COMMISSION ON COMMUNITY INVESTMENT AND INFRASTRUCTURE

RESOLUTION NO. 80-2014
Continued to a future meeting

CONDITIONALLY APPROVING A VARIATION TO THE TRANSBAY REDEVELOPMENT PLAN'S ON-SITE AFFORDABLE HOUSING REQUIREMENT AS IT APPLIES TO THE MIXED-USE PROJECT AT 181 FREMONT STREET, SUBJECT TO APPROVAL BY THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO IN ITS CAPACITY AS LEGISLATIVE BODY FOR THE SUCCESSOR AGENCY TO THE SAN FRANCISCO REDEVELOPMENT AGENCY, AND AUTHORIZING THE ACCEPTANCE OF A FUTURE PAYMENT OF $13.85 MILLION TO THE SUCCESSOR AGENCY FOR USE IN FULFILLING ITS AFFORDABLE HOUSING OBLIGATIONS IN THE PROJECT AREA; TRANSBAY REDEVELOPMENT PROJECT AREA

WHEREAS, The California Legislature in 2003 enacted Assembly Bill 812 ("AB 812") authorizing the demolition of the historic Transbay Terminal building and the construction of the new Transbay Transit Center (the "TTC") (Stat. 2003, Chapter 99, codified at § 5027.1 of the Cal. Public Resources Code). AB 812 also mandated that 25 percent of the residential units developed in the area around the TTC "shall be available to" low income households, and an additional 10 percent "shall be available to" moderate income households if the City and County of San Francisco ("City") adopted a redevelopment plan providing for the financing of the TTC (the "Transbay Affordable Housing Obligation"); and,

WHEREAS, The Board of Supervisors of the City and County of San Francisco ("Board of Supervisors") approved a Redevelopment Plan for the Transbay Redevelopment Project Area ("Project Area") by Ordinance No. 124-05, adopted on June 21, 2005 and by Ordinance No. 99-06, adopted on May 9, 2006 ("Redevelopment Plan"). The Redevelopment Plan established a program for the Redevelopment Agency of the City and County of San Francisco ("Former Agency") to redevelop and revitalize the blighted Project Area; it also provided for the financing of the TTC and thus triggered the Transbay Affordable Housing Obligation; and

WHEREAS, The 2005 Report to the Board of Supervisors on the Redevelopment Plan ("Report") estimated that the Transbay Affordable Housing Obligation would require the development of 1200 affordable units. Report at p. VI-14 (Jan. 2005). The Report also stated: "The affordable housing in the Project Area will include approximately 388 inclusionary units, or units built within market-rate housing projects… The affordable housing will also include approximately 795 units in stand-alone, 100 percent affordable projects." Report at page VIII-7; and

WHEREAS, The Project Area is 40 acres in size and there are a limited number of publicly-owned properties ("Blocks") remaining on which to build affordable

housing to meet the Transbay Affordable Housing Requirement. All of the remaining Blocks are already programmed for stand-alone, 100 percent affordable housing (e.g., Blocks 2 and 12), for commercial office space (e.g., Block 5 and Parcel F), or for a combination of market-rate and affordable housing, with specific land value goals that the Transbay Joint Powers Authority ("TJPA") has used in its funding plan for the TTC. Nonetheless, with an additional public subsidy, units may be added to proposed stand-alone affordable housing developments on one or more of the Blocks; and,

WHEREAS, The Redevelopment Plan established, under Cal. Health and Safety Code § 33333, the land use controls for the Project Area, required development to conform to those land use controls, and divided the Project Area into two land use zones: Zone One and Zone Two. The Redevelopment Plan required the Former Agency to exercise land use authority in Zone One and authorized it to delegate to the San Francisco Planning Department ("Planning Department") the land use controls of the San Francisco Planning Code ("Planning Code"), as amended from time to time, in Zone Two; and

WHEREAS, On May 3, 2005, the Former Agency and the Planning Department entered into a Delegation Agreement whereby the Planning Department assumed land use authority in Zone Two of the Project Area subject to certain conditions and procedures, including the requirement that the Planning Department's approval of projects shall be consistent with the Redevelopment Plan ("Delegation Agreement"); and,

WHEREAS, To fulfill the Transbay Affordable Housing Obligation, both the Redevelopment Plan and the Planning Code require that all housing developments within the Project Area contain a minimum of 15 percent on-site affordable housing. Redevelopment Plan, § 4.9.3; Planning Code, § 249.28 (b) (6) (the "On-Site Requirement"). Neither the Redevelopment Plan nor the Planning Code authorize off-site affordable housing construction or an "in-lieu" fee payment as an alternative to the On-Site Requirement in the Project Area; and,

WHEREAS The Redevelopment Plan provides a procedure and standards by which certain of its requirements and the provisions of the Planning Code may be waived or modified. Section 3.5.5 of the Redevelopment Plan states: "The Agency Commission, in its sole discretion, may grant a variation from the Plan, the Development Controls and Design Guidelines, or the Planning Code where enforcement would otherwise result in practical difficulties for development creating undue hardship for the property owner and constitute an unreasonable limitation beyond the intent of the Plan, the Design for Development or the Development Controls and Design Guidelines… Variations to the Plan or the Development Controls and Design Guidelines shall only be granted because of unique physical constraints or other extraordinary circumstances applicable to the property. The granting [of] a variation must be in harmony with the Plan, the Design for Development and the Development Controls and Design Guidelines

and shall not be materially detrimental to the public welfare or materially injurious to neighboring property or improvements in the vicinity… In granting any variation, the Agency Commission shall specify the character and extent thereof, and shall also prescribe any such conditions as are necessary to secure the goals of the Plan, the Design for Development and the Development Controls and Design Guidelines;" and,

WHEREAS, On February 1, 2012, the Former Agency was dissolved pursuant to the provisions of California State Assembly Bill No. 1X 26 (Chapter 5, Statutes of 2011-12, First Extraordinary Session) ("AB 26") and the decision by the California Supreme Court in California Redevelopment Assoc. v. Matosantos, 53 Cal.4th 231 (2011). On June 27, 2012, AB 26 was amended in part by California State Assembly Bill No. 1484 (Chapter 26, Statutes of 2011-12) ("AB 1484"). (AB 26 and AB 1484 are codified in sections 33500 et seq. of the California Health and Safety Code, which sections, as amended from time to time, are referred to as the "Redevelopment Dissolution Law."); and,

WHEREAS, Under the Redevelopment Dissolution Law, all of the Former Agency's assets (other than certain housing assets) and obligations were transferred to the Successor Agency to the Former Agency, also known as the Office of Community Investment and Infrastructure ("Successor Agency" or "OCII"). Some of the Former Agency's housing assets were transferred to the Mayor's Office of Housing and Community Development ("MOHCD"), acting as the housing successor; and,

WHEREAS, To implement the Redevelopment Dissolution Law, the Board of Supervisors adopted Resolution No. 11-12 (Jan. 26, 2012) and Ordinance No. 215-12 (Oct. 4, 2012), which granted land use authority over the Former Agency's Major Approved Development Projects, including the Transbay Redevelopment Project, to the Successor Agency and its Commission. The Delegation Agreement, however, remains in effect and the Planning Department continues to exercise land use authority over development in Zone Two; and,

WHEREAS, On April 15, 2013, the California Department of Finance ("DOF") determined finally and conclusively that the Successor Agency has enforceable obligations under Redevelopment Dissolution Law to complete certain development in the Project Area, including the Transbay Affordable Housing Obligation; Letter, S. Szalay, DOF Local Government Consultant, to T. Bohee, Successor Agency Executive Director (April 15, 2012 [sic]); and

WHEREAS, On December 6, 2012, the Planning Commission approved Motions 18763, 18764, 18765 and the Zoning Administrator issued a variance decision (later revised on March 15, 2013) (collectively, the "Approvals") for a project at 181 Fremont Street in Zone 2 of the Project Area. The Approvals authorized the demolition of an existing three-story building and an existing two-story building, and the construction of a 52-story building reaching a roof height of approximately 700 feet with a decorative screen reaching a maximum height of approximately 745

feet and a spire reaching a maximum height of approximately 800 feet, containing approximately 404,000 square feet of office uses, approximately 74 dwelling units, approximately 2,000 square feet of retail space, and approximately 68,000 square feet of subterranean area with off-street parking, loading, and mechanical space (the "Project"). The Project also includes a bridge to the future elevated City Park situated on top of the Transit Center; and

WHEREAS, To comply with the On-Site Requirement, the Approvals require the Project to include approximately 11 inclusionary below-market-rate units that are affordable to income-eligible households. All of the Project's approximately 74 residential units are located on the highest 15 floors of the approximately 52-story building. The residential units will be for-sale units with home owners association (HOA) assessments that the Project's developer estimates will exceed $2000 per month; and

WHEREAS, On June 5, 2014, OCII received a request from the developer of 181 Fremont Street ("Developer") for a variation from the On-Site Requirement. The Developer proposed removing the affordability restrictions from the approximately 11 affordable units on-site and converting them to market rate units. Letter, J. Paul, 181 Fremont Street, LLC, to M. Grisso, OCII (June 5, 2014) ("Variation Request"), attached as Exhibit A to the Commission Memorandum related to this Resolution; and,

WHEREAS, In the Variation Request, the Developer explained that the Project was unique in that it is the only approved or proposed mixed-use office and housing development within the Project Area, it has the smallest number of residential units of any high rise development in the Project Area, its residential units are located on the upper 15 floors of an approximately 52-story tower, and its HOA dues will be in excess of $2000 per month. The Variation Request concludes that the application of the On-Site Requirement to the Project creates "practical difficulties for maintaining the affordability of the units because homeowners association ("HOA") fees, already high in such developments, will likely increase such that the original residents would not be able to afford the payments" and thus "creates an undue hardship for both the Project Sponsor and the owners of the inclusionary housing units;" and

WHEREAS, The Variation Request proposes that the Successor Agency grant a variation on the condition that the Developer contribute $13.85 million toward the development of affordable housing in the Project Area. Payment of this fee would ensure that the conversion of the approximately 11 inclusionary units to market rate units does not adversely affect the Successor Agency's compliance with the Transbay Affordable Housing Obligation; and

WHEREAS, The following facts support a finding that the On-Site Requirement imposes practical difficulties for the Project creating undue hardships for the owners of the inclusionary below-market-rate units ("BMR Owners") and MOHCD, as the housing successor responsible for enforcing the long-term affordability restrictions on the units:

1) HOA fees pay for the costs of operating and maintaining the common areas and facilities of a condominium project and generally must be allocated equally among all of the units subject to the assessment, Cal. Code Reg., title 10, § 2792.16 (a). HOA fees may not be adjusted based on the below-market-rate ("BMR") status of the unit or the income level of the homeowner. If HOA fees increase, BMR Owners will generally be required to pay the same amount of increases in regular assessments and of special assessments as other owners.

