



**CITY AND COUNTY OF SAN FRANCISCO
LONDON N. BREED, MAYOR**

LEASE DISPOSITION AND DEVELOPMENT AGREEMENT

BY AND BETWEEN

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

AND

**TZK BROADWAY, LLC
A CALIFORNIA LIMITED LIABILITY COMPANY**

SEAWALL LOTS 323 AND 324

[_____], 2019

**ELAINE FORBES
EXECUTIVE DIRECTOR**

SAN FRANCISCO PORT COMMISSION

**KIMBERLY BRANDON, PRESIDENT
WILLIE ADAMS, VICE PRESIDENT
GAIL GILMAN, COMMISSIONER
VICTOR MAKRAS, COMMISSIONER
DOREEN WOO HO, COMMISSIONER**

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LEASE DISPOSITION AND DEVELOPMENT AGREEMENT

THIS LEASE DISPOSITION AND DEVELOPMENT AGREEMENT dated for reference purposes as of [REDACTED], 2019, is by and between the **CITY AND COUNTY OF SAN FRANCISCO**, a municipal corporation (“**City**”), operating by and through the **SAN FRANCISCO PORT COMMISSION** (“**Port**”), and TZK Broadway, LLC, a California limited liability company (“**Developer**”). This Lease Disposition and Development Agreement, including the recitals and exhibits, are and shall be construed as a single instrument and are referred herein as this “**Agreement.**” All capitalized terms in this Agreement are defined in *Article 19*.

RECITALS

This Agreement is made with reference to the following facts and circumstances:

A. Port is an agency of the City, exercising its functions and powers over property under its jurisdiction and organized and existing under the Burton Act and the City’s Charter. Port’s Waterfront Land Use Plan (“**WLUP**”) is Port’s adopted land use document for property within Port jurisdiction, which provides the policy foundation for waterfront development and improvement projects.

B. Most Port property consists of tidelands and submerged lands that are subject to the common law public trust doctrine, the California Constitution, the Burton Act, and the related transfer agreement under which the State of California (the “**State**”) transferred most of the San Francisco waterfront to the City in 1969.

C. Seawall Lot (“**SWL**”) 323 and SWL 324 are two separate, nearly triangular land parcels with frontages on The Embarcadero, Broadway, Davis and Vallejo Streets and are located in the Northeast Waterfront area of the WLUP. The SWLs abut two right-of-ways at the intersection of Davis and Vallejo Streets (collectively, “**ROWS**”). The SWLs and ROWS (collectively, the “**Site**”) are also located in the Northeast Waterfront Historic District and are within a C-2 (Community Business) zoning district, Waterfront Special Use District No. 3, and a 40-X Height and Bulk district.

D. The WLUP and the Planning Department’s Northeastern Waterfront Subarea Plan and Northeast Embarcadero Study list hotel, entertainment, theatre and public open space as acceptable uses for the SWLs.

E. Port and One Reel, a Washington State nonprofit corporation, entered into Lease No. L-12847 in 1999 (as amended, the “**Prior Theater Lease**”) for portions of Piers 27 and 29 to be used for Teatro ZinZanni’s dinner-theater and cabaret operations commonly known as “Teatro ZinZanni”. Teatro ZinZanni, a Washington State non-profit corporation (“**TZ**”) was created in 2002 to serve as the manager and transferee of the Theater Lease and as the operator of Teatro’s dinner-theater operations. The Prior Theater Lease expired in 2005, and continued on a holdover month-to-month basis until 2011. To accommodate the 34th America’s Cup and the construction of the new James R. Herman Cruise Terminal on Pier 27, Port and TZ terminated the Prior Theater Lease and identified a portion of SWL 324 as a potential relocation site pursuant to that certain Mutual Agreement for Lease Termination and Reservation of Rights Agreement dated August 12, 2011 (“**Mutual Termination Agreement**”).

F. TZ initially proposed that it lease from Port a portion of SWL 324 for a term not to exceed 10 years and operate Teatro ZinZanni within a temporary structure. But Teatro abandoned the initial proposal after various stakeholders raised concerns that a temporary structure would be incompatible within the historic district.

G. TZ, in 2013, re-formed itself as TZZ San Francisco, LLC, a Washington limited liability company (“**Teatro**”). TZZ San Francisco, LLC is the successor in interest to TZ.

H. Teatro concluded that to amortize the cost of permanent structures for Teatro ZinZanni, it would need to increase the lease term, expand the use program and enlarge the

footprint of the development. Accordingly, Teatro proposed to bring on a development partner with the financial resources and expertise to help it shepherd the expanded development.

I. Teatro, Kenwood Investments No. 6, LLC (“**Kenwood**”) and PresidioCo Bay Area LLC (“**Presidio**”), each a member of Tenant, are developing the Project.

J. Developer proposes to build and finance a state-of-the-art theatre and entertainment venue, a 192 room Hotel, and a public park, together with related public infrastructure and other improvements, as further described in the Scope of Development attached hereto as *Exhibit A* (collectively, the “**Project**”).

K. On October 28, 2014, the Port Commission approved Resolution No. 14-58 directing Port staff to assist Teatro and Developer in developing and introducing a resolution to the Board of Supervisors (“**Board**”) for its consideration on exempting the potential lease of the Site to Developer from the competitive bidding policy of Administrative Code Section 2.6-1.

L. On May 5, 2015, the Board adopted Resolution No. 170-15 (the “**Sole Source Resolution**”) and found that the proposed Project is exempt from competitive bidding requirements of Administrative Code Section 2.6-1.

M. Port staff and a Port-hired third-party real estate consultant reviewed Kenwood Investments’ qualifications and financial capacity to develop the Project and issued a report confirming that Kenwood Investments is qualified to develop the Project (“**Qualification Determination**”). Port staff submitted a copy of the Qualifications Determination to the Clerk of the Board on August 18, 2015.

N. On September 8, 2015, the Port Commission adopted Resolution No. 15—31 and authorized and directed Port’s Executive Director (the “**Executive Director**”), or her designee, to enter into an Exclusive Negotiation Agreement (“**ENA**”). The ENA, dated September 10, 2015, was subsequently executed by the Parties.

O. On April 26, 2016, the Port Commission adopted Resolution No. 16-18 and endorsed a non-binding term sheet describing the fundamental deal terms for the Project (“**Term Sheet**”) and authorized and directed the Executive Director, or her designee, to forward the Term Sheet to the Board for its consideration. In the same resolution the Port Commission directed the Executive Director, or her designee, to work with the Developer to undertake project review and negotiate the terms and conditions of the final transaction documents, including this Agreement.

P. On July 12, 2016, the Board adopted Resolution No. 277—16 and endorsed the Term Sheet.

Q. On December 21, 2018, the Planning Department approved the issuance of the Final Mitigated Negative Declaration (“**FMND**”) as prepared by the Planning Department.

R. On March 6, 2019, the Historic Preservation Commission adopted Motion No. 0370 finding that the proposed Project is consistent with Article 10 of the Planning Code and the Secretary of the Interior's Standards for Rehabilitation in conformance with the architectural plans filed with the Planning Department subject to the conditions and findings listed in its Motion No. 0370.

S. On May 2, 2019, the Planning Commission conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Authorization Application and General Plan Referral Nos. 2015-016326 CUA and 2016- 011011GPR. At that hearing, pursuant to Resolution No. 20443, the Planning Commission made Findings of Consistency with the General Plan and with the Priority Policies of Planning Code Section 101.1 for the street vacations for the Project, pursuant to Section 4.105 of the City Charter and Section 2A.53 of the Administrative Code. In addition, pursuant to Motion No. 20444, the Planning Commission granted a Conditional Use Authorization for the Development pursuant to Planning Code

Sections 210.1, 240.3 and 303 to allow a hotel use within the C-2 Zoning District, the Waterfront Special Use District No. 3, and a 40-X Height and Bulk District, subject to the conditions and findings listed in the Motion No. 20444.

T. In Resolution No. 20443, the Planning Commission, having reviewed the FMND, concurred with the Planning Department's determination that, pursuant to the FMND, including its mitigation measures, the Project could not have a significant impact on the environment. In Motion No. 20444, the Planning Commission made the same findings as in Resolution No. 20443, and more specifically found that, based on review and consideration of the FMND and the record as a whole, there is no substantial evidence that the Project will have a significant effect on the environment with the adoption of the mitigation measures contained in the Mitigation Monitoring and Reporting Program. The Planning Commission adopted the FMND and the Mitigation Monitoring and Reporting Program and included all required mitigation measures identified in the FMND and contained in the Mitigation Monitoring and Reporting Program as conditions of approval.

U. On September 10, 2019, by Resolution No. 19-36, the Port Commission, among other things, adopted the Mitigation, Monitoring, and Reporting Program and authorized and directed the Executive Director to (i) enter into this Agreement and other Transaction Documents with Developer and (ii) seek approval of the form of Lease from the Board.

V. On [REDACTED], 2019, by Resolution No. XX-19, the Board, among other things, adopted the Mitigation, Monitoring, and Reporting Program and approved the form of Lease with Developer.

W. The parties now desire to enter into this Agreement to set forth the terms and conditions upon which Port will deliver the Lease to Developer and Developer will Construct the Improvements.

AGREEMENT

Accordingly, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as set forth below.

1. SITE; TERM; RELATIONSHIP TO LEASE; MEMORANDUM OF TECHNICAL CORRECTIONS

1.1. Site. The Site is bounded by The Embarcadero, Broadway, Davis and Vallejo Streets in the City and County of San Francisco, and is more particularly described in the legal description (*Exhibit A-1*) and the Site Map (*Exhibit A-2*) attached to this Agreement. The Site includes SWL 323, SWL 324, and the two abutting ROWs and has a combined land area of approximately 57,170 square feet.

1.2. Term. The term of this Agreement is from the Effective Date until recording of the Certificate of Completion, unless this Agreement is earlier terminated in accordance with its provisions (the "LDDA Term").

1.3. Relationship of this Agreement to the Lease. This Agreement addresses, among other matters, the conditions precedent to Close of Escrow and the Delivery of the Lease to Developer, the scope of Developer's obligations to design and Construct the Improvements, and the financing for Construction of the Improvements by Developer, provided, however, the foregoing does not limit right of Developer to mortgage leasehold interest in accordance with the Lease. If the conditions precedent for the Close of Escrow as set forth in *Section 2* are satisfied, then upon Close of Escrow, Port will lease the Site to Developer, and Developer will lease the Site from Port, pursuant to the Lease. Before Completion, this Agreement shall control in the event of any inconsistency between this Agreement and the Lease. From and after Completion, the Lease will govern the rights and obligations of the Parties with respect to use and occupancy of the Site.

1.4. Memorandum of Technical Corrections. The Parties reserve the right, upon mutual agreement of Port’s Executive Director and Developer, to enter into a memorandum of technical corrections to reflect any non-material changes in the actual legal description and square footages of the Site and the Improvements, and upon full execution thereof, such memoranda will be deemed to become a part of this Agreement.

2. PAYMENTS.

2.1. LDDA Fee. Developer will pay to Port a fee equal to Thirty-Seven Thousand Five Hundred Dollars (\$37,500) (“**LDDA Fee**”) as consideration for Port’s agreement to enter into this Agreement for one (1) year from and after the Effective Date (the “**Initial Period to Close Escrow**”), subject to Force Majeure and extensions of term as set forth in this Agreement. The LDDA Fee will not be pro-rated or reduced in the event Close of Escrow occurs prior to the expiration of the Initial Period to Close Escrow.

2.2. Target Close Date Extension Fee. In the event Developer elects to extend the Target Close Date in accordance with *Section 4.3(b)*, then for each three (3)-month extension, Developer will pay to Port an extension fee equal to Twenty-Five Thousand Dollars (\$25,000) (the “**Target Close Date Extension Fee**”) in accordance with *Section 4.3(b)*. The Target Close Date Extension Fee will not be pro-rated or reduced in the event Close of Escrow occurs prior to the expiration of the applicable three (3) month extended term.

2.3. Deferred ENA Negotiation Fee. The Parties agreed in the ENA that as consideration for the right to exclusively negotiate with Developer, Developer will pay Port a negotiation fee (“**ENA Negotiation Fee**”) equal to One Hundred Thousand Dollars (\$100,000). The Parties also agreed in the ENA that a portion of the ENA Negotiation Fee will be paid on or before the Close of Escrow. As of the Effective Date, the amount of the ENA Negotiation Fee that has not been paid to Port equals Fifty Thousand Dollars (\$50,000) (“**Deferred ENA Negotiation Fee**”). The Parties agree that the Deferred ENA Negotiation Fee will be paid to Port as of the Close of Escrow.

2.4. LDDA Termination Fee. Unless this Agreement terminates solely as a result of a Port Event of Default or a Title Defect as set forth in *Section 4.7(c)*, if this Agreement terminates prior to Close of Escrow, then Developer must pay to Port, as liquidated damages, a termination fee (the “**LDDA Termination Fee**”) in the amount of Fifty Thousand Dollars (\$50,000), payable within thirty (30) days following the termination of this Agreement. The (i) LDDA Termination Fee, and (ii) Developer’s assignment to Port of the Project Materials and Developer’s rights under any Regulatory Approval (pursuant to *Section 15.6*), are Port’s sole and exclusive remedy for any such termination.

THE PARTIES AGREE THAT THE SUM OF FIFTY THOUSAND DOLLARS (\$50,000) IS A REASONABLE SUM CONSIDERING THE CIRCUMSTANCES EXISTING ON THE DATE OF THIS AGREEMENT, INCLUDING THE RELATIONSHIP OF THE SUM TO THE RANGE OF HARM TO PORT THAT REASONABLY COULD BE ANTICIPATED AND THAT THE ANTICIPATION THAT PROOF OF ACTUAL DAMAGES COULD BE EXTREMELY DIFFICULT OR IMPRACTICABLE TO DETERMINE. IN PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF EACH OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THIS AGREEMENT WAS MADE.

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2.5. *Transaction Costs.*

(a) Definition of Transaction Costs. Developer will pay the reasonable expenses (collectively, the “**Transaction Costs**”) incurred by Port related to this Agreement, the Lease, other Transaction Documents, and the Project. Transaction Costs includes time spent by Port staff (including City staff paid by Port) and Outside Transaction Costs. Transaction Costs also include costs incurred by Port for negotiating Transaction Documents; costs related to CEQA review of the Project; costs related to monitoring Developer’s compliance with the Mitigation Monitoring and Reporting Program and if required by Port, the Environmental Protection Plan until the Certificate of Completion is recorded in the Official Records; costs related to pursuit of entitlements for which Port is required to be a co-permittee or co-applicant; costs related to review of public trust consistency with State Lands or other Regulatory Agencies, including, if necessary, any legislative process pursued to obtain legislative authorization of trust consistency; costs of preparing materials to be submitted to the Board of Supervisors, the Port Commission, State Lands and any other Regulatory Agency; costs of preparing legislative reports, records, findings, resolutions and other materials related to any hearing on the Project, this Agreement, the Lease and other Transaction Documents by the Port Commission, the Board of Supervisors, the Planning Commission, and any other Regulatory Agency, as applicable; costs associated with community outreach and other public meetings; costs of the review of any construction documents, architectural design or schematic drawings, plans and specifications; and costs associated with any event of Litigation Force Majeure.

(b) Payment of Transaction Costs.

(i) Developer agrees to reimburse Port for up to Three Hundred Thousand Dollars (\$300,000) of Transaction Costs that Port incurs during the LDDA Term; provided, however, there will be no cap on Developer’s obligation to reimburse Port for Transaction Costs if there is any litigation related to the Project. The first Payment Advance will be due on the Effective Date and cover the period ending [_____, 201XX]; provided, however, that Developer will be entitled to credit against any Payment Advance due hereunder the amount of any Overpayment existing under the ENA as of the Effective Date. [**Note: Insert last date of the first full quarter immediately after the Effective Date.**]

(ii) Subject to credit for any Overpayment existing under the ENA, following the first Payment Advance, each subsequent Payment Advance will be due on the first (1st) day of every subsequent calendar quarter (i.e., January 1, April 1, July 1, and October 1). Port will use Payment Advances as needed to reimburse Port for its Transaction Costs incurred during the LDDA Term.

(iii) The parties agree and acknowledge that a Payment Advance may not cover all of Port’s Transaction Costs incurred for the period covered by such Payment Advance. Accordingly, if the Payment Advances paid to Port are insufficient to cover Transaction Costs, Developer must pay any Underpayment to Port within thirty (30) days after Port’s delivery of the Port Statement showing an Underpayment.

(iv) Within thirty (30) days after the end of each calendar quarter, Port will provide Developer with a Port Statement for that quarter. If Developer has overpaid in the prior quarter, Developer may use such overpayment as a credit against the next Payment Advance owed. Developer expressly agrees that after this Agreement expires or terminates, Port may apply any Overpayment against any Transaction Costs or other amounts then owed to Port under this Agreement. Subject to the immediately preceding sentence, any remaining Overpayment will be returned to Developer within ninety (90) days after this Agreement expires or terminates.

(c) Additional Definitions.

“**Consultant Invoice**” means an invoice for Outside Transaction Costs.

“**Outside Transaction Costs**” means all reasonable costs that Port incurs for services of architect, engineering, appraisal, real estate, economic, and other professional consultants (including City staff and other experts within the City that are paid by Port), construction management services, and legal services (including costs for the City Attorney’s office and outside counsel fees and costs).

“**Overpayment**” means Payment Advances paid by Developer in excess of the actual Transaction Costs for the periods covered.

“**Payment Advance**” means an installment payment by Developer to Port to be applied towards Port’s Transaction Costs. Each Payment Advance will equal Forty-Five Thousand Dollars (\$45,000).

“**Port Statement**” means a reasonably detailed statement showing Transaction Costs incurred by Port for, and Port’s application of previously paid Payment Advances during, the immediately preceding quarter, including a calculation of the difference between the amounts of the Payment Advance and actual Transactions Costs for the immediately preceding quarter. Port will include in Port Statement any Consultant Invoices for any Outside Transaction Costs paid during that quarter.

“**Underpayment**” means the amount of actual Transaction Costs incurred by Port to date as set forth in a Port Statement that exceeds the Payment Advance paid by Developer for such applicable period.

2.6. Target CO Date Extension Fee. If Developer elects to exercise its option to extend the Target Final Inspection Date in accordance with *Section 10.2*, then for each three (3)-month extension, Developer will pay to Port an extension fee equal to Twenty-Five Thousand Dollars (\$25,000) (the “**Target CO Date Extension Fee**”) in accordance with *Section 10.2*.

2.7. Liquidated Damages for Failure to Have Final Certificate of Occupancy by Certain Date. If Port has not issued a Final Certificate of Occupancy for the Improvements by the Fourth Extended Target Final Inspection Date, then Developer must pay to Port, as liquidated damages, a daily fee (the “**Delayed Completion Fee**”) in the amount of One Thousand Three Hundred Fifty Dollars (\$1,350), for each day following the Fourth Extended Target Final Inspection Date until Port has issued a Final Certificate of Occupancy for the Improvements. The accrued Delayed Completion Fee for each calendar month will be payable by the fifth (5th) day of the immediately following calendar month.

THE PARTIES AGREE THAT THE DAILY FEE OF ONE THOUSAND ONE HUNDRED FIFTY DOLLARS (\$1,150) IS A REASONABLE SUM CONSIDERING THE CIRCUMSTANCES EXISTING ON THE DATE OF THIS AGREEMENT, INCLUDING THE RELATIONSHIP OF THE SUM TO THE RANGE OF HARM TO PORT THAT REASONABLY COULD BE ANTICIPATED AND THAT THE ANTICIPATION THAT PROOF OF ACTUAL DAMAGES COULD BE EXTREMELY DIFFICULT OR IMPRACTICABLE TO DETERMINE. IN PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF EACH OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THIS AGREEMENT WAS MADE.

_____ Developer	_____ Port
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2.8. Acknowledgements. The Parties acknowledge and agree that: (a) under California Government Code section 87103.6, Developer's payments to Port and the City are not a "source of income" within the meaning of the California Political Reform Act; (b) Port reserves the full and sole discretion and authority to determine which consultants, contractors, or employees to hire or assign to work on the Project, to direct and evaluate their work and to establish the amount of compensation paid; (c) Developer will have no control over which Port or City account is used to pay for their consultants, contractors, or employees; (d) Developer will have no right to withhold payment of or recover from Port or the City any portion of the LDDA Fee, Target Close Date Extension Fee, Target CO Date Extension Fee, the Deferred ENA Negotiation Fee, Transaction Costs, LDDA Termination Fee, or Delayed Completion Fee, that have become due and payable under this Agreement (regardless of whether or not the Lease and/or other Transaction Document is executed); (e) Port may offset any outstanding amounts due and payable (including amounts due and payable to Port under *Section 15.2* (Port's Remedies) following a Developer Event of Default) against such amounts before Port is obligated to refund any unused balance to Developer.

2.9. Survival. The terms and conditions of this Section 2 will survive the expiration or earlier termination of this Agreement.

3. EXISTING PARKING OPERATIONS ON SITE; DELIVERY OF SITE FREE OF TENANTS AND OCCUPANTS AT CLOSE OF ESCROW.

3.1. Existing Parking Operations on Site; Leasing and Revenues Prior to Close of Escrow. The Site is currently operated as a surface parking lot. Until the Close of Escrow, subject to *Section 3.2*, Port will continue to have the absolute right to operate the Site as a surface parking lot or for any other use and, in its sole discretion, (i) execute any new leases, licenses, or agreements affecting the Site, (ii) modify, renew or extend any existing leases or licenses, and (iii) consent to or approve of any request made by a tenant, licensee, or other occupant or user. Port will retain all revenues from activities on the Site occurring prior to Close of Escrow.

3.2. Delivery of Site Free of Tenants and Occupants. Except for rights of Port reserved under the Lease or as otherwise allowed as Permitted Title Exceptions, Port is responsible, at no cost or expense to Developer, for vacating the Site of all tenants and occupants as of the Close of Escrow, provided that there is no material Developer Event of Default. Such responsibility consists of vacating the Site of all Port uses, and terminating all existing tenancies. Port is required under the existing parking operations agreement to provide the parking operator prior written notice before terminating the agreement. Accordingly, Developer will provide Port at least one hundred twenty (120) days prior notice of its anticipated Target Close Date.

3.3. Failure to Deliver or Delay.

(a) Port's failure to obtain possession or delay in obtaining possession from all tenants and occupants on the Site before the Close of Escrow as required hereby will not be considered a Port Event of Default, but may be considered a Title Defect, subject to the terms and remedies of *Section 4.7(c)*.

(b) In no event will Port be liable for monetary damages of any kind or nature arising from Port's failure to obtain possession from all of the tenants and occupants on the Site as required by this Agreement; provided, however, if Close of Escrow is delayed solely as a result of Port's failure to deliver possession of the Site free of all tenants and occupants, then Developer may extend the Target Close Date without payment of any Target Close Date Extension Fee and without having to exercise any remaining options to extend the Target Close Date. In the event of any such extension of the Target Close Date by Developer, the term of this Agreement shall be extended day-for-day for each day Port fails to deliver possession of the Site free of all tenants and occupants.

4. DISPOSITION OF LEASE THROUGH ESCROW.

4.1. Agreement to Lease. Subject to satisfaction or waiver of all of the conditions to Close of Escrow, Port agrees to lease to Developer and Developer agrees to lease from Port, the Site (subject to the Permitted Title Exceptions) pursuant to the terms and conditions set forth in the Lease, substantially in the form and substance of *Exhibit B*, all in accordance with and subject to the terms, covenants and conditions of this Agreement.

4.2. Escrow.

(a) **Opening of Escrow.** Developer must open an escrow for the Delivery of the Lease (“Escrow”) with the San Francisco office of Chicago Title Company (“Title Company”). Developer must open the Escrow no later than the date set forth in the Schedule of Performance.

(b) **Joint Escrow Instructions.** No later than seven (7) business days prior to the anticipated date for Close of Escrow, the Parties will prepare joint escrow instructions as are necessary and consistent with this Agreement and execute and deliver the same to the Title Company no less than two (2) business days prior to the anticipated date for Close of Escrow (the “Joint Escrow Instructions”).

(c) **Costs of Escrow.** Port is not responsible for any costs or expenses related to the Escrow. Developer must pay all fees, charges, costs and other amounts necessary for the opening and close of Escrow (collectively, the “Closing Costs”), including (i) Escrow fees; (ii) the cost of any title reports, ALTA survey, or other surveys, inspections and premiums for all title insurance policies obtained by Developer, Port, and if applicable, any lender; (iii) recording fees; and (iv) transfer taxes. Developer must pay the Closing Costs promptly after the Title Company notifies Developer that such amounts are payable, but in any event before the Close of Escrow. If the Title Company requires, Developer will pay into Escrow any fees, costs, charges or other amounts required for the Close of Escrow under this Agreement.

4.3. Target Close Date; Extension of Target Close Date; Outside Close Date.

(a) **Target Close Date.** Subject to Force Majeure, Close of Escrow will occur no later than twelve (12) months after the Effective Date (“Target Close Date”), subject to extension in accordance with *Section 4.3(b)*. Notwithstanding the foregoing, Close of Escrow may not occur earlier than the date by which all of the conditions in *Sections 4.4 and 4.5* are either satisfied or waived by the Party which is benefited by such conditions.

(b) Extension of Target Close Date.

(i) If Close of Escrow does not occur by the Target Close Date, Developer has four (4) consecutive three (3)-month options to extend the Target Close Date, subject to satisfaction of all of *Sections 4.3(b)(i)(1)--4.3(b)(i)(4)*. “Extended Target Close Date” means the date that is three (3) months after the Target Close Date and if further extended in accordance with this *Section 4.3(b)*, the date that is three (3) months after the previously applicable Extended Target Close Date.

(1) Port receives written notice of Developer’s exercise of its option to extend the Target Close Date or the Extended Target Close Date, as applicable, no later than thirty (30) days before the Target Close Date or the Extended Target Close Date, as applicable;

(2) There is no uncured Developer Event of Default or Unmatured Developer Event of Default;

(3) Port received Developer’s notice of its proposed anticipated Target Close Date at least one hundred twenty (120) days prior to the anticipated Target Close Date; and

(4) Together with the notice to extend, Port receives from Developer (A) an extension fee in an amount equal to Twenty-Five Thousand Dollars (\$25,000.00) to extend the Target Close Date or the applicable Extended Target Close Date, as applicable, by an additional three (3) months (“**Target Close Date Extension Fee**”), and (B) any other amounts due and payable to Port under this Agreement.

(c) Target Close Date Extension Fee Acknowledgements. Developer agrees and acknowledges that the Target Close Date Extension Fee is non-refundable, will not be credited against any rent or other consideration due Port under the Lease, and will not be reduced or pro-rated if Close of Escrow occurs before the end of the applicable three (3)-month extended period.

(d) No Change. Other than the extension of the Target Close Date or the Extended Target Close Date, as applicable, and any corresponding change, if any, to the dates to complete the various Performance Benchmarks (“**Performance Dates**”), all other terms and conditions to this Agreement will remain the same.

(e) Termination. If Developer fails to extend the Target Close Date or if applicable, the Extended Target Close Date in accordance with *Section 4.3(b)* in a timely manner, then this Agreement will terminate on the date immediately following the Target Close Date or if applicable, the applicable Extended Target Close Date. If Developer extends the Extended Target Close Date in accordance to *Section 4.3(b)*, but Close of Escrow does not occur by the Outside Close Date, then this Agreement will terminate on the day immediately following the Outside Close Date, unless earlier terminated in accordance with this Agreement.

(f) Outside Close Date. Subject to Force Majeure or *Section 3.3(b)*, in no event will Close of Escrow occur beyond two (2) years after the Effective Date (“**Outside Close Date**”).

4.4. Conditions to Port’s Obligation to Close Escrow.

(a) Port’s Conditions Precedent. The following are conditions precedent to Port’s obligation to close Escrow:

(i) Developer has deposited into Escrow the Deferred ENA Negotiation Fee.

(ii) Developer has performed all obligations under this Agreement required to be performed on its part before the Close of Escrow, no Unmatured Developer Event of Default or uncured Developer Event of Default exists and all of Developer’s representations and warranties made in *Section 18.21* was true and correct in all aspects when made and is true and correct in all aspects as of the Close of Escrow. At the Close of Escrow, Developer will deliver to Port a certificate to confirm the accuracy of such representations and warranties in all aspects substantially in the form of *Exhibit C*.

(iii) Port has approved those aspects of the Construction Documents that are required under *Section 9.4* to be approved by the Close of Escrow and in accordance with the Schedule of Performance.

(iv) Port has received and approved evidence of adequate financing for the Improvements to be constructed in accordance with the Construction Documents approved hereunder, including evidence of Developer’s ability to meet any debt service obligation(s) attendant thereto, as provided for below. In this regard, as to the following *Sections 4.4(a)(iv)(1), 4.4(a)(iv)(2), and 4.4(a)(iv)(3)*, no later than the date specified in the Schedule of Performance for submission of evidence of financing:

(1) Developer has submitted and Port has reasonably approved the then current Development Budget, which Development Budget will be substantially in the form of the Anticipated Development Budget.

(2) Developer has submitted, and Port has reasonably approved, (i) evidence of a bona fide commitment or commitments for the financing of that portion of the Development Budget Developer intends to borrow, certified by Developer to be a true and correct copy or copies thereof, with (1) no conditions to funding other than standard and customary conditions and (2) no provisions requiring acts of Developer prohibited in this Agreement or the Lease, or prohibiting acts of Developer required in this Agreement or the Lease, and (ii) such documentation showing sources and uses of funds as may be required by such leasehold lender.

(3) Developer has submitted a statement and appropriate supporting documents certified by Developer to be true and correct and in form reasonably satisfactory to Port showing sources and expected uses of funds sufficient to demonstrate that Developer has or will have funds equal to or exceeding the total development cost of the Improvements (as shown on the Development Budget) as of the Close of Escrow, and such funds have been or will be spent for uses described in the Development Budget.

(4) Within thirty (30) days after Developer's submission of all of the applicable documents described in this *Section 4.4(a)(iv)*, Port will notify Developer in writing of Port's approval or disapproval (including the reasons for disapproval) of the evidence of financing, exercised in accordance with the approval standards set forth in *Section 18.5(g)*.

(v) If Developer elects to finance any part of the Improvements with a leasehold lender, then such financing will close simultaneously with the Close of Escrow.

(vi) Developer will have submitted and Port has approved prior to Close of Escrow, the Final Pro-Forma, updated to account for any updates to the Development Budget and market conditions and that is materially similar to the anticipated Pro-Forma attached as *Exhibit D*.

(vii) Port has received Developer's notice of its anticipated Target Close Date at least one hundred twenty (120) days prior to the anticipated Target Close Date.

(viii) Developer has deposited into Escrow the Lease and the Memorandum of Lease, duly executed by Developer.

(ix) Developer has in place all insurance required under this Agreement and the Lease and has deposited evidence thereof into Escrow.

(x) Developer has deposited into Escrow Transaction Costs due and payable to Port, if any.

(xi) Legislation for the vacation of the ROWS has been approved by the Board of Supervisors, signed by the Mayor and Finally Granted.

(xii) Building Permits for the Improvements are ready to be issued but for the execution of the Lease by Port and payment by Developer of all Building Permit fees that are required to be paid prior to commencement of Construction of the Improvements.

(xiii) Developer has deposited into Escrow funds necessary for payment to the City of all development exaction fees that are required to be paid prior to commencement of Construction of the Improvements.

(xiv) Developer has deposited into Escrow a duly executed and authorized Performance Bond.

(xv) Port has reasonably approved evidence of a guaranteed maximum price contract or other comparable construction contract approved by Port for Construction of the Improvements consistent with the Construction Documents ("**Construction Contract**"). Port's approval of the Construction Contract will solely be for purposes of determining consistency with the Development Budget and the Scope of Development, and consistency with the terms of

this Agreement and the Lease. Port's approval of the Construction Contract is in addition to, and not as a limitation of, Port's approval rights of the Construction Documents pursuant to **Article 9**.

(xvi) City has approved the submissions Developer is required to make before the Close of Escrow relating to Developer's obligations to comply with the First Source Hiring Program, participation of LBEs, and Local Hiring Requirements, and Developer and the City have entered into any agreements related to the foregoing that are required to be entered into prior to issuance of the Building Permit.

(xvii) Developer has executed and delivered to Port a certification of compliance with Administrative Code Chapters 12B and 12C on the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form, as set forth in **Section 16.1(d)**, together with supporting documentation, and has submitted evidence to Port that it has secured approval of the form by the City's Human Rights Commission.

(xviii) Port has approved Developer's integrated pest management plan as set forth in **Section 16.9**.

(xix) The WDAC has reviewed and provided recommendations, if any, and the Port Commission, and, if required under Planning Code Section 240, the Planning Commission, has reviewed and approved the design of the Improvements, and such approvals are final, binding and non-appealable.

(xx) Developer has obtained all Regulatory Approvals required for the development of the Improvements and the same has been Finally Granted.

(xxi) Developer has deposited into Escrow such evidence of authority to enter into the Lease, this Agreement and any other Transaction Documents, as Port and the Title Company may reasonably require (including certificates of good standing, officer's certificates, resolutions, and certificates of incumbency).

(xxii) The Title Company is prepared to issue to Port the title insurance policy required by **Section 4.8(a)(ii)** to be delivered to Port.

(xxiii) The Port Commission's authorization and approval, by resolution, of this Agreement, the Lease, and any other Transaction Document to be executed by Port, and the Board of Supervisors' authorization and approval, by resolution, of the Lease and any other Transaction Document if required, has been completed and has become and remain effective, and such approvals shall be Finally Granted.

(b) Satisfaction of Port's Conditions. The conditions precedent set forth in **Section 4.4(a)** are intended solely for the benefit of Port. If any such condition precedent is not satisfied on or before the required completion date specified therefor in the Schedule of Performance, the Executive Director, or, if the Executive Director determines that waiver of the condition precedent materially affects the rights, obligations, or expectations of Port, the Port Commission by resolution, has the right in its sole discretion to (i) waive in writing the condition precedent in question and proceed with Delivery of the Lease, or (ii) terminate this Agreement and exercise its rights and remedies hereunder.

4.5. Conditions to Developer's Obligation to Close Escrow.

(a) Developer's Conditions Precedent. The following are conditions precedent to Developer's obligation to close Escrow:

(i) Port has performed all obligations under this Agreement that Port is required to perform before the Close of Escrow and no Unmatured Port Event of Default or uncured Port Event of Default exists.

(ii) Port has approved those aspects of the Construction Documents that are required under **Section 9.4** to be approved by Port by the Close of Escrow and in

accordance with the Schedule of Performance, provided that Developer has timely submitted all required information and documents.

(iii) Port has approved evidence of adequate financing for the Construction of the Improvements in accordance with *Sections 4.4(a)(iv)*.

(iv) If Developer elects to finance any part of the Improvements with a leasehold lender, then such financing will close simultaneously with the Close of Escrow.

(v) Port has approved prior to Close of Escrow, the Development Budget and the Final Pro-Forma.

(vi) Port has deposited into Escrow the Lease, duly executed by Port.

(vii) Legislation for the vacation of the ROWS has been approved by the Board of Supervisors, signed by the Mayor and Finally Granted.

(viii) Building Permits for the Improvements are ready to be issued but for the execution of the Lease by Port and payment by Developer of all Building Permit fees that are required to be paid prior to commencement of Construction of the Improvements.

(ix) Developer has obtained all Regulatory Approvals required for the development of the Improvements and the same has been Finally Granted.

(x) The WDAC has reviewed and provided recommendations, if any, and the Port Commission, and, if required under Planning Code Section 240, the Planning Commission, has reviewed and approved the design of the Improvements, and such approvals are final, binding and non-appealable.

(xi) City has approved the submissions Developer is required to make before Close of Escrow relating to Developer's obligations to comply with the EOP and Developer and the City, through its First Source Hiring Administration, have entered into that certain First Source Hiring Agreement attached as an exhibit to that certain Memorandum of Understanding between the same parties, substantially in the form attached hereto as *Exhibit E*.

(xii) The Title Company is prepared to issue to Developer, upon payment by Developer of the Closing Costs, the title insurance policy required by *Section 4.8(a)(i)* to be delivered to Developer.

(xiii) The Port Commission's authorization and approval, by resolution, of this Agreement, the Lease, and any other Transaction Documents to be executed by Port, and the Board of Supervisors' authorization and approval, by resolution, of the Lease and any other Transaction Documents if required, has been completed and has become and remain effective, and such approvals shall be Finally Granted.

(b) Satisfaction of Developer's Conditions Precedent. The conditions precedent set forth in *Section 4.5(a)* are intended solely for the benefit of Developer. If any such condition precedent is not satisfied on or before the Close of Escrow, Developer has the right in its sole discretion to waive in writing the condition precedent in question and proceed with the Close of Escrow and acceptance of the Site or to terminate this Agreement.

4.6. Delivery of the Lease.

(a) Obligation to Close Escrow. Provided that the conditions to Port's and Developer's obligations with respect to Close of Escrow as set forth in *Sections 4.4 and 4.5* have been satisfied or expressly waived by the benefited party on or before the Performance Dates or as otherwise set forth in this Agreement, Port and Developer will instruct the Title Company to complete the Close of Escrow as set forth below. Upon the Close of Escrow, the Lease will be Delivered to Developer, and Developer will accept such Delivery.

(b) Steps to Close Escrow. Close of Escrow will be completed as follows:

(i) On or before Close of Escrow, Port will execute and acknowledge, as necessary, and deposit into Escrow with the Title Company the following documents: (1) the Lease; (2) the Memorandum of Lease, (3) copies of the resolution(s) of the Port Commission authorizing and approving the Lease and related Transaction Documents; and (4) copies of the resolution(s) of the Board of Supervisors authorizing and approving the Lease.

(ii) On or before the Close of Escrow, Developer will execute and acknowledge (or cause to be executed and acknowledged), as necessary, and deposit into Escrow with the Title Company the following: (1) the Lease; (2) the Memorandum of Lease; (3) the certificate as to the accuracy of the representations and warranties under this Agreement required by *Section 4.4(a)(ii)*; (4) such resolution(s) of Developer its authorizing the execution and delivery of the Lease, this Agreement and the related Transaction Documents, and any other evidence of authority as Port or the Title Company may reasonably require; (5) all Closing Costs; (6) the Security Deposit, and if required under the Lease, the Environmental Oversight Deposit, and Environmental Financial Performance Deposit; (7) the Performance Bond or if applicable, a letter of credit or if approved by Port, a completion guaranty from a guarantor approved by Port in its sole discretion; and (8) if Developer finances the Improvements with a leasehold lender, the deed of trust and other related loan documents.

(iii) Upon receipt of confirmation from the Title Company that it has received the items described in *Sections 4.6(b)(i) and 4.6(b)(ii)* and if applicable, is ready to disburse funds to the applicable Parties, Port and Developer will instruct the Title Company to close the Escrow. Upon Close of Escrow, the Title Company will record in the Official Records, the Memorandum of Lease, and any other documents reasonably required to be recorded in the Official Records under the terms of Regulatory Approvals.

(iv) The Title Company will issue title policies to Developer and Port as required under *Section 4.8*.

(c) Waiver of Pre-Delivery Conditions. Unless the Parties otherwise expressly agree at the time of Close of Escrow, all conditions of the Parties to Close of Escrow will, upon Close of Escrow, be deemed waived by the Party benefited by such condition.

4.7. Condition of Title.

(a) Permitted Title Exceptions. Except for the items listed in the attached *Exhibit F*, underground utility lines (including for water, power, telecommunications, and sewer), and such other matters as Developer will cause or suffer to arise (collectively, “**Permitted Title Exceptions**”), Port will Deliver to Developer the Site under and subject to the provisions of the Lease for the term specified in the Lease, free and clear of possession by others and liens, assessments, and taxes.

(b) Title Defect. If at the time scheduled for Close of Escrow, other than as set forth in *Section 4.7(a)*, any (i) possession or use by others, (ii) rights of possession or use other than those of Developer or Port as reserved under the Lease, or (iii) lien, encumbrance, assessment, tax or other matter which is not a Permitted Title Exception, encumbers the Site and would materially and adversely affect the Construction of the Improvements (“**Title Defect**”), Port will have up to thirty (30) days from the date scheduled for Close of Escrow to remove the Title Defect (the “**Title Defect Cure Period**”). In such event, Close of Escrow will be extended to the earlier of seven (7) business days after the Title Defect is removed or the expiration of the Title Defect Cure Period, but in no event will Close of Escrow extend beyond the Outside Close Date. If the Title Defect can be removed by bonding and Port has not bonded within the Title Defect Cure Period, Developer may cause a bond to be issued. If Developer causes a bond to be issued in accordance with this *Section 4.7(b)*, Port, at its option, will reimburse Developer for the cost of such bond within thirty (30) days of demand therefor or offset such amounts against any rent due under the Lease.

(c) Developer's Remedies With Respect to Uncured Title Defect. If after expiration of the Title Defect Cure Period, a Title Defect still exists at the time scheduled for Close of Escrow, Developer may by written notice to Port:

- (i) terminate this Agreement;
- (ii) accept Delivery of the Site; or
- (iii) extend the time scheduled for Close of Escrow if the Title Defect relates solely to continued possession or use of the Site by others until the Site is no longer in possession or use by others.

If Developer accepts Delivery, the Title Defect will be deemed waived by Developer. If Developer does not accept Delivery and fails to terminate this Agreement within seven (7) days after expiration of the Title Defect Cure Period, so long as Developer has not extended the Close of Escrow in accordance with *Section 4.7(c)(iii)*, Port may terminate this Agreement upon three (3) days written notice to Developer. If this Agreement is terminated under this *Section 4.7(c)*, Developer will have no further remedies against, or other obligations to Port with respect to such termination (other than those that survive expiration or earlier termination of this Agreement). In the event that Developer does not accept Delivery and fails to terminate this Agreement within such seven (7) days after the expiration of the Title Defect Cure Period, *Section 4.7(c)(iii)* is not applicable, and Port elects not to terminate this Agreement as set forth in this Section, then this Agreement will continue in full force and effect and until the Target Close Date or if applicable, the Extended Target Close Date (but in no event later than the Outside Close Date), and any Title Defect will be deemed waived by Developer.

(d) Reservation of Mineral Rights by the State. In accordance with Sections 2 and 3.5(c) of the Burton Act, Developer and Port acknowledge that the State reserves certain subsurface mineral rights from a point of entry outside of the Site, and subject to certain limitations, as more particularly described in the Lease.

4.8. Title Insurance.

(a) Title Insurance to be Issued at the Close of Escrow. The Joint Escrow Instructions will provide that concurrently with Close of Escrow, the Title Company will issue and deliver:

(i) To Developer, an A.L.T.A. extended coverage title insurance policy issued by the Title Company, with such coinsurance or reinsurance and direct access agreements as Developer may request reasonably, in an amount designated by Developer which is satisfactory to the Title Company, insuring that the leasehold estate in the Site is vested in Developer subject only to the Permitted Title Exceptions, and with such A.L.T.A. and/or C.L.T.A. form endorsements as may be requested reasonably by Developer, all at the sole cost and expense of Developer; and

(ii) To Port, an A.L.T.A. extended coverage title insurance policy issued by Title Company in an amount specified by Port and satisfactory to the Title Company, insuring Port's fee interest in the Site subject to the Public Trust, the Lease and the other Permitted Title Exceptions which are applicable to the fee, and with such C.L.T.A. endorsements as Port may reasonably request, all at the sole cost and expense of Developer, provided that subject to *Section 4.8(c)*, Port pays any incremental cost for such policy (including endorsements) in excess of the cost of the title policy and endorsements referred to in *Section 4.8(a)(i)*.

(b) Surveys. Developer is responsible for securing any and all surveys and engineering studies at its sole cost and expense, as needed for the title insurance required under this Agreement or as otherwise required to consummate the transactions contemplated by this Agreement. Developer, at no cost to Port, must provide Port with complete and accurate copies

of all such final surveys (which surveys must be certified to Port in a form reasonably acceptable to Port) and engineering studies.

(c) Construction Endorsement. In the event that the title insurance policy described in *Section 4.8(a)(ii)* is issued to Port, and in the event that Developer obtains an endorsement to its title insurance policy insuring Developer that the Improvements have been completed free and clear of all mechanics' and materialmen's liens, Developer will also obtain such an endorsement for Port with respect to Port's title insurance policy, all at the sole cost and expense of Developer.

4.9. Taxes and Assessments.

(a) Ad Valorem Taxes and Assessments Before and After Close of Escrow. For any period before Close of Escrow, Developer is responsible for the payment of any ad valorem taxes (including possessory interest and special taxes) assessed by reason of this Agreement, Developer's entry upon the Site under any Transaction Document or otherwise. Ad valorem taxes and assessments levied, assessed, or imposed for any period on or after Close of Escrow, including possessory interest and special taxes, are the sole responsibility of Developer, as provided in the Lease.

(b) Possessory Interest Taxes. Developer recognizes and understands that this Agreement may create a possessory interest subject to property taxation and that Developer may be subject to the payment of property taxes levied on such interest. Administrative Code Sections 23.38 and 23.39 (or any successor statute) require that certain information relating to the creation, renewal, extension, assignment, or other transfer of this Agreement be reported to the County Assessor within sixty (60) days after any such transaction. Accordingly, Developer must provide a copy of this Agreement to the County Assessor not later than sixty (60) days after the Effective Date, and any failure of Developer to timely provide a copy of this Agreement to the County Assessor will be a default under this Agreement. Developer will also timely provide any information that Port or City may request to ensure compliance with this or any other reporting requirement.

4.10. Compliance with Laws; Regulatory Approvals and Other Requirements.

(a) Compliance with Laws and Other Requirements. As to the Site and the Improvements, at its sole cost and expense, Developer will comply (taking into account any variances or other deviations properly approved) at all times throughout the LDDA Term, with: (i) all Laws; (ii) all requirements of all policies of insurance which may be applicable to the Site, the Improvements, or Developer's personal property; (iii) the Lease (to the extent then in effect); and (iv) all of the Mitigation Monitoring and Reporting Program. It is expressly understood and agreed that the performance required of Developer by the preceding sentence includes the obligation to make, at Developer's sole cost and expense, all additions to, modifications of, and installations on the Site which may be required by any Laws regulating the Site, the Improvements, or any of Developer's insurance policies covering the Site, the Improvements, or Developer's personal property, regardless of, among other factors, the relationship of the cost of curative action to the rent payable under the Lease, the length of the then remaining term thereof, the relative benefit of the repairs to Developer or Port, the degree to which the curative action may interfere with Developer's use or enjoyment of the Site, the likelihood that the parties contemplated the particular Laws involved, and whether the Laws involved is related to Developer's particular use of the Site. Developer will, promptly upon request, provide Port with evidence of Developer's compliance with its obligations under this *Section 4.10(a)*. The Parties acknowledge and agree that Developer's obligation to comply with this *Section 4.10(a)* is a material part of the bargained for consideration under this Agreement. Except as otherwise expressly set forth in this Agreement, no occurrence or situation arising during the LDDA Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, will relieve Developer of its obligations hereunder, nor give Developer any right to terminate this Agreement in whole or in part or to seek redress against Port, except to the extent Developer may

have remedies against Port pursuant to this Agreement or applicable Law. Developer waives any rights now or hereafter conferred upon it by any existing or future Law to terminate this Agreement, to receive any abatement, diminution, reduction or suspension of payment of rent under the Lease, or to compel Port to make any repairs to comply with any such Laws, on account of any such occurrence or situation. Developer will, promptly upon request, provide Port with evidence of compliance with Developer's obligations under this **Section 4.10(a)**.

(b) Regulatory Approvals.

(i) Developer understands and agrees that Port is entering into this Agreement in its capacity as a landowner with a proprietary interest in the Site (subject to the Public Trust) and not as a Regulatory Agency with certain police powers. Developer agrees and acknowledges that Port has made no representation or warranty that the necessary Regulatory Approvals to allow for Construction of the Improvements can be obtained. Developer agrees and acknowledges that although Port is an agency of the City, Port staff and executives have no authority or influence over officials or Regulatory Agencies responsible for the issuance of any Regulatory Approvals, including Port and/or City officials acting in a regulatory capacity. Accordingly, there is no guarantee, nor a presumption, that any of the Regulatory Approvals required for the approval or Construction of the Improvements will be issued by the appropriate Regulatory Agency and Developer understands and agrees that neither entry by Port into this Agreement nor any approvals given by Port under this Agreement will be deemed to imply that Developer will obtain any required approvals from Regulatory Agencies which have jurisdiction over the Site, including Port itself in its regulatory capacity. Port's status as an agency of the City will in no way limit the obligation of Developer, at Developer's own cost and initiative, to obtain Regulatory Approvals from Regulatory Agencies that have jurisdiction over the Site or Construction of the Improvements. By entering into this Agreement, Port is in no way modifying or limiting the obligations of Developer to Construct the Improvements in accordance with all Laws. Without limiting the foregoing, Developer understands and agrees that Port staff have no obligation to advocate, promote or lobby any Regulatory Agency and/or any local, regional, state or federal official for any Regulatory Approval, for approval of the Improvements, this Agreement or the Lease, and any such advocacy, promotion or lobbying will be done by Developer at Developer's sole cost and expense. Port's sole obligation will be to negotiate with Developer in compliance with this Agreement and to present any final negotiated agreement to the Port Commission and the Board of Supervisors (with respect to the Lease only) for their review and consideration. Developer hereby waives any Losses against the Indemnified Parties, and fully releases and discharges the Indemnified Parties to the fullest extent permitted by Law, from any liability relating to the failure of Port, the City or any Regulatory Agency from issuing any required Regulatory Approval or from issuing any approval of the Improvements.

(ii) Developer understands that its construction of the Improvements require Regulatory Approvals from Regulatory Agencies, which may include RWQCB, SHPO, the National Park Service, State Lands, the City's Planning Commission and/or Zoning Administrator, SFPUC, and other Regulatory Agencies. Developer will be solely responsible for obtaining any such Regulatory Approvals, as further provided in this **Section 4.10(b)**.

(iii) Developer will not seek any Regulatory Approval without first obtaining approval of Port, which (except as set forth in this **Section 4.10(b)**) will not be unreasonably withheld, conditioned or delayed. Throughout the LDDA Term, Developer will submit all applications and other forms of request for required Regulatory Approvals on a timely basis and will consult and coordinate with Port in Developer's efforts to obtain Regulatory Approvals. Port will provide Developer with its approval or disapproval thereof in writing to Developer within ten (10) days after receipt of Developer's written request, or if Port's Executive Director determines that Port Commission or Board of Supervisors action is necessary, at the first Port and subsequent Board hearings after receipt of Developer's written request subject to notice requirements and reasonable staff preparation time.

(iv) Port will cooperate reasonably with Developer in its efforts to obtain the Regulatory Approvals required for the Project. However, Developer will not agree to the imposition of conditions or restrictions in connection with its efforts to obtain a Regulatory Approval if Port is required to be a co-permittee under such permit or the conditions and/or restrictions in the permit could create any obligations on the part of Port or could otherwise encumber, restrict or change the use of Port property, unless in each instance, Port has previously approved, in Port's sole and absolute discretion, such conditions or restrictions.

(v) Developer will bear, and will pay as they are incurred, all costs associated with (x) applying for and obtaining any necessary Regulatory Approval, and (y) complying with any and all conditions or restrictions imposed by Regulatory Agencies as part of any Regulatory Approval, including the economic costs of any development concessions, waivers, or other impositions, and whether such conditions or restrictions are on-Site or require off-Site improvements, removal, or other measures. Developer has the right to appeal or contest any condition in any manner permitted by law imposed upon any such Regulatory Approval. Developer will provide Port with prior notice of any such appeal or contest and keep Port informed of such proceedings. Developer will pay or discharge any fines, penalties or corrective actions imposed as a result of Developer's failure to comply with the terms and conditions of any Regulatory Approval. No Port Approval will limit Developer's obligation to pay all the costs of complying with any conditions or restrictions.

(vi) Without limiting any other Indemnification provisions of this Agreement, Developer will Indemnify Port and the Indemnified Parties from and against any and all Losses which may arise in connection with Developer's failure to obtain or seek to obtain in good faith, or to comply with the terms and conditions of any Regulatory Approval or to pursue in good faith the appeal or contest of any conditions of any Regulatory Approval except to the extent that such Losses arise solely from the gross negligent or willful acts or omissions of Port acting in its proprietary capacity.

5. AS IS CONDITION OF THE SITE; RELEASE; INDEMNIFICATION.

The provisions of this *Section 5* will survive the expiration or earlier termination of this Agreement.

5.1. Site As Is; Risk of Loss.

(a) Acceptance of Site in "AS IS WITH ALL FAULTS" Condition. Port will not prepare the Site for any purpose whatsoever, except solely for its obligations to Deliver the Site as provided in *Sections 3.2* and *4.7*. Subject to the provisions of *Section 4.7*, Developer agrees to accept the Site in its "AS IS WITH ALL FAULTS" condition on the date of Close of Escrow as further described in *Sections 5.1(b) and 5.1(c)*.

(b) Independent Investigation by Developer. Developer acknowledges that it has been afforded a full opportunity to inspect Port's records relating to conditions of the Site. Port makes no representation or warranty as to the accuracy or completeness of any matters contained in such records. Developer is not relying on any such information. All information contained in such records is subject to the limitations set forth in *Section 5.1(c)*. Developer represents and warrants to Port that Developer has performed a diligent and thorough inspection and investigation of the Site, either independently or through its own experts including (i) the quality, nature, adequacy and physical condition of the Site including the structural elements, foundation, and all other physical and functional aspects of the Site; (ii) the quality, nature, adequacy, and physical, geotechnical and environmental condition of the Site, including the soil and any groundwater (including Hazardous Materials conditions (including the presence of asbestos or lead) with regard to the building, soils and any groundwater); (iii) the suitability of the Site for the Improvements and Developer's planned use of the Site; (iv) the zoning, land use regulations, historic preservation laws, and other Laws governing use of or construction on the

Site; and (v) all other matters of material significance affecting the Site and its development under this Agreement.

(c) DISCLAIMER OF REPRESENTATIONS AND WARRANTIES.

DEVELOPER AGREES THAT THE SITE IS BEING DELIVERED BY PORT AND ACCEPTED BY DEVELOPER IN ITS **AS IS WITH ALL FAULTS CONDITION**. DEVELOPER REPRESENTS AND WARRANTS TO PORT THAT DEVELOPER HAS RECEIVED AND REVIEWED PORT'S RECORDS. DEVELOPER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT NEITHER THE CITY, INCLUDING PORT, NOR ANY OF THE OTHER INDEMNIFIED PARTIES, HAS MADE, AND THERE IS HEREBY DISCLAIMED, ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, OF ANY KIND, WITH RESPECT TO THE CONDITION IN, ON, UNDER, OR PERTAINING TO THE SITE, THE SUITABILITY OR FITNESS OF THE SITE OR APPURTENANCES TO THE SITE FOR THE DEVELOPMENT, USE OR OPERATION OF THE IMPROVEMENTS, ANY COMPLIANCE WITH LAWS OR APPLICABLE LAND USE OR ZONING REGULATIONS, ANY MATTER AFFECTING THE USE, VALUE, OCCUPANCY OR ENJOYMENT OF THE SITE, THE ACCURACY OF PORT'S RECORDS, OR ANY OTHER MATTER WHATSOEVER PERTAINING TO THE SITE OR THE PROPOSED PROJECT.

Developer

5.2. Release. As a material condition to Port's agreement to enter into this Agreement, as part of Developer's agreement to accept the Site in its "As Is With All Faults" condition, Developer, on behalf of itself and its successors and assigns, is deemed to waive any right to recover from, and forever release, acquit and discharge, Port and the Indemnified Parties from any and all Losses, whether direct or indirect, known or unknown, foreseen or unforeseen, that Developer may now have or that may arise on account of or in any way be connected with (i) the physical, geotechnical or environmental condition in, on, under, above, or about the Site (including soil and groundwater conditions), including any Hazardous Materials in, on, under, above or about the Site, (ii) the suitability of the Site for Construction of the Improvements, (iii) any applicable Laws, including Environmental Laws or Laws pertaining to rehabilitation or historic preservation of historic resources, (iv) damages by death of or injury to any Person, or to property of any kind whatsoever and to whomever belonging, and (v) goodwill, or business opportunities arising or lost at any time and from any cause, in, on, under, or about the Site, including all claims arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties, but the foregoing waivers or releases of claims do not extend to Losses to the extent caused by the sole negligence or willful misconduct of the Indemnified Parties.

Further, Port would not be willing to enter into this Agreement without the agreement of Developer, on behalf of itself and its successors and assigns, to waive any right to recover from, and forever release, acquit and discharge, Port and the Indemnified Parties from any and all consequential, incidental or punitive damages, and Developer expressly assumes the risk with respect thereto. Accordingly, without limiting any Indemnification obligations of Developer or other waivers contained in this Agreement and as a material part of the consideration of this Agreement, Developer fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against the Indemnified Parties for consequential, incidental and punitive damages (including, without limitation, lost profits) and covenants not to sue for such damages, the Indemnified Parties arising out of this Agreement or the uses authorized hereunder, including, any interference with uses conducted by Developer pursuant to this Agreement regardless of the cause, and whether or not due to the negligence of the Indemnified Parties.

Developer understands and expressly accepts and assumes the risk that any facts concerning the claims released, waived and discharged in this Agreement might be found later to be other than or different from the facts now believed to be true, and agrees that the releases, waivers, and discharges in this Agreement will remain effective. Therefore, with respect to the claims released, waived and discharged in this Agreement, Developer waives any rights or benefits provided by Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR THE RELEASED PARTY.

Developer

Developer agrees that the releases, waivers, and discharges given in and/or contemplated by this **Section 5.2** includes all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims regarding (i) all or any of the physical, geotechnical, and environmental condition in, on, under, above, or about the Site (including soil and groundwater conditions), including any Hazardous Materials in, on, under, above or about the Site, (ii) the suitability of the Site for Construction of the Improvements, (iii) applicable Laws, including Environmental Laws or Laws pertaining to rehabilitation or historic preservation of historic resources, (iv) damages by death of or injury to any Person or to property of any kind whatsoever and to whomever belonging, (v) goodwill, or business opportunities arising or lost at any time and from any cause, in, on, under, or about the Site, including all claims arising from the joint, concurrent, active or passive negligence of any of Indemnified Parties, and (vi) consequential, incidental or punitive damages. Accordingly, Developer hereby waives the benefits of Civil Code Section 1542, or under any other statute or common law principle of similar effect, in connection with the releases contained in this Section.

5.3. General Indemnification.

(a) Indemnification Prior to Close of Escrow. Before Close of Escrow and without limiting any Indemnity contained in any other Transaction Document or under Law, Developer will Indemnify the Indemnified Parties from and against any and all Losses incurred in connection with or arising directly or indirectly, in whole or in part, out of: (i) the death of any person or any accident, injury, loss or damage whatsoever caused to any person or to the property of any person (including the person or property of Developer or its Agents) which may occur in, on, under, about, or around the Site, and which may be directly or indirectly caused by any acts done in, on, under, around, or about the Site, or acts or omissions of Developer, its Agents or Invitees, (ii) any failure by Developer or its Agents or Invitees, as applicable, in the observation or performance of any of the terms, covenants or conditions of this Agreement; (iii) the entry or use by Developer, its Agents or Invitees in, on, under, around, or about the Site; and (iv) performance of any labor or services or the furnishing of any materials or other property with respect to the Site or any part thereof by Developer or its Agents during the LDDA Term; and (v) any acts, omissions, or negligence of Developer, its Agents or Invitees during the LDDA Term.

(b) Indemnification After Close of Escrow. On and after the Close of Escrow, Developer will Indemnify the Indemnified Parties in accordance with the provisions of the Lease.

(c) General Provisions Regarding Indemnities.

(i) **Costs.** The foregoing Indemnities include, without limitation, Attorneys' Fees and Costs, as well as the Indemnified Party's costs of investigating any Loss.

(ii) **Immediate Obligation to Defend.** Developer's Indemnification obligations are enforceable regardless of the active or passive negligence of the Indemnified Parties, and regardless of whether liability without fault is imposed or sought to be imposed on the Indemnified Parties. Developer agrees to immediately defend the Indemnified Parties against any claims that are actually or potentially within the scope of the Indemnity provisions of this Agreement even if such claims may be groundless, fraudulent or false. The Indemnified Party against whom any claim is made which may be within the scope of the Indemnity provisions of this Agreement shall provide notice to Developer of such claim within a reasonable time after learning of such claim, and thereafter shall cooperate with Developer in the defense of such claim. Developer's obligation to defend shall arise at the time such claim is tendered to Developer by the Indemnified Parties and shall continue at all times thereafter until finally resolved; provided, however, any failure to provide such notice shall not affect Developer's obligations under any such Indemnity provisions except to the extent Developer is materially prejudiced by such failure.

(iii) **Exclusion.** Developer will not be required to Indemnify the Indemnified Parties if such Losses are caused solely by the gross negligence or willful misconduct of any of the Indemnified Parties.

(iv) **Survival.** Developer's Indemnification obligations set forth in this Agreement and Developer's releases, waivers, and discharges made in this Agreement will survive the expiration or earlier termination of this Agreement as to any acts or omissions occurring prior to such date, provided that after Close of Escrow, Developer's Indemnification obligations under this Agreement will be subsumed in the Indemnification obligations of Developer under the Lease.

(v) **Defense.** Developer will, at its option but subject to the reasonable consent and approval of Port, be entitled to control the defense, compromise, or settlement of any Indemnified matter through counsel of Developer's own choice; provided, however, in all cases Port is entitled to participate in such defense, compromise, or settlement at its own expense. If Developer fails, however, within a reasonable time following notice from Port describing in reasonable detail the nature of Developer's alleged failure, to take reasonable and appropriate action to defend such suit or claim, Port has the right promptly to use the City Attorney or to hire outside counsel to carry out such defense, which expense will be due and payable to Port within thirty (30) days after receipt by Developer of an invoice therefor.

(vi) **Additional Obligations.** The agreements to Indemnify under this Agreement are in addition to, and may not be construed to limit or replace any other obligations or liabilities that Port may have to Developer or that Developer may have to Port under applicable Law.

(vii) **Not Limited by Insurance.** The insurance requirements and other provisions of this Agreement will not limit Developer's Indemnification obligations under this Agreement or any other Transaction Document.

6. DAMAGE OR DESTRUCTION.

6.1. *After Close of Escrow.* If at any time after the Close of Escrow, a fire or other casualty damages or destroys the Site or any portion thereof, the Lease will govern the obligations of the Parties.

6.2. *Before Close of Escrow.*

(a) If prior to Close of Escrow, the Site suffers any damage from fire or other casualty that would add less than Ten Million Dollars (\$10,000,000) to the Development Budget, Developer agrees that it will consummate the Close of Escrow in accordance with this Agreement. The Schedule of Performance will be adjusted, as necessary, to reflect any additional work necessitated by the fire or other casualty.

(b) If prior to Close of Escrow, the Site suffers any damage from fire or other casualty that would add more than Ten Million Dollars (\$10,000,000) to the Development Budget, then either Party may elect to terminate this Agreement, by written notice to the other Party delivered not less than thirty (30) days following the event that caused such damage. If neither Party so terminates this Agreement, the Parties will consummate the Close of Escrow and this Agreement will remain in effect. Developer (or any permitted assignee) will not be entitled to any additional rent credit, abatement or allowance under the Lease as a result of such casualty. The Schedule of Performance will be adjusted, as necessary, to reflect any additional work necessitated by the fire or other casualty.

(c) Following a termination pursuant to this *Section 6.2*, neither Party will have any further right or obligation hereunder other than those that survive the expiration or earlier termination of this Agreement.

7. **HAZARDOUS MATERIALS.**

(a) Developer must comply with all Environmental Laws applicable to the Site and the activities it conducts on the Site. Developer must perform any required Investigation and Remediation of Hazardous Materials as required by applicable Laws regarding any condition of the Site existing before or after the Effective Date to the extent necessitated by Developer's construction of the Improvements or Release or Exacerbation of Hazardous Materials, at no cost to Port, in accordance with applicable Laws. Developer must comply with all Environmental Laws and with all conditions for Regulatory Approval of any Investigation or Remediation. Without limiting Developer's obligations to comply with Environmental Laws and other Hazardous Materials obligations under any other Transaction Document, from and after Close of Escrow, Developer's obligations related to Hazardous Materials will be set forth in the Lease.

(b) If a notice of violation or other regulatory order from a Regulatory Agency with jurisdiction over the Site and/or Developer's activities and operations in, on, under, or pertaining to the Site (in each case, an "**Environmental Notice**") is delivered to Developer and such notice of violation arises from Developer's activities in, on, under, or pertaining to the Site and cannot be cured, or such regulatory order cannot be complied with, within fourteen (14) calendar days after delivery of such Environmental Notice, Developer will reimburse Port, within five (5) days following demand, for Port's administrative costs and expenses incurred while inspecting and monitoring the conditions of the Site and enforcing and administering Developer's obligations under this Agreement (including staff time corresponding with and responding to Regulatory Agencies and collection and laboratory analysis of environmental samples).

If an Environmental Notice is delivered to Developer and such notice of violation is cured, or regulatory order is complied with, within fourteen (14) calendar days after delivery of such Environmental Notice, Developer shall pay to Port within five (5) days following demand, Five Hundred Dollars (\$500.00) for each Environmental Notice delivered to Developer to reimburse Port for its administrative cost and expense. The parties agree that the foregoing charge relating to each Environmental Notice delivered to Developer represents a fair and reasonable estimate of the administrative cost and expense Port will incur by reason of Port staff time devoted to its response and action to each Environmental Notice.

(c) Nothing in this Agreement is intended in any way to preclude or limit Developer from pursuing any remedies Developer may have with regard to the existence of Hazardous Materials in, on, under, or pertaining to the Site, against any Third Party; provided, however, Developer may pursue remedies against Third Parties only at Developer's sole cost and expense and with advance written notice to, and approval from, Port. Port will have the right, in its sole election and at its sole cost, to join in any such suit or claim.

8. DEVELOPER ACCESS TO SITE.

8.1. *Before Close of Escrow.*

(a) Access to Perform Due Diligence. From time to time and at all reasonable times prior to the Close of Escrow, Developer will have the right to access the Site for the purposes of performing due diligence, visual surveys and inspections; provided, however, Developer must first obtain a license from Port in its standard form, including, but not limited to, the Indemnification and insurance requirements contained in such license.

(b) No Right to Perform Excavation or Construction. Developer may not perform any removal, salvaging operation, demolition, excavation or construction work before Close of Escrow without the express written approval of Port, which Port may give or withhold in its sole and absolute discretion. If Port grants such approval, Port may require additional insurance, bond, guaranty and Indemnification requirements as Port determines are appropriate to protect its interest in light of the proposed use.

8.2. *After Close of Escrow.* From and after the Close of Escrow, Developer's right of access and entry upon the Site to Construct the Improvements will be in accordance with the Lease.

9. DEVELOPMENT OF THE SITE.

9.1. *Developer's Construction Obligations.*

(a) Scope of Development; Schedule of Performance. Developer will Construct or cause to be Constructed the Improvements in accordance with the Project Requirements within the times and in the manner set forth in this **Section 9**, the Schedule of Performance, the Scope of Development, and the Schematic Drawings. The satisfaction of the matters set forth in the Schedule of Performance by the required Performance Dates is an essential part of this Agreement, time being of the essence. In the event Port grants an extension of any such date, Port will not be deemed to be waiving any other rights under this Agreement or implying the extension of any other dates.

(b) Project Requirements. Developer must Construct all of the Improvements (i) to achieve no less than LEED Gold Certification, (ii) in accordance with this Agreement and all applicable Laws, including the Port Building Code, required Regulatory Approvals, the Waterfront Plan, Environmental Laws, disabled access Laws, and Laws regulating construction on the Site, (iii) in compliance with Administrative Code Section 4.1-3 (All-Gender Toilet Facilities in Buildings on City Owned or Leased Land), Construction Dust Control Plan, a Sediment and Erosion Control Plan, and a Site Mitigation Plan, Public Works Code Sections 140-140.7 (Control of Fats, Oils and Grease) and the inclusion of automatic grease removal devices on all kitchen sinks in any café, restaurant or other food establishment or kitchen facility on the Site, and the applicable requirements of the design approved by the Port Commission and, if required, the Historic Preservation Commission, the Planning Commission, pursuant to Section 240 of the Planning Code, (iv) in compliance with the Mitigation Monitoring and Reporting Program and the Conditional Use Permit; (v) in accordance with the Port approved Construction Documents; [and (vi) in compliance with the Equal Opportunity Program]. All the foregoing requirements are sometimes referred to collectively as the "**Project Requirements**". Notwithstanding any other provision of this Agreement or the Lease to the contrary, Port's approval of the Schematic Drawings and the site plan in the respective forms

attached hereto is in no manner intended to, and is not, evidence or be deemed to evidence Port's approval of the Preliminary Construction Documents or the Final Construction Documents.

(c) Costs; Private Development. Developer will bear all of the cost of developing the Site and construction of all Improvements, including, without limitation, any and all cost overruns in relation to the approved Development Budget. Without limiting the foregoing, Developer is responsible for performing all Site preparation work necessary for construction of the Improvements. Such preparation of the Site includes, among other things, Investigation and Remediation of Hazardous Materials required for development or operation of the Improvements, all structure and substructure work, disabled access improvements and, public access improvements and tenant improvements.

(d) Permits. Developer will apply for all necessary permits for the Construction of the Improvements directly with the applicable Regulatory Agency. Developer will bear all risk of delay due to its submission of an incomplete or insufficient permit application.

(e) Standards Generally. All construction at the Project must be performed diligently, commenced and Completed within the time frames under the Schedule of Performance, and in accordance with good construction and engineering practices and applicable Laws. Dust, noise and other effects of the Construction must be controlled using commercially reasonable methods customarily used to control deleterious effects associated with construction projects in populated or developed urban areas. Developer must make adequate provision for the safety of all Persons affected by the Construction, and Developer must undertake commercially reasonable measures in accordance with good construction practices to: (i) minimize damage, disruption, or inconvenience caused by the Construction, (ii) minimize the risk of injury or damage to the Site and the surrounding property, or the risk of injury or death to members of the public and (iii) make adequate provision for the safety of all Persons affected by the Construction.

(f) Mitigation Monitoring and Reporting Program; Environmental Protection Plan. In order to mitigate potential significant environmental impacts of development of the Site, Developer agrees that the Construction of the Improvements will be in accordance with the Mitigation Monitoring and Reporting Program. In order to document and comply with pollution prevention measures during Construction of the Improvements, including dust control measures, Regulatory Approval requirements, and stormwater pollution prevention measures, Developer will implement and comply with the Port's Environmental Protection Plan if required by Port in its sole discretion until a Certificate of Completion is recorded. Developer shall perform and comply with the Mitigation Monitoring and Reporting Program and if applicable, the Environmental Protection Plan at no cost to Port. As appropriate, Developer shall incorporate the Mitigation Monitoring and Reporting Program and the Environmental Protection Plan into any contract for the Construction of the Improvements and cause such contractors to comply with such provisions.

(g) Utilities. Developer, at its sole expense, must (i) arrange for the provision and construction of all on-site and off-site utilities necessary to Construct the Improvements and necessary to operate the Project upon Completion, subject to Section 14.3 of the Lease (requirement to use SFPUC power), (ii) maintain, replace, restore, and provide utilities to any tenants, subtenants, licensees or other users at the Site, and (iii) coordinate with San Francisco Public Works with respect to installation of off-site utilities, including providing advance notice to appropriate parties of trenching requirements.

9.2. *The Construction Documents.*

(a) Definitions.

(i) **“Construction Documents”** mean Schematic Drawings (which are attached to this Agreement), the Preliminary Construction Documents and the Final Construction

Documents. As used in this Agreement “**Construction Documents**” does not mean any contracts between Developer and any contractor, subcontractor, architect, engineer or consultant.

(ii) “**Preliminary Construction Documents**” must be in sufficient detail and completeness to show the Improvements and the Construction thereof will comply with the Project Requirements and will generally include, without limitation:

(1) Site plan(s) at appropriate scale showing the buildings, the Spiegeltent, streets, walks, Exterior Improvements, and other open spaces. All land uses shall be designated. All site development details and bounding streets, points of vehicular and pedestrian access shall be shown.

(2) All building plans and elevations at appropriate scale.

(3) Building sections showing all typical cross sections at appropriate scale.

(4) Floor plans.

(5) Preliminary tenant improvement plans.

(6) Preliminary Exterior Improvement plans.

(7) Plans for public access areas showing details of features intended to be Constructed as part of the Improvements, including but not limited to, walls, fences, railings, benches, lockers, bicycle racks, street furniture, markers, plaques, models, paving, exterior lighting, signs, trash containers, and other Exterior Improvements.

(8) Outline specifications for materials, finishes and methods of construction.

(9) Plans for interior and exterior signs required by the Port Building Code.

(10) Site and exterior and interior (for common areas only) lighting plans.

(11) Material and color samples for exterior facades, public plazas and open space, and other public areas.

(12) Roof plans showing all proposed mechanical and other equipment, vents, photo-voltaic panels, satellite dish(es), antennae(s), and mechanical or elevator penthouses.

(13) Geotechnical, structural, and other engineering assessments and investigation reports.

The Preliminary Construction Documents must be in conformance with the Schematic Drawings and the Scope of Development, and must incorporate conditions, modifications and changes specified by Port or required as a condition of Regulatory Approvals as approved by Port. The Preliminary Construction Documents must also be in sufficient detail and completeness to show that the Improvements will be in compliance with *Section 9.1(b)* and matters previously approved. “**Preliminary Construction Documents**” also includes if applicable, the Environmental Protection Plan and the Mobilization and Staging Plan, all as approved by Port.

(iii) “**Final Construction Documents**” must include all plans and specifications required under applicable Laws to be submitted with an application for a Building Permit, including, to the extent applicable: (i) geotechnical, structural, and other engineering assessments and investigation reports, and (ii) a technical report summarizing construction objectives and methodology, operational requirements, project design criteria, and preliminary cost estimates. The Final Construction Documents must be a final development of, and be based

upon and conform to, the approved Preliminary Construction Documents for the Improvements. The Final Construction Documents must incorporate conditions, modifications and changes required by Port for the approval of the Preliminary Construction Documents for the Improvements. The Final Construction Documents must include all drawings, specifications and documents necessary for the Improvements to be constructed and completed in accordance with this Agreement.

(b) Preparation of Construction Documents by Licensed Architect. The Construction Documents must be prepared by or signed by an architect (or architects) duly licensed to practice architecture in and by the State of California. A California licensed architect will coordinate the work of any associated design professionals, including engineers and landscape architects.

(c) Inspection. A California licensed architect must inspect all Construction of the Improvements and must provide an Architect's Certificate substantially in the form attached hereto as *Exhibit G* concurrently with Developer's request for Port's issuance of a Certificate of Completion, as further described in *Section 12.1(a)(ii)*.

(d) Certification by Structural Engineer. A California licensed structural engineer must review and certify (by wet-stamp on the Construction Documents) all final structural plans and the sufficiency of structural support elements to support the Improvements.

9.3. Submission of Construction Documents. Developer will prepare and submit the Construction Documents to Port for review and approval as provided in *Sections 9.4 and 9.5* at the time or times established in the Schedule of Performance.

9.4. Port Review of Construction Documents.

(a) Scope of Review. Port's review and approval of the Construction Documents under this Agreement will be reasonable and will address (i) conformity and compliance with the Project Requirements, (ii) exterior architectural appearance and aesthetics of structures on the Site, (iii) alterations to any structures on the Site, (iv) landscape and design of all outdoor areas, including those required under Regulatory Approvals to be accessible to the public, and (v) the design and appearance of all exterior Signs (whether temporary or permanent), including the Signs described in *Section 9.13*. The design of the Improvements will be subject to the design review process pursuant to Planning Code Section 240. Port's review and approval of the Construction Documents will not be inconsistent with the design matters previously approved by the Port Commission and, if required, the Planning Commission, pursuant to the Section 240 process.

(b) Effect of Review. Port's review and approval or disapproval of Construction Documents, exercised in accordance with *Section 18.5(g)*, will be final and conclusive. Except by mutual agreement with Developer, Port will not disapprove or require changes subsequently in, or in a manner that is inconsistent with, matters that it has approved previously. If there is a disagreement between Port and Developer as to whether or not a matter contained in a particular submittal has been approved previously or whether Port is acting in a manner that is inconsistent with matters that it approved previously, Port's reasonable judgment, exercised in accordance with *Section 18.5(g)*, will apply in resolving the disagreement.

(c) Method of Port Action/Prior Approvals. Port will approve, disapprove or approve conditionally each set of the Construction Documents, in writing, within the time frames set forth in the Schedule of Performance, so long as each set of the applicable Construction Documents are properly submitted within the time frames set forth in the Schedule of Performance. Failure by Port to either approve or disapprove within such times will entitle Developer to an extension of time equal to the period of such delay. Notwithstanding any other provision of this Agreement or the Lease to the contrary, Port's approval of the Schematic Drawings and the site plan in the respective forms attached hereto is in no manner intended to,

and will not, evidence or be deemed to evidence Port's approval of the Preliminary Construction Documents or the Final Construction Documents.

(d) Timing of Port Disapproval/Conditional Approval and Developer Resubmission. If Port disapproves aspects of the Construction Documents in whole or in part, Port in the written disapproval will state the reason or reasons for such disapproval and may recommend changes and make other recommendations. If Port conditionally approves the Construction Documents in whole or in part, the conditions will be stated in writing and a time will be stated for satisfying the conditions. Developer will resubmit as expeditiously as possible. Developer may continue making resubmissions until the earlier of (i) approval of the submissions, or (ii) the later of (x) the time specified in any conditional approval, or (y) the date specified in the Schedule of Performance, as either may be extended by Port. Developer's failure to obtain a required Port approval of a submission by the later date will give Port the right to terminate this Agreement on 30 days' notice to Developer, unless Developer earlier terminates this Agreement or cures the failure within the 30 day period or Developer exercises its rights under any Extension Option.

(e) Exterior Improvements. Developer acknowledges that any Exterior Improvements not otherwise approved by Port during Port's review of Construction Documents will need Port's prior approval before installation, which may require, in Port's sole discretion, review by the WDAC. Developer will provide to Port the size, design, color, dimensions, text, materials, location, and method of installation of the Exterior Improvements to enable Port to evaluate the proposed request for approval; provided, however, any Signs requiring Port's prior approval under *Section 9.13* will be approved as set forth in *Section 9.13*.

9.5. Changes in Final Construction Documents.

(a) Approval of Changes in Required Elements. Developer will not make or cause to be made any material or substantial changes in any Port-approved Construction Documents as to elements requiring Port approval as provided in *Section 9* (each a "Required Element") without Port's express written approval. Prior to making any changes that Developer considers to be non-material to any Port approved Construction Documents as to Required Elements, including substituting materials that are the architectural equivalent as to aesthetic appearance, quality, color, transparency, design and texture, Developer must first notify Port in writing of such changes in Required Elements. If Port determines that such noticed changes are material or substantial, then such changes will be subject to Port's approval under *Section 9.5(b)*. Port's determination of whether such changes are material or substantial will be conclusive.

(b) Response. Developer will request Port's approval for all material or substantial changes in Required Elements in writing. Port will respond to Developer in writing as promptly as reasonably possible, but in no event later than twenty (20) days after receipt of Developer's request. If Port fails to respond to such request within such twenty (20) day period, then Developer will submit a second written notice to Port requesting Port's approval or disapproval ("**Second Notice**"). The Second Notice must display prominently in at least 16 point font on the envelope enclosing such request and on the first page of such request, substantially the following: "**APPROVAL REQUEST FOR CHANGE IN REQUIRED ELEMENT OF TEATRO/HOTEL PROJECT. IMMEDIATE ATTENTION REQUIRED; FAILURE TO RESPOND WITHIN FIVE (5) BUSINESS DAYS WILL RESULT IN THE REQUEST BEING DEEMED APPROVED.**" If Port fails to approve or disapprove the requested changes within five (5) business days following receipt of the Second Notice, then such requested changes will be deemed approved by Port.

9.6. Conflict With Other Governmental Requirements.

(a) Approval by Port. Port will not withhold its approval, where otherwise required under this Agreement, of elements of the Construction Documents or changes in

Construction Documents required by any other governmental body with jurisdiction if all of the following have occurred:

- (i) Port receives written notice of the required change;
- (ii) Port is afforded at least thirty (30) days to discuss such element or change with the governmental body having jurisdiction of and requiring such element or change and with Developer's architect;
- (iii) Developer cooperates fully with the governmental body having jurisdiction in seeking reasonable modifications of such requirement, or reasonable design modifications of the Improvements, or some combination of such modifications, all to the end that a design solution reasonably satisfactory to Port may be achieved despite the imposition of such requirement; and
- (iv) any conditions imposed in connection with such requirements is subject to *Section 4.10*.

(b) Best Efforts to Attempt to Resolve Disputes. Developer and Port recognize that the foregoing kind of conflict may arise at any stage in the preparation of the Construction Documents, but that it is more likely to arise at or after the time of the preparation of the Final Construction Documents and may arise in connection with the issuance of Building Permits. Accordingly, time is of the essence when such a conflict arises. Both Parties agree to use their best efforts to reach a solution expeditiously that is mutually satisfactory to Developer and Port.

9.7. Progress Meetings/Consultation. During the preparation of Construction Documents and the Construction of the Improvements, Port staff and Developer agree to hold periodic progress meetings, as appropriate considering Developer's progress, to coordinate the preparation of, submission to, and review by Port of Construction Documents and the Construction process, including occasional attendance by Port at on-site construction meetings. Additionally, Developer must provide Port with at least five (5) days advance notice of any on-Site mock-ups, on-Site trial installations, and in-plant visual mock-ups. Port staff and Developer (and its applicable consultants) agree to communicate and consult informally as frequently as is reasonably necessary to assure that the formal submittal of any Construction Documents to Port can receive prompt and speedy consideration. Developer will keep Port reasonably informed of all meetings taking place in connection with Construction and will give Port the opportunity to attend and participate in such meetings. Port may, but is not obligated to, have one or more individuals present on-Site at any time and from time to time during Construction, to observe the progress of Construction and to monitor Developer's compliance with this Agreement.

9.8. Quarterly and Annual Project Cost and Equity Statements.

- (a) Quarterly Project Cost and Equity Statement.
 - (i) From and after the Effective Date until the twentieth (20th) day following Port's issuance of a Final Certificate of Occupancy, Developer will furnish to Port by the twentieth (20th) day of each Quarter, a complete statement setting forth in reasonable detail for the immediately preceding Quarter (the "**Quarterly Project Cost and Equity Statement**"): (i) the Total Project Cost incurred as of the last day of the immediately preceding Quarter, including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) Outstanding Developer Equity, if any, as of the last day of the immediately preceding calendar Quarter, (iii) Developer Equity expended, if any, during the immediately preceding Quarter only, (iv) all debt or other Third Party proceeds received by or on behalf of Developer in connection with the Project as of the last day of the immediately preceding Quarter, and (v) any disputed amounts or expenditures from prior monthly or annual project cost statements or Developer's Certified Total Project Cost and Equity Statement. An example of the Quarterly

Project Cost and Equity Statement is attached hereto as **Exhibit H**. A financial officer of Developer must certify each Quarterly Project Cost and Equity Statement as true, accurate, complete and current.

(ii) Within thirty (30) days following receipt of the applicable Quarterly Project Cost and Equity Statement, Port will notify Developer if it agrees or disagrees with all or any of the amounts set forth in the Quarterly Project Cost and Equity Statement. If Port disagrees with all or any of the amounts set forth in the applicable Quarterly Project Cost and Equity Statement, then the Parties will meet as many times as necessary over the next twenty-one (21) days to resolve their disagreement. If the Parties are unable to resolve their disagreement within such twenty-one (21) day period, Developer will include in all future Quarterly Project Cost and Equity Statements, Annual Project Cost and Equity Statements, and the Developer's Certified Total Project Cost and Equity Statement, a separate line item for such disputed amount or expenditure until such dispute is resolved between the Parties or either Party exercises its rights under **Section 11.3**.

(b) Annual Project Cost and Equity Statement.

(i) Within ninety (90) days after the end of each calendar year (or for the calendar year when Port issues a Final Certificate of Occupancy, if it is issued before October 1, ninety (90) days following the date of such issuance), Developer will deliver to Port a complete statement setting forth in reasonable detail (the "**Annual Project Cost and Equity Statement**"): (i) the Total Project Cost incurred as of the last day of the immediately preceding calendar year (or portion thereof if applicable), including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) total Outstanding Developer Equity, if any, as of the last day of the immediately preceding calendar year (or portion thereof if applicable), (iii) all debt or other Third Party proceeds received by or on behalf of Developer in connection with the Project as of the last day of the immediately preceding calendar year, (iv) any adjustments to any of the Quarterly Project Cost and Equity Statements applicable to such calendar year (or portion thereof if applicable) and previously delivered to Port, and (v) any disputed amounts or expenditures from prior monthly or annual project cost statements. A financial officer of Developer must certify each Annual Project Cost and Equity Statement as true, accurate, complete and current.

(ii) Within sixty (60) days following receipt of the applicable Annual Project Cost and Equity Statement, Port will notify Developer if it agrees or disagrees with all or any of the amounts set forth in the Annual Project Cost and Equity Statement. If Port disagrees with all or any of the amounts set forth in the applicable Annual Project Cost and Equity Statement, then the Parties will meet as many times as necessary over the next twenty-one (21) days to resolve their disagreement. If the Parties are unable to resolve their disagreement within such twenty-one (21) day period, then Developer will include in all future Quarterly Project Cost and Equity Statements and Annual Project Cost and Equity Statements, a separate line item for such disputed amount or expenditure until such dispute is resolved between the Parties or either Party exercises its rights under **Section 11.3**.

(c) Port Representative to Examine Books and Records. If Developer fails to deliver any Quarterly Project Cost and Equity Statement, Annual Project Cost and Equity Statement, or Developer's Certified Total Project Cost and Equity Statement, as applicable, within the time period set forth in **Sections 9.8 and 11.2**, as applicable, and such failure continues for thirty (30) days after the date Port delivers to Developer written notice of such failure, Port has the right, among its other remedies under this Agreement, to have a Port Representative examine Developer's books and records as may be necessary to determine all the information required in the Quarterly Project Cost and Equity Statement or Annual Project Cost and Equity Statement, as applicable. The determination made by Port Representative will be binding upon Developer, absent manifest error, and Developer must promptly pay to Port the total cost of the examination.

9.9. *Submittals after Completion.*

(a) Record Drawings. Developer shall furnish Port Record Drawings of the Improvements Constructed on, in, under and around the Site within the timeframe set forth in the Schedule of Performance in electronic format as (1) full-size scanned TIF files, and (2) AutoCAD files of the completed and updated Construction Documents, as further described below. As used in this Section “**Record Drawings**” means drawings, plans and surveys showing Improvements as built on the Site and prepared during the course of Construction. If Developer fails to provide Record Drawings to Port within such period of time, Port will give written notice to Developer requesting such Record Drawings, and if Developer has not provided the Record Drawings within ninety (90) days’ after Port’s delivery of such notice, Port will have the right, but not the obligation, to cause the preparation of the Record Drawings by an architect of Port’s choice, at Developer’s sole cost, to be paid by Developer to Port within ten (10) days after Port’s request therefor.

(b) Record Drawings Requirements. Record Drawings must be based on no less than 24” x 36”, with mark-ups neatly drafted to indicate modifications from the original design drawings, scanned at 400 dpi. Each drawing must have a Port-assigned number placed onto the title block prior to scanning. An index of drawings shall be prepared correlating drawing titles to the numbers. A minimum of ten (10) drawings must be scanned as a test, prior to execution of this requirement in full.

(c) AutoCAD Requirements. The AutoCAD files must be contained in Release 2006 or a later version, and drawings must be transcribed onto a compact disc(s), DVD(s) or such other format requested by Port. All X-REF, block and other referenced files shall be coherently addressed within the environment of the compact disc. Discs containing files that do not open automatically without searching or reassigning X-REF addresses will be returned for reformatting. A minimum of ten (10) complete drawing files, including all referenced files, is required to be transmitted to Port as a test, prior to execution of this requirement in full.

(d) Certified Total Project Cost. Following Port’s issuance of a Final Certificate of Occupancy for the Improvements, Developer will furnish to Port Developer’s Certified Total Project Cost and Statement in accordance and within the time frame set forth in *Section 11.2.*

9.10. *Insurance Requirements.*

(a) Before Close of Escrow. Before Close of Escrow, Developer will procure and maintain insurance coverage as required by any other Transaction Document agreement entered into between Developer and Port.

(b) After Delivery. From and after Close of Escrow, Developer’s requirement to maintain insurance under this Agreement will be as set forth in the Lease.

(c) Port Self-Help Right to Obtain Insurance. After five (5) days’ written notice to Developer, Port has the right, but not the obligation, to obtain, and thereafter to continuously maintain, any insurance required by this Agreement that Developer fails to obtain or maintain, and to charge the cost of obtaining and maintaining that insurance to Developer; provided, however, if Developer reimburses Port for any premiums and subsequently provides such insurance satisfactory to Port, then Port agrees to cancel the insurance it obtained and to credit Developer with any premium refund less any other costs incurred by Port resulting from Developer’s failure to obtain or maintain the required insurance.

(d) Indemnity. The Indemnification requirements under this Agreement, the Lease, or any other agreement between Port and Developer, will in no way be limited by any insurance requirements under any such agreements.

9.11. *Building Permit.* Developer will submit to Port a complete application for the Building Permit (subject to Developer's election to make deferred submittals in accordance with the Port Building Code) within a time adequate to obtain the same before the date set forth in the Schedule of Performance, taking into account normal processing time by Port and notwithstanding the dates set forth in the Schedule of Performance for submission of Construction Documents. Upon any such submission, Developer will prosecute the application diligently to issuance.

9.12. *Port Rights of Access.* Without limiting the rights of Port in its regulatory capacity, Port and its Agents will have the right of access to the Site and upon reasonable advance notice of no less than 2-hours (except in an emergency which requires no prior notice) which may be by electronic mail or telephone, to the extent necessary to carry out the purposes of this Agreement, including to observe the progress of Construction, to inspect the work being performed in Constructing the Improvements, and to monitor Developer's compliance with the Mitigation Monitoring and Reporting Program, the Conditional Use Permit, and if required, the Environmental Protection Plan. Port will not be estopped from taking any action (including later claiming that the construction of the Improvements is defective, unauthorized or incomplete) nor be required to take any action as a result of any such inspection.

9.13. *Construction Barriers; Signs.*

(a) **Construction Fencing and Barriers.** Developer will provide appropriate construction fencing and barriers on-Site during the period of Construction. Developer will obtain from Port a building permit prior to the placement of any such construction fencing and/or barrier.

(b) **Construction Signs.** Developer will provide appropriate construction Signs and post the Signs on-Site during the period of Construction. All Signs will comply with Port's Sign Guidelines. The size, design, color, dimensions, text, materials, location, and method of installation of such Signs must be submitted to Port for approval prior to installation.

(c) **Project Signs.** At Developer's election, Developer may also post Signs that provide general information about the Project and its status, including "Coming Soon" Signs. All such Signs will comply with Port's Sign Guidelines. The size, design, color, dimensions, text, materials, location, and method of installation of such Signs must be submitted to Port for approval prior to installation.

9.14. *Coordination with City Projects.* Developer acknowledges that during the LDDA Term, the SFPUC North Shore Force Main Rehabilitation Project], the affordable housing project at SWL 322-1, development at Piers 19, 23, and 29, improvements to all or any portion of the seawall, and other projects on Port or City property also may be constructed in the vicinity of the Site (collectively, "**City Projects**"). Developer is aware that construction of the City Projects and other construction projects of Port tenants, licensees or occupants within or in the vicinity of the Site and the activities associated with such construction may generate adverse impacts on construction of the Improvements, use and/or operation of the Site after construction, or may result in inconvenience to or disturbance of Developer and its Agents and Invitees. Said impacts may include increased vehicle and truck traffic, closure of traffic lanes, traffic delays and re-routing, loss of street and public parking, dust, dirt, construction noise, and visual obstructions. Developer hereby waives any and all Losses against the Indemnified Parties arising out of any inconvenience or disturbance to Developer, its Agents or Invitees, increased vehicle and truck traffic, traffic delays and re-routing, loss of street and public parking, dust, dirt, construction noise, and visual obstructions due to construction of the City Projects. The Parties will each use reasonable efforts to coordinate its construction efforts with each other and with others engaged in construction on such other projects in a manner that will seek, to the extent reasonably possible, to reduce construction conflicts.

9.15. Construction Staging. During construction of the Improvements, Developer will use the portions of the Site as staging areas for construction laydown and parking, construction equipment, and related materials, as reasonably determined by Developer. Port will have no responsibility for providing additional areas for construction staging, but agrees to reasonably cooperate with Developer in any consultations with SFMTA and San Francisco Public Works on construction staging needs.

10. CONSTRUCTION PERIOD; EXTENSION FEES; LIQUIDATED DAMAGES.

10.1. Construction Period. Subject to *Section 10.1*, Developer must complete construction of the Improvements such that Port is able to issue a Final Certificate of Occupancy for the Improvements within twenty-four (24) months following Close of Escrow (the “**Target Final Inspection Date**”).

10.2. Extension of Construction Period and Extension Fees.

(a) If Port has not issued a Final Certificate of Occupancy for the Improvements by the Target Final Inspection Date, then unless Developer extends the Target Final Inspection Date in accordance with this *Section 10.2(a)*, Developer will be in default under this Agreement. “**Extended Target Final Inspection Date**” means the date that is three (3) months after the Target Final Inspection Date or the applicable Extended Target Final Inspection Date, as applicable.

(i) Port receives written notice from Developer of the necessity to extend by an additional three (3) months, the Target Final Inspection Date or the Extended Target Final Inspection Date, as applicable, no later than thirty (30) days before the Target Final Inspection Date or the Extended Target Final Inspection Date, as applicable;

(ii) There is no uncured Developer Event of Default or Unmatured Developer Event of Default at the time Port receives the notice to extend and as of the Target Final Inspection Date or the First Extended Target Final Inspection Date, as applicable;

(iii) Together with the notice to extend, Port receives from Developer (A) the Target CO Extension Fee to extend the Target Final Inspection Date or if applicable, the Extended Target Final Inspection Date, by an additional three (3) months, and (B) any other amounts due and payable to Port under this Agreement.

(b) Target CO Date Extension Fee Acknowledgements. Developer agrees and acknowledges that the Target CO Date Extension Fee is non-refundable, will not be credited against any rent or other consideration due Port under the Lease, and will not be reduced or pro-rated if Port issues a Final Certificate of Occupancy for the Improvements before the end of the applicable three (3)-month extended period.

(c) No Other Change. Other than the extension of the Target Final Inspection Date or the Extended Target Final Inspection Date, as applicable, and any corresponding change, if any, to the Performance Dates, all other terms and conditions to this Agreement will remain the same.

10.3. Liquidated Damages. If Port is unable to issue a Final Certificate of Occupancy for the Improvements because Developer has not completed construction of the Improvements by the fourth Extended Target Final Inspection Date, then Developer will pay to Port on a daily basis, the Delayed Completion Fee in accordance with *Section 2.7*.

11. CERTIFICATION OF TOTAL PROJECT COST.

11.1. Definitions.

“**Agreed Total Project Cost and Developer Equity Amount**” is defined in *Section 11.2(b)*.

“**Annual Project Cost and Equity Statement**” is defined in *Section 9.8(b)(i)*.

“Developer’s Certified Total Project Cost and Equity Statement” is defined in *Section 11.2(a)*.

“Hard Costs” means Developer’s reasonable out-of-pocket costs actually incurred from and after the [XXXXX, 2019 (the effective date of the LDDA)] until and including the Hotel Opening Date attributable to the cost of labor, materials and construction of the Project. The following do not constitute **“Hard Costs”**: any Soft Costs, Pre-LDDA Costs, and other than any Hard Costs attributable to Deferred Items, any Hard Costs attributable to the Premises after the Hotel Opening Date or any of Tenant’s Personal Property.

“Hotel Opening Date” means the date a Final Certificate of Occupancy for the Hotel is issued by Port for the Premises to permit the Hotel to be opened for guests.

“Permissible Financing Costs” means debt service and other customary financing costs that are capitalized by Developer in connection with obtaining, negotiating and closing any debt for the development of the Project that is secured by a mortgage against Developer’s leasehold interest in the Premises, as permitted under the Lease, and all interest costs and other customary payments made by Developer pursuant to the terms thereof, including all application fees, transaction costs, reasonable legal, professional and consultant fees, origination fees, brokerage commissions for the financing, and appraisal, title and survey costs actually incurred in connection with such financing and paid by Developer.

“Pre-LDDA Costs” means reasonable costs actually incurred and paid by Developer and directly related to the development, entitlement, acquisition and implementation of the Project incurred by Developer between November 5, 2015 (the effective date of the ENA) and [XXXXX, 2019 (the effective date of the LDDA)], including architectural, engineering, environmental, community outreach, reasonable legal and other professional and consulting fees; payments to Port required under the ENA; insurance, title, and survey expenses; fees and charges for bonds and permits; [and so long as the following have not already been accounted for in Hard Costs or Soft Costs, the wages, salaries and other compensation (excluding bonuses) and benefits, including taxes levied thereon, of Developer’s employees below the level of manager who devote substantially all of their employed time to the Project]. The following do not constitute **“Pre-LDDA Costs”**: (1) repayment of the principal, fees and interest of any loan or other expense; (2) distributions, dividends, preferred return or other capital return to the members or shareholders of the Developer, Developer, or any of their respective Affiliates, (3) the wages, salaries and other compensation and benefits, including taxes levied thereon, attributable to personnel above the level of manager, any officer, director, or investor of Developer or any of its members or Affiliates, or (4) a development, project management, or guaranty fee; or (5) any late charges or fees or default interest on late payments. The Parties agree that the total Pre-LDDA Costs is equal to \$_____. **[NOTE: The amount is to be agreed up by the execution of the LDDA.]**

“Project Cost” means the Total Project Cost incurred as of the applicable date.

“Soft Costs” means Developer’s reasonable out-of-pocket costs actually incurred from and after [XXXXX, 2019 (the effective date of the LDDA)] until and including the Hotel Opening Date, and directly attributable to the development of the Project, including:

- (1) architectural, engineering, environmental, reasonable attorney and other professional or consulting fees;
- (2) a development fee to Developer (not to exceed 5% of Hard Costs) reasonable construction management, asset management, or owner’s representative fees; provided, however, that the combined development fee, construction management fee, asset management fee, owner’s representative fee, and other reasonably related costs or charges for similar tasks do not exceed in the aggregate Nine Million Two Hundred Fifty Thousand Dollars (\$9,250,000.00);

- Approvals;
- (3) costs related to community outreach and efforts to obtain Regulatory
 - (4) marketing fees;
 - (5) permit and impact fees;
 - (6) payments to Port required under this Agreement (other than any late fees or default interest)
 - (7) application fees and review fees, and other pre-opening costs and fees required under the hotel franchise or third-party hotel management agreement paid by Developer, which may include employee training costs;
 - (8) Permissible Financing Costs;
 - (9) premiums for builder's risk insurance and other insurance expenses directly related to construction of the Project, including premiums for the title insurance required in *Section 4.8*;
 - (10) performance and payment bond expenses;
 - (11) costs incurred in developing and opening the Hotel, the Venue Space and public park;
 - (12) liquor license fees; and
 - (13) so long as the following have not already been accounted for in Hard Costs, Soft Costs, or Pre-LDDA Costs, the wages, salaries and other compensation (excluding bonuses) and benefits, including taxes levied thereon, of all employees of Developer below the level of manager who devote substantially all of their employed time to the Project.

The following do not constitute “Soft Costs:” (1) distributions, dividends, preferred return or other capital return to the members or shareholders of Developer, Developer, or any of their respective Affiliates, (2) the wages, salaries and other compensation and benefits, including taxes levied thereon, attributable to personnel above the level of manager or any officer, director, or investor of Developer or any of its members or Affiliates, (3) any late charges or fees or default interest on late payments (4) any amount of a development fee, construction management fee, asset management fee, owner's representative fee, and other reasonably related costs or charges for similar tasks that in the aggregate, is in excess of Nine Million Two Hundred Fifty Thousand Dollars (\$9,250,000.00), (5) any Soft Costs attributable to the Premises after the Hotel Opening Date, (6) any Hard Costs or Pre-LDDA Costs, (7) any guaranty fee, or (8) any Personal Property.

“Total Project Cost” means (i) the sum of Pre-LDDA Costs and all Hard Costs and Soft Costs incurred by Developer for the development and construction of the Project prior to the Hotel Opening Date plus the cost of any Deferred Items incurred after the Hotel Opening Date included in the Agreed Total Project Cost and Developer Equity Amount.

11.2. Developer's Certified Total Project Cost and Equity Statement.

(a) Within one hundred twenty (120) days following the Hotel Opening Date, Developer will furnish Port with an itemized statement setting forth in detail: (i) the Total Project Cost incurred by Developer as of the Hotel Opening Date, including as line items, increases over (or decreases under) the items listed in the Development Budget, (ii) all debt proceeds secured by Permitted Mortgages used as of the applicable Project Cost Cut-Off Date, (iii) Developer Equity expended by Developer as of the applicable Project Cost Cut-Off Date, and (iv) any disputed amounts or expenditures from prior monthly or annual project cost statements, certified as true, accurate and complete by an independent certified public accountant (the “Developer's Certified Total Project Cost and Equity Statement”).

(b) Port will notify Developer within sixty (60) days following Port's receipt of the Developer's Certified Total Project Cost and Equity Statement of Port's agreement or disagreement with such statement. If Port disagrees with the Developer's Certified Total Project Cost and Equity Statement, the Parties will meet to resolve the disagreement. If (i) Port agrees with the Developer's Certified Total Project Cost and Equity Statement, (ii) disagreements between the Parties, if any, on Developer's Certified Total Project Cost and Equity Statement are resolved between the Parties, or (iii) the records are audited as described in **Section 11.3**, then "**Agreed Total Project Cost and Developer Equity Amount**" means the amounts set forth in the Developer's Certified Total Project Cost and Equity Statement, as adjusted between the Parties, if applicable, or the Audited Total Project Cost and Equity Statement, if applicable.

11.3. Audit Rights. If Port disagrees with the Developer's Certified Total Project Cost and Equity Statement and the Parties are unable to resolve their disagreement, Port may request that Developer's books and records be audited by an independent certified public accounting firm mutually acceptable to Port and Developer, or if the Parties are unable to agree, either Party may apply to the Superior Court of the State of California in and for the County of San Francisco for appointment of an auditor meeting the foregoing qualifications. If the court denies or otherwise refuses to act upon such application, either Party may apply to the American Arbitration Association, or any similar provider of professional commercial arbitration services, for appointment in accordance with the rules and procedures of such organization of an independent auditor. The audited Developer's Certified Total Project Cost and Equity Statement is referred to as the "**Audited Total Project Cost and Equity Statement**" which audited statement will be binding on the Parties, except in the case of fraud, corruption or undue influence. Port will pay the entire cost of the audit unless the audit discovers that Developer has overstated the Total Project Cost by more than three percent (3%) of the lower amount, in which case Developer will pay the entire cost of the audit.

11.4. Books and Records Related to Project Cost and Developer Equity. Developer must keep accurate books and records of the Project Cost incurred to date, funds expended by Developer, Outstanding Developer Equity, and debt or other Third Party proceeds received by or on behalf of Developer in connection with the development and construction of the Project, all in accordance with accounting principles generally accepted in the construction industry. Port, including its Agents, has the right to inspect Developer's books and records regarding the development of the Improvements, the costs incurred in connection therewith, and all other Total Project Cost, including funds expended by Developer, and debt or other Third Party proceeds received by or on behalf of Developer in connection with the development of the Project in a location within San Francisco during regular business hours and upon reasonable advance notice.

12. CERTIFICATE OF COMPLETION.

12.1. Certificate of Completion.

(a) Issuance Process.

(i) Other than in connection with the Construction of the Improvements, Developer may not occupy or use the buildings, Improvements, the Site, or any portion thereof where a Final Certificate of Occupancy has not been issued. A Certificate of Completion is not required to occupy or use portions of the Site where a Final Certificate of Occupancy has been issued for such area.

(ii) After Developer has Completed the Construction in accordance with all the provisions of this Agreement and there is an Agreed Total Project Cost and Developer Equity Amount, Developer will request a Certificate of Completion in writing and concurrently therewith submit the Architect's Certificate. Port will act on Developer's request within thirty (30) days of receipt.

(iii) Port's issuance of the Certificate of Completion does not relieve Developer or any other Person from any and all requirements or conditions of any Regulatory

Approval of any Regulatory Agency to occupancy of any building or other Improvement. Developer will comply with all such requirements or conditions separately.

(b) Condition to Issuance. If there remain (i) uncompleted customary punch list items, (ii) landscaping, (iii) exterior finishes (to the extent Developer can demonstrate to Port's reasonable satisfaction that such finishes would be damaged during the course of later construction of interior improvements) (collectively, "Deferred Items"), Port may reasonably condition issuance of the Certificate of Completion upon provision of security or other assurances in form, substance and amount satisfactory to Port that all of the Deferred Items will be diligently pursued to completion. Such security may consist of any one or more of the following forms of assurance: a letter of credit (in a form and issued by an institution acceptable to Port), a completion guaranty, or funds in an escrow account acceptable to Port (with joint escrow instructions acceptable to both Parties) or other forms of credit enhancement acceptable to the Port. Any such letter of credit, completion guaranty, other credit enhancement and/or escrowed funds will be in the amount of one hundred percent (100%) of the cost of completion of the Deferred Items as reasonably determined by Port. "Deferred Items" also includes (i) LEED Gold Certification so long as Developer has promptly after Completion of the Improvements, submitted all documents necessary to the U.S. Green Building Council to obtain such certification. Developer's obligation to obtain LEED Gold Certification survive the expiration or earlier termination of this Agreement.

(c) Definition of Completed and Completion. For purposes of Port's issuance of the Certificate of Completion in accordance with the provisions of *Section 12.1(a)*, "Completed" and "Completion" mean completion by Developer of all aspects of the Improvements in accordance with the approved Construction Documents, the Scope of Development, Project Requirements, and Laws, issuance of applicable certificates of occupancy for all the Improvements, together with completion of all Improvements which are required under conditions of any Regulatory Approvals needed for Construction of the Improvements, no uncured Developer Event of Default or Unmatured Developer Event of Default exists, Developer has paid all development exaction fees that are required to be paid to City or Port prior to issuance of a Final Certificate of Occupancy.

12.2. *Form and Effect of Certificate.*

(a) Form of Certificate. The Certificate of Completion, substantially in the form of *Exhibit I*, will be in a form that permits it to be recorded in the Official Records. For purposes of this Agreement, the Certificate of Completion will be a conclusive determination of Completion of the Improvements (except for completion of Deferred Items).

(b) Effect. The Certificate of Completion is not a notice of completion as referred to in Section 3093 of the California Civil Code, and is not in lieu of a certificate of occupancy or Final Certificate of Occupancy to be issued by Port in its regulatory capacity, which is separately required for occupancy.

(c) Termination of Agreement Upon Recordation. Recording of the Certificate of Completion by Port (or by Developer at the written request and authorization of Port) will terminate this Agreement (subject to any obligations that survive the expiration or termination of this Agreement).

12.3. *Failure to Issue.* If Port refuses or fails to issue the Certificate of Completion, Port shall provide Developer with a written statement specifying the reasons for Port's refusal or failure to issue the Certificate of Completion and identifying the items Developer shall complete or requirements it shall satisfy in order to obtain the Certificate of Completion.

13. ENCUMBRANCES AND LIENS.

13.1. *No Mortgage of Fee.* Developer may not under any circumstance engage in any financing or other transaction creating any mortgage, deed of trust, lien or other encumbrance on

Port's fee interest in the Site. The Public Trust and Port's interest under the Lease (including the rent payable thereunder) will not be subordinated under any circumstance whatsoever to any Mortgage.

13.2. *Leasehold Liens.* Following Close of Escrow, Developer will have the right pursuant to the terms and conditions of the Lease, to assign, mortgage, pledge, hypothecate or encumber all of its right, title and interest in the Site by way of leasehold mortgages, deeds of trust or other security instruments to the extent permitted in the Lease. In addition, Developer may assign, mortgage, pledge, or encumber its interest under this Agreement with the prior written consent of Port to any Mortgagee, and in such event all of the provisions set forth in the Lease relating to the rights of Mortgagees will also apply to the rights and obligations of Developer and Port under this Agreement.

13.3. *Mechanics' Liens.* Developer will keep the Site and any Improvements thereon free from any liens arising out of any work performed, materials furnished or obligations incurred by Developer or its Agents. If Developer does not, within twenty (20) days following Developer's receipt of notice of the imposition of any such lien, cause the same to be released of record or sufficiently bonded over to Port's reasonable satisfaction or take such other action reasonably acceptable, Port will have the right, but not the obligation, to cause the same to be released by such means as it deems proper, including payment of the claim giving rise to such lien. All sums paid by Port for such purpose and all expenses incurred by Port in connection therewith will be payable to Port by Developer within ten (10) days following written demand by Port.

13.4. *Contests.* Developer will be permitted to contest the validity or amount of any tax, assessment, encumbrance or lien related directly to the Site and to pursue any remedies associated with such contest subject to all of the terms and conditions of the Lease.

14. ASSIGNMENT AND TRANSFER.

14.1. *Prohibition Against Transfer of this Agreement or Significant Change.* Except as otherwise permitted under *Section 13.2* and following Close of Escrow, as permitted under the Lease, Developer may not sell, convey, assign, transfer, alienate or otherwise dispose of all or any of its interest or rights in this Agreement, including any right or obligation to acquire a leasehold estate in the Site, Construct the Improvements or otherwise do any of the above or make any contract or agreement to do any of the same (each a "**Transfer**"), or permit a Significant Change to occur, without in each instance obtaining the prior written approval of Port. Any Transfer or Significant Change made in violation of this *Section 14.1* is a Developer Event of Default from and after the time of Transfer or Significant Change, without necessity of Port's giving of notice or passage of time. Consent to any one Transfer or Significant Change will not be a waiver of Port's right to require such consent for each and every Transfer or Significant Change. Developer shall reimburse Port for its reasonable costs of reviewing a proposed Transfer, as provided in the Lease.

14.2. *No Release of Developer's Obligations.* No Transfer or Significant Change will relieve Developer or any other party from any obligations under this Agreement.

15. DEFAULTS, REMEDIES, TERMINATION AND PROJECT MATERIALS.

15.1. *Developer Events of Default.* Each of the following constitutes a "**Developer Event of Default**":

(a) Developer fails to use its good-faith efforts to obtain all Regulatory Approvals within the time frames set forth in the Schedule of Performance and such failure is not cured within ten (10) days following notice from Port;

(b) Developer fails to use its good-faith efforts to obtain all the elements of the financing described in *Sections 4.4(a)(iv) and 4.4(a)(v)* within the time frames set forth in

the Schedule of Performance and such failure is not cured within ten (10) days following notice from Port;

(c) After Close of Escrow, Developer fails to commence in accordance with the Schedule of Performance, or after commencement fails to prosecute diligently to Completion (except for Deferred Items, if any), the Construction of the Improvements to be constructed on the Site in accordance with the Scope of Development, approved Construction Documents, and this Agreement, or abandons or substantially suspends Construction for more than ten (10) consecutive days, and such failure, abandonment or suspension continues for a period of twenty (20) days from the date of written notice from Port;

(d) Developer fails to pay any amount required to be paid under this Agreement when due and such failure continues for five (5) business days following written notice from Port to Developer;

(e) Developer fails to comply with the Mitigation Monitoring and Reporting Program or if applicable, the Environmental Protection Plan and Developer fails to cure the foregoing within twenty-four (24) hours following written notice from Port. If such failure cannot reasonably be cured within such twenty-four (24) hour period, it shall not be a Developer Event of Default so long as Developer commences to cure within such twenty-four (24) hour period and diligently and in good faith continues to cure the failure;

(f) Developer does not accept Delivery of the Lease within the times set forth in this Agreement, provided that all pre-Delivery conditions to Developer's obligation to accept Delivery have been satisfied, and such failure continues for a period of twenty (20) days after written notice from Port;

(g) Developer fails to perform its obligations under *Article 16* (collectively, the "Special City Requirements"); provided, however, that any rights to cure and Port's remedies for any default under any of the Special City Requirements will be only as set forth in such applicable Special City Requirement;

(h) Developer does not submit the Construction Documents that are required to be submitted within the times provided in the Schedule of Performance and Developer does not cure such default within thirty (30) days after the date of written demand by Port specifying the items missing or due;

(i) Developer commits an uncured Tenant Event of Default or Unmatured Tenant Event of Default under the Lease (as such terms are defined in the Lease) but such Developer Event of Default under this Agreement shall be deemed cured if the uncured Tenant Event of Default or Unmatured Tenant Event of Default is cured pursuant thereto within the cure period set forth in the Lease;

(j) Developer is unable to cure an event of default under any Mortgage within the time period to cure in the applicable Mortgage;

(k) Developer files a petition for relief, or an order for relief is entered against Developer, in any case under applicable bankruptcy or insolvency law, or any comparable law that is now or hereafter may be in effect, whether for liquidation or reorganization, which proceedings if filed against Developer are not dismissed or stayed within one hundred twenty (120) days;

(l) A writ of execution is levied on this Agreement which is not released within one hundred twenty (120) days, or a receiver, trustee or custodian is appointed to take custody of all or any material part of the property of Developer, which appointment is not dismissed within one hundred twenty (120) days;

(m) Developer makes a general assignment for the benefit of its creditors;

(n) Developer fails to maintain the insurance required pursuant to **Section 9.10**, or fails to deliver certificates and endorsements or policies evidencing such coverage, and such failure continues for three (3) days following written notice from Port to Developer;

(o) Any Transfer or Significant Change made in violation of **Section 14.1** without the necessity of Port's giving of notice or the passage of time. If Port declares a Developer Event of Default, Developer will have fifteen (15) days to cure such default by effectively rescinding the Transfer or Significant Change, or obtaining Port's consent which may be given or withheld in Port's sole and absolute discretion. If Developer fails to cure such Developer Event of Default within such fifteen (15) day period, Port will be entitled to all remedies available to it hereunder, by law or at equity, including termination of this Agreement without necessity of Port's giving of further notice or the passage of further time; and

(p) Without limiting any other provisions of this **Section 15.1**, Developer violates any other covenant, or fails to perform any other obligation to be performed by Developer under this Agreement or the Lease, at the time such performance is due, and such violation or failure continues without cure for more than thirty (30) days after written notice from Port specifying the nature of such violation or failure, or, if such cure cannot reasonably be completed within such thirty (30) day period, if Developer does not within such thirty (30) day period commence such cure, or having so commenced, does not prosecute such cure with diligence and dispatch to completion within a reasonable time thereafter, but in no event more than sixty (60) days.

15.2. Remedies of Port. Except as otherwise provided in **Section 15.1(g)**, upon the occurrence of a Developer Event of Default, Port has the remedies set forth below:

(a) **Termination.** Port may terminate this Agreement upon thirty (30) days' written notice to Developer.

(b) **Termination Fee.** If such termination occurs prior to the Close of Escrow, Developer will pay to Port the LDDA Termination Fee, obtain copies of the Project Materials, and to the extent provided in **Section 15.6**, have the applicable Project Materials assigned to Port, as its sole right to damages. If such termination occurs after Close of Escrow, Port's remedies are as set forth in **Sections 15.2(c)--(e)**.

(c) **Project Materials.** Port shall be entitled to the Project Materials, as provided in **Section 15.6**.

(d) **Specific Performance.** Port may institute an action for specific performance.

(e) **Additional Remedies of Port.** Except as provided in **Sections 15.1(g) and 15.2(b)**, the remedies provided for in this Agreement are in addition to and not in limitation of other remedies including those provided (i) in the Lease, (ii) in the Special City Requirements, (iii) at Law; or (iv) in equity.

(f) **Nonliability of Developer's Members, Partners, Shareholders, Directors, Officers and Employees.** No member, officer, partner, agent, shareholder, director, or employee of Developer will be personally liable to Port, for a Developer Event of Default or for any amount which may become due to Port or for any obligations under the terms of this Agreement.

15.3. Port Events of Default. Each of the following constitutes a "Port Event of Default":

(a) The conditions to Close of Escrow in Port's favor have been satisfied, or waived by Port, and Port fails to Deliver the Lease where such failure is in violation of this Agreement, and continues for a period of twenty (20) days from the date of written notice from Developer;

(b) Port violates any covenants or fails to perform any other obligations and duties provided in this Agreement after the time for any cure or the expiration of any grace period specified therefor in this Agreement, or if no such time is specified, within thirty (30) days after the date of written demand by Developer to Port to perform such obligation and duty, or, in the case of a default not susceptible of cure within thirty (30) days, Port fails promptly to commence to cure such default and thereafter to prosecute diligently such cure to completion within a reasonable time.

15.4. Remedies of Developer. Upon the occurrence of a Port Event of Default, Developer has the exclusive remedies set forth below following the expiration of applicable cure periods:

(a) Termination. Developer may terminate this Agreement upon thirty (30) days' written notice to Port only if the Port Event of Default would make impossible Completion of the Improvements substantially in accordance with the Schedule of Performance and the provisions of this Agreement.

(b) Developer may institute an action for specific performance.

(c) Damages. Port will not be liable to Developer for monetary damages caused by any Port Event of Default.

(d) Nonliability of City and Port Members, Directors, Officers, Officials and Employees. No member, director, officer, official, agent or employee of the City, including its Port, will be personally liable to Developer, or any successor in interest, for a Port Event of Default or for any amount which may become due to Developer or successor or for any obligations under the terms of this Agreement.

15.5. General.

(a) Institution of Legal Actions. Subject to the limitations set forth in this Agreement, either Party may institute legal action to cure, correct or remedy any default, to recover damages for any default or to obtain any other remedy consistent with the terms of this Agreement. Such legal actions shall be instituted in the Superior Court of the City and County of San Francisco, State of California, in any other appropriate court in the City or, if appropriate, in the Federal District Court in San Francisco, California.

(b) Acceptance of Service of Process. In the event that any legal action is commenced by Developer against Port, service of process on Port shall be made by personal service upon the Executive Director of Port, or in such other manner as may be provided by Law. In the event that any legal action is commenced by Port against Developer, service of process on Developer shall be made by personal service upon Developer at the address provided for notices or such other address as shall have been given to Port by Developer under *Section 18.1*, or in such other manner as may be provided by Law, and will be valid whether made within or outside of the State.

(c) Rights and Remedies are Cumulative. Except with respect to any rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties to this Agreement, whether provided by Law, in equity or by this Agreement, are cumulative, and not in derogation of other rights and remedies found in this Agreement and, after Close of Escrow, in the Lease. The exercise by either Party of any one or more of such remedies will not preclude the exercise by it, at the same or a different time, of any other such remedies for the same default or breach or of any of its remedies for any other default or breach by the other Party.

(d) No Waiver. No waiver made by either Party with respect to the performance, or manner or time of performance, or any obligation of the other Party or any condition to its own obligation under this Agreement will be considered a waiver with respect to the particular obligation of the other Party or condition to its own obligation beyond those

expressly waived to the extent of such waiver, or a waiver in any respect in regard to any other rights of the Party making the waiver or any other obligations of the other Party.

15.6. Project Materials. If this Agreement terminates for any reason (other than a Port Event of Default) before Completion of the Improvements, Developer will within thirty (30) days after written demand from Port and without cost to Port, (i) deliver to Port any and all copies of studies, applications, reports, permits, plans, architectural drawings, test results, and similar work product regarding the physical condition of the Site, and any existing Construction Documents in the possession of Developer, or Developer's Agents, architects, engineers, or consultants (or if not in the foregoing parties' possession, reasonably obtainable by Developer), or prepared for Developer, including electronic or AutoCAD files (collectively, the "Project Materials"), and (ii) provided Developer is authorized to do so, assign to Port (x) all of Developer's existing rights and interest in the Project Materials, and (y) all of Developer's rights under any Regulatory Approval; provided, however, in each case without any representation or warranty, express or implied, by Developer, as to the sufficiency, accuracy, completeness or compliance with Laws or any other matter whatsoever. Port may use the Project Materials for any purpose whatsoever relating to the Site, without cost or liability therefor to Port or any other Person; provided, however, that, Port will release Developer and Developer's Agents, contractor, architect, engineer and other consultants from any Losses arising out of Port's use of such Project Materials and Construction Documents except to the extent such contractor, architect, engineer or other consultant is retained by Port to complete construction and they agree to such continued liability. Developer will use commercially reasonable efforts to include in all contracts and authorizations for services pertaining to the planning and design of the Improvements, an express agreement by the Person performing such services that Port may use such Project Materials as provided in this **Section 15.6** without compensation or payment from Port in the event such Project Materials are delivered to Port under the provisions of this **Section 15.6**, provided that Port agrees (i) not to remove the name of the preparer of such Project Materials without the preparer's written permission, or (ii) to remove the name of the preparer of such Project Materials at the preparer's written request. If a third-party (i.e. non-Port or non-City party or a party that is not the Project Material author) seeks to obtain and use the Project Materials assigned to the Port, then such third-party will be required to negotiate appropriate and reasonable compensation to the Project Material author for the incremental value of the Project Material.

15.7. Survival. The provisions of this Section will survive the expiration or earlier termination of this Agreement.

15.8. Return of Site. If this Agreement terminates after the Close of Escrow but before Completion of the Improvements due to a Developer Event of Default, Developer will, at its sole expense, return the Site to Port in a safe condition, and unless otherwise requested by Port, must remove all loose building materials, debris, supplies, equipment, personal property, and other materials present at the Site resulting from Developer's Construction activities. Developer's obligations set forth in this **Section 15.8** will survive the earlier termination of this Agreement.

16. SPECIAL PROVISIONS.

Developer has reviewed, understands, and is ready, willing, and able to comply with the terms of this **Article 16**, which summarizes additional City and Port requirements as of the Effective Date, each of which is incorporated by reference as if fully stated in this Agreement. Developer acknowledges that City and Port requirements in effect when Transaction Documents are executed will be incorporated into the Transaction Documents as applicable, and will apply to all contractors, subcontractors, subtenants, and any other Developer parties, as applicable. The following summary is for Developer's convenience only; Developer is obligated to become familiar with all applicable requirements and to comply with them fully as they are amended from time to time. City ordinances are currently available on the web at www.sfgov.org. References to specific laws in this **Article 16** refer to San Francisco municipal codes unless

specified otherwise. Capitalized or other terms used in this *Article 16* and not defined in this Agreement shall have the meanings ascribed to them in the cited ordinance.

16.1. *Non-Discrimination in City Contracts and Benefits Ordinance.*

(a) Covenant Not to Discriminate. In the performance of this Agreement, Developer covenants and agrees not to discriminate 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 or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), weight, height, association with members of classes protected under Chapter 12B or 12C of the Administrative Code or in retaliation for opposition to any practices forbidden under Chapter 12B or 12C of the Administrative Code against any employee of Developer or any City and County employee working with Developer, any applicant for employment with Developer, or any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Developer in the City and County of San Francisco.

(b) Subleases and Other Contracts. Developer shall include in all Subleases and other contracts relating to the Site a non-discrimination clause applicable to such Subtenant or other contractor in substantially the form of *Section 16.1(a)*. In addition, Developer shall incorporate by reference in all Subleases and other contracts the provisions of Sections 12B.2 (a), 12B.2 (c)-(k) and 12C.3 of the Administrative Code and shall require all subtenants and other contractors to comply with such provisions.

(c) Non-Discrimination in Benefits. Developer represents that it does not as of the date of this Agreement and will not during the LDDA Term or Lease Term, in any of its operations in San Francisco or where the work is being performed for the City, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits (collectively "**Core Benefits**") as well as any benefits other than the Core Benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local Law authorizing such registration, subject to the conditions set forth in Section 12B.2 of the Administrative Code.

(d) CMD Form. On or prior to the Effective Date, Developer shall execute and deliver to Port the "**Nondiscrimination in Contracts and Benefits**" form approved by CMD.

(e) Penalties. Developer understands that pursuant to Section 12B.2(h) of the Administrative Code, a penalty of \$50.00 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Developer and/or deducted from any payments due Developer.

16.2. *Requiring Health Benefits for Covered Employees.* Unless exempt, Developer agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in Administrative Code Chapter 12Q (Chapter 12Q).

(a) For each Covered Employee Developer shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO.

(b) Notwithstanding the above, if Developer meets the requirements of a "small business" by the City pursuant to Section 12Q.3(d) of the HCAO, it shall have no obligation to comply with *Section 16.2(a)*.

(c) If, within 30 days after receiving written notice of a breach of this Agreement for violating the HCAO, Developer fails to cure such breach or, if such breach cannot reasonably be cured within such 30-day period, Developer fails to commence efforts to cure within such period, or thereafter fails to diligently pursue such cure to completion, the City shall

have the remedies set forth in Section 12Q.5(f). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

(d) Any Sublease or Contract regarding services to be performed on the Site entered into by Developer shall require the Subtenant or Contractor and Subcontractors, as applicable, to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in Chapter 12Q of the Administrative Code. Developer shall notify the Office of Contract Administration when it enters into such a Sublease or Contract and shall certify to the Office of Contract Administration that it has notified the Subtenant or Contractor of the obligations under the HCAO and has imposed the requirements of the HCAO on the Subtenant or Contractor through written agreement with such Subtenant or Contractor. Developer shall be responsible for ensuring compliance with the HCAO for each Subtenant, Contractor and Subcontractor performing services on the Site. If any Subtenant, Contractor or Subcontractor fails to comply, the City may pursue the remedies set forth in Section 12Q.5 of the Administrative Code against Developer based on the Subtenant's, Contractor's, or Subcontractor's failure to comply, provided that the Contracting Department has first provided Developer with notice and an opportunity to cure the violation.

(e) Developer shall not discharge, reprimand, penalize, reduce the compensation of, or otherwise discriminate against, any employee for notifying the City of any issue relating to the HCAO, for opposing any practice proscribed by the HCAO, for participating in any proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

(f) Developer represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the requirements of the HCAO.

(g) Developer shall keep itself informed of the requirements of the HCAO, as they may change from time to time.

(h) Upon request, Developer shall provide reports to the City in accordance with any reporting standards promulgated by the City under the HCAO, including reports on Subtenants, Contractors, and Subcontractors.

(i) Within ten (10) business days of any request, Developer shall provide the City with access to pertinent records relating to any Developer's compliance with the HCAO. In addition, the City and its agents may conduct random audits of Developer at any time during the Term. Developer agrees to cooperate with City in connection with any such audit.

(j) If a Contractor or Subcontractor is exempt from the HCAO because the amount payable to such Contractor or Subcontractor under all of its contracts with the City or relating to City-owned property is less than \$25,000.00 (or \$50,000.00 for nonprofits) in that fiscal year, but such Contractor or Subcontractor later enters into one or more agreements with the City or relating to City-owned property that cause the payments to such Contractor or Subcontractor to equal or exceed \$75,000.00 in that fiscal year, then all of the Contractor's or Subcontractor's contracts with the City and relating to City-owned property shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements to equal or exceed \$75,000.00 in the fiscal year.

16.3. First Source Hiring. The City has adopted a First Source Hiring Program (Administrative Code Sections 83.1 et seq.) which establishes specific requirements, procedures and monitoring for first source hiring of qualified economically disadvantaged individuals for entry-level positions as those terms are defined by the ordinance. Developer acknowledges receiving and reviewing the First Source Hiring Program materials and requirements and agrees to comply with requirements of the ordinance as implemented by the Port and/or City, including without limitation, notification of vacancies throughout the Term and entering into a First Source Hiring Agreement, if applicable. Developer acknowledges and agrees that it may be subject to monetary penalties for failure to comply with the ordinance or a First Source Hiring Agreement

and that such non-compliance shall be a default of this Agreement. **[Note: This Section subject to revision based on agreed format between Developer and City. Requirements will include compliance with Chapter 83, First Source Hiring Program for end use jobs – good faith effort working with OEWD for the operations of the hotel and any entry-level position.]**

16.4. Local Business Enterprises. The Port Commission encourages the participation of local business enterprises (“LBEs”) in Developer’s operations. Developer is committed to affording opportunities to LBEs to participate in the architecture, design, engineering, and construction of the Improvements, and in the operation of the Project and agrees to consult with the CMD of the City’s General Services Agency to determine appropriate methods for promoting participation by LBEs. Architecture, Engineering, Laboratory Services (Materials Testing), Trucking and Hauling, and Security Guard Services are categories of services that may provide opportunities for certified LBE participation. City maintains a list of certified LBEs at: <http://sf.gov.org/cmd/lbe-certification-0>. **[Note: This Section subject to revision based on agreed format between Developer and City. LBE goals 17% SF Small and Micro LBE sub goal across the board for non-construction and construction; 17% SF Small and Micro LBE participation for operations; Standard Good Faith Outreach Efforts including advance notice, outreach, and record keeping provisions; Port and TZK will seek to, whenever practicable, engage contracting teams to reflect the diversity of the City and include participation of both businesses and residents from the City’s most disadvantaged communities including, but not limited to the Bayview/Hunters Point, Chinatown, Mission, South of Market, Tenderloin, Visitacion Valley and Western Addition neighborhoods.]**

16.5. Indoor Air Quality. Tenant agrees to comply with Section 711(g) of the Environment Code and any additional regulations adopted by the Director of the Department of the Environment pursuant to Environment Code Section 703(b) relating to construction and maintenance protocols to address indoor air quality.

16.6. Prohibition Against Tobacco Advertising; Prohibition Against Tobacco Product Sales, Manufacture, and Distribution. Developer acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on the Premises. This advertising prohibition includes the placement of the name of a company producing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. In addition, Developer acknowledges and agrees that no Sales, Manufacture, or Distribution of Tobacco Products (as such capitalized terms are defined in Health Code Section 19K.1) is allowed on the Premises and such prohibition must be included in all subleases or other agreements allowing use of the Premises. The prohibition against Sales, Manufacture, or Distribution of Tobacco Products does not apply to persons who are affiliated with an accredited academic institution where the Sale, Manufacture, and/or Distribution of Tobacco Products is conducted as part of academic research.

16.7. Prohibition of Alcoholic Beverages Advertising. Developer acknowledges and agrees that no advertising of alcoholic beverages is allowed on the Site. For purposes of this section, “alcoholic beverage” shall be defined as set forth in California Business and Professions Code Section 23004, and shall not include cleaning solutions, medical supplies and other products and substances not intended for drinking. This advertising prohibition includes the placement of the name of a company producing, selling or distributing alcoholic beverages or the name of any alcoholic beverage in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit or other entity designed to (i) communicate the health hazards of alcoholic beverages, (ii) encourage people not to drink alcohol or to stop drinking alcohol, or (iii) provide or publicize drug or alcohol treatment or rehabilitation services. This advertising prohibition does not apply to any restaurant within the Premises or to Developer or any Subtenant operating a business where the sale, production or consumption of alcoholic beverages is legally permitted and that complies with applicable City sign ordinances.

16.8. Graffiti Removal. Developer will remove all graffiti from the Site (including any construction fencing, barriers and Signs) within forty-eight (48) hours of the earlier of Developer's (i) discovery or notification of the graffiti or (ii) receipt of notification of the graffiti from the Department of Public Works or Port. This *Section 16.8* is not intended to require Developer to breach any lease or other agreement that it may have concerning its use of the Site. The term "**graffiti**" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only any of the Exterior Improvements, whether public or private, without the consent of the owner of the property or the owner's authorized Agent, and which is visible from the public right-of-way. "**Graffiti**" does not include: (1) any Sign that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code, the Port Building Code, the Port's Sign Guidelines, or the San Francisco Building Code; or (2) any mural or other painting or marking on the Site that is protected as a work of fine art under the California Art Preservation Act (Calif. Civil Code §§ 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

16.9. Restrictions on the Use of Pesticides. Chapter 3 of the San Francisco Environment Code (the Integrated Pest Management Program Ordinance or "**IPM Ordinance**") describes an integrated pest management ("**IPM**") policy to be implemented by all City departments. Developer will not use or apply or allow the use or application of any pesticides on the Site, and will not contract with any party to provide pest abatement or control services to the Site, without first receiving City's written approval of an integrated pest management plan that (i) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Developer may need to apply to the Site during the term of this Agreement, (ii) describes the steps Developer will take to meet the City's IPM Policy described in Section 300 of the IPM Ordinance, and (iii) identifies, by name, title, address and telephone number, an individual to act as the Developer's primary IPM contact person with the City. Developer will comply, and will require all of Developer's contractors to comply, with the IPM plan approved by the City and will comply with the requirements of Sections 300(d), 302, 304, 305(f), 305(g), and 306 of the IPM Ordinance, as if Developer were a City department. Among other matters, such provisions of the IPM Ordinance: (a) provide for the use of pesticides only as a last resort, (b) prohibit the use or application of pesticides on property owned by the City, except for pesticides granted an exemption under Section 303 of the IPM Ordinance (including pesticides included on the most current Reduced Risk Pesticide List compiled by City's Department of the Environment), (c) impose certain notice requirements, and (d) require Developer to keep certain records and to report to City all pesticide use by Developer's staff or contractors. If Developer or Developer's contractor will apply pesticides to outdoor areas, Developer must first obtain a written recommendation from a person holding a valid Agricultural Pest Control Advisor license issued by the California Department of Pesticide Regulation and any such pesticide application will be made only by or under the supervision of a person holding a valid Qualified Applicator certificate or Qualified Applicator license under state law. City's current Reduced Risk Pesticide List and additional details about pest management on City property can be found at the San Francisco Department of the Environment website, <http://sfenvironment.org/ipm>.

16.10. MacBride Principles - Northern Ireland. The City and Port urge companies doing business in Northern Ireland to move towards resolving employment inequities and encourages them to abide by the MacBride Principles as expressed in Administrative Code Section 12F.1, et seq. The City and Port also urge San Francisco companies to do business with corporations that abide by the MacBride Principles.

16.11. Tropical Hardwood and Virgin Redwood Ban. The City and Port urge companies not to import, purchase, obtain or use for any purpose, any tropical hardwood or tropical hardwood wood product, or any virgin redwood or virgin redwood wood product. Developer agrees that, except as permitted by the application of Sections 802(b) and 803(b) of

the San Francisco Environment Code, Developer shall not use or incorporate any tropical hardwood or virgin redwood in the Construction of the Improvements. Developer shall not provide any items to the construction of the Improvements, or otherwise in the performance of this Agreement which are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. In the event Developer fails to comply in good faith with any of the provisions of Chapter 8 of the San Francisco Environment Code, Developer shall be liable for liquidated damages for each violation in any amount equal to the contractor's net profit on the contract, or five percent (5%) of the total amount of the contract dollars, whichever is greater.

16.12. Preservative Treated Wood Containing Arsenic. Developer may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the Environment Code is obtained from the Department of the Environment under Section 1304 of the Environment Code. The term "**preservative-treated wood containing arsenic**" means wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Developer may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Developer from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "**saltwater immersion**" means a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

16.13. Notification of Limitations on Contributions. Through its execution of this Agreement, Developer acknowledges its obligations under Section 1.126 of the San Francisco Campaign and Governmental Conduct Code which prohibits any person who contracts with the City for the selling or leasing of any land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making a contribution to such an officer, or candidate for such an office, or committee controlled by such officer or candidate at any time from the submission of a proposal for such contract until the termination of negotiations for such contract or twelve (12) months has elapsed from the date the contract is approved.

Developer acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of one hundred thousand dollars (\$100,000) or more. Developer further acknowledges that, if applicable, (i) the prohibition on contributions applies to each Developer; each member of Developer's board of directors, and Developer's principal officers, including its chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Developer; and any subcontractor listed in the Developer's bid or contract; and (ii) within thirty (30) days of the submission of a proposal for the contract, the Port is obligated to submit to the Ethics Commission the parties to this Agreement. Additionally, Developer certifies that Developer must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126 by the time it submitted a proposal for the contract, and has provided to City the names of the persons required to be informed.

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

16.14. *Sunshine Ordinance.* In accordance with Section 67.24(e) of the Administrative Code, contracts, contractors' bids, leases, agreements, responses to Requests for Proposals, and all other records of communications between Port and persons or firms seeking contracts will be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract, lease, agreement or other benefit until and unless that person or organization is awarded the contract, lease, agreement or benefit. Information provided which this Section covers will be made available to the public upon request.

16.15. *Developer Conflicts of Interest.* Through its execution of this Agreement, Developer acknowledges that it is familiar with the provisions of Article III, Chapter 2 of the Campaign and Governmental Conduct Code, and Sections 87100 et seq. and Sections 1090 et seq. of the California Government Code, certifies that it does not know of any facts which would constitute a violation of these provisions and agrees that if Developer becomes aware of any such fact during the LDDA Term Developer shall immediately notify the Port and City.

16.16. *Drug-Free Workplace.* Developer acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1988 (41 U.S.C. Ch. 81), the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City property (including the Site). Developer and its Agents or assigns shall comply with all terms and provisions of such Act and the rules and regulations promulgated thereunder. Developer agrees that any violation of this prohibition by Developer, its Agents or assigns shall be deemed a material breach of this Agreement.

16.17. *Prevailing Wages and Working Conditions.*

(a) **Prevailing Wage Rate Requirement For Construction.** Developer agrees that any person performing (i) labor in the Construction of the Improvements, including any "public work" as defined under California Labor Code Section 1720 et seq. (which includes certain construction, alteration, maintenance, demolition, installation, repair, carpet laying, or refuse hauling work if paid for in whole or part out of public funds) or (ii) Covered Construction to: (A) pay workers performing such work not less than the highest prevailing rate of wages (B) provide the same hours, working conditions, and benefits as in each case are provided for similar work performed in San Francisco County, and (C) employ apprentices in accordance with Administrative Code Section 23.61 (collectively, "**Prevailing Wage Requirements**"). Developer agrees to cooperate with the City in any action or proceeding against a contractor or subcontractor that fails to comply with the Prevailing Wage Requirements.

Developer will include, and will require its subtenants, Agents, and contractors and subcontractors (regardless of tier), to include the Prevailing Wage Requirements and the agreement to cooperate in City enforcement actions in any Construction Contract with specific reference to Administrative Code Section 23.61. Each such Construction Contract will name the City and County of San Francisco, affected workers, and employee organizations formally representing affected workers as third party beneficiaries for the limited purpose of enforcing the Prevailing Wage Requirements, including the right to file charges and seek penalties against any contractor or subcontractor in accordance with Administrative Code Section 23.61. Developer's failure to comply with its obligations under this section constitutes a material breach of this Agreement. A contractor's or subcontractor's failure to comply with this Section will enable the City to seek the remedies specified in Administrative Code Section 23.61 against the breaching party.

Developer will also pay, and shall require its subtenants, Agents, and contractors and subcontractors (regardless of tier) to pay, the Prevailing Rate of Wage for the following activities on the Site as set forth in and to the extent required by Administrative Code Chapter 21C: a Public Off-Street Parking Lot, Garage or Automobile Storage Facility (as defined in

Section 21C.3), a Show (as defined in Section 21C.4), a Special Event (as defined in Section 21C.8), and Broadcast Services (as defined in Section 21C.9).

(b) Prevailing Wage Rate Requirement For Theatrical Workers. City law entitles individual engaged in theatrical or technical services related to the presentation of a Show at the Site, including individuals engaged in rigging, sound, projection, theatrical lighting, videos, computers, draping, carpentry, special effects, and motion picture services, to be paid not less than the Prevailing Rate of Wages (including fringe benefits or matching equivalents) fixed by the Board of Supervisors, unless the Show is free and open to the public or meets any of the other exemptions in Administrative Code Section 21C.4(b). Capitalized terms in this Section shall have the meanings provided in Section 21.C4. Accordingly, Developer, as a condition of this Agreement, agrees that:

(i) Developer shall comply with the obligations in Administrative Code Section 21C.4, and shall require Developer's subtenants, Agents, contractors, and any subcontractors, to comply with the obligations in Section 21C.4, including the payment of Prevailing Rate of Wages to individuals engaged in theatrical or technical services related to the presentation of a Show. In addition, if Developer or its subtenant, Agent, contractor (or any subcontractor) fails to comply with these obligations, the City shall have all available remedies against Developer to secure compliance and seek redress for workers who provided the services as described in Section 21C.7, together with the remedies set forth in this Agreement.

(ii) The City may inspect and/or audit any workplace, job site, books and records pertaining to the presentation of a Show at the Site, and may interview any individual who provides, or has provided, work involving theatrical or technical services for the Show at the Site; provided that the City agrees it will not conduct any such inspection or interview at a time or in a manner that would unreasonably interfere with performances at the Site.

(iii) Developer shall provide to the City (and to require any subtenant, contractor or subcontractor who maintains such records to provide to the City), upon request, immediate access to all workers' time sheets, payroll records, and paychecks for inspection in so far as they relate the presentation of a Show at the Site.

For current Prevailing Wage rates, see www.sfgov.org/olse/prevailingwages or call the Office of Labor Standard Enforcement at 415-554-6235.

(c) Prevailing Wage Rate Requirement For Special Event or Trade Show Work. City law entitles individuals engaged in work involving the on-site installation, set-up, assembly, and dismantling of temporary exhibits, displays, booths, modular systems, signage, drapery, specialty furniture, floor coverings, and decorative materials in connection with trade shows, conventions, expositions, and other special events on City property to receive the Prevailing Rate of Wages (including fringe benefits or matching equivalents) fixed by the Board of Supervisors, unless the event is free and open to the public or meets any of the other exemptions in Administrative Code Section 21C.8(b). Capitalized terms in this Section shall have the meanings provided in Sections 21.C8. Accordingly, Developer, as a condition of this Agreement, agrees that:

(i) Developer will comply with the obligations in Administrative Code Section 21C.8, and will require Developer's subtenants, Agents, contractors, and any subcontractors, to comply with the obligations in Section 21C.8, including the payment of Prevailing Wage Rates to workers engaged in On-site work on Trade Shows or Special Events. In addition, if Developer or its subtenant, Agent, contractor (or any subcontractor) fails to comply with these obligations, the City shall have all available remedies against Developer to secure compliance and seek redress for workers who provided the services as described in Section 21C.7, together with the remedies set forth in this Agreement.

(ii) The City may inspect and/or audit any workplace, job site, books and records pertaining to On-site work on Trade Shows or Special Events at the Site, and may interview any individual who provides, or has provided, On-site work on Trade Shows or Special Events at the Site.

(iii) Developer shall provide to the City (and to require any subtenant, Agent, contractor or subcontractor who maintains such records to provide to the City), upon request, immediate access to all workers' time sheets, payroll records, and paychecks for inspection in so far as they relate a Trade Show or Special Event at the Site.

For current Prevailing Wage rates, see www.sfgov.org/olse/prevailingwages or call the Office of Labor Standard Enforcement at 415-554-6235.

16.18. Prohibition of Political Activity with City Funds. In accordance with Administrative Code Chapter 12.G, no funds appropriated by Port for this Agreement may be expended for organizing, creating, funding, participating in, supporting, or attempting to influence any political campaign for a candidate or for a ballot measure.

16.19. Compliance with Disabled Access Laws. Developer acknowledges that, pursuant to the Disabled Access Laws, programs, services and other activities provided by a public entity to the public, whether directly or through Developer or contractor, must be accessible to the disabled public. Developer shall not discriminate against any person protected under the Disabled Access Laws in connection with the use of all or any portion of the Property and shall comply at all times with the provisions of the Disabled Access Laws.

16.20. Protection of Private Information. Developer agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the Administrative Code (the "Protection of Information Ordinance"), including the remedies provided therein. Consistent with the requirements of the Protection of Information Ordinance, Developer agrees to all of the following:

(a) Neither Developer nor any of its Contractors or Subcontractors who receive Private Information from the City in the performance of a Contract may disclose that information to a Subcontractor or any other person or entity, unless one of the following is true:

(i) The disclosure is authorized by this Agreement;

(ii) Developer receives advance written approval from the Contracting Department to disclose the information; or

(iii) The disclosure is required by judicial order.

(b) Any disclosure or use of Private Information authorized by this Agreement shall be in accordance with any conditions or restrictions stated in this Agreement or the Contracting Department's approval and shall not be used except as necessary in the performance of the obligations under the Contract. Any disclosure or use of Private Information authorized by a Contracting Department shall be in accordance with any conditions or restrictions stated in the approval.

(c) "Private Information" shall mean any information that (1) could be used to identify an individual, including name, address, social security number, medical information, financial information, date and location of birth, and names of relative; or (2) the law forbids any person from disclosing.

(d) Any failure of Developer to comply with the Protection of Information Ordinance shall be a material breach of this Agreement. In such an event, in addition to any other remedies available to it under equity or at law, Port may terminate this Agreement, debar Developer, or bring a false claim action against Developer.

16.21. Diesel Fuel Measures. Developer must minimize exhaust emissions from operating equipment and trucks during construction. At a minimum, Developer will maintain vehicles and equipment in good condition and well-tuned to minimize emissions, ensure that vehicles and equipment run only when necessary, and prohibit running engines when vehicles and equipment are not in use or when queuing. Developer must also make good faith efforts to use low-emission diesel fuel or alternative low-emission fuels for all petroleum hydrocarbon-powered equipment used on the Site, and to explore emerging new technologies for reducing diesel particulate matter, such as catalytic particulate traps, which currently are under study by the California Air Resources Board. Identifying sources of viable alternative low-emission fuels, retrofitting or purchasing new or late-model equipment to use such fuels to the extent reasonably feasible, and using low-emission fuels to the extent reasonably practicable are examples of “good faith efforts.” In addition, Developer will encourage independent truckers contracting with Developer to move materials to and from the Site to use low-emission fuels if possible, including if reasonably feasible, providing the truckers with economic incentives to retrofit equipment or take other measures necessary to use low-emission fuels.

16.22. Charter Provisions. This Agreement is governed by and subject to the provisions of the Charter of the City and County of San Francisco.

16.23. Card Check Agreement. Article 6 of Chapter 23 of the Administrative Code presently requires employers of employees in projects that include hotels or restaurants on public property with more than fifty (50) employees to enter into a “card check” agreement with a labor union regarding the preference of employees to be represented by a labor union to act as their exclusive bargaining representative. The Lease will require Developer and Developer’s subtenants to comply with these requirements to the extent applicable to restaurant and hotel operations within the Site.

16.24. Food Service Waste Reduction Ordinance. Developer agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided therein and implementing guidelines and rules. By entering into this Agreement, Developer agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Developer agrees that the sum of one hundred dollars (\$100.00) liquidated damages for the first breach, two hundred dollars (\$200.00) liquidated damages for the second breach in the same year, and five hundred dollars (\$500.00) liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amounts shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Developer’s failure to comply with this provision.

16.25. Consideration Of Criminal History In Hiring And Employment Decisions.

(a) Developer agrees to, and will cause its contractors, subcontractors, and Agents to comply with and be bound by all of the provisions of Administrative Code Chapter 12T (Criminal History in Hiring and Employment Decisions; “**Chapter 12T**”), which are hereby incorporated, including the remedies and implementing regulations as may be amended from time to time, with respect to applicants and employees of Developer, its contractors, subcontractors, and Agents, who would be or are performing work at the Site.

(b) Developer must incorporate by reference the provisions of Chapter 12T in the Construction Contract, all contracts, subcontracts, and subleases of some or all of the Site, and must require all its contractors, subcontractors, Agents and subtenants to comply with such provisions. Developer’s failure to comply with the obligations in this subsection will constitute a material breach of this Agreement.

(c) Developer, its contractors, subcontractors, Agents and subtenants will not inquire about, require disclosure of, or if such information is received base an Adverse Action on an applicant's or potential applicant for employment, or employee's: (1) Arrest not leading to a Conviction, unless the Arrest is undergoing an active pending criminal investigation or trial that has not yet been resolved; (2) participation in or completion of a diversion or a deferral of judgment program; (3) a Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (4) a Conviction or any other adjudication in the juvenile justice system; (5) a Conviction that is more than seven years old, from the date of sentencing; or (6) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

(d) Developer, its contractors, subcontractors, Agents and subtenants will not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in subsection (c) above. Developer, its contractors, subcontractors, Agents and subtenants will not require such disclosure or make such inquiry until either after the first live interview with the person, or after a conditional offer of employment.

(e) Developer, its contractors, subcontractors, Agents and subtenants must state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment with Developer, its contractors, subcontractors, Agents, or subtenant at the Site, that the Developer, its contractors, subcontractors, Agents, or subtenant will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

(f) Developer, its contractors, subcontractors, Agents and subtenants must post the notice prepared by the Office of Labor Standards Enforcement ("OLSE"), available on OLSE's website, in a conspicuous place at the Premises and at other workplaces within San Francisco where interviews for job opportunities at the Premises occur. The notice must be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the Premises or other workplace at which it is posted.

(g) Developer, its contractors, subcontractors, Agents and subtenants understand and agree that upon any failure to comply with the requirements of Chapter 12T, the City has the right to pursue any rights or remedies available under Chapter 12T or this Agreement, including but not limited to a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Agreement.

(h) If Developer has any questions about the applicability of Chapter 12T, it may contact Port for additional information. Port may consult with the Director of the City's Office of Contract Administration who may also grant a waiver, as set forth in Section 12T.8.

16.26. Local Hire. Any undefined, initially-capitalized term used in this Section shall have the meaning given to such term in Administrative Code Section 23.62 (the "**Local Hiring Requirements**"). The Construction of the Project is subject to the Local Hiring Requirements unless the cost for such work is (i) estimated to be less than \$750,000 per building permit; (ii) is in connection with the set-up, execution and strike of special events of three (3) or fewer days costing in excess of the Threshold Amount; or (iii) meets any of the other exemptions in the Local Hiring Requirements. Developer agrees that it will comply with the Local Hiring Requirements to the extent applicable. Before starting any Developer Improvements or Alterations, Developer shall contact City's Office of Economic Workforce and Development ("OEWD") to determine whether the work is a Covered Project subject to the Local Hiring Requirements.]

Developer will include, and will require its contractors, subcontractors, Agents and subtenants to include, a requirement to comply with the Local Hiring Requirements in any

contract for a Covered Project with specific reference to Administrative Code Section 23.62. Each such contract will name the City and County of San Francisco as a third party beneficiary for the limited purpose of enforcing the Local Hiring Requirements, including the right to file charges and seek penalties. Developer will cooperate, and require its contractors, subcontractors, Agents and subtenants to cooperate, with the City in any action or proceeding against a contractor or subcontractor that fails to comply with the Local Hiring Requirements when required. Developer's failure to comply with its obligations under this Section will constitute a material breach of this Agreement. A contractor's, subcontractor's, Agent's, or subtenants failure to comply with this Section will enable the City to seek the remedies specified in Administrative Code Section 23.62 against the breaching party. **[Note: This Section subject to revision based on agreed format between Developer and City. Requirements will include compliance with Chapter 82, Mandatory Local Hire policy for construction – 30% by trade; and Chapter 83, First Source Hiring Program for end use jobs – good faith effort working with OEWD for the operations of the hotel and any entry-level position.]**

16.27. San Francisco Bottled Water Ordinance. Tenant is subject to all applicable provisions of Environment Code Chapter 24 (which are hereby incorporated) prohibiting the sale or distribution of drinking water specified containers at City-permitted events held on the Premises with attendance of more than 100 people, except as otherwise set forth in Environmental Code Chapter 24.

16.28. Vending Machines; Nutritional Standards and Calorie Labeling Requirements; Offerings. Developer must not install or permit any vending machine on the Site without the prior written consent of Port. Any permitted vending machine must comply with the food and beverage nutritional standards and calorie labeling requirements set forth in Administrative Code Section 4.9- 1(c), as may be amended from time to time (the “**Nutritional Standards Requirements**”). Developer agrees to incorporate the Nutritional Standards Requirements into any contract for the installation of a vending machine on the Site or for the supply of food and beverages to that vending machine. Failure to comply with the Nutritional Standards Requirements or to otherwise comply with this Section will be deemed a material breach of this Agreement. Without limiting Port's other rights and remedies under this Agreement, Port has the right to require the immediate removal of any vending machine on the Site that is not permitted or that violates the Nutritional Standards Requirements. In addition, any Restaurant including any employee eating establishment located on the Site is encouraged to ensure that at least twenty-five percent (25%) of Meals (as capitalized terms are defined in Administrative Code Section 4.9-1) offered on the menu meet the nutritional standards set forth in Administrative Code Section 4.9-1(e), as may be amended.

16.29. All-Gender Toilet Facilities. Developer must comply with Administrative Code Section 4.1-3 which requires at least one all-gender toilet facility on each floor of any new building on City-owned land and within existing buildings leased by the City, including the Site, where extensive renovations are made. An “**all-gender toilet facility**” means a toilet that is not restricted to use by persons of a specific sex or gender identity by means of signage, design, or the installation of fixtures. “**Extensive renovations**” means any renovation where the construction cost exceeds 50% of the cost of providing the toilet facilities required by this section.

16.30. Consideration of Salary History. Tenant shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or “**Pay Parity Act.**” For each employment application to Tenant for work that relates to this Agreement or for work to be performed in the City or on City property, Tenant is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant. Tenant shall not (1) ask such applicants about their current or past salary or (2) disclose a current or former employee's salary history without that employee's authorization unless the salary history is publicly available. Tenant is subject to the enforcement and penalty provisions in Chapter 12K. Information about Chapter 12K is available on the web at <https://sfgov.org/olse/consideration-salary-history>.

17. FORCE MAJEURE.

(a) Effect of Force Majeure. For the purpose of this Agreement, neither Developer, Port, nor any successor in interest (the “**Delayed Party**,” as applicable) will be considered in breach of or default in any obligation or satisfaction of a condition to an obligation of the other Party in the event of Force Majeure, and the time fixed for performance of any such obligation or satisfaction of conditions shall be extended by a period of time equal to the duration of the Force Majeure event; provided, however, within thirty (30) days after the beginning of any such Force Majeure event, the Delayed Party shall have first notified the other Party of the cause or causes of such delay and claimed an extension for the reasonably estimated period of the enforced delay.

(b) Definition of Force Majeure. “**Force Majeure**” means events that cause delays in the Delayed Party’s performance of its obligations under this Agreement, or in the satisfaction of a condition to the other Party’s performance under this Agreement, due to causes beyond the Delayed Party’s control and not caused by the acts or omissions of the Delayed Party (excluding, in any case, a Delayed Party’s performance of the payment of money required under the terms of this Agreement), including: acts of nature or of the public enemy; war; invasion; insurrection; riots; any general moratorium in the issuance of governmental or regulatory permits applicable to the Site or the Improvements (but in the absence of such a moratorium, acts of the government relating to issuance of building permits or other Regulatory Approvals are governed by *Section 17(d)*); fires; floods; tidal waves; epidemics; quarantine restrictions; freight embargoes; earthquakes; unusually severe weather (but only if such unusually severe weather causes actual delays); delays of contractors or subcontractors due to any of the foregoing causes; the unanticipated presence of Hazardous Materials or other concealed conditions on the Site that would not have reasonably been discovered through due diligence and that would actually delay or materially and adversely impair or delay Developer’s ability to Construct the Improvements; archeological finds on the Site; strikes and substantial interruption of work because of labor disputes (excluding strikes and labor disputes directly related to any contracts between Developer and its contractors or work performed on behalf of Developer); inability to obtain materials or reasonably acceptable substitute materials (provided that Developer has ordered such materials on a timely basis and Developer is not otherwise at fault for such inability to obtain materials); or any Litigation Force Majeure (provided that the Delayed Party proceeds with due diligence to defend or commence, as applicable, such action or proceeding or take other appropriate measures to resolve any dispute that is the subject of such action or proceeding). The following are excluded from the definition of Force Majeure: (1) Developer’s failure to secure anticipated financing for the Improvements unless caused by a direct result of some other event of Force Majeure; (2) sea level rise; and (3) any event that does not cause an actual delay.

(c) Definition of Litigation Force Majeure. “**Litigation Force Majeure**” means any action or proceeding before any court, tribunal, or other judicial, adjudicative or legislative decision-making body, including any administrative appeal, brought by a third party that challenges, (a) the validity of any action taken by the City in connection with the Construction of the Improvements or any findings upon which any action is predicated, or (b) the failure of any Regulatory Agency to impose conditions to a Regulatory Approval or the validity of any other Regulatory Approval required in connection with Construction of the Improvements. With respect to an event of Litigation Force Majeure occurring after the Close of Escrow, such event will not be considered Litigation Force Majeure unless such event would enjoin construction or other work on the Site or any portion thereof, cause a lender to refuse to commit, close, fund, disburse or cause an acceleration of payment on a loan, or prevent or suspend construction work on the Site except to the extent caused by the Party claiming an extension.

Notwithstanding anything to the contrary contained in this Agreement, Litigation Force Majeure excludes any action or proceeding brought by an Affiliate of Developer, any of Developers’ members or their Affiliates, any consultant of Developer, or any other Third Party assisted by Developer, directly or indirectly, in such action or proceeding. Performance by a

party hereunder shall be deemed delayed or made impossible by virtue of Litigation Force Majeure during the pendency thereof, and until a judgment, order, or other decision resolving such matter in favor of the party whose performance is delayed has become final and unappealable.

The Parties will each proceed with due diligence and shall cooperate with one another to defend the action or proceeding or take other measures to resolve the dispute that is the subject of such action or proceeding.

(d) Permit Force Majeure. If Developer is diligently proceeding to obtain necessary Building Permits as required by **Section 9.11** or Port or Developer are diligently proceeding to obtain other necessary Regulatory Approvals for the Improvements as required hereunder, Force Majeure includes such party's inability to obtain in a timely manner Building Permits or other Regulatory Approvals. With respect to such event of Force Majeure, time for Close of Escrow and for commencement and Completion of Construction of the Improvements will be tolled for the period equal to the number of days a delay in issuing such permits or other Regulatory Approvals directly results in the delaying of the Close of Escrow or the commencement of Construction of the Improvements in accordance with the Schedule of Performance.

(e) Limitations on Force Majeure. Under no circumstances shall the delay attributable to an event of Force Majeure or Litigation Force Majeure extend beyond 24 months after the start of the event of Force Majeure or Litigation Force Majeure.

18. GENERAL PROVISIONS.

18.1. Notices.

(a) Manner of Delivery. Except as otherwise expressly provided in this Agreement, all notices, demands, approvals, consents and other formal communications between Port and Developer required or permitted under this Agreement shall be in writing and shall be deemed given and effective (i) upon the date of receipt if given by personal delivery on a business day (or the next business day if delivered personally on a day that is not a business day) or (ii) if mailed by (x) the U.S. Postal Service, two (2) business days after deposit with the U.S. Postal Service for delivery by United States mail, first class postage prepaid, or (y) a nationally recognized overnight courier, one (1) business day after deposit with such nationally recognized overnight courier, to Port or Developer at their respective addresses for notice designated below.

(b) Request for Approval. In order for a request for any approval required under the terms of this Agreement to be effective, it shall be clearly marked "**Request for Approval**" and state (or be accompanied by a cover letter stating) substantially the following:

- (i) the section of this Agreement under which the request is made and the action or response required;
- (ii) if applicable, the period of time as stated in this Agreement within which the recipient of the notice shall respond; and
- (iii) if applicable, that the failure to object to the notice within the stated time period will be deemed to be the equivalent of the recipient's approval of or consent to the request for approval which is the subject matter of the notice.

In the event that a request for approval states a period of time for approval that is less than the time period provided for in this Agreement for such approval, the time period stated in this Agreement shall be the controlling time period.

In no event shall a recipient's approval of or consent to the subject matter of a notice be deemed to have been given by its failure to object to such notice if such notice (or the accompanying cover letter) does not comply with the requirements of this Section.

(c) Addresses for Notices. All notices shall be properly addressed and delivered to the Parties at the addresses set forth below or at such other addresses as either Party may designate by written notice given in the manner provided in this Section:

All notices, demands, consents, approvals, and requests that may or are to be given by any Party to the other will be in writing, except as otherwise provided herein. All notices, demands, consents, approvals, and requests to be provided hereunder will be deemed to have been properly given on the date of receipt if served personally on a day that is a business day (or on the next business day if served personally on a day that is not a business day) or if mailed, the next business day after being deposited with an overnight courier or two business days after being deposited with the U.S. Postal Service (as evidenced by a postmark date), postage prepaid, in each case, addressed as follows:

To Port: San Francisco Port Commission
Pier 1
San Francisco, California 94111
Attention: Director of Planning &
Development (Reference: Teatro)
Telephone: (415) 274-0400

With a copy to: Port General Counsel
Pier 1
San Francisco, California 94111
Telephone: (415) 274-0486

To Developer: TZK Broadway, LLC
1215 K Street, Suite 1150
Sacramento, CA 95814
Attention: Darius Anderson, Manager
Telephone: (916) 443-8891

PresidioCo Bay Area LLC
631 Folsom Street, 11F
San Francisco, CA 94107
Attn: Rikesh Patel, Manager
Telephone: 415-264-7298

TZZ San Francisco, LLC
14200 NE 145th Street
Woodinville, WA 98072
Attn: Norm Langill, Manager
Telephone: (206) 802-0015

18.2. Conflict of Interest. No member, official or employee of the City, including its Port, may have any personal interest, direct or indirect, in this Agreement nor shall any such member, official or employee participate in any decision relating to this Agreement which affects her or his personal interest or the interests of any corporation, partnership or association in which she or he is interested directly or indirectly.

18.3. Inspection of Books and Records. Port, including its Agents, has the right at all reasonable times and from time to time to inspect the books and records of Developer in a

location within San Francisco during regular business hours pertaining to Developer's compliance with its obligations under this Agreement, provided that Port shall, to the maximum extent allowed by applicable law, keep strictly confidential any such information which Developer reasonably and in good faith determines is proprietary and clearly and conspicuously so designates.

18.4. *Time of Performance.*

(a) Expiration. All performance dates (including cure dates) expire at 5:00 p.m., San Francisco, California time, on the performance or cure date.

(b) Weekends and Holidays. A performance date that falls on a Saturday, Sunday or City holiday is deemed extended to the next business day.

(c) Days for Performance. All periods for performance specified in this Agreement in terms of days shall be calendar days, and not business days, unless otherwise expressly provided in this Agreement.

(d) Time of the Essence. Time is of the essence with respect to each required completion date in the Schedule of Performance.

18.5. *Interpretation of Agreement.*

(a) Exhibits. Whenever an "Exhibit" is referenced, it means an exhibit or attachment to this Agreement unless otherwise specifically identified. All such Exhibits are incorporated in this Agreement by reference.

(b) Captions. Whenever a section or paragraph is referenced, it refers to this Agreement unless otherwise specifically identified. The captions preceding the sections of this Agreement and in the table of contents have been inserted for convenience of reference only. Such captions shall not define or limit the scope or intent of any provision of this Agreement.

(c) Words of Inclusion. The use of the term "including", "include", "such as" or words of similar import when following any general term, statement or matter shall not be construed to limit such term, statement or matter to the specific items or matters, whether or not language of non-limitation is used with reference thereto. Rather, such terms shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such statement, term or matter.

(d) No Presumption Against Drafter. This Agreement has been negotiated at arm's length and between Persons sophisticated and knowledgeable in the matters dealt with herein. In addition, experienced and knowledgeable legal counsel has represented each Party. Accordingly, this Agreement shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Agreement (including California Civil Code Section 1654).

(e) Costs and Expenses. The Party on which any obligation is imposed in this Agreement shall be solely responsible for paying all costs and expenses incurred in the performance of such obligation, unless the provision imposing such obligation specifically provides to the contrary.

(f) Agreement References. Wherever reference is made to any provision, term or matter "in this Agreement," "herein" or "hereof" or words of similar import, the reference shall be deemed to refer to any and all provisions of this Agreement reasonably related thereto in the context of such reference, unless such reference refers solely to a specific numbered or lettered section or paragraph of this Agreement or any specific subdivision of this Agreement.

(g) Approvals. Unless this Agreement otherwise expressly provides or unless the City's Charter otherwise requires, all approvals, consents or determinations to be made by or

on behalf of the City or Port under this Agreement shall be made by Port's Executive Director and shall not be unreasonably withheld, conditioned, or delayed.

18.6. *Successors and Assigns.* This Agreement is binding upon and will inure to the benefit of the successors and assigns of Port and Developer, subject to the limitations on assignment set forth in *Section 14*. Where the term "**Developer**," or "**Port**" is used in this Agreement, it means and includes their respective successors and assigns. Whenever this Agreement specifies Port as a Party or the holder of the right or obligation to give approvals or consents, if Port or a comparable public body which has succeeded to Port's rights and obligations no longer exists, then the City (or the State, if applicable) will be deemed to be the successor and assign of Port for purposes of this Agreement.

18.7. *Technical Corrections.* The parties reserve the right, upon mutual agreement of Port's Executive Director and Developer, to enter into memoranda of technical corrections hereto to reflect any non-material changes in the actual legal description and square footages of the Site and the Improvements, and upon full execution thereof, such memoranda shall be deemed to become a part of this Agreement.

18.8. *No Third Party Beneficiaries.* This Agreement is made and entered into for the sole protection and benefit of Port and Developer and their successors and assigns. No other Person shall have or acquire any right or action based upon any provisions of this Agreement.

18.9. *Real Estate Commissions.* Developer and Port each represents that it engaged no broker, agent or finder in connection with this transaction. In the event any broker, agent or finder makes a claim, the Party through whom such claim is made agrees to Indemnify the other Party from any Losses arising out of such claim.

18.10. *Counterparts.* This Agreement may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument.

18.11. *Entire Agreement.* This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and supersedes all negotiations or previous agreements between the Parties with respect to all or any part of the terms and conditions mentioned in or incidental to this Agreement (other than as set forth in other Transaction Documents fully executed by the Parties). No parol evidence of any prior draft of this Agreement, or of any other agreement shall be permitted to contradict or vary the terms of this Agreement.

18.12. *Amendment.* Neither this Agreement nor any of its terms may be terminated, amended or modified except by a written instrument executed by the Parties.

18.13. *Governing Law.* The Laws of the State of California shall govern the interpretation and enforcement of this Agreement. As part of the consideration for Port's entering into this Agreement, Developer agrees that all actions or proceedings arising directly or indirectly under this Agreement may, at the sole option of Port, be litigated in courts having sites within the State of California.

18.14. *Recordation.* A memorandum of this Agreement will be recorded by Developer in the Official Records on or after the Effective Date. Developer shall promptly upon request deliver to Port a duly executed and acknowledged quitclaim deed, suitable for recordation in the Official Records and in form and content reasonably satisfactory to Port and the City Attorney, for the purpose of effectuating the termination of Developer's interest under this Agreement upon the termination of this Agreement. Port may record such quitclaim deed at any time on or after the termination of this Agreement, without the need for any approval or further act of Developer.

18.15. *Extensions by Port.* Upon the request of Developer, Port, acting through its Executive Director, may, by written instrument, extend the time for Developer's performance of any term, covenant or condition of this Agreement or permit the curing of any default upon such

terms and conditions as it determines appropriate, including the time within which Developer shall agree to such terms or conditions, provided, however, that any such extension or permissive curing of any particular default will not operate to release any of Developer's obligations nor constitute a waiver of Port's rights with respect to any other term, covenant or condition of this Agreement or any other default in, or breach of, this Agreement or otherwise effect the time of the essence provisions with respect to the extended date or the other dates for performance under this Agreement.

18.16. *Extensions by Developer.* Upon the request of Port, Developer may, by written instrument, extend the time for Port's performance of any term, covenant or condition of this Agreement or permit the curing of any default upon such terms and conditions as it determines appropriate, including the time within which Port shall agree to such terms or conditions, provided, however, that any such extension or permissive curing of any particular default will not operate to release any of Port's obligations nor constitute a waiver of Developer's rights with respect to any other term, covenant or condition of this Agreement or any other default in, or breach of, this Agreement or otherwise effect the time of the essence provisions with respect to the extended date or the other dates for performance under this Agreement.

18.17. *Further Assurances.* The Parties agree to execute and acknowledge such other and further documents and take such other reasonable actions as may be necessary or reasonably required to effectuate the terms of this Agreement. Port's Executive Director is authorized to execute on behalf of Port any closing or similar documents and any contracts, agreements, memoranda or similar documents with State, regional or local entities or other Persons that are necessary or proper to achieve the purposes and objectives of this Agreement and do not materially increase the obligations of Port under this Agreement, if the Executive Director determines, in consultation with the City Attorney, that the document is necessary or proper and in Port's best interests. The Executive Director's signature on any such document shall conclusively evidence such a determination by him or her.

18.18. *Attorneys' Fees.* If either Party fails to perform any of its respective obligations under this Agreement or if any dispute arises between the Parties hereto concerning the meaning or interpretation of any provision of this Agreement, then the defaulting Party or the Party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other Party on account of such default or in enforcing or establishing its rights under this Agreement, including Attorneys' Fees and Costs. Any such Attorneys' Fees and Costs incurred by either Party in enforcing a judgment in its favor under this Agreement shall be recoverable separately from and in addition to any other amount included in such judgment, and such Attorneys' Fees and Costs obligation is intended to be severable from the other provisions of this Agreement and to survive and not be merged into any such judgment. For purposes of this Agreement, the reasonable fees of attorneys of the Office of the City Attorney shall be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the City Attorney's services were rendered who practice in the City of San Francisco in law firms with approximately the same number of attorneys as employed by the City Attorney's Office.

18.19. *Relationship of Parties.* The subject matter of this Agreement is a private development with neither Party acting as the agent of the other Party in any respect. None of the provisions in this Agreement shall be deemed to render Port a partner in Developer's business, or joint venturer or member in any joint enterprise with Developer.

18.20. *Severability.* If any provision of this Agreement, or its application to any Person or circumstance, is held invalid by any court, the invalidity or inapplicability of such provision shall not affect any other provision of this Agreement or the application of such provision to any other Person or circumstance, and the remaining portions of this Agreement shall continue in full force and effect, unless enforcement of this Agreement as so modified by and in response to such

invalidation would be grossly inequitable under all of the circumstances, or would frustrate the fundamental purposes of this Agreement.

18.21. Representations and Warranties of Developer. Developer represents and warrants as follows as of the Effective Date and as of the date of the Close of Escrow:

(a) Valid Existence; Good Standing. Developer is a Delaware limited liability company duly organized and validly existing and is in good standing under the laws of the State of Delaware. Developer has all requisite power and authority to conduct its business as presently conducted.

(b) Authority. Developer has all requisite power and authority to execute and deliver the Transaction Documents and to carry out and perform all of the terms and covenants of the Transaction Documents.

(c) No Limitation on Ability to Perform. Neither Developer's articles of formation, operating agreement, nor any other agreement or Law in any way prohibits, limits or otherwise affects the right or power of Developer to enter into and perform all of the terms and covenants of the Transaction Documents. Developer is not party to or bound by any contract, agreement, indenture, trust agreement, note, obligation or other instrument that could prohibit, limit or otherwise affect the same. Other than the Regulatory Approvals required to Construct the Improvements, no consent, authorization or approval of, or other action by, and no notice to or filing with, any governmental authority, regulatory body or any other Person is required for the due execution, delivery and performance by Developer of the Transaction Documents or any of the terms and covenants contained therein. There are no pending or threatened lawsuits or proceedings or undischarged judgments affecting Developer before any court, governmental agency, or arbitrator that might materially and adversely affect the enforceability of the Transaction Documents or the business, operations, assets or condition of Developer.

(d) Valid Execution. The execution and delivery of the Transaction Documents by Developer has been duly and validly authorized by all necessary action. The Transaction Documents will be a legal, valid and binding obligation of Developer, enforceable against Developer in accordance with its terms.

(e) Defaults. The execution, delivery and performance of the Transaction Documents (i) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default under (A) any agreement, document or instrument to which Developer or by which Developer's assets may be bound or affected, (B) any Law, or (C) the articles of formation or Developer's operating agreement, and (ii) do not and will not result in the creation or imposition of any lien or other encumbrance upon the assets of Developer.

(f) Meeting Financial Obligations. There is no material adverse change in Developer's financial condition and Developer is meeting its current liabilities as they mature; no federal or state tax liens have been filed against it; and Developer is not in default or claimed default under any agreement for borrowed money.

The representations and warranties in this Section shall survive any expiration or earlier termination of this Agreement.

18.22. Effective Date. This Agreement shall become effective on the date the Parties duly execute and deliver this Agreement following approval by the Port Commission of the Transaction Documents, approval by the Board of Supervisors and the Mayor of the Lease, all in their respective sole and absolute discretion, and payment by Developer of any outstanding Transaction Costs (as defined in the ENA) incurred during the ENA term. The Effective Date of this Agreement will be inserted by Port on the cover page and on Page 1 of this Agreement; provided, however, failure by Port to do so shall in no way invalidate this Agreement. Where used in this Agreement or in any of its exhibits, references to "**the date of this Agreement,**" the

“reference date of this Agreement,” “Agreement date” or “Effective Date” shall mean the Effective Date determined as set forth above and shown on Page 1 of this Agreement.

19. DEFINITIONS.

For purposes of this Agreement, initially capitalized terms shall have the meanings ascribed to them in this Section:

“**Affiliate**” is defined in the Lease.

“**Agents**” means, when used with reference to either Party to this Agreement or any other Person, the members, managers, officers, directors, commissioners, employees, agents and contractors of such Party or other Person, and their respective heirs, legal representatives, successors and assigns.

“**Agreed Total Project Cost and Developer Equity Amount**” is defined in *Section 11.2(b)*.

“**Agreement**” means this Lease Disposition and Development Agreement, including its exhibits, as it may be amended in accordance with its terms.

“**alcoholic beverage**” is defined in *Section 16.7*.

“**All-gender toilet facility**” is defined in *Section 16.29*.

“**Annual Project Cost and Equity Statement**” is defined in *Section 9.8(b)*.

“**Anticipated Development Budget**” means the anticipated budget for the Improvements based on the Preliminary Construction Documents and the Anticipated Pro-Forma. The Anticipated Development Budget will show a balanced sources and uses of funds that include the total development cost for Construction of the Improvements, including line items for Pre-LDDA Costs, permits, fees, exactions, architectural and engineering costs, Hard Costs, Permissible Financing Costs, insurance and bonding costs, and other Soft Costs, along with the sources of funds. The Anticipated Development Budget is attached hereto as *Exhibit J*.

“**Anticipated Pro-Forma**” is attached hereto as *Exhibit D*.

“**As Is With All Faults**” is defined in *Section 5.2*.

“**Attorneys’ Fees and Costs**” means any and all attorneys’ fees, costs, expenses and disbursements, including consultants and experts, expert witness fees and costs, laboratory costs, travel time and associated costs, transcript preparation fees and costs, document copying, exhibit preparation, courier, postage, facsimile, long-distance and communications expenses, court costs and the costs and fees associated with any other legal, administrative or alternative dispute resolution proceeding, fees and costs associated with execution upon any judgment or order, and costs on appeal.

“**Audited Total Project Cost and Equity Statement**” is defined in *Section 11.1*.

“**Board**” or “**Board of Supