j. **Reimbursement for City Expenses.** Developer shall reimburse City for all of its costs related to the pursuit of the Tidelands Exchange and all permits and activities necessary to support the development of the Property by the Developer, including, without limitation,

all costs owed under that certain reimbursement agreement between Developer and City dated October 8, 2020 (“**Reimbursement Agreement**”).

k. **Environmental Mitigation Measures.** Developer shall be responsible for implementing all environmental mitigations required by the Encinal Terminals Master Plan Mitigation Monitoring and Reporting Program attached as Exhibit E.

7. **City Obligations**

- a. **Public Trust Exchange.** City agrees to work in good faith to execute the State Exchange Agreement with the State of California within 24 months of the Effective Date.
- b. **Assessment District(s).** Subject to Developer’s compliance with all applicable laws, including, but not limited to, any required vote of affected property owners, and further subject to reimbursement by Developer of all costs borne by City to establish a CFD, GHAD, and/or similar financing district (“**Assessment District**”), City shall cooperate with Developer in the establishment of an Assessment District and/or a similar financing mechanism for the construction and maintenance of future improvements within the Open Space. Nothing in this paragraph shall be construed as relieving Developer from (1) its obligation to construct and maintain improvements on Public Trust Lands in the event that an Assessment District or other financing mechanism is insufficient to fully fund the cost of constructing and maintaining the improvements, or (2) in the event this Agreement terminates for failure to successfully establish such Assessment District or other financing mechanism, or as otherwise provided in this Agreement, its obligation to maintain any improvements constructed prior to termination.
- c. **Universal Design.** City agrees to approve the necessary waivers to allow a 50% reduction in the 100% visibility requirement of the Universal Design ordinance, AMC Section 30-18
- d. **Grants.** City agrees to support grants for the funding of public facilities that may be required by the Project Approvals or apply for grants as otherwise required by agreement between the Parties, unless those grants would compete against other grant applications that the City deems to be of higher importance.
- e. **Timely Review.** City shall reasonably cooperate with Developer to facilitate prompt and timely review and processing of applications for Subsequent Approvals, including the timely provision of notice and scheduling of all required public hearings, and processing and checking of all maps, plans, permits, building plans and specifications and other plans relating to development of the Project filed by Developer, subject in all events to Developer’s satisfaction of the conditions for obtaining such approvals as set forth in the Project Approvals, including without limitation the completion of the required public improvements in accordance with the Tidelands Exchange Master Plan phasing plan and schedule.
- f. **Processing During Third Party Litigation.** Subject to Developer’s rights to tolling under applicable laws, the filing of any third party lawsuit(s) against City or Developer

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relating to this Development Agreement, the Project Approvals, Subsequent Approvals, or any other action taken in furtherance of the Project, including actions related to the Property outside the control of City or Developer, shall not delay or stop the development, processing, or construction of the Project or the issuance of Subsequent Approvals, unless the third party obtains a court order preventing the activity. To the extent such third-party litigation results in a court order that delays or stops the development, processing, or construction of the Project, the Term of this Development Agreement and any Project Approvals affected by such litigation shall be extended by the period of such delay.

8. **Development of the Property.**

- a. **Vested Development Rights.** The Property is hereby made subject to the provisions of this Development Agreement. All development of or on the Property, or any portion thereof, shall be undertaken only in compliance with the Project Approvals, Applicable Law and the provisions of this Development Agreement. For the Term of this Development Agreement, Developer shall have a vested right to develop the Property in accordance with the Project Approvals, Applicable Law and this Development Agreement. The Project shall be subject to all Subsequent Approvals (which, upon final approval, shall be deemed part of the Project Approvals hereunder).
- b. **Public Trust Lands.** With respect to property to be held by City subject to the Public Trust, no provision of this Agreement is intended to limit or restrict City with respect to its use, management or lease of such lands or to restrict its authority with respect to such lands as necessary to comply with the City's Public Trust obligations. Nothing in this Agreement shall be construed as vesting any rights in Developer to develop or use any portion of the City Parcel to be conveyed to Developer until such portion has been conveyed to Developer free of the Public Trust in accordance with the State Exchange Agreement and the DDA.
- c. **Future Marina on Public Trust Lands.** If City considers any proposals to construct, operate and maintain a marina on submerged lands within Alaska Basin and adjacent to the project site, City will reasonably coordinate with Developer for the purpose of reducing potential conflicts with the Project and Project development.
- d. **Applicable Law.** The rules, regulations, official policies, standards and specifications applicable to the development of the Property ("Applicable Law") shall be those set forth in (1) the Project Approvals, including this Development Agreement, and (2) those laws, rules, regulations, official policies, standards and specifications adopted by the City, governing development, permitted uses, building locations, timing of construction, densities, design, heights, fees and exactions ("City Laws") that are in force and effect on the Effective Date to the extent not inconsistent with Project Approvals, including without limitation the General Plan and Planning and Zoning Code requirements in effect on the Effective Date. Changes to City Laws after the Effective Date that are Conflicting City Enactments as defined in Section 8.k shall not apply to the Project.

i. Notwithstanding the foregoing, Applicable Law shall include the following City Laws as they exist at the time they are applied to the Project and not as they existed on the Effective Date:

(1) City Laws applicable citywide that are necessary to protect persons from a condition dangerous to their health or safety;

(2) If any subsequent environmental review is required for the Project, any mitigation measures required as part of that review;

(3) City Laws that are:

A. Specifically mandated by or necessary to comply with state or federal law, or mandated by any regional governmental agency that has legal authority over City under state law or a joint powers agreement; or

B. A result of or in response to state or federal law, or regional agency action, and necessary for City to avoid losing or not receiving substantial funding or other substantial public benefits or facilities that would be available to City only if it enacts the new or changed City Law; or

C. Specifically mandated by, or necessary for compliance with or implementation of, the terms of any permit, entitlement or other authorization for the Project issued by any federal, state or regional agency.

(4) Any requirements contained in the California Building Standards Code, as amended by City in accordance with the Health and Safety Code, including requirements of the City of Alameda Building and Housing Code, Fire Code, Sewer and Water Code, Energy Code, Green Building Code, or other uniform construction codes.

ii. Nothing in this Development Agreement shall limit the application of any of the following laws or other requirements, regardless of whether the law or other requirement is in effect on the Effective Date: (A) any state or federal law; (B) any requirement of any public agency other than City; or (C) any laws, rules, regulations, official policies, standards and specifications adopted by the City that do not govern development, permitted uses, building locations, timing of construction, densities, design, heights, fees or exactions.

b. Outside Agency Fees. The term “**Outside Agency Fees**” shall mean monetary fees or impact fee requirements imposed on the Project by the Alameda Unified School District, the State of California, or any political subdivision of the State except City. Notwithstanding anything to the contrary in this Development Agreement, the Outside Agency Fees for the Project shall be calculated based on the fee schedules and other fee requirements in effect at

the time the fees are due, whether or not the fees are collected by City on behalf of the outside agency.

c. Impact Fees. The term “Impact Fees” shall mean monetary fees, development impact fees, exactions, impositions, special taxes or assessments, established for or imposed upon the Project individually or as a class of projects, that are imposed by City on the Project in connection with any Project Approval (including Subsequent Approvals) for covering the Project’s fair share cost of constructing public facilities; and/or improvement, operation, and maintenance attributable to the burden created by the Project. The Project and any Subsequent Project Approval shall be subject to the specific Impact Fees (including the applicable inflator, if any) that are in effect as of the Effective Date, and the City shall not impose any new Impact Fees on the Project or any Subsequent Project Approval (excepting any Assessment District established pursuant to Section 7.b) for the Term of this Agreement. The base year for any Impact Fee inflator shall be 2021. Developer shall not receive any protection from rate escalators or rate increases established by ordinance as of the Effective Date. Notwithstanding the foregoing, applications for Project Approvals shall be subject to processing fees then in effect charged for the purpose of allowing the City to recover its actual and reasonable costs for processing such approvals.

i. In consideration of Developer’s agreement to construct and maintain in perpetuity 4.5 acres of public parks on public land and all associated public access and public roads to those public waterfront parks; and whereas those public parks will be available to the public during the same hours of the day as all other City park lands; and whereas the public's right of access is assured because the parks will be on land dedicated to the City in trust for the people of the State of California, and whereas Developer has agreed to maintain the entirety of the Project open spaces, streets, and other public facilities in perpetuity such that there will be no cost to the City to provide these municipal services generated by the development of the property, which is a cost of development not otherwise required by the subdivision regulations, City agrees that the Project shall be exempt from the obligation to pay the Improvement Tax in accordance with Alameda Municipal Code Section 3-62

ii. The rules and regulations for application of Development Impact Fees per AMC Section 27-3 (adopted July 16, 2019) shall apply, as follows:

- a. Each market rate residential unit will be assessed Development Impact Fees at a rate of \$1,735 per unit for Transportation, \$5,921 per unit for Parks, \$1,092 for General Public Facilities and \$1,688 per unit for Public Safety. Deed restricted affordable housing units shall not be assessed Development Impact Fees.
- b. Nonresidential Development Impact Fees for Retail shall be assessed at the following rates: \$4,186 per 1,000 sf for Transportation, \$303 per 1,000 sf for General Public Facilities and \$469 per 1,000 sf for Public Safety.
- c. Nonresidential Development Impact Fees for Office/Commercial shall be assessed at the following rates: \$4,119 per 1,000 sf for Transportation, \$554 per 1,000 sf for General Public Facilities and \$861 per 1,000 sf for Public Safety.

- d. These fees listed above are in effect in Base Year 2021 and shall be adjusted annually by the Consumer Price Index for all Urban Consumers for the San Francisco-Oakland-Hayward area.
- e. Should the fee(s) in place at the time of the application for building permit(s) be less than the fees on this schedule, or should any of the fees on this schedule no longer exist at the time of the application for building permit(s), the developer may elect to pay the lesser.
- f. Pursuant to Alameda Municipal Code Section 27-3.12, all deed restricted affordable housing units shall be exempt from Development Impact Fees, and pursuant to Sections 27-3.7 and 27-3.8, the Project may be eligible for fee credits and/or waivers.

d. **Life of Project Approvals.** The term of Project Approvals shall automatically be extended for the longer of the Term of this Agreement or the term otherwise applicable to such Project Approvals, provided however, that the terms of use permits, design review, building permits and variances shall be the time period permitted by Applicable Law.

e. **Subsequent Project Approvals.** Developer and City acknowledge and agree that Developer intends to submit applications for Subsequent Approvals, as defined herein. In connection with any Subsequent Approval, City shall conduct its review and exercise its discretion in accordance with Applicable Law, the Project Approvals (including the Tidelands Exchange Master Plan), and as provided by this Development Agreement.

f. **Vesting Tentative Maps.** If any tentative map heretofore or hereafter approved in connection with development of the Property is a vesting tentative map under the Subdivision Map Act, and if this Agreement is determined by a final judgment to be invalid or unenforceable that insofar as it grants a vested right to Developer for development of the Project, such judgment shall not terminate the rights and protections afforded Developer under the laws and ordinances applicable to vesting tentative maps.

g. **Developer's Right to Rebuild.** City agrees that Developer may renovate or rebuild portions of the Project at any time within the Term of this Development Agreement should it become necessary due to natural disaster or other casualty, or changes in seismic requirements. Such renovations or reconstruction shall be processed as a Subsequent Approval. Any such renovation or rebuilding shall be subject to all design, density and other limitations and requirements imposed by this Development Agreement, and shall comply with the Project Approvals and/or Applicable Law.

h. **Conflicting City Enactments.** For purposes of this Development Agreement, the term “**Conflicting City Enactment**” means a new or amended City Law that is enacted or amended after the Effective Date and conflicts with the Project Approvals or reduces the development rights or assurances provided by this Development Agreement. For the Term of this Agreement, and except as provided in Section 8.d.ii, the City shall not apply a Conflicting City Enactment to the Project or the Subsequent Approvals. Without limiting the generality of the foregoing, a City Law enacted or amended after the Effective Date of this Agreement shall be deemed to conflict with this Agreement or reduce the development rights

or assurances provided hereby if it would cause any of the following to occur if applied to the Project:

- i. Limit or reduce the number of residential units or other building types permitted to be developed on the Property;
- ii. Limit or reduce the square footage of residential, commercial, or other development permitted to be developed on the Property;
- iii. Limit or reduce the height, bulk, massing, or other intensity of the Project or of any building within the Project;
- iv. Change any land use designation or permitted use of the Property unless otherwise authorized by the Project Approvals;
- v. Limit or control the availability of public utilities, services or facilities or any privileges or rights to public utilities, services or facilities (for example, water rights, water connections or sewage capacity rights, sewer connections, etc.) for the Project;
- vi. Materially change, limit, or control the location, configuration or size of lots, buildings, structures, or other improvements of the Project in a manner that is inconsistent with or more restrictive than the limitations included in or imposed by the Project Approvals, Applicable Law or this Agreement;
- vii. Limit or control the rate, timing, phasing or sequencing of the approval, development or construction of all or any part of the Project in any manner, except as set forth in this Development Agreement, Applicable Law or the Project Approvals; or
- viii. Impose on the Project or Developer any fees or exactions other than those permitted by this Agreement, Applicable Law or the Project Approvals.

i. **Developer Right to Apply Future Changes.** Developer shall have the right to elect, with the consent of the City in its sole and absolute discretion, to have future changes to Applicable Law that conflict with this Development Agreement apply to the Project, in which case, such future change to Applicable Law shall be deemed an Applicable Law.

j. **Compliance with Applicable Federal and State Laws.** Developer shall comply, at no cost to City, with all applicable federal and state laws relating to the Project or the use, occupancy or development of the Property under this Development Agreement. Pursuant to Section 65869.5 of the Development Agreement Legislation, in the event that state or federal laws or regulations enacted after the Effective Date preclude or prevent compliance with one or more provisions of this Development Agreement, such provisions shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations.

k. **Other Government Permits, Fees and Approvals.** City shall reasonably cooperate with Developer in Developer's efforts to obtain permits and approvals from other

governmental or quasi-governmental entities for work performed on lands owned (or to be owned) by City, to the extent City's participation is necessary and is permitted by law; provided that Developer shall reimburse City for its costs and expenses incurred in connection with such efforts, including without limitation City staff time and outside consultant and legal fees.

9. Initiatives and Referenda. To the extent authorized by law, if any City Law enacted or imposed by a citizen-sponsored initiative is a Conflicting City Enactment, such City Law shall not apply to the Property or Project during the Term.

10. Annual Review. Developer shall notify the City in writing at least forty-five (45) days prior to the anniversary of the Effective Date requesting an annual review of the Agreement ("Annual Review"). The periodic review of the Development Agreement shall be made at least every twelve (12) months, consistent with Government Code section 65865.1 and Alameda Municipal Code Section 30-95. At least thirty (30) days prior to each anniversary of the Effective Date during the Term of this Agreement, Developer shall submit a written report to City outlining its efforts toward good faith compliance with the terms of this Agreement. Notwithstanding any other provision of this Agreement, if the Planning Board finds and determines on the basis of substantial evidence that Developer has not complied in good faith with the terms and conditions of the Agreement during the period under review, the Planning Board shall forward its recommendations to the City Council and the Council may modify or terminate this Agreement in accordance with AMC Section 30-95.2.

11. Extensions of Time. Without further action by the City Council, the City Manager shall have the authority, but not the obligation, in his or her sole and absolute discretion, to extend or adjust the deadline for Developer to complete any obligation under this Development Agreement (except extending the Term of the Development Agreement) for up to one (1) year, upon any terms or conditions he or she deems appropriate, if she or he believes the Developer has made a good faith effort to meet the deadline and the additional time is necessary to accommodate delays that were not the result of actions by the Developer.

12. Transfer and Assignment. "Transfer" shall be defined as the sale, conveyance, transfer, ground lease or assignment of Developer's interest in the Property or any portion thereof ("Transferred Property") to another party (including a joint venture or partnership) ("Transferee"), but excepting any conveyances made pursuant to the State Exchange Agreement. No Transfer shall require the amendment of this Development Agreement, provided that such Transfer is completed in conformance with the following requirements:

a. Right to Transfer Property. A Transfer shall be permitted, provided (1) Developer concurrently assigns to the Transferee, and Transferee assumes, all of Developer's rights and obligations under this Agreement and the Project Approvals (including, without limitation, the Affordable Housing Agreement) with respect to the Transferred Property, (2) the Transfer is permitted under the DDA, (3) either the Public Trust Exchange has been completed for all of the Transferred Property, the Transferred Property includes no portion of the Public Trust Lands, or the Transferred Property is conveyed to a single Transferee and includes all of Developer's remaining interest in the Property; and (4) the City has given its prior written consent in accordance with Section 12.c. At least 30 days prior to a Transfer,

Developer shall (i) notify City in writing of such Transfer; and (ii) provide the City a written assignment and assumption agreement in a form reasonably acceptable to the City Attorney.

b. Permitted Transfers. Notwithstanding the foregoing, the following Transfers of interests in the Property shall be permitted without the City's consent, but otherwise subject to the requirements of Section 12.a:

- (1)** Any Transfer creating a security financing.
- (2)** Any Transfer resulting from the foreclosure of a security financing interest or the granting of a deed in lieu of foreclosure of a security financing interest.
- (3)** Any Transfers between or among existing members of Developer.
- (4)** Any Transfer to a corporation, limited liability company, partnership or other entity which is controlling of, controlled by, or under common control with the Developer. For purposes of this paragraph, "control" 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").

c. City Consent. City's consent to a Transfer shall not be unreasonably withheld, delayed or conditioned. City's decision to withhold consent shall be based upon its determination, in its reasonable discretion, that the Transferee is not qualified to develop the Project or is unable to perform the obligations of Developer under this Development Agreement. Any such consent shall be in a writing signed by the City Manager and approved as to form by the City Attorney.

d. Assignment and Assumption. Developer shall not assign its rights or obligations under this Development Agreement except in connection with a Transfer, or as the City may otherwise approve in its sole and absolute discretion. Following an assignment, Developer shall continue to be obligated under this Agreement with respect to (1) all portions of the Property retained by Developer, (2) the construction and maintenance of all infrastructure and other public improvements to be provided by Developer and all other Developer obligations not expressly assigned to and accepted by the Transferee, and (3) any obligation for which a release is not obtained under Section 12.f.

e. Certificate of Compliance. Subject to City's written consent as provided in this Section __, City, upon request of Developer or Transferee, and following compliance with the notification provisions above, shall provide Transferee with a certificate of compliance, stating that, based on the City's actual and present knowledge, this Development Agreement remains valid and in full force and effect and is binding upon City, Developer and Transferee as of the last Annual Review pursuant to the provisions of Section __, except that if City knows of any non-compliance, City shall not be required to issue a certificate of compliance.

f. **Release of Transferring Developer.** Except with respect to a permitted transfer and assignment under Section 12(b) to an Affiliated Party, notwithstanding any Transfer, Developer shall continue to be obligated under this Development Agreement as to all or the portion of the Property so transferred unless City is satisfied the Transferee is fully able to comply with Developer's obligations under this Development Agreement (both financially and otherwise) and City gives Developer a release in writing.

g. **Responsibility for Performance.** Transferee shall be deemed to be "Developer" under this Agreement with all rights and obligations related thereto with respect to the Transferred Property. The City is entitled to enforce each and every obligation assumed by each Transferee directly against the Transferee as if the Transferee were an original signatory to this Agreement with respect to such obligation. Accordingly, in any action by the City against a Transferee to enforce an obligation assumed by the Transferee, the Transferee shall not assert as a defense against the City's enforcement of performance of such obligation that such obligation (i) is attributable to Developer's breach of any duty or obligation to the Transferee arising out of the Transfer or the Assignment and Assumption Agreement or any other agreement or transaction between Developer and the Transferee, or (ii) relates to the period before the Transfer.

h. **Constructive Notice.** Every person or entity who now or hereafter owns or acquires any right, title or interest in or to any portion of the Property is, and shall be, constructively deemed to have consented to every provision contained herein, whether or not any reference to this Agreement is contained in the instrument by which such person acquired an interest in the Property, and to be bound by this Agreement insofar as it pertains to the Transferred Property.

i. **Transfers of Finished Units.** Notwithstanding any other provision hereof to the contrary, Developer may transfer, convey or lease a parcel for which all construction has been completed and received a certificate of occupancy, and this Development Agreement shall terminate as to that parcel only upon transfer, conveyance or lease; provided that such transfer shall not affect Developer's obligations under this Development Agreement.

13. **Mortgagee Protection.** This Development Agreement shall be superior and senior to any lien placed upon the Property or any portion thereof after the date of recording the Development Agreement, including the lien of any deed of trust or mortgage ("Mortgage"). Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Development Agreement shall be binding upon and effective against and shall run to the benefit of any person or entity, including any deed of trust beneficiary or mortgagee ("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.

a. **Mortgagee Not Obligated.** Notwithstanding the foregoing, no Mortgagee shall have any obligation or duty under this Development Agreement to construct or complete the Project, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property or any portion thereof to any use

except in full compliance with Developer's obligations under this Agreement and the 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. The foregoing provisions shall not be applicable to any party who, after a foreclosure, conveyance or other action in lieu thereof, or other remedial action, obtains title to some or all of the Property from or through the Mortgagee, or any other purchaser at a foreclosure sale other than the Mortgagee itself.

b. 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 best efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an event of Default, and if City makes a determination of noncompliance hereunder, City shall likewise use its best efforts to serve notice of such noncompliance on such Mortgagee concurrently with service thereon on 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. If a Mortgagee shall be required to obtain possession in order to cure any Default, then vis-à-vis the Mortgagee, 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 one hundred twenty (120) days from the City's notice.

14. Estoppel Certificate. Within thirty (30) days of a written request, either Party shall execute an estoppel certificate in writing that, to the actual, present knowledge of the responding Party as of the last Annual Review: (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 amended, identifying the amendments, and (c) the requesting Party is not in material Default in the performance of its obligations under this Agreement, or if in material Default, describe the nature and amount of any such material Default.

15. Remedies for Default. If a Party is in Default under this Development Agreement, it may pursue one or more of the following courses of action after thirty (30) days' prior written notice to the other Party:

a. Breach. The failure by a Party to timely perform any obligation under this Development Agreement shall constitute a breach of this Agreement. In the event of alleged breach of any terms, or obligations under this Agreement, the Party alleging such breach shall give the other Party notice in writing specifying the nature of the breach and the manner in which said breach may be satisfactorily cured, and the Party in breach shall have thirty (30) days following such notice ("Cure Period") to cure such breach, except that in the event of a breach of an obligation to make a payment, the Party in breach shall have ten (10) days to cure the breach. If the breach is of a type that cannot be cured within thirty (30) days (or ten (10) days in the case of an obligation to make a payment), the breaching Party shall, within a thirty (30) day period (or ten (10) day period in the case of an obligation to make a payment) following notice from the non-breaching Party, notify the non-breaching Party of the time it will take to cure such breach which shall be a reasonable period under the

circumstances (“**Extended Cure Period**”); commence to cure such breach; and proceed diligently to cure such breach. The Extended Cure Period shall in no event exceed one hundred twenty (120) days unless otherwise agreed by the Parties. During the Cure Period or Extended Cure Period, the Party charged shall not be considered in Default for purposes of termination or institution of legal proceedings; but the City's right to refuse to issue a permit or Subsequent Project Approval, under Section 15.c shall not be limited by this provision. The failure of any Party to give notice of any breach shall not be deemed to be a waiver of that Party's right to allege that breach or any other breach at any other time.

b. **Default.** If the breaching Party has not cured such breach within the Cure Period or the Extended Cure Period, if any, such Party shall be in default (“**Default**”), and the non-breaching Party, at its option, may institute legal proceedings or otherwise avail itself of the remedies set forth in Sections 15. d below.

c. **Withholding of Permits.** In the event that the City issues a notice of breach to a Developer, City Manager shall have the right to refuse to issue any permits or other approvals to which Developer would otherwise have been entitled pursuant to this Development Agreement until such time as the breach is determined to be cured by the City or by a final, non-appealable court order. This remedy is in addition to and shall not limit any actions that City may take to enforce the conditions of the Project Approvals. This remedy shall be enforceable against a Transferee, regardless of whether the Transferee is responsible for the breach.

d. **Additional Remedies.**

i. **Additional Developer Remedies.** City and Developer agree that in the event of Default by City, the Parties intend that the primary remedy for Developer shall be specific performance of this Agreement. If City is in Default, Developer 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 hereof, or to obtain any other remedies (excluding monetary damages) consistent with the purpose of this Agreement. Any such legal action shall be brought in the Superior Court for Alameda County, California. The Parties further acknowledge that the City would not have entered into this Development Agreement had it been exposed to damage claims from Developer for any breach thereof. As such, the Parties agree that in no event shall Developer be entitled to recover monetary damages (including but not limited to actual, consequential, punitive or special damages) or attorney's fees against the City for breach of this Agreement.

ii. **Termination by Developer.** In the event of a Default by City, the Developer shall have the right to terminate this Development Agreement upon giving forty-five (45) days prior written notice to City of its intent to terminate.

iii. **Termination by City.** In the event of a Default by Developer, the City, through its City Manager, shall have the right to terminate this Development Agreement upon giving forty-five (45) days prior written notice to Developer. The

Developer may appeal a decision by the City Manager to terminate the Development Agreement to the City Council by providing written notice of the appeal to the City Manager, with a copy to the City Clerk and City Attorney, within ten (10) days of receipt of the Notice of Termination. The City Clerk shall schedule the appeal at the next available regularly scheduled City Council meeting, but not less than three regularly scheduled meetings from the date of the Appeal.

iv. Additional City Remedies. Developer acknowledges and agrees that the Property is unique, that City's remedy at law for Developer's Default is inadequate, that Developer's obligations under this Agreement are sufficiently clear and specifically enforceable, that there is adequate consideration for specific performance, and that the terms of this Agreement are just and reasonable. Accordingly, Developer agrees that in the event of Default by Developer, the City, without the necessity to prove the foregoing, may bring an action for specific performance of this Agreement. If Developer is in Default, City, in addition to any other rights or remedies, may institute legal action to cure, correct or remedy any Default, to compel specific performance of the Developers' obligations, to enforce any covenants or agreements herein, to enjoin any threatened or attempted violation hereof, or to obtain any other remedies (subject to the limitation on monetary damages described in Section __ below) consistent with the purpose of this Agreement. Any such legal action shall be brought in the Superior Court for Alameda County, California. If City issues an 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.

v. Limited City Damages Remedy. The City agrees that Developer shall not be liable to the City for damages under this Agreement and expressly waives its right to recover damages from Developer under this Agreement, except as follows: (1) City shall have the right to recover actual damages only (and not consequential, punitive or special damages, each of which is hereby expressly waived) for Developer's failure to pay sums to the City as and when due under this Agreement, and (2) the City shall have the right to recover actual damages for Developer's failure to make any payment due under any indemnity in this Agreement.

16. Indemnification. To the maximum extent permitted by law, Developer shall defend, indemnify, release and hold harmless City and its elected and appointed officials and employees (the "Indemnified Parties") from and against any Indemnified Claim. "Indemnified Claim" means any litigation, claim, action, court proceeding, loss, damage, arbitration proceedings, administrative proceedings, regulatory proceedings, civil penalties and fines brought against any of the Indemnified Parties, arising directly or indirectly from (i) any third party claim arising from a Default by Developer under this Agreement, (ii) Developer's failure to comply with any Project Approval (iii) the failure of any improvements constructed pursuant to the Project Approvals to comply with any Applicable Laws (iv) any accident, bodily injury, death, personal injury, or loss of or damage to property occurring on the Property in connection with the construction by Developer or its agents or contractors of any improvements pursuant to the Project Approvals or this Agreement, (v) any

dispute between Developer, its contractors or subcontractors relating to the construction of any part of the Project, (vi) any claim relating to the Public Trust Exchange Agreement, including any claim by the State against the City relating to the condition of the property transferred to the State, and (viii) any dispute between Developer and any Transferee or any subsequent owner of any of the Property relating to any assignment of this Agreement or the obligations that run with the land, or any dispute between Developer and any Transferee, (ix) any action to attack, set aside, void or annul this Agreement, any Project Approvals, or any portions thereof on any grounds, or which arises out of or in connection with this Development Agreement, including the approval of or enforcement of this Agreement, the development of the Project, or any actions undertaken to implement any of the Project Approvals. . City shall retain the right to approve legal counsel selected by Developer to defend City against an Indemnified Claim, which approval shall not be unreasonably withheld. Developer will reimburse the Indemnified Parties, within thirty (30) days of receiving copies of invoices evidencing that such costs have been incurred, for the reasonable attorney's fees, expert witness fees, and related costs as the Indemnified Parties may incur in connection with their retention of outside counsel. City shall retain the final right to approve any and all settlements proposed by Developer. Developer's responsibility for such defense and indemnity obligations shall survive the termination or completion of this Agreement for the full period of time allowed by law.

17. Attorney's Fees. If one of the Parties brings legal action against the other to enforce or defend a provision of this Development Agreement, the parties shall bear their own costs and fees, including attorney's fees, regardless of who prevails.

18. Third Party Legal Action; Attorney's Fees. If City chooses to defend any third party claim or suit challenging any action taken by City with regard to any procedure or aspect of City's approval of the development of the Project, including the environmental review process, Developer agrees to reimburse City for attorney's fees, expert witness fees, and related costs as City may incur in connection with its retention of outside counsel, and for any award of damages, court costs or fees against City. City has the right to choose and retain such legal counsel as City deems appropriate.

19. Provisions that Survive Termination of this Development Agreement. It is expressly agreed by the Parties that the following provisions survive the termination or expiration of this Development Agreement, together with any definitions or other general provisions necessary to effectuate the rights and obligations set forth therein:

- Section 6.c – Construction and Maintenance of Public Lands
- Section 15 – Remedies for Default
- Section 16 – Indemnification
- Section 17 – Attorney's Fees, and
- Section 18 – Third Party Legal Action; Attorney's Fees.

20. Waiver of Claims. Developer consents to, and waives any rights it may have now or in the future, to challenge the legal validity of the application of Applicable Law to the Project or the Property, or of any conditions or requirements imposed on Developer by the Project Approvals, including, without limitation, any claim that such terms and conditions constitute an abuse of discretion, are not within the police power, violate substantive or procedural due process, deny equal protection of the laws, effect a taking of property without payment of just compensation, or impose an unlawful tax.

21. **Severability.** If any term or provision of this Agreement or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the Parties.

22. **Recordation; Binding Effect.** This Agreement shall be recorded in the Official Records and shall be binding upon and inure to the benefit of successors in interest to the Parties. Where there is more than one Developer, the obligations are joint and several.

23. **Binding Effect; Covenants to Run with the Land.** This Development Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors in interest, and assigns of each of the Parties, and the terms of this Agreement shall constitute covenants running with the land; provided, however, that there shall be no transfer of rights or obligations under this Development Agreement except as permitted in Section __, and in no event shall any property transferred to the State or the City pursuant to the State Exchange Agreement transfer to or impose on the State or the City any obligations of Developer under this Agreement, or release Developer from any such obligations. Any reference in this Agreement to a specifically named Party shall be deemed to apply to any heir, administrator, executor, successor in interest, or assign of such Party who has acquired an interest in compliance with the terms of this Agreement or under law. Where there is more than one Developer, the obligations of Developer are joint and several.

24. **Successors and Assigns.** Subject to the provisions of Section __ relating to Transfer, the terms, covenants and conditions contained in this Agreement shall bind and inure to the benefit of City, Developer and their respective successors and assigns; provided, however, that the City shall have no obligation under this Agreement to, nor shall any benefit of this Agreement accrue to, any unapproved successor or assign of Developer where City approval of a successor or assign is required by this Agreement.

25. **Cooperative Drafting.** This Agreement has been drafted through a cooperative effort of both Parties, and both Parties have had an opportunity to have the Agreement reviewed and revised by legal counsel of their own choosing. No Party shall be considered the drafter of this Development Agreement, and no presumption or rule that an ambiguity shall be construed against the Party drafting the clause shall apply to the interpretation or enforcement of this Development Agreement.

26. **Integration.** This Agreement constitutes in full the final and exclusive understanding and agreement of the Parties and supersedes all negotiations or previous agreements of the Parties with respect to all or any part of the subject matter hereof. All waivers of the provisions of this Agreement shall be in writing and signed by Developer and the City Manager and shall be approved as to form by the City Attorney.

27. **No Third Party Beneficiaries.** There are no third-party beneficiaries to this Agreement.

28. **Non-Liability of Officials, Employees and Agents.** No City elected or appointed official, board member, commission, officer, employee, attorney, agent, volunteer or their respective

successors and assigns shall be personally liable to Developer, or any successor or interest, in the event of a City Default.

29. Parties Not Co-Venturers. Nothing in this Development Agreement is intended to or does establish the Parties as partners, co-venturers, or principal and agent with one another.

30. Time of the Essence. Time is of the essence in this Development Agreement. All reference to days shall mean calendar days unless otherwise noted. All references to year shall mean calendar year unless otherwise noted.

31. Applicable Law and Venue. This Development Agreement shall be interpreted, construed and enforced with the laws of the State of California. All rights and obligations of the Parties under this Development Agreement are to be performed in the City of Alameda in the County of Alameda and such county shall be the venue for any legal action or proceeding that may arise out of or be brought in connection with or by reason of this Development Agreement.

32. **Signature in Counterparts.** This Development Agreement may be executed in duplicate counterpart originals, each of which is deemed to be an original, and all of which when taken together shall constitute one and the same instrument.

33. Prevailing Wages. If required by State law and Alameda Municipal Code Section 2-67, Developer agrees to comply with California Labor Code Section 1770 et seq. regarding the payment of prevailing wages, the training of apprentices and compliance with other applicable requirements for any work on the Project.

34. Notices. The address of each Party for the purpose of all notices permitted or required by this Development Agreement is as follows:

To City: City of Alameda
Alameda City Hall, Rm 320
2263 Santa Clara Avenue
Alameda, CA 94501
Attn: City Manager

With a copy to: City of Alameda
Alameda City Hall, Rm 280
2263 Santa Clara Avenue
Alameda, CA 94501
Attn: City Attorney

To Developer: North Waterfront Cove LLC
3500 Douglas Boulevard
Roseville, CA 95661
Attn: Tim Lewis

With a copy to: Tim Lewis Communities
12667 Alcosta Boulevard, Suite 170

San Ramon, CA 94583
Attn: Michael S. O'Hara

With a copy to: Buchalter, A Professional Corporation
 55 Second Street, Suite 1700
 San Francisco, CA 94105-3493
 Attn: Alicia Guerra

The written address of either party set forth above may be changed by written notice given not less than five (5) days prior to the date such change is to be in effect. All notices under this Agreement shall be in writing, shall be properly addressed and shall be sent by personal delivery, United States mail (registered, certified, or Express Mail, return receipt requested and postage prepaid), or by overnight courier delivery service. All such notices shall be considered delivered: (i) if personally delivered, on the date of delivery; (ii) if sent by United States mail in the manner prescribed above, on the date shown on the return receipt for acceptance or rejection; or (iii) if sent by overnight courier delivery service, on the date of delivery or attempted delivery as shown by the written delivery record of such service.

35. **Amendments.** The Agreement may be amended by the Parties, upon mutual agreement, consistent with the procedures set forth in Government Code section 65868 and Alameda Municipal Code Section 30-94.3. Except as may otherwise be required by law or court order, all amendments to this Agreement shall be approved by the City Council, and shall be: (i) in writing; (ii) approved by the City Council in its sole discretion, by ordinance, at a public meeting; (iii) signed by both Parties; and (iv) entitled "Development Agreement – Encinal Terminals Project, Amendment N" where "N" is the next number in order.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties have signed this Development Agreement on the dates indicated below.

DEVELOPER

NORTH WATERFRONT COVE LLC,
a Delaware limited liability company

By: Marina View L.P., a California limited
partnership
Its: Managing Member

By: TL Management, Inc.
Its: General Partner

CITY OF ALAMEDA

By: _____
Eric J. Levitt, City Manager

By: _____
Michael S. O'Hara

Date: _____

(Notary Acknowledgment Required)

Date: _____

Attest:

Lara Weisiger, City Clerk

Recommended for Approval:

Andrew Thomas, Planning, Building and
Transportation Director

Approved as to Form:

Celena H. Chen
Assistant City Attorney

Authorized by City of Alameda Ordinance No. _____

Exhibits:

- A. Encinal Terminals Parcel – Legal Description**
- B. City Parcel – Legal Description**
- C. Pre- and Post-Exchange Property Lines**
- D. Affordable Housing Agreement Form**
- E. Mitigation Monitoring Program**

Exhibit 3

Item 7-A, 5/24/21

Planning Board Meeting

Exhibit 3
Item 7-A, 5/24/21
Planning Board Meeting