

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

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

DA - _____
DEVELOPMENT AGREEMENT
BOATWORKS PROJECT

This Development Agreement (“**Development Agreement**”) is entered into by and between the City of Alameda, a municipal corporation (“**City**”), and Boatworks LLC, a limited liability company (“**Developer**”) regarding the Boatworks project. City and Developer are each a “**Party**” and collectively are the “**Parties**”.

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 (“**Development Agreement Legislation**”), which authorizes City and a developer having a legal or equitable interest in real property to enter into a binding 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 (“**City Development Agreement Regulations**”). This Development Agreement has been processed in accordance with the City Development Agreement Regulations.

C. Developer owns approximately 9.4 acres of real property commonly known as Boatworks, located at 2229-2235 Clement Avenue, City of Alameda, County of Alameda (APNs 071-0289-005-00 and 071-0290-001), as more specifically described in **Exhibit A**, attached hereto and incorporated herein (“**Boatworks Parcel**” or “**Property**”).

D. Developer proposes to develop the Property with a 182-unit residential housing development, including 21 deed-restricted affordable units, and to provide approximately 1.5 acres of improved waterfront open space, which shall be publicly accessible from dawn to dusk, on the Property (“**Project**”).

E. To resolve certain legal disputes regarding the Project, City and Developer entered into that certain Settlement Agreement dated _____, 2020 (“**2020 Settlement Agreement**”).

F. The City examined the environmental effects of the development of the Project in an Environmental Impact Report (“**EIR**”) prepared and certified pursuant to the California Environmental Quality Act (“**CEQA**”).

G. On March 23, 2020, the Planning Board conducted a duly noticed public hearing and recommended for approval Tentative Map Tract 8060 (PLN 20-0118), Density Bonus Application (PLN 20-0119), Development Plan (PLN 20-0120), and Open Space Design Review (PLN 20-0121) for the Project.

H. On _____, 2020, the City Council conducted a duly noticed public hearing and approved Tentative Map Tract 8060, Density Bonus Application, Development Plan, and Open Space Design Review for the Project.

I. City is desirous of advancing the socioeconomic interests of City and its residents by promoting the productive use of underdeveloped property and 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 5, 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.

J. This Development Agreement will eliminate uncertainty regarding Project Approvals (as defined in section 4 below), thereby encouraging planning for, investment in and commitment to use and development of the Property. Continued use and development of the Property in accordance with this Development 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.

K. By entering into this Development Agreement: (1) City will ensure the productive use of underdeveloped property and foster orderly growth and quality development in City; (2) 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; (3) City will receive substantially increased tax revenues; and (4) City will receive the public benefits provided by the Project for the residents of City. Entering into this Development Agreement will also contribute to final resolution to the legal disputes underlying the 2020 Settlement Agreement.

L. The terms and conditions of this Development Agreement have undergone extensive review by City, Developer, and their respective legal counsel. The Planning Board, following a duly noticed public hearing held on March 23, 2020, determined that the Development 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 at the public hearing, including the matters to be considered pursuant to the City Development Agreement Regulations, in recommending to the City Council the adoption of a development agreement.

M. On _____, 2020, the City Council, following a duly noticed public hearing, and after due review of and report on Developer's application for this Agreement by City staff, consideration of the Planning Board's recommendations thereon, all other evidence heard and submitted at such public hearing, after compliance with CEQA and all other matters considered by the Planning Board, including the matters to be considered pursuant to the City Development Agreement Regulations, considered and found that approval of the Development Agreement is in compliance with CEQA and found and determined that the Development Agreement is consistent with the General Plan and other regulations prescribed for the use of land, and introduced the ordinance approving this Development Agreement ("**Ordinance**"). On _____, 2020, the City Council adopted the Ordinance enacting this Development Agreement.

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 Development Agreement is described in Recital C and more particularly in **Exhibit A** hereto.
2. **The Project.** Developer is authorized to develop and use the Property for a 182-unit, residential housing development, including 21 deed-restricted affordable units, and to provide approximately 1.5 acres of improved waterfront open space which shall be publicly accessible during daylight hours, and other improvements in conformance with the Project Approvals, as defined in Section 4.
3. **Effective Date; Term.** The Effective Date of this Development Agreement is 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 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. In establishing and agreeing to such Term, City has determined that the Project Approvals and this Development Agreement incorporate sufficient provisions to permit City to adequately monitor and respond to changing circumstances and conditions in granting permits and approvals and undertaking actions to carry out the development of the Project.

b. **Termination.** This Development Agreement shall terminate and be of no further force and effect 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 §§30-95.2; 30-94.3; or (5) the 2020 Settlement Agreement terminates and is of no further force and effect.

c. **Termination for Developer Breach.** In the event of a material breach by Developer, the City may also act to modify or terminate this Development Agreement as follows: Termination shall not relieve Developer of any other obligation, including obligations under this Development Agreement that survive Termination, accrued obligations under this Development Agreement, and obligations to comply with Project Approvals and other laws.

i. In the event of a material breach by Developer, City shall deliver to Developer, by certified mail, a notice containing:

a. Description of the alleged material breach and a statement as to whether the City proposes to terminate or modify the Development Agreement.

b. Demand for cure within 45 days.

c. The time and place of a City Council hearing on the proposed termination or modification at least 45 days from the date of the notice;

d. Other information which the City considers necessary to inform the Developer of the nature of the proceedings.

ii. At the time and place set for the hearing on modification or termination, the City shall give Developer an opportunity to be heard. If substantial evidence shows Developer has materially breached and has not cured the breach, City may impose those conditions to the action it takes as it considers necessary to protect the interests of the City.

c. **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 §§ 30-94.3; 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.

d. **Effect of Expiration of Term.** Except for obligations under this Development Agreement that survive expiration, accrued obligations of a Party, and obligations to comply with Project Approvals and other laws, upon expiration of the Term, 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. The expiration of the Term shall not affect the effectiveness of the Project Approvals.

4. **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 in this section. For purposes of this Development Agreement, “**Project Approvals**” shall mean the Initial Project Approvals and the Subsequent Approvals (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 and 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. In the event of any inconsistency between the Applicable Law and this Development Agreement, this Development Agreement shall control.

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

- i. **CEQA.** The documentation prepared under CEQA including the EIR (State Clearinghouse No. 2009102040), which was recommended for certification by the Planning Board on June 21, 2010, and certified with findings by the City Council on October 5, 2010, by Resolution No. 14494 (certifying EIR and adopting findings and a mitigation monitoring and reporting program).
- ii. **General Plan.** On October 5, 2010, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Resolution No. 14495, adopted General Plan Amendments related to the Project.
- iii. **Density Bonus Application.** On _____, 2020, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Resolution No. _____, approved the density bonus application (PLN 20-0119) for the Project.
- iv. **Open Space Design Review.** On _____, 2020, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Resolution No. _____, approved the Open Space Design Review (PLN 20-0121) for the Project.
- v. **Development Plan.** On _____, 2020, following Planning Board review and recommendation, and after a duly noticed public hearing, the

City Council, by Resolution No. _____, approved the Development Plan (PLN 20-0120) for the Project.

vi. **Tentative Map Tract 8060.** On _____, 2020, following Planning Board review and recommendation, and after a duly noticed public hearing, the City Council, by Resolution No. _____, approved Tentative Map Tract 8060 (PLN 20-0118) for the Project.

vii. **Development Agreement.** On _____, 2020, 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. 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 in Section 8). Subsequent Approvals may include, without limitation: subdivision improvement agreements, infrastructure agreements, right-of-way permits, landscaping plans, final subdivision map, architectural design review, grading permits, building permits, sewer and water connection permits, certificates of occupancy, affordable housing agreements, and encroachment permits. Subsequent Approvals shall not include any substantial amendment or other change to the Initial Approvals. If Developer submits to the City any application seeking to amend an Initial Approval or to obtain an approval that is inconsistent with the Initial Approvals, this shall be considered a Default unless Developer and City have agreed otherwise in writing, which writing shall be signed by Developer and the City Manager, and shall be approved as to form by the City Attorney. At such time as City approves any Subsequent Approval, all the terms and conditions of this Development Agreement applicable to the Initial Project Approvals shall apply to the Subsequent Approval, and the Subsequent Approval shall be treated as a “Project Approval” under this Development Agreement.

5. **Public Benefits.** In consideration of, and in reliance on, City agreeing to the provisions of this Development Agreement, Developer will provide the following public benefits, some of which are over and above those dedications, exactions, and conditions required by laws or regulations:

- a. Provide for the orderly development of the Property and the surrounding community.
- b. Provide public access to waterfront open space on an approximately 1.5-acre area of the Property as shown on Tentative Map Tract 8060, providing approximately one half extra acre of open space on the Property beyond what the R2-PD zoning requires.
- c. Contribute to relieving the housing shortage in the Bay Area.
- d. Increase property tax revenue for city and county.
- e. Add to City’s affordable housing stock.

6. **Developer's 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 (as defined in Section 8 herein and specified in **Exhibit B**) that City is authorized to charge.

7. **City of Alameda Obligations.**

a. **No Action to Impede Project Approvals.** The City shall take no action nor impose any condition that would conflict with this Development Agreement or the Project Approvals. Any action taken or condition imposed shall be deemed to be "in conflict with" this Agreement or the Project Approvals if such actions or conditions result in one or more of the circumstances identified in Section 8.i. of this Development Agreement.

b. **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.

c. **Processing During Third Party Litigation.** The filing of any third party lawsuit(s) against City or Developer 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 does delay or stop processing, the term of this Development Agreement 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 Applicable Law as defined in Section 8.b and this Development Agreement. For the Term of this Development Agreement, Developer shall have a vested right to develop the Property in accordance with 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. **Applicable Law.**

i. 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 and, (2) those laws, rules, regulations, ordinances, resolutions, 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 shall not apply to the Project.

ii. 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 city-wide 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 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, made necessary in order for the City to avoid losing or not receiving substantial funding or other substantial public benefits or facilities that would be available to the 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 necessary for the development of the Property issued by any federal, state or regional agency; or
- (4) Any requirements contained in the California Building Standards Code, as amended by City in accordance with the California Health and Safety Code, including requirements of the City of Alameda Building and Housing Code, Fire Code, Sewer and Water Code, or other uniform construction codes.

iii. Nothing in this Development Agreement shall limit the application of any state or federal law to the Project, or any requirement of any public agency other than City, regardless of whether the law or other requirement is in effect on the Effective Date.

c. **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 the 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.

d. **Fees.** The term “**Fees**” shall mean monetary fees, exactions, impositions, taxes or assessments whether 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 any purpose, including, without limitation, defraying all or a portion of the cost of: processing development applications; providing public services or constructing facilities; and/or improvement, operation, and maintenance attributable to the burden created by the Project. City Fees shall not include any Outside Agency Fees. Notwithstanding anything to the contrary contained in this Development Agreement:

i. Only the specific Fees (including any applicable inflator) as set forth in Exhibit F of the 2020 Settlement Agreement and as attached hereto as **Exhibit B** shall apply to the Project. The base year for any Fee inflator shall be 2020.

ii. Except as provided in section 8.d.i, above, no change to any Fee resulting in an increase in dollar amounts charged to the Project by City that is adopted after the Effective Date shall apply to the Project. No new Fee not listed on **Exhibit B** shall apply to the Project during the Term of this Development Agreement.

iii. City shall apply no new, additional, or further charges, taxes, fees, assessments, or levies to the Project during the Term of this Development Agreement except as specifically allowed herein.

iv. Developer shall have the right to elect to have future changes to Fees apply to the Project by giving City written notice of its election.

e. **Development Timing.** Developer shall use its best efforts to commence development, and to complete development of the Project in a regular, progressive and timely manner in accordance with the provisions and conditions and within the Term of this Development Agreement and the Project Approvals.

f. **Life of Project Approvals.** The term of any and all Project Approvals that would otherwise expire before the expiration of the Term of this Development Agreement shall automatically be extended to coincide with the Term of this Development Agreement; provided, however, that the terms of building permits and variances shall be limited to the time period permitted by Applicable Law; and provided further that any extension under this paragraph shall automatically terminate upon termination of this Agreement.

g. **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, and as provided in the Development Agreement.

h. **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.

i. **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. Without limiting the generality of the foregoing, a City Law enacted or amended after the Effective Date of this Development Agreement shall be deemed to conflict with this Development Agreement or reduce the development rights or assurances provided by this Development Agreement 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 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 Development 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 or costs other than those permitted by this Development Agreement and the Project Approvals.

j. **Developer Right to Apply Future Changes.** Developer shall have the right to elect to have future changes to Applicable Law that conflict with this Development Agreement apply to the Project by giving City written notice of its election to have a

future change to Applicable Law apply, in which case, such future change to Applicable Law shall be deemed an Applicable Law.

k. **Compliance with Applicable Federal and State Laws.** Developer shall comply, at no cost to the City, with all applicable federal or 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.

l. **Other Government Permits, Fees and Approvals.** City shall cooperate with Developer, to the extent appropriate and as permitted by law, in Developer's efforts to obtain, as may be required, permits and approvals from other governmental or quasi-governmental entities.

9. **Initiatives and Referenda.** If any City Law enacted or imposed by a citizen-sponsored initiative or referendum 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 date of the Effective Date requesting an annual review of the Development 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 AMC Section 30-95.1. See **Exhibit C** (AMC 30-95.1). At least thirty (30) days prior to each anniversary of the Effective Date during the Term, Developer shall submit a written report to City outlining its efforts towards good faith compliance with the terms of this Development Agreement. Notwithstanding any other provision of this Agreement, if the Planning Board finds and determines on the basis of substantial evidence that the applicant 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 Development Agreement in accordance with Alameda Municipal Code Section 30-95.2.

11. **Amendments.** The Development Agreement may be amended by the Parties, upon mutual agreement, consistent with the procedures set forth in Government Code section 65868 and AMC Section 30-94.3. See **Exhibit D** (AMC 30-94.3). Except as may otherwise be required by law or court order, all amendments to this Development Agreement shall be (i) in writing, (ii) approved by the City Council in its sole discretion, by ordinance, at a public meeting or alternatively approved by the City Manager pursuant to Section 11.a below, (iii) signed by both Parties, and (iv) entitled "Development Agreement – Boatworks, Amendment N" where "N" is the next number in order.

a. **Ministerial Amendments.** Without further action by the City Council, the City Manager shall have the authority, but not the obligation, to take the following action in his or her sole discretion:

- i. Extend or adjust the deadline for City or Developer to complete any obligation under this Development Agreement (except extending the Term of this Development Agreement) for up to one (1) year upon any terms or conditions he/she deems appropriate using his/her reasonable discretion.
 - ii. To consent, on behalf of City, to a Transfer pursuant to Section 12 herein, and to amend this Development Agreement to correctly identify the new developer.
- b. Nothing in this Section shall be construed as to require the City Manager to exercise his/her discretion or to prevent the City Manager from seeking City Council review and approval of an amendment that might otherwise fall within the City Manager's authority.

12. **Transfer and Assignment.** "Transfer" shall be defined as the sale, transfer, ground lease, or assignment of all or a portion of the Property, creation of a joint venture or partnership, or assignment of Developer's rights under this Development Agreement. No Transfer shall require the amendment of this Development Agreement, provided that such Transfer is completed in conformance with the 2020 Settlement Agreement and the following requirements:

a. **Right to Transfer Property.** Developer agrees to and accepts the restrictions on its right to Transfer its interest under this Development Agreement with respect to the Property, or any portion thereof, as set forth in this Section 12 as reasonable and as a material inducement to City to enter into this Development Agreement. Developer shall have the right to Transfer the Property in whole or in part (provided that no such partial Transfer shall violate the provisions of the Subdivision Map Act) to any person, partnership, joint venture, firm, company or corporation (any of the foregoing, an "Assignee") subject to the prior written consent of City.

i. **Permitted Transfers.** Notwithstanding the foregoing, the following Transfers of interests in the Property, shall be permitted without seeking or receiving consent:

- (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 transfer due to the death or incapacity of an individual.
- (4) Any transfer to an entity in which Developer has the power to direct the affairs or management of the proposed transferee, whether by contract, other governing documents, or operation of Law or otherwise.
- (5) Any transfer into or out of a living trusts for purposes of estate planning.

(6) Any transfers between or among existing members of Developer.

b. **City Consent.** City's consent to a Transfer or assignment under Section 12.a shall not be unreasonably withheld, delayed or conditioned. City's decision to withhold consent must be based upon its determination, in its reasonable discretion, that the Assignee 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.

c. **Assignment of Interest Under Development Agreement.** The sale, transfer, lease or assignment of any right or interest under this Development Agreement shall be made only together with the sale, transfer, ground lease or assignment of all or a part of the Property. Assignee shall succeed to the rights, duties and obligations of Developer only with respect to the parcel or parcels of the Property so purchased, transferred, ground leased or assigned, and Developer shall continue to be obligated under this Development Agreement with respect to (i) all portions of the Property in which Developer retains an interest, and (ii) except to the extent Developer has obtained a written release from City pursuant to Section 13.e, all portions of the Property retained by Developer and all conditions of approval under the Project Approvals, including without limitation the dedication and installation of all required infrastructure improvements.

d. **Notice of Assignment; Assumption Agreement.** Concurrently with any sale, transfer, ground lease or assignment of the Property, Developer shall (i) notify City in writing of such sale, transfer or ground lease; and (ii) Developer and Assignee shall have entered into a written assignment and assumption agreement, in form reasonably acceptable to and approved by the City Attorney, pursuant to which Assignee shall assume and succeed to the rights, duties and obligations of Developer with respect to the parcel or parcels of the Property so purchased, transferred, ground leased or assigned. Upon request of Developer or Assignee, and following compliance with the notification provisions above, City shall provide Assignee with an estoppel certificate in accordance with Section 13.

e. **Release of Transferring Developer.** Except with respect to a permitted Transfer and assignment under Section 12.a or 12.b, notwithstanding any sale, transfer, or assignment of all or a portion of the Property, Developer shall continue to be obligated under this Development Agreement as to all or the portion of the Property so transferred, and from any duty to comply with the conditions of approval per the Project Approvals, unless City is satisfied the Assignee is fully able to comply with Developer's obligations under this Development Agreement (both financially and otherwise) and Developer is given a release in writing. Such release shall not extend to any obligations pertaining to any portion of the Property retained by Developer.

f. **Partial Transfer.** Notwithstanding any other provision hereof to the contrary, if Developer only transfers a portion of the Property, then Developer shall continue to be obligated under this Development Agreement with respect to the balance of the Property not so transferred.

g. Any Transfer made in contravention of this Section shall void this Development Agreement, provided that each of the following has occurred: (a) approval and recordation of the final map for the Project, (b) approval and recordation of the open space deed restriction for the Project, and (c) approval and recordation of the affordable housing deed restriction for the Project (collectively, “**Assignment Conditions Precedent**”).

13. **Mortgage 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.

14. **Estoppel Certificate.** Within thirty (30) days of a written request, either Party shall execute an estoppel certificate in writing that, to the knowledge of the responding Party as of the last Annual Review: (a) this Development Agreement is in full force and effect and is a binding obligation of the Parties, (b) this Development 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 Breach in the performance of its obligations under this Development Agreement, or if in Breach or Default, describe the nature and amount of any such Breach or 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 or delay by either Party to perform any term or provision of this Development Agreement shall constitute a breach of this Development Agreement. In the event of an alleged breach of any terms or conditions of this Development 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 or default 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 reasonably be cured within thirty (30) days (or ten days in the case of an obligation to make a payment), the breaching Party shall, within a thirty (30) day period (or ten 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 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, as applicable, such Party shall be in default ("**Default**"), and the non-breaching Party, at its option, may terminate the Development Agreement or institute legal proceedings pursuant to this Development Agreement and shall have such remedies as are set forth in Sections 15.c and 15.d below.

c. **Withholding of Permits.** In the case of a serious and substantial breach by the Developer, the City 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 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.

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 Development 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 Development Agreement. Any such legal action shall be brought in the Superior Court for Alameda County, California. The Parties further acknowledge that 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) against City for breach of this Development Agreement.

ii. **Additional City Remedies.** City and Developer agree that in the event of Default by Developer, the Parties intend that the primary remedy for City shall be specific performance of this Development 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 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 Development Agreement. Any such legal action shall be brought in the Superior Court for Alameda County, California. If City issues an Approval pursuant to this Development 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.

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 or court proceeding brought against any of the Indemnified Parties, the purpose of which is to attack, set aside, void or annul this Development Agreement or any portion thereof on any grounds, or which arises out of or in connection with the approval or enforcement of this Development Agreement. This indemnification shall include, without limitation, damages, costs, expenses, court awarded attorney fees or expert witness fees that may be asserted or incurred by the Indemnified Parties, arising out of or in connection with the approval or enforcement of this Development Agreement. City shall retain the right to approve legal counsel retained 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 the evidence 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 its or their retention of outside counsel. City shall retain the final right to approve any and all settlements proposed by Developer.

17. **Attorney’s Fees.** If one of the Parties brings legal action to enforce or defend a provision of this Development Agreement, then the prevailing Party is entitled to its reasonable attorney’s fees, expert witness fees, and court costs.

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, 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:

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 Development Agreement or the application of any term or provision of this Development 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 Development Agreement, or the application of this Development 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 Development 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 12. 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 12 relating to Transfer, the terms, covenants, and conditions contained in this Development Agreement shall bind and inure to the benefit of City, Developer, and their respective successors and assigns; provided, however, that City shall have no obligation under this Development Agreement to, nor shall any benefit of this Development Agreement accrue to, any unapproved successor or assign of Developer where City approval of a successor or assign is required by this Development Agreement, or, after occurrence of the Assignment Conditions Precedent, where any Transfer voids the Development Agreement.
25. **Cooperative Drafting.** This Development Agreement has been drafted through a cooperative effort of both Parties, and both Parties have had an opportunity to have the Development 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 Development Agreement and the 2020 Settlement Agreement constitute 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 Development 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 Development 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 in 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 reference to year shall mean calendar year unless otherwise noted.
31. **Applicable Law and Venue.** This Development Agreement shall be interpreted, construed and enforcement 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 AMC 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: Boatworks LLC

With a copy to:

The written address of either Party set forth above may be changed by written notice given to the other Party not less than five (5) days prior to the date such change is to be in effect. All notices under this Development 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.

[Remainder of Page Intentionally Left Blank]

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

DEVELOPER

CITY OF ALAMEDA

By:
Its:

By: _____

By: _____

Eric J. Levitt, City Manager

(Notary Acknowledgment Required)

Date: _____

Date: _____

Attest:

Recommended for Approval:

Lara Weisiger
City Clerk
Director

Andrew Thomas
Planning Building and Transportation

Approved as to Form:

Yibin Shen
City Attorney

Authorized by City Council Ordinance No. _____

Exhibits:

- A Boatworks Property – Legal Description**
- B Fee Exhibit**
- C AMC 30-95.1 and 30-95.2**
- D AMC 30-94.3**

Exhibit A: (to be added)

Exhibit B : Fee Exhibit

The following identifies the fees that will apply to the Project (as defined in the 2020 Settlement Agreement and Development Agreement) and how they are calculated.

Unit Based Fees: Each building will be assessed the following fees at the following rates. Buildings with more than one unit shall pay per unit. The per unit fee shown below shall be adjusted annually by the CPI*.

1. Certificate of occupancy: \$150 per unit
2. Public Works – Waste Management Reporting Fee: \$373 per unit
3. Public Works – Sewer Connection Fee: \$1,118 per unit
4. Filing Fee: \$264 per unit
5. Plan Check – Planning: \$216 per unit
6. Plan Check – Fire: \$150 per unit
7. Plan Check – Public Works: \$192 per unit

* “Adjusted annually by the CPI” means that at the time the fee is due, the fee will be adjusted by multiplying it times the most recent Consumer Price Index for all Urban Consumers for the San Francisco-Oakland-Hayward area (or the successor index with the smallest geographic unit that includes the City of Alameda), and dividing it by the same index from February 2020 CPI-U for SF-OAK-HAY. Should the non-adjusted fee be greater than the fee in existence at the time of application, developer may elect to pay the lesser.

Valuation Based Fees: Each building will be assessed valuation based fees at the following rates.

- a. Improvement tax is 1% of “Valuation” **
- b. Community Planning Fee is 0.5% of “Valuation”
- c. Technology Fee is 5% of applicable permit fee

** “Valuation” will be based on the International Code Council (ICC) Building Valuation Data cost guide, a periodic publication updated at six-month intervals and used to provide a simplified method of estimating a value of a building. The most recent version of the guide can be found here: <https://cdn-web.iccsafe.org/wp-content/uploads/BVD-BSJ-AUG19-converted.pdf>.

Valuation will be determined based on the most recent version at the time that the fees are due, not the version in place as of the date of the Settlement or Development Agreement.

Fees Based on Floor Area and Fire Rating:

- a. Plan Check-Building
- b. Inspection-Building

Fees based on floor area, occupancy classification and fire rating will be charged at rates determined by City of Alameda July 2019 Master Fee Schedule. Plan Check-Building Fees for

duplicate units/buildings charged at 25% of initial unit/building fee. The Plan check – Building fee and Inspection Building fee shall be adjusted annually by the CPI*.

Development Impact Fees:

Each building will be assessed development impact fees. Single family homes will be charged Development Impact Fees at a rate of \$2,235 per unit for Transportation, \$8,105 per unit for Parks, \$1,377 per unit for Facilities and \$2,127 per unit for Safety. Units other than single family homes will be charged Development Impact Fees at a rate of \$1,735 per unit for Transportation, \$5,921 per unit for Parks, \$1,092 for Facilities and \$1,688 per unit for Safety. The rules and regulations for application of these fees per AMC Section 27-3 (adopted July 2019) shall apply. Deed restricted affordable housing units shall not be assessed Development Impact Fees. These fees shall be adjusted annually by the Construction Cost Index for the San Francisco Bay Area.

Public Works Review:

Public Works site improvement review and inspection will be billed at actual cost.

Design Review:

Design Review fees will be billed at actual cost.

APPLICABLE to ALL FEES:

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.