2) The Successor Agency's Limited Equity Homeownership Program (May 2005) ("LEHP") ensures that income-eligible households are able to afford, at initial occupancy, all of the housing costs, but does not cover increases in HOA dues that occur over time. Initially, the LEHP will decrease the cost of the BMR unit itself to ensure that income-eligible applicants are able to meet all of the monthly costs, including HOA fees. Neither the Successor Agency nor MOHCD (which ultimately assumes authority over the BMR unit as a transferred housing asset) has a program, however, for assisting owners in BMR units when increases in regular monthly HOA fees occur.

3) Members of homeowner associations may approve increases in HOA fees without the support of the BMR Owners because BMR Owners, particularly in a development with inclusionary units, typically constitute a small minority of the total HOA membership. Increases less than 20 percent of the regular assessment may occur without a vote of the HOA; increases exceeding 20 percent require a majority vote of members in favor. Cal. Civil Code § 1366 (b). In addition, a homeowner association may impose special assessments to cover the costs of capital expenditures for repairs and other purposes. *Id.*

4) State legislation to provide protections to low- and moderate-income households in inclusionary BMR units of a market-rate building when HOA fees increase has been unsuccessful to date, *see e.g.* Assembly Bill No. 952, vetoed by Governor, Sep. 27, 2008 (2007-08 Reg. Sess.).

5) When HOA fees increase or special assessments are imposed, BMR Owners whose incomes have not increased comparably may have difficulty making the higher monthly payments for HOA fees. *See e.g.* Carol Lloyd, *Owners' Dues Keep Going Up*, S.F. Chronicle, Aug. 5, 2007, *available at* http://www.sfgate.com/default/article/Owners-dues-keep-going-up-2526988.php. The result is that housing costs may become unaffordable and some BMR Owners will face the hardship of having to sell their unit at the reduced prices required under the limited equity programs of the Successor Agency and MOHCD.

6) If the BMR Owner is forced to sell the inclusionary unit because of the high HOA fees, the cost of the restricted affordable unit, which will now include the high HOA fees, will be assumed by either the subsequent income-eligible buyer or by MOHCD, as the housing successor required to comply with the affordability restrictions. In either case, the high HOA dues will have caused an additional hardship; and

WHEREAS, The hardship imposed by the On-Site Requirement constitutes an unreasonable limitation beyond the intent of the Redevelopment Plan to create affordable

housing for the longest feasible time, as required under the Community Redevelopment Law, Cal. Health & Safety Code § 33334.3 (f) (1); and

WHEREAS, The following facts support a finding that extraordinary circumstances apply to the Project:

1) The Project is unique in that it is a mixed-use, high-rise development with a very small number of for-sale, on-site inclusionary affordable housing units at the top of the tower. Of high-rise development recently approved or proposed in the Project Area, the Project is the only mixed-use development with commercial office and residential uses and has the smallest number of residential units. As noted above, the construction of affordable housing units at the top of a high-rise creates practical difficulties for maintaining the affordability of the units.

2) The Developer has offered to contribute toward the Transbay Inclusionary Housing Obligation $13.85 million, which constitutes approximately 2.5 times the amount of the affordable housing fee that would be permitted under the City's Inclusionary Affordable Housing Program if this Project were located outside of the Project Area. *See* San Francisco Planning Code, §§ 415.1 et seq. The Successor Agency can use those funds to subsidize the equivalent of up to 55 stand-alone affordable housing units on publicly-owned parcels in the Project Area and thus significantly increase the number of affordable units that would be produced under the On-Site Requirement. The amount of the affordable housing fee was determined based on a market analysis by a real estate economics firm retained by the Successor Agency, The Concord Group ("TCG"). As shown in Exhibit B to the Commission Memorandum related to this Resolution, TCG calculated the net additional revenue that would accrue to the developer if 11 on-site affordable housing units were converted to market-rate units and concluded that the developer would accrue an additional $13.85 million.

WHEREAS, The payment of $13.85 million as a condition of granting the Variation Request ensures that the variation will not be materially detrimental to the public welfare and is necessary to secure the goals of the Redevelopment Plan to fulfill the Transbay Affordable Housing Obligation; and

WHEREAS Approval of the Variation Request would be subject to approval by the Board of Supervisors , in its capacity as legislative body for the Successor Agency, because it constitutes a material change to a Successor Agency affordable housing program, Ordinance No. 215-12, § 6 (a) (providing that "the Successor Agency Commission shall not modify the Major Approved Development Projects or the Retained Housing Obligations in any manner that would . . . materially change the obligations to provide affordable housing without obtaining the approval of the Board of Supervisors…."); and

WHEREAS, The San Francisco Planning Commission and Board of Supervisors will consider approving a development agreement with the Developer that would be consistent with this Resolution, would provide relief from the on-site affordable housing requirement in Section 249.28 of the Planning Code, and would require the Developer to pay an affordable housing fee of $13.85 million to the Successor

Agency for its use in fulfilling the Transbay Affordable Housing Obligation. The form of the proposed development agreement is attached to this resolution; and

WHEREAS, Approval of the Variation Request does not compel any changes in the Project that the Planning Commission previously approved. Rather, approval of the Variation Request merely authorizes the Planning Commission and Board of Supervisors to consider a future action that would remove the On-Site Requirement from the Project. Thus, OCII's approval of the Variation Request is statutorily exempt from the California Environmental Quality Act ("CEQA") as a feasibility and planning study under CEQA Guidelines Section 16262. Moreover, authorizing the future acceptance of $13.85 million for the Transbay Affordable Housing Obligation does not constitute a project under CEQA Guidelines Section 15378 (b)(4) because it merely creates a government funding mechanism that does not involve any commitment to a specific project; now, therefore, be it

RESOLVED, The Commission on Community Investment and Infrastructure, as Successor Agency, hereby approves a variation to the Redevelopment Plan's On-Site Requirement at 181 Fremont Street consistent with the Variation Request, subject to approval by the Board of Supervisors, acting in its capacity as the legislative body for the Successor Agency, on the condition that the Developer pay $13.85 million to the Successor Agency for use in fulfilling the Transbay Affordable Housing Obligation; and, be it further

RESOLVED, The Commission on Community Investment and Infrastructure authorizes the Executive Director to take appropriate and necessary actions to effectuate the purpose of this resolution.

I hereby certify that the foregoing resolution was adopted by the Commission at its meeting of September 12, 2014.

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Commission Secretary

COMMISSION ON COMMUNITY INVESTMENT AND INFRASTRUCTURE

RESOLUTION NO. 80-2014
Adopted October 10, 2014

CONDITIONALLY APPROVING A VARIATION TO THE TRANSBAY REDEVELOPMENT PLAN'S ON-SITE AFFORDABLE HOUSING REQUIREMENT AS IT APPLIES TO THE MIXED-USE PROJECT AT 181 FREMONT STREET, SUBJECT TO APPROVAL BY THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO IN ITS CAPACITY AS LEGISLATIVE BODY FOR THE SUCCESSOR AGENCY TO THE SAN FRANCISCO REDEVELOPMENT AGENCY, AND AUTHORIZING THE ACCEPTANCE OF A FUTURE PAYMENT OF $13.85 MILLION TO THE SUCCESSOR AGENCY FOR USE IN FULFILLING ITS AFFORDABLE HOUSING OBLIGATIONS IN THE PROJECT AREA; TRANSBAY REDEVELOPMENT PROJECT AREA

WHEREAS, The California Legislature in 2003 enacted Assembly Bill 812 ("AB 812") authorizing the demolition of the historic Transbay Terminal building and the construction of the new Transbay Transit Center (the "TTC") (Stat. 2003, Chapter 99, codified at § 5027.1 of the Cal. Public Resources Code). AB 812 also mandated that 25 percent of the residential units developed in the area around the TTC "shall be available to" low income households, and an additional 10 percent "shall be available to" moderate income households if the City and County of San Francisco ("City") adopted a redevelopment plan providing for the financing of the TTC (the "Transbay Affordable Housing Obligation"); and,

WHEREAS, The Board of Supervisors of the City and County of San Francisco ("Board of Supervisors") approved a Redevelopment Plan for the Transbay Redevelopment Project Area ("Project Area") by Ordinance No. 124-05, adopted on June 21, 2005 and by Ordinance No. 99-06, adopted on May 9, 2006 ("Redevelopment Plan"). The Redevelopment Plan established a program for the Redevelopment Agency of the City and County of San Francisco ("Former Agency") to redevelop and revitalize the blighted Project Area; it also provided for the financing of the TTC and thus triggered the Transbay Affordable Housing Obligation; and

WHEREAS, The 2005 Report to the Board of Supervisors on the Redevelopment Plan ("Report") estimated that the Transbay Affordable Housing Obligation would require the development of 1200 affordable units. Report at p. VI-14 (Jan. 2005). The Report also stated: "The affordable housing in the Project Area will include approximately 388 inclusionary units, or units built within market-rate housing projects... The affordable housing will also include approximately 795 units in stand-alone, 100 percent affordable projects." Report at page VIII-7; and

WHEREAS, The Project Area is 40 acres in size and there are a limited number of publicly-owned properties ("Blocks") remaining on which to build affordable

housing to meet the Transbay Affordable Housing Requirement. All of the remaining Blocks are already programmed for stand-alone, 100 percent affordable housing (e.g., Blocks 2 and 12), for commercial office space (e.g., Block 5 and Parcel F), or for a combination of market-rate and affordable housing, with specific land value goals that the Transbay Joint Powers Authority ("TJPA") has used in its funding plan for the TTC. Nonetheless, with an additional public subsidy, units may be added to proposed stand-alone affordable housing developments on one or more of the Blocks; and,

WHEREAS, The Redevelopment Plan established, under Cal. Health and Safety Code § 33333, the land use controls for the Project Area, required development to conform to those land use controls, and divided the Project Area into two land use zones: Zone One and Zone Two. The Redevelopment Plan required the Former Agency to exercise land use authority in Zone One and authorized it to delegate to the San Francisco Planning Department ("Planning Department") the land use controls of the San Francisco Planning Code ("Planning Code"), as amended from time to time, in Zone Two; and

WHEREAS, On May 3, 2005, the Former Agency and the Planning Department entered into a Delegation Agreement whereby the Planning Department assumed land use authority in Zone Two of the Project Area subject to certain conditions and procedures, including the requirement that the Planning Department's approval of projects shall be consistent with the Redevelopment Plan ("Delegation Agreement"); and,

WHEREAS, To fulfill the Transbay Affordable Housing Obligation, both the Redevelopment Plan and the Planning Code require that all housing developments within the Project Area contain a minimum of 15 percent on-site affordable housing. Redevelopment Plan, § 4.9.3; Planning Code, § 249.28 (b) (6) (the "On-Site Requirement"). Neither the Redevelopment Plan nor the Planning Code authorize off-site affordable housing construction or an "in-lieu" fee payment as an alternative to the On-Site Requirement in the Project Area; and,

WHEREAS The Redevelopment Plan provides a procedure and standards by which certain of its requirements and the provisions of the Planning Code may be waived or modified. Section 3.5.5 of the Redevelopment Plan states: "The Agency Commission, in its sole discretion, may grant a variation from the Plan, the Development Controls and Design Guidelines, or the Planning Code where enforcement would otherwise result in practical difficulties for development creating undue hardship for the property owner and constitute an unreasonable limitation beyond the intent of the Plan, the Design for Development or the Development Controls and Design Guidelines... Variations to the Plan or the Development Controls and Design Guidelines shall only be granted because of unique physical constraints or other extraordinary circumstances applicable to the property. The granting [of] a variation must be in harmony with the Plan, the Design for Development and the Development Controls and Design Guidelines

and shall not be materially detrimental to the public welfare or materially injurious to neighboring property or improvements in the vicinity... In granting any variation, the Agency Commission shall specify the character and extent thereof, and shall also prescribe any such conditions as are necessary to secure the goals of the Plan, the Design for Development and the Development Controls and Design Guidelines;" and,

WHEREAS, On February 1, 2012, the Former Agency was dissolved pursuant to the provisions of California State Assembly Bill No. 1X 26 (Chapter 5, Statutes of 2011-12, First Extraordinary Session) ("AB 26") and the decision by the California Supreme Court in California Redevelopment Assoc. v. Matosantos, 53 Cal.4th 231 (2011). On June 27, 2012, AB 26 was amended in part by California State Assembly Bill No. 1484 (Chapter 26, Statutes of 2011-12) ("AB 1484"). (AB 26 and AB 1484 are codified in sections 33500 et seq. of the California Health and Safety Code, which sections, as amended from time to time, are referred to as the "Redevelopment Dissolution Law."); and,

WHEREAS, Under the Redevelopment Dissolution Law, all of the Former Agency's assets (other than certain housing assets) and obligations were transferred to the Successor Agency to the Former Agency, also known as the Office of Community Investment and Infrastructure ("Successor Agency" or "OCII"). Some of the Former Agency's housing assets were transferred to the Mayor's Office of Housing and Community Development ("MOHCD"), acting as the housing successor; and,

WHEREAS, To implement the Redevelopment Dissolution Law, the Board of Supervisors adopted Resolution No. 11-12 (Jan. 26, 2012) and Ordinance No. 215-12 (Oct. 4, 2012), which granted land use authority over the Former Agency's Major Approved Development Projects, including the Transbay Redevelopment Project, to the Successor Agency and its Commission. The Delegation Agreement, however, remains in effect and the Planning Department continues to exercise land use authority over development in Zone Two; and,

WHEREAS, On April 15, 2013, the California Department of Finance ("DOF") determined finally and conclusively that the Successor Agency has enforceable obligations under Redevelopment Dissolution Law to complete certain development in the Project Area, including the Transbay Affordable Housing Obligation; Letter, S. Szalay, DOF Local Government Consultant, to T. Bohee, Successor Agency Executive Director (April 15, 2012 [sic]); and

WHEREAS, On December 6, 2012, the Planning Commission approved Motions 18763, 18764, 18765 and the Zoning Administrator issued a variance decision (later revised on March 15, 2013) (collectively, the "Approvals") for a project at 181 Fremont Street in Zone 2 of the Project Area. The Approvals authorized the demolition of an existing three-story building and an existing two-story building, and the construction of a 52-story building reaching a roof height of approximately 700 feet with a decorative screen reaching a maximum height of approximately 745

feet and a spire reaching a maximum height of approximately 800 feet, containing approximately 404,000 square feet of office uses, approximately 74 dwelling units, approximately 2,000 square feet of retail space, and approximately 68,000 square feet of subterranean area with off-street parking, loading, and mechanical space (the "Project"). The Project also includes a bridge to the future elevated City Park situated on top of the Transit Center; and

WHEREAS, To comply with the On-Site Requirement, the Approvals require the Project to include approximately 11 inclusionary below-market-rate units that are affordable to income-eligible households. All of the Project's approximately 74 residential units are located on the highest 15 floors of the approximately 52-story building. The residential units will be for-sale units with home owners association (HOA) assessments that the Project's developer estimates will exceed $2000 per month; and

WHEREAS, On June 5, 2014, OCII received a request from the developer of 181 Fremont Street ("Developer") for a variation from the On-Site Requirement. The Developer proposed removing the affordability restrictions from the approximately 11 affordable units on-site and converting them to market rate units. Letter, J. Paul, 181 Fremont Street, LLC, to M. Grisso, OCII (June 5, 2014) ("Variation Request"), attached as Exhibit A to the Commission Memorandum related to this Resolution; and,

WHEREAS, In the Variation Request, the Developer explained that the Project was unique in that it is the only approved or proposed mixed-use office and housing development within the Project Area, it has the smallest number of residential units of any high rise development in the Project Area, its residential units are located on the upper 15 floors of an approximately 52-story tower, and its HOA dues will be in excess of $2000 per month. The Variation Request concludes that the application of the On-Site Requirement to the Project creates "practical difficulties for maintaining the affordability of the units because homeowners association ("HOA") fees, already high in such developments, will likely increase such that the original residents would not be able to afford the payments" and thus "creates an undue hardship for both the Project Sponsor and the owners of the inclusionary housing units;" and

WHEREAS, The Variation Request proposes that the Successor Agency grant a variation on the condition that the Developer contribute $13.85 million toward the development of affordable housing in the Project Area. Payment of this fee would ensure that the conversion of the approximately 11 inclusionary units to market rate units does not adversely affect the Successor Agency's compliance with the Transbay Affordable Housing Obligation; and

WHEREAS, The following facts support a finding that the On-Site Requirement imposes practical difficulties for the Project creating undue hardships for the owners of the inclusionary below-market-rate units ("BMR Owners") and MOHCD, as the public agency that would be responsible for enforcing the long-term affordability restrictions on the on-site units:

1) HOA fees pay for the costs of operating and maintaining the common areas and facilities of a condominium project and generally must be allocated equally among all of the units subject to the assessment, Cal. Code Reg., title 10, § 2792.16 (a). HOA fees may not be adjusted based on the below-market-rate ("BMR") status of the unit or the income level of the homeowner. If HOA fees increase, BMR Owners will generally be required to pay the same amount of increases in regular assessments and of special assessments as other owners.

2) The City's Inclusionary Affordable Housing Program ensures that income-eligible households are able to afford, at initial occupancy, all of the housing costs, but does not cover increases in HOA dues that occur over time. Initially, the LEHP will decrease the cost of the BMR unit itself to ensure that income-eligible applicants are able to meet all of the monthly costs, including HOA fees. Neither the Successor Agency nor MOHCD has a program, however, for assisting owners in BMR units when increases in regular monthly HOA fees occur.

3) Members of homeowner associations may approve increases in HOA fees without the support of the BMR Owners because BMR Owners, particularly in a development with inclusionary units, typically constitute a small minority of the total HOA membership. Increases less than 20 percent of the regular assessment may occur without a vote of the HOA; increases exceeding 20 percent require a majority vote of members in favor. Cal. Civil Code § 5605 (b). In addition, a homeowner association may impose special assessments to cover the costs of capital expenditures for repairs and other purposes. *Id.*

4) State legislation to provide protections to low- and moderate-income households in inclusionary BMR units of a market-rate building when HOA fees increase has been unsuccessful to date, *see e.g.* Assembly Bill No. 952, vetoed by Governor, Sep. 27, 2008 (2007-08 Reg. Sess.).

5) When HOA fees increase or special assessments are imposed, BMR Owners whose incomes have not increased comparably may have difficulty making the higher monthly payments for HOA fees. The result is that housing costs may become unaffordable and some BMR Owners will face the hardship of having to sell their unit at the reduced prices required under the limited equity programs of the Successor Agency and MOHCD. A recent nation-wide review and analysis of inclusionary housing programs concluded: "Condominium fees can increase substantially over time, making the overall costs of homeownership unsustainable for low- and moderate-income households. Rising condominium fees are a growing problem for many municipalities...Program administrators can set the initial affordable home price low enough to offset high initial condominium fees but, increases in these fees over time for new amenities or building repairs, can in some cases rival mortgage payments on below-market-rate units, leading to high overall housing costs, potential default, or homeowners being forced to sell their units." R. Hickey, et al, *Achieving Lasting Affordability through Inclusionary Housing* at page 33, Lincoln Institute of Land Policy (2014), *available at* http://www.lincolninst.edu/pubs/2428_Achieving-Lasting-Affordability-through-Inclusionary-Housing. *See also* Carol Lloyd, *Owners' Dues Keep Going Up*, S.F.

Chronicle, Aug. 5, 2007, *available at* http://www.sfgate.com/default/article/Owners-dues-keep-going-up-2526988.php; Robert Hickey, *After the Downturn: New Challenges and Opportunities for Inclusionary Housing*, Center for Housing Policy at page 10 (Feb. 2013), *available at* http://www.nhc.org/media/files/InclusionaryReport201302.pdf ("Multiple jurisdictions have had problems with HOA fees in [high-amenity, luxury developments] and other properties rising beyond what owners of inclusionary units can afford.").

6) If the BMR Owner is forced to sell the inclusionary unit because of the high HOA fees, the cost of the restricted affordable unit, which will now include the high HOA fees, will be assumed by either the subsequent income-eligible buyer or by MOHCD. In either case, the high HOA dues will have caused an additional hardship. *See* Robert Hickey, *After the Downturn: New Challenges and Opportunities for Inclusionary Housing*, Center for Housing Policy, page 10 (Feb. 2013), *available at* http://www.nhc.org/media/files/InclusionaryReport201302.pdf ("Rising fees and special assessments undercut the affordability of inclusionary units for both existing owners and future homebuyers. Jurisdictions struggle to prevent or even just stay apprised of these cost increases. And for jurisdictions committed to maintaining the affordability of their inclusionary housing stock--ownership as well as rental--the cost of offsetting higher fees can be exorbitant, compromising a municipality's ability to promote affordability elsewhere in its jurisdiction."); and

WHEREAS, MOHCD supports the finding that the On-Site Requirement creates undue hardships for the BMR Owners and MOHCD because the high HOA fees, which would be a disproportionately large portion of a BMR Owner's monthly housing costs, would detract from many of the traditional benefits associated with homeownership, such as the mortgage interest tax deduction, and put both the BMR Owners and the BMR units at risk. (See email dated September 23, 2014 from Maria Benjamin, Director of Homeownership and Below Market Rate Programs for MOHCD, attached as Exhibit B to the Commission Memorandum related to this Resolution.)

WHEREAS, The hardship imposed by the On-Site Requirement constitutes an unreasonable limitation beyond the intent of the Redevelopment Plan to create affordable housing for the longest feasible time, as required under the Community Redevelopment Law, Cal. Health & Safety Code § 33334.3 (f) (1); and

WHEREAS, The following facts support a finding that extraordinary circumstances apply to the Project:

1) The Project is unique in that it is a mixed-use, high-rise development with a very small number of for-sale, on-site inclusionary affordable housing units at the top of the tower. Of high-rise development recently approved or proposed in the Project Area, the Project is the only mixed-use development with commercial office and residential uses and has the smallest number of residential units. As

noted above, the construction of affordable housing units at the top of a high-rise creates practical difficulties for maintaining the affordability of the units.

2) The Developer has offered to contribute toward the Transbay Inclusionary Housing Obligation $13.85 million, which constitutes approximately 2.5 times the amount of the affordable housing fee that would be permitted under the City's Inclusionary Affordable Housing Program if this Project were located outside of the Project Area. *See* San Francisco Planning Code, §§ 415.1 et seq. The Successor Agency can use those funds to subsidize the equivalent of up to 69 stand-alone affordable housing units on publicly-owned parcels in the Project Area and thus significantly increase the number of affordable units that would be produced under the On-Site Requirement. The amount of the affordable housing fee was determined based on a market analysis by a real estate economics firm retained by the Successor Agency, The Concord Group ("TCG"). As shown in Exhibit A to the Commission Memorandum related to this Resolution, TCG calculated the net additional revenue that would accrue to the developer if 11 on-site affordable housing units were converted to market-rate units and concluded that the developer would accrue an additional $13.85 million.

WHEREAS, The payment of $13.85 million as a condition of granting the Variation Request ensures that the variation will not be materially detrimental to the public welfare and is necessary to secure the goals of the Redevelopment Plan to fulfill the Transbay Affordable Housing Obligation; and

WHEREAS Approval of the Variation Request would be subject to approval by the Board of Supervisors , in its capacity as legislative body for the Successor Agency, because it constitutes a material change to a Successor Agency affordable housing program, Ordinance No. 215-12, § 6 (a) (providing that "the Successor Agency Commission shall not modify the Major Approved Development Projects or the Retained Housing Obligations in any manner that would . . . materially change the obligations to provide affordable housing without obtaining the approval of the Board of Supervisors...."); and

WHEREAS, The San Francisco Planning Commission and Board of Supervisors will consider approving a development agreement with the Developer that would be consistent with this Resolution, would provide relief from the on-site affordable housing requirement in Section 249.28 of the Planning Code, and would require the Developer to pay an affordable housing fee of $13.85 million to the Successor Agency for its use in fulfilling the Transbay Affordable Housing Obligation. The form of the proposed development agreement is attached to this resolution as Exhibit A; and

WHEREAS, Approval of the Variation Request does not compel any changes in the Project that the Planning Commission previously approved. Rather, approval of the Variation Request merely authorizes Planning Commission and Board of Supervisors to consider a future action that would remove the On-Site Requirement from the Project. Thus, approval of the Variation Request and authorizing the future acceptance of $13.85 million for the Transbay Affordable

Housing Obligation does not constitute a project under the California Environmental Quality Act ("CEQA"), CEQA Guidelines (California Code of Regulations Title 14) Section 15378 (b)(4) because it merely creates a government funding mechanism that does not involve any commitment to a specific project; now, therefore, be it

RESOLVED, The Commission on Community Investment and Infrastructure, as Successor Agency, hereby approves a variation to the Redevelopment Plan's On-Site Requirement at 181 Fremont Street consistent with the Variation Request, subject to approval by the Board of Supervisors, acting in its capacity as the legislative body for the Successor Agency, on the condition that the Developer pay $13.85 million to the Successor Agency for use in fulfilling the Transbay Affordable Housing Obligation; and, be it further

RESOLVED, The Commission on Community Investment and Infrastructure authorizes the Executive Director to take appropriate and necessary actions to effectuate the purpose of this resolution.

Exhibit A: Development Agreement

I hereby certify that the foregoing resolution was adopted by the Commission at its meeting of October 10, 2014.

Lucinda Nguyen
Commission Secretary

RECORDING REQUESTED BY
CLERK OF THE BOARD OF SUPERVISORS
OF THE CITY AND COUNTY OF SAN FRANCISCO

(Exempt from Recording Fees
Pursuant to Government Code
Section 27383)

AND WHEN RECORDED MAIL TO:

Angela Calvillo, Clerk of the Board of Supervisors
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY AND COUNTY OF SAN FRANCISCO
AND 181 FREMONT STREET LLC,
RELATIVE TO THE DEVELOPMENT KNOWN AS
181 FREMONT DEVELOPMENT PROJECT

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Exhibits

DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY AND COUNTY OF SAN FRANCISCO
AND 181 FREMONT STREET LLC, A DELAWARE LIMITED LIABILITY COMPANY, RELATIVE TO THE DEVELOPMENT KNOWN AS
THE 181 FREMONT DEVELOPMENT PROJECT

THIS DEVELOPMENT AGREEMENT (this "**Agreement**") dated for reference purposes only as of this _____ day of _____, 2014, is by and between the CITY AND COUNTY OF SAN FRANCISCO, a political subdivision and municipal corporation of the State of California (the "**City**"), acting by and through its Planning Department, and 181 Fremont Street LLC, a Delaware limited liability company, its permitted successors and assigns (the "**Developer**"), pursuant to the authority of Section 65864 *et seq.* of the California Government Code.

RECITALS

This Agreement is made with reference to the following facts:

A. Developer is the owner of that certain property known as 181 Fremont Street (the "**Project Site**") which is an irregularly shaped property formed by two parcels measuring a total of 15,313 square feet, located on the east side of Fremont Street, between Mission and Howard Streets. The Project Site is within the C-3-0 (SD) District, the 700-S-2 Height and Bulk District, the Transit Center C-3-0 (SD) Commercial Special Use District, the Transbay C-3 Special Use District, the Transit Center District Plan area (the "**TCDP**") and in Zone 2 of the Transbay Redevelopment Project Area (the "**Project Area**").

B. The Redevelopment Plan for the Project Area ("Plan") establishes land use controls and imposes other requirements on development within the Project Area. Notably, the Plan incorporates, in section 4.9.2, state law requirements that 25 percent of the residential units developed in the Project Area "shall be available to" low income households, and an additional 10 percent "shall be available to" moderate income households. Cal. Public Resources Code § 5027.1 (the "Transbay Affordable Housing Obligation"). To fulfill the Transbay Affordable Housing Obligation, both the Plan and the San Francisco Planning Code ("Planning Code") require that all housing developments within the Project Area contain a minimum of 15 percent on-site affordable housing. Redevelopment Plan, § 4.9.3; Planning Code, § 249.28 (b) (6) (the "On-Site Requirement"). Neither the Redevelopment Plan nor the Planning Code authorize off-site affordable housing construction or an "in-lieu" fee payment as an alternative to the On-Site Requirement in the Project Area.

C. The Plan provides that the land use controls for Zone 2 of the Project Area shall be the Planning Code, as amended from time to time, so long as any amendments to the Planning Code are consistent with the Plan. Through a Delegation Agreement, the former Redevelopment Agency of the City and County of San Francisco (the "Former Agency") delegated jurisdiction for permitting of projects in Zone 2 (including the Project Site) to the

Planning Department, with the Planning Code governing development, except for certain projects that require Redevelopment Agency action.

D. However, pursuant to Section 3.5.5 of the **Plan**, the Commission on Community Investment and Infrastructure (**"CCII"**) (as the Commission to the Successor Agency to the Former Agency, a public body organized and existing under the laws of the State of California, also known as the Office of Community Investment and Infrastructure (**"Successor Agency"** or **"OCII"**)), has the authority to grant a variation from the Plan and the associated Transbay Development Controls and Design Guidelines, or the Planning Code where the enforcement of these controls would otherwise result in practical difficulties for development creating undue hardship for the property owner and constitute an unreasonable limitation beyond the intent of the Plan, the Transbay Design for Development or the Transbay Development Controls and Design Guidelines.

E. Where a variation or other action of the Successor Agency materially changes the Successor Agency's obligations to provide affordable housing, the Board of Supervisors ("Board") must approve that action. San Francisco Ordinance No. 215-12, § 6 (a) (Oct. 4, 2012).

F. On December 6, 2012, the Planning Commission approved Motions 18763, 18764, 18765 and the Zoning Administrator issued a variance decision (later revised on March 15, 2013) (collectively, the "**Approvals**"). The Approvals approved a project on the Project Site (the "**Project**") that would demolish an existing three-story building and an existing two-story building, and construct a 52-story building reaching a roof height of approximately 700 feet with a decorative screen reaching a maximum height of approximately 745 feet and a spire reaching a maximum height of approximately 800 feet, containing approximately 404,000 square feet of office uses, approximately 74 dwelling units, approximately 2,000 square feet of retail space, and approximately 68,000 square feet of subterranean area with off-street parking, loading, and mechanical space. The Project also includes a bridge to the future elevated City Park situated on top of the Transbay Transit Center.

G. As part of the Project approval on December 6, 2012, the Planning Commission found that the Project was consistent with the objectives, policies, general land uses and programs specified in the General Plan, as amended, and the Planning Principles set forth in Section 101.1 of the Planning Code (together, the "**General Plan Consistency Findings**").

H. As part of the Project approval on December 6, 2012, Conditions of Approval were placed on the Project including the On-Site Requirement that pursuant to Planning Code Sections 249.28(b)(6) and 415.6 and Plan Section 4.9.3, the Project is required to provide 15% of the proposed dwelling units as affordable to qualifying households.

I. Developer has commenced construction of the Project in accordance with the provisions of the Plan, the Planning Code and the Approvals applicable thereto, including the On-Site Requirement (the "**Existing Requirements**").

J. In order to strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic risk of development, the Legislature of the State of California adopted Government Code Section 65864 et seq. (the "**Development**

Agreement Statute"), which authorizes the City to enter into a development agreement with any person having a legal or equitable interest in real property related to the development of such property. Pursuant to the Development Agreement Statute, the City adopted Chapter 56 **("Chapter 56")** of the San Francisco Administrative Code establishing procedures and requirements for entering into a development agreement. The Parties are entering into this Agreement in accordance with the Development Agreement Statute and Chapter 56.

