



**CITY AND COUNTY OF SAN FRANCISCO
EDWIN LEE, MAYOR**

DISPOSITION AND DEVELOPMENT AGREEMENT

BETWEEN

**THE CITY AND COUNTY OF SAN FRANCISCO,
ACTING BY AND THROUGH THE SAN FRANCISCO PORT COMMISSION**

AND

**FC PIER 70, LLC,
A DELAWARE LIMITED LIABILITY COMPANY**

28-ACRE SITE PROJECT

[REFERENCE DATE]

ELAINE FORBES, EXECUTIVE DIRECTOR

SAN FRANCISCO PORT COMMISSION

**WILLIE ADAMS, PRESIDENT
KIMBERLY BRANDON, VICE PRESIDENT
LESLIE KATZ, COMMISSIONER
DOREEN WOO HO, COMMISSIONER**

[Page intentionally omitted.]

TABLE OF CONTENTS

	<u>Page</u>
1. PROJECT OVERVIEW	4
1.1. Purpose and Term	4
1.2. Public Trust Exchange	4
1.3. Project Description.....	4
1.4. Special Use District.....	8
2. PROJECT PHASING	8
2.1. Schedule of Performance	8
2.2. Development Process for Each Phase.....	9
2.3. Phase Areas	10
2.4. Phasing Goals.....	10
3. PHASE APPROVAL.....	11
3.1. Phase Submittal.....	11
3.2. Phase Approval Procedures	11
3.3. Changes to Phase	18
3.4. Changes to Project after Phase 1.....	19
3.5. Streetscape Master Plan	21
4. PERFORMANCE DATES	22
4.1. Performance Generally	22
4.2. Excusable Delay Generally	22
4.3. Excusable Delay Time Periods Generally	23
4.4. Limits on Excusable Delay Period.....	23
4.5. Down Market Delay Procedures	24
5. PARTY RELATIONSHIPS.....	28
5.1. No Agency	28
5.2. ICA.....	28
5.3. Port approvals	28
5.4. Developer Approvals	29
5.5. Standards Otherwise Applicable.....	30
5.6. Limitations on Liability of the Parties	30
5.7. Defaults and Breaches.....	31

6. TRANSFERS 32

6.1. Transfer Limitations in Phase 1 32

6.2. Third-Party Transfers in Other Phases..... 32

6.3. Affiliate Transfers..... 34

6.4. Assignment and Assumption Agreement..... 35

6.5. Releases..... 35

6.6. Notice of Transfer..... 36

6.7. Related Matters 37

7. PARCEL CONVEYANCES 37

7.1. Developer Option..... 37

7.2. Fair Market Value 38

7.3. Option Parcel Appraisals 38

7.4. Option Parcel Closings 40

7.5. Public Offering Procedures..... 41

7.6. Vertical Coordination Agreement..... 43

7.7. Post-Closing Boundary Adjustments..... 43

7.8. Parcel C1A 43

7.9. 20th/Illinois Parcel 43

7.10. Hoedown Yard..... 45

7.11. Historic Building 2..... 45

7.12. Arts Building..... 47

7.13. Noonan Replacement Space 49

7.14. Historic Buildings 12 and 21 51

7.15. Rooftop Open Space 53

7.16. Affordable Housing Parcels..... 53

7.17. PDR..... 54

7.18. Child Care 54

7.19. Community Facilities..... 54

7.20. Report on Associated Public Benefits..... 55

8. DELIVERY OF MASTER LEASE..... 55

8.1. Procedures for Delivery 55

8.2. Disapproved Exceptions 56

8.3. New Title Matters 58

8.4. Conditions to Closing 59

8.5. Close of Escrow 60

8.6. Master CC&Rs..... 60

9. SITE CONDITION AND INDEMNITIES 61

9.1. As-Is..... 61

9.2. Damage and Destruction..... 63

9.3. General Indemnity 64

9.4. Environmental Indemnity 65

9.5. Defense of Claims..... 65

9.6. Mutual Release and Waiver 65

9.7. Parties to Contract..... 66

9.8. Survival..... 66

10. RESOLUTION OF CERTAIN DISPUTES 66

10.1. Arbiters 66

10.2. Meet and Confer Requirement..... 67

10.3. General Arbitration Procedures 68

10.4. Binding Arbitration..... 69

10.5. Nonbinding Arbitration..... 69

10.6. Nonarbitrable Matters 71

11. DEFAULTS 71

11.1. Generally..... 71

11.2. Events of Default by Developer..... 72

11.3. Events of Default by the Port..... 72

11.4. Remedies for Events of Default..... 73

12. MATERIAL BREACHES AND TERMINATION..... 74

12.1. Generally..... 74

12.2. Material Breaches by Developer..... 74

12.3. Material Breaches by the Port..... 76

12.4. Termination as Port Remedy 76

12.5. Termination as Developer Remedy 78

12.6. Mutual Termination Right 78

12.7. Termination Procedures 79

12.8. Effects of Termination on Development Rights 79

- 12.9. Effects of Termination on Project Payment..... 80
- 12.10. Assignment of Documents after Termination..... 81
- 13. IMPROVEMENT PLANS 82
 - 13.1. Improvement Plans for Phase Improvements 82
 - 13.2. Preparation of Improvement Plans..... 82
 - 13.3. Review of Improvement Plans..... 82
 - 13.4. Conflicts with Other Governmental Requirements..... 82
 - 13.5. As-Built Drawings 83
 - 13.6. Schematic Design Review of Public Spaces..... 83
 - 13.7. Signage..... 85
- 14. CONSTRUCTION GENERALLY..... 86
 - 14.1. Substantial Compliance with Plans..... 86
 - 14.2. Standards of Construction..... 87
 - 14.3. Site Security 87
 - 14.4. Costs..... 87
 - 14.5. Contracting Procedures 88
 - 14.6. Progress Meetings..... 89
 - 14.7. Other Construction Matters..... 89
 - 14.8. Mitigation Measures 90
 - 14.9. Nondiscrimination..... 91
- 15. HORIZONTAL DEVELOPMENT 91
 - 15.1. Horizontal Improvements 91
 - 15.2. Site Preparation Work..... 92
 - 15.3. Preparation of Development Parcels..... 92
 - 15.4. Conditions to Construction 92
 - 15.5. Regulatory Approvals 93
 - 15.6. Deferred Infrastructure..... 93
 - 15.7. SOP Compliance..... 94
 - 15.8. Acceptance of Park Parcels and Phase Improvements 95
 - 15.9. Acceptance of Other Horizontal Improvements 96
 - 15.10. Maintenance of Horizontal Improvements 96
 - 15.11. Waterfront Park..... 97
- 16. INSURANCE..... 97

17. SECURITY FOR PROJECT ACTIVITIES 97

 17.1. Adequate Security Generally 97

 17.2. Loss Security..... 98

 17.3. Phase Security..... 98

 17.4. Verification of Obligor Net Worth 100

18. LENDERS’ RIGHTS..... 101

 18.1. Right to Encumber 101

 18.2. Certain Assurances..... 101

 18.3. Lenders’ Notice Rights 102

 18.4. Lender Not Obligated to Construct..... 102

 18.5. Right to Cure..... 102

 18.6. Obligations with Respect to the Property 103

 18.7. No Impairment of Permitted Lien..... 103

 18.8. Multiple Permitted Liens 103

 18.9. Cured Defaults 104

 18.10. Estoppel Certificates 104

19. PORT AND CITY COSTS..... 104

 19.1. Generally..... 104

 19.2. Payment of Costs 105

20. NOTICES..... 105

 20.1. Delivery..... 105

 20.2. Notice Addresses 106

 20.3. Interested Persons 107

 20.4. Change of Address..... 107

 20.5. Effective Date 107

 20.6. Day-to-Day Communications 107

21. MISCELLANEOUS PROVISIONS..... 107

 21.1. Transaction Documents 107

 21.2. Lien of Agreement 107

 21.3. Survival..... 108

DDA EXHIBITS AND SCHEDULES

DESIGNATION	EXHIBIT/SCHEDULE NAME
APPENDIX	
Appendix Part A	Standard Provisions and Rules of Interpretation
Appendix Part B	Glossary of Defined Terms
EXHIBIT TAB A	
PROJECT DESCRIPTION AND DEVELOPMENT	
DDA Exhibit A1	Legal description of 28-Acre Site
DDA Exhibit A2	Site plan of 28-Acre Site
DDA Exhibit A3	Project Approvals
DDA Exhibit A4	Land Use Plan
DDA Exhibit A5	Provisions for Office Development
DDA Exhibit A6	Mitigation Monitoring and Reporting Program
DDA Exhibit A7	Other City Requirements
EXHIBIT TAB B	
CONSTRUCTION PHASING AND PUBLIC BENEFITS	
DDA Exhibit B1	Phasing Plan
DDA Exhibit B2	Schedule of Performance
DDA Exhibit B3	Affordable Housing Plan <ul style="list-style-type: none"> ○ AHP Exhibit A: Housing Map ○ AHP Exhibit B: San Francisco Affordable Housing Monitoring Procedures Manual ○ AHP Exhibit C: Initial In-Lieu Fee Rate Schedule
DDA Exhibit B4	Workforce Development Plan <ul style="list-style-type: none"> ○ Attachment A-1 First Source Hiring Agreement for Operations ○ Attachment A-2 First Source Hiring Agreement for Tech Operations ○ Attachment A-3 First Source Hiring Agreement for Construction ○ Attachment B Local Hiring Requirements ○ Attachment C LBE Utilization Plan ○ Attachment D Dispute Resolution
DDA Exhibit B5	Transportation Program (including TDM Plan)
DDA Exhibit B6	Arts Program
DDA Exhibit B7	Map of Potential Childcare Locations
DDA Exhibit B8	Infrastructure Plan
DDA Exhibit B9	Required Submittals for SOP Compliance Request
DDA Exhibit B10	Form of Master Lease
DDA Exhibit B11	Intentionally Omitted
DDA Exhibit B12	Intentionally Omitted
EXHIBIT TAB C	
PROJECT FINANCE	
DDA Exhibit C1	Financing Plan

DESIGNATION	EXHIBIT/SCHEDULE NAME
	<ul style="list-style-type: none"> ○ FP Exhibit A: Form of Acquisition and Reimbursement Agreement <ul style="list-style-type: none"> ○ AA Exhibit A: Horizontal Improvements to be Acquired ○ AA Exhibit B: Description of Horizontal Improvements and Components, with Cost Estimates or Method of Calculation ○ AA Exhibit C: Form of Payment Request ○ FP Exhibit B: Form of Special Fund Administration Agreement ○ FP Exhibit C: Intentionally Omitted ○ FP Exhibit D: Form of Promissory Note-LP ○ FP Exhibit E: Form of Partial Assignment of Promissory Note-LP ○ FP Exhibit F: Form of Promissory Note-X ○ FP Exhibit G: Intentionally Omitted ○ FP Schedule 1: Summary Proforma ○ FP Schedule 2: Intentionally Omitted ○ FP Schedule 3: Entitlement Cost Statement ○ FP Schedule 4: Tables-Public Financing Project Areas, Sources and Uses ○ FP Schedule 5: Intentionally Omitted
DDA Exhibit C2	Appendix G-2 to Infrastructure Financing Plan for IFD Project Area G
DDA Exhibit C3:	Term Sheet: Rate and Method of Apportionment for Pier 70 Leased Property CFD, Pier 70 Condo Property CFD, and Hoedown Yard CFD
DDA Exhibit C4:	Intentionally Omitted
DDA Exhibit C5	Intentionally Omitted
DDA Exhibit C6	<p>Tax Allocation Memorandum of Understanding among the Controller, the Assessor-Recorder, the Treasurer and Tax Collector, and the Port</p> <ul style="list-style-type: none"> ○ MOU Exhibit A: DDA Financing Plan ○ MOU Exhibit B: Appendix G-2 ○ MOU Exhibit C: RMAs ○ MOU Exhibit E: Form of Reimbursement and Acquisition Agreement
EXHIBIT TAB D	TRANSFERS AND PARCEL DISPOSITION
DDA Exhibit D1	Permitted Exceptions
DDA Exhibit D2	Form of Vertical DDA
DDA Exhibit D3	Form of Parcel Lease
DDA Exhibit D4	Form of Appraisal Instructions
DDA Exhibit D5	Bidder Qualifications (residential and commercial)
DDA Exhibit D6	Land Value Indicators by Parcel
DDA Exhibit D7	Outline of Master Association Conditions, Covenants, and Restrictions
DDA Exhibit D8	Intentionally Omitted
SCHEDULES	
DDA Schedule 1	Approved Arbiters Pool
DDA Schedule 2	Qualified Appraiser Pool
DDA Schedule 3	Qualified Broker Pool
DDA Schedule 4	Anticipated Configuration of Parcel K North and Parcel K South

DESIGNATION	EXHIBIT/SCHEDULE NAME
DDA Schedule 5	Restrictions on Illinois Street Parcels

[Rest of page intentionally left blank.]

**DISPOSITION AND DEVELOPMENT AGREEMENT
(28-ACRE SITE PROJECT)**

This **DISPOSITION AND DEVELOPMENT AGREEMENT** (including the Appendix and all Exhibits and Schedules as amended from time to time, this “**DDA**”) between the City and County of San Francisco, a municipal corporation and charter city (the “**City**”), acting by and through the San Francisco Port Commission (the “**Port**” or the “**Port Commission**”), and FC Pier 70, LLC, a Delaware limited liability company (“**Developer**”), is dated for reference purposes only as of the Reference Date specified on the title page to this DDA. Developer and the Port are each a “**Party**” to this DDA.

Initially capitalized and other terms are defined in the Appendix or other Transaction Documents as specified in the Appendix. All definitions and all Transaction Documents are subject to the standard provisions and rules of interpretation in the Appendix.

RECITALS

A. The Port owns about 7 miles of tidelands and submerged lands along San Francisco Bay, including Pier 70, which is generally bounded by Illinois Street on the west, 22nd Street on the south, and San Francisco Bay on the north and east. The National Park Service approved the Port’s application to list approximately 66 acres of Pier 70, representing the historic shipyard at its maximum buildout in 1945, as a historic district named the Union Iron Works Historic District in the National Register of Historic Places as of April 17, 2014. The Port acquired portions of Pier 70 from the State and other portions from private parties. Most of the lands that the Port acquired from the State are subject to the public trust.

B. Portions of Pier 70 are historic uplands and other portions have been in and out of private and federal ownership, creating uncertainty over the extent to which Pier 70 is subject to the public trust and trust use restrictions. The Legislature authorized State Lands to approve a trust exchange that reorients Pier 70 parcels to benefit the public trust by rationalizing public trust land use restrictions and resolving public trust title uncertainties by enacting AB 418. Reorienting the public trust on Pier 70 allows the development of cultural, institutional, office, biotech, other commercial, and residential uses in areas that are least suitable for public trust uses and preserves larger areas along the waterfront or providing access to the Bay for public trust uses. The Port’s revenues from development of the 28-Acre Site will provide the Port with nontrust revenues to help revitalize Pier 70 as a whole for public trust purposes and meet the State’s, the City’s, and the Port’s overarching goals.

C. A portion of Pier 70, referred to herein as the “**28-Acre Site**” currently contains a mix of heavy commercial and light industrial buildings and uses, including warehousing and contractor and construction storage. The 28-Acre Site is described in the legal description attached as **DDA Exhibit A1** and depicted in the site plan attached as **DDA Exhibit A2**. Given its size, historic uses, and adjacent uses, the 28-Acre Site is one of the Port’s most challenging development sites. From 2007 to 2010, the Port staff held community meetings seeking public input to help guide potential development partners at Pier 70 in the context of existing policies for the Eastern Neighborhoods Central Waterfront Plan. Public guidance was incorporated into the vision, goals, objectives, and design criteria of the Pier 70 Master Plan, which the Port Commission endorsed in 2010. The Pier 70 Master Plan creates a strong policy framework and flexible strategies for Port development offerings and implementation initiatives at Pier 70.

D. Using the Pier 70 Master Plan, the Port initiated a public solicitation process by a Request for Developer Qualifications to select a private developer partner for the development of the 28-Acre Site in August 2010. The Port Commission selected Developer for exclusive negotiations for development of the 28-Acre Site by Resolution No. 11-21. The Port entered into

negotiations with Developer, resulting in a proposed Term Sheet for redevelopment of the 28-Acre Site as described in more detail below. The Port Commission endorsed the Term Sheet by Resolution No. 13-20.

E. The Board of Supervisors found that the Term Sheet presented a plan for development that is fiscally responsible as required by Administrative Code chapter 29 and endorsed the Term Sheet by Resolution No. 201-13. In its resolution, the Board of Supervisors urged the Port to include the following conditions in the Transaction Documents.

1. Other than the 28-Acre Site, only the Port-owned 20th Illinois Parcel and the Hoedown Yard will be eligible for inclusion in an expanded 28-Acre Site.
2. Transfer fees will be payable to the Port from the proceeds of the second and each subsequent transfer of condominium parcels in the amount of 1½% of the gross sales price, net of costs of sale only.
3. Developer Return will be calculated only on outstanding Developer Capital.
4. Project-generated Public Financing Sources will be the sole source of public funds to reimburse Developer's historic rehabilitation costs of Building 12 and Building 21, and only to extent necessary for Developer to achieve a 10% profit.
5. Project-generated Public Financing Sources will be the sole source of public funds to reimburse the costs to construct a new building on Parcel E4, contingent on the building containing retail, restaurant, and arts/light-industrial or public uses that are eligible for reimbursement under Governing Law and Policy.
6. If the Board of Supervisors approves a Pier 70 financing plan to provide General Fund financing based on projected revenues from payroll and hotel tax increment to the Port under Charter section B7.310, authorized uses of the General Fund financing will be limited to improvements to Pier 70 areas outside of the 28-Acre Site except to the extent authorized by the approved plan.

The Board of Supervisors also directed the Port to report back on: (a) proposed financing plans for the building on Parcel E4, Building 12, and Building 21 as soon as the Port and Developer have agreed on the approach; and (b) how its recommendations have been included in the Transaction Documents at the Board of Supervisors hearing on Project Approval.

F. The SUD Amendments approved concurrently with this DDA contemplates a variety of building types and uses, which are intended to work interdependently and support each other, including: (1) commercial office; (2) retail, restaurant, and arts/light-industrial; and (3) residential. Residential mixed-use development will create more housing to meet the demand driven by job growth in San Francisco's eastern neighborhoods, reduce commuting times and traffic, support the retail and community spaces at Pier 70, and increase the density of people on the 28-Acre Site, making it an active, vibrant, and safer place. The housing will be located primarily in the mixed-use core of the 28-Acre Site that includes retail, restaurant, and arts/light-industrial uses. At build-out, the 28-Acre Site Project could include up to approximately 3.4 million gsf of vertical development with additional above-grade and below-grade parking uses.

G. Among the public benefits of the 28-Acre Site Project are approximately 9 acres of the following new and expanded parks and shoreline access that Developer and the Port will provide.

1. Market Square will be a courtyard and plaza at the heart of the area's historic core, bounded by Building 2 and Building 12.
2. The Waterfront Terrace along the northernmost section of the water's edge at the site will connect 20th Street with dramatic views of the Bay and ongoing ship repair

activities to the north and include a flexible lawn space for public use and an extension of the Bay Trail and the Blue Greenway.

3. Slipways Commons will be linear open space at the center of the 28-Acre Site that connects the historic buildings and will be flanked on both sides by active uses. Its terminus at the water will support an event plaza and a viewing pavilion adjacent to the existing piers.

4. Waterfront Promenade along the southernmost portion of the waterfront will create a shoreline promenade with outdoor dining, seating terraces, and a pedestrian and bicycle pathway. The Bay Trail and the Blue Greenway will be aligned through this open space.

5. Useable and publicly-accessible open space for active recreation uses will be located on the rooftop of a building in the 28-Acre Site Project, subject to availability of public financing sources.

6. The 20th Street Plaza, which will function as a place of entry to the 28-Acre Site Project, and Irish Hill Playground with a picnic area, a seating terrace, and connections to all surrounding streets, will be developed in coordination with development of 20th/Illinois Parcel and the adjacent Hoedown Yard (assuming the City exercises its purchase option).

H. On November 4, 2014, San Francisco voters approved the *Union Iron Works Historic District Housing, Waterfront Parks, Jobs and Preservation Initiative* (Proposition F), which authorized increased height limits on the 28-Acre Site and established a City policy to encourage development of the 28-Acre Site with the major features listed below.

- 1.** approximately 1,000 to 2,000 new residential units; most of these units would be rental units, and 30% would be below market rate and affordable to middle- and low-income households;
- 2.** restoration and reuse of historic structures;
- 3.** space for arts and cultural activities, nonprofits, small-scale manufacturing, retail, and neighborhood services;
- 4.** preservation of the artist community presently located in the Noonan Building;
- 5.** between 1 million and 2 million gsf of new commercial and office space;
- 6.** parking and transportation improvements; and
- 7.** a significant number of permanent jobs.

I. The City has analyzed potential environmental impacts of the 28-Acre Site Project and identified mitigation measures in the Final EIR and MMRP in accordance with the requirements of CEQA.

J. As of the Reference Date, the Port, Board of Supervisors and various City Agencies have adopted all Project Approvals shown on **DDA Exhibit A3**, including approval of this DDA by the Port and Board of Supervisors.

K. The Parties have negotiated and enter into this DDA with reference to the facts and circumstances above.

[Remainder of page intentionally left blank.]

AGREEMENT

1. PROJECT OVERVIEW

1.1. Purpose and Term.

(a) Purpose. This DDA governs the Parties' respective rights and obligations with respect to the 28-Acre Site Project and incorporates all requirements and limitations under the Project Approvals and implementing documents attached as DDA Exhibits.

(b) Term.

(i) The DDA Term will begin on the Reference Date.

(ii) Unless terminated under **Article 12** (Material Breaches and Termination), the DDA Term will end on the earlier of: (a) the date that is 25 years after the Reference Date, as that date may be extended by Excusable Delay for any reason other than Down Market Delay; and (ii) the date that the Port issues the final SOP Compliance Determination for Horizontal Improvements in the FC Project Area.

(iii) Termination of this DDA will not affect any provisions of this DDA, the Acquisition Agreement, the Financing Plan, or other Transaction Documents that expressly survive termination.

1.2. Public Trust Exchange. The Project is predicated on effecting the Public Trust Exchange between the Port and State Lands. Development of the 28-Acre Site Project cannot proceed until the Public Trust Exchange has closed and the public trust is permanently lifted from all Development Parcels and the 20th/Illinois Parcel by agreement between State Lands and the Port under AB 418. The Port will diligently take all actions to implement the Public Trust Exchange in a timely manner as soon as practicable after the Reference Date.

1.3. Project Description. The Project consists of the horizontal and vertical development of the 28-Acre Site consistent with the Waterfront Plan and the SUD Amendments. Key elements of the 28-Acre Site Project are summarized in this Section.

(a) Development. This DDA establishes the Parties' respective rights and obligations, including Project Requirements and Regulatory Requirements, that will apply to horizontal and vertical development of the 28-Acre Site.

(i) Developer has the nontransferable right and obligation to complete construction of Horizontal Improvements for Phase 1 and the right to horizontal development of and the obligation to complete construction of Horizontal Improvements for the remaining Phases, subject to **Article 6** (Transfers). As master developer for the 28-Acre Site Project, Developer is responsible for orchestrating horizontal development efficiently in coordination with vertical development.

(ii) Upon satisfaction or waiver of conditions precedent set forth in **Article 8 (Delivery of Master Lease)**, the Port and Developer will enter into the Master Lease for all of the 28-Acre Site except for the Noonan Building, property leased to Affordable Self-Storage (the "**Affordable Self-Storage Lease**") and **Building 21**, all in accordance with the procedures of **Article 8** (Delivery of Master Lease). Through Escrow, each Development Parcel that the Port conveys to a Vertical Developer will be released from the Master Lease and this DDA. Vertical Developers will assume obligations relating to the applicable Development Parcel under a Vertical DDA, which will set forth the allowable scope of development and may include requirements for Deferred Infrastructure.

When the City and the Port have accepted all Phase Improvements, the Phase Area will be released from the Master Lease.

(b) 28-Acre Site. The 28-Acre Site on the Reference Date is described in the legal description attached as **DDA Exhibit A1**. Any of the Illinois Street Parcels for which Developer is the successful bidder will become part of an expanded 28-Acre Site. The 28-Acre Site and the Illinois Street Parcels are shown on the site plan attached as **DDA Exhibit A2**.

(c) Phasing and Land Use Generally. The Project has been divided into three Phases, as shown in the Phasing Plan attached **DDA Exhibit B1**, which illustrates the expected size, order, and duration of the 28-Acre Site Project's Phases and the Parties' best estimates of the conditions forecast for the expected development period. Each Phase Area includes Development Parcels and areas that will be developed as public rights-of-way, parks, and public access areas. Features of Phases are discussed in **Article 2** (Project Phasing), and Phase Approval procedures are addressed in **Article 3** (Phase Approval). The SUD Amendments, including the Design for Development, establishes the permitted land uses for the 28-Acre Site Project. The Land Use Concept Plan shown in *D4D Fig 2.1.1* is attached for reference as **DDA Exhibit A4** (the "**Land Use Plan**"). Together, the Land Use Plan and the Phasing Plan reflect the Parties' current expectations regarding the progression of the 28-Acre Site Project as a whole.

(d) Parcels under City and Port Control of Land Uses. In all cases subject to the SUD Amendments that the Board of Supervisors adopted by Ordinance No. XXXX and the Design for Development approved by Planning Commission Motion No. M-19980 and Port Commission Resolution No. 17-45, the City and the Port will decide on the land uses and development programs for Parcel C1B, Parcel C1C, Parcel C2A, Parcel C2B, the Hoedown Yard, and Parcel K South as described in this Subsection.

(i) The City, in its sole discretion through consultation among the Port, OEWD, and MOHCD, will determine the land use and development programs for Parcel C1C, Parcel C2A, Parcel C2B, and the Hoedown Yard.

(ii) Parcel C1C and Parcel C2B are Option Parcels, but the Port in its sole discretion will decide whether Parcel C1C and Parcel C2B are developed for residential or commercial use.

(iii) The Port, in its sole discretion after consultation with MOHCD, will decide on the development programs for the Affordable Housing Parcels, currently designated as Parcel C1B, Parcel C2A, and Parcel K South.

(e) Horizontal Improvements.

(i) The Design for Development provides the vision, intent, and requirements for the future design of public realm improvements within the 28-Acre Site, including street and sidewalk landscaping and furnishings, public parks, and other public access areas in conformity with the SUD. This DDA sets forth the Parties' respective roles regarding Developer's horizontal development activities and applicable construction procedures and standards described in **Article 14** (Construction Generally), and **Article 15** (Horizontal Development).

(ii) The Schedule of Performance establishes deadlines by which Developer must achieve key benchmarks within each Phase of the 28-Acre Site Project, subject to Excusable Delay under **Article 4** (Performance Dates). Developer's failure to meet certain key benchmarks in the Schedule of Performance would result in a Material Breach for which the Port could exercise

remedies up to termination of this DDA under **Article 12** (Material Breaches and Termination).

(iii) Developer is obligated to construct all of the Horizontal Improvements for the 28-Acre Site that are described in the Infrastructure Plan attached as **DDA Exhibit B8**, as amended by the Streetscape Master Plan when approved. The Port and SFMTA will approve the Streetscape Master Plan under this DDA and the ICA, and SFPUC will approve the Master Utilities Plans under the ICA. The City's Subdivision Code regulates the Subdivision Map process.

(iv) Developer may request in each Phase Submittal that the Port require Vertical Developers of specified Development Parcels to build Horizontal Improvements adjacent to or serving their Development Parcels under their Vertical DDAs. This proposed treatment of Deferred Infrastructure is described briefly in this clause and in more detail in **Subsection 15.6** (Deferred Infrastructure) and is subject to **Section 6.5** (Release).

(1) Developer will retain the obligation to build and complete Deferred Infrastructure in each Phase until the applicable Acquiring Agency has agreed to permit some or all of these obligations to be imposed on an applicable Vertical Developer through its Vertical DDA.

(2) To avoid damage to Public Spaces during vertical construction of adjacent Development Parcels, the Port will include a requirement in Vertical DDAs for applicable Development Parcels a requirement that the applicable Vertical Developer complete Deferred Infrastructure within a zone of up to 40 feet within the Public Spaces and mid-block passages adjacent to the applicable Development Parcel (including Market Square (OS-2) that will be built in the air parcel above Parcel D);

(3) The Other Acquiring Agencies have no obligation to agree to Deferred Infrastructure under this DDA or the ICA. A Phase Approval by the Port based on a Phase Submittal that includes Developer's proposal for Deferred Infrastructure, will have no effect on any Other Acquiring Agency. Developer will be responsible for obtaining each affected Other Acquiring Party's consent to releasing Developer for obligations regarding some or all Deferred Infrastructure and will retain all responsibility for Horizontal Improvements to the extent that any Other Acquiring Party does not provide its express consent.

(v) The Port has agreed to undertake and fund the construction of the Michigan Street segment and, under certain conditions, Irish Hill Park.

(vi) Phase Improvements will be reviewed and approved by applicable City Agencies and the Port through submittal of Subdivision Maps and improvement plans in accordance with the Project Requirements and Regulatory Requirements, including the ICA. Before the City (including the Port) may file a Phased Final Map for recordation or issue any Construction Permit allowing construction of Phase Improvements, Developer must first obtain Port approval of a Phase Submittal for such Phase, in accordance with the Phase Approval Procedures set forth in **Article 3** (Phase Approval).

(f) Vertical Development.

(i) Vertical development will include a mix of office, retail, restaurant, arts/light-industrial, and market rate and affordable residential uses conforming to the Waterfront Plan, and the SUD Amendments, which includes

the Design for Development. The SUD Amendments and the Waterfront Plan regulate vertical development, and the Design for Development provides the vision, intent, and requirements for the design of Vertical Improvements.

(ii) In accordance with the procedures set forth in **Article 7** (Parcel Conveyances), the Port will ground lease or sell Development Parcels to Vertical Developers in accordance with the terms and conditions of a Vertical DDA and implementing documents that will set forth applicable development obligations, including the Port's and Vertical Developers' respective roles regarding vertical development activities and applicable procedures and standards.

(g) Certain Other Obligations.

(i) Developer must comply with the Affordable Housing Plan attached as **DDA Exhibit B3** that governs the obligations of the Developer and Affordable Housing Developers for the delivery and development of the Affordable Housing Parcels. The Affordable Housing Plan also governs the obligations that will be binding on Vertical Developers for the delivery of affordable housing, including on-site Inclusionary Units and other BMR Units, the payment of in-lieu fees and the use of Jobs-Housing Linkage Fees for production of affordable housing within the 28-Acre Site Project.

(ii) Developer must comply with the obligations that are identified as Developer obligations in the Transportation Program, which includes a TDM Program, attached as **DDA Exhibit B5**.

(iii) The MMRP attached as **DDA Exhibit A6** describes all of the measures required to mitigate environmental impacts of the 28-Acre Site Project and identifies a responsible person for each measure. Developer is required to undertake all Developer Mitigation Measures.

(iv) Developer will rehabilitate or cause to be rehabilitated Historic Building 12 and Historic Building 21, and if it exercises its Option, Historic Building 2, all in accordance with the Secretary's Standards. Financial terms for the Port's subsidy of Developer's rehabilitation, operation, and leasing costs are described in *FP art. 11 (Historic Buildings)*.

(v) Developer must cause to be developed a new Arts Building on Parcel E4 for arts uses as more particularly described in **Section 7.12** (Arts Building).

(vi) Within the Arts Building, or elsewhere as may be determined by Developer for a Phase (subject to the timing set forth in the Schedule of Performance), Developer must cause be provided as part of the 28-Acre Site Project replacement space for the Noonan Tenants as more particularly described in **Section 7.13** (Noonan Replacement Space).

(vii) Developer will cause to be provided a minimum of 50,000 gross floor feet of PDR-restricted space within the 28-Acre Site Project.

(viii) Developer will comply with the requirements of the Workforce Development Plan attached as **DDA Exhibit B4** that are applicable by their terms to Developer, which includes goals and targets for local hiring and local business enterprise utilization, compliance with the City's First Source Hiring program and providing funding for CityBuild and TechSF job readiness and training programs, all as more particularly set forth therein.

(h) Financing Plan. The Financing Plan for the 28-Acre Site Project, attached as **DDA Exhibit C1**, establishes the Parties' agreement on eligible Horizontal

Development Costs, the flow of Project Payment Sources for eligible costs, and revenue-sharing.

(i) Conveyances.

(i) Through the exercise of its Option under **Article 7** (Parcel Conveyances), Developer will have vertical development rights to each Option Parcel. Developer must exercise its Option rights on behalf of itself or a Vertical Developer Affiliate no later than the Outside Date for Close of Escrow on all of the Options Parcels within a Phase, as described in **Subsection 2.2(f)** (Early Lease Parcels). If Developer fails to exercise its Option on behalf of itself or a Vertical Developer Affiliate by such Outside Date or if Developer elects not to exercise the Option after an appraisal, the Port will offer the Option Parcel to third parties through a Public Offering. Conveyance of each Option Parcel to any Vertical Developer will be governed by a Vertical DDA entered into between Port and the applicable Vertical Developer, substantially in the form attached as **DDA Exhibit D2**, that sets forth procedures and conditions precedent to close of escrow for the applicable Option Parcel and certain terms and conditions governing construction of improvements thereon. At close of escrow under an Vertical DDA, the Port will convey Option Parcels that are offered for lease by Parcel Leases substantially in the form attached as **DDA Exhibit D3** and will convey parcels that are to be sold in fee by Quitclaim Deed substantially in the form attached to the form of Vertical DDA.

(ii) Procedures in **Article 7** (Parcel Conveyances) will govern Port conveyances of Option Parcels, including procedures for establishing Fair Market Value, Developer's exercise of its Option, and Public Offerings if Developer elects not to exercise its Option.

(iii) The treatment of the Affordable Housing Parcels is addressed in **Section 7.16** (Affordable Housing Parcels) and the Affordable Housing Plan attached as **DDA Exhibit B3**. Procedures for conveyance of specific other parcels are addressed in **Section 7.9** (20th/Illinois Parcel), **Section 7.10** (Hoedown Yard), and **Section 7.12** (Arts Building).

(j) Controlling Laws. Nothing in this DDA affects the Parties' respective obligations under this DDA to comply with the Regulatory Requirements and the Development Agreement, as applicable to Improvements required or permitted to be made to the 28-Acre Site.

1.4. Special Use District. The SUD Amendments and related zoning maps prescribe allowed uses and certain development standards at the 28-Acre Site and the Illinois Street Parcels. Planning Code provisions covering matters that are not addressed in the SUD Amendments will apply to the 28-Acre Site, subject to the Development Agreement.

2. PROJECT PHASING

2.1. Schedule of Performance. The Outside Dates for major Project benchmarks are specified in the Schedule of Performance attached as **DDA Exhibit B2**, subject to **Article 4** (Performance Dates). Developer may request changes to Outside Dates or other revisions to the Schedule of Performance, subject to the Port's approval under **Section 3.3** (Changes to Phasing Plan) and **Section 3.4** (Changes to Project after Phase 1). Following a Transfer, the Port, Developer, and the Transferee may discuss whether to maintain one or more separate schedules of performance related to the Transferee's obligations under this DDA for the remainder of the 28-Acre Site Project or for any relevant Phase, but the Port will make the final decision in its reasonable judgment. The Schedule of Performance includes Outside Dates by Phase for the conveyance of all of the Option Parcels by Parcel Lease or in fee, as applicable, and the timing

for delivery of Horizontal Improvements, including Public Spaces and Public ROWs, and Associated Public Benefits. Developer may request changes to Outside Dates or other revisions to the Schedule of Performance, subject to the Port's approval under **Section 3.3** (Changes to Phasing Plan) and **Section 3.4** (Changes to Project after Phase 1).

2.2. Development Process for Each Phase. This Section sets forth the process for Port approval of horizontal development for each Phase.

(a) Phase Submittal. Developer must submit a Phase Submittal to the Port for each Phase before the Outside Date in the Schedule of Performance.

(b) Subdivision Maps. The Map Act authorizes local jurisdictions to adopt local procedures to implement Map Act requirements for subdivisions and prohibits local agencies from filing Final Maps unless the consent of all persons holding title to the subdivided land is on file in the local recorder's office. Developer agrees not to submit any Subdivision Map to Public Works for review and approval under the Subdivision Code without the Port's prior consent. Port approval of a Phase Submittal in accordance with the Phase Approval Procedures is a prerequisite to the recordation of a Phased Final Map (but not a Final Transfer Map) or issuance of any Construction Permit allowing construction of Phase Improvements.

(c) Phase Improvements and Associated Public Benefits. Developer must obtain required Regulatory Approvals for Phase Improvements, and Commence and construct Phase Improvements (including Public Spaces and Associated Public Benefits) in accordance with applicable Project Requirements and Regulatory Requirements and with the Schedule of Performance.

(d) Fair Market Value Determinations.

(i) Developer may initiate the Fair Market Value determination process for each Option Parcel in the Phase under **Article 7** (Parcel Conveyances) at any time after submitting its Phase Submittal but must execute a Vertical DDA for the Option Parcel no later than the Outside Date therefor specified in the Schedule of Performance.

(ii) The Port will use a proprietary appraisal to determine Fair Market Value for Parcel K North.

(iii) The Financing Plan describes procedures for determining the Feasibility Gaps for the Historic Building 12 and Historic Building 21.

(iv) **Section 7.11** (Historic Building 2) describes procedures for determining the Fair Market Value of Historic Building 2.

(e) Parcel Conveyances. The Port will enter into a Vertical DDA with a Vertical Developer Affiliate upon its exercise of the Option, or with a third-party Vertical Developer if selected through a Public Offering, and Close Escrow on the applicable Development Parcel in accordance with the terms and conditions of the Vertical DDA. Each Vertical DDA will include procedures for the Vertical Developer to obtain required Regulatory Approvals for its Vertical Improvements and, subject to **Subsection Error!** Reference source not found. (Deferred Infrastructure) and **Section 6.5** (Release), any Deferred Infrastructure.

(f) Early Lease Parcels. This Subsection applies to the first Option Parcel to be conveyed to a Vertical Developer Affiliate by Parcel Lease in each of Phase 1 and Phase 2 (each, an "**Early Lease Parcel**"). Developer must timely exercise its Option and Close Escrow for each Early Lease Parcel no later than two years after Commencement of Construction for the Phase. If Close of Escrow does not occur for an Early Lease

Parcel within the time required, then Port may place the Early Lease Parcel for Public Offering in accordance with **Section 7.5** (Public Offering Procedures).

(g) **Option Parcels.** The Developer or a Vertical Developer Affiliate must Close Escrow on all of the Option Parcels no later than three years after issuance of a SOP Compliance Determination for all Phase Improvements within the applicable Phase other than Public Spaces. Failure to Close Escrow as to any Option Parcel in the Phase by the Outside Date will not be an Event of Default, but will terminate the Option as to the applicable Option Parcels in the applicable Phase that have not Closed Escrow as of the Outside Date.

2.3. Phase Areas.

(a) **Boundaries.** The preliminary boundaries of the Phase Areas are shown in the Phasing Plan. Developer may request changes to the boundaries of any Phase Area other than Phase 1 through a Phase Submittal in accordance with the Phase Approval Procedures, or through an amendment to the applicable Phase Submittal. Final boundaries of parcels within each Phase Area will be established through the recordation of Phased Final Maps.

(b) **Phase Improvements and Associated Public Benefits.** Because the 28-Acre Site Project will be built out over a number of years, the amount and timing of the Phase Improvements and Associated Public Benefits are allocated by Phase in accordance with the Schedule of Performance. Developer may request changes to the timing of the Phase Improvements and Associated Public Benefits in accordance with **Section 3.3** (Changes to Phase) and subject to Excusable Delay.

(c) **Phasing Order.** Developer must submit Phase Submittals in the order that the Port has approved under the Phasing Plan. Developer may request changes to the approved order, subject to the Port's approval under **Article 3** (Phase Approval).

2.4. Phasing Goals. The Phasing Plan reflects the following Phasing Goals.

(a) **Proportionality.** Phase Improvements, including Public Spaces, and Associated Public Benefits should be provided proportionately with the development of market-rate housing and commercial-office uses taking into account the 28-Acre Site Project as a whole. The Parties acknowledge that Phase 1 includes more Horizontal Improvements and Associated Public Benefits for the 28-Acre Site Project as a whole than Later Phases will provide.

(b) **Rational Development.** Horizontal Improvements should be developed in an orderly manner and consistent with the Infrastructure Plan, Streetscape Master Plan, Affordable Housing Plan, and Transportation Program. Finished portions of the 28-Acre Site Project should be generally contiguous.

(c) **Appropriate Development.** The scope of Horizontal Improvements should be appropriate for the Vertical Improvements to be built in each Phase Area. Horizontal development should be timed to coordinate with the needs of vertical development. Completed infrastructure must provide continuous reliable access and utilities to then-existing visitors, residents, and businesses.

(d) **Market Timing.** The boundaries and mix of uses within the Phase should be designed to minimize unsold inventory of Development Parcels.

(e) **Maximize Value and Benefits.** Maximize Associated Public Benefits and the nontrust revenues that the 28-Acre Site Project can deliver to the Port for trust uses. In doing so, allocate Project Payment Sources and their uses to maximize revenues to the Port and Developer.

(f) Flexibility. Provide flexibility to respond to market conditions, cost and availability of financing, and economic feasibility.

3. PHASE APPROVAL

3.1. Phase Submittal. Developer must submit a Phase Submittal on or before the Outside Dates in the order set forth in the Schedule of Performance (as the same may be updated from time to time in accordance with the Phase Approval Procedures). Phase Submittals consistent with the Phasing Plan will be submitted for the Port Director's approval. Developer will submit Phase Submittals that include a request for revisions to the Phasing Plan or Schedule of Performance to the Port Director or Port Commission for approval, as required under **Section 3.3** (Changes to Phase) or **Section 3.4** (Changes to Project after Phase 1).

3.2. Phase Approval Procedures.

(a) Generally.

(i) Phase Improvements will be reviewed and approved by the Port and applicable Other City Agencies through submittal of Subdivision Maps and Improvement Plans in accordance with the Project Requirements and Regulatory Requirements, including ICA and **Article 13** (Improvement Plans). Developer intends to obtain City approval of a Tentative Map for the 28-Acre Site Project, including conditions of approval. The Developer intends for the Tentative Map to provide for Developer's submittal of a series of Phased Final Maps, which must meet the conditions of approval of the Tentative Map in accordance with the Subdivision Code and applicable Project Approvals.

(ii) Before the City (including the Port) may file a Phased Final Map for recordation, Developer must obtain a Phase Approval to verify that the Phase will be developed consistently and in conformity with the DDA and other applicable Project Requirements and Regulatory Requirements. Approval of a Phase Submittal will not be required for the issuance of Construction Permits for Site Preparation in any Phase.

(iii) Developer may submit Phased Final Maps and Improvement Plans for review by City Agencies in advance of the Phase Submittal application. Each City Agency will review and provide comments on these submittals in a timely manner in accordance with the ICA. Developer may submit completed drawings for a Phased Final Map Approval or other Construction Permit allowing construction of Phase Improvements within a particular Phase at the same time it submits the Phase Submittal and before the Phase Approval, and the City Agencies will provide review and comment in accordance with the ICA. No City Agency may issue any Construction Permit for the applicable Phase other than Construction Permits for Site Preparation until Developer has obtained a Phase Approval for the property that is the subject of the Phase Submittal application. If Developer requests changes to the Phasing Plan or Schedule of Performance as part of the Phase Submittal that require Port approval under **Section 3.3** (Changes to Phase) or **Section 3.4** (Changes to Project after Phase 1), City Agencies may defer their review of the Phased Final Maps and Improvement Plans until the Port has approved the Phase Submittal application.

(b) Phase Submittal. No later than the applicable Outside Date in the Schedule of Performance, Developer will submit a Phase Submittal to the Port Director for the Port's approval. Each Phase Submittal will include the information and documents listed below.

(i) Narrative Statement. Developer must provide an overview of the Phase that addresses the matters described below. The narrative statement must include:

- (1) a description of the Phase Area and explanations for any proposed changes to the Phase Area from the boundaries of the Phasing Plan;
- (2) the Phase Improvements and explanations for any proposed changes to the scope of Phase Improvements;
- (3) the proposed land use program for each building, if known, including Product Type and housing tenure of residential uses, office development that would be subject to the provisions for office development attached as **DDA Exhibit A5**, and off-site parking to be provided;
- (4) conformity with and any proposed variances to the streetscape, open space and parking standards (to the extent applicable to the Phase Improvements) from the Design for Development and Streetscape Plan;
- (5) application of and conformity with the Affordable Housing Plan, Transportation Program and Developer Mitigation Measures;
- (6) amount and location of childcare facilities and PDR space in the Phase, if applicable;
- (7) a description of the manner in which the Workforce Development Plan will apply to construction and operations within the Phase, including identifying the designated Development Parcels that will be subject to the small retail business marketing requirements described in *Workforce Plan § III.D.3* (Local Diverse Small Business Retail Marketing Program);
- (8) the Associated Public Benefits within the Phase and explanations for any proposed changes to Associated Public Benefits;
- (9) explanations for proposed changes to the boundaries of any Development Parcels in the Phase from those shown on the Tentative Map;
- (10) explanations for any proposed changes to the Phasing Plan, which the Port will consider as described in **Section 3.3** (Changes to Phase) and **Subsection 3.2(e)** (Phase Submittal Approval);
- (11) if applicable to the Phase and not previously approved, an Artist Transition Plan consistent with the requirements of **Section 7.13** (Noonan Replacement Space);
- (12) a Phase schedule that shows in reasonable detail Developer's anticipated schedule for Site Preparation, initial street construction, and phasing of Development Parcels and Public Spaces based on its commercially reasonable assumptions for unknown conditions;
- (13) for Phase Submittals other than Phase 1, a report that shows the 28-Acre Site Project's performance with the goals set forth in the Sustainability Plan that was presented to the Port Commission concurrently with the Project Approvals;

(14) subject to the procedures in **DDA Exhibit A5** (Procedures for Office Development), a notice of intent to construct commercial office space that would be counted against the maximum annual limit under Planning Code section 321, including anticipated total gsf of office development anticipated for each Option Parcel; and

(15) for the Phase 3 Submittal, potential locations for a minimum of 20,000 gsf of contiguous rooftop open space that could be used for active recreation accessible to the public, subject to availability of sources of public funding, as described in **Section 7.15** (Rooftop Open Space).

(ii) Phase Budget. Developer must submit an updated Summary Proforma based on the proposed land use program for the Phase and the results of the meeting under **Subsection 3.2(c)** (Pre-Submittal Conference and Presentation), which must be consistent with the DDA, the Infrastructure Plan, the Streetscape Master Plan, the Financing Plan, and the other contents of the Phase Submittal and reflect, to the extent applicable:

(1) changes to assumptions underlying the previously-submitted Summary Proforma;

(2) changes, if any, to the land uses designated for Development Parcels in the Phase;

(3) for Phase 1, the projected Historic Building Feasibility Gap for Historic Building 12 using the formula in *FP § 11.2(b) (Formula)*;

(4) for Phase 2, the projected Historic Building Feasibility Gap for Historic Building 21 using the formula in *FP § 11.2(b)(Formula)*;

(5) updates to preliminary estimates of Horizontal Development Costs for each Later Phase of the 28-Acre Site Project to the extent reasonably available or applicable;

(6) for each Prior Phase, a reconciliation of the approved Phase Budget against its actual Horizontal Development Costs, accrued Developer Return, and accrued Interest on Port Capital until its Phase Audit Date;

(7) updates to projections of Project Payment Sources that would be available to fund Horizontal Development Costs, including Developer's reasonable estimate in its professional judgment of the aggregate Fair Market Value of all Development Parcels in the Phase Area; and

(8) Developer's proposal for allocating Developer Capital and Project Payment Sources to pay projected Horizontal Development Costs for the Phase.

(iii) Cost Estimates. Developer will provide for the Current Phase cost estimates for informational purposes based on the design information available at the time of the Phase Submittal. Cost estimates will not be used to determine the final project cost, which will be the actual cost of the Phase Improvement or Component determined in accordance with the Financing Plan and Acquisition Agreement.

(iv) Data Charts. Developer must provide detail for:

(1) the land use mix, Product Type and housing tenure for residential uses, and building height proposed for each Development Parcel, to the extent known;

(2) the maximum and minimum range of residential density or commercial square footage that can be allocated to each Development Parcel in the Phase, which will be established finally in the Appraisal Instructions for the Development Parcel and enforced through the Vertical DDA;

(3) the Housing Data Table described in the Affordable Housing Plan, including a description of how the 28-Acre Site Project will maintain an average affordability level to the extent required if 4% LIHTCs are no longer available, and the Product Type and housing tenure of all residential projects under approved Vertical DDAs then in effect;

(4) compliance of the Phase with the parking standards and aggregate parking ratios permitted under the SUD Amendments and Design for Development, which will be in the form of a parking data chart specifying how many spaces Developer proposes for the Phase and, when applicable, spaces previously built or under construction;

(5) percentage of the total allowable building program that would be completed at Phase build-out; and

(6) status of build-out in any Prior Phases, including Associated Public Benefits.

(v) Schedules of Performance. Developer must provide evidence of compliance with the Schedule of Performance, subject to Excusable Delay under **Article 4** (Performance Dates), or request that the Port Commission extend Outside Dates in its Phase Approval.

(vi) Financial Capacity. Developer must show evidence reasonably acceptable to the Port of Developer's financial capacity to pay Horizontal Development Costs of Phase Improvements to be funded by Developer Capital. For the purpose of the Phase Submittal, that amount will be assumed to be the cost of Phase Improvements shown in the Proforma, less the amount of any projected Early Mello-Roos Bond Proceeds. Evidence of financial capacity may include a sworn affidavit by an authorized officer of Developer as to sources of equity with copies of certified resolutions demonstrating each equity source's commitment to fund the 28-Acre Site Project and financing letters of intent or commitments from proposed lenders.

(vii) Option Parcels. Developer must make a nonbinding statement as to each Option Parcel in the Phase Area regarding whether it intends to: (1) exercise its Option; and (2) request that the Vertical Developer be obligated to construct Deferred Infrastructure in its Vertical DDA, subject to **Subsection 15.6** (Deferred Infrastructure) and **Section 6.5** (Release).

(viii) Insurance. The form, amount, type, terms, and conditions of insurance coverages required of Developer in connection with the applicable Phase to the extent different from the insurance requirements provided under the Master Lease or License.

(ix) Adequate Security. The estimated Secured Amount and type and form of Adequate Security, including, with respect to a Guaranty, evidence that

Obligors are prepared to issue a Guaranty satisfying the requirements of **Article 17** (Security for Project Activities).

(x) Impact Fees and Exactions. A summary table that shows impact fees and exactions paid by Developer or Vertical Developers in accordance with the Development Agreement in all Prior Phases to date on a per-building basis.

(xi) Associated Public Benefits Report. The Phase Submittal for Phase 3 will include the Associated Public Benefits Report described in **Section 7.20** (Report on Associated Public Benefits) that will track Project compliance to-date with the Associated Public Benefits provided under **Section 7.11** (Historic Building 2) through **Section 7.19** (Community Facilities).

(c) Pre-Submittal Conference and Presentation.

(i) Pre-Submittal Conference. Not less than 30 days before submitting a Phase Submittal, Developer will submit to the Port Director drafts of the primary documents listed in **Subsection 3.2(b)** (Phase Submittal) and any other information as Developer will so desire concerning the applicable Phase. Developer will meet with the Port at least 20 days before the date on which Developer intends to submit a Phase Submittal, at a mutually acceptable date and time and with appropriate Port staff that elect to attend. Developer may submit information and materials iteratively, and Developer and the Port may agree to hold additional pre-Submittal meetings as they deem useful or appropriate. If Developer fails to schedule a pre-Submittal meeting before submitting a Phase Submittal, such failure will not, by itself, be an Event of Default, and instead the Port's time for review of the Phase Submittal will be extended by 30 days. At the pre-Submittal meeting, the Parties will cover Developer's draft submittals, the following topics, and any other topics that the Parties may deem useful or appropriate.

(1) Market Conditions. The Parties will discuss whether they have observed or anticipate any significant changes in market conditions during the expected term of the Phase, including potential impacts on the costs of labor and materials.

(2) Fair Market Value Estimate. The Parties will review any recent information on updated estimates of the aggregate Fair Market Value of Development Parcels at the 28-Acre Site that the Port has not yet conveyed.

(3) Proforma. Developer will indicate updates to the Proforma and whether it intends to assign responsibility for Deferred Infrastructure to Vertical Developers, to the extent known. The Parties will discuss the expected impact of the changes on the Phase Budget.

(4) Estimate of Public Financing Sources. Based on the estimated Fair Market Value of Development Parcels in the Phase, the Parties will develop estimates of Mello-Roos Taxes, Tax Increment, and bonding capacity for the Phase.

(5) Insurance. Developer must initiate discussion of any proposed changes to the insurance requirements under the Master Lease or License.

(6) Changes to Phasing Plan or Schedule of Performance. Developer will indicate whether it intends to request any changes to the Phasing Plan or Schedule of Performance in connection with the

applicable Phase Submittal, for purposes of determining the Port's approval process.

(ii) Public Presentation. Developer will make an informational presentation of each Phase Submittal to CWAG at least 30 days before submitting it to the Port. The Port will cooperate with Developer to schedule and notice this presentation by publication, posting, mailing, or other means reasonably aimed at providing stakeholders with an opportunity to attend the presentation. If a CWAG presentation cannot be scheduled 30 days or more before the date Developer intends to submit the Phase Submittal for Port review under **Subsection 3.2(d)** (Port Review), Developer will have the option to present at the next scheduled CWAG meeting or to host an informational presentation, providing a minimum of two weeks' notice by publication, posting, mailing or other means reasonably aimed at providing stakeholders with an opportunity to attend the presentation.

(d) Port Review.

(i) Initial Port Review. Port staff will review the components of each Phase Submittal for completeness as expeditiously as reasonably possible. Within 30 days following receipt of a Phase Submittal, the Port staff will notify Developer of any deficiencies and make any requests for additional information or materials that are reasonably necessary in order to process the Phase Submittal and are consistent with the type of documents listed in **Subsection 3.2(b)** (Phase Submittal). The Port will notify Developer within 30 days after Developer's delivery of the Phase Submittal whether the Phase Submittal is complete, as such time may be extended in accordance with **Subsection 3.2(c)** (Pre-Submittal Conference and Presentation), or, if applicable, no later than 15 days following receipt of any additional information and materials requested under this clause, and notify Developer of the same. If the Port Director does not so advise Developer within such 30- or 15-day period, as applicable, Developer must deliver electronic notice in accordance with *App ¶ 2.2(c) (No Deemed Consent Without Notice)* before the Phase Submittal will be deemed complete.

(ii) Port Review – Complete Phase Submittal. Port staff will review each complete (or deemed complete) Phase Submittal for conformity with the DDA and applicable Project Approvals as expeditiously as reasonably possible. Port staff will provide final comments on each Phase Submittal no later than 30 days after the Phase Submittal is found or deemed complete. Port staff may propose changes to the Phase Submittal that do not conflict with the DDA or other applicable Project Approvals. If the Port staff proposes any such changes, then the Port will notify Developer, and the Port and Developer will promptly meet and confer in good faith to reach agreement on any such changes proposed by the Port during the 30-day review period. Any meet-and-confer period under this clause will run concurrently with, and will not extend, the 30-day review period unless extended by the Parties' agreement. Changes proposed by Port staff will be reasonably considered by Developer, but will not be binding on Developer without Developer's consent in its sole discretion.

(e) Phase Submittal Approval.

(i) Port Director Review. On the earlier of Port staff's Submittal of final comments to the Phase Submittal or the expiration of the 30-day review period, as extended by agreement, the Port Director will approve, conditionally approve, or disapprove the Phase Submittal in accordance with the standards set forth in **Subsection 3.2(e)** (Phase Submittal Approval). If a Phase Submittal includes a request for changes to the Phasing Plan or Schedule of Performance,

the Port Director will: (1) approve such changes if she reasonable finds that the modified Phase meets the criteria set forth in **clause (i) of Subsection 3.3(b)** (Developer Request); or (2) submit such changes to the Port Commission for approval under **clause (ii) of Subsection 3.3(b)** (Developer Request).

(ii) Port Commission Review. For matters referred to the Port Commission pursuant to **clause (i)** of this Subsection, the Port Commission will consider whether to approve a Phase Submittal, with or without Port staff recommendation as applicable, at a public Port Commission hearing only after the Port Director has notified Developer that the Phase Submittal is complete and submitted the Phase Submittal to the Port Commission in accordance with **Subsection 3.2(e)** (Phase Submittal Approval).

(iii) Standard of Approval. Each Phase Submittal will be approved if and to the extent that, in the reasonable judgment of the Port Director or Port Commission, as applicable, the Phase Submittal conforms to and is consistent with the applicable Project Requirements and Regulatory Requirements. The Port Director or the Port Commission, as applicable, will not (i) disapprove any Phase Submittal on the basis of any element that conforms to and is consistent with the DDA and the other applicable Project Requirements and Regulatory Requirements, which include the Development Agreement; or (ii) impose conditions that conflict with the DDA and other applicable Project Requirements or Regulatory Requirements.

(iv) Port Capital/Public Financing Matters. The Parties acknowledge that the Port retains the right to invest Port Capital and to select the timing of the issuance of Tax Increment Bonds and Mello-Roos Bonds (including Early Mello-Roos Bonds). From time to time during the DDA Term, the Port may notify Developer of its anticipated timing for contribution of Port Capital and issuance of Tax Increment Bonds and Mello-Roos Bonds (including Early Mello-Roos Bonds). Upon such notice, Developer will reflect such updated information in all Later Phase Submittals and Phase Quarterly Reports as required under the Financing Plan.

(f) Disapproval of Phase Submittal. If the Port Director disapproves a Phase Submittal, the Port Director will immediately notify the Developer of its decision in accordance with **Subsection 3.2(f)** (Disapproval of Phase Submittal). If the Port Commission disapproves a Phase Submittal, then the Port Commission will, at the public hearing during which the Phase Submittal is being considered, state the basis for the disapproval, which basis will be summarized in writing by the Port Director or her designee after the hearing and delivered to Developer within 10 days of the hearing date. Following any disapproval of a Phase Submittal, Developer will have 90 days following receipt by Developer of such summary (subject to such extensions as may be approved by the Port Director) to make changes to and resubmit the Phase Submittal. Promptly following the Port Director's receipt of a revised complete Phase Submittal, the Port Director will review and consider, or submit to the Port Commission for its review and consideration, such revised complete Phase Submittal in accordance with the procedures set forth in **Subsection 3.2(e)** (Phase Submittal Approval), except that in the case of a resubmittal, the time for the Port's response with final comments will be 15 days instead of 30 days. The Schedule of Performance will be automatically extended, if necessary, to allow for the foregoing procedure so long as Developer is making diligent good faith efforts to make changes to the Phase Submittal that are responsive to the matters that the Port Director cited as the basis for disapproval of the Phase Submittal.

(g) Phase Application Approval. The Port's approval of the Phase Submittal will be its final discretionary approval action in relation to Developer's proposed

construction of Phase Improvements, except as otherwise provided in the DDA and without prejudice to its rights following a request for changes to the 28-Acre Site Project under **Section 3.4** (Changes to Project after Phase 1), a request for approval of a Transfer under **Article 6** (Transfer), an Event of Default by Developer under **Article 11** (Defaults), or a Material Breach by Developer under **Article 12** (Material Breaches and Termination).

(h) Periodic Updates of Phase Budget. From time to time during a Phase, Developer may submit updates to the Phase Budget to reflect its most current cost estimates for Horizontal Improvements, based on approved Schematic Design for Public Spaces (in accordance with **Section 13.6** (Schematic Design Review of Public Spaces) and approved Improvement Plans of Phase Improvements in accordance with **Article 13** (Improvement Plans).

(i) Amendments to Phase Approvals. Developer may apply to the Port for an amendment to a Phase Approval in accordance with the standards and procedures for a Phase Submittal. All proposed amendments will be subject to review, consideration, and approval by the Port Director or the Port Commission in the manner and under the approval standards established for Phase Submittals, as set forth in **Section 3.2(e)** (Phase Submittal Approval), provided that the following proposed amendments will, without limitation, require the approval of the Port Commission in its sole discretion: (i) material amendments to the Infrastructure Plan and Streetscape Master Plan; (ii) material extensions of the Schedule of Performance for the issuance of an SOP Compliance Determination for the applicable Phase Improvements; (iii) amendments to the Design for Development; (iv) material amendments to the timing or substance of the Associated Public Benefits within the Phase; or (v) material amendments to the Phasing Plan. For purposes hereof, a reduction in the number of Development Parcels in a Phase will be deemed a material amendment to the Phasing Plan; provided, however, that if a Phase Approval includes a subdivision of the Development Parcels shown on the Land Use Plan (e.g., Parcels B, F/G, and H in Phase 2 and Phase 3) into one or more sub-parcels, a subsequent change to the Phase Approval that merges the sub-parcels into the larger Development Parcel will not be considered a reduction in the number of Development Parcels or a material amendment to the Phasing Plan. Extensions of time to which Developer is entitled under the DDA will not be considered an amendment subject to the provisions of this Subsection.

(j) Phase Construction. Within 30 days after satisfaction of all conditions to construction set forth in **Section 15.4** (Conditions to Construction) other than issuance of Construction Permits, the Chief Harbor Engineer will issue Construction Permits necessary for Developer to begin to construct approved Phase Improvements and Associated Public Benefits. Developer is required to begin and complete the Phase Improvements and Associated Public Benefits in accordance with the Schedule of Performance (as may be revised in accordance with **Section 3.3** (Changes to Phase) from time to time), subject to events of Force Majeure under **Article 4** (Excusable Delay).

(k) Phase Completion. Developer must provide notice to the Port when it has obtained a SOP Compliance Determination for all Phase Improvements within a Phase, followed by the Phase Audit as required under *FP § 9.3(a)* (Phase Audit).

3.3. Changes to Phase.

(a) Changed Conditions. The Parties agree that many factors, including general economic conditions, the local housing, office, and retail markets, capital markets, general market acceptability, and local tax burdens will determine the rate at which various residential and commercial uses within the 28-Acre Site Project can be developed and absorbed. In connection with a Phase Submittal, Developer may request changes to the Phasing Plan and related changes to the Schedule of Performance and may

request changes to a Phase Approval, all in accordance with the Phase Approval Procedures of **Section 3.2** (Phase Approval).

(b) Developer Request.

(i) In considering whether to approve Developer's requested changes, the Port may consider in its reasonable judgment whether the revised Phasing Plan would be consistent with the Phasing Goals, including the principle of proportionality if the change would delay the production of Phase Improvements and Associated Public Benefits or impair the Parties' ability to meet the Funding Goals. The Port Director will approve such change if she reasonably finds that the modified Phase would:

(1) support a minimum of 400,000 gsf of Vertical Improvements;

(2) deliver Phase Improvements and Associated Public Benefits proportionately with private development within the modified Phase;

(3) allow Phase Improvements to be developed in an orderly manner so that finished portions of the 28-Acre Site Project are generally contiguous and provide consistent access and services to residents and businesses;

(4) remain consistent with the requirements under the Affordable Housing Plan and not reduce the ratio of Inclusionary Units and other BMR Units (which ratio may take into account payment of a fee in-lieu to the extent permitted under the Affordable Housing Plan) to Market-Rate Units or otherwise secure future delivery of Inclusionary Units and other BMR Units in a manner inconsistent therewith, as reasonably determined by the Port Director; and

(5) make Project Payment Sources available to maximize revenues to the Port and Developer.

(ii) If Developer proposes changes that do not meet the criteria under **clause (i)** of this Subsection, the Port Director may present Developer's request to the Port Commission for consideration.

(c) Port Request.

(i) Port staff may request that Developer change the order and composition of any Phase Submittal before it is presented to the Port Director or Port Commission, as applicable, for Phase Approval. In considering whether to approve the Port's requested changes to the Phasing Plan, Developer may consider, among other matters, whether the revised Phasing Plan would be consistent with the Phasing Goals, including the principle of proportionality if the change would delay the production of Associated Public Benefits or impair the Parties' ability to meet the Funding Goals and consider how such changes would affect Horizontal Development Costs and ability to achieve the Developer Return. Any such requested changes will be subject to the Approval of Developer in its sole discretion.

3.4. Changes to Project after Phase 1. The Parties acknowledge that Project build-out will take place over a number years and that unforeseen circumstances may affect market conditions. This Section will apply to any request by Developer to change its Developer Construction Obligations under this DDA. Phase 1 is excluded from consideration under this Section except under circumstances described in **Section 9.1(e)(v)** (Damage and Destruction).

(a) Timing and Contents of Notice. If Developer reasonably determines after Phase 1 that further development of the 28-Acre Site Project under this DDA has become commercially infeasible for reasons other than Developer's financial condition, the following will apply.

(i) Developer may deliver a Requested Change Notice to the Port stating Developer's unwillingness to proceed with any Later Phase unless the Port agrees to specified changes to this DDA to make the 28-Acre Site Project commercially feasible.

(ii) Developer must deliver the Requested Change Notice to the Port before the applicable Outside Date for Developer's Submittal of the Phase Submittal for any Later Phase that would be affected if Developer's request is approved.

(iii) Developer must include in the Requested Change Notice a detailed description of all provisions of this DDA that Developer proposes to change and provide evidence to support Developer's belief that further development is infeasible without the proposed changes.

(iv) The Port will not be required to respond to a Requested Change Notice if: (1) Developer does not deliver it at least 30 days prior to the applicable Outside Date; or (2) when it is delivered, a Material Breach by Developer exists (other than the failure to submit a complete Phase Submittal with reference to the Phase as to which a Requested Change Notice is timely given).

(b) Effect of Requested Change Notice. If Developer delivers a Requested Change Notice complying with **Subsection 3.4(a)** (Timing and Contents of Notice), the performance dates in the Schedule of Performance for all Phases specified in the Requested Change Notice will be tolled for a negotiation period of nine months, subject to any extensions to which Developer and the Port agree, each in its sole discretion.

(c) Amendment of the DDA.

(i) If the Port staff and Developer agree within the nine-month negotiating period to changes to the DDA, including the Schedule of Performance and the Financing Plan, the Port will prepare an amendment for Port Commission consideration, following, if required, additional environmental analysis and review.

(ii) The City, through Board Resolution No. **XXXX** approving this DDA, has delegated to the Port the authority to make certain modifications to this DDA. If the change would be a Material Modification in the Port Director's reasonable judgment, the Port will also present the amendment to the Board of Supervisors for consideration in accordance with its Charter authority if the Port Commission approves the amendment. Any decision by the Port Commission or the Board of Supervisors to approve or disapprove a proposed amendment will be made in its respective sole discretion.

(iii) The Port Director and the Port Director of Public Works are authorized to approve amendments to the Infrastructure Plan and Streetscape Master Plan (which may also require approval by the SFMTA Director), unless either, as applicable, reasonably determines that a proposed amendment is a Material Modification that would significantly increase an Acquiring Agency's costs of ownership or impair the operation of the affected Horizontal Improvements.

(d) Changes to Implementation Documents. If the Port staff and Developer agree within the nine-month negotiating period to changes to implementing documents,

the changes will be presented to the City Agencies that approved them prior to the Reference Date. City Agencies will have the right to reject any requested change that would not comply with Regulatory Requirements, but will make other determinations in their reasonable discretion in light of the circumstances, including the impact on Project Requirements. Examples of implementing documents are the Infrastructure Plan and the Workforce Development Plan.

(e) Failure to Agree or Approve. If after the expiration of the nine month tolling period in **Subsection 3.4(d)** (Changes to Implementation Documents) (subject to extension by agreement) and subject to **Article 4** (Performance Dates) any of the following conditions exist, then the Port retains all available remedies hereunder, including, without limitation, remedies under **Section 11.4** (Remedies for Events of Default) and **Section 12.4** (Termination as Port Remedy) for a Material Breach.

(i) Developer's proposed amendments to the Infrastructure Plan is rejected by the applicable Acquiring Agency.

(ii) Port staff and Developer are unable to agree on the changes to be submitted to the Port Commission and, if applicable, Board of Supervisors, for approval within the negotiating period under **Subsection 3.4(b)** (Effect of Requested Change Notice).

(iii) The Port Commission or the Board of Supervisors disapproves a proposed amendment to the DDA.

3.5. Streetscape Master Plan. Before the Port will approve the first Phase Submittal, Developer will submit and the Port will approve the Streetscape Master Plan in accordance with this Section.

(a) Streetscape Master Plan Application. The Streetscape Master Plan is applicable to the SUD and will address street trees, landscaping, lighting, street furnishings, sidewalk treatment, stormwater treatment, and utilities. Prior to the Reference Date, Developer submitted drafts of its proposed Streetscape Master Plan and has revised it based upon comments received from applicable City Agencies. The Port acknowledges that the Streetscape Master Plan application submitted by Developer under this Section will be deemed a complete application to the extent that it is consistent with the previously submitted drafts reviewed and approved by applicable City Agencies.

(b) Submittal for Review. Developer will submit its final Streetscape Master Plan application to the Port within 90 days after the Reference Date (the "**Streetscape Submittal Date**"). Port staff will submit the Streetscape Master Plan application to applicable Other City Agencies. Each City Agency will review the Streetscape Master Plan for consistency with the Project Approvals, including the SUD Amendments, Design for Development and Infrastructure Plan. Consistent with the Port's responsibilities under the ICA, the Port will use commercially reasonable efforts to cause each applicable Other City Agency to complete its review of the Streetscape Master Plan application within 30 days.

(c) Port Review. Port staff will complete its review and consideration on the Streetscape Master Plan within 60 days after the Streetscape Submittal Date. Port staff may propose changes to the Streetscape Master Plan that do not conflict with the Project Approvals, including the SUD Amendments, Design for Development and Infrastructure Plan. If the Port staff proposes any such changes, then the Port and Developer will promptly meet and confer in good faith for a period of not more than 10 days, as such period may be extended by agreement, to reach agreement on any such changes proposed by the Port, provided such meet and confer period shall run concurrently with, and shall not extend, the 60-day period specified above unless agreed to by Developer and Port staff.

(d) Port Approval. No later than the expiration of the 60-day period specified above (as such 60-day period may be extended by agreement), the Port Director will act on the approval of the Streetscape Master Plan. If the Port Director disapproves the Streetscape Master Plan application, she will provide a reasonably detailed explanation of the reasons for disapproval. Thereafter, Developer will resubmit its Streetscape Master Plan application and the procedures of **Subsection 3.5(b)** (Submittal for Review) and **Subsection 3.5(c)** (Port Review) will apply until approved.

(e) Changes to the Streetscape Master Plan. After it has been approved, changes to the Streetscape Master Plan will be subject to the review and approval processes in this Section..

4. PERFORMANCE DATES

4.1. Performance Generally. All time periods under this DDA are subject to App ¶ 2.2 (*Performance Generally*) unless unequivocally stated otherwise. In addition to any other specific provisions of this DDA excusing or delaying the date by which an obligation must be performed, a Party will not be in default of any specific DDA provision, and performance dates may be extended under procedures in this Article, for the duration of each event of Excusable Delay that applies to the specific DDA provision. If a Party's performance is excused or the time for its performance is extended under this Article, any performance of the other Party that is conditioned on the excused or extended performance will be excused or extended to the same extent.

4.2. Excusable Delay Generally.

(a) Notice. Except for Environmental Delay and Down Market Delay, the Party claiming Excusable Delay must provide notice to the other Party promptly, and in no case more than 30 days, after learning of the event causing delay. The notice must specify: (i) the date on which the event causing the claimed Excusable Delay occurred or the date on which the Party claiming Excusable Delay discovered the event; (ii) the expected period of delay; and (iii) whether the Party claims Excusable Delay for a specific event or Phase or the 28-Acre Site Project as a whole. The Party receiving the notice may challenge the existence or length of Excusable Delay claimed in the notice, and if the Parties are unable to agree on the length of Excusable Delay, the issue will be resolved by procedures in **Article 10** (Resolution of Certain Disputes).

(b) Limits on Excusable Delay. Each extension for Excusable Delay will cause future performance dates for Time-Sensitive Matters specified in the notice to be extended, subject to the following limitations:

(i) If the delay interrupts Developer's ability to start or finish any Developer Construction Obligations, Developer must take appropriate measures to secure and leave the affected property in good and safe condition until construction can start again.

(ii) Once Developer's Construction Obligations have Commenced, Excusable Delay will extend the Outside Dates for obtaining the SOP Compliance Determination for Developer Construction Obligations only if the delay affects related horizontal development, for example, a strike that interrupts work, inability to obtain materials that have been ordered timely, or an injunction is issued to stop work.

(iii) Excusable Delay will not affect Developer's obligations to: (1) pay taxes or assessments, if applicable; (2) maintain in effect Adequate Security; or (3) pay the Developer Reimbursement Obligations except to the extent payment due dates are tied to completion of Developer Construction Obligations delayed by Excusable Delay.

4.3. Excusable Delay Time Periods Generally. All of the following are subject to **Section 4.4** (Limits on Excusable Delay Period).

(a) Environmental Delay for Certain Matters. Environmental Delay will begin on the date when the Party seeking delay receives notice of the event causing the delay and end in accordance with the following.

(i) When the Port or the City is required to conduct additional environmental review or prepare additional environmental documents after the Planning Commission has certified the Final EIR and City staff has filed a notice of determination, the Environmental Delay will end on the date that the City files a subsequent Notice of Exemption or Notice of Determination, or if none is filed, the effective date of the underlying approval by the Port or City that relies on the additional environmental review.

(ii) When a third party files an action challenging the certification or sufficiency of the Final EIR or any other additional environmental review, even if development activities are not stayed, enjoined, or otherwise prohibited, the Environmental Delay will end on the date that is 90 days after the final judgment or other resolution of the action or issue.

(b) Down Market Delay. Down Market Delay will begin on the date of the Down Market Notice resulting in a Down Market Test establishing that a Down Market exists and end when a later Down Market Test indicates that a Down Market has ended.

(c) Other Excusable Delays. Other Excusable Delays will begin on the first day of the event causing delay or the date on which the Party claiming delay reasonably discovered the event and, subject to **Section 4.4** (Limits on Excusable Delay Period), end on the date that the event causing Excusable Delay has ended. Developer will provide the Port with written notice of the end date for an event causing Excusable Delay; provided, however, that if the Port reasonably determines that an event of Excusable Delay has ended before Developer submits its notice, the Port will provide written notice to Developer with an explanation supporting the Port's determination. If Developer disputes the Port's determination as to the start or end of the event of Excusable Delay, the matter will be submitted to binding arbitration in accordance with **Section 10.4** (Binding Arbitration).

4.4. Limits on Excusable Delay Period.

(a) Meet and Confer.

(i) The Parties agree to meet and confer in a good faith attempt to reach mutually acceptable measures that will allow the 28-Acre Site Project to proceed if an event of Force Majeure causes an Excusable Delay longer than one year. The obligation to meet and confer will arise when the Parties reasonably foresee or know that the delay will exceed one year.

(ii) Measures to which the Parties agree at the staff level may be subject to Port Commission and Board of Supervisors approval if the Port Director in her reasonable judgment determines that the changes would require a Material Modification to any of the Transaction Documents. But the Parties' failure to reach agreement under this Subsection will not result in adverse consequences to either Party, except for those caused by Force Majeure.

(b) Maximum Delay. For each occurrence of Excusable Delay, if: (i) Force Majeure other than Administrative Delay, Environmental Delay or Force Majeure triggered by litigation, earthquake or flood causes an Excusable Delay longer than 48 months; or (ii) a Down Market Delay causes an Excusable Delay longer than 60 months, Developer may elect either to waive the Excusable Delay, deliver a

Requested Change Notice with measures intended to allow the 28-Acre Site Project to proceed despite Force Majeure, or submit a revised Phase Submittal changing the proposed land use mix, reclassifying Development Parcels within the Phase, or adjusting delivery of Phase Improvements or Associated Public Benefits, subject to limitations imposed by the Project Approvals. Limitations include consistency with the project description for environmental review and consistency with the SUD Amendments. If the revised land uses or delivery of Phase Improvements and Associated Public Benefits are consistent with the Project Approvals, the period of Excusable Delay will be extended to include the time for Port approval of the revised Phase Application under **Section 3.3** (Changes to Phase).

4.5. Down Market Delay Procedures.

(a) Timing. Developer may request a Down Market Test in writing to the Port (each, a “**Down Market Notice**”) at any time to determine whether a Down Market exists as to the applicable Phase. A Down Market Test will be used to determine whether Developer’s Time-Sensitive Matters for the Phase will be tolled or otherwise adjusted under this Section. A Down Market may also be established if the appraisal process conducted in accordance with **Article 7** (Parcel Conveyances) shows that a Down Market condition exists for the applicable parcel. Developer may elect to perform the Down Market Test for any Residential Parcel (each, a “**Residential Test Parcel**”), any Commercial Parcel that is not also a Flex Parcel (each, a “**Commercial Test Parcel**”), or both. If Developer elects to perform the Down Market Test on a Residential Test Parcel, it may designate the proposed use as residential rental product, residential condominium product, or both.

(b) Land Value Indicators.

(i) Base land values that will serve as Land Value Indicators for Option Parcels in each Phase are derived from the residual land values shown in the Proforma in the Port files on the Reference Date and are set forth by Option Parcel number in **DDA Exhibit D6**. Flex Parcels have a Land Value Indicator for both commercial-office and residential use. Affordable housing, parking, and retail, restaurant, and arts/light-industrial uses will not be subject to the Down Market Test or Down Market Delay.

(ii) Land Value Indicators will be adjusted annually, subject to a floor of no change and a maximum annual increase of 4.5%. The annual adjustment will be the percentage of change between the CPI for commercial Option Parcels and CPI (Residential) for residential parcels, as the applicable index is first published in any full month after the Reference Date and the CPI published on each subsequent anniversary of the first date.

(iii) *Example:* Assume the Reference Date was December 8, 2014. The first full month after the Reference Date in which CPI is published would be February 2015. CPI in February 2015 was 254.910, and CPI in February 2016 was 262.600. The annual adjustment would be 1.030%.

(c) Down Market Test. The Down Market Test will consist of appraisals of the Residential Test Parcels or Commercial Test Parcels, as applicable, conducted by procedures described in **Section 7.3** (Option Parcel Appraisals). The Parties agree that a Down Market Test will establish whether a Down Market exists for one or both of the land uses tested as follows:

(i) A Down Market for residential use will be established if the Fair Market Value of any Residential Test Parcel (whether determined by a Down Market Test under this Section or through the appraisal procedures of **Section 7.3** (Option Parcel Appraisals)) is less than 85% of the Land Value Indicator, as

escalated to the Down Market Test Date (the “**Down Market Threshold**”). If the Fair Market Value established through this appraisal process is less than the Down Market Threshold for either rental or condominium use, the Down Market for residential use will be established.

(ii) A Down Market for commercial-office use will be established if both: (i) the Fair Market Value of any Commercial Test Parcel (whether determined by a Down Market Test under this Section or through the appraisal procedures of **Section 7.3** (Option Parcel Appraisals)) is less than the Down Market Threshold; and (ii) commercial-office uses will occupy 30% or more of the total gsf of market-rate residential and commercial use approved under the applicable Phase Approval (excluding commercial-office use on Flex Parcels, and affordable housing, parking, retail, restaurant, and arts/light-industrial uses) (the “**30% Commercial Trigger**”).

(iii) If a Down Market Test (or the appraisal procedures of **Section 7.3** (Option Parcel Appraisals)) establishes a Down Market for one or both of the land uses tested, a Down Market will exist as to the entire Phase and the provisions of **Subsection 4.5(e)** (Effect of Down Market Delay) and **Subsection 4.5(f)** (End of Down Market Delay) will take effect.

(iv) If the Down Market Test (or an appraisal conducted in accordance with **Section 7.3** (Option Parcel Appraisals)) meets or exceeds the Down Market Threshold, no Down Market Delay will apply and the applicable Schedule of Performance and any other Time-Sensitive Matters will not be extended to account for the delays caused by the Down Market Test.

(d) Cost of Down Market Test. If the Down Market Test fails to establish a Down Market for any of the land uses tested, then the appraisal costs of the Down Market Test will be at Developer’s sole cost and will be excluded from Soft Costs. If the Down Market Test establishes a Down Market for any of the land uses tested, then the appraisal costs will be included in Soft Costs.

(e) Effect of Down Market Delay.

(i) During any period of Down Market Delay:

(1) the times for Developer’s performance of Time-Sensitive Matters will be extended for the period beginning on the date of the Down Market Notice until such time as a new Down Market Test indicates that the Down Market no longer exists;

(2) the Port may, in its sole discretion, elect to halt processing any pending Phase Submittal applications from Developer;

(3) upon Port request, the Parties will meet and confer to decide whether any of the Port’s Time-Sensitive Matters will be tolled, other than the processing of any pending Phase Submittal which may be tolled as provided in **Subsection 4.5(e)(i)(2)** or the matters which will not be tolled as provided in **Subsection 4.5(e)(ii)**; and

(4) the times for Developer’s performance of Time-Sensitive Matters will be extended for the period beginning on the date of the Down Market Notice until such time as a new Down Market Test indicates that the Down Market no longer exists.

(ii) During any period of Down Market Delay, the following matters will not be subject to the meet and confer procedures of Section 4.5(a)(i)(3) above:

- (1) **Financing Plan:** All Port obligations under the Financing Plan.
- (2) **Previously Approved Phases:** Any Port Time-Sensitive Matters for any approved Phase where a Down Market Delay has not occurred.
- (3) **Option Parcels under an Executed Vertical DDA.** Any Port Time-Sensitive Matters under the DDA or any Vertical DDA applicable to an Option Parcel that is the subject of an executed Vertical DDA or has been conveyed by Parcel Lease or Quitclaim Deed.
- (4) **Public Trust Exchange:** Port's obligation to implement the Public Trust Exchange under **Section 1.2** (Public Trust Exchange).
- (5) **Streetscape Master Plan:** Port's obligation to review and approve the Streetscape Master Plan under **Section 3.5** (Streetscape Master Plan).
- (6) **Parcel K North:** Port's obligations to offer and sell Parcel K North under **Section 7.9** (20th/Illinois Parcels).
- (7) **Allocation of Port Community Facilities Funds.** Subject to Developer timely meeting its obligations, the Port's obligations for allocation of Port Community Facilities Funds under **Section 7.12(e)**.
- (8) **Noonan Replacement Space.** Port's obligations with respect to the Noonan Replacement Space (including approval of the Artist Transition Plan and providing the required transition notices) under **Section 7.13**.
- (9) **Master Lease:** Port's obligations under **Article 8** (Delivery of Master Lease) with respect to the title and delivery of the Master Lease, conveyance of the Premises thereunder and execution of partial releases of the Master Lease.
- (10) **Resolution of Certain Disputes:** Any of Port's Time-Sensitive Matters related to the resolution of disputes set forth in **Article 10** (Resolution of Certain Disputes).
- (11) **Port Events of Default:** The time for the Port to cure any potential breach after notice under **Section 11.3** (Events of Default by the Port) or **Section 12.3** (Material Breaches by the Port).
- (12) **Schematic Design Review of Public Spaces:** The time for Port to review and approve a Schematic Design Application for any Park Parcel submitted by Developer under **Section 13.6** (Schematic Design Review of Public Spaces).
- (13) **Signage.** The time for Port to review and approve any request for approval of a Signage Plan application submitted by Developer under **Section 13.7** (Signage).
- (14) **Mitigation Measures:** Port's obligation to comply with the MMRP, as applicable, under **Section 14.8** (Mitigation Measures).
- (15) **Review of Improvement Plans under the ICA.** Port's obligations under the ICA to review and process Improvement Plans

submitted in accordance with the ICA, under **Section 13.3(b)** (Port Review Procedures).

(16) SOP Compliance: Port's obligations with respect to any SOP Compliance Request and SOP Compliance Determination under **Section 15.7** (SOP Compliance).

(17) Acceptance of Park Parcels and Phase Improvements: Port obligations with respect to acceptance of any Park Parcel or other Phase Improvement that the Port will accept under **Section 15.8** (Acceptance of Park Parcels and Phase Improvements).

(18) Adequate Security: Port's obligations with respect to the approval or release of any Adequate Security under **Article 17** (Security for Project Activities).

(19) Lenders' Rights: Any Port obligation with respect to Lenders' Rights or the delivery of Estoppel Certificates, set forth in **Article 18** (Lenders' Rights).

(20) Time for Payment: Port's satisfaction of a payment demand under **Section 19.2(b)** (Time for Payment).

(iii) With respect to an Option that Developer has exercised but where Escrow has not Closed by the start of the Down Market Delay, Developer may rescind its exercise of Option. Rescission under this Subsection will not prejudice Developer's right to exercise the Option after the Down Market Delay ends.

(f) End of Down Market.

(i) Either Party may request another Down Market Test to determine whether the Down Market has ended at any time after the first anniversary of the Down Market Test Date. Each new Down Market Test will result in a new Down Market Test Date.

(ii) If neither Party has requested a new Down Market Test by the end of the 18th month after the Down Market Test Date, the Port will initiate a new Down Market Test to determine whether the Down Market has ended.

(g) Down Market Delay in Certain Circumstances.

(i) Down Market Without 30% Commercial Trigger. This Subsection applies if all of the following circumstances are present: (i) no Down Market for any Residential Parcel within the Phase exists; (ii) a Down Market Test establishes a value for a Commercial Test Parcel at or below the Down Market Threshold; (iii) commercial-office uses within the applicable Phase do not meet the 30% Commercial Trigger; and (iv) in Phase 2, Developer has designated both Parcel F and Parcel G for commercial-office use in its Phase Approval, or in Phase 3, Developer has designated one or more of the Flex Parcels for commercial-office use in its Phase Approval. Under those circumstances, Developer will provide Port with written notice, to be provided within 15 days after the applicable Down Market Test for the Commercial Test Parcel, of its election to either proceed with the 28-Acre Site Project in accordance with the Schedule of Performance or to undertake a redesign effort for the Flex Parcels to increase residential use. If Developer elects to redesign the Flex Parcels for residential use, then Down Market Delay will apply during such six-month period. If Developer fails to provide its notice within such 15-day period, it will be deemed to have elected to proceed with the 28-Acre Site Project without delay.

(ii) Residential Redesign Procedures. If Developer elects to proceed with the residential redesign analysis, Developer and the Port will conduct a joint feasibility and proforma analysis of the potential effects of increasing the residential uses in the Phase using agreed-upon assumptions, formulas, and variables. The factors that the Parties must examine in the analysis are additional Horizontal Development Costs of Phase Improvements that Developer would need to incur, the amount of Public Financing Sources that would be available for the Phase, the estimated Fair Market Values of the Option Parcels in the Phase, the effect on Phase Improvements and Associated Public Benefits (and in particular, the ability to fund delivery of the targeted amounts of affordable housing in Later Phases), possible changes to the Phasing Plan, and the amount by which the Developer Balance would increase if the Down Market Delay continued for the maximum period of Excusable Delay under this Article. The costs of this analysis will be Soft Costs. The Parties will meet and confer in an attempt to reach a joint decision on the feasibility and desirability of increasing residential use within the Phase, provided, however, that Developer may decide to change commercial-office use to residential use on any Flex Parcel in its sole discretion after completing joint feasibility and proforma analysis.

(iii) Change to Residential.

(1) If within the six-month evaluation period, Developer provides the Port with written notice of Developer's election not to change the land use on any Flex Parcel from commercial to residential or fails to make an election, then at the end of such six-month period (or the date of Developer's decision, whichever is earlier), Down Market Delay will cease as to that Phase.

(2) Alternatively, within the six-month evaluation period, if Developer provides the Port with written notice of Developer's election to change the applicable Flex Parcel from commercial-office to residential, then Down Market Delay will cease as applied to the Phase as of the date of such election, except as provided in **paragraph (3)** of this clause.

(3) In Phase 2, if Developer elects to change the land use of either Parcel F or Parcel G (but not both) to residential use, then a Down Market Test performed on the remaining Commercial Parcel that results in a Fair Market Value that is less than the Down Market Threshold, then Developer may invoke a Down Market Delay for the Phase.

5. PARTY RELATIONSHIPS

5.1. No Agency. The Port is not, and none of the provisions in this DDA will be deemed to make the Port, a partner in Developer's or any Vertical Developer's business, or a joint venturer or member in any joint enterprise with Developer or any Vertical Developer. No Party has the right to act as the agent of any other Party in reference to this DDA.

5.2. ICA. The Port agrees to perform its obligations under the ICA, and to use commercially reasonable efforts to cause other City Agencies to perform their respective obligations under the ICA.

5.3. Port approvals. The Parties agree that the approval standards and procedures below will apply to implementation of this DDA except as otherwise specified.

(a) Regulatory Capacity. This DDA does not constrain the Port's exercise of regulatory authority.

(b) Proprietary Capacity. The Port, when acting in its proprietary capacity as landowner and landlord, will make determinations in its reasonable judgment except as otherwise specified, including its review and approval of Schematic Design Applications under **Section 13.6** (Schematic Design Review of Public Spaces). All Improvements will be subject to the Port's review in accordance with applicable procedures and standards in this DDA, the SUD Amendments, and the ICA.

(c) Port Commission Meetings. Except as otherwise provided in this DDA, whenever the Port Commission must approve or otherwise consider any matter in reference to the 28-Acre Site Project, the Port Director will submit the matter to the Port Commission at the next regularly-scheduled meeting of the Port Commission for which an agenda has not been finalized and for which Port staff can prepare and submit a staff report in keeping with the Port Commission's customary meeting practices and obligations under public meeting laws. The Port Commission will approve or disapprove discretionary matters in accordance with its powers and duties under the Burton Act and the Charter and as otherwise specified in this DDA.

(d) Authority for Port approvals.

(i) The Port Director, or her designee, is authorized to sign on behalf of the Port any documents, including any contracts, agreements, memoranda, or similar documents with state, regional, or local authorities or other persons, or enter into any tolling agreement with any person, to the extent of the authority granted under the Port Commission and Board of Supervisors resolutions approving this DDA. The Port Director's authority is limited to matters that are in the best interests of the Port and the City, and otherwise do not materially increase the obligations or liabilities of the Port or the City or materially decrease the public benefits to the Port or the City, and are necessary or advisable to complete the transactions described in this DDA and to effectuate the purpose and intent of the authorizing resolutions if the Port Director determines, after consultation with the City Attorney, that the document is necessary or proper and in the Port's and the City's best interests. The Port Director's signature on any document will be conclusive evidence of her determination.

(ii) The Port Commission, through the Chief Harbor Engineer, administers and enforces the Port Building Code, the Port Harbor Code, and other Port regulations to protect the public health, safety, and general welfare. The Chief Harbor Engineer, or his designee, and in conjunction with other City Agencies, will oversee project and construction management, engineering design, facility inspection, contracting, code compliance review and permitting services for all of the Port's facilities and for plan review, permitting and inspection services to ensure safe and compatible construction on Port property. The Chief Harbor Engineer will issue all permits for construction on Port land, sign certificates regarding their completion, and issue "red tags" and other regulatory notices that would prohibit or condition use of Port property to protect public safety.

5.4. Developer Approvals.

(a) Regulatory Approval. Each of the persons executing this DDA on behalf of Developer represents to the Port, and the Port is entitled to rely on those representations, that: (i) Developer is a duly authorized and existing entity under Delaware law; (ii) Developer is qualified to do business in California; (iii) Developer has full right and authority to enter into this DDA and other Transaction Documents; and (iv) each of the persons signing the Transaction Documents on its behalf is authorized to do so. Developer agrees to provide the Port with satisfactory evidence confirming these representations promptly after a Port request.

(b) Authorized Developer Representative. Developer must designate from time to time by notice to the Port under *App ¶ 1.5 (Notices)* and **Article 20** (Notices) a representative who is authorized to act on Developer's behalf in reference to requests for approvals or other actions. The Port will rely on any notice delivered under this Subsection until superseded by a later notice.

5.5. Standards Otherwise Applicable. Except as expressly provided otherwise, the following standards will apply to the Parties' conduct under this DDA.

(a) Covenant of Good Faith and Fair Dealing. In all situations arising from this DDA, subject to **Article 11** (Defaults), Developer and the Port each must attempt to avoid and minimize the damages resulting from the other's conduct and take all reasonably necessary measures to implement this DDA. This DDA is subject to the covenant of good faith and fair dealing applicable to contracts under California law. Accordingly, Developer and the Port each covenants, on behalf of itself and its successors and assigns, to take all actions and to execute, with acknowledgment or affidavit if required, all documents necessary to achieve the objectives of this DDA to the extent consistent with Applicable Law.

(b) Cooperation and Non-Interference. Developer and the Port acknowledge that the implementation of this DDA and the remedies provided to a Party for the other Party's default or failure to perform an obligation under this DDA are predicated on their cooperation throughout the DDA Term, and agree, subject to **Article 11** (Defaults): (i) to implement this DDA in a manner intended to accomplish its objectives; (ii) to refrain from doing anything that would render performance under this DDA impossible; and (iii) that a Party will be excused from performing under this DDA to the extent prevented by the other Party's actions.

(c) Commercial Reasonableness. Unless specifically provided otherwise in this DDA, whenever a Party is permitted to make a judgment, form an opinion, judge the sufficiency of the other Party's performance, or exercise discretion in taking (or refraining from taking) any action or making any determination, that Party must proceed with due diligence and employ commercially reasonable standards in doing so. In general, the Parties' ministerial acts in implementing this DDA, including construction of Improvements, approvals, disapprovals, demands for performance, requests for additional information, and any exercise of an election or option, must be commercially reasonable. The requirements for approvals under this DDA extend to and bind any Agents of Developer or of the Port that act on behalf of their principals.

(d) Disapproval. A Party that declines to grant approval or grants conditional approval must state its reasons in reasonable detail in writing. This requirement does not apply to the Port Commission, which as a public body will grant or deny approval in open session at a noticed public meeting held under applicable public meeting laws.

(e) Specificity of Approval. A Party's approval to or of any act or request by the other Party will not be deemed to waive or render unnecessary approval to or of any similar or subsequent acts or requests. In determining whether to give an approval, no Party is allowed to require changes from or impose conditions inconsistent with applicable Project Requirements and Regulatory Requirements or its prior approvals for the specific matter.

5.6. Limitations on Liability of the Parties.

(a) No Consequential, Punitive, or Special Damages.

(i) Neither Developer nor the Port would have entered into or become a Party to this DDA if it could be liable for indirect or consequential, punitive, or special damages under this DDA. Accordingly, Developer and the Port each

waives any Claims against the other Party, and covenants not to sue the other, for indirect or consequential, punitive, or special damages under this DDA, including loss of profit, loss of business opportunity, or damage to goodwill.

(ii) The waivers in this DDA will not affect each Party's right to recover actual damages that arise from a Breaching Party's failure to: (1) pay any sum when due under any Transaction Document between the Parties relating to the 28-Acre Site Project; (2) satisfy any indemnity under this DDA; or (3) pay attorneys' fees when due under an Arbiter's decision or a court's final judgment.

(b) Project Payment Sources. Except as otherwise provided in this DDA, Developer agrees as follows.

(i) All obligations of the Port or the City arising out of or related to this DDA are special and limited obligations of the Port and the City, as applicable, and the Port's and City's obligations to make any payments to implement this DDA are restricted strictly to Project Payment Sources described in the Financing Plan to this DDA, and only to the extent those sources are available to the Port and the City.

(ii) More specifically, in no event may Developer compel: (1) the City to use funds in or obligate the City's General Fund; or (2) the Port to use funds in or obligate the Port Harbor Fund except as described in the Financing Plan to this DDA, in either case to reimburse Developer's Horizontal Development Costs or any other costs associated with the 28-Acre Site Project or to satisfy any Developer Claim of damages for a breach by the Port or the City under any of the Transaction Documents.

(c) No Personal Liability. Unless specifically provided otherwise, the Parties agree that no Agents of the Port or of its successors or assigns will be personally liable to Developer or any Vertical Developer, and no Agents of Developer or any Vertical Developer or of their successors or assigns will be personally liable to the Port, for any default or breach of this DDA or for any payment or performance that becomes due under this DDA. This Subsection does not release or waive the obligations of any person with a direct legal obligation under Applicable Law, such as the general partner of a limited partnership or any Obligor providing Adequate Security for a specified obligation.

5.7. Defaults and Breaches.

(a) Phase-Specificity. An Event of Default by Developer or any Transferee hereunder in one Phase will not be an Event of Default by Developer or any Transferee in any other Phase. In certain instances as specified in **Article 12** (Material Breaches and Termination), a Material Breach may affect more than one Phase.

(b) Limitations on Cross-Defaults.

(i) Cross-Defaults Between Developer and Vertical Developers. No Event of Default by Developer or a Transferee with respect to the Horizontal Improvements hereunder will be deemed to be an Event of Default by any Vertical Developer (including, without limitation, Vertical Developer Affiliates) under any Vertical DDA, Parcel Lease, or Restrictive Covenant.

(ii) Cross-Defaults Between Vertical Developer Affiliates and Developer. An Event of Default by a Vertical Developer Affiliate with respect to any Development Parcel pursuant to any Vertical DDA, Parcel Lease or Restrictive Covenant will be deemed to be an Event of Default by Developer hereunder but only as to an Event of Default related to the Vertical Developer Affiliate's: (1) failure to pay taxes; (2) failure to complete its Deferred Infrastructure obligations under the Vertical DDA; or (2) any other Transferred

obligations that Developer explicitly retains in the pertinent Assignment and Assumption Agreement. Any of the foregoing events of default under a Vertical DDA will only be an Event of Default by Developer if the Port is entitled to terminate the Vertical DDA for such event of default after expiration of relevant notice and cure periods (including cure rights afforded to Lenders and Developer thereunder) and, in the case of Material Breach under **Subsection 12.2(d)** (Deferred Infrastructure), the Port's exclusive remedies will be governed by **clause (iii) of Subsection 12.4(c)** (Termination re: Outside Dates).

(iii) No Cross-Defaults in Other Cases. Except as provided in **clause (ii) of Subsection 5.7(b)** (Limitations on Cross-Defaults), no Event of Default by a Vertical Developer (including without limitation, a Vertical Developer Affiliate) with respect to Development Parcels under any Vertical DDA, Parcel Lease, or Restrictive Covenant will be deemed to be an Event of Default by Developer or any Transferee hereunder with respect to its Horizontal Improvement obligations under this DDA, or by any other Vertical Developer with respect to its obligations under any other Vertical DDA, Parcel Lease, or Restrictive Covenant.

6. TRANSFERS

6.1. Transfer Limitations in Phase 1. Except as to Deferred Infrastructure, subject to **Subsection 15.6** (Deferred Infrastructure) and **Section 6.5** (Release), Developer is expressly prohibited from Transferring its development rights and obligations for Phase 1 to an Unrelated Transferee under any circumstance without the approval of the Port Commission, in its sole discretion.

6.2. Third-Party Transfers in Other Phases. This Section governs Developer's Transfer of any development rights and obligations for Phase 2 through the Final Phase of the 28-Acre Site Project to Unrelated Transferees. These limitations do not apply to Deferred Infrastructure obligations that the Port has agreed, through a Phase Approval or Vertical DDA, to assign to Vertical Developers.

(a) Before Phase Approval. Before the applicable Phase Approval, Developer may Transfer: (i) all of its rights and obligations as a Party for any Phase other than Phase 1; and (ii) all of its rights and obligations for all Later Phases as master developer under this DDA, to an Unrelated Transferee subject to the Port Commission's approval in either case under **Subsection 6.2(e)** (Port Commission Consideration).

(b) After Phase Approval. After a Phase Approval for any Phase other than Phase 1, Developer may only Transfer the applicable rights and obligations to an Unrelated Transferee as described below if approved by the Port Commission under **Subsection 6.2(e)** (Port Commission Consideration).

(i) If Developer has not begun to build Phase Improvements for the Phase that received the Phase Approval, Developer may Transfer all of its future rights and obligations with respect to the Current Phase. Developer's right of Transfer without a release for the applicable Phase will end when its starts construction.

(ii) If Developer has begun to build Phase Improvements for the Phase that received the Phase Approval, the Assignment and Assumption Agreement required under **Section 6.4** (Assignment and Assumption Agreement) will not release Developer of its obligations hereunder as to the applicable Phase, unless approved by the Port Commission in its sole discretion.

(c) Transferee Qualifications. The Port Commission is not obligated to approve a Transfer if an Unrelated Transferee (by itself or through the person controlling the Unrelated Transferee):

(i) does not satisfy the Experience Requirement;

(ii) does not satisfy the Net Worth Requirement;

(iii) does not commit in the applicable Assignment and Assumption Agreement to submitting any applicable Phase Submittals for the development opportunity being Transferred by the Outside Date specified in the Schedule of Performance or, if the Port Commission will consider the proposed Transfer less than 90 days before the Outside Date for Submittal of the Phase Submittal, within 90 days after the Port Commission's approval of the proposed Transfer; and

(iv) has been suspended, disciplined, debarred, or is otherwise prohibited from contracting with the City or the Port.

(d) Port Conditions. The Port Commission will not unreasonably withhold, delay, or condition its approval to a proposed Transfer to an Unrelated Transferee qualified under **Subsection 6.2(c)** (Transferee Qualifications) if all of the following conditions are satisfied.

(i) Developer is not in Material Breach of this DDA and the Port has not given notice of any potential breach by Developer before the Port Commission considers the requested Transfer.

(ii) Developer is in Material Breach or a potential breach has occurred, but in either case, the Transferee's cure of the Material Breach or potential breach is a condition of the Transfer in accordance with the timing and conditions reasonably satisfactory to the Port Commission.

(iii) Developer agrees that any consideration of monetary value that it actually receives from the Transferee in connection with the proposed Transfer will be treated as Land Proceeds under the Financing Plan.

(iv) Developer reimburses the Port for its reasonable costs of reviewing the Transferee's qualifications.

(v) The Transferee does not condition the Transfer on changes to the Transaction Documents that would materially increase the costs or other burdens to the Port or the City.

(vi) The proposed Transfer would not result in Developer Construction Obligations for the Phase to be split between more than one person.

(vii) The Transferee provides commitments that satisfy the Adequate Security and Loss Security requirements under **Article 17** (Security for Project Activities) for all obligations that the Transferee assumes, subject to the Port Director's approval, unless Developer confirms, with each applicable Obligor's consent, that the Adequate Security and Loss Security previously provided to the Port for any Transferred Phases will secure the Transferee's assumed obligations.

(viii) The Transferee must agree to satisfy and maintain the Net Worth Requirement at all times until the Transferee has satisfied all of its assumed obligations. Promptly after the Port's request, a person required to maintain a minimum Net Worth under this DDA must provide to the Port reasonable evidence that the person satisfies the Net Worth Requirement, including a copy of the person's most recent audited financial statements, which must not be dated more than 180 days before the date of the Port's request. Audited financial

statements must be prepared by an independent CPA and must include the CPA's opinion that the financial statements are fairly stated in all material respects.

(ix) Developer (or any Transferee of all of Developer's obligations as master developer) will be responsible for all Phase Quarterly Reports, Phase Audits, and the Final Audit, including information from the Transferee's horizontal development activities, except to the extent that **clause (ii)** of **Subsection 12.8** (Effect of Termination) applies.

(x) Developer (or any Transferee of all of Developer's obligations as master developer) agrees to be solely responsible for any distribution of Project Payment Sources and the Developer Share of Project Surplus for revenue sharing to its Transferees and to indemnify the Port against any Claims from Transferees regarding reimbursements and revenue-sharing; provided however, that if Developer Transfers all of its obligations as master developer hereunder, then the applicable Transferee will be responsible for these distributions.

(e) Port Commission Consideration.

(i) Developer and any proposed Unrelated Transferee must provide to the Port reasonably detailed information to demonstrate compliance with **Subsection 6.2(c)** (Transferee Qualifications) and **Subsection 6.2(d)** (Port Conditions), a proposed Assignment and Assumption Agreement in such form as is reasonably approved by Port, and any additional documents and information that the Port Director reasonably requests. When the Port Director has sufficient information in her reasonable judgment to permit the Port Commission to make its determination, the Port Director will submit the proposed Transfer for Port Commission consideration.

(ii) Developer may request that the Port Commission consider a Transfer to an Unrelated Transferee that does not meet all of the requirements of **Subsection 6.2(c)** (Transferee Qualifications) and conditions of **Subsection 6.2(d)** (Port Conditions). The Port Commission may give or withhold its approval to a noncompliant request in its sole discretion.

6.3. Affiliate Transfers. This Section governs Developer's Transfer of horizontal development rights and obligations under this DDA to an Affiliate. This Section does not apply to a Vertical Developer's transfer rights, which will be governed by the applicable Vertical DDA.

(a) Conditions to Transfer. Developer has the right at any time to Transfer any portion of its rights and corresponding obligations under this DDA to an Affiliate of Developer without the Port's approval if all of the following conditions are met.

(i) Developer is not then in Material Breach or, if an event has occurred that with notice and the passage of time would be a Material Breach, Developer has cured the event before the effective date of the Transfer.

(ii) The Transferee or the persons with Control of the Transferee satisfies the Experience Requirement and the Net Worth Requirement.

(b) Reorganization. A Transfer effected by Developer's consolidation or merger into or with any other business organization that meets the requirements of **Subsection 6.3(a)** (Conditions to Transfer) will be considered a permitted Transfer under this Section even if Developer is not the surviving entity under Applicable Law.

(c) Application. Any Affiliate Transferee under this Section will be a Developer Party under this DDA to which Developer's Loss Security and any Phase

Security will apply to the obligations assumed by the Transferee unless it provides replacement Adequate Security approved by the Port Director.

6.4. Assignment and Assumption Agreement.

(a) Form. Each Transfer permitted under this Article must be subject to an Assignment and Assumption Agreement in a form reasonably approved by Port. The Port will not approve any Assignment and Assumption Agreement if the Transferee does not satisfy the Adequate Security requirements under **Article 17** (Security for Project Activities) for all obligations that the Transferee assumes or if Developer is in Material Breach or has not cured a potential breach after notice from the Port.

(b) Content. Each Assignment and Assumption Agreement must include:

(i) a legal description of any real property subject to the Transfer;

(ii) a detailed description of the rights and obligations under this DDA that Developer will assign to the Transferee, which must include all of Developer's related indemnifications and releases under this DDA;

(iii) the Transferee's agreement to comply with all pertinent Project Requirements and Regulatory Requirements;

(iv) a detailed description of any of Developer's obligations that the Transferee will not assume;

(v) the Transferee's express assumption of the obligations to be assigned;

(vi) a detailed description of the Transferee's obligations under the Affordable Housing Plan, and the Transferee's acknowledgement of the City's rights if Developer does not meet its obligations under the Affordable Housing Plan for the AHP Housing Area;

(vii) the Transferee's covenant not to challenge the enforceability of any provision of this DDA or the Development Agreement, including the Transferee's acknowledgement, for the benefit of the Port and Developer, affirming that the Costa-Hawkins Act does not apply to any Development Parcel developed for residential use;

(viii) an assumption of the risk that Horizontal Improvements for any adjoining real property will not be completed and a waiver and release for the benefit of the Port and the City regarding any failure to complete the Horizontal Improvements;

(ix) the Transferee's agreement to provide information to Developer that Developer needs to meet its obligations to submit Phase Quarterly Reports, Phase Audits, and the Final Audit;

(x) the Transferee's agreement to look solely to Developer for reimbursement of the Transferee's Horizontal Development Costs and any share of Project Surplus to which it may be entitled; and

(xi) other matters that Developer deems appropriate if approved by the Port Director.

6.5. Releases.

(a) Unrelated Transferee. Upon the consummation of any Transfer, including receipt of the Assignment and Assumption Agreement executed by the Unrelated Transferee and Developer, the Port will provide to Developer or other a written release from any obligations arising under this DDA from and after the date of Transfer to the

extent that such obligations are permitted to be released under this DDA and are expressly Transferred to and assumed by the Transferee under the approved Assignment and Assumption Agreement (subject to the terms of approval by the Port). The form of release may be in the approved Assignment and Assumption Agreement, or prepared as a separate document. Developer will not be released as to any obligations of Developer that arose before the date of the Transfer except to the extent that the same are expressly assumed by the Transferee in the Assignment and Assumption Agreement (subject to the terms of approval by the Port). The release will be provided within 30 days after the Port receives confirmation of the effective date of the Transfer, in a form prepared by the Port, consistent with this Section.

(b) Unrelated Vertical Developers. The Port will release Developer from any Deferred Infrastructure obligations that is an obligation of an Unrelated Vertical Developer under its Vertical DDA only after the Unrelated Vertical Developer has provided Adequate Security meeting the requirements of **Section 17.3** (Phase Security) to secure the completion in accordance with all applicable Project Requirements and Regulatory Requirements of the applicable Deferred Infrastructure under the Vertical DDA, or at such earlier time as is requested by Developer so long as the Port determines, in its sole discretion, that the Unrelated Vertical Developer's obligation to construct the Deferred Infrastructure in accordance with the Schedule of Performance is adequately assured.

6.6. Notice of Transfer. Developer must provide notice to the Port when any Transfer is complete, in addition to providing a copy of the fully executed Assignment and Assumption Agreement and any additional information and materials that the Port Director reasonably requests.

(a) With the Port approval. For any Transfer described in **Section 6.1** (No Third-Party Transfers in Phase 1), Developer must provide notice to the Port within 10 business days after the effective date of an approved Transfer.

(b) Without Port approval. For any Transfer described in **Section 6.3** (Affiliate Transfers), Developer must provide notice to the Port at least 30 days before the effective date of the Transfer or any shorter period the Port Director approves in her sole discretion. Developer's notice must include the identity, business and notice addresses, contact person, and contact information for the proposed Transferee and include evidence of the type described in **clause (vi)** of **Subsection 3.2(b)** (Phase Submittal). Developer must also provide notice to the Port within 10 business days after the Transfer confirming its effective date. This provision will not create any obligation on or duty of a Lender other than as set forth in **Article 18** (Lenders' Rights).

(c) Effect of Transfers.

(i) Any attempted Transfer that does not meet all applicable requirements of this Article will be void as to the Port, and the Port will continue to have all rights against Developer under this DDA and at law as if the prohibited Transfer had not occurred.

(ii) As of the effective dates of Transfers conforming to applicable requirements of this Article, all references to Developer in provisions of this DDA relating to the assigned and assumed obligations will include each permitted Transferee.

(iii) After the effective date of a Transfer of which the Port has notice, the Port will deliver to Developer copies of any notice delivered to an Unrelated Transferee of the Port's intent to terminate the Transferee's rights under this DDA due to a Material Breach by the Transferee.

(d) Post-Transfer Defaults. The effects of a Transferee's defaults are described in **Section 5.7** (Defaults and Breaches).

6.7. Related Matters.

(a) Certain Recordkeeping. Developer and its Transferees will be treated as one person for purposes of Phase Quarterly Reports, Phase Audits and the Final Audit required under *FP art. 9 (Reporting)*. Developer agrees to require each Transferee to create and maintain reports, records, and information in a fashion that will allow Developer to meet its reporting obligations under this DDA. Developer will be responsible for gathering and compiling all Transferee information for inclusion in integrated Phase Quarterly Reports, Phase Audits, and the Final Audit in compliance with this DDA. The Port's audit and inspection rights as to Developer will apply to all Transferees that assume horizontal development obligations.

(b) Exclusions. Nothing in this Article prohibits or otherwise restricts Developer from any of the following:

- (i) granting easements, leases, subleases, licenses, or permits to facilitate the development, operation, and use of any part of the 28-Acre Site that Developer holds in fee or by leasehold;
- (ii) granting or creating a Permitted Lien permitted under **Article 18** (Lenders' Rights);
- (iii) conveying its interest in any portion of the 28-Acre Site in connection with a Lender Acquisition; or
- (iv) making a Transfer to the Port, the City, or any other Regulatory Agency as authorized by this DDA or other Transaction Document.

7. PARCEL CONVEYANCES

This Article addresses the procedures for conveyances of Option Parcels to Vertical Developer Affiliates or third-party Vertical Developers, conveyances by the Port or the City of Parcel C1A, the 20th/Illinois Parcel, and the Hoedown Yard, and the Developer's obligations to ensure delivery of Associated Public Benefits.

7.1. Developer Option.

(a) Option Parcels. By procedures in this Article, the Port will ground lease or sell each Option Parcel to a Vertical Developer pursuant to a Vertical DDA. Developer, through its Vertical Developer Affiliates, will have the right to exercise the Option for Option Parcels.

(b) Exclusions. Developer's Option applies to all Development Parcels except the following parcels:

- (i) the Affordable Housing Parcels (anticipated to be Parcel C1B, Parcel C2A, and Parcel K South);
- (ii) the parcel previously designated for potential parking facilities (Parcel C1A);
- (iii) Parcel E4, on which the Arts Building will be developed;
- (iv) Historic Building 12 and Historic Building 21; and
- (v) the Illinois Street Parcels (except Parcel K South) except under conditions described in **Section 7.9** (20th/Illinois Parcel) and **Section 7.10** (Hoedown Yard).

(c) Early Lease Parcels.

(i) Developer must Close Escrow for the first Option Parcel to be conveyed by Parcel Lease within each of Phase 1 and Phase 2 (each, an “**Early Lease Parcel**”) no later than two years after Commencement of Construction for the applicable Phase, as provided in the Schedule of Performance.

(ii) Developer’s failure to meet the Outside Date for Close of Escrow for an Early Lease Parcel will terminate its Option as to that specific Early Lease Parcel without any further action by the Port. After termination of the Option under this Subsection, the Port will have the right to offer the Early Lease Parcel through a Public Offering under **Section 7.5** (Public Offering Procedures).

(iii) All Land Proceeds from the Port’s conveyance of the Early Lead Parcels will be subject to *FP art. 3 (Land Proceeds)*.

(d) Option Termination. Developer must Close Escrow for all Option Parcels within an applicable Phase for which it has exercised its Option no later than three years after the Port has issued a SOP Compliance Determination for all Phase Improvements other than the Public Spaces within the applicable Phase, as provided in the Schedule of Performance. Developer’s failure to meet the Outside Date for an Option Parcel within a Phase will terminate its Option as to that specific Option Parcel without any further action by the Port, and the Port will have the right to offer the Option Parcel through a Public Offering under **Section 7.5** (Public Offering Procedures). Any Port conveyance of an Option Parcel by a Public Offering to a third-party Vertical Developer will be through a Vertical DDA substantially in the form attached as **Exhibit D2**.

7.2. Fair Market Value.

(a) Established by Appraisal. The Port will determine the Fair Market Value for each Option Parcel by the appraisal process described in **Section 7.3** (Option Parcel Appraisals).

(b) Public Offering Prices as Comparables. The Parties agree that the Appraiser may appropriately consider the price at which the Port conveys any Option Parcel through a Public Offering under **Section 7.5** (Public Offering Procedures) as an appropriate comparable in the appraisal process triggered by a later Appraisal Notice for a different Option Parcel that is designated for the same land use and for Residential Parcels, Product Type and housing tenure.

7.3. Option Parcel Appraisals

(a) Appraisal Notice.

(i) Developer may trigger the appraisal process for an Option Parcel in a Phase at any time after it submits the applicable Phase Submittal by delivering an Appraisal Notice to the Port. In the Appraisal Notice, Developer must identify the Option Parcel, provide a detailed program of uses planned for the parcel, including the area programmed for each type of use, the location and amount of office development on the Option Parcel that would be subject to the provisions for office development attached as **DDA Exhibit A5**, the scope of Deferred Infrastructure that will be attached to the parcel (with the Acquiring Parties’ consent), and any inclusionary requirements under the Affordable Housing Plan if residential use is proposed.

(ii) With respect to any Flex Parcel, Developer may identify alternative use programs that are primarily residential or primarily commercial and consistent with the Project Approvals, and the appraisal will provide a value for both use programs. The Parties will initiate an appraisal process to determine

the Fair Market Value of the applicable Option Parcel within 30 days after Developer delivers an Appraisal Notice to the Port by selecting a Qualified Appraiser from the Qualified Appraiser Pool and issuing joint Appraisal Instructions in accordance with **Subsection 7.3(d)** (Appraisal Instructions).

(b) Appraiser Qualifications. Each Qualified Appraiser must meet the following qualifications:

- (i)** be licensed in the State of California as a Certified General Appraiser;
- (ii)** be a member of the appraisal Institute;
- (iii)** have at least 10 years' experience in the San Francisco Bay Area valuing commercial-office or multiple occupancy residential properties or both, depending on the allowed uses of the Option Parcel;
- (iv)** be a principal in either a national or regional firm based in California that: (1) is not a Vertical Developer Affiliate; (2) does not have an equity investment in Developer, any Vertical Developer Affiliate, any Vertical Developer that has entered into a Vertical DDA with the Port, or any of their Affiliates; (3) does not have a conflict of interest by virtue of a contractual relationship with Developer either existing or in the 24 months immediately preceding the engagement, unless the Port in its sole discretion waives the conflict; and (4) must agree to avoid future conflicts of interest as a condition to being on the panel; and
- (v)** otherwise be acceptable to both Parties.

(c) Qualified Appraiser Pool. The Qualified Appraiser Pool from which the Parties may select as of the Reference Date is attached as **DDA Schedule 1**. From time to time, either Party may propose in writing to amend the Schedule to add or remove appraisers to or from the Qualified Appraisers Pool. If the Parties disagree on a proposed addition or removal, then the Parties will engage in a dispute resolution procedure under **Section 10.4** (Binding Arbitration).

(d) Appraisal Instructions. The Parties will issue their joint Appraisal Instructions to Qualified Appraisers substantially in the form of **DDA Exhibit D4**, providing instructions for either residential or commercial-office use, as appropriate, and directing the Qualified Appraiser to prepare and deliver simultaneously to both Parties a Joint Appraisal. Either Party may propose to make nonmaterial changes to the forms of Appraisal Instructions from time to time, and the other Party will not unreasonably withhold, condition, or delay its approval. If a Party proposes material changes to Appraisal Instructions, such as assumptions, special assumptions, limiting conditions, hypothetical conditions, and special instructions, the Party proposing the changes must provide its proposal in writing together with evidence supporting its proposed changes, and the other Party may approve or disapprove the proposed change in its sole discretion.

(e) Joint Appraisal. If the Parties agree on the value conclusions in the Joint Appraisal for an Option Parcel, it will become the Final Appraisal. In either case, the costs of the Joint Appraisal will be Soft Costs. If the Parties do not agree on the value conclusions in a Joint Appraisal, the dispute will be resolved by procedures in **Subsection 7.3(f)** (Appraisal Disputes). A Final Appraisal for any Option Parcel must be completed and delivered to the Parties within 6 months after the date that Developer delivered the related Appraisal Notice.

(f) Appraisal Disputes. If either Party objects to the Joint Appraisal within two weeks after its delivery, the objecting Party may submit the valuation to a binding arbitration process under **Subsection 7.3(g)** (Appraisal Dispute Resolution Procedures).

Under the expedited process, each Party will have the right to engage another Qualified Appraiser to prepare a Party Appraisal using the same instructions used for the disputed Joint Appraisal. Each Party will be responsible for the fees and costs of its own Qualified Appraiser and will share equally in the fees and costs of any additional Qualified Appraiser engaged under **Subsection 7.3(g)** (Appraisal Dispute Resolution Procedures). Fees and costs incurred by Developer under this Subsection will be reimbursable as Soft Costs under the Financing Plan. Fees and costs incurred by the Port under this Subsection will be reimbursable as Port Capital under the Financing Plan.

(g) Appraisal Dispute Resolution Procedures. If both Parties engage another Qualified Appraiser to prepare Party Appraisals, the Joint Appraisal will be disregarded. If only one Party engages another Qualified Appraiser, the Joint Appraisal will be considered. In either case, the Fair Market Value will be determined by the following appraisal dispute resolution process.

(i) If the difference between the value conclusions in the Party Appraisals is 10% or less of the higher value, then the Fair Market Value will be the average of the values.

(ii) If the difference between the value conclusions in the Party Appraisals is more than 10% of the higher value, the Parties will jointly select another Qualified Appraiser to perform an appraisal using the same instructions, and the Fair Market Value will be established as follows.

(1) If the difference between the value conclusion in either Party Appraisal and the third value is 10% or less of the higher value, then the third value will be disregarded, and the Fair Market Value will be the average of the values in the Party Appraisals.

(2) If neither Party Appraisal's value conclusion is within 10% of the third value, or if both Party Appraisal's value conclusions are within 10% of the third value, then both Party Appraisals will be disregarded, and the third value will be the Fair Market Value for Option purposes.

7.4. Option Parcel Closings.

(a) Option Exercise Deadline. Developer will have 30 days after delivery of any Final Appraisal (the "**Option Exercise Deadline**") to exercise its Option on the Option Parcel by notice to the Port. The price the Option Parcel (by deed or Parcel Lease) will be (i) the Fee Value (as defined in the Appraisal Instructions) for fee transfers, (ii) the Fee Value or Prepaid Lease Value (as those terms are defined in the Appraisal Instructions) for fully Pre-Paid Leases, or (iii) the annual ground rent determined with regard to the Fee Value or Prepaid Lease Value, as any of those values are determined by the Final Appraisal in accordance with the Appraisal Instructions; however, if the Final Appraisal is equal to or less than the applicable Down Market Threshold, then the procedures of **Subsection 7.4(d)** (Effect of Down Market Delay). Following Developer's notice, the procedures for Close of Escrow under the VDDA will apply.

(b) Right to Credit Bid. As described in more detail in the Financing Plan, a Vertical Developer Affiliate will have the right to submit a Credit Bid for an Option Parcel, subject to the conditions and limitations of *FP § 3.3 (Right to Credit Bid)* and *FP § 3.4 (Amount of Credit Bid)*.

(c) Disposition of Land Proceeds. Under the Vertical DDA, the Port will instruct the Escrow Agent to disburse Land Proceeds from Escrow at Closing in accordance with the requirements of the Financing Plan.

(d) Effect of Down Market Delay.

(i) Final Appraisal Less than Down Market Threshold. If the Final Appraisal is equal to or less than the applicable Down Market Threshold, then the Final Appraisal will trigger an event of Down Market Delay. However, if the Final Appraisal is equal to or less than the Down Market Threshold, then Developer or its designated Vertical Developer Affiliate may still elect to exercise the Option at a price equal to (but not less than) the Down Market Threshold amount, or at any amount that is less than the Down Market Threshold by agreement between the Port and Developer, each in their sole discretion.

(ii) Final Appraisal. If a Down Market occurs after the exercise of the Option but before the Close of Escrow on an affected Option Parcel, the following will apply.

(1) Developer may elect in its sole discretion to rescind its exercise of the Developer Option and direct the Escrow Agent to close the Escrow Account.

(2) The Option Parcel will remain subject to Developer's Option for the period described in **Section 7.1**.

(3) By agreement of the Parties, some or all appraisals previously prepared for the Option Parcel will be disregarded for future conveyances under this DDA.

(e) Effect of Failure to Close Escrow. Developer's failure to exercise its Option, Vertical Developer Affiliate's failure to Close Escrow by the Outside Date therefor set forth in the Schedule of Performance, as it may be extended under **Article 4** (Performance Dates) or the termination of a Vertical DDA prior to Close of Escrow thereunder will not be an Event of Default hereunder, but will cause Developer's Option for that Option Parcel to terminate automatically. After termination, the Port will have the right to conduct a Public Offering for the Option Parcel using procedures in **Section 7.5** (Public Offering Procedures) so long as the Fair Market Value established by the Final Appraisal is more than the Down Market Threshold, and proceeds received by the Port for conveyance of the applicable Option Parcel will be treated as Land Proceeds in accordance with the Financing Plan.

7.5. Public Offering Procedures

(a) Broker-Managed Offerings. Each Public Offering will be managed by a Qualified Broker selected jointly by Developer and the Port from a list that the Parties have approved. The Qualified Broker Pool as of the Reference Date is set forth in **DDA Schedule 3**. From time to time, either Party may propose in writing to add or remove Qualified Brokers to or from the list. If the Parties disagree on a proposed addition or removal, then the Parties will engage in the dispute resolution procedure under **Section 10.4** (Binding Arbitration).

(b) Offering Document. The Public Offering documents for any Option Parcel will:

(i) identify the parcel being offered, describe any Deferred Infrastructure obligations for the parcel, specify the allowed uses, and indicate whether it is being offered for ground lease or sale;

(ii) specify a minimum bid price equal to the applicable Down Market Threshold for the Option Parcel and disclose that any offer that is between the Down Market Threshold and the Fair Market Value established by Final Appraisal must be subject to a right of first refusal in favor of Developer (the "**Developer ROFR**") as described in in **Subsection 7.5(e)** (Developer Right of First Refusal);

(iii) for a parcel to be leased, indicate whether the Port will require Fair Market Value to be paid as Prepaid Rent, Annual Ground Rent that amortizes Fair Market Value over the Parcel Lease term, or a combination of Prepaid Rent and Annual Ground Rent to the extent permitted in accordance with the Financing Plan;

(iv) identify the Qualified Broker managing the Public Offering;

(v) state a date by which sealed bids must be submitted and specify the deadline by which the bidder must enter into the Vertical DDA;

(vi) attach the proposed form of Vertical DDA in substantially the form attached as **DDA Exhibit D2** and require each bidder in its bid to acknowledge its agreement with its terms or to expressly identify any terms it proposes to modify.

(c) Bidder Prequalification. Each Public Offering document will specify a prequalification period ending no less than 20 days before bids are due during which any person interested in bidding must submit evidence that it meets applicable bidder guidelines. Each Qualified Bidder must:

(i) be an Unrelated Vertical Developer that is reasonably creditworthy given the obligations it is assuming in the Port's reasonable judgment in light of the bidder's other qualifications;

(ii) have one or more principals with at least five years of experience in developing the type of land use to be developed on the Option Parcel; and

(iii) meet all other bidder criteria set forth in **DDA Exhibit D5**, as applicable for residential or commercial-office use.

(d) Offering Period/Bid Award.

(i) The Qualified Broker will determine the deadline by which the bidder must enter into a Vertical DDA in consultation with the Port and Developer. Until such deadline (and subject to a right of first refusal in favor of Developer (the "**Developer ROFR**")), the Port will be obligated to enter into the applicable Vertical DDA for the Option Parcel with the Qualified Bidder submitting the highest bid that meets or exceeds the Fair Market Value as determined by Final Appraisal.

(ii) If none of the bids meets or exceeds Fair Market Value, then the Port in its sole discretion may enter into a Vertical DDA for the Option Parcel with the Qualified Bidder submitting the highest bid that meets or exceeds the Down Market Threshold, which may be a third party or Developer in its exercise of the Developer ROFR.

(iii) The Port will not accept any offers below the Down Market Threshold unless agreed between the Port and Developer, each in its sole discretion.

(iv) Close of Escrow on the applicable Option Parcel with the Qualified Bidder will occur in accordance with the procedures set forth in the applicable Vertical DDA. The Developer ROFR will not apply to any offer that is at or above the Fair Market Value established by Final Appraisal.

(e) Developer Right of First Refusal. Subject to the Port's and Developer's agreement to accept a bid price that is lower than the Fair Market Value but exceeds the Down Market Threshold, each in its sole discretion, any Public Offering will be expressly subject to the Developer ROFR in any situation where the high bid exceeds the Down Market Threshold but is less than the Fair Market Value. Within five business day after

final bids are received, the Port will provide Developer with written notice of the highest qualifying bid, including all material terms and conditions thereof (including price and form of consideration) and the intended date of the proposed Closing. Developer may exercise the Developer ROFR within 15 days after delivery of the Port's notice in the same manner as set forth in **Subsection 7.4(a)** (Option Exercise Deadline), except that the price will be the same as the third-party bid received, and on substantially equivalent terms.

(f) **Effect of Failed Offering.** If no Qualified Bidder submits a timely bid in accordance with **Subsection 7.5(d)** (Offering Period/Bid Award), then the Port will remove the Option Parcel from the market temporarily. Unless precluded by the Schedule of Performance, Developer will have additional opportunities to exercise an Option for that Option Parcel until such time as it would be impossible for Developer to deliver a new Appraisal Notice and Close the conveyance by the applicable Outside Date.

7.6. Vertical Coordination Agreement. As a condition to Developer's reconveyance of its rights to any Development Parcel under the Master Lease, it will deposit for execution and delivery by the applicable Vertical Developer of a Vertical Coordination Agreement with Developer. The purpose of the Vertical Coordination Agreement will be to ensure the orderly development of the 28-Acre Site Project. Although the Port will have the right to review and comment on the Vertical Coordination Agreement, it will not be deemed to be a party to or be required to enforce it.

7.7. Post-Closing Boundary Adjustments. The Parties acknowledge that as development of the 28-Acre Site advances, the description of each parcel of real property may require further refinements, which may require minor boundary adjustments. The Parties agree to cooperate in effecting any required boundary adjustments consistent with *App ¶ A.1.5 (Technical Changes)*. The Port and Developer agree that each Vertical DDA with Vertical Developers will include the obligation to cooperate with Developer and the Port in boundary adjustments.

7.8. Parcel C1A. The Port will have the right to offer Parcel C1A by a Public Offering for office development or market-rate residential if deemed appropriate by the Port in consultation with MOHCD. The Port will not seek any amendments to the SUD Amendments or Design for Development with respect to Parcel C1A without Developer's consent in its sole discretion. Parcel C1A will be a Development Parcel subject to the Master CC&Rs described in **Section 8.6** (Master CC&Rs). The Port's proceeds of its conveyance of Parcel C1A will be Port Capital free of any restrictions under this DDA.

7.9. 20th/Illinois Parcel.

(a) **Relationship to Project.** The 20th/Illinois Parcel is in the SUD but is not in the 28-Acre Site and is not an Option Parcel or a Development Parcel. But the Port has decided to merge a portion of Michigan Street into the 20th/Illinois Parcel, the subdivide the resulting parcel into Parcel K North and Parcel K South as shown generally in **DDA Exhibit A4** and in more detail in **DDA Schedule 4**.

(b) **Treatment of Parcel K North.**

(i) The Port intends to conduct a proprietary public offering process to sell Parcel K North at Fair Market Value established by a proprietary appraisal for a Market-Rate Condo Project. The public offering will be on terms proposed by the Port and approved by the Board of Supervisors by resolution. Terms proposed by the Port will include the following:

- (1) compliance with all applicable mitigation measures of the MMRP, including Mitigation Measure M-AQ-1f, the Transportation Demand Management Plan;

(2) compliance with applicable land use restrictions, impact fees, and exactions imposed by the SUD Amendments, including a requirement to pay in lieu affordable housing fees equal to 28% of the costs of on-site market-rate condominium units;

(3) a Restrictive Covenant requiring that each individual owner who sells a Condo Unit pay the Port a transfer fee of 1.5% of the net purchase price;

(4) compliance with recorded Illinois Street restrictions against the Illinois Street Parcels, a copy of which is attached as **DDA Schedule 5**, to avoid conflicts with activities in the American Industrial Center located directly west of the Illinois Street Parcels; and

(5) a requirement to enter into an agreement with Developer that will address coordination and liability matters between Developer and the applicable purchaser, and pursuant to which, the applicable purchaser will provide Developer with advance notice of the availability of non-impacted surplus soil and provide Developer with the first right to receive the surplus soil at a location for delivery in the 28-Acre Site identified by Developer.

(6) If a third party bidder does not Close Escrow and Developer has not received funds from the sale within 15 months after the date that the Board of Supervisors resolution approving this DDA is signed by the Mayor (the date of such resolution, the “**PKN Conveyance Approval Date**”), then subject to **Subsection 7.9(b)(ii)**, the Port must either: (1) pay Developer an amount equal to the Fair Market Value of Parcel K North, net of assumed costs of sale (i.e., customary closing costs and transfer taxes), within the following 60 days; or (2) offer Developer the right to enter into a Vertical DDA to purchase Parcel K North at its appraised Fair Market Value.

(ii) In order to facilitate the timely conveyance of Parcel K North (and subject to the effectiveness of the proposed Board of Supervisors Ordinance that would amend Subdivision Code 1312.1 (BOS File No 170733), Developer will submit to the Port a Tentative Transfer Map on behalf of the Port prepared in accordance with the City’s Subdivision Code that will encompass the 28-Acre Site, the remainder of the FC Project Area and the Historic Pier 70 Premises. The parcels shown on the Tentative Transfer Map that are within the 28-Acre Site will be consistent with the configuration of Development Parcels, Public ROWs and Public Spaces shown in the Land Use Plan and Phasing Plan. Port will direct Developer as to the parcel configuration for the remainder of the FC Project Area and the Historic Pier 70 Premises. Developer will submit the Tentative Transfer Map draft for submittal to the City within 90 days after it has received written direction from the Port that includes the proposed parcel configuration for the remainder of the FC Project Area and Historic Pier 70 Premises. Port will work diligently and cooperatively with Developer to provide such other information reasonably requested by Developer as necessary to prepare the draft Tentative Transfer Map. Failure of Developer to prepare the Tentative Transfer Map within such 90 days will not be an Event of Default hereunder, but will serve to extend the 15-month period in **Subsection 7.9(b)(6)** on a day-for-day basis from the expiration of the 90-day period until Developer submits the draft Tentative Transfer Map.

(iii) The Port will apply the net sales proceeds or an amount equal to Parcel K North’s Fair Market Value to eligible cost of the 28-Acre Site Project in

accordance with *FP § 7.4(a) (Parcel K North)*. If Developer is the successful bidder for Parcel K North, the parcel will be treated as an Option Parcel under this DDA, except for the appraisal procedures, and Developer will be entitled to submit a Credit Bid for its purchase, subject to the conditions and limitations of *FP § 3.3 (Right to Credit Bid)* and *FP § 3.4 (Amount of Credit Bid)*.

(iv) If Developer does not bid or timely Close Escrow under the Vertical DDA, Developer's rights under this Subsection will terminate automatically without any further action by the Port.

(c) Treatment of Parcel K South. Parcel K South will be an Affordable Housing Parcel subject to the Affordable Housing Plan and the Illinois Street restrictions.

7.10. Hoedown Yard.

(a) Relationship to Project. The Hoedown Yard is in the SUD but is not in the 28-Acre Site and is not an Option Parcel or a Development Parcel. The Port will urge the City to use commercially reasonable efforts to: (i) vacate the public right-of-way bisecting the Hoedown Yard; and (ii) obtain PG&E's consent to subdivide the parcel that would result from merging the former public right-of-way with Hoedown Yard to create parcels called HDY1, HDY2, and HDY3 as shown generally in **DDA Exhibit A4**.

(b) Public Offering.

(i) Assuming that the City exercises its purchase option, the Port will work with the City on a public offering document to sell the Hoedown Yard at or above its Fair Market Value established by appraisal. If the parcel is offered for development as a Market-Rate Condo Project, the offering terms will parallel to those listed in **clause (i) of Subsection 7.9(b)** (Treatment of Parcel K North), except that Condo Unit owners will pay transfer fees to MOHCD.

(ii) At the City's election, the offering document may require the Hoedown Yard developer to build Irish Hill Park subject to reimbursement from HDY Proceeds and Port Tax Increment.

7.11. Historic Building 2.

(a) Option Exercise Procedures.

(i) Building 2 is an Option Parcel in Phase 1. At any time before the Option exercise Outside Date in the Schedule of Performance, Developer may initiate the Option process by notice to the Port. References to Developer in this Section also mean its selected Vertical Developer Affiliate if required in the context.

(ii) If Developer initiates the Option process for Historic Building 2, Developer will prepare conceptual or schematic design plans for the historic rehabilitation of Historic Building 2 in compliance with the Secretary's Standards at a level of detail reasonably required to submit a Part 1 and Part 2 application for Historic Tax Credits. Within a reasonable time after preparing the plans, Developer will submit Part 1 and Part 2 of the application for Historic Tax Credits to NPS, with a copy to the Port; provided, however, that the Port Director may waive this requirement in writing if she reasonably determines based on discussions with the NPS that Historic Building 2 would not qualify for Historic Tax Credits.

(iii) Within 90 days after receipt of NPS's decision whether or not to certify the Part 2 application (or, if applicable, within 90 days after the Port issues its written waiver of the requirement for submittal of the Part 2 application), Developer will submit to the Port a construction cost estimate based on the plans

approved or disapproved under the Part 2 application, and the Parties may meet and confer to discuss adjustments to the application based on the NPS decision. All hard cost estimates must be prepared by a licensed contractor having experience with the rehabilitation of historic buildings, and all soft cost estimates must be prepared by an experienced development manager or consultant working for Developer.

(iv) The decision by NPS on the Part 2 application, if applicable, and delivery of the cost estimate under **clause (iii)** of this Subsection will trigger the appraisal process for Building 2 in accordance with **Section 7.3** (Option Parcel Appraisals) and will commence the conveyance procedures of **Article 7** (Parcel Conveyances). The appraisal will value the ground lease based on a 99-year lease term, with the Appraiser taking into account the construction cost estimate provided by Developer and further subject to the Appraiser's consultation with a third-party cost estimator or experienced construction contractor, but otherwise subject to the same appraisal procedures applicable to other Option Parcels. The Lease will be valued as if Historic Tax Credits are obtained if the NPS certifies the Part 2 application, and as if Historic Tax Credits are not obtained if the NPS does not certify the Part 2 application or if the Port waives the submittal requirement.

(v) If Developer elects to enter into a Vertical DDA after the Final Appraisal in accordance with **Article 7** (Parcel Conveyances), then the appraised value will be paid by Credit Bid at Close of Escrow in accordance with the terms of the Vertical DDA.

(vi) If Developer elects not to exercise its Option for Historic Building 2, the Port will offer Historic Building 2 in accordance with the Public Offering procedures of **Section 7.5** (Public Offering Procedures), except that the minimum bid price will be 85% of the Historic Building 2 value as determined by the appraisal.

(vii) If Developer elects not to exercise its Option for Historic Building 2, its soft costs related to preparation of plans, the Historic Tax Credit application, and cost estimates will be included as Soft Costs under this DDA on which Developer will be entitled to a 12% return if Developer has obtained the agreement of its applicable architects, engineers, and other consultants engaged to produce the required studies, applications, reports, permits, plans, drawings, and similar work product for Historic Building 2 (collectively, the "**Project Materials**") to assign the Project Materials to the Port automatically if Developer elects not to exercise its Option for Historic Building 2 and, if requested by the Port, has entered into an assignment agreement of the Project Materials in such form as reasonably agreed upon by the Parties. As part of such assignment, Developer will be permitted to disclaim any representations or warranties with respect to the Project Materials (other than Developer's payment of fees), and, at Developer's request, the Port will provide Developer with a release from liability for future use of the applicable Project Materials, in a form acceptable to Developer and the Port. Developer's acceptance of the Port's release will be deemed to waive and release the Port from any claims of proprietary rights or interest in the Project Materials, and Developer agrees that, following an assignment of the Project Materials, the Port or its designee may use any of the Project Materials for any purpose, including pursuit of the historic rehabilitation of Historic Building 2 with a third party.

(b) Terms of Conveyance. Historic Building 2 is an Option Parcel and its conveyance by Vertical DDA and Parcel Lease will be in the same form of Vertical DDA

and Parcel Lease attached as **DDA Exhibit D2** and **DDA Exhibit D3** respectively, but subject to the additional or alternative provisions described in the Appendix for Historic Buildings attached to each, addressing, among other matters, the following.

(i) All construction work will comply with the Secretary's Standards and, if certified by NPS, comply with the certified Part 2 application.

(ii) The term of the Parcel Lease will be 99 years.

(iii) Rent will be a Prepaid Lease or Hybrid Lease to the extent permitted under *FP § 3.7(Parcel Lease Options)*.

(iv) Vertical Developer will bear the risk of loss for any event of damage or destruction to Historic Building 2 that occurs prior to Close of Escrow that is estimated to add less than \$500,000 (subject to an annual CPI escalation) to the estimated construction cost (except that Port will assign any insurance proceeds to the Vertical Developer the extent received), and the Vertical Developer may terminate the Vertical DDA in the case of damage or destruction that exceeds \$500,000. Damage or destruction that occurs prior to the date of the Vertical DDA will be governed by **Section 9.2(c)** (Effect on Historic Buildings).

7.12. Arts Building.

(a) Parcel E4. Developer has designated Parcel E4 for construction of the Arts Building, consisting of one or more new buildings in which space will be primarily dedicated to arts/light industrial uses consistent with the SUD Amendments and the Arts Program attached as **DDA Exhibit B6**. The Arts Building may also include replacement space for the Noonan Tenants in accordance with **Section 7.13** (Noonan Replacement Space).

(b) Developer Election. Developer may elect to develop Parcel E4 either: (i) in two separate phases, with a stand-alone building to accommodate the Noonan Replacement Space on approximately 1/3 of Parcel E4 and a separate Arts Building on the remainder of Parcel E4; or (ii) as a single Arts Building on Parcel E4 that would accommodate the Noonan Replacement Space and other arts/light industrial uses consistent with the SUD. If Developer elects to provide the Noonan Replacement Space in a separate building on 1/3 of Parcel E4, Developer, through a Vertical Developer Affiliate or an Arts Master Tenant as described below, will enter into a Vertical DDA and Parcel Lease for the applicable portion of Parcel E4 or, if agreeable to the Parties, a direct Parcel Lease without a Vertical DDA, on the same terms and conditions for the Arts Building as described in **Subsection 7.12(d)** (Arts Building Lease).

(c) Private Fundraising. As a condition to entering into the Vertical DDA and Parcel Lease for the Arts Building, Developer or the Arts Master Tenant must have obtained a minimum of \$17.5 million in cash and pledges for grants, charitable contributions, and other private sources to fund the Arts Building. Pledges will be verified by the Controller under procedures established to protect confidential information such as names of donors and amounts of individual donations.

(d) Arts Building Lease.

(i) Developer, through a Vertical Developer Affiliate or an Arts Master Tenant as described below, will enter into a Vertical DDA and Parcel Lease with the Port substantially in the forms attached as **DDA Exhibit D2** and **DDA Exhibit D3**, as modified by the Appendix for Parcel E4. In either case, the initial term of the Parcel Lease will be 50 years with an option in favor of the tenant to extend by an additional 16 years.

(ii) The Vertical Developer will be obligated to construct the Arts Building. The scope of development for the Arts Building will be subject to the requirements of the Arts Program attached as **DDA Exhibit B6**.

(iii) Base rent for the initial 50-year term will be \$1 per year, prepaid in advance. Base rent for the 16-year extension term will be set at a commercially reasonable amount as agreed-upon by the Port and the master tenant, taking into account the required uses of the Arts Building, including the requirements of the Noonan Space Parcel Lease as described in **Subsection 7.13(a)** (Obligation to Provide Space), if applicable, subject to dispute resolution procedures as more particularly described in the Building E4 Appendix to the form of Parcel Lease.

(e) Allocation of Port Community Facilities Funds. The Parties acknowledge that under *FP § 1.3(a)(iii) (Pier 70 Leased Property CFD)*, the Port has agreed to subsidize the Arts Building by providing a no-cost lease and has committed up to \$20 million of in Arts Building Proceeds toward funding the Noonan Replacement Space, the Arts Building Costs, and community facilities within the 28-Acre Site and surrounding neighborhood. Subject to *FP art. 10 (Arts Building)*, the first priority for the Arts Building Proceeds is \$13.5 million for the Noonan Replacement Space provided under **clause (iii) of Subsection 7.13(b)** (Artist Transition Plan). In the event of a termination under **Subsection 7.12(g)** (Schedule of Performance), the Port may use the Arts Building Proceeds other than the Noonan Replacement Space and call on the Noonan Tenant Phase Security under **Subsection 17.3(d)** (Noonan Replacement Space) to be used toward a publicly-oriented use described in **Subsection 7.12(h)** (Use After Termination).

(f) Arts Master Tenant Qualifications. Developer may assign its lease rights under this Section to an Arts Master Tenant that satisfies all of the following criteria, or otherwise approved by the Port in its sole discretion.

(i) The proposed Arts Master Tenant must provide the Port with reasonably satisfactory evidence of its ability to fully fund the proposed project, including fundraising and grants, and its ability to service debt in light of the obligations it is assuming in the Port's reasonable judgment in light of the bidder's other qualifications.

(ii) The proposed Arts Master Tenant must have one or more principals with at least five years of experience in developing real estate projects of similar size and scope to the proposed building on Parcel E4 with nonprofit arts organizations in San Francisco and throughout the greater Bay Area.

(iii) The proposed Arts Master Tenant must identify a project team, including real estate development consultants, architects, construction management professionals, and a general contractor that each have at least 10 years' experience in developing real estate projects of similar size and scope to the proposed building on Parcel E4.

(g) Schedule of Performance.

(i) The Vertical Developer Affiliate or the Arts Master Tenant must comply with the Schedule of Performance for the Arts Building.

(ii) If the Vertical Developer Affiliate or the Arts Master Tenant Developer fails to enter into the Vertical DDA or Parcel Lease within the time required under the Schedule of Performance, the Port, as its sole remedy, may terminate Developer's development rights to any portion of Parcel E4 for which Developer has not satisfied the requirements of this Section, effective

immediately upon delivery of notice and without any action by the Port Commission.

(h) Use After Termination. After termination in accordance with **Subsection 7.12(g)(i)** (Schedule of Performance), the Port, in its sole discretion, may use Parcel E4 for any publicly-oriented use as reasonably determined by the Port, consistent with the SUD Amendments and Design for Development and may sell or lease Parcel E4 to a third party by Public Offering for development and operation of a publicly-oriented use. The Port will not process any amendment to the SUD Amendments or Design for Development to accommodate a proposed use on Parcel E4 without agreement between the Port and Developer, each in its sole discretion. Any proceeds received by the Port from a conveyance of Parcel E4 under a Public Offering will be Port Capital free of any restrictions under this DDA.

7.13. Noonan Replacement Space.

(a) Obligation to Provide Space. Construction of the 28-Acre Site Project must be phased to ensure that the Noonan Tenants have the right (but not the obligation) to move to a new or rehabilitated building within the 28-Acre Site Project for which the Port has issued a Temporary Certificate of Occupancy that meets the requirements of this Section (the “**Noonan Replacement Space**”). The Parties acknowledge that the Noonan Replacement Space will likely be provided in two phases: a temporary space within the 28-Acre Site (the “**Temporary Noonan Replacement Space**”) that will allow for the demolition of the Noonan Building and the development of a permanent transition space that will likely be located on the site of Parcel E4 (the “**Noonan Replacement Space**”). If Developer fails to enter into the Vertical DDA or Parcel Lease within the time required under the Schedule of Performance (or cause the Arts Master Tenant to do so), then Developer may designate the Noonan Replacement Space within any appropriate space within the 28-Acre Site that it chooses, consistent with all applicable Regulatory Requirements. As described in **Section 7.12** (Arts Building), Developer, through a Vertical Developer Affiliate or Arts Master Tenant, retains the flexibility, with or without first entering into a Vertical DDA, to enter into either: (i) a Parcel Lease for up to 1/3 of Parcel E4 on which it would construct a stand-alone building to accommodate the Noonan Replacement Space; or (ii) a Parcel Lease for all of Parcel E4 for a single Arts Building, subject the conditions of **Section 7.12** (Arts Building), in which case, the Arts Building must accommodate the Noonan Replacement Space unless otherwise approved by the Port.

(b) Artist Transition Plan. Prior to or in connection with the Phase Submittal for the Phase in which Developer intends to demolish the existing Noonan Building, Developer will consult and cooperate with the Port prepare a transition plan (the “**Artist Transition Plan**”) in consultation with the Noonan Tenants and the Port, which will be submitted for Port approval. The Port will approve the Artist Transition Plan within 30 days of its submittal (or 15 days in the case of a resubmittal as provided below). If the Port disapproves the Artist Transition Plan, it will provide Developer with notice, with a reasonably detailed explanation of the reasons for disapproval. The Artist Transition Plan will be an agreement binding on the Port and Developer and will include the material terms described below. The Port will include relevant terms under the Artist Transition Plan in the Parcel Lease for the building in which the Noonan Replacement Space will be located (the “**Noonan Space Parcel Lease**”) and will reasonably cooperate with Developer in the implementation of the Artist Transition Plan. The Artist Transition Plan will address the following matters, at a minimum.

(i) Notice and Terms for Temporary Noonan Replacement Space. The Port, with Developer’s cooperation and consultation, will provide the Noonan Tenants with a minimum of 6 and up to 24 months’ prior written notice (“**Initial**

Transition Notice”) of the termination of their respective leases at the Noonan Building, with an opportunity to relocate to the Temporary Noonan Replacement Space upon termination. The Temporary Noonan Replacement Space will be subject to a sublease with each Noonan Tenant under the applicable Parcel Lease on the tenant’s standard commercial sublease form, subject to the requirements of **clause (iv)** and **clause (v)**. Each sublease will include a termination clause with 24 months’ advance notice to allow the Noonan Tenant relocating to the Temporary Noonan Replacement Space to transition to the Noonan Replacement Space.

(ii) Master Tenant. To the extent feasible, the sublease of the Temporary Noonan Replacement Space will be with a single subtenant representing the Noonan Tenants (such as a duly formed nonprofit entity) that licenses or subleases artist space to individual artists. Each Noonan Tenant must respond to the Initial Transition Notice within 60 days of the Initial Transition Notice with its election to vacate the Noonan Building or move to the Temporary Noonan Replacement Space upon the termination of their lease as set forth in the Initial Transition Notice. Any Noonan Tenant that elects not to relocate to the Temporary Noonan Replacement Space within the time required must vacate the Noonan Building within the time required under the Initial Transition Notice, which obligation will be enforced by the Port under the existing lease for the Noonan Building, and will forego its rights to locate within the Noonan Transition Space.

(iii) Notice and Terms for Noonan Replacement Space. The Vertical Developer under the applicable Parcel Lease for the Temporary Noonan Replacement Space, with the Port’s cooperation and consultation, will provide the Noonan Tenants with a minimum of 24 months’ prior written notice (“**Second Transition Notice**”) of the termination of the applicable subleases at the Temporary Noonan Replacement Space, with the opportunity to relocate to the Noonan Replacement Space upon termination. Each Noonan Tenant must respond to the Second Transition Notice within 60 days of the Second Transition Notice to vacate the Temporary Noonan Replacement Space or move to the Noonan Replacement Space upon the termination of their lease as set forth in the Second Transition Notice. Any Noonan Tenant that elects not to relocate to the Noonan Replacement Space within the time required must vacate the Temporary Noonan Replacement Space within the time required under the Second Transition Notice and will forego its rights to locate within the Noonan Transition Space.

(iv) Size. The Noonan Replacement Space will be sized to accommodate those existing Noonan Tenants that elect to relocate to the Noonan Replacement Space, estimated to be between 20,000 and 25,000 gsf. Procedures for determining the size of individual subtenant spaces and priority for selection will be identified in the Artist Transition Plan, and, for the Noonan Replacement Space, will be managed by the Arts Master Tenant, if applicable, under the Noonan Space Parcel Lease in consultation with the Port and the Noonan Tenants.

(v) Rent. The base rent for the Noonan Replacement Space will be permanently restricted during the term of the sublease for the Temporary Noonan Replacement Space, and for the life of the building of the Noonan Replacement Space to reflect the following components (collectively, the “**Noonan Tenant Rent**”).

(1) Base rent will be \$1.30 per square foot (i.e., equal to the Port’s parameter rent schedule for the tenant’s existing space on the Reference Date), adjusted by the percentage of change between the CPI

first published in any full month after the Reference Date and the CPI published for the month most immediately prior to the rent commencement date of the applicable Noonan Tenant sublease, with an annual CPI adjustment thereafter.

(2) To the extent the Noonan Tenant base rent would not be reasonably anticipated to cover customary common area charges for the Noonan Replacement Space (e.g., taxes, insurance, utilities and building maintenance and repair), an additional amount per subtenant based on the size of their subleased premises to the extent required to operate the building in which the Noonan Replacement Space is located without an annual operating loss, as determined by the master tenant under the Parcel Lease for the Noonan Replacement Space in consultation with the Port. However, the amount of common area charges that may be passed on to subtenants under the Noonan Space Parcel Lease must not exceed: (A) 10% of base rent for each initial Noonan Tenant that relocates to the applicable Noonan Replacement Space; and (B) 50% of base rent for any subsequent subtenant occupying the Noonan Replacement Space.

(c) Moving Expenses. Developer will be responsible for actual moving expenses of each eligible Noonan Tenant that moves to the Temporary Noonan Replacement Space and the Noonan Replacement Space, including costs of transportation, packing, crating, unpacking and uncrating personal property, insurance covering personal property, and connection charges for starting utility service.

(d) Remedies for Failure. Unless previously approved, the Artist Transition Plan will be a component of the Phase Approval for the Phase in which demolition of the Noonan Building is scheduled to occur. Developer's failure to comply with its obligations hereunder will not be a Material Breach; however, the Port may withhold the issuance of any permit that would authorize demolition of the Noonan Building unless and until: (i) Developer has obtained Port approval of the Artist Transition Plan meeting the requirements of this Section; and (ii) the Port has issued a Temporary Certificate of Occupancy for the designated Noonan Replacement Space. The Port's failure to issue a demolition permit due to Developer's failure to satisfy the foregoing conditions will not be an event of Administrative Delay. In addition, the Port will have the right to call on the Adequate Security for the Noonan Transitions Costs in accordance with **Subsection 17.3(d)** (Phase Security for Noonan Replacement Space).

7.14. Historic Buildings 12 and 21. Except as otherwise provided in **Subsection 9.2(c)** (Effect on Historic Buildings), Developer must rehabilitate Historic Building 12 and Historic Building 21 in accordance with the Secretary's Standards and subject to the Schedule of Performance, all as more particularly described in this Section.

(a) Schedule. As shown on the Schedule of Performance, Developer must comply with the following schedule for Historic Buildings 12 and 21.

(i) The Vertical Developer Affiliate must enter into a Vertical DDA and Close Escrow on a Parcel Lease for Historic Building 12 consistent with **Subsection 7.14(b)** (Forms) within the times provided under the Schedule of Performance.

(ii) The Vertical Developer Affiliate must enter into a Vertical DDA and Close Escrow on a Parcel Lease for Historic Building 21 consistent with **Subsection 7.14(b)** (Forms) within the times provided under the Schedule of Performance.

(b) Forms. The Vertical DDA and Parcel Lease for Historic Building 12 and Historic Building 21 will be substantially in the forms attached as **DDA Exhibit D2** and

DDA Exhibit D3, but subject to the additional and alternative provisions described in the Appendix for Historic Buildings attached to each, addressing, among other matters, the following terms.

(i) The Vertical Developer Affiliate will be required to rehabilitate or cause to be rehabilitated Historic Building 12 and Historic Building 21 consistent with the Design for Development and in accordance with the Schedule of Performance, consistent with the Secretary's Standards.

(ii) The Vertical Developer Affiliate will be required to submit Part 1 and Part 2 of the application for Historic Tax Credits, provided, however, that the Port Director may waive this requirement if she reasonably determines based on discussions with the NPS that Historic Building 12 and 21 would not qualify for Historic Tax Credits;

(iii) The term of each Parcel Lease will be 66 years.

(iv) Base rent will be \$1/year.

(v) Participation rent will equal 3.5% of Modified Gross Income (as defined in the Parcel Lease) subordinate the rights of any permitted Lienholder thereunder, starting on the 31st anniversary of the issuance of a Temporary Certificate of Occupancy for the applicable Historic Building.

(vi) As a condition to Close of Escrow on the Parcel Lease, the Vertical Developer Affiliate must provide a guaranty from a Obligor having a Net Worth of not less than \$10 million that unconditionally and irrevocably obligates the Obligor to cause the lien-free completion of the required improvements. The guaranty will be in a form reasonably satisfactory to the Port based upon then-prevailing terms in the market.

(vii) Damage and Destruction. The Vertical Developer Affiliates will bear the risk of loss for any event of damage or destruction to Historic Building 12 or 21, as applicable, that occurs prior to Close of Escrow on the Parcel Lease that is estimated to add less than \$500,000 (subject to an annual CPI escalation) to the estimated construction cost (except that the Port will assign any insurance proceeds to the Vertical Developer the extent applied to reconstruction costs), and the Vertical Developer may terminate the Vertical DDA in the case of damage or destruction that exceeds \$500,000. Damage or destruction that occurs prior to the date of the Vertical DDA will be governed by **Subsection 9.2(c)** (Effect on Historic Buildings).

(viii) Participation in Proceeds from Sales and Refinancing. Participation rent features set forth in the form of Parcel Lease governing participation in sales and refinancing proceeds will apply equally to the Parcel Leases for Historic Building 12 and 21.

(c) Failure to Proceed a Material Breach. If the Vertical Developer Affiliate fails to enter into a Vertical DDA for Historic Building 12 or 21 by the Outside Date shown on the Schedule of Performance for any reason except the Port's failure to execute the Vertical DDA, it will be a Material Breach by Developer and the remedies of **Section 12.4** (Termination as Port Remedy) will apply.

(d) Vertical Developer Default. If Vertical Developer Affiliate fails to Commence Construction and thereafter diligently prosecute to completion the required Improvements under the Schedule of Performance, it will not be a default under this DDA, but Port may exercise all available remedies under the applicable Vertical DDA, including an action on the completion guaranty described in **Subsection 7.14(b)** (Forms), specific performance and termination of the Parcel Lease. After termination, the Port

will have the right to offer Historic Building 12 and Historic Building 21 by Public Offerings for any use permitted under the SUD Amendments. The Port's proceeds from a conveyance under this clause will be Port Capital free of any restrictions under this DDA.

7.15. Rooftop Open Space. The 28-Acre Site Project may include 20,000 gsf of contiguous rooftop open space that could be used for active recreation (the "**Rooftop Open Space**"), to be provided in accordance with this Section.

(a) Provided by the Port. If the Port develops Parcel C1A for commercial use, it will provide at least 20,000 gsf of the rooftop space on the roof of Parcel C1A, subject to funding availability. The Port may use public finance proceeds to pay for the Rooftop Open Space as a public benefit of the 28-Acre Site Project. If the Port, in consultation with MOHCD, is able to develop residential use on Parcel C1A, then the procedures of **Subsection 7.15(b)** (Selected by Developer) will apply.

(b) Selected by Developer. If the Port, in consultation with MOHCD, notifies Developer prior to Developer's Phase Submittal for Phase 3 that the Port will not develop Parcel C1A for commercial use, then the Port may request Developer to include in its Phase Submittal for Phase 3, a location for the Rooftop Open Space on a commercial parcel in Phase 3, subject to the following conditions.

(i) The Vertical DDA for the Option Parcel subject to the Rooftop Open Space will include a condition precedent to the Vertical Developer's obligation to provide the Rooftop Open Space that the Port has demonstrated to the Vertical Developer's reasonable satisfaction at Close of Escrow that Public Financing Sources are available to pay for the construction costs, at time of construction, to be incurred by the Vertical Developer solely associated with the Rooftop Open Space, including items such as Construction Code requirements triggered by the Rooftop Open Space (e.g., structural framing or a change in building type construction), additional elevators, a dedicated entry, additional egress requirements, and noise mitigation measures to shield the commercial uses within the building.

(ii) The Vertical DDA will include a mechanism for timely payment of the Vertical Developer's construction costs as they are incurred, from available Public Financing Sources.

(iii) The Vertical Developer will have no obligation or liability for operation and maintenance of the Rooftop Open Space. Costs of operation and maintenance (including additional costs to building such as security, separate entrance lobby, etc.) will be paid through the Maintenance Special Taxes and the costs of Maintained Facilities included in the budget and tax rates for the Pier 70 Leased Property CFD and Zone 2 of the Pier 70 Condo CFD.

(iv) As a condition to Vertical Developer's construction obligations, the Port and City will take actions necessary to allow development of the Rooftop Open Space.

7.16. Affordable Housing Parcels. Developer has preliminarily selected, and the Port and MOHCD have approved, Parcel C1B and Parcel C2A as the Affordable Housing Parcels in the 28-Acre Site, and Port has also agreed that Parcel K South will also be an Affordable Housing Parcel. Developer will comply with its obligations under the Affordable Housing Plan, including the preparation and timely delivery of the Affordable Housing Parcels and the requirement that no more than 50% of all Market-Rate Units at full build-out of the 28-Acre Site will be sold as Condo Units.

7.17. PDR. No less than 50,000 gsf of space within the 28-Acre Site Project will be restricted for PDR use (the “**PDR Requirement**”) through compliance with this Section. Developer will identify in each Phase Submittal each Development Parcel within the Phase, if any, that will accommodate all or a portion of the PDR Requirement. Upon approval of each Phase Submittal that contains all or a portion of the PDR Requirement, the Port will incorporate the applicable PDR use and size restriction into the Parcel Lease for the applicable Development Parcel. If Developer has not identified sufficient space to fulfill the PDR Requirement with the Phase Submittal for Phase 2, the Port may condition its approval of the Phase Submittal for Phase 3 upon Developer’s satisfaction of the remaining PDR Requirement within Phase 3. A default by a Vertical Developer under the applicable Parcel Lease of its obligation to comply with the PDR Requirement will be a default in accordance with the applicable terms of the Parcel Lease, but will not give rise to an Event of Default under this DDA. The Appraisal Instructions for any Option Parcel that will be subject to the PDR Requirement will take into account the required gsf of the PDR Requirement.

7.18. Child Care.

(a) Locations. Developer will accommodate two on-site childcare facilities within the 28-Acre Site Project, as provided in this Section. In both its Phase Submittal for Phase 1 and its Phase Submittal for either Phase 2 or Phase 3, Developer will identify the potential location for an on-site childcare facility within the applicable Phase with a capacity of a minimum of 50 children each and meeting all applicable Regulatory Requirements. The locations and maximum size for the childcare facilities will be limited to the potential childcare locations shown on the map attached as **DDA Exhibit B7**. The Port and Developer may agree to move the location of the childcare facility shown in a Phase Approval to another of the eligible childcare sites at any time prior to Developer’s delivery of an Appraisal Notice for the applicable Option Parcel. The requirement for the on-site childcare facility will be included in the Appraisal Instructions for the applicable Option Parcel.

(b) Sublease. When the location of the childcare facility is finally determined within each applicable Phase, the Port will include a provision in the Vertical DDA for the applicable Option Parcels that requires the Vertical Developer to provide a childcare facility meeting the requirements of this Section. Each facility must have a capacity of a minimum of 50 children and be available for lease to a qualified nonprofit operator at a cost not to exceed actual operating and tenant improvement costs reasonably allocated to similar facilities in similar buildings, amortized over the term of the lease.

(c) Potential Reinstatement of Childcare Fees. Developer may request the elimination of one or both of the childcare facilities from the 28-Acre Site Project, subject to the Port’s approval in its sole discretion. If the Port approves such request as to a particular Option Parcel, the Vertical Developer under the applicable Vertical DDA will be required to pay an amount equal to the Impact Fees under Planning Code sections 414.1-414.15 and sections 414A.1–414A.8 as a condition to the Port’s approval.

7.19. Community Facilities.

(a) Right to Sublease. The City will have the right to sublease from Vertical Developers within the 28-Acre Site (excluding the frontages designated in the Design for Development and SUD Amendments as “priority retail”) up to 15,000 gsf of community facilities (the “**Community Facility Space**”) at fair market rents and on lease terms consistent with then-current market. The Community Facility Space will be subject to all applicable requirements of the subject Parcel Lease, including those provisions governing prohibited uses.

(b) Prohibited Uses. The City must not use the Community Facility Space for any automobile-related uses, garages, hazardous waste facility, incinerators, junkyards,

machine shops, public utilities yards, recycling centers, social services, or health services operated or directed by the City specifically or primarily for purposes of community behavioral health services, community substance abuse services, or similar services, service yards, storage yards, or wireless telecommunications services facilities.

(c) Exercise of Right.

(i) In each Phase Submittal that includes commercial-office uses, Developer will designate one or more eligible Option Parcels that could accommodate the Community Facility Space, or if 15,000 gsf of contiguous ground floor space is not available in the subject Phase, Developer may propose a distribution of the 15,000 gsf among more than one building in the Phase. In its Phase Approval, the Port, in consultation with the City, must notify Developer as to whether or not the City intends to accept the right to the Community Facility Space within any designated location (each, a “**CF Election**”).

(ii) If the Port makes the CF Election, then it will forfeit its right to Community Facility Space in any Later Phase, but the Parcel Lease for the designated Option Parcel will include a requirement for the Vertical Developer to provide the City with a right of first offer to sublease the Community Facility Space at fair market rent and on market terms. If the City fails to exercise its right of first offer within six months after execution date of the applicable Vertical DDA or if it elects not to exercise a sublease renewal option, it will forfeit all further rights to the Community Facility Space.

(d) Failure to Exercise. If the Port fails to make the CF Election with the Phase Approval, it will forfeit the City’s right to the Community Facility Space for that Phase, but Developer must offer an alternate Community Facility Space in each Later Phase. The Port will forfeit the City’s right to any Community Facility Space if the Port has failed to make the CF Election by the date of the Phase 3 Phase Approval.

7.20. Report on Associated Public Benefits. With the Phase Submittal application for Phase 3, and within six months after the Port has issued the last Final Certificate of Occupancy for all Vertical Improvements in all Phases, Developer must submit to the Port a report that describes compliance with the Associated Public Benefits described in this DDA. The Associated Public Benefits Report will track compliance with all categories of Associated Public Benefits provided with applicable Development Parcels and Affordable Housing Parcels, and, at the beginning of Phase 3, will describe how all remaining Associated Public Benefits will be achieved and enforced within Phase 3.

8. DELIVERY OF MASTER LEASE

8.1. Procedures for Delivery .

(a) Escrow. Within 60 days after the Reference Date, Developer will open an Escrow with an Escrow Agent and promptly notify the Port of the Escrow number and contact information for the title officer assigned to the Escrow.

(b) Title Report. Prior to the Effective Date, Developer caused the Title Company to deliver to Port and Developer a preliminary title report (the “**Preliminary Title Report**”) for the 28-Acre Site, together with copies of all documents relating to title exceptions shown in the title reports. The Port Title Covenant will apply to the Master Lease Premises and each Option Parcel that the Port conveys to a Vertical Developer under each Vertical DDA.

(c) Permitted Exceptions. Attached as **DDA Exhibit D1** is a copy of the Preliminary Title Report, marked to show those title exceptions that Developer has approved for delivery of the Master Lease. The “**Permitted Exceptions**” are: (i) those

exceptions that are marked as “approved” on **DDA Exhibit D1**; (ii) exceptions created by this DDA or with the written consent of Developer; (iii) exceptions for the Project Approvals; and (iv) exceptions that are “Permitted Exceptions” under each Vertical DDA.

(d) Quiet Title Action. The Parties acknowledge that the Preliminary Title Report contains exceptions that could adversely affect planned development of the 28-Acre Site and that may be removed by a McEnerney action. The Port will file and diligently prosecute to judgment the appropriate McEnerney action. The McEnerney action exception will be considered a Permitted Exception so long as the Port has initiated the necessary McEnerney actions prior to delivery of the Master Lease, and the Title Company commits to issue an endorsement insuring Developer for claims related to the title matters that are the subject of the McEnerney action at Close of Escrow for the Master Lease. If the Port obtains a favorable judgment in the action, it will obtain a certified copy of the judgment and instruct to Escrow Agent to record the judgment and issue an amendment or endorsement removing the exception. Developer must cooperate with the Port, and all fees and costs the Port incurs in McEnerney action will be included as Port Capital under the Financing Plan.

(e) Street and Utility Easements. The Parties acknowledge that the Permitted Exceptions include various exceptions, including easements and agreements relating to public streets and various public utilities, including gas, sewer, water, and electrical (collectively, the “**Street and Utility Easements**”), the presence of which could adversely affect or delay the Commencement or the completion of the applicable Phase Improvements. In the absence of approved Improvement Plans for the applicable Phase Improvements, the Parties are unable to identify all Permitted Exceptions that might interfere with the development of the 28-Acre Site Project. Therefore, in connection with each Phase Submittal and Phased Final Map, the Parties will work cooperatively to identify those Street and Utility Easements that should be abandoned, removed, relocated, amended, or otherwise modified to permit the construction of the Phase Improvements (each, an “**Easement Action**”). To the extent that the Easement Actions will require action by the City, such as a quiet title action or Board of Supervisors action to abandon, vacate, or relocate (temporarily or permanently) the applicable Street and Utility Easement, the City will take all such reasonable measures to implement the required Easement Actions at Port’s sole cost, and such costs will be included as Port Capital under the Financing Plan.

8.2. Disapproved Exceptions.

(a) Removal of Title Exceptions. Except as set forth in this Section, the Port will convey the leasehold interest under the Master Lease subject only to the Permitted Exceptions and free of all tenants, leases, and occupants. If any exceptions to title are not Permitted Exceptions, the Port will cause the removal of such exceptions prior to execution and delivery of the Master Lease or otherwise cause the Title Company not to show such exceptions in the Developer’s Title Policy, and any such delay shall be an event of Excusable Delay applicable to all times for performance by Developer under this DDA. The Port’s efforts with respect to the removal of exceptions pursuant to this Section will be included as Port Capital under the Financing Plan.

(b) Relocation. If the Port has tenants other than the Noonan Tenants on any portion of the 28-Acre Site who require relocation, the Port, at its sole cost, will comply to the extent applicable with requirements of the California Relocation Assistance Law (Cal. Gov’t Code §§ 7260 et seq.) and any other Applicable Laws. Any Port costs incurred with the relocation of any tenants or occupants of the 28-Acre Site other than the Noonan Tenants will not be eligible for reimbursement as Port Capital under the Financing Plan or in any other manner. Subject to the requirements of **Section 7.13**

(Noonan Replacement Space), the Port will be obligated to terminate the Noonan Building lease, the Affordable Self-Storage Lease, and the rights of SFPUC and any other tenants or subtenants of Building 21 when needed by Developer for construction of the Horizontal Improvements upon prior notice by Developer given in accordance with the Master Lease.

(c) Election of Remedies. If the Port fails to remove any title exception that is not a Permitted Exception prior to Close of Escrow for delivery of the Master Lease, then Developer may elect any of the following actions.

(i) Developer may terminate Escrow for delivery of the Master Lease and terminate this DDA by delivering notice to the Port.

(ii) Developer may elect to remove the exception after delivering notice to the Port. Developer may take any actions reasonably necessary to remove the exception, which may include obtaining an endorsement from the Escrow Agent insuring over the exception. A delay in Closing caused by this election will be an Excusable Delay so long as long as Developer is diligently proceeding with its election.

(iii) Developer may waive its objection and execute and accept delivery of the Master Lease subject to the exception, which will then be deemed to be a Permitted Exception.

(d) Effect of Action or Inaction.

(i) Developer's timely election under **Subsection 8.2(c)** (Election of Remedies) will not affect Developer's remedies under **Section 11.4** (Remedies Generally) if the title exception is caused by the Port's breach of the Port Title Covenant, subject to any notice and cure requirements under **Section 11.3** (Event of Default by the Port).

(ii) Developer's failure to make a timely election under this Subsection will be deemed to waive any objections to applicable title exceptions that are not Permitted Exceptions, and each exception that Developer is deemed to have waived will also be deemed to be Permitted Exceptions.

(e) Developer's Title Policy. Developer's obligation to Close Escrow on the Port's conveyance of the Master Lease is conditioned on the Escrow Agent's irrevocable commitment to issue to the Developer a CLTA title insurance policy (or at the Developer's option, an ALTA extended coverage title insurance policy) insuring Developer's leasehold interest under the Master Lease. Developer may designate desired endorsements, reinsurance, and direct access agreements for the policy and the amount insured, subject to the Escrow Agent's reasonable agreement. The title policy must insure Developer's interest in the Master Lease Premises under the Master Lease, subject only to the Permitted Exceptions. If Developer elects to obtain an ALTA owner's policy, Developer will be responsible for securing at its sole cost, without reimbursement as a Soft Cost, any required surveys, engineering studies, and other documents in time to permit Close of Escrow by the Closing Deadline.

(f) Port's Title Policy. The Port's obligation to Close Escrow on the Master Lease is conditioned on the Escrow Agent's irrevocable commitment to issue to the Port a CLTA owner's title insurance policy in an amount specified by the Port and satisfactory to the Title Company, insuring Port's fee interest in the Master Lease Premises subject to the Permitted Title Exceptions that are applicable to the fee, and with such CLTA endorsements as Port may reasonably request, all at the sole cost of Developer, provided that Port pays any incremental cost for such policy (including endorsements) in excess of the cost of the title insurance policy and endorsements referred to in **Subsection 8.2(e)**

(Developer's Title Policy) and further provided that this condition precedent will not apply if any existing Title Policy for the 28-Acre Site (including any endorsements that can be issued by Title Company) does not adequately provide the coverage described in this Subsection, as reasonably determined by the Port. The Port's incremental costs to obtain title insurance will be included as Port Capital under the Financing Plan.

(g) Boundary Adjustment. The Port has leased property adjacent to the 28-Acre Site to Historic Pier 70, LLC, as shown on **DDA Schedule 6** (the "**Historic Pier 70 Premises**") that includes land on which Developer must construct portions of Louisiana and 20th Streets and that Port must deliver to Developer under the Master Lease. Within 90 days after the Reference Date, the Port will initiate a minor boundary adjustment to the Historic Pier 70 Premises to remove all title exceptions marked on **DDA Exhibit D1** as Vertical DDA Disapproved Exceptions that relate to the Historic Pier 70 Premises. Developer and Port will promptly record a Memo of Technical Changes to revise the legal descriptions of the Historic Pier 70 Premises, the Master Lease Premises, and the 28-Acre Site if needed for any other Transaction Document.

8.3. New Title Matters. The Port agrees that it will not voluntarily permit or cause to be created after the Reference Date any new exceptions to title other than the Permitted Exceptions (the "**Port Title Covenant**"). If the Escrow Agent advises Developer of a new title exception that is not a Permitted Exception that arises after the Reference Date, this Section will apply.

(a) Time and Right to Object.

(i) If the new exception would materially and adversely affect the Developer's intended use of the Master Lease Premises or the delivery and development of any Option Parcel, then Developer must provide notice of its objection to the Port no later than five business days after the Escrow Agent provided the information to Developer.

(ii) Unless the Port created or consented to the new title exception, the Port may elect in its sole discretion to cause the Escrow Agent to remove the new exception from the title policy to be issued to Developer at Close of Escrow. The Port must notify Developer within 30 days after receipt of Developer's objection whether the Port elects to remove the exception. If Developer reasonably determines that the time for the Port to remove the exception would delay Developer's performance of its obligations under the Schedule of Performance, then such delay will be an event of Excusable Delay applicable to all times for performance by Developer under this DDA. The Port's efforts with respect to the removal of exceptions pursuant to this Subsection will be at the Port's sole cost and will not be subject to reimbursement as Port Capital.

(b) Port Failure to Remove or Respond. If the Port elects not to remove the exception or fails to respond within the 30-day period, then Developer may elect one of the following actions.

(i) Developer may terminate Escrow for delivery of the Master Lease and terminate this DDA by delivering notice to the Port of its election.

(ii) Developer may elect to remove the exception after delivering notice to the Port. Developer may take any actions reasonably necessary to remove the exception, which may include obtaining an endorsement from the Escrow Agent insuring over the exception. A delay in Closing caused by this election will be an Excusable Delay so long as long as Developer is diligently proceeding with its election.

(iii) Developer may waive its objection, execute and accept delivery of the Master Lease subject to the exception, which will then be deemed to be a Permitted Exception.

(iv) Developer's failure to make a timely objection to a new title matter under this Subsection will be deemed to waive its objection. New exceptions that the Developer is deemed to have accepted will also be deemed to be Permitted Exceptions.

(v) With respect to any Vertical DDA Disapproved Exceptions that relate to the Historic Pier 70 Premises, Developer may delay Closing for the period of time necessary for the Port to remove the exceptions, and the period between the date that is 90 days after the Reference Date and the date that the Memorandum of Technical Changes is recorded under **Subsection 8.2(g)** (Boundary Adjustment) will be an event of Excusable Delay that will extend all dates in the Schedule of Performance on a day-for-day basis.

(c) Remedies. Developer's timely election under **Subsection 8.3(a)** (Time and Right to Object) or under **Subsection 8.3(b)** (Port Failure to Remove or Respond) will not affect Developer's remedies under **Section 11.4** (Remedies Generally) if the new exception is caused by the Port's breach of the Port Title Covenant, subject to any notice and cure requirements under **Section 11.3** (Events of Default by the Port).

8.4. Conditions to Closing.

(a) Developer Conditions. The following are conditions precedent to Developer's obligation to Close Escrow for the Port's conveyance of the Master Lease unless expressly waived by Developer's notice to the Port.

(i) The Port has performed all obligations under this DDA that the Port is required to perform by the Closing Deadline.

(ii) The Port is not in Material Breach under this DDA.

(iii) The Escrow Agent is irrevocably committed to issue title insurance to Developer at the Close of Escrow, subject only to Permitted Exceptions and, if applicable, the McEnerney action, and otherwise on conditions specified in the Joint Escrow Instructions.

(b) Port Conditions. The following are conditions precedent to the Port's obligation to Close Escrow for the Master Lease with Developer unless expressly waived by the Port's notice to Developer.

(i) Developer has provided the Port with certificates of insurance or duplicate originals of insurance policies and binders that will provide the required coverage effective as of the Closing Deadline to the extent required under **Article 20** (Insurance) of the Master Lease.

(ii) Developer, as Tenant under the Master Lease, delivered to Port an acknowledgment (the "**Notice of Special Tax**") confirming that Tenant has been advised of the terms and conditions of the future formation of the CFD, including that the Premises will be subject to CFD Assessments, as defined in the Master Lease.

(iii) Developer is not in Material Breach of this DDA and no event that, with notice and the opportunity to cure, would be a Material Breach if uncured has occurred and is continuing.

8.5. Close of Escrow.

(a) Closing Costs. Developer will be responsible for all Developer Closing Costs.

(b) Closing Deliveries.

(i) Developer will provide the Port with at least 90 days' prior written notice of its intent to Close Escrow (the "**Closing Date**"), which date will be no later than the date that is 90 days prior to the Outside Date for Commencement of Construction of the Phase 1 Improvements, as set forth in the Schedule of Performance. Within 15 days prior to the Closing Date, each Party must execute and deliver to the Escrow Agent, and deliver a copy contemporaneously to the other Party, a signed counterpart of the Joint Escrow Instructions as appropriate for the Port's conveyance.

(ii) At least two business days before Closing Date, each Party must deposit into Escrow all documents it is obligated to deposit under this DDA and the Joint Escrow Instructions, some of which are listed below. All documents to be recorded must be executed and acknowledged.

(1) Four originals of the Master Lease, substantially in conformity with the form attached as **DDA Exhibit B10**, duly executed by an authorized representative of the signing Party.

(2) The Notice of Special Tax, duly executed by an authorized representative of Developer.

(3) A Memorandum of Master Lease, substantially in conformity with the form attached to **DDA Exhibit B10**, duly executed by an authorized representative of the signing Party.

(iii) Developer must deposit into Escrow all funds it is obligated to deposit at least two business days before the Closing Date.

(c) Conveyance and Delivery of Possession. If all conditions to the conveyance of the Master Lease has been satisfied or, to the extent waivable, expressly waived by the applicable Party, the Port will convey to Developer, and Developer will accept, the real property interest conveyed by the Master Lease at the Close of Escrow. The Joint Escrow Instructions will instruct the Escrow Agent to deliver fully executed counterpart documents to the Parties and record documents to be recorded after the Close of Escrow as instructed.

(d) Obligation to Cooperate. Each Party agrees to use commercially reasonable efforts to satisfy the Closing conditions that are in its control and reasonably cooperate with the other Party's efforts to satisfy conditions that are in the other Party's control.

8.6. Master CC&Rs. Prior to delivery of the first Appraisal Notice for a Development Parcel (or at such later time as is agreed upon by the Parties), the Port and Developer will have agreed upon the form of Master Conditions, Covenants and Restrictions (the "**Master CC&Rs**"). The Master CC&Rs will be recorded and be a lien on Developer's leasehold interest under the Master Lease, and the Port will consent to their survival after the termination of the Master Lease so as to bind all Development Parcels conveyed to Vertical Developer through a Vertical DDA. The Master CC&Rs will contain, at a minimum, the provisions set forth in **DDA Exhibit D7**. The Master CC&Rs must be recorded against the 28-Acre Site prior to or concurrently with the delivery of the Parcel Lease for the first Development Parcel.

9. SITE CONDITION AND INDEMNITIES

9.1. As-Is.

(a) Generally. Except as provided otherwise in this DDA (and subject to the rights, obligations and liabilities of the Parties under the Master Lease), the Port will convey all Development Parcels in the 28-Acre Site to Vertical Developers under this DDA strictly in their “**as-is**” condition with all faults and defects, and Developer agrees to accept and cause all Vertical Developer Affiliates to accept each Option Parcel or other Development Parcel for which Developer is the successful bidder in its “**as-is**” condition with all faults and defects. Developer’s obligations for the condition of the 28-Acre Site prior to delivery to Vertical Developers will be governed by the Master Lease. The Port has no obligation to repair any improvements on the 28-Acre Site or any liability for their damage or destruction, however caused.

(b) Environmental Condition. The Port will not take any actions that materially exacerbate the environmental condition of the 28-Acre Site between the Reference Date and the date the Port conveys the Master Lease to Developer; and as to any parcels excluded from the Master Lease Premises (i.e., the building occupied by the Noonan Tenant, Building 21, and the parcel subject to the Affordable Self-Storage lease), the Port will not take any actions that materially exacerbate the environmental condition of those parcels between the Reference Date and the date the Port conveys the applicable Development Parcel to a Vertical Developer or grants a License to Developer for construction of Horizontal Improvement thereon.

(c) Developer Due Diligence. Developer acknowledges explicitly that it has had the opportunity to investigate the physical and title conditions affecting the 28-Acre Site fully, using experts of its own choosing. Through the term of the Master Lease with the Port, Developer will have a continuing opportunity to conduct due diligence, including physical testing, subject to reasonable conditions in the Master Lease and any License with respect to Port property outside of the Master Lease. The Port, at no cost to the Port, will cooperate reasonably with Developer in its investigations and provide Developer with access to public books and records in the Port’s possession or control relating to the prior use and ownership of the 28-Acre Site during the Port’s regular business hours. Developer must provide a reasonably detailed description of the documents that it wishes to review at least five days before the requested review date.

(d) Hazardous Materials Conditions.

(i) Developer expressly acknowledges its knowledge of the industrial history of the 28-Acre Site and nearby property, the contents of a Feasibility Study and Remedial Action Plan and a Risk Management Plan for Pier 70 that the Water Board has approved, and Environmental Covenants attaching to the 28-Acre Site. The Master Lease, each License, and each Parcel Lease or set of Restrictive Covenants entered into by a Vertical Developer will require Developer or the Vertical Developer to comply with all Environmental Laws, including the Environmental Covenants, applicable to the portion of the 28-Acre Site to which it has access, possession, or ownership.

(ii) Developer has no obligation under this DDA for: (1) work within submerged lands or that would disturb any submerged lands or improvements outside of the 28-Acre Site, except for certain rip rap repair work as provided in the Infrastructure Plan, replacement of a bulkhead at one of the craneways as provided in the Infrastructure Plan, repair of the 20th Street and 22nd Street outfalls, and mitigation measures identified as Developer Mitigation Measures; or (2) remediation work in the southeast portion of the 28-Acre Site arising from

activities or conditions related to the lands formerly owned by PG&E (now owned by Associated Capital).

(iii) Developer acknowledges that no City Party has made any representation or warranty, express or implied, in reference to the condition of the 28-Acre Site.

(e) FEMA Disclosure. FEMA is performing detailed coastal engineering analyses and mapping of the San Francisco Bay shoreline within the nine San Francisco Bay Area counties that will provide flood and wave data for the City's Flood Insurance Study report and Flood Insurance Rate Maps. This process may have significant impacts for developing new structures and reconstructing or repairing existing structures on San Francisco's waterfront. The City advises Developer as follows.

(i) FEMA prepares the Flood Insurance Rate Maps to support the National Flood Insurance Program, a federal program that enables property owners, businesses, and residents in participating communities to purchase flood insurance backed by the federal government. The Board of Supervisors adopted the Floodplain Ordinance, which governs new construction and substantial improvements in flood-prone areas of San Francisco and authorizes the City's participation in the National Flood Insurance Program. National Flood Insurance Program regulations allow a local jurisdiction to issue variances to its floodplain management ordinance under certain narrow circumstances without jeopardizing the local jurisdiction's eligibility in the National Flood Insurance Program. But, projects that obtain variances from the local jurisdiction may be deemed ineligible for federally-backed flood insurance by FEMA.

(ii) Flood Insurance Rate Maps identify areas that have a 1% chance of inundation in a given year, also known as a *base year* or a *100-year flood*. FEMA refers to an area that is at risk from a flood of this magnitude as a special flood hazard area. To prepare the Flood Insurance Rate Map for San Francisco, FEMA has performed detailed coastal engineering analyses and mapping of the San Francisco Bay shoreline. The San Francisco Bay Area Coastal Study includes both regional hydrodynamic and wave modeling of the San Francisco Bay, as well as detailed onshore coastal analysis used to estimate wave runup and overtopping, as well as overland wave propagation. These onshore analyses form the basis for the Base Flood Elevations and special flood hazard areas shown on the Flood Insurance Rate Map.

(iii) In November 2015, FEMA issued a preliminary Flood Insurance Rate Map of San Francisco tentatively identifying special flood hazard areas along the City's shoreline in and along the San Francisco Bay consisting of "A zones" (areas subject to inundation by tidal surge) and "V zones" (areas subject to the additional hazards that accompany wave action). These zones generally affect City property under Port jurisdiction and other areas of the San Francisco waterfront, including parts of Mission Bay, Hunters Point Shipyard, Candlestick Point, Treasure and Yerba Buena Islands, and an area adjacent to Islais Creek. FEMA plans to finalize the Flood Insurance Rate Map in mid-2017. Six months after this date, the Flood Insurance Rate Map will become effective and will be used for flood insurance and floodplain management purposes. During this six-month period, the City plans to amend the Floodplain Ordinance to adopt the Flood Insurance Rate Map.

(iv) The Port Building Code provides for variances from these requirements under certain extraordinary circumstances that parallel those in the Floodplain Ordinance. The Port Building Code regulates construction activities on piers and wharves and incorporates, with certain amendments, California

Building Code provisions that generally limit new construction in *V zones* to areas that are landward of the reach of mean high tide.

(v) The federal legislation and regulations implementing the NFIP are located at 42 U.S.C. §§ 4001 et seq.; 44 C.F.R. Parts 59-78, §§ 59.1-78.14. FEMA also publishes "Answers to Questions About the NFIP" and FEMA Publication 186 entitled "Mandatory Purchase of Flood Insurance Guidelines." Additional information on this matter can be found on the City's and FEMA's websites at the following links:

<http://sfgsa.org/san-francisco-floodplain-management-program>

<https://www.fema.gov/national-flood-insurance-program-flood-hazard-mapping>

<https://www.fema.gov/national-flood-insurance-program>

[http://www.r9map.org/Docs/Oct13-SanFranCo-FEMA_Factsheet_rev%20\(2\).pdf](http://www.r9map.org/Docs/Oct13-SanFranCo-FEMA_Factsheet_rev%20(2).pdf)

9.2. Damage and Destruction. Beginning on the Reference Date, Developer will assume all risk of damage to or destruction of existing or future improvements at the FC Project Area, subject to the terms and conditions of this Section.

(a) Effect on Existing Improvements to be Demolished. A casualty causing damage to or destruction of any existing improvements in a Phase Area and other changes in site conditions will not affect the Parties' rights and obligations under this DDA except by application of this Section or **Article 4** (Performance Dates). Developer will have the right elect to obtain relief under either provision, but not both, following a casualty.

(b) Developer's Remedies. In the event of a casualty outside of Developer's reasonable control that occurs to any portion of the 28-Acre Site that remains subject to this DDA (*i.e.*, prior to its release upon Close of Escrow for Option Parcels), Developer may deliver a Requested Change Notice to the Port under **Section 3.4** (Changes to Project after Phase 1) seeking to revise the Schedule of Performance to provide Developer a reasonable amount of additional time to make adjustments to the Phase Improvements, the Arts Building, or the Historic Buildings, as applicable, in light of the casualty, or otherwise amend this DDA, whether or not the casualty occurs in Phase 1 or Later Phases. The Parties' obligations under this DDA would not be affected except to the extent changes are approved under **Section 3.4** (Changes to Project after Phase 1).

(c) Effect on Historic Buildings. If the casualty occurs prior to the effective date of the Port entering into a Vertical DDA for the applicable building and would result in damage or destruction that would cause the cost to restore the building to exceed 50% of the Historic Building Value as of the date of casualty, then at Developer's election, **Section 7.14** (Historic Buildings 12 and 21) and **Section 7.11** (Historic Building 2) will no longer apply to the affected Historic Building, Developer will demolish the affected Historic Building (the cost of which will be included as a Horizontal Development Cost under the Financing Plan), and the affected parcel will be deemed an Option Parcel within the applicable Phase, unless the Parties agree otherwise. If the casualty results in damage or destruction that would cause the cost to restore the building to exceed 50% of the Historic Building Value as of the date of casualty, then Developer may avail itself of relief available under **Article 4** (Performance Dates), and to the extent permitted by Applicable Law, the Port will retain any and all unexpended insurance proceeds and any uncollected claims and rights under insurance policies covering such damage or destruction, if any, and assign such proceeds, claims, and rights to the Vertical Developer under the applicable Vertical DDA. A casualty occurring after the Port has entered into a

Vertical DDA will be governed by its terms. All costs incurred by Developer under this Subsection not otherwise reimbursed by insurance proceeds will be reimbursable under the Financing Plan.

(d) No Action. If Developer fails to seek a remedy under **Subsection 9.2(b)** (Developer's Remedies), the Parties' rights and obligations under this DDA will not be affected by the casualty except to the extent of relief available under **Article 4** (Performance Dates).

9.3. General Indemnity.

(a) Scope of Indemnity. The following apply to an Indemnitor's obligations under this Section.

(i) The Indemnitor must defend the Indemnified Parties against any Claims for Losses that reasonably fall or are otherwise determined to fall within this indemnity even if the Claims may be groundless, fraudulent, or false. If a Claim is made against an Indemnified Party that may be within the scope of this indemnity, that Indemnified Party must provide notice to the Indemnitor of the Claim within a reasonable time after learning of the Claim and cooperate with the Indemnitor in the defense of the Claim. An Indemnified Party's failure to provide the notice, however, will not affect the Indemnitor's obligations except to the extent of prejudice caused by the lack of notice. The Indemnitor's defense obligation will arise when a City Party tenders the Claim to the Indemnitor and will continue until finally resolved.

(ii) After the Port has entered into a Vertical DDA with a Vertical Developer for a Development Parcel, the Vertical DDA will control and govern indemnification obligations of the Vertical Developer. The agreements to indemnify under this DDA are in addition to, and must not be construed to limit or replace any other obligations or liabilities that the Port may have to a Vertical Developer or that a Vertical Developer may have to the Port under any Vertical DDA or implementing agreement or Applicable Law.

(b) Developer. Except to the extent directly or indirectly caused by the act or omission of a City Party, Developer must indemnify the City Parties against all Losses arising directly or indirectly from:

(i) failure to obtain any Regulatory Approval or to comply with any Regulatory Requirement for the Horizontal Improvements;

(ii) any personal injury or property damage occurring on any portion of the 28-Acre Site while under Developer's ownership or control; and

(iii) any Developer Party's acts or omissions in relation to construction, management, or operations at the 28-Acre Site related to Horizontal Improvements, including patent and latent defects and mechanic's or other liens to secure payment for labor, service, equipment, or material.

In addition, Developer will Indemnify the City Parties from and against all Losses (if a City Party has been named in any action or other legal proceeding) incurred by a City Party (if the City Party has not been named in the action or legal proceeding) arising directly or indirectly out of or connected with contracts or agreements (i) to which no City Party is a party and (ii) entered into by Developer in connection with its performance under this DDA, any Assignment and Assumption Agreement and any dispute between parties relating to who is responsible for performing certain obligations under this DDA (including any record keeping or allocation under the Financing Plan), except to the extent such Losses were caused by the act or omission of a City Party.

9.4. Environmental Indemnity. In addition to its obligations under *Section 9.3 (General Indemnity)*, Developer on behalf of itself and the Developer Parties will indemnify the Indemnified Parties and the State Lands Indemnified Parties from any and all Losses and Hazardous Materials Claims to the same extent as the Hazardous Materials Indemnification to be provided by the Tenant and Tenant Parties under **Article 19** of the Master Lease.

9.5. Defense of Claims.

(a) Notice.

(i) The Port, on behalf of itself and the City Parties, and Developer, on behalf of itself and the Developer Parties, agree to give notice to any Indemnitor by the earlier of:

(1) 10 days after valid service of process of a summons or other notice that an action has been filed against the Indemnified Party; or

(2) 15 business days after receiving notice that: (A) an action has been filed or a Claim has been made against an Indemnified Party; or (B) any other event that the Indemnified Party believes in good faith will be covered by this indemnity.

(ii) But the Indemnified Party's failure to give timely notice will not affect the Indemnified Party's rights or the Indemnitor's obligations under this DDA except to the extent that the delay prejudices the Indemnitor.

(iii) Control. Subject to the Indemnified Party's approval, the Indemnitor will be entitled to control the defense, compromise, or other resolution of any Claim through counsel of the Indemnitor's choice. But in all cases the Indemnified Party will be entitled to participate in the defense, compromise, or other resolution of the Claim at its own expense.

(b) Failure to Defend. If the Indemnitor fails to take reasonable and appropriate steps to defend the Claim within a reasonable time after notice from the Indemnified Party describing in reasonable detail the nature of the Indemnitor's alleged failure, the Indemnified Party will have the right to hire defense counsel to carry out the defense at the Indemnitor's cost, which may be any combination of the City Attorney's Office (for a City Party), in-house counsel (for a Developer Party), and outside counsel. The Indemnified Party's defense costs will be due and payable within 30 days after the Indemnified Party delivers to the Indemnitor an invoice meeting the requirements of *App ¶ A.4.1 (Attorneys' Fees)*.

9.6. Mutual Release and Waiver.

(a) Scope. The releases under this Section do not affect either Party's rights to enforce the other Party's obligations, assert an Event of Default or Material Breach by the other Party, or seek its remedies under any Transaction Document at law or in equity.

(i) In consideration of the Port's covenants and obligations under this DDA, and as part of its agreement to accept the 28-Acre Site in its "as-is" condition, Developer, on behalf of itself and all other Developer Parties, agrees to waive any right to recover from, and forever releases the City Parties and their Agents of and from any Losses, whether direct or indirect, known or unknown, foreseen or unforeseen, that any Developer Party may now have or that may arise later on account of or in any way be connected with:

(1) the negotiations for this DDA and other Transaction Documents;

(2) the Existing Geotechnical Condition of the 28-Acre Site;

(3) compliance of the 28-Acre Site with Applicable Laws; and

(4) Developer's Losses with respect to third-party Claims arising from the Existing Geotechnical Condition of any portion of the 28-Acre Site or any Applicable Laws before the Reference Date.

(ii) In consideration of Developer's covenants and obligations under this DDA and as part of its agreement to master develop the 28-Acre Site, the Port releases Developer Parties from all Losses that may arise on account of or in any way be connected with the Existing Hazardous Material Condition of the 28-Acre Site, nuisance, or other physical condition that occurred or existed before Developer takes possession or ownership of the 28-Acre Site, except to the extent caused, contributed to, or exacerbated by a Developer Party or a Developer Party's breach of any agreement under which the Developer Party assumes responsibility for compliance with Environmental Laws.

(b) Waiver of Statute. In connection with this release, Developer and the Port each acknowledges familiarity with California Civil Code section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR EXPECT TO EXIST IN HIS OR HER FAVOR WHEN OF EXECUTING THE RELEASE, WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED THE SETTLEMENT WITH THE DEBTOR.

Each Party agrees that the release given in this Subsection covers unknown Claims and that, by entering into this DDA, each Party waives the benefits of Civil Code section 1542, or under any other statute or common law principle of similar effect.

(c) Informed Consent. Each Party represents that it has been fully informed in reference to, and represented by counsel of its choice in connection with the rights, remedies, limitations on damages, and waivers contained in this DDA and after consultation with its attorneys, with full knowledge of its rights and remedies otherwise available at law or in equity, presently and actually intends to waive and relinquish those rights and remedies to the extent specified in this DDA, and to rely solely on the prescribed remedies for any breach of this DDA, or any other right that the Party seeks to exercise.

9.7. Parties to Contract. For purposes of this Article, no City Party will be deemed to be a party to a contract solely because the City Party approved or consented to the contract, and no Developer Party will be deemed to be a party to a contract solely because the Developer Party approved or consented to the contract.

9.8. Survival. The agreements to indemnify, releases, and waivers under this Article will survive termination of this DDA. The agreements to indemnify under **Section 9.3** (General Indemnity) and **Section 9.4** (Environmental Indemnity) are in addition to, and do not limit or replace, any other obligations or liabilities under this DDA or other Transaction Documents.

10. RESOLUTION OF CERTAIN DISPUTES.

10.1. Arbiters.

(a) Arbiter Pool. The Parties may agree to submit certain disputes to Arbiters on the approved Arbiters Pool attached as **DDA Schedule 1** and have agreed that Arbiters

on the list meet the qualifications under this Subsection. To be qualified, an Arbiter must have at least 10 years' experience in the Bay Area in a professional capacity handling issues arising from complex real estate and master planned development transactions with expertise in areas such as property valuation, commercial and multifamily residential real estate sales and leasing, engineering and cost-estimating, real estate economics, and complex financial accounting.

(b) Changes.

(i) The Parties will review the approved Arbiters Pool periodically to determine each Arbiter's continued availability and willingness to serve. Either Party may propose to change the approved Arbiters Pool by notice to the other Party, together with documentation supporting the proposed change, such as a proposed new Arbiter's qualifications or reasons to remove an Arbiter from the approved Arbiters Pool.

(ii) The other Party will have 15 business days to respond. Failure to respond will be deemed consent if the notice prominently stated that the other Party's failure to respond within 15 business days will be deemed consent.

(iii) If the other Party objects, the Parties will meet and confer under **Subsection 10.2(a)** (Good Faith Efforts) and, if necessary, discuss whether to resolve the dispute by nonbinding arbitration under **Subsection 10.5(b)** (Nonbinding Arbitration Process).

10.2. Meet and Confer Requirement.

(a) Good Faith Efforts. Before resorting to any dispute resolution procedure under **Subsection 10.4(b)** (Binding Arbitration Procedures) or **Subsection 10.5(b)** (Nonbinding Arbitration Process), or initiating a judicial action, each Party agrees to make good faith efforts to resolve the dispute as follows.

(i) Any Party may initiate a meet-and-confer effort by giving notice under procedures for progress meetings under **Section 14.6** (Progress Meetings). Within five business days after a Disputing Party's request to confer regarding an identified matter, decision-making representatives of each Disputing Party will meet in a good faith effort to resolve the dispute.

(ii) If the Disputing Parties are unable to resolve the dispute at the meeting (or any longer time to which each Disputing Party agrees in its sole discretion), the following options will apply.

(1) The Parties may agree to submit the matters listed in **Subsection 10.4(a)** (Scope) to binding arbitration under **Subsection 10.4(b)** (Binding Arbitration Procedures).

(2) The Parties may agree to submit the matters listed in **Subsection 10.5(a)** (Scope) to nonbinding arbitration under **Subsection 10.5(b)** (Nonbinding Arbitration Process).

(3) Disputes over matters listed in **Section 10.6** (Nonarbitrable Matters) will not be subject to arbitration under any circumstances.

(4) The Parties, each in its sole discretion, may agree to submit any other matters to arbitration under this Article.

(iii) If the Disputing Parties do not agree to arbitration, or the dispute is not resolved by nonbinding arbitration, any Disputing Party may seek to enforce its rights and remedies at law or in equity.

(b) No Prejudice. The dispute resolution procedures in this Article will not delay or otherwise prejudice a Party's right to give notice of an alleged default under **Article 11** (Defaults).

10.3. General Arbitration Procedures.

(a) Notice. A Party may initiate arbitration by providing a notice to the other Party, specifying with particularity both the nature of the dispute between the Parties and the initiating Party's demand to resolve the dispute. Neither Party may initiate or continue to prosecute a judicial action, except to comply with court rules, during the pending of an arbitration proceeding.

(b) Selection of Arbitrator. The Parties will meet to designate the Arbitrator from the approved Arbitrators Pool within 10 business days after the effective date of the arbitration notice. If the designated Arbitrator is not available to meet the time requirements for the proceeding, the Disputing Parties will designate another Arbitrator on the approved Arbitrators Pool. If none of the Arbitrators listed is able or willing to hear a dispute, the Disputing Parties will agree on the selection of an Arbitrator to serve for the purposes of that dispute. Each Party initially will advance 50% of the required arbitration fee.

(c) Arbitrator's Authority. The Arbitrator will be authorized to:

(i) decide the matter on the written Submittals;

(ii) hold an evidentiary hearing on reasonable prior notice to the Parties;

(iii) enter a default decision against a Party that does not deliver a brief or appear at the hearing and require the non-participating Party to pay the other Party's attorneys' fees and arbitration fees; and

(iv) award attorneys' fees and arbitration fees to the prevailing Party if the Arbitrator finds that the arbitration request was frivolous or was brought in bad faith.

(d) Limits on Arbitrator's Authority. The Arbitrator will have no authority to:

(i) decide any matter that is listed in **Section 10.6** (Nonarbitrable Matters) unless the Parties have agreed to submit the matter to the Arbitrator;

(ii) decide any matter that was not specified in the initiating Party's notice;

(iii) add to, remove from, disregard, modify, or otherwise alter this DDA or any other agreement between the Parties regarding the 28-Acre Site Project;

(iv) negotiate new agreements or provisions between the Parties;

(v) award damages of any kind or award attorneys' fees or arbitration fees except as specified in **Subsection 10.3(c)** (Arbitrator's Authority); or

(vi) order any form of equitable relief.

(e) Service of Documents. In all dispute resolution proceedings under this Article, all agreements, submittals, and decisions must be in writing, and each Disputing Party must serve copies of any documents submitted to any Arbitrator simultaneously to all other Disputing Parties.

(f) Ex Parte Communications. No Disputing Party or any of its Agents may engage in ex parte communications with the Arbitrator with regard to any pending arbitration proceeding. A Disputing Party may write to the Arbitrator concerning

procedural matters such as scheduling if it delivers a copy simultaneously to the other Disputing Parties.

10.4. Binding Arbitration

(a) **Scope.** The Parties have agreed to submit disputes specified in this Subsection to binding arbitration. The Parties, each in its sole discretion, also may agree to submit any other dispute to binding arbitration under this Section.

(i) **Interim Satisfaction.** One Party disputes the other Party's Interim Satisfaction determination under *FP § 3.6(a) (Party Election)*.

(ii) **Qualified Appraiser Pool.** The Parties disagree on proposed changes to the Qualified Appraiser Pool under **Subsection 7.3(c)** (Qualified Appraiser Pool).

(iii) **Qualified Broker Pool.** The Parties disagree on proposed changes to the Qualified Broker Pool under **Subsection 7.5(a)** (Broker-Managed Offerings).

(iv) **Approved Arbiters Pool.** The Parties disagree on proposed changes to the approved Arbiters Pool under **Subsection 10.1(b)** (Changes).

(v) **Beginning and End of Excusable Delay.** The Parties disagree on the beginning or end date for an event of Excusable Delay under **Subsection 4.3(c)** (Other Excusable Delay).

(vi) **Qualified Contractor.** The Port objects to the qualifications of Developer's general contractor under **Subsection 14.5(a)** (Qualified Contractors).

(b) **Binding Arbitration Procedures.** The following procedures will apply to binding arbitration of disputes under this Section.

(i) Each Disputing Party may submit an initial brief, not to exceed 10 double-spaced pages, and supporting documentary evidence to the Arbiter within 15 business days after the Arbitration Start Date. Evidence may include expert or consultant opinions, any form of graphic evidence such as photos, maps, and charts, and other evidence that could assist the Arbiter in resolving the dispute in the Disputing Party's discretion.

(ii) Each Disputing Party may submit a reply brief, not to exceed five double-spaced pages, within 20 business days after the Arbitration Start Date, even if it did not submit an initial brief. The Arbiter may request further briefing on specified issues, with documents submitted within 10 business days after the Arbiter's request.

(iii) Unless each Disputing Party agrees otherwise, the Arbiter will hold a telephonic hearing. The Arbiter must issue a decision within 25 business days after the Arbitration Start Date, unless the Arbiter requested further briefing, in which case the Arbiter must issue a decision within 45 business days after the Arbitration Start Date. The Arbiter's decision will be final, binding on all Parties, and nonappealable. Each Party explicitly waives any right to de novo judicial review of an Arbiter's decision under this Section.

10.5. Nonbinding Arbitration.

(a) **Scope.** The Parties have agreed to submit disputes specified in this Subsection to nonbinding arbitration. The Parties, each in its sole discretion, also may agree to submit any other dispute to nonbinding arbitration under this Section.

- (i) Phase Submittal. Developer contends that Port wrongfully withheld its approval of a Phase Submittal.
 - (ii) Reasonableness of Decision. One Party contends that the other Party disapproved a request unreasonably in violation of the standards in **Article 6** (Transfers).
 - (iii) Transfers. The Parties are unable to resolve disputes under **Section 6.2** (No Third-Party Transfers in Phase 1).
 - (iv) Proportionality. The Parties fail to reach agreement on the manner in which proportionality will be addressed after termination of a Phase under **Subsection 2.4(a)** (Proportionality).
 - (v) Historic Building 2 Costs. Disputes over the cost estimates for Historic Building 2.
 - (vi) Developer's Costs. Disputes over whether any of Developer's Horizontal Development Costs for any category are overstated by 5% or more under *FP § 9.4(a) (Port Audit)*.
 - (vii) Port Costs. Disputes over whether any of the Port's Horizontal Development Costs for any category are overstated by 5% or more under *FP § 9.4(b) (Developer Audit)*.
 - (viii) Improvement Plans. Disputes relating to the Port's review, approval or disapproval of Improvement Plans in accordance with **Article 13** (Commercial Reasonableness).
 - (ix) Other Arbitrable Disputes. The Parties disagree on a matter under any Transaction Document that calls for or permits arbitration of disputes but does not specify an arbitration process.
- (b) Nonbinding Arbitration Process.

(i) The Disputing Parties may agree to submit disputes to nonbinding arbitration within 10 business days after the meet-and-confer period under **Section 10.2** (Meet and Confer Requirement) expires. The Disputing Parties may submit a joint statement of the dispute and a proposed discovery, briefing, and hearing schedule to the Arbiter. Otherwise, each Disputing Party may submit to the Arbiter a short statement of the dispute and a proposed discovery, briefing, and hearing schedule, and the Arbiter will specify the schedule for the proceeding. The Disputing Parties may agree to supplement, but not override, the nonbinding arbitration process under this Subsection by procedures applicable to commercial nonbinding arbitration of alternative dispute resolution providers in the Bay Area.

(ii) The Arbiter will decide any dispute subject to nonbinding arbitration under this Section. The Disputing Parties must provide the Arbiter with briefs, not to exceed 10 double-spaced pages, on their respective positions. The Arbiter must issue a decision within five days after the last Submittal.

(iii) Within 20 business days after the Arbitration Start Date, the Arbiter will conduct a preliminary hearing, either by telephone or personal appearance at the Arbiter's option. At the preliminary hearing, the Arbiter will establish discovery and briefing schedules and relevant dates, including a hearing date. In resolving discovery issues, the Arbiter must consider expediency, cost effectiveness, fairness, and the needs of the Disputing Parties for adequate information in reference to the dispute. The Disputing Parties will make good faith efforts to prepare a joint record of evidentiary documents for the proceeding.

(iv) The Disputing Parties may agree to retain one or more consultants to assist the Arbiter at the Arbiter's request. In the request, the Arbiter must provide to all Disputing Parties an explanation of the need for each proposed consultant, the consultant's identity and relevant qualifications, hourly rate, the estimated costs of the service, and a proposed cap on the consultant's cost. All Disputing Parties must approve each consultant's retention, the cost cap, and each Parties' allocated share of the consultant's cost.

(v) The evidentiary hearing must be scheduled to begin within 60 days and be completed within 80 days after the preliminary hearing, unless the Arbiter extends the date with the Disputing Parties' consent. The Arbiter must issue an advisory decision, specifying the reasons for the decision, within 20 days after the hearing. Each Disputing Party will give due consideration to the Arbiter's decision before deciding to pursue further legal action.

(vi) No advisory decision will have any res judicata or collateral estoppel effect in any other arbitration conducted under this Article or in any other action.

10.6. Nonarbitrable Matters. The following are not subject to arbitration under this DDA unless both Parties agree, each in its sole discretion.

(a) Consent. Developer cannot compel any City Agency to arbitrate a decision not to grant a Regulatory Approval for the 28-Acre Site Project.

(b) Adequate Security. Developer cannot compel the Port to arbitrate a dispute about whether a Port draw on Adequate Security was wrongful or whether an Obligor failed to perform the Obligor's obligations under the Adequate Security.

(c) Sole Discretion. One Party cannot compel the other to arbitrate any decision that a Party is entitled to make in its sole discretion.

11. DEFAULTS

11.1. Generally.

(a) Notice. Except as otherwise specified, an Aggrieved Party must provide notice of an alleged potential breach to the Breaching Party as specified in *App ¶ A.5 (Notices)* and **Article 20** (Notices). The notice must state with reasonable specificity the nature of the alleged default, the provisions under which the Aggrieved Party claims the default arose, and, if specified in this DDA, the cure period for the default.

(b) Cure Period.

(i) A default that is cured before the specified cure period ends will not become an Event of Default.

(ii) The Breaching Party will have 10 business days after the effective delivery date of the default notice to request a meeting with the Aggrieved Party to discuss measures to cure any performance (not payment) default and the Aggrieved Party will promptly meet with the Breaching Party within three business days of such request; provided, however, that the Aggrieved Party will not be required to meet if the Breaching Party delivers the request less than five business days before the cure period ends for the potential Material Breach. The Aggrieved Party's agreement to meet will not cause the cure period to be extended.

(iii) If the Breaching Party cures the default to the Aggrieved Party's reasonable satisfaction within the cure period, the Aggrieved Party will issue a notice acknowledging the cure.

(iv) If the Breaching Party does not timely cure the default, the Aggrieved Party in its sole discretion may:

- (1) agree to extend the cure period;
- (2) waive the default; or
- (3) take any other measure permitted under this DDA following an Event of Default, including an action at law or in equity.

11.2. Events of Default by Developer. The Parties agree that the occurrence of any of the following will be an Event of Default by Developer under this DDA and, as applicable, Events of Default by Vertical Developer Affiliates under **Section 5.7** (Defaults and Breaches).

(a) Nonpayment to Port. Developer fails to pay any sum due under this DDA and does not cure the default within 30 days after the Port delivers notice to Developer. This default does not apply to the Developer Reimbursement Obligation or a final judgment requiring Developer to make any payments to the Port, which are addressed in **Section 12.2** (Material Breaches by Developer).

(b) Taxes. Developer or any Vertical Developer Affiliate fails to pay any property taxes or Mello-Roos Taxes levied on any Taxable Parcel it then owns or leases by the delinquency date specified in its tax bill.

(c) Other Obligations. Developer fails to perform any other obligation to be performed by Developer under this DDA, excluding obligations described in **Section 12.2** (Material Breaches by Developer), and does not cure the default within any cure period specified in this DDA (or within 60 days after the Port delivers notice to Developer if no cure period is specified), or if the default cannot be cured within 60 days, Developer fails to take steps to cure the default within the cure period and diligently complete the cure within a reasonable time.

(d) Financial Condition. A Significant Adverse Change to Developer occurs, and Developer fails within 45 days after the Port delivers notice to Developer to either (i) provide the Port with evidence acceptable to the Port Director in her reasonable discretion that Developer has the financial capacity sufficient to satisfy the judgment and complete the remaining Developer Construction Obligations for the applicable Phase in which the Significant Adverse Change Occurs; or (ii) provide the Port with a Letter of Credit or other security instrument reasonably satisfactory to Port, securing the cost of the remaining Developer Construction Obligations for the applicable Phase in which the Significant Adverse Change Occurs.

(e) Insolvency. Developer initiates or is the subject of an Insolvency proceeding, if not released, dismissed, or stayed within 120 days.

11.3. Events of Default by the Port. The Parties agree that the occurrence of any of the following will be an Event of Default, but not a Material Breach, by the Port under this DDA.

(a) Financing Plan. The Port fails to perform its obligations under the Financing Plan and does not cure the default within 30 days after Developer delivers notice to the Port or if the default cannot be cured within 30 days, the Port fails to take steps to cure the default within the cure period and diligently complete the cure within a reasonable time.

(b) Acquisition Agreement. The Port fails to perform its obligations under the Acquisition Agreement and does not cure the default within 30 days after Developer delivers notice to the Port or if the default cannot be cured within 30 days, the Port fails to take steps to cure the default within the cure period and diligently complete the cure within a reasonable time.

(c) Other Obligations. The Port fails to perform any other agreement or obligation under this DDA, excluding obligations described in **Section 12.3** (Material Breaches by the Port), and does not cure the default within any cure period specified in this DDA (or within 60 days after Developer delivers notice to the Port if no cure period is specified), or if the default cannot be cured within 60 days, the Port fails to take steps to cure the default within the cure period and diligently complete the cure within a reasonable time.

11.4. Remedies for Events of Default.

(a) Equitable Remedies.

(i) Following an Event of Default, the Aggrieved Party may file an action in equity to compel the Breaching Party to perform its obligations under this DDA or to prevent the Breaching Party from further violating this DDA. The Aggrieved Party is not required to postpone filing an equitable action if it believes in good faith that postponement would cause it to suffer irreparable harm.

(ii) The Parties agree that, except when a dispute involves a sum that is fixed or calculable or an indemnified Loss:

(1) monetary damages are generally inappropriate remedies for an Event of Default under this DDA;

(2) determining the actual damages suffered by any Party as a result of an Event of Default would be extremely difficult and impractical; and

(3) equitable remedies are particularly appropriate to enforce this DDA.

(b) Specific Remedies. This DDA prescribes the following specific remedies for certain Events of Default.

(i) Nonpayment of Taxes. If Developer or any Vertical Developer Affiliate fails to pay any property taxes or Mello-Roos Taxes levied on any Taxable Parcel it then owns or leases, which failure continues for 60 days after written notice from the Port with opportunity to cure:

(1) accrual of Developer Return will be suspended for the period during which the taxes are unpaid; and

(2) the City will not be obligated to issue any Debt for the 28-Acre Site Project, levy and allocate Mello-Roos Taxes to the CFD, or allocate Tax Increment to the IFD for Sub-Project Area G-2 except to service previously issued Debt.

(ii) Violation of Covenants. If Developer defaults in its performance of the Other City Requirements described in **DDA Exhibit D9**, the Port and the City will have only the remedies prescribed in the applicable ordinance, policy, or implementation document, as amended by the DA Ordinance.

(iii) Other Payment Obligations. If either Party fails to make any payment when due (other than Developer Reimbursement Obligations for Developer or a final judgment in favor of either Party), the Aggrieved Party's exclusive remedy, at its sole election, is to initiate a request for nonbinding arbitration under **Article 10** (Resolution of Certain Disputes) or a judicial action for actual damages.

(iv) Arts Building. The Port's exclusive remedies for Developer's failure to comply with its obligations with respect to the Arts Building are specified in **Section 7.12** (Arts Building).

(c) Rights and Remedies Cumulative. Except as expressly limited by this DDA, the Parties' respective rights and remedies with respect to an Event of Default are cumulative. And an Aggrieved Party's exercise of any one or more of its remedies for an Event of Default by the Breaching Party will not preclude its exercise, at the same or different times, of any of its other remedies. Each Party acknowledges its intent to limit its remedies for an Event of Default by the other Party to those specified in this DDA.

12. MATERIAL BREACHES AND TERMINATION

12.1. Generally.

(a) Nature of Material Breaches. Because certain defaults could seriously impair the benefits that the Parties expect the 28-Acre Site Project to generate, they are categorized as Material Breaches and could result in more serious consequences affecting some or all of the 28-Acre Site Project, as described in this Article.

(b) Notice. An Aggrieved Party must provide notice to the Breaching Party as specified in *App ¶ A.5 (Notices)* and **Article 20** (Notices) of any potential breach. The notice must state with specificity the nature of the alleged Material Breach, the provisions of this DDA under which the alleged Material Breach would arise, and the specified cure period.

(c) Cure Period.

(i) Except as otherwise specified, the Breaching Party will not be in Material Breach unless it fails to cure the event within the specified cure period.

(ii) The Breaching Party may request a meeting to discuss measures to cure a potential performance-based Material Breach, and the Aggrieved Party will promptly meet with the Breaching Party within three business days of such request. But the Aggrieved Party will not be required to meet if the Breaching Party delivers the request less than five business days before the cure period ends for the potential Material Breach.

(iii) If the Breaching Party cures the potential Material Breach to the Aggrieved Party's reasonable satisfaction within the cure period, the Aggrieved Party will issue a notice acknowledging the cure.

(iv) If the Breaching Party does not cure the potential Material Breach within the cure period, the Aggrieved Party in its sole discretion may:

- (1) agree to extend the cure period;
- (2) waive the potential Material Breach; or
- (3) take any other measure permitted under this DDA, including an action at law or in equity.

12.2. Material Breaches by Developer. The occurrence of any of the following will be a Material Breach by Developer under this DDA.

(a) Transfer in Phase 1. Developer causes or allows a Transfer in Phase 1 without Port Commission consent that is not reversed or voided within 30 days after the Port delivers notice to Developer.

(b) Other Prohibited Transfer. Developer causes or allows a Transfer that violates **Section 6.2** (No Third-Party Transfers in Phase 1) or **Section 6.3** (Affiliate

Transfers), or a prohibited Transfer imposed on Developer is not reversed or voided within 30 days after the Port delivers notice to Developer.

(c) Outside Dates for Phase Improvements and Public Spaces. Developer fails to meet any Outside Date under the Schedule of Performance with respect to the Phase Improvements or Public Spaces other than permitted Deferred Infrastructure and does not cure its failure within 90 days after the Port delivers notice to Developer.

(d) Deferred Infrastructure. A Vertical Developer Affiliate commits a Vertical Developer Default with respect to its Deferred Infrastructure obligations under its Vertical DDA.

(e) Historic Buildings 12 and 21. Close of Escrow under the applicable Vertical DDA for Historic Building 12 or 21 has not occurred by the Outside Date shown on the Schedule of Performance due to an uncured default by a Vertical Developer Affiliate under its Vertical DDA that prevents Close of Escrow from occurring.

(f) Abandonment. Developer Commences Phase Improvements within a Phase, but ceases all work or abandons the premises under the Master Lease (within the meaning of Cal. Civ. Code § 1951.2 or a successor statute) for more than 120 consecutive days or a total of 180 days (which need not be consecutive), unless approved by the Port Director, and does not cure the default within 45 days after the Port delivers notice to Developer.

(g) Adequate Security. Developer fails to provide Adequate Security, including the Loss Security, as required under this DDA, or once it has provided Adequate Security fails to maintain the same as required under this DDA (including, but not limited to, the failure of a Obligor to meet the Obligor Net Worth Requirement or the occurrence of a Significant Change to Obligor under any Guaranty), and such failure continues for 45 days following receipt of notice from the Port to Developer (provided, that Developer will immediately, upon receiving notice from the Port Director to such effect, suspend all activities (other than those needed to preserve the condition of improvements or as necessary for health or safety reasons) on affected portions of the 28-Acre Site during any period during which Adequate Security is not maintained as required by this DDA).

(h) Obligor Default. The Obligor of any Adequate Security, including the Loss Security, commits a default under the applicable security instrument or revokes or refuses to perform as required under the Adequate Security, and Developer does not replace the Adequate Security within 45 days following Developer's receipt of notice from the Port; provided, that (i) Developer will immediately, upon receiving notice from the Port Director to such effect, suspend all activities other than those needed to preserve the condition of Improvements or as necessary for health or safety reasons on affected portions of the FC Project Area during any period during which the Adequate Security is not maintained as required by this DDA, (ii) any cure period for a default under the Adequate Security will run concurrently with the 45-day period under this Subsection, (iii) such default may be cured by the Obligor to the extent provided under the terms of the Adequate Security; and (iv) upon receipt by the Authority of any replacement Adequate Security, the Port will return the original Adequate Security.

(i) Special Taxes. Developer fails to pay before its delinquency date any Mello-Roos Taxes that the CFD levies on any Development Parcel before the Port conveys the parcel to a Vertical Developer and does not cure the default within 15 days after the Port delivers notice to Developer.

(j) Developer Reimbursement Obligations. Developer fails to pay Developer Reimbursement Obligations when due, the Port is unable to recover all or any portion of the Reimbursement Obligations in accordance with **Subsection 19.1(c)** (Unreimbursed

Port Costs) and Developer thereafter fails to cure the failure within 30 days after the Port delivers notice to Developer.

(k) Indemnities. Developer fails to meet its indemnification obligations under **Section 9.3** (General Indemnity) or **Section 9.4** (Environmental Indemnity) and does not cure the failure within 45 days after the Port delivers notice to Developer; provided, however, that to the extent that such failure results from Developer's failure to pay Developer Reimbursement Obligations, the requirements of **Subsection 12.2(j)** (Developer Reimbursement Obligations) will apply.

(l) Final Judgment. Developer fails to satisfy a final judgment in the Port's favor in an action for payment or performance within 60 days after the judgment becomes final or any longer period specified in the judgment.

(m) Release under Master Lease. Developer fails to release a Development Parcel from the Master Lease when required under the Vertical DDA, which failure is not cured within 15 days after notice from the Port.

12.3. Material Breaches by the Port. The occurrence of any of the following will be a Material Breach by the Port under this DDA.

(a) Project Finance. A noticed Event of Default by the Port occurs under **Section 11.3** (Financing Plan) that also:

(i) materially and adversely affects Developer's ability to proceed timely with the 28-Acre Site Project or any significant portion thereof without substantially increased costs caused solely by the Event of Default, which Developer must demonstrate by new bids, estimates of an approved cost estimator, or other documentary evidence reasonably satisfactory to the Port, and evidence supported by relevant cost indices or by a third-party analysis prepared by a consultant reasonably acceptable to Port that the claimed cost increases result directly from the Port's Event of Default and not to general market-wide inflationary causes; or

(ii) prevents or substantially delays or impairs the availability of Project Payment Sources.

(b) Failure to Close. The Port fails to enter into a Vertical DDA with a Vertical Developer in accordance with **Article 7** (Parcel Conveyances) or fails to Close Escrow on its conveyance of the applicable Option Parcel to a Vertical Developer after all of the Port's conditions and mutual conditions to Closing under the Vertical DDA have been satisfied or waived, and the Port does not Close Escrow within 30 days after Developer delivers notice to the Port.

(c) Port Title Defect. The Port defaults on the Port's Title Covenant by creating or allowing a title exception other than the Permitted Exceptions allowed hereunder, and the Port does not remove the exception within 60 days after Developer delivers notice to the Port.

(d) Final Judgment. The Port fails to satisfy a final judgment in Developer's favor in an action for payment or performance within 60 days after the judgment becomes final or any longer period specified in the judgment.

12.4. Termination as Port Remedy. The Port's termination rights are described in this Section.

(a) Automatic Termination of Development Rights to Certain Parcels. Developer's development rights and obligations for specified Development Parcels will terminate automatically under the circumstances described below. Termination under this Subsection will not affect Developer's rights and obligations for any Phase Approval

obtained before termination or prevent Developer from submitting Later Phase Submittals to the Port. Termination of Developer's development rights as to an Option Parcel will not affect its rights to Land Proceeds under the Financing Plan.

(i) Option Parcels. Developer fails to enter into an Vertical DDA for an Option Parcel by the Option Exercise Deadline specified in **Subsection 7.4(a)** (Option Exercise Deadline) or to Close Escrow on an Option Parcel by the Outside Date therefor in the Schedule of Performance, subject to Down Market Delay.

(ii) Closing on Parcel K North. If Developer is the successful bidder, it fails to Close Escrow on the Port's proprietary conveyance of Parcel K North by the Closing Date specified in the applicable Vertical DDA.

(b) Port Election to Terminate. The Port may elect to terminate Developer's future development rights and obligations under this DDA all or in part if Developer is in Material Breach of this DDA, subject to **Subsection 12.4(c)** (Termination re: Outside Dates). Such termination will not affect any Phase that has been Completed by Developer or a Phase for which Developer has submitted a Phase Submittal application and that is not the subject of the Material Breach. By way of illustration of the foregoing sentence, if on the date of termination, Developer is constructing Phase Improvements in Phase 1 and the Material Breach is not related to Phase 1, then Developer will have the right to Complete the Phase Improvements for Phase 1 and exercise its Option as to all Option Parcels within that Phase in accordance with the terms of this DDA.

(c) Termination re: Outside Dates.

(i) With respect to a Material Breach for failure to submit any Phase Submittal in accordance with the Schedule of Performance, the Port will have the right to terminate the DDA in accordance with the procedures set forth in **Section 12.7** (Termination Procedures).

(ii) With respect to a Material Breach for that relates to Developer's failure to Commence construction of Phase Improvements or a Vertical Developer Default due to a Vertical Developer Affiliate's failure to Commence construction of Deferred Infrastructure under its Vertical DDA, each under the applicable Schedule of Performance, or to provide Adequate Security upon such Commencement, the Port will have the right to terminate this DDA in accordance with **Section 12.7** (Termination Procedures).

(iii) With respect to a Material Breach for failure to obtain a SOP Compliance Determination for Phase Improvements by the required Outside Date, including Phase Improvements on the Public Spaces, or a Vertical Developer Default due to a Vertical Developer Affiliate's failure to perform its obligations to construct Complete Deferred Infrastructure under its Vertical DDA, each under the applicable Schedule of Performance, the Port's exclusive remedies will be:

(1) an action on the Adequate Security for the applicable Phase Improvements or Deferred Infrastructure to the extent still available;

(2) if the Port is unable to recover upon such Adequate Security within 18 months after the Port files its claim, termination of this DDA;

(3) the automatic suspension of Developer's right to exercise its Option or submit a bid in a Public Offering for any Option Parcels in the Current and Later Phases;

(4) during the suspension of Developer's Option rights, the Port, in its sole discretion, may initiate Public Offerings of any Option Parcel that is not under contract in the Current and Later Phases in accordance with **Section 7.5** (Public Offering Procedures), with the right to Close Escrow with an Unrelated Vertical Developer even if the Material Breach is cured before the Closing Date; and

(5) the exercise of its rights under **Subsection 12.4(d)** (Special Rights).

(d) **Special Rights.** At any time after a Material Breach described in **Subsection 12.2(d)** (Deferred Infrastructure), either Party may give notice to the other that it intends to exercise its rights under this Subsection. After delivery of notice, the Parties will meet to discuss a schedule for the completion of the Deferred Infrastructure.

(i) As long as Developer is diligently proceeding with and cures the Material Breach within the agreed schedule, the Port will forbear from exercising its remedies under **Subsection 12.4(c)** (Termination re: Outside Dates). Developer's Horizontal Development Costs to effect the cure will be reimbursable Capital Costs under the Financing Plan.

(ii) The Port may undertake the construction of any Public Spaces in the Deferred Infrastructure Zone. The Port's Horizontal Development Costs to complete the Public Spaces will be reimbursable Capital Costs under the Financing Plan that, at the Port's option, will have priority for payment from any available Project Payment Sources. The Port's exercise of rights under this Subsection will not require the Port to forbear from exercising its remedies under **Subsection 12.4(c)** (Termination re: Outside Dates).

(e) **Termination re: Historic Buildings 12 and 21.** With respect to a Material Breach with respect to Historic Building 12 or Historic Building 21, the Port may terminate the DDA in accordance with **Section 12.7** (Termination Procedures).

12.5. Termination as Developer Remedy. Developer's termination rights are described in this Section.

(a) **Material Breach.** If the Port causes a Material Breach under **Section 12.3** (Material Breach by the Port) that would significantly and adversely affect Developer's ability to proceed with the 28-Acre Site Project in accordance with the Schedule of Performance, Developer may terminate all future development obligations and rights under this DDA upon submittal to the Port of a written notice of its election to terminate.

(b) **Title Exception.** Developer may terminate an Option on an Option Parcel by choosing not to Close Escrow if the Port does not remove or fails to respond timely to Developer's objection to a new title exception under *VDDA § 6.3 (Title Review Following Contingency Period Expiration)*.

(c) **Casualty.** Developer may elect to terminate this DDA in its entirety following a casualty under circumstances described in **Section 9.1(e)(v)** (Damage and Destruction).

12.6. Mutual Termination Right.

(a) **Costs to Defend Third-Party Challenge.** If a Third-Party Challenge to the 28-Acre Site Project is filed, Developer may elect not to reimburse all Port Costs and City Costs arising from the action by providing notice to the Port within 10 days after Developer receives notice of the action. If Developer makes this election, either Party may terminate this DDA on 10 days' notice to the other Party.

(b) Surviving Developer Obligations. Developer, if it chooses to terminate this DDA, may deliver its Notice of Termination with its notice of election on costs. Termination under this Section will not relieve Developer of its obligation to pay all Port Costs and City Costs incurred before the Termination Date or any award of attorneys' fees to the plaintiffs in the action.

12.7. Termination Procedures. The following procedures will apply to all terminations except those under **Subsection 12.4(a)** (Automatic Termination).

(a) Notice of Termination.

(i) The Party electing to terminate must provide a Notice of Termination to the other Party that prominently includes the phrase "*Notice of Termination.*" The notice must describe the alleged Material Breach or other circumstance giving rise to the right to terminate, list portions of the DDA or the 28-Acre Site Project to be terminated, and specify a Termination Date at least 15 days after the notice is delivered.

(ii) A Party may agree in its sole discretion to extend the Termination Date in a writing confirming the later Termination Date, but doing so will not require the Party to deliver a new Notice of Termination.

(iii) The Port may deliver a Notice of Termination before the date of the public meeting at which the Port Commission is expected to consider termination. None of the following will affect the validity of the Port's Notice of Termination, except as to the specified Termination Date: (1) the Port Director, in her sole discretion agrees to extend the anticipated Termination Date; (2) the matter is not placed on the Port Commission's agenda for the anticipated Termination Date; or (3) the Port Commission continues its action to a later date.

(b) Port Commission Action. Except for the situation described in **Section 12.6** (Mutual Termination Right), a Port Commission resolution is required for the Port to terminate any part of this DDA.

(c) Recorded Notice. After termination, the Party electing termination may record a Notice of Termination specifying the Termination Date in the Official Records. The Party must deliver, or cause delivery of, conformed copies of any recorded Notice of Termination to the other Party and any Interested Person.

(d) Preservation of Special Tax Lien. The Parties acknowledge that retaining the lien of the CFD on all Taxable Parcels benefits Developer, the Port, the City, and the public trust. Developer agrees not to object to any agreement between the Port on its own behalf, or as the CFD Agent, and the City, any Indenture Trustee, or other person that would preserve the lien even if any portion of Developer's rights under this DDA is terminated.

12.8. Effects of Termination on Development Rights. On the Termination Date, the following changes will take effect automatically.

(a) Mutual Obligations. On the Termination Date, each Party's obligations to the other Party for the terminated portions of this DDA will terminate, except for indemnities and any other obligations that expressly survive termination.

(b) Development Opportunities.

(i) Port. The Port will have the right to offer the Development Opportunities associated with the terminated portions of the DDA to third parties through proprietary public offerings and to specify any terms that it determines in its sole discretion are appropriate for the offered Development Opportunities. The Port may require that the Development Opportunity conform to the material

requirements of this DDA with respect to the applicable real property or may make such changes to the Development Opportunity as the Port determines are appropriate under the circumstances; provided, that in formulating the Development Opportunity, the Port will not permit uses that are incompatible with Developer's development rights under any portion of this DDA that has not been terminated. So long as the Port offers the Development Opportunity consistent with the foregoing sentence, Developer will have no right to challenge, limit or contest the Port's process or the offering of the Development Opportunity to others as set forth in this Section.

(ii) Developer. Developer will have no rights to the Development Opportunities associated with the terminated portions of the DDA or to reimbursement of Developer Capital it uses for the terminated Development Opportunities after the Termination Date, subject to **Section 12.9** (Effects of Termination on Project Payment Sources).

(iii) Waiver. Developer acknowledges the Port's rights under this Subsection and expressly waives any right that Developer might have to challenge or limit the Port's right to publicly offer any Development Opportunity under this Subsection, or to bid in the public offering.

12.9. Effects of Termination on Project Payment Sources

(a) Before Phase 1 Completion. If the Port terminates the DDA as to Phase 1 following a Material Breach by Developer before the Port has issued a SOP Compliance Determination for all Phase 1 Improvements, Developer's rights will be as follows.

(i) Developer will be entitled to receive the entire Entitlement Sum, but only to the extent generated by Project Payment Sources from Parcel K North and Phase 1 Option Parcels on which Developer has Closed Escrow before the Termination Date.

(ii) Developer will be entitled to reimbursement of Horizontal Development Costs for Phase Improvements paid by Developer Capital before the Termination Date without any Developer Return but only to the extent of Project Payment Sources generated by Phase 1 Option Parcels on which Developer has Closed Escrow before the Termination Date.

(iii) Developer will retain development rights only to Option Parcels in the Phase on which it has Closed Escrow before the Termination Date.

(b) Before Completion of Other Phases. The following will apply if the Port terminates the DDA as to any other Phase following a Material Breach by Developer before the Port, whether or not the Port has issued a SOP Compliance Determination for the applicable Phase Improvements.

(i) Developer will be entitled to a Cumulative IRR of 12% on Developer Capital spent on the Entitlement Sum and all Phase Improvements before the Termination Date, calculated up to the Termination Date, but only to the extent of Project Payment Sources generated by the Option Parcels in the Phase on which Developer has Closed Escrow before the Termination Date.

(ii) Developer will retain development rights only to Option Parcels in the Phase on which it has Closed Escrow before the Termination Date.

(c) Developer's Cure Rights.

(i) This clause applies to any Transferee to the extent that Developer has not been explicitly released from the obligation in default when the Port approved the Transfer. If the Port gives notice of a default or of the Port's intent

to terminate a Transferee's rights under this DDA due to a Material Breach by the Transferee, at least 60 days before the effective Termination Date, Developer will have the right to cure the default within the specified cure period.

(ii) This clause applies only to Transferees to the extent Port explicitly released Developer from the obligation in default when it approved the Transfer, Developer may request that the Port meet and confer regarding the Transferee's default or Material Breach. Developer must specify in its request that it is willing to assume responsibility for all of the Transferee's unperformed obligations for each affected Phase and any conditions to Developer's assumption of these obligations. The Port may accept or reject Developer's conditions in its sole discretion. The Port will respond to Developer within 15 days after Developer's request is delivered. Even if the Port agrees to meet and confer with Developer, the Port will not be required to negotiate exclusively with Developer, agree to Developer's proposed terms for assumption, or approve another Transfer proposed by Developer.

(d) After Phase Completion. The following will apply if the Port terminates the DDA as to any Phase for any reason after the Port has issued a SOP Compliance Determination for all Phase Improvements.

(i) Developer will be entitled to receive the Developer Balance for the Phase, but only to the extent of Project Payment Sources generated by the Option Parcels in the Phase on which Developer has Closed Escrow before the Termination Date.

(ii) The Port's obligation for further revenue-sharing for the Phase will end on the Termination Date.

(e) Termination Due to Port Default. If the Port willfully causes a Material Breach that prevents Forest City from proceeding with the 28-Acre Site Project in accordance with the Schedule of Performance, then Port will pay to Developer a priority payment from Project Revenues associated with the Phase in the amount of the Developer Balance plus Developer's costs of collection, plus interest at the annual rate of 10%, calculated from the date the payment from Developer was due until paid in full, compounded annually.

12.10. Assignment of Documents after Termination.

(a) Consulting Contracts. Developer agrees to use good faith efforts to obtain provisions in services contracts with its consultants that will permit Developer's assignment of Project Materials to the Port under this Section.

(b) Required Assignment. If this DDA is terminated in whole or in part, Developer must:

(i) provide to the Port at no cost within 60 days after the Port's notice a Project Assignment of all Project Materials, including all Structural Materials, to the associated portions of the 28-Acre Site Project, to the extent permitted under Developer's consulting contracts;

(ii) satisfy all outstanding fees relating to the 28-Acre Site Project Materials for services rendered by any of the 28-Acre Site Project Consultants up to the Termination Date and provide proof of payment to the Port; and

(iii) subject to limitations in this Section, deliver copies of all Project Materials in Developer's possession or confirm for materials not in its possession, on request from Project Consultants or the Port, that Project Consultants are authorized to deliver all Project Materials to the Port.

(c) Allowed Disclaimer. Developer will be permitted to disclaim any representations or warranties with respect to the 28-Acre Site Project Materials (other than Developer's payment of fees), and, at Developer's request, the Port will provide Developer with a release from liability for future use of the applicable Project Materials, in a mutually acceptable form. Developer's acceptance of the Port's release will be deemed to waive and release the Port from any claims of proprietary rights or interest in the 28-Acre Site Project Materials, and Developer agrees that the Port or its designee may use any of the 28-Acre Site Project Materials for any purpose after a Project Assignment.

13. IMPROVEMENT PLANS

13.1. Improvement Plans for Phase Improvements. This Section applies to the submittal of Improvement Plans by Developer for Phase Improvements and any new or revised Improvement Plans for Deferred Infrastructure submitted by Vertical Developers. For purposes hereof, reference to "Developer" in this Article means both the Developer any Vertical Developer submitting Improvement Plans for Deferred Infrastructure.

13.2. Preparation of Improvement Plans. In its Consent to ICA, Developer agreed to comply with the Improvement Plan Submittal requirements set forth in *ICA § 4.3 (Review Periods)* and *ICA § 4.4 (Improvement Plans Generally)*.

13.3. Review of Improvement Plans.

(a) Review by City Agencies. The ICA sets forth procedures and standards for review and approval of Improvement Plans and Master Utility Plans and issuance of Construction Permits for Horizontal Improvements.

(b) Port Review Procedures. The Port staff will review and approve Improvement Plans for consistency with the Project Requirements and Regulatory Requirements in accordance with the procedures for review and approval set forth in the ICA.

(c) Standard of Review. Except as otherwise provided in this DDA, the Port's review and approval or disapproval of Improvement Plans subject to its review will be final and conclusive and will comply with the ICA.

(d) Disputes. Either Party may initiate a proceeding under **Section 10.5** (Non-Binding Arbitration) if the Port and Developer disagree as to whether:

(i) a matter contained in a particular submittal has been approved previously or requires the Port's approval under this DDA;

(ii) the Port is acting in a manner that is inconsistent with matters that it approved previously; or

(iii) a Port disapproval is inconsistent with the applicable standards of approval.

13.4. Conflicts with Other Governmental Requirements.

(a) Other Regulatory Approvals. The Port will not unreasonably withhold its approval, where otherwise required under this DDA, of elements of the Improvement Plans or changes in Improvement Plans required by any other Regulatory Agency if all of the following have occurred.

(i) The Port receives notice of the required change.

(ii) The Port has at least 10 days to discuss the element or change with the other Regulatory Agency requiring the element or change and with Developer's registered design professional in responsible charge.

(iii) Developer will cooperate fully with the Port and with the other Regulatory Agency within the 10-day discussion period in seeking reasonable modifications of the requirement, or reasonable design modifications of the Improvements, or some combination of modifications, to reach a design solution satisfactory to the Port.

(iv) As modified, the Improvements will comply with all Applicable Laws, including the Regulatory Requirements.

(b) Disputes. Developer and the Port recognize that regulatory conflicts may arise at any stage in the preparation of the Improvement Plans, but that it is more likely to arise at or after the Permit Set has been prepared and may arise in connection with permit applications. Accordingly, time is of the essence when a conflict arises. Both Parties agree to use their good faith efforts to reach a solution expeditiously that satisfies both Developer and the Port. At any time, either Party may submit the conflict to the dispute resolution procedures of **Section 10.5** (Non-Binding Arbitration).

13.5. As-Built Drawings.

(a) Delivery. Within 120 days after the Port issues a SOP Compliance Determination for each Phase, Developer must deliver to the Port As-Built Drawings for the applicable Phase Improvement that meets the requirements of **Subsection 13.5(b)** (Technical Requirements) and **Subsection 13.5(c)** (Format).

(b) Technical Requirements. As-Built Drawings must reflect all requests for information responses, field orders, change orders, and other corrections to the documents made during the course of construction. As-Built Drawings must be both in the form of full-size (24" x 36"), hard paper copies and converted into electronic format as full-size scanned tagged image files (TIFF) and AutoCAD files. As-Built Drawings must be full-sized documents, with "mark-ups" neatly drafted to indicate modifications from the original design documents, scanned at 400 dots per inch (dpi). Each drawing must have a unique number stamped onto the title block. An index of drawings must be prepared correlating drawing titles to the numbers. A minimum of 10 drawings must be scanned as a test before execution of this requirement in full.

(c) Format. The AutoCAD files must be contained in Release 14 or a later version, and drawings must be transcribed onto electronic storage media. All "X-REF," "block" and other referenced files must be coherently addressed within the environment of the compact disc. Media containing files that do not open automatically without searching or reassigning "X-REF" addresses will be returned for reformatting. A minimum of 10 complete drawing files, including all referenced files, must be transmitted to the Port as a test before execution of this requirement in full.

(d) Production Costs. Developer's costs to produce required files will be reimbursable Soft Costs unless Developer fails to comply timely with this Section. If Developer does not comply, the Port, after giving notice to Developer, will have the right, but not the obligation, to cause an engineer of the Port's choice to prepare final surveys and As-Built Drawings, plans and specifications, at Developer's sole, unreimbursable cost.

13.6. Schematic Design Review of Public Spaces. The Port will not issue a Construction Permit for any Park Parcel until the Port Commission has approved the schematic design of the applicable Park Parcel in accordance with this Section.

(a) Applications. Developer will submit to the Port an application for the schematic design of each Park Parcel (each, a "**Schematic Design Application**") at such time as Developer reasonably determines necessary to meet the Schedule of Performance

for construction of the applicable Park Parcel. Each Schematic Design Application will include the following information:

- (i) A written narrative describing the overall conceptual design, including the park program, design elements, and facilities provided for each Park Parcel;
- (ii) An illustrative site plan to scale showing:
 - (1) Conceptual circulation systems (vehicular, bicycle and pedestrian) including parking;
 - (2) Conceptual grading and drainage;
 - (3) Generalized locations of active and passive recreational areas; park elements and facilities;
 - (4) Generalized locations and conceptual layout for landscaping and hardscape areas, including tree planting and any stormwater treatment areas; and
 - (5) Generalized locations for furnishings, lighting, public art, signage, comfort facilities, stairs, ramps, and railing;
- (iii) Illustrative sections and perspectives representative of the overall conceptual design, including key relationships between programmatic areas, design elements, and defining park features and facilities;
- (iv) Image “boards” showing proposed concepts, detailed studies and/or precedents for site furnishings, paving materials, site architectural elements, lighting, public art, signage, comfort facilities, stairs, ramps and railings, tree species (and alternate species), and species palette concepts for major landscaping areas; and
- (v) A proposed signage program consistent with **Subsection 13.7(a)** (Public Spaces) if not previously approved.

(b) Pre-Submittal Meetings. Not less than 30 days before submitting a Schematic Design Application for a Park Parcel, Developer will submit to the Port Director a draft of the concept plans and documents of the type listed in **Subsection 13.6(a)** (Applications). Not less than 20 days before submitting a Schematic Design Application, Developer and Port staff will hold at least one pre-Submittal meeting at a agreeable time. Developer may submit information and materials iteratively, and Developer and the Port may agree to hold such additional meetings as they may deem useful or appropriate. If Developer fails to submit such preliminary documents or to schedule such pre-Submittal meeting before submitting a Schematic Design Application as specified above, then such failure will not, by itself, be an Event of Default but the Port’s time for review of the Schematic Design Application will be extended by 30 days.

(c) Developer Outreach. Prior to submitting a Schematic Design Application for a Park Parcel, Developer will also host a public presentation of its design and will provide a minimum of two weeks’ notice by publication, posting, mailing, or other means reasonably aimed at providing stakeholders with an opportunity to attend the presentation.

(d) Port Review – Initial. The Port staff will review each Schematic Design Application for completeness, which means the Schematic Design Application includes all documents and materials in such detail as is required hereunder. The Port will make its determination of completeness within 15 days after submittal and will advise Developer in writing of any deficiencies. Subject to *App ¶ 2.2(c) (No Deemed Consent*

Without Notice), if the staff does not so advise Developer, the Schematic Design Application will be deemed complete and all time periods for Port review will run from the date of such deemed completeness. Notwithstanding the foregoing, a determination that a Schematic Design Application is deemed complete will not prevent the Port staff from requesting such additional materials as deemed reasonably necessary to complete its review.

(e) Review of Complete Applications. Prior to submittal of the first Schematic Design Application, the Port Director, in consultation with the Planning Director, will designate a design advisory committee composed of qualified design professionals (which may include Port and Planning staff), to make design recommendations to the Port Commission (the “**Design Advisory Committee**”) on Schematic Design Applications. When the Schematic Design Application is complete or deemed complete under *App ¶ 2.2(c) (No Deemed Consent Without Notice)*, the Port staff will transmit the Schematic Design Application to the Design Advisory Committee for consideration at a noticed public hearing at its next meeting.

(f) Recommendation of Design Advisory Committee. The Design Advisory Committee will hold a public hearing on the Schematic Design Application and make design recommendations to ensure that the design of the park is consistent with applicable provisions of the Design for Development and other applicable Development Requirements.

(g) Port Commission Approval. The Port Director will submit the applicable complete Schematic Design Application to the Port Commission for review and consideration, with the Design Advisory Committee recommendation for Port Commission consideration in accordance with **Subsection 5.3(c)** (Port Commission Meetings).

(h) Approval of Public Space Improvement Plans. After the Port Commission’s approval of Schematic Design Application, Public Space Improvement Plans will be processed in accordance with the ICA. The Port Director may approve Public Space Improvement Plans that amend or modify the approved Schematic Design Application, provided she finds that the amendment or modification would not be a material change, would not be detrimental to the public welfare or injurious to the property or improvements in the vicinity of the 28-Acre Site Project, and would be consistent with the Project Requirements and Regulatory Requirements.

(i) Approval of Park Rules and Regulations. Port staff will consult with Developer to develop reasonable rules and regulations for the conduct of activities and operations in the Public Spaces, including limits on restricted access events, in conjunction with its conditional acceptance of Public Spaces under **Section 15.7** (Heading). After Port Commission approval, these regulations will apply to each Public Space when finally accepted by the Port under this DDA.

13.7. Signage. The Design for Development sets forth general standards and guidelines for signage within the SUD, including public realm signage, wayfinding elements, and building signage. Because the Design for Development standards and guidelines are general in nature, this Section sets forth a process for Port approval of comprehensive signage plans that will cover the Public Spaces, Public ROWs, and buildings in the 28-Acre Site, and provide for an interpretive signage program that will help educate visitors on the history and significance of particular features or points of interest (each, a “**Signage Plan**”). Each Signage Plan will consist of the following four elements, approved in accordance with the following.

(a) Public Spaces. Developer will submit a concept level Public Spaces Signage Plan with or prior to its first Schematic Design Application. The Public Spaces Signage Plan may be a master plan for some or all of the Public Spaces or may be limited

to the Public Spaces that are the subject of the particular Schematic Design Application. Each Park Parcel Signage Plan will be consistent with the Design for Development and will include concept level plans that include, at a minimum: signage controls governing program area; text size and design; volume dimensions or limitations; signage on kiosks or furnishings; and a description of any uniform signage features. The Port consideration and approval of the Public Spaces Signage Plan (including amendments to previously approved plans) will occur at the same time, and in accordance with, the Schematic Design Application process described in **Section 13.6** (Schematic Design Review of Public Spaces).

(b) Public ROWs. Developer will submit a concept level Public ROWs Signage Plan with or prior to its first submittal of Improvement Plans under the ICA. The Public ROWs Signage Plan will be a master plan for the Public ROWs within the 28-Acre Site. The Public ROWs Signage Plan will be consistent with the Design for Development and include concept level plans that include, at a minimum, signage controls governing non-City standard street signs; temporary signs; parking and other wayfinding signs; kiosks, streetscape commercial signage, and street furniture-related commercial signage. Port consideration and approval of the Public ROWs Signage Plan, will occur at the same time, and in accordance with, the same process for Port approval of Improvement Plans under the ICA.

(c) Building Signage. As provided under the Design for Development, Developer will submit a Building Signage Plan to the Port and Planning that will serve as further guidance to Port and Planning staff in reviewing building signage for consistency with the Design for Development. Developer will submit the building Signage Plan to the Port Director, with a copy to the Planning Director, on or before a Vertical Developer submits a design review application for the first building under the SUD Amendments. The Building Signage Plan will include concept level plans that include, at a minimum: temporary signs; commercial signs; text size and design, or volume dimensions or limitations; permitted types of signage; and a description of any uniform signage features. The Port Director will review and approve the building Signage Plan within 30 days after submittal and use commercially reasonable efforts to coordinate a review by the Planning Director within the same timeframe. Such approval must be consistent with the Design for Development and other Project Requirements and Regulatory Requirements, unless otherwise agreed by Developer.

(d) HABS Survey/Interpretive Signage.

(i) As a condition to the Port's issuance of the first demolition permit for the 28-Acre Site Project, Developer will have submitted Historic American Buildings Survey (HABS) documentation for all structures being demolished.

(ii) As a condition to the Port's approval of the first Schematic Design submittal for Parks, the Port will have approved an interpretive signage Plan for the 28-Acre Site, intended to educate visitors to the 28-Acre Site to key historic, cultural and natural features of significance. The interpretive signage program will include, at a minimum, the proposed location and general content of the interpretive signs and features. The Port Director will approve the interpretive signage plan within 30 days after submittal. Such approval must be consistent with the Design for Development and other Project Requirements and Regulatory Requirements, unless otherwise agreed-upon by Developer.

14. CONSTRUCTION GENERALLY

14.1. Substantial Compliance with Plans. The allowed scope of work for Horizontal Improvements will be determined by the Port's approval of Permit Sets in accordance with the ICA. Developer agrees to construct Horizontal Improvements in substantial compliance with

approved Permit Sets and in strict compliance with applicable Project and Regulatory Requirements.

14.2. Standards of Construction.

(a) Generally. Developer must construct or cause all Horizontal Improvements to be completed using standards of quality and quantities in accordance with the approved Permit Sets and in compliance with Applicable Laws. Developer must undertake commercially reasonable measures using good construction practices to:

- (i) minimize damage, disruption, or inconvenience caused by the work;
- (ii) make adequate provision for the safety and convenience of all persons affected by the work;
- (iii) minimize the risk of injury or damage to adjoining portions of the 28-Acre Site, Horizontal Improvements and Vertical Improvements under way or completed, and the surrounding property; and
- (iv) minimize the risk of injury to members of the public.

(b) Historic Resources. The Developer Construction Obligations require Developer to rehabilitate the Historic Buildings for reuse in compliance with the Secretary's Standards. This requirement will be incorporated into the applicable Vertical DDA for each of the Historic Buildings. The Port will review building permit applications for rehabilitation of Historic Buildings and inspect the completed rehabilitation work for compliance with all applicable Regulatory Requirements and Project Requirements. The Port will review all building permit applications for rehabilitation of Historic Buildings and inspect the completed rehabilitation work for compliance with all applicable Regulatory Requirements and Project Requirements. The Port's review will be consistent with SHPO and NPS requirements for Historic Tax Credit eligibility, and Port will not disapprove of the building permit for a Historic Building or require changes to the proposed building permit plans for reasons that would conflict with plans approved by SHPO and NPS for the applicable Vertical Developer to obtain Historic Tax Credits.

14.3. Site Security. During all construction activities at the 28-Acre Site, Developer will be responsible for taking commercially reasonable measures to secure the physical site and protect the public, as well as the City, the Port, and their Agents, from reasonably foreseeable harm. Examples of security measures include fencing, security patrols, video surveillance, and general liability insurance.

14.4. Costs.

(a) Commercially Reasonable Costs. The Parties acknowledge that any Horizontal Development Cost that Developer incurs will be deemed commercially reasonable and to represent the fair market value price of the Horizontal Improvements if it provides the Port with documentation showing satisfaction of the requirements of *FP § 8.1 (Commercially Reasonable Costs)* or *FP § 8.2 (Guaranteed Maximum Price Contract)*. To the extent that relevant documents are available, Developer will provide such documentation to Port in each Phase Budget and Phase Quarterly Report regarding costs already incurred in the Phase or Prior Phases, and costs anticipated to be incurred in the applicable Phase. If Developer anticipates that any of its Horizontal Development Costs will be incurred without satisfying the requirements of *FP § 8.1 (Commercially Reasonable Costs)* or *FP § 8.2 (Guaranteed Maximum Price Contract)*, it will include an estimate of such costs in each Phase Quarterly Report submitted under *FP § 8.1 (Developer Quarterly Reports)*, based on approved Improvement Plans, construction contracts (including contingencies) and any change orders.

(b) Change Orders. From time to time, Developer and its general contractor may agree on change orders to the underlying GMP or other construction contract, which will occur during the course of construction of the applicable Phase Improvements. At the earliest feasible opportunity, but in any event no later than the next regular meeting described in **Section 14.6** (Progress Meetings), Developer must share with the Port any agreed-upon change order that would exceed a \$250,000 threshold per occurrence (each, a “**Material Change Order**”). In the event that multiple occurrences are packaged in a single change order, this threshold applies only to individual occurrences. All change orders will also be reflected in Developer’s reporting of estimated or actual Horizontal Development Costs required under *FP § 8.1 (Developer Quarterly Reports)*. With each reimbursement request under the Acquisition Agreement, Developer will also submit documentation supporting the Material Change Order request and associated amendment to the applicable GMP or other construction contract.

(c) Disputes. The Port will notify Developer within 14 days after Developer’s Submittal of documents described in **Subsection 14.4(a)** (Commercially Reasonable Costs) or **Subsection 14.4(b)** (Change Orders) if the Port considers any of the estimated or actual Horizontal Development Costs to be commercially unreasonable based on the documentation provided and would not qualify as a Project Cost under the Financing Plan. If not resolved by consultation under **Subsection 14.6(a)**(Purpose), the Parties may agree to submit the following disputes for resolution under **Section 10.5** (Nonbinding Arbitration):

- (i) whether the challenged costs are commercially unreasonable;
- (ii) whether the challenged costs are outside the scope of approved Permit Sets;
- (iii) proposed changes to address regulatory conflicts under **Section 13.4** (Conflicts with Other Governmental Requirements); and
- (iv) whether the review process meets the applicable standard of conduct.

14.5. Contracting Procedures. Developer agrees to follow the contracting procedures described in this Section to negotiate one or more contracts for Horizontal Improvements consistent with the terms of the applicable Phase Approval.

(a) Qualified Contractors. Developer will provide the Port with a list of the general contractors from which Developer intends to solicit bids for construction of Horizontal Improvements prior to issuing bid packages. If the Port reasonably objects to any of the proposed general contractors, the Port must respond in writing within five business days with a reasonably detailed explanation for its objection. Reasons for disapproval will be limited to the general contractor’s relevant experience and financial capacity (including ability to meet bonding requirements); ability to comply with all applicable City contracting requirements; and legal grounds for disqualification, such as debarment or failure to be licensed by the State Contractors License Board. If the Port objects to a general contractor, then Developer may provide Port with notice of a replacement general contractor subject to the same five business day objection period, or submit the matter to the dispute resolution procedures of **Section 10.4** (Binding Arbitration).

(b) Bid Package Requirements and Security. The bid package must include relevant Improvement Plans clearly defining the scope of work. The bid package will require the general contractor to guarantee performance and payment the work, which may be provided through a subcontractor default insurance provided by the general contractor covering all enrolled subcontractors, or require each subcontractor under subcontracts having a value of more than \$100,000 to provide payment and performance

bonds guaranteeing their work. Payment and performance bonds must be issued by a surety meeting the required standards under the Subdivision Code.

14.6. Progress Meetings.

(a) Purpose. Developer must provide notice to the Port of a place and time that Developer's senior construction management team will hold construction progress meetings (but such notice will not be required more frequently than monthly), in which the Port and the other City Agencies will be entitled to participate. The purpose of the City Agencies' participation in these meetings will be to:

- (i) coordinate Developer's preparation and Submittal of Improvement Plans to the Port for City Agency review;
- (ii) review progress in constructing the Improvements;
- (iii) coordinate the Acquiring Agency's inspections;
- (iv) review Developer's expected change orders; and
- (v) review any expected changes in the scope of work.

(b) Minutes. Developer agrees to prepare and distribute meeting minutes promptly after each progress meeting. The Port staff and Developer (and their respective consultants subject to Port and Developer presence or consent) agree to communicate and consult informally as frequently as reasonably necessary to assure that the formal submittal of any Improvement Plans to the Port can receive prompt and speedy consideration.

(c) Representatives. For the purposes of this Section, until otherwise directed, the Port's representative is the Chief Harbor Engineer. Developer will provide Port with notice of the identity of its representative promptly after the Reference Date. The Parties do not have to comply with *App ¶ A.5 (Notices)* and **Article 20** (Notices) for notices and requests made to facilitate the Parties' progress meetings and consultations covered by this Article.

(d) Reports. During periods of construction, the Port will have the right to require Developer to submit monthly progress reports on construction to the Port, in form and detail as reasonably required by the Port.

14.7. Other Construction Matters.

(a) Port and Other Governmental Permits. Developer has the sole responsibility for obtaining all necessary permits for the Horizontal Improvements and must submit applications for the permits directly to the applicable Regulatory Agency, unless otherwise provided in **Article 13** (Improvement Plans). Developer will bear all risk of delay due to its submittal of an incomplete or insufficient permit application.

(b) Developer License. For all Horizontal Improvements to be constructed by Developer on land owned by the Port that has not been conveyed to Developer under the Master Lease, the Port will enter into a License with Developer, in such form as is reasonably approved by Port.

(c) Port Right of Entry. Developer acknowledges that under the Master Lease, the Port and its Agents have the right of entry onto the 28-Acre Site to the extent reasonably necessary to carry out the purposes of this DDA and as the landowner.

(i) The Port will have access required to install, repair, replace, monitor, and service any security installations.

(ii) The Parties may agree to submit disputes over whether Port actions arising from entry under this Section or through the Port's exercise of its right of

entry under the Master Lease unreasonably impeded Developer's construction activities for resolution under **Section 10.5** (Nonbinding Arbitration).

(d) Workforce Development Plan. Although the Parties acknowledge that construction of the Improvements is a private work of improvement, Developer, its Agents and Vertical Developer must comply with all applicable provisions of the Workforce Development Plan attached as **DDA Exhibit B4**.

(e) Construction Signs and Barriers. Developer must provide appropriate construction barriers, construction signs, and a project sign or banner describing the 28-Acre Site Project and must post the signs at the 28-Acre Site during construction. Unless the Port Commission adopts a signage plan for the 28-Acre Site Project, the Port's Guidelines for Review and Approval of Signs and Murals on Port Property, adopted by Resolution No. 97-12, will apply. Developer must submit the proposed size, design, text, and location of any construction signs and the composition and appearance of any construction barriers to the Port for approval before installation.

(f) Coordination. The Parties acknowledge that a number of construction projects on public land near the 28-Acre Site are being or are expected to be constructed at the same time as the construction of early Project Phases. Expected projects include the rehabilitation of the 20th Street historic buildings, construction of Crane Cove Park, construction of SFMTA line extensions, development of the Illinois Street Parcels, and SFPUC utility infrastructure work. Developer and the Port each agree to use reasonable efforts to coordinate construction efforts, to the extent within each Party's respective control, with those at other project sites in a manner intended to reduce construction conflicts without material delay to Developer Construction Obligations under this DDA.

(g) Construction Staging. During the DDA Term, Developer will use portions of the 28-Acre Site as staging areas for construction lay down and parking, construction equipment, and related materials under the Master Lease. Developer may request additional areas outside of the 28-Acre Site (including Parcel K South) for construction staging, which the Port may grant or deny in its sole discretion. If the Port agrees to license additional land to Developer for this purpose, the Port will charge license fees at market rates.

(h) Mechanics' Liens. Developer must keep the 28-Acre Site, Parcel K South, and Horizontal Improvements free from any liens arising out of any work performed, materials furnished, or obligations incurred by Developer or its Agents. Developer's failure to cause any construction-related lien to be released of record or bonded or take other action acceptable to the Port within 30 days after Developer's receipt of final notice of the imposition of the lien will be a default under this DDA and the Master Lease, and the Port will have the right at its option to effect a release of the lien by any commercially reasonable means. Developer at its sole cost must reimburse the Port for all costs the Port incurs to do so within 30 days after the Port's demand. Developer will be permitted to contest the validity or amount of any tax, assessment, encumbrance, or other lien and to pursue any remedies associated with the contest, but the contest will be subject to all conditions in the Master Lease.

14.8. Mitigation Measures. Developer and the Port agree that construction and operation of all Improvements in the SUD must comply with applicable Mitigation Measures in the MMRP.

(a) Horizontal Improvements. Developer agrees to implement the Developer Mitigation Measures related to the Horizontal Improvements within the FC Project Area and Parcel K South as required by the MMRP and other Project Requirements and Regulatory Requirements. Developer also agrees to cause its contractors, subcontractors, and Transferees to comply with this obligation through its contracts.

(b) Vertical Improvements. Developer and the Port agree to incorporate into the applicable Vertical DDA each Vertical Developer's responsibility to implement Developer Mitigation Measures related to associated Vertical Improvements as required by the MMRP.

(c) Other Horizontal Improvements. The Port agrees to implement the Mitigation Measures that are Port obligations as required by the MMRP and use good faith efforts consistent with the ICA to cause the necessary public agencies or applicable private parties to implement the Mitigation Measures assigned to them.

14.9. Nondiscrimination.

(a) Prohibited Acts. Developer agrees on its own behalf and on behalf of any Transferee or any other person claiming under or through Developer or a Transferee not to discriminate against or segregate, or to permit any occupant or user of the 28-Acre Site to discriminate against or segregate, any person or group of persons on any basis listed in section 12955 of the California Fair Employment and Housing Act (Cal. Gov't Code §§ 12900-12996), or on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, AIDS/HIV status, weight, height, association with members of protected classes, or in retaliation for opposition to any practices forbidden under this chapter against any employee of, any City employee working with, or applicant for employment with Developer, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in the business, social, or other establishment or organization operated by Developer.

(b) Binding Covenants. Developer, all Interested Parties, and any occupant or user of the 28-Acre Site, by contract, occupancy agreement, security interest, or otherwise, will be bound by, and must comply with the nondiscrimination requirements of this Section. The covenants in this Section run with the land.

(c) Right to Enforce. The Port is beneficiary of the covenants in this Section both in its own right and for the purposes of protecting the public interest and will retain that status even after conveyances of portions of the 28-Acre Site. The Port and its successors and assigns will have the right to exercise all rights and remedies available at law or in equity to enforce the covenants.

(d) Cure. Developer will not be in default of its obligations under this Section if Developer promptly acts to satisfy any adverse judgment or award in any action involving a bona fide dispute over whether Developer is engaged in discriminatory practices.

15. HORIZONTAL DEVELOPMENT

15.1. Horizontal Improvements.

(a) Developer Construction Obligation. Developer will proceed with the Developer Construction Obligations in accordance with the Schedule of Performance and this DDA after obtaining a Phase Approval for each Phase.

(b) Phase Transfers. Developer may Transfer Developer Construction Obligations for Phases other than Phase 1 to Transferees under **Article 6** (Transfers).

(c) Deferred Infrastructure. Developer may assign the obligations for Deferred Infrastructure in all Phases to Vertical Developers in accordance with the terms of the applicable Vertical DDA and Vertical Coordination Agreement, subject to Other City Agency review, inspection, and acceptance of the Deferred Infrastructure under the ICA and the Subdivision Code. Developer will continue to be responsible for seeking and obtaining: (i) reimbursement for Deferred Infrastructure costs under the Acquisition

Agreement; and (ii) acceptance of Deferred Infrastructure by the Board of Supervisors or the Port, as applicable.

15.2. Site Preparation Work. Before beginning any Site Preparation, Developer must: (a) submit an update to the prices in the Acquisition Agreement to reflect construction estimates and obtain a Construction Permit from the Port; and (b) obtain all other required Regulatory Approvals, including Construction Permits, necessary to perform the applicable Site Preparation. Phase Approval will not be required for the issuance of Construction Permits for Site Preparation.

15.3. Preparation of Development Parcels. Developer must complete the following work necessary to prepare Development Parcels for the Port's conveyance to Vertical Developers.

(a) Final Map. A Final Map (which may be a Final Transfer Map) creating a separate legal parcel for each Development Parcel must be recorded in the Official Records.

(b) Site Conditions.

(i) Development Parcels may be left in an as-is condition until conveyed.

(ii) For Development Parcels assumed to include a basement level, Developer may elect at its sole option to excavate the basement to generate fill for use elsewhere on-site, subject to any required Water Board approval.

(iii) For other Development Parcels, Developer may elect at its sole option to grade the building pad to target subgrade elevation with soil compacted under the applicable grading permit and the geotechnical recommendations for the site as certified by Developer's geotechnical engineer.

(c) Phase Improvements. Developer will have performed all necessary Site Preparation and will be contractually obligated to construct all necessary Phase Improvements to serve the Development Parcel in accordance with the Schedule of Performance, except for any Deferred Infrastructure that a Vertical Developer is obligated to construct.

15.4. Conditions to Construction. Developer must satisfy the following additional conditions before Commencing construction of Phase Improvements other than Site Preparation.

(a) Approvals. Developer has obtained: (i) approval of the Streetscape Master Plan in accordance with **Section 3.5** (Streetscape Master Plan); (ii) the applicable Phase Approval; (iii) for any Park Parcel, approval of its Schematic Design in accordance with **Section 13.6** (Schematic Design Review of Public Spaces); and (iv) all other required Regulatory Approvals, including Construction Permits, necessary to Commence construction.

(b) Tentative Map. Developer has obtained Public Works' conditional approval of the Tentative Map for the Phase Area, entered into a Public Improvement Agreement with the City, provided all bonds required under the Subdivision Code, and Public Works' authorization to begin construction.

(c) Good Standing. Developer must not be in Material Breach or have received notice of a potential breach of this DDA.

(d) Security. Developer has provided Phase Security to the Port under **Section 17.2** (Phase Security).

(e) Conditions for Benefit of the Port. The conditions in this Section are solely for the benefit of the Port. Only the Chief Harbor Engineer, in his sole discretion, may waive any of those conditions, and only to the extent waivable under law.

(f) Effect of Failure of Condition. Developer's failure to satisfy any condition described in this Section for one Phase will not alone: (i) be a failure of conditions for any other Phase unless the failure directly impedes the other Phase; (ii) relieve either Party of any obligations that previously arose under this DDA; or (iii) be a Material Breach except in conjunction with Developer's failure to meet an Outside Date for the Phase or Developer's abandonment of construction after notice and the opportunity to cure.

15.5. Regulatory Approvals.

(a) Requirement to Obtain. Developer understands that: (i) Site Preparation and construction of Horizontal Improvements will require Regulatory Approvals from other Regulatory Agencies to Commence construction under this DDA; and (ii) none of the Port's Phase Approval, Schematic Design approval, or approval of any other aspect of Developer Construction Obligations in the Port's regulatory capacity is a guarantee that other Regulatory Agencies will grant required Regulatory Approvals.

(b) Cooperation. The Port will cooperate reasonably with Developer to obtain required Regulatory Approvals and will sign any application that the Port is required to sign as a co-applicant or co-permittee. Developer is not authorized to agree to any conditions or restrictions to a Regulatory Approval that would create any Port obligation not expressly stated under this DDA without the Port's approval in its sole discretion. The Port will not unreasonably withhold its approval for any condition or restriction for which Developer has assumed all liability in such form as is reasonably satisfactory to the Port. The Port's obligation under this Subsection does not apply to any application for a Regulatory Approval that would require the Port to incur costs unless Developer agrees to reimburse the Port.

(c) City Regulatory Approvals. Developer and the City have entered into the Development Agreement, which will govern certain land use matters under the Planning Code, including Impact Fees and Exactions. The Port and Other City Agencies, with Developer's consent, have entered into the ICA specifying certain procedures and standards that will apply when Developer seeks certain Regulatory Approvals from the Port and Other City Agencies.

(d) Compliance. Developer is solely responsible for ensuring that the design and construction of the Horizontal Improvements comply with all applicable Project Requirements and Regulatory Requirements.

(e) Noncompliance. Developer and its consultants and contractors must pay any fines and penalties at their sole cost and perform any corrective actions imposed for noncompliance with any applicable Regulatory Requirement and indemnify the Port against any liability arising from such noncompliance, even if the Port is a co-permittee. Fines, penalties, and costs of corrective actions will not be reimbursable to Developer under the Financing Plan.

15.6. Deferred Infrastructure.

(a) Identification of Deferred Infrastructure Zones. The timely and efficient construction of Phase Improvements may require the construction of certain Deferred Infrastructure to be delayed until the adjacent Vertical Improvements are built. When Developer submits its Basis of Design Report under the ICA, it will identify Deferred Infrastructure as "not-in-permit;" which Deferred Infrastructure will be subject to the approval of the applicable Permitting Agency under the ICA.

(b) Deferred Infrastructure Zones. To the extent known, Developer will identify “**Deferred Infrastructure Zones**” associated with the applicable Phase Improvements in each Phase Submittal and with each Basis of Design Report. The Deferred Infrastructure Zones consist of the following:

- (i) the area between back-of-curb and the adjacent Development Parcel boundary or the adjacent Public Space, as applicable;
- (ii) bands up to 40 feet along the outer boundaries of Public Spaces and Mid-Block Passages adjacent to Development Parcels and the entire portion of Market Square (OS-2) that will be built in the air parcel above Parcel D; and
- (iii) the area adjacent to Development Parcels for the installation of service infrastructure, including laterals, traps, air vents, clean-outs, meter boxes, irrigation facilities and associated pedestals, pull boxes, and secondary conduits.

(c) Construction of Deferred Infrastructure. Developer (or the applicable Vertical Developer under a Vertical DDA) will be obligated to construct the Deferred Infrastructure in accordance with the Project Requirements and Regulatory Requirements in accordance with the Schedule of Performance as it applies to Deferred Infrastructure.

15.7. SOP Compliance. This Section sets forth the procedures for determining when Developer’s has met its obligations under the Schedule of Performance to construct an Improvement, including any Component of or entire Phase Improvement, element of Deferred Infrastructure, Park Parcel, and the entirety of required Phase Improvements in accordance with the Schedule of Performance. The ICA addresses procedures and standards that will apply when Developer seeks certain Regulatory Approvals from the Port and Other City Agencies, including future acceptance of Phase Improvements.

(a) Request to Port.

(i) When Developer believes that an Improvement has been constructed and completed in accordance with all applicable Project Requirements and Regulatory Requirements, it may submit to the Chief Harbor Engineer a request for a Determination of SOP Compliance. Developer’s request must include all of the documents listed in **DDA Exhibit B9** (the request, with all submitted materials, the “**SOP Compliance Request**”).

(ii) Unless the SOP Compliance Request relates to Deferred Infrastructure or all Phase improvements in a Phase, the Chief Harbor Engineer will make an SOP Compliance Determination without regard to Deferred Infrastructure.

(b) SOP Compliance Determination.

(i) The Chief Harbor Engineer will review the SOP Compliance Request and will consult with Other City Agencies as provided under the ICA to determine whether Developer has completed the applicable Improvements in accordance with applicable Project Requirements and Regulatory Requirements for purposes of the Schedule of Performance. Under the ICA, each Other City Agency must respond within 30 days to the Chief Harbor Engineer with any comments, subject to a 14-day cure period for failure to respond within the 30-day period. In any event, the Chief Harbor Engineer will approve or disapprove each SOP Compliance Request within 45 days after receiving Developer’s complete SOP Compliance Request.

(ii) The Chief Harbor Engineer will grant an SOP Compliance Request by issuing a signed, acknowledged document in recordable form identifying each Improvement that Developer has constructed and completed in accordance with

all applicable Project Requirements and Regulatory Requirements (“**SOP Compliance Determination**”). The Parties will negotiate on the form of the SOP Compliance Determination before Developer submits its Phase Submittal for Phase 1.

(iii) If the Chief Harbor Engineer disapproves the SOP Compliance Request, he will respond in writing with a reasonably detailed description of the reasons for disapproval and measures necessary to address the deficiencies. Developer’s resubmittal of an SOP Compliance Request will be subject to the same review and response periods.

(iv) If the Chief Harbor Engineer fails to issue the SOP Compliance Determination within 45 days after receiving Developer’s complete SOP Compliance Request, Developer may submit a request to the Chief Harbor Engineer, clearly labelled, “*Action Required for Determination of SOP Compliance or Deemed Approval*,” in accordance with App ¶ A.5 (Notices) and **Article 20** (Notices) requesting issuance of the SOP Compliance Determination. If the Chief Harbor Engineer or his nominee fails to respond within 15 days after the date notices was delivered, the applicable Request of SOP Compliance will be deemed approved for purposes of establishing Developer’s compliance with the Schedule of Performance.

(v) Before Developer submits its Phase Submittal for Phase 1, the Parties will negotiate on the form of a Memorandum of Deemed Approval that will require Developer to specify the applicable Improvements and Developer’s satisfaction of all conditions for deemed approval.

(c) Effect of SOP Compliance Determination. An SOP Compliance Determination or deemed approval under **clause (iv)** of **Subsection 15.7(b)** (SOP Compliance Determination):

(i) will conclusively establish Developer’s compliance with the Outside Date under the Schedule of Performance for the completion of each Improvement listed in the SOP Compliance Request; but

(ii) will not have any precedential effect for the purpose of the City’s acceptance of Horizontal Improvements.

(d) Effect of Recordation. Developer may record in the Official Records each SOP Compliance Determination or, if applicable, a Memorandum of Deemed Approval. After a recordation, any person then owning or later purchasing, leasing, or otherwise acquiring any interest in the applicable Phase Area will not, solely by virtue of its interest or actual or constructive knowledge of the contents of this DDA, incur any obligation or liability under this DDA for failure to comply with the Schedule of Performance obligations to which the recorded document applies.

(e) Timing of SOP Compliance Requests and Schedule of Performance. The Schedule of Performance includes Outside Dates by which Developer must obtain an SOP Compliance Determination for Phase Improvements, Public Spaces within Park Parcels, and Deferred Infrastructure. Developer will not be in Material Breach for failure to meet the Outside Date for an SOP Compliance Determination if it has submitted a complete SOP Compliance Request for the applicable Improvements at least 45 days prior to the applicable Outside Date, and, if subsequently disapproved, Developer is diligently curing any deficiencies identified by the Chief Harbor Engineer.

15.8. Acceptance of Park Parcels and Phase Improvements. After the Chief Harbor Engineer issues an SOP Compliance Determination for any Park Parcel or other Phase Improvement that the Port will accept, subject to completion of Deferred Infrastructure in

associated Deferred Infrastructure Zones, Port staff will place an item on the Port Commission's calendar in accordance with **Subsection 5.3(c)** (Port Commission Meetings). Port staff's memorandum to the Port Commission will report on the findings made by the Chief Harbor Engineer in issuing the SOP Compliance Determination and recommend that the Port Commission accept the applicable Park Parcel or Phase Improvement on the following terms.

(a) Conformity Findings. The Port Commission finds that the Improvement is a functional Public Space or Phase Improvement and is constructed in conformity with the Project Requirements and Regulatory Requirements.

(b) Delegation for Deferred Infrastructure. The Port Commission will delegate to the Port Director or her designee the authority to accept Deferred Infrastructure associated with the applicable Improvement. The Port Commission resolution will specify any conditions to the Port Director's delegated actions.

(c) Release and Acceptance. Upon satisfaction of all conditions required by the Port Commission for acceptance, the Port Commission will authorize and direct the Port Director, or her designee, to record a signed, acknowledged Partial Release under *ML § 1.1(b)(ii) (Adjustment of Premises for Development)* releasing the accepted Improvement from the Master Lease promptly after the Chief Harbor Engineer issues an SOP Compliance Determination for the Deferred Infrastructure. The Port Director will deliver a conformed copy of the recorded document to Developer promptly after recordation.

(d) Effect of Recordation. Recordation of the Partial Release of Master Lease will:

(i) transfer ownership of the applicable Improvement to the Port; and

(ii) release Developer from future obligations for liability or repair of the Improvement except to the extent provided under **Section 9.3** (General Indemnity), **Section 9.4** (Hazardous Materials Indemnity), and applicable warranties.

15.9. Acceptance of Other Horizontal Improvements. The ICA provides for the City Agencies to meet and confer to consider other standards and procedures for acceptance of Horizontal Improvements, including Utility Infrastructure and, if desired, adopt procedures for acceptance of Horizontal Improvements. For any other Horizontal Improvement that any City Agency accepts in accordance with applicable Regulatory Requirements, upon a City Agency's acceptance of a Horizontal Improvement, the Parties will record a Partial Release under *ML § 1.1(b)(ii) (Adjustment of Premises for Development)* unless the acceptance relates only to sub-surface improvements where the surface improvements have not been accepted, or vice versa, in which case, as a condition to the acceptance, Developer will be required to provide the accepting agency with access rights in accordance with the Master Lease, and warranties covering the accepted improvements for a period of time as specified in the conditions to acceptance and thereafter, under the applicable Public Improvement Agreement.

15.10. Maintenance of Horizontal Improvements.

(a) Port Facilities. Developer will be required to maintain Phase Improvements that will be under Port jurisdiction until the Port issues the applicable SOP Compliance Determination.

(b) Non-Port Facilities. Developer will be required to maintain all other Phase Improvements until the effective date of the Board of Supervisors acceptance action.

(c) Ongoing Maintenance Costs. Ongoing Maintenance Costs of accepted Phase Improvements will be paid by Services Special Taxes from the Pier 70 Leased

Property CFD and the Pier 70 Condo Property CFD in accordance with *FP § 4.6 (Services Special Taxes)*.

15.11. Waterfront Park. The Port will not use the waterfront park for staging or other activities related to the demolition of Pier 64 to the extent that it would interfere with Developer's construction obligations.

16. INSURANCE

Developer will be required to obtain insurance in accordance with the Master Lease and any applicable License. As a part of each Phase Submittal, Developer may propose the form, amount, type, terms, and conditions of insurance coverages required of Developer in connection with the applicable Phase to the extent different from the insurance requirements provided under the Master Lease or License; provided however, that the binding insurance requirements for the Phase will be approved by the Port in consultation with the City's Risk Manager, consistent with the Master Lease or License.

17. SECURITY FOR PROJECT ACTIVITIES

17.1. Adequate Security Generally. Developer will provide to the Port Adequate Security as provided in this Article to secure: (i) the Developer Reimbursement Obligations; (ii) Developer's obligation to deliver the Affordable Housing Parcels under the Affordable Housing Plan; (iii) construction of the Public Spaces when required under the Schedule of Performance; and (iv) relocation of the Noonan Tenants to the Noonan Replacement Space. This Adequate Security is separate from bonds that Developer will provide to the City under the Subdivision Code, but must meet the same requirements.

(a) Multiple Adequate Security Instruments. If Developer provides more than one instrument of Adequate Security, the instruments will not be cross-defaulted, and liability under each will be several and not joint, unless Developer requests otherwise with each Obligor's consent. The Port will have the right to proceed against all forms of Adequate Security securing the same obligation simultaneously or in any order that the Port elects in its sole discretion.

(b) Substitution of Adequate Security. Developer has the right to substitute at any time any portion of the Adequate Security that it has provided to the Port with another form of Adequate Security that meets the requirements under this Article.

(c) Material Breach. Except as specified in **Subsection 17.3** (Delivery), Developer's failure to provide timely, or to cure its failure to provide and maintain or replenish, Adequate Security as required under this Article will be a Material Breach of this DDA under **Section 12.2** (Material Breaches by Developer). Immediately after this Material Breach, Developer must: (i) take steps to preserve the existing condition of Improvements and other actions necessary to protect public health and safety; and (ii) suspend all other activities that were, or were to be, secured by the Adequate Security.

(d) Costs of Adequate Security.

(i) Developer's actual cost to provide any Adequate Security that is in the form of bonds or a cash equivalent provided by a third party will be a Soft Cost for which Developer will be entitled to the Developer Return under the Financing Plan.

(ii) Developer may not recover any imputed or actual cost to provide Adequate Security in the form of a Guaranty under which the Obligor is an Affiliate of Developer.

17.2. Loss Security. As a condition to each Phase Approval, Developer must provide to the Port and maintain Loss Security in the aggregate amount of \$5.5 million to secure the Developer Reimbursement Obligations for the Phase, subject to the following conditions.

(a) Delivery. Developer must provide the Loss Security within 30 days after receiving Phase Approval. The Parties have agreed that Developer may provide the Loss Security in the form of Guaranty attached as **DDA Exhibit B12**. Each Loss Security instrument, including a Guaranty, must be issued by an Obligor that meets the Obligor Net Worth Requirement and be in a form approved by the Port Director.

(b) Delivery by Transferees. Before the effective date of a Transfer by Developer under **Article 6** (Transfers), either: (i) Developer and all Obligors for Developer's Loss Security must confirm in a manner acceptable to the Port Director that Developer's Loss Security will continue to secure the Developer Reimbursement Obligations, whether retained by Developer or assumed by the Transferee; or (ii) the Transferee must provide to the Port new Loss Security that secures the Developer Reimbursement Obligations that the Transferee assumed and obtain the Port Director's approval of the new Loss Security.

(c) As specified in **Article 6** (Transfers), the Port Commission's approval of any Transfer to an Unrelated is conditioned on the continued availability of Loss Security meeting the requirements of this Section. Failure to satisfy this condition will be a Material Default by Developer under **Article 12** (Material Breaches and Termination).

(d) Replenishment. If provided in the form of a bonds or a cash equivalent, Developer must maintain and replace or replenish the Loss Security until the applicable Loss Security End Date, and payment or performance by the Obligor under any Loss Security will not reduce or eliminate the requirement for Loss Security meeting the requirements of this Section until the applicable Loss Security End Date. Accordingly, within 30 days after any payment or performance by an Obligor under its Loss Security, Developer or its Transferee, as applicable, must replenish the Loss Security to its previous level. Developer or its Transferee may satisfy this requirement by replacing the Loss Security or providing an amendment to the Loss Security from the Obligor that honored the claim meeting all of the requirements for the Loss Security under this DDA.

(e) Release. The Port will release the unused portion of any Loss Security and, on request, destroy or return the original instrument to Developer or Transferee on the first anniversary of the Loss Security End Date.

(f) Relationship to Phase Security. Developer Reimbursement Obligations are secured by Loss Security and not any other Adequate Security. The Port may demand payment and performance of Developer Reimbursement Obligations only under the Loss Security.

17.3. Phase Security.

(a) Delivery. As a condition to Phase Approval, Developer must provide to the Port with each Phase Application an Obligor's irrevocable commitment to issue Phase Security in the Secured Amount required under this Section and within the time frames specified.

(b) Affordable Housing Parcels. The Affordable Housing Plan requires the Developer to deliver Completed Affordable Housing Parcels meeting the requirements of *AHP § 3.3 (Developer's Obligations to Complete Infrastructure)*. In connection with any Phase Submittal, Developer will provide an estimate of the Secured Amount to meet its performance and payment obligations to deliver each Completed Affordable Housing Parcel within the applicable Phase, which will be subject to the approval of the Port Director as part of the Phase Approval. The Port's issuance of the first Construction

Permit for any Phase Improvement within the applicable Phase will be conditioned upon Developer's delivery of the Phase Security for the applicable Affordable Housing Parcel.

(c) Public Spaces. In connection with any Phase Submittal that includes a Park Parcel, Developer will provide an estimate of the Secured Amount to meet its performance and payment obligations to complete the Developer's Construction Obligations for the Public Spaces within the applicable Phase, which will be subject to the approval of the Port Director as part of the Phase Approval. The Port's issuance of the first Construction Permit for any Phase Improvement within the applicable Phase will be conditioned upon Developer's delivery of the Phase Security for the applicable Public Spaces.

(d) Noonan Replacement Space. Under *FP art. 10 (Arts Building)*, the Port has committed to fund the construction costs of the Noonan Replacement Space in the amount of \$13.5 million. The Port's issuance of the first Construction Permit for Parcel B will be conditioned upon the Port's receipt of the Phase Security for the Noonan Replacement Space.

(e) Form and Secured Amount.

(i) The Port will approve any Phase Security conforming to the requirements of the Subdivision Code. Developer may propose other forms of Phase Security, which will be subject to the Port's approval as follows.

(1) The Port will decide whether to accept Phase Security in the form of a guaranty substantially similar to that of **DDA Exhibit B12** in its sole discretion.

(2) The Port will not unreasonably withhold its approval of other forms of Phase Security if the Port determines, in consultation with the Risk Manager, that the proposed form meets the Obligor Net Worth Requirement and otherwise is adequate to secure the applicable Developer Construction Obligations.

(ii) Subject to **clause (iii)** of this Subsection, the secured amount of any Phase Security provided to the Port (the "**Secured Amount**") must have an aggregate liability no less than 100% of the costs determined in accordance with **Subsection 17.3(b)** (Affordable Housing Parcels), **Subsection 17.3(c)** (Public Spaces), or **Subsection 17.3(d)** (Noonan Replacement Space) as applicable.

(1) The secured amount for the Noonan Replacement Space will be \$13.5 million.

(2) With respect to the Affordable Housing Parcel and Public Spaces, Developer must provide security sufficient to pay for 100% of the costs to complete the applicable Improvements, plus 50% of the costs of labor, materials, and goods needed to complete the Improvements. Developer may satisfy the security requirement for costs of labor, materials, and goods through a payment bond or other security instrument provided by its general contractor.

(iii) To the extent that the Phase Security for the Affordable Housing Parcel and Public Spaces secures the same obligations for which Developer has provided Improvement Bonds in accordance with the Subdivision Code, the Port will approve an appropriate reduction in the Secured Amount of the Phase Security under this DDA. In all cases, the sum of the payment and performance obligations that Developer provides under the Subdivision Code and the Phase Security combined must be no less than 100% of the Secured Amount as determined in accordance with **clause (i)** of this Subsection.

(f) Reduction, Return, and Release.

(i) Phase Security for the Noonan Replacement Space will be released upon Close of Escrow and delivery of a Parcel Lease for Parcel E4 in accordance with **Section 7.12** (Arts Building) or delivery of Noonan Replacement Space in either a portion of Parcel E4 or an alternate location; after which, construction obligations for completion of the Arts Building will be governed by the Vertical DDA for Parcel E4.

(ii) Phase Security for the Affordable Housing Parcels and Parks Parcels will be proportionately reduced when Developer has satisfied portions of its obligations for the Affordable Housing Parcels or Public Spaces, as applicable, to the extent approved by the Port or by the express terms of the Phase Security.

(iii) Phase Security for the Affordable Housing Parcel will be released upon request of Developer when Developer has satisfied all of the requirements of *AHP § 3.3 (Developer's Obligations to Complete Infrastructure)* or by the express terms of the Phase Security.

(iv) Phase Security for each Parks Parcel will be released upon the Port's issuance of an SOP Compliance Determination under **Subsection XXXX** (SOP Compliance Determination) for the applicable Phase or by the express terms of the Phase Security.

(v) After a release, upon request of Developer, the Port will promptly (and in any event within 30 days following such request) return to Developer the original Phase Security documents and, if requested by Developer or the applicable Obligor, provide a written confirmation of such release and return.

(vi) If the Port terminates this DDA as to a Phase before the applicable release date specified above, the Port will release the Phase Security when the applicable Developer Construction Obligation that relates to the period before such termination are complete or, if applicable, as ordered by a final judgment.

17.4. Verification of Obligor Net Worth.

(a) Port Request.

(i) Documentation for each form of Adequate Security must require the Obligor to provide reasonably satisfactory evidence to the Port on request that the Obligor satisfies the Obligor Net Worth Requirement. The Port may direct its request to the Obligor or Developer from time to time but not more than once in any year unless the Port reasonably believes that a Significant Adverse Change to Obligor has occurred.

(ii) In response to the Port's request, Developer or the Obligor must provide to the Port within 20 days after the Port's request a copy of a financial statement on the Obligor's financial condition prepared by a CPA. The report must not be dated more than six months before the date of the Port's request and must include the CPA's unqualified opinion that the data in financial statement are fairly stated in all material respects. In the alternative, an Obligor may satisfy the Obligor Net Worth Requirement by providing a Guaranty guaranteeing the Secured Amount from a different person that meets the Obligor Net Worth Requirement.

(iii) If the Obligor or Developer does not or is unable to provide the financial statement, Developer must deliver to the Port a new form of Adequate Security that satisfies the requirements of **Section 17.1** (Adequate Security Generally) within the following 20 days.

(b) Effect of Significant Adverse Change. If a Significant Adverse Change to any Obligor occurs, Developer will notify the Port as soon as reasonably practicable. Within 20 days after the occurrence of the Significant Change to Obligor, Developer must deliver to the Port either: (i) evidence acceptable to the Port Director in her reasonable discretion that the Obligor has the financial capacity sufficient to satisfy both the judgment and the obligations secured by its Adequate Security; or (ii) a new form of Adequate Security that satisfies the Adequate Security requirements from a replacement Obligor that satisfies the Obligor Net Worth Requirement.

18. LENDERS' RIGHTS

The provisions of this Article, together with similar provisions in the forms of the Master Lease and Parcel Lease, make up the Applicable Lender Protections.

18.1. Right to Encumber.

(a) Permitted Loans. Developer is expressly permitted to obtain one or more Permitted Loans from Permitted Lenders. As security for any Permitted Loan, Developer will have the right, at any time during the DDA Term and without Port consent, to grant one or more Permitted Liens to secure the Permitted Loans.

(b) Prohibited Loans. Developer is expressly prohibited from: (i) granting any liens on any real or personal property interest in or related to the 28-Acre Site to secure obligations other than the Developer Construction Obligations for the 28-Acre Site Project; or (ii) providing compensation or rights to any lender as consideration for matters unrelated to the 28-Acre Site Project.

(c) Loan Transfers. A Permitted Lender may transfer any part of its interest in a Permitted Loan and Permitted Lien without the prior consent of or notice to either Party.

18.2. Certain Assurances.

(a) Port Cooperation.

(i) The Port agrees to cooperate reasonably to confirm rights and obligations under the Applicable Lender Protections.

(ii) If requested by a Permitted Lender, the Port will enter into a separate agreement to implement this Article. But the Port will have no obligation to agree to any additional provisions that could, in the Port's sole judgment, adversely affect any of the Port's rights and remedies under this DDA. The Port Director's execution and delivery of an agreement under this Subsection will be condition on its prior receipt of payment for all costs incurred to review and negotiate the agreement. If paid by Developer, these costs will not be Soft Costs.

(b) Construction Loans. Developer must provide the Port with a conformed copy of any Permitted Lien that is recorded in the Official Records or filed with the California Secretary of State.

(c) Mezzanine Loans. Developer must provide the Port with the name of each Mezzanine Lender and the priority of its Permitted Lien, together with a copy of the Permitted Lien and other agreements describing the security for the Permitted Loan or granting foreclosure rights to the Mezzanine Lender. To protect confidential proprietary information, Developer may comply with this requirement by making the relevant documentation available for review by a Port representative during regular business hours at Developer's offices in San Francisco.

(d) Requests for Notice. The Port will not be required to recognize any Permitted Lender's rights unless Developer or the Permitted Lender has provided notice under *App ¶ A.5 (Notices)* and **Article 20** (Notices) of each Permitted Lender's addresses for notice. The Port will be entitled to rely on any notice delivered in this manner until superseded by a later notice given in the same manner.

18.3. Lenders' Notice Rights.

(a) Delivery of Notices. The Port will deliver a copy of any notice given to Developer under **Article 11** (Defaults) or **Article 12** (Material Breaches and Termination) to each Permitted Lender at the notice address in a previously delivered request made under **Subsection 18.2(d)** (Requests for Notice). The Port will also deliver a notice of Developer's failure to cure any default or breach under **Article 11** (Defaults) or **Article 12** (Material Breaches and Termination) to each Permitted Lender at its notice address.

(b) Effect of Delayed Delivery of Notice. The Port's delay or failure to provide notice to a Permitted Lender under this Section will extend the Permitted Lender's cure period by the number of days the Port delayed before delivering notice.

(c) No Extension for Unknown Lenders. If the Port receives a request for notice from a Permitted Lender under **Subsection 18.2(d)** (Requests for Notice) after the Port has already delivered a notice to Developer under **Article 11** (Defaults) or **Article 12** (Material Breaches and Termination) or to any other Permitted Lender under **Subsection 18.3(a)** (Delivery of Notices), the request will not extend any of the time periods in this Article.

18.4. Lender Not Obligated to Construct. No Permitted Lender or Successor by Foreclosure will be obligated to perform the Developer Construction Obligations or provide any form of Adequate Security under this DDA. Nothing in this DDA may be construed to permit or authorize any Permitted Lender or any other person to devote any portion of the FC Project Area to any uses or to construct any Improvements inconsistent with the Project Requirements or Regulatory Requirements.

18.5. Right to Cure.

(a) Lender Election. Each Permitted Lender will have the right at its sole election to cure any Event of Default or Material Breach. The cure period for the Permitted Lender will be the same period as Developer cure period, plus an additional: (i) 30 days to cure a monetary Event of Default or Material Breach; or (ii) 60 days to cure any other Event of Default or Material Breach that the Permitted Lender could cure without foreclosing on its Permitted Lien.

(b) Port Forbearance for Foreclosure. If an Event of Default or Material Breach is not cured within the cure period under **Subsection 18.5(a)** (Lender Election) or cannot be cured by the Permitted Lender without foreclosing on its Permitted Lien, the Port will forbear from exercising its remedies and provide the Permitted Lender an extended cure period if, within the cure period under **Subsection 18.5(a)** (Lender Election):

(i) the Permitted Lender has a recorded or filed its Permitted Lien and given notice to the Port under *App ¶ A.5 (Notices)* and **Article 20** (Notices) that the Permitted Lender intends to proceed with due diligence to complete a Lender Acquisition;

(ii) the Permitted Lender begins foreclosure proceedings within 60 days after delivering notice under **clause (i)** and diligently completes the Lender Acquisition; and

(iii) after becoming the Successor by Foreclosure, the Permitted Lender or its nominee diligently proceeds to cure any Event of Default or Material Breach for which the Port delivered notice to the Permitted Lender under **Subsection 18.3(a)** (Delivery of Notices) and the Permitted Lender gave to the Port under **clause (i)** of this Subsection.

(c) Deemed Cure by Foreclosure. No Permitted Lender will be required to cure any Event of Default or Material Breach that is personal to the Borrower, such as Borrower's Insolvency or failure to submit required information in the Borrower's possession. The Permitted Lender's completion of a Lender Acquisition to become a Successor by Foreclosure will be deemed to be a cure any Event of Default or Material Breach that resulted in the Lender Acquisition.

(d) Horizontal Improvements. Although not obligated to do so, any Permitted Lender that becomes a Successor by Foreclosure may elect to perform the Developer Construction Obligations that were its Borrower's. If a Successor by Foreclosure affirms its intent to perform the Developer Construction Obligations, the Schedule of Performance will be extended to the extent required, in the Port's reasonable judgment, for the Successor by Foreclosure to perform the Developer Construction Obligations. If the Developer Construction Obligations for the applicable Phase have been constructed and completed in accordance with all applicable Project Requirements and Regulatory Requirements, the Successor by Foreclosure will be entitled to request and receive from Port a SOP Compliance Determination.

18.6. Obligations with Respect to the Property.

(a) Relationship to DDA. Except as set forth in this Article, no Permitted Lender will have any obligations or other liabilities under this DDA until it becomes a Successor by Foreclosure to the Foreclosed Property and expressly assumes its Borrower's rights and obligations under this DDA in writing. A Permitted Lender (or its designee) that becomes a Successor by Foreclosure to any Foreclosed Property will take title subject to all of the terms and conditions of this DDA to the extent applicable to the Foreclosed Property, including any Claims for payment or performance of obligations that are due as a condition to enjoying the benefits under this DDA after the Lender Acquisition is complete.

(b) Relationship with the Port. As of the date of the Permitted Lender's completion of a Lender Acquisition and assumption of Developer's rights and obligations under this DDA, the Port will recognize the Permitted Lender as Developer under this DDA.

(c) Limitations on Liability. **Subsection 5.6(c)** (No Personal Liability) will apply to any Successor by Foreclosure.

(d) Port Right to Terminate. The Port will have the right to terminate this DDA with respect to the Foreclosed Property if the Successor by Foreclosure does not agree to assume Developer's obligations relating to the Foreclosed Property in writing within 90 days after the date of the Lender Acquisition. s.

18.7. No Impairment of Permitted Lien. No default under this DDA by a Borrower will invalidate or defeat the Permitted Lien of any Permitted Lender. A breach of any obligation secured by any Permitted Lien will not defeat, diminish, render invalid or unenforceable, or otherwise impair Developer's rights or obligations or be, by itself, a default under this DDA.

18.8. Multiple Permitted Liens.

(a) Lien Priority Generally. If at any time there is more than one Permitted Lien against any real property interest securing a Permitted Loan to Developer, the Permitted Lien of the Permitted Lender prior in time to all others on that portion of the

encumbered real property interest will be vested with the rights under this Article to the exclusion of the holder of any other Permitted Lien except to the extent that the Permitted Lender holding the junior Permitted Lien has obtained the consent of the Permitted Lender holding the senior Permitted Lien.

(b) Succeeding Rights. If the Permitted Lender holding the senior Permitted Lien fails to exercise the rights set forth in this Article, a Permitted Lender holding the junior Permitted Lien will succeed to the rights set forth in this Article only if:

(i) all Permitted Lenders holding the senior Permitted Liens have failed to exercise the rights set forth in this Article; and

(ii) the Permitted Lender holding the junior Permitted Lien seeking to exercise its rights has provided prior written notice to the Port under **Subsection 18.5(b)** (Port Forbearance for Foreclosure).

(c) No Extension after Failure to Act. No failure by the Permitted Lender holding the senior Permitted Lien to exercise its rights under this Article or delay in the response of any Permitted Lender to any notice by the Port will extend any cure period or Developer's or any Permitted Lender's rights under this Article.

(d) Port's Reliance on Title Report. For purposes of this Section, in the absence of a final order to the contrary that is served on the Port, a title report prepared by a reputable title company licensed to do business in California and having an office in San Francisco setting forth the order of priorities of Permitted Liens on real property interests in the 28-Acre Site may be relied upon by the Port as conclusive evidence of priority.

18.9. Cured Defaults. Upon a Permitted Lender's timely cure of any Event of Default or Material Breach under **Subsection 18.5** (Right to Cure), the Port's right to pursue any remedies for the cured Event of Default or Material Breach will terminate.

18.10. Estoppel Certificates. Each Party agrees to execute and deliver to the requesting Party and, if requested, any Permitted Lender or prospective Permitted Lender, within 20 days after a request is made, an estoppel certificate with regard to the following matters.

(a) Modification. The responding Party will state that this DDA: (i) is unmodified and in full force and effect; (ii) is in full force and effect with modifications specified in the estoppel certificate; or (iii) is not in full force and effect for reasons specified in the estoppel certificate.

(b) Defaults. The responding Party will state whether it is aware of any Event of Default or Material Breach or the occurrence of a potential breach by the other Party under this DDA and, if so, describe the event, Event of Default, or Material Breach.

19. PORT AND CITY COSTS

19.1. Generally.

(a) Reimbursement. Developer must pay the Port the sum of unreimbursed Port Costs and Other City Costs within 60 days after receipt of each Port Quarterly Report delivered accordance with *FP § 9.2(e)* (*Reporting*). The Parties will meet and confer in good faith to resolve any disputes regarding a Port Quarterly Report. In addition to the other remedies provided in this DDA, the Port has the right to terminate or suspend any work under this DDA if Developer fails to pay the amount due, until the Port is paid in full.

(b) Interim Lease Revenues. Interim Lease Revenues generated after the Reference Date will be applied as Land Proceeds in accordance with *FP § 1.6(d)* (Interim Lease Revenues).

(c) Unreimbursed Costs. To the extent that Developer does not pay or reimburse the Port for any Port Costs and Other City Costs when due under **Subsection 19.1(a)** (Reimbursement), the Port will first attempt to recover the unpaid amounts from any available Land Proceeds or Public Financing Sources (to the extent permitted), plus the Port's costs of collection, plus interest at the annual rate of 10%, calculated from the date the payment from Developer was due until paid in full, compounded annually. If Project Payment Sources are not available, the Port will next make a claim on the Loss Security provided under **Article 17** (Security for Project Activities). If there remains any unreimbursed Port Costs after the foregoing, the Port may issue a notice to Developer under **Subsection 12.1(b)** (Notice) that its failure to cure will be a Material Breach under **Subsection 12.2(j)** (Developer Reimbursement Obligations).

19.2. Payment of Costs. The following procedures will apply to any demand from one Party to the other Party for payment required under this DDA, including the defense, compromise, and resolution of an action, except as otherwise provided under this DDA.

(a) Demand. The Party seeking payment must deliver its demand for payment to the other Party together with proof of payment. The Party obligated to pay will have the right to engage a CPA to review the other Party's claimed costs, and the Party seeking payment must cooperate in providing information necessary for the review. The Party conducting the review will bear its own costs unless the review reveals that the other Party's costs are overstated by 5% or more, in which case, the amount of the reimbursement will be reduced by the amount of the review costs.

(b) Time for Payment. Except when other procedures are specified in this DDA, or during any period of review, the Party obligated to make payment must satisfy the payment demand within 30 days after receipt of the demand for payment.

20. NOTICES

20.1. Delivery.

(a) Manner of Delivery. Except as otherwise provided in this DDA, any notices (including notice of approval or disapproval, demands, waivers, and responses to any of them) required or permitted by this DDA must be delivered by:

- (i) hand delivery;
- (ii) first class United States mail, postage prepaid, return receipt requested; or
- (iii) overnight delivery by a nationally recognized delivery service or the United State Postal Service, delivery charges prepaid.

(b) Required Information. To be effective, every notice given to a Party under this DDA must be in writing, or be accompanied by a cover letter, that includes the following, if applicable:

- (i) cites the Section of this DDA under which the notice is given;
- (ii) states if an action or response is required;
- (iii) if applicable, states the period of time within which the recipient of the notice must act or otherwise respond;
- (iv) states the period of time within which the recipient of the notice must cure an alleged default and is clearly marked "*Notice of Default*" or "*Notice of Material Breach*" if applicable;

(v) if applicable and subject to App ¶ A.2.2(c) (*No Deemed Consent Without Notice*), indicates that the failure to object to the notice within a stated time period will be deemed to be the equivalent of the recipient's approval or disapproval of the subject matter of the notice;

(vi) is clearly marked "*Request for Approval*" if approval is being requested; and

(vii) if applicable, states with particularity the reasons for the disapproval or objection.

(c) Prohibited Manner of Delivery. Except as otherwise provided in this DDA, notices must not be given by facsimile or electronic mail, but either Party may deliver a courtesy copy of a notice by facsimile or electronic mail.

20.2. Notice Addresses. Addresses for notice are listed below.

Port: Port of San Francisco
Pier 1
San Francisco, CA 94111
Att'n: Byron Rhett, Director, Planning & Development

Telephone: (415) 274-0400
Facsimile: (415) 274-0495
Email: Byron.rhett@sfport.com

With a copy to: City Attorney's Office
Port of San Francisco
Pier 1
San Francisco, CA 94111
Att'n: Eileen Malley, General Counsel

Telephone: (415) 274-0485
Facsimile: (415) 274-0494
Email: Eileen.Malley@sfgov.org

Developer: FC Pier 70, LLC
949 Hope Street, Suite 200
Los Angeles, California 90015
Attention: Mr. Kevin Ratner

Facsimile: (213) 488-0039
Email: kevinratner@forestcity.net

With copies to: Forest City Realty Trust
50 Public Square
1360 Terminal Tower
Cleveland, Ohio 44113
Attention: Amanda Seewald, Esq.

Facsimile: (216) 263-6206
Email: amandaseewald@forestcity.net

Gibson Dunn & Crutcher

555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Attention: Neil Sekhri, Esq.

Telephone: (415) 393-8334
Email: nsekhri@gibsondunn.com

20.3. Interested Persons. Interested Persons may request copies of notices that the Port delivers by providing notice to the Port in the manner required under this Article. Developer will have the sole responsibility for providing notice information to any Interested Person desiring notice. The Port will incur no liability for failure to provide notice to any Interested Person unless the Port affirmatively assumes liability for failure to provide notice to a specifically identified Interested Person.

20.4. Change of Address. Notices given to a Party or any Interested Person entitled to notice under this DDA must be delivered to that Party's or Interested Person's mailing address, unless superseded by a notice of a change in that Party's or Interested Person's mailing address for notices that is delivered in the required manner.

20.5. Effective Date. All notices under this DDA will be deemed to be duly delivered: (a) on the date personal delivery actually occurs; (b) if mailed return receipt requested, on the date of delivery or on which delivery is refused as shown on the return receipt; or (c) the business day after the business day deposited for overnight delivery.

20.6. Day-to-Day Communications. Developer and the Port agree that day-to-day communications regarding the 28-Acre Site Project need not comply with the other notice requirements under this Article. In general, however, day-to-day communications about site conditions, Phase Submittals, construction planning and progress, and Project implementation must be transmitted or confirmed by email or facsimile and will be directed to other Party's designated project manager. As of the Reference Date, day-to-day communications will be delivered to: (a) [Name/email/Phone No.] for Developer; and (b) [Name/email/Phone No.] for the Port.

21. MISCELLANEOUS PROVISIONS

21.1. Transaction Documents.

(a) Relationship to ENA and Master Lease. The ENA will terminate on the Reference Date. This DDA will control over any inconsistent terms in the Master Lease.

(b) Documents on Record with the Port. All exhibits and attachments to this DDA need not be recorded but will be kept on file with the Port as amended or supplemented from time to time. In addition, the Proforma as of the Reference Date is on file with the Port, and the Port will keep on file each updated Proforma as approved by Developer and the Port. The Port Director and Developer will update or supplement the Schedule of Performance from time to time to reflect changes to the same as permitted in this DDA. All public records on file with the Port will be made available to members of the public in keeping with the Port's standard practices and public records laws.

(c) Brokers. Developer and the Port each represents to the other that it has not employed a broker or a finder in connection with the execution and delivery of this DDA, and agrees to indemnify the other from the claims of any broker or finder in relation to the 28-Acre Site Project.

21.2. Lien of Agreement.

(a) Recordation. The Parties agree that this DDA and certain exhibits, when fully executed, will be recorded in the Official Records because the obligations under this

DDA and other documents to be recorded are covenants that attach to and run with Developer's interest in the 28-Acre Site under the Master Lease and this DDA.

(b) Partial Releases. Through the Escrow for each conveyance of a Development Parcel, the Port will cause the lien of this DDA to be released as to the Development Parcel being conveyed concurrently with the Close of Escrow for the Vertical DDA between the Port and the applicable Vertical Developer. But no partial release of the lien of this DDA will release the Developer Construction Obligations as to any other portion of the 28-Acre Site or of the Developer Reimbursement Obligations.

(c) Termination of Agreement. If this DDA is terminated, Developer or the Port may record a Notice of Termination as provided in **Subsection 12.7(c)** (Recorded Notice). Recordation of a Notice of Termination will terminate the lien of this DDA as to all portions of the FC Project Area affected by the notice except for provisions that expressly survive the expiration or termination.

21.3. Survival.

(a) Generally. Except as provided otherwise, termination or expiration of this DDA will not affect:

- (i) rights and obligations in reference to Adequate Security for an obligation arising before termination or expiration;
- (ii) any provision of this DDA or any other Transaction Document that expressly survives the expiration or termination of this DDA; or
- (iii) rights and obligations under the Financing Plan or the Acquisition Agreement to the extent related to an obligation arising before termination or expiration or that expressly survives the expiration or termination.

[Remainder of page intentionally left blank.]

Developer and the Port have executed this DDA as of the last date written below.

MASTER DEVELOPER:

FC Pier 70, LLC, a Delaware limited liability company

By: _____
Kevin Ratner,
Vice President

Date: _____

PORT:

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, operating by and through the San Francisco Port Commission

By: _____
Elaine Forbes
Port Director

Date: _____

Authorized by the Port Resolution No. _____
and Board Resolution No. _____

APPROVED AS TO FORM:
Dennis J. Herrera, City Attorney

By: _____
Joanne Sakai
Deputy City Attorney