K. Approval of this Agreement does not compel any changes in the Project that the Planning Commission previously approved. Rather, approval of this Agreement merely authorizes the Commission on Community Investment and Infrastructure, Planning Commission and Board of Supervisors to remove the On-Site Requirement from the Project. Thus, approval of this Agreement and authorizing the future acceptance of $13.85 million for the Transbay Affordable Housing Obligation does not constitute a project under the California Environmental Quality Act ("CEQA"), CEQA Guidelines Section 15378 (b)(4) because it merely creates a government funding mechanism that does not involve any commitment to a specific project..

L. On June 5, 2014, OCII received a request from the Developer for a variation from the On-Site Requirement. The Developer proposed removing the affordability restrictions from the 11 affordable units on-site and converting them to market rate units. Letter, J. Paul, 181 Fremont Street, LLC, to M. Grisso, OCII (June 5, 2014) ("Variation Request"), attached as Exhibit A.

M. The Developer's Variation Request explained that the Project was unique in that it is the only approved or proposed mixed-use office and housing development within the Project Area, it has the smallest number of residential units of any high rise development in the Project Area, its residential units are located on the upper 15 floors of a 52 story tower, and its HOA dues will be in excess of $2000 per month. The Variation Request concludes that the application of the On-Site Requirement to the Project will create practical difficulties for maintaining the affordability of the units because homeowners association ("HOA") fees, which are already high in such developments, will likely increase such that the original residents would not be able to afford the payments and thus an undue hardship can be created for both the Project Sponsor and the owners of the inclusionary housing units.

N. The Variation Request proposes that the Successor Agency grant a variation on the condition that the Developer contribute $13.85 million toward the development of affordable housing in the Project Area (the "Affordable Housing Fee"). Payment of this fee would ensure that the conversion of the 11 inclusionary units to market rate units does not adversely affect the Successor Agency's compliance with the Transbay Affordable Housing Obligation

O. On _____, 2014, CCII, pursuant to Resolution No. _____, approved a variation pursuant to Section 3.5.5 of the Plan, allowing the Project to pay the Affordable Housing Fee in lieu of satisfying the On-Site Requirement (the "**OCII Variation**"), attached as Exhibit B.

P. The Board, in its capacity as the governing body of OCII, has reviewed the OCII Variation under the authority that it reserved to itself in Ordinance No. 215-12 to approve

material changes to the Successor Agency's affordable housing program and has approved, by Board of Supervisors Resolution No. ____, the actions of OCII in granting the OCII Variation.

Q. The City has determined that as a result of the development of the Project in accordance with this Agreement additional, clear benefits to the public will accrue that could not be obtained through application of existing City ordinances, regulations, and policies because the payment of the Affordable Housing Fee and use thereof in accordance with this Agreement rather than compliance with the On-Site Requirements will result in more affordable housing units within the Project Area at deeper affordability levels while maintaining land values necessary for the financing assumptions of the Transbay Joint Powers Authority (the "**TJPA**"). The basis for this determination is the following:

- To achieve the overall goal of at least 35% of all new housing development units within the Project Area, there must be both inclusionary units and stand-alone affordable housing developments in the Project Area.

- The Plan's 2005 report set a goal of 388 inclusionary units and approximately 795 stand-alone affordable housing units but at the time of the Plan's adoption, mixed-use, high-rise developments were not contemplated within the Project Area.

- The Project Area covers 40 acres and includes blocks programmed for: (i) stand-alone affordable housing developments; (ii) all or a majority of office space; and (iii) a combination of market and affordable housing.

- The TJPA established specific land value goals for each block in its funding plan for the Transbay Transit Center (the "**TTC**") and there are a limited number of publicly-owned blocks remaining upon which affordable housing may be built to meet the Plan's 35% affordability requirement.

- Adding affordable housing to blocks that must be sold to finance the TTC is not feasible without significantly reducing the land value and thereby creating shortfalls in the TTC funding.

- Due to zoning restrictions, the addition of affordable units to a block will result in a decrease of the number of market-rate units that may be built on that block. However, each block contains both market-rate and stand-alone affordable parcels and it is possible to add stand-alone affordable housing units to one or more of the stand-alone affordable parcels on a particular block while reducing the number of inclusionary units on the market rate parcel. This would result in the increase of the total amount of affordable housing, but would require additional public subsidy to fund the bonus stand-alone units.

- The Affordable Housing Fee is estimated to be capable of subsidizing the equivalent of approximately 69 stand-alone affordable housing units on publicly owned parcels in the Project Area in contrast to the up to 11 units that would be produced under the On-Site Requirement and accordingly the Affordable Housing Fee will allow OCII to better fulfill the requirements of the Transbay Affordable Housing Obligation (as

defined in Recital B above). In addition, the 69 stand-alone affordable housing units would provide deeper affordability levels (50% of AMI) compared to the levels (100% of AMI) that would be achieved through the application of the On-Site Requirement for up to 11 units.

- In addition, due to the unique nature of the Property, any affordable units created under the On-Site Requirement would have challenges associated with maintaining their affordability in so much as the residential units within the Project are for-sale and include high homeowners fees, in excess of $2,000 per month. Although the initial price of the affordable for-sale units would be adjusted to reflect the cost of these fees, after completion of the Project such fees may rise from time-to-time in a manner that might cause the once affordable units to become unaffordable.

- The City and OCII determined the amount of the Affordable Housing Fee following review of an analysis and determination by The Concord Group ("**TCG**"), a real estate economics firm (see report, Exhibit C). TCG calculated the net additional revenue that would accrue to the Developer if the 11 on-site affordable units were converted to market-rate units.

R. It is the intent of the Parties that all acts referred to in this Agreement shall be accomplished in a way as to fully comply with CEQA, the CEQA Guidelines, Chapters 31 and 56 of the San Francisco Administrative Code, the Development Agreement Statute, the Enacting Ordinance and all other applicable laws as of the Effective Date. This Agreement does not limit the City's obligation to comply with applicable environmental laws, including CEQA, before taking any discretionary action regarding the Project, or Developer's obligation to comply with all applicable laws in connection with the development of the Project.

S. On _____, the Planning Commission held a public hearing and approved Motion ___, conditionally amending the Conditions of Approval applicable to the Project related to the On-Site Requirement, which Conditions of Approval are attached to this Agreement as Exhibit D.

T. On _____, the Planning Commission held a public hearing on this Agreement, duly noticed and conducted under the Development Agreement Statute and Chapter 56. Following the public hearing, the Planning Commission made General Plan Consistency Findings with respect to this Agreement and recommended adoption of an ordinance approving this Agreement.

U. On _____, the Board, having received the Planning Commission's recommendations, held a public hearing on this Agreement pursuant to the Development Agreement Statute and Chapter 56. Following the public hearing, the Board approved the actions of OCII in granting the OCII Variation pursuant to Resolution No. _____ and adopted Ordinance No. _____, approving this Agreement, incorporating by reference the General Plan Consistency Findings, and authorizing the Planning Director to execute this Agreement on behalf of the City (the "**Enacting Ordinance**"). The Enacting Ordinance took effect on ____, 2014.

Now therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. GENERAL PROVISIONS

1.1 Incorporation of Preamble, Recitals and Exhibits. The preamble paragraph, Recitals, and Exhibits, and all defined terms contained therein, are hereby incorporated into this Agreement as if set f**orth in full.**

1.2 **Def**initions. In addition to the definitions set forth in the above preamble paragraph, Recitals and elsewhere in this Agreement, the following definitions shall apply to this Agreement:

1.2.1 "**Administrative Code**" shall mean the San Francisco Administrative Code.

1.2.2 "Affordable Housing Fee" shall mean the payment, pursuant to Section 2.1 of this Agreement, from the Developer to the City in the amount of thirteen million eight hundred fifty thousand dollars ($13,850,000) for fulfillment of the Transbay Affordable Housing Obligation.

1.2.3 "**Board of Supervisors**" or "**Board**" shall mean the Board of Supervisors of the City and County of San Francisco.

1.2.4 "**CCII**" shall mean the Commission on Community Investment and Infrastructure.

1.2.5 "**City**" shall have the meaning set forth in the preamble paragraph. Unless the context or text specifically provides otherwise, references to the City shall mean the City acting by and through the Planning Director or, as necessary, the Planning Commission or the Board of Supervisors. The City's approval of this Agreement will be evidenced by the signatures of the Planning Director and the Clerk of the Board of Supervisors [need to confirm if the Clerk needs to sign].

1.2.6 "**City Agency**" or "**City Agencies**" shall mean, where appropriate, all City departments, agencies, boards, commissions, and bureaus that execute or consent to this Agreement and that have subdivision or other permit, entitlement or approval authority or jurisdiction over the Project or the Project Site, together with any successor City agency, department, board, or commission.

1.2.7 "**City Attorney's Office**" shall mean the Office of the City Attorney of the City and County of San Francisco.

1.2.8 "**Director**" or "**Planning Director**" shall mean the Director of Planning of the City and County of San Francisco.

1.2.9 "**Indemnify**" shall mean to indemnify, defend, reimburse, and hold harmless.

1.2.10 "**OCII**" shall mean Office of Community Investment and Infrastructure.

1.2.11 "**Official Records**" shall mean the official real estate records of the City and County of San Francisco, as maintained by the City's Recorder's Office.

1.2.12 "On-Site Requirement" is defined in Recital B.

1.2.13 "**Party**" means, individually or collectively as the context requires, the City and Developer (and, as Developer, any Transferee that is made a Party to this Agreement under the terms of an Assignment and Assumption Agreement). "**Parties**" shall have a correlative meaning.

1.2.14 "**Plan**" shall mean the Transbay Project Area Redevelopment Plan, Approved by Ordinance No. 124-05, Adopted by the Board of Supervisors on June 21, 2005 and Ordinance No. 99-06 adopted by the Board of Supervisors May 9, 2006, as amended from time to time.

1.2.15 "**Planning Code**" shall mean the San Francisco Planning Code.

1.2.16 "**Planning Commission**" or "**Commission**" shall mean the Planning Commission of the City and County of San Francisco.

1.2.17 "**Planning Department**" shall mean the Planning Department of the City and County of San Francisco.

1.3 Effective Date. This Agreement shall take effect upon the later of (i) the full execution of this Agreement by the Parties and (ii) the effective date of the Enacting Ordinance ("**Effective Date**"). The Effective Date is _____.

1.4 Term. The term of this Agreement shall commence upon the Effective Date and shall continue in full force and effect for the earlier of (i) Project completion (as evidenced by issuance of the Temporary Certificate of Occupancy) or (ii) ten (10) years after the effective date., unless extended or earlier terminated as provided herein ("**Term**"). Following expiration of the Term, this Agreement shall be deemed terminated and of no further force and effect except for any provisions which, by their express terms, survive the expiration or termination of this Agreement.

2. PROJECT CONTROLS AND VESTING

2.1 Project Controls; Affordable Housing Fee. During the term of this Agreement, Developer shall have the vested right to develop the Project Site in accordance with the Existing Requirements, provided (i) within 30 days following the Effective Date, Developer shall pay to the City the Affordable Housing Fee, and (ii) upon the City's receipt of the Affordable Housing Fee, the On-Site Requirement shall not apply to the Project. Upon receipt, the City shall transfer the Affordable Housing Fee to OCII to be used by OCII to fulfill the Transbay Affordable

Housing Obligation. The City agrees to work collaboratively with OCII to seek to maximize the number of affordable units that can be built with the Affordable Housing Fee. OCII shall have the right, in its sole discretion, to determine how and where to apply the Affordable Housing Fee, with the only restriction being that OCII use the Affordable Housing Fee for predevelopment and development expenses and administrative costs associated with the acquisition, construction or rehabilitation of affordable housing in the Project Area. Developer shall have no right to challenge the appropriateness or the amount of any expenditure, so long as it is used for affordable housing in the Project Area.

2.2 Vested Rights. The City, by entering into this Agreement, is limiting its future discretion with respect to Project approvals that are consistent with this Agreement during the Term. Consequently, the City shall not use its discretionary authority in considering any application to change the policy decisions reflected by the Agreement or otherwise to prevent or to delay development of the Project as set forth in the Agreement. Instead, implementing approvals that substantially conform to or implement the Agreement shall be issued by the City so long as they substantially comply with and conform to this Agreement. The City shall not use its discretionary authority to change the policy decisions reflected by this Agreement or otherwise to prevent or to delay development of the Project as contemplated in this Agreement. The City shall take no action under this Agreement nor impose any condition on the Project that would conflict with this Agreement.

2.3 Changes in Federal or State Laws. If Federal or State Laws issued, enacted, promulgated, adopted, passed, approved, made, implemented, amended, or interpreted after the Effective Date have gone into effect and (i) preclude or prevent compliance with one or more provisions of the this Agreement, or (ii) materially and adversely affect Developer's or the City's rights, benefits or obligations, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such Federal or State Law. In such event, this Agreement shall be modified only to the extent necessary or required to comply with such Law. If any such changes in Federal or State Laws would materially and adversely affect the construction, development, use, operation or occupancy of the Project such that the Development becomes economically infeasible, then Developer shall notify the City and propose amendments or solutions that would maintain the benefit of the bargain (that is this Agreement) for both Parties.

2.4 Changes to Development Agreement Statute. This Agreement has been entered into in reliance upon the provisions of the Development Agreement Statute. No amendment of or addition to the Development Agreement Statute which would affect the interpretation or enforceability of this Agreement or increase the obligations or diminish the development rights of Developer hereunder, or increase the obligations or diminish the benefits to the City hereunder shall be applicable to this Agreement unless such amendment or addition is specifically required by Law or is mandated by a court of competent jurisdiction. If such amendment or change is permissive rather than mandatory, this Agreement shall not be affected.

2.5 Taxes. Nothing in this Agreement limits the City's ability to impose new or increased taxes or special assessments, or any equivalent or substitute tax or assessment.

3. DEVELOPER REPRESENTATIONS, WARRANTIES AND COVENANTS

3.1 Interest of Developer; Due Organization and Standing. Developer represents that it is the legal owner of the Project Site, and that all other persons with an ownership or security interest in the Project Site have consented to this Agreement. Developer is a Delaware limited liability company. Developer has all requisite power to own its property and authority to conduct its business as presently conducted. Developer has made all required state filings required to conduct business in the State of California and is in good standing in the State of California.

3.2 No Conflict with Other Agreements; No Further Approvals; No Suits. Developer warrants and represents that it is not a party to any other agreement that would conflict with Developer's obligations under this Agreement. Neither Developer's articles of organization, bylaws, or operating agreement, as applicable, nor any other agreement or law in any way prohibits, limits or otherwise affects the right or power of Developer to enter into and perform all of the terms and covenants of this Agreement. No consent, authorization or approval of, or other action by, and no notice to or filing with, any governmental authority, regulatory body or any other person is required for the due execution, delivery and performance by Developer of this Agreement or any of the terms and covenants contained in this Agreement. To Developer's knowledge, there are no pending or threatened suits or proceedings or undischarged judgments affecting Developer or any of its members before any court, governmental agency, or arbitrator which might materially adversely affect Developer's business, operations, or assets or Developer's ability to perform under this Agreement.

3.3 No Inability to Perform; Valid Execution. Developer warrants and represents that it has no knowledge of any inability to perform its obligations under this Agreement. The execution and delivery of this Agreement and the agreements contemplated hereby by Developer have been duly and validly authorized by all necessary action. This Agreement will be a legal, valid and binding obligation of Developer, enforceable against Developer in accordance with its terms.

3.4 Conflict of Interest. Through its execution of this Agreement, Developer acknowledges that it is familiar with the provisions of Section 15.103 of the City's Charter, Article III, Chapter 2 of the City's Campaign and Governmental Conduct Code, and Section 87100 *et seq.* and Section 1090 *et seq.* of the California Government Code, and certifies that it does not know of any facts which constitute a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the Term.

3.5 Notification of Limitations on Contributions. Through execution of this Agreement, Developer acknowledges that it is familiar with Section 1.126 of City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City, whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to the officer at any time from the commencement of negotiations for a contract as defined under Section 1.126 of the Campaign and Governmental Conduct Code until six (6) months after the date the contract is approved by the City elective officer or the board on which that City elective officer

serves. San Francisco Ethics Commission Regulation 1.126-1 provides that negotiations are commenced when a prospective contractor first communicates with a City officer or employee about the possibility of obtaining a specific contract. This communication may occur in person, by telephone or in writing, and may be initiated by the prospective contractor or a City officer or employee. Negotiations are completed when a contract is finalized and signed by the City and the contractor. Negotiations are terminated when the City and/or the prospective contractor end the negotiation process before a final decision is made to award the contract.

3.6 Other Documents. No document furnished or to be furnished by Developer to the City in connection with this Agreement contains or will contain to Developer's knowledge any untrue statement of material fact or omits or will omit a material fact necessary to make the statements contained therein not misleading under the circumstances under which any such statement shall have been made.

3.7 No Suspension or Debarment. Neither Developer, nor any of its officers, have been suspended, disciplined or debarred by, or prohibited from contracting with, the U.S. General Services Administration or any federal, state or local governmental agency.

3.8 No Bankruptcy. Developer represents and warrants to City that Developer has neither filed nor is the subject of any filing of a petition under the federal bankruptcy law or any federal or state insolvency laws or laws for composition of indebtedness or for the reorganization of debtors, and, to the best of Developer's knowledge, no such filing is threatened.

3.9 Taxes. Without waiving any of its rights to seek administrative or judicial relief from such charges and levies, Developer shall pay and discharge all taxes, assessments and governmental charges or levies imposed on it or on its income or profits or on any of its property before the date on which penalties attach thereto, and all lawful claims which, if unpaid, would become a lien upon the Project Site.

3.10 Notification. Developer shall promptly notify City in writing of the occurrence of any event which might materially and adversely affect Developer or Developer's business, or that would make any of the representations and warranties herein untrue, or that would, with the giving of notice or passage of time over the Term, constitute a default under this Agreement.

3.11 Nexus/Reasonable Relationship Waiver. Developer consents to, and waives any rights it may have now or in the future, to challenge with respect to the Project, the legal validity of, the conditions, requirements, policies, or programs required by this Agreement, including, without limitation, any claim that they constitute an abuse of police power, violate substantive due process, deny equal protection of the laws, effect a taking of property without payment of just compensation, or impose an unlawful tax.

3.12 Indemnification of City. Developer shall Indemnify the City and OCII (each an "Indemnified Party") and the Indemnified Party's officers, agents and employees from and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims ("**Losses**") arising or resulting directly or indirectly from this Agreement and Developer's performance (or nonperformance) of this Agreement, regardless of the negligence of and

regardless of whether liability without fault is imposed or sought to be imposed an Indemnified Party, except to the extent that such Indemnity is void or otherwise unenforceable under applicable law, and except to the extent such Loss is the result of the active negligence or willful misconduct of an Indemnified Party. The foregoing Indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs, and the Indemnified Party's cost of investigating any claims against the Indemnified Party. All Indemnifications set forth in this Agreement shall survive the expiration or termination of this Agreement.

3.13 Payment of Fees and Costs.

3.13.1. Developer shall pay to the City all City Costs during the Term within thirty (30) days following receipt of a written invoice from the City. Each City Agency shall submit to the Planning Department or another City agency as designated by the Planning Department monthly or quarterly invoices for all City Costs incurred by the City Agency for reimbursement under this Agreement, and the Planning Department or its designee shall gather all such invoices so as to submit one City bill to Developer each month or quarter. To the extent that a City Agency fails to submit such invoices, then the Planning Department or its designee shall request and gather such billing information, and any City Cost that is not invoiced to Developer within twelve (12) months from the date the City Cost was incurred shall not be recoverable.

3.13.2. The City shall not be required to process any requests for approval or take other actions under this Agreement during any period in which payments from Developer are past due. If such failure to make payment continues for a period of more than sixty (60) days following notice, it shall be a Default for which the City shall have all rights and remedies as set forth in Section 7.4.

3.14 Mello-Roos Community Facilities District. The Project shall be subject to the provisions of the proposed City and County of San Francisco Transbay Center District Plan [Mello-Roos] Community Facilities District No. 2014-1 (Transbay Transit Center) ("**CFD**"), once established, to help pay the costs of constructing the new Transbay Transit Center, the Downtown Rail Extension ("DTX"), and other improvements in the Transit Center District Plan area. The special tax rate has not been established, but will be equal to or less than those set forth in the CFD Rate and Method of Apportionment ("RMA") attached hereto as Exhibit _____.

i. If the Project is not subject to a CFD that will help pay the costs of constructing the new Transbay Transit Center, the DTX, and other improvements in the Transit Center District Plan area on the date that a Final C of O is issued to the Developer, then the Developer will be required to pay to the City for transmittal to the TJPA, and retention by the City as applicable, of the estimated CFD taxes amount that would otherwise be due to the San Francisco Office of the Assessor-Recorder ("**Assessor-Recorder**") if the CFD had been established in accordance with the rates established in the RMA.

ii. The "amount that would otherwise be due" under 3.14(i) above shall be based on the RMA attached hereto as Exhibit ___, calculated as if the Project were subject to the RMA from the date of issuance of the Final C of O until the Project is subject to the CFD.

iii. If the City proposes a CFD covering the Site, Developer agrees to cast its vote in favor of the CFD, provided that the tax rates are not greater than the Base Special Tax rates in the RMA attached as **Exhibit** to this Agreement.

4. MUTUAL OBLIGATIONS

4.1 Notice of Completion or Revocation. Upon the Parties' completion of performance or revocation of this Agreement, a written statement acknowledging such completion or revocation, signed by the appropriate agents of City and Developer, shall be recorded in the Official Records.

4.2 Estoppel Certificate. Developer may, at any time, and from time to time, deliver written notice to the Planning Director requesting that the Planning Director certify in writing that to the best of his or her knowledge: (i) this Agreement is in full force and effect and a binding obligation of the Parties; (ii) this Agreement has not been amended or modified either orally or in writing, and if so amended or modified, identifying the amendments or modifications and stating their date and nature; (iii) Developer is not in default in the performance of its obligations under this Agreement, or if in default, describing therein the nature and amount of any such defaults; and (iv) the findings of the City with respect to the most recent annual review performed pursuant to Section 9.2 below. The Planning Director shall execute and return such certificate within forty-five (45) days following receipt of the request. Each Party acknowledges that any mortgagee with a mortgage on all or part of the Project Site, acting in good faith, may rely upon such a certificate. A certificate provided by the City establishing the status of this Agreement with respect to any lot or parcel shall be in recordable form and may be recorded with respect to the affected lot or parcel at the expense of the recording party.

4.3 Cooperation in the Event of Third-Party Challenge.

4.3.1 In the event any legal action or proceeding is instituted challenging the validity of any provision of this Agreement, the Parties shall cooperate in defending against such challenge. The City shall promptly notify Developer of any Third-Party Challenge instituted against the City.

4.3.2 Developer shall assist and cooperate with the City at its own expense in connection with any Third-Party Challenge. The City Attorney's Office may use its own legal staff or outside counsel in connection with defense of the Third-Party Challenge, at the City Attorney's sole discretion. Developer shall reimburse the City for its actual costs in defense of the action or proceeding, including but not limited to the time and expenses of the City Attorney's Office and any consultants; *provided, however*) Developer shall have the right to receive monthly invoices for all such costs. Developer shall Indemnify the City from any other liability incurred by the City, its officers, and its employees as the result of any Third-Party Challenge, including any award to opposing counsel of attorneys' fees or costs, except where such award is the result of the willful misconduct of the City or its officers or employees. This section shall survive any judgment invalidating all or any part of this Agreement.

4.3.3 Affordable Housing Fee Challenge. The Parties agree that if a Third_Party Challenge is initiated regarding the validity or enforceability of this Agreement or, specifically of the Affordable Housing Fee, Developer shall not sell [or lease?] the residential units designated for and required to complete the On-Site Requirements until the validity and enforceability of this Agreement, including payment of the Affordable Housing Fee, has been finally determined and upheld. If this Agreement or the Affordable Housing Fee is not upheld (on any final appeal), then Developer will satisfy the On-Site Requirements with the designated residential units.

4.4 Good Faith and Fair Dealing. The Parties shall cooperate with each other and act in good faith in complying with the provisions of this Agreement. In their course of performance under this Agreement, the Parties shall cooperate and shall undertake such actions as may be reasonably necessary to implement the Project as contemplated by this Agreement.

4.5 Agreement to Cooperate; Other Necessary Acts. The Parties agree to cooperate with one another to expeditiously implement the Project in accordance with this Agreement, and to undertake and complete all actions or proceedings reasonably necessary or appropriate to ensure that the objectives of the Agreement are fulfilled during the Term. Each Party shall use good faith efforts to take such further actions as may be reasonably necessary to carry out this Agreement, in accordance with the terms of this Agreement (and subject to all applicable laws) in order to provide and secure to each Party the full and complete enjoyment of its rights and privileges hereunder.

5. PERIODIC REVIEW OF DEVELOPER'S COMPLIANCE

5.1 Annual Review. Pursuant to Section 65865.1 of the Development Agreement Statute, at the beginning of the second week of each January following final adoption of this Agreement and for so long as the Agreement is in effect (the "**Annual Review Date**"), the Planning Director shall commence a review to ascertain whether Developer has, in good faith, complied with the Agreement. The failure to commence such review in January shall not waive the Planning Director's right to do so later in the calendar year; *provided, however,* that such review shall be deferred to the following January if not commenced on or before May 31st.

5.2 Review Procedure. In conducting the required initial and annual reviews of Developer's compliance with this Agreement, the Planning Director shall follow the process set forth in this Section.

5.2.1 Required Information from Developer. Upon request by the Planning Director but not more than sixty (60) days and not less than forty-five (45) days before the Annual Review Date, Developer shall provide a letter to the Planning Director confirming Developer's compliance with this Agreement.

5.2.2 City Compliance Review. If the Planning Director finds Developer is not in compliance with this Agreement, the Planning Director shall issue a Certificate of Non-Compliance. The City's failure to timely complete the annual review is not deemed to be a waiver of the right to do so at a later date within a given year, so long as the annual review is commenced on or before May 31st, as contemplated in Section 5.1.

6. AMENDMENT; TERMINATION; EXTENSION OF TERM

6.1 Amendment or Termination. Except as provided in Section XX (Changes in State and Federal Rules and Regulations) and Section XXX (Remedies), this Agreement may only be amended or terminated with the mutual written consent of the Parties. Except as provided in this Agreement to the contrary, the amendment or termination, and any required notice thereof, shall be accomplished in the manner provided in the Development Agreement Statute and Chapter 56.

6.2 Extension Due to Legal Action, Referendum, or Excusable Delay.

6.2.1 If any litigation is filed challenging this Agreement or the validity of this Agreement or any of its provisions, then the Term shall be extended for the number of days equal to the period starting from the commencement of the litigation or the suspension to the end of such litigation or suspension.

6.2.2 In the event of changes in state or federal laws or regulations, inclement weather, delays due to strikes, inability to obtain materials, civil commotion, war, acts of terrorism, fire, acts of God, litigation, lack of availability of commercially-reasonable project financing (as a general matter and not specifically tied to Developer), or other circumstances beyond the control of Developer and not proximately caused by the acts or omissions of Developer that substantially interfere with carrying out the obligations under this Agreement ("**Excusable Delay**"), the Parties agree to extend the time periods for performance, as such time periods have been agreed to by Developer, of Developer's obligations impacted by the Excusable Delay. In the event that an Excusable Delay occurs, Developer shall notify the City in writing of such occurrence and the manner in which such occurrence substantially interferes with the ability of Developer to perform under this Agreement. In the event of the occurrence of any such Excusable Delay, the time or times for performance of the obligations of Developer, will be extended for the period of the Excusable Delay if Developer cannot, through commercially reasonable and diligent efforts, make up for the Excusable Delay within the time period remaining before the applicable completion date; *provided*, *however*, within thirty (30) days after the beginning of any such Excusable Delay, Developer shall have first notified City of the cause or causes of such Excusable Delay and claimed an extension for the reasonably estimated period of the Excusable Delay. In the event that Developer stops any work as a result of an Excusable Delay, Developer must take commercially reasonable measures to ensure that the affected real property is returned to a safe condition and remains in a safe condition for the duration of the Excusable Delay.

6.2.3 The foregoing Section XXXX notwithstanding, Developer may not seek to delay the payment of the Affordable Housing Fee as a result of an Excusable Delay related to the lack of availability of commercially reasonable project financing.

7. ENFORCEMENT OF AGREEMENT; REMEDIES FOR DEFAULT; DISPUTE RESOLUTION

7.1 Enforcement. The only Parties to this Agreement are the City and Developer. This Agreement is not intended, and shall not be construed, to benefit or be enforceable by any other person or entity whatsoever.

7.2 Default. For purposes of this Agreement, the following shall constitute an event of default (an "**Event of Default**") under this Agreement: (i) except as otherwise specified in this Agreement, the failure to make any payment within ninety (90) calendar days of when due; and (ii) the failure to perform or fulfill any other material term, provision, obligation, or covenant hereunder, including complying with all terms of the Conditions of Approval, attached hereto as Exhibit D, and the continuation of such failure for a period of thirty (30) calendar days following a written notice of default and demand for compliance (a "**Notice of Default**"); *provided, however*, if a cure cannot reasonably be completed within thirty (30) days, then it shall not be considered a default if a cure is commenced within said 30-day period and diligently prosecuted to completion thereafter.

7.3 Notice of Default. Prior to the initiation of any action for relief specified in Section XX below, the Party claiming default shall deliver to the other Party a Notice of Default. The Notice of Default shall specify the reasons for the allegation of default with reasonable specificity. If the alleged defaulting Party disputes the allegations in the Notice of Default, then that Party, within twenty-one (21) calendar days of receipt of the Notice of Default, shall deliver to the other Party a notice of non-default which sets forth with specificity the reasons that a default has not occurred. The Parties shall meet to discuss resolution of the alleged default within thirty (30) calendar days of the delivery of the notice of non-default. If, after good faith negotiation, the Parties fail to resolve the alleged default within thirty (30) calendar days, then the Party alleging a default may (i) institute legal proceedings pursuant to Section XX to enforce the terms of this Agreement or (ii) send a written notice to terminate this Agreement pursuant to Section XX. The Parties may mutually agree in writing to extend the time periods set forth in this Section.

7.4 Remedies.

7.4.1 Specific Performance; Termination. In the event of an Event of Default under this Agreement, the remedies available to a Party shall include specific performance of the Agreement in addition to any other remedy available at law or in equity (subject to the limitation on damages set forth in Section XX below). In the event of an Event of Default under this Agreement, and following a public hearing at the Board of Supervisors regarding such Event of Default and proposed termination, the non-defaulting Party may terminate this Agreement by sending a notice of termination to the other Party setting forth the basis for the termination. The Party alleging a material breach shall provide a notice of termination to the breaching Party, which notice of termination shall state the material breach. The Agreement will be considered terminated effective upon the date set forth in the notice of termination, which shall in no event be earlier than ninety (90) days following delivery of the notice. The Party receiving the notice of termination may take legal action available at law or in equity if it believes the other Party's decision to terminate was not legally supportable.

7.4.2 Actual Damages. Developer agrees that the City shall not be liable to Developer for damages under this Agreement, and the City agrees that Developer shall not be liable to the City for damages under this Agreement, and each covenants not to sue the other for or claim any damages under this Agreement and expressly waives its right to recover damages under this Agreement, except as follows: (1) the 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 (a) Developer's failure to pay sums to the City as and when due under this Agreement, but subject to any express conditions for such payment set forth in this Agreement, and (b) Developer's failure to make payment due under any Indemnity in this Agreement, and (2) either Party shall have the right to recover attorneys' fees and costs as set forth in Section XX, when awarded by an arbitrator or a court with jurisdiction. For purposes of the foregoing, "actual damages" shall mean the actual amount of the sum due and owing under this Agreement, with interest as provided by law, together with such judgment collection activities as may be ordered by the judgment, and no additional sums.

7.5 Dispute Resolution. The Parties recognize that disputes may arise from time to time regarding application to the Project. Accordingly, in addition and not by way of limitation to all other remedies available to the Parties under the terms of this Agreement, including legal action, the Parties agree to follow the dispute resolution procedure in Section XX that is designed to expedite the resolution of such disputes. If, from time to time, a dispute arises between the Parties relating to application to the Project the dispute shall initially be presented by Planning Department staff to the Planning Director, for resolution. If the Planning Director decides the dispute to Developer's satisfaction, such decision shall be deemed to have resolved the matter. Nothing in this section shall limit the rights of the Parties to seek judicial relief in the event that they cannot resolve disputes through the above process.

7.6 Dispute Resolution Related to Changes in State and Federal Rules and Regulations. The Parties agree to the follow the dispute resolution procedure in this Section XX for disputes regarding the effect of changes to State and federal rules and regulations to the Project pursuant to Section XX.

7.6.1 Good Faith Meet and Confer Requirement. The Parties shall make a good faith effort to resolve the dispute before non-binding arbitration. Within five (5) business days after a request to confer regarding an identified matter, representatives of the Parties who are vested with decision-making authority shall meet to resolve the dispute. If the Parties are unable to resolve the dispute at the meeting, the matter shall immediately be submitted to the arbitration process set forth in Section XX.

7.6.2 Non-Binding Arbitration. The Parties shall mutually agree on the selection of an arbiter at JAMS in San Francisco or other mutually agreed to Arbiter to serve for the purposes of this dispute. The arbiter appointed must meet the Arbiters' Qualifications. The "**Arbiters' Qualifications**" shall be defined as at least ten (10) years of experience in a real property professional capacity, such as a real estate appraiser, broker, real estate economist, or attorney, in the Bay Area. The disputing Party(ies) shall, within ten (10) business days after submittal of the dispute to non-binding arbitration, submit a brief with

all supporting evidence to the arbiter with copies to all Parties. Evidence may include, but is not limited to, expert or consultant opinions, any form of graphic evidence, including photos, maps or graphs and any other evidence the Parties may choose to submit in their discretion to assist the arbiter in resolving the dispute. In either case, any interested Party may submit an additional brief within ten (10) business days after distribution of the initial brief. The arbiter thereafter shall hold a telephonic hearing and issue a decision in the matter promptly, but in any event within five (5) business days after the submittal of the last brief, unless the arbiter determines that further briefing is necessary, in which case the additional brief(s) addressing only those items or issues identified by the arbiter shall be submitted to the arbiter (with copies to all Parties) within five (5) business days after the arbiter's request, and thereafter the arbiter shall hold a telephonic hearing and issue a decision promptly but in any event not sooner than two (2) business days after submission of such additional briefs, and no later than thirty-two (32) business days after initiation of the non-binding arbitration. Each Party will give due consideration to the arbiter's decision before pursuing further legal action, which decision to pursue further legal action shall be made in each Party's sole and absolute discretion.

7.7 Attorneys' Fees. Should legal action be brought by either Party against the other for an Event of Default under this Agreement or to enforce any provision herein, the prevailing party in such action shall be entitled to recover its reasonable attorneys' fees and costs. For purposes of this Agreement, "reasonable attorneys' fees and costs" shall mean the fees and expenses of counsel to the Party, which may include printing, duplicating and other expenses, air freight charges, hiring of experts, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. The term "reasonable attorneys' fees and costs" shall also include, without limitation, all such fees and expenses incurred with respect to appeals, mediation, arbitrations, and bankruptcy proceedings, and whether or not any action is brought with respect to the matter for which such fees and costs were incurred. For the purposes of this Agreement, the reasonable fees of attorneys of City Attorney's Office shall be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the City Attorney's Office's services were rendered who practice in the City of San Francisco in law firms with approximately the same number of attorneys as employed by the City Attorney's Office.

7.8 No Waiver. Failure or delay in giving a Notice of Default shall not constitute a waiver of such Event of Default, nor shall it change the time of such Event of Default. Except as otherwise expressly provided in this Agreement, any failure or delay by a Party in asserting any of its rights or remedies as to any Event of Default shall not operate as a waiver of any Event of Default or of any such rights or remedies, nor shall it deprive any such Party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert, or enforce any such rights or remedies.

7.9 Future Changes to Existing Standards. Pursuant to Section 65865.4 of the Development Agreement Statute, unless this Agreement is terminated by mutual agreement of the Parties or terminated for default as set forth in Section XX, either Party may enforce this Agreement notwithstanding any change in any applicable general or specific plan, zoning,

subdivision, or building regulation adopted by the City or the voters by initiative or referendum (excluding any initiative or referendum that successfully defeats the enforceability or effectiveness of this Agreement itself).

7.10 Joint and Several Liability. If Developer consists of more than one person or entity with respect to any real property within the Project Site or any obligation under this Agreement, then the obligations of each such person and/or entity shall be joint and several.

8. MISCELLANEOUS PROVISIONS

8.1 Entire Agreement. This Agreement, including the preamble paragraph, Recitals and Exhibits, constitute the entire understanding and agreement between the Parties with respect to the subject matter contained herein.

8.2 Binding Covenants; Run With the Land. Pursuant to Section 65868 of the Development Agreement Statute, from and after recordation of this Agreement, all of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this Agreement shall be binding upon the Parties and, subject to Article XX above, their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, and all persons or entities acquiring the Project Site, or any portion thereof, or any interest therein, whether by sale, operation of law, or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns. All provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants and benefits running with the land pursuant to applicable law, including but not limited to California Civil Code section 1468.

8.3 Applicable Law and Venue. This Agreement has been executed and delivered in and shall be interpreted, construed, and enforced in accordance with the laws of the State of California. All rights and obligations of the Parties under this Agreement are to be performed in the City and County of San Francisco, and such City and County shall be the venue for any legal action or proceeding that may be brought, or arise out of, in connection with or by reason of this Agreement.

8.4 Construction of Agreement. The Parties have mutually negotiated the terms and conditions of this Agreement and its terms and provisions have been reviewed and revised by legal counsel for both the City and Developer. Accordingly, no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement. Language in this Agreement shall be construed as a whole and in accordance with its true meaning. The captions of the paragraphs and subparagraphs of this Agreement are for convenience only and shall not be considered or referred to in resolving questions of construction. Each reference in this Agreement or to this Agreement shall be deemed to refer to the Agreement as amended from time to time pursuant to the provisions of the Agreement, whether or not the particular reference refers to such possible amendment.

8.5 Project Is a Private Undertaking; No Joint Venture or Partnership.

8.5.1 The Agreement is to be undertaken by Developer the Project is a private development and no portion shall be deemed a public work. The City has no interest in, responsibility for, or duty to third persons concerning the Project. Developer shall exercise full dominion and control over the Project Site, subject only to the limitations and obligations of Developer contained in this Agreement.

8.5.2 Nothing contained in this Agreement, or in any document executed in connection with this Agreement, shall be construed as creating a joint venture or partnership between the City and Developer. Neither Party is acting as the agent of the other Party in any respect hereunder. Developer is not a state or governmental actor with respect to any activity conducted by Developer hereunder.

8.6 Recordation. Pursuant to Section 65868.5 of the Development Agreement Statute, the clerk of the Board shall cause a copy of this Agreement or any amendment thereto to be recorded in the Official Records within ten (10) business days after the Effective Date of this Agreement or any amendment thereto, as applicable, with costs to be borne by Developer.

8.7 Obligations Not Dischargeable in Bankruptcy. Developer's obligations under this Agreement are not dischargeable in bankruptcy.

8.8 Signature in Counterparts. This 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.

8.9 Time of the Essence. Time is of the essence in the performance of each and every covenant and obligation to be performed by the Parties under this Agreement.

8.10 Notices. Any notice or communication required or authorized by this Agreement shall be in writing and may be delivered personally or by registered mail, return receipt requested. Notice, whether given by personal delivery or registered mail, shall be deemed to have been given and received upon the actual receipt by any of the addressees designated below as the person to whom notices are to be sent. Either Party to this Agreement may at any time, upon written notice to the other Party, designate any other person or address in substitution of the person and address to which such notice or communication shall be given. Such notices or communications shall be given to the Parties at their addresses set forth below:

To City:

John Rahaim
Director of Planning
San Francisco Planning Department
1650 Mission Street, Suite 400
San Francisco, California 94102

with a copy to:

Dennis J. Herrera, Esq.
City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102

To Developer:

XXXXXX
XXXXXX

with a copy to:

Rachel B. Horsch
Pillsbury Winthrop Shaw Pittman LLP
4 Embarcadero Center, 22nd Floor
San Francisco, California, 94111

8.11 Limitations on Actions. Pursuant to Section 56.19 of the Administrative Code, any decision of the Board of Supervisors made pursuant to Chapter 56 shall be final. Any court action or proceeding to attack, review, set aside, void, or annul any final decision or determination by the Board shall be commenced within ninety (90) days after such decision or determination is final and effective. Any court action or proceeding to attack, review, set aside, void or annul any final decision by (i) the Planning Director made pursuant to Administrative Code Section 56.15(d)(3) or (ii) the Planning Commission pursuant to Administrative Code Section 56.17(e) shall be commenced within ninety (90) days after said decision is final.

8.12 Severability. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, or if any such term, provision, covenant, or condition does not become effective until the approval of any Non-City Responsible Agency, the remaining provisions of this Agreement shall continue in full force and effect unless enforcement of the remaining portions of the Agreement would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement. Notwithstanding the foregoing, the Developer and the City agree that the Agreement will terminate and be on no force or effect if Section 2.1 herein is found invalid, void or unenforceable.

8.13 Sunshine. Developer understands and agrees that under the City's Sunshine Ordinance (Administrative Code, Chapter 67) and the California Public Records Act (California Government Code section 6250 *et seq.*), this Agreement and any and all records, information, and materials submitted to the City hereunder are public records subject to public disclosure. To the extent that Developer in good faith believes that any financial materials reasonably requested

by the City constitutes a trade secret or confidential proprietary information protected from disclosure under the Sunshine Ordinance and other applicable laws, Developer shall mark any such materials as such, . When a City official or employee receives a request for information that has been so marked or designated, the City may request further evidence or explanation from Developer. If the City determines that the information does not constitute a trade secret or proprietary information protected from disclosure, the City shall notify Developer of that conclusion and that the information will be released by a specified date in order to provide Developer an opportunity to obtain a court order prohibiting disclosure.

[Remainder of Page Intentionally Blank;

Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

CITY

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation

By:_____
John Rahaim
Director of Planning

Approved as to form:
Dennis J. Herrera, City Attorney

By:_____
Heidi Gewertz
Deputy City Attorney

Approved on _____
Board of Supervisors Ordinance No. _____

DEVELOPER

181 FREMONT STREET LLC, a Delaware limited liability company

By: _____

Name: _____

Title: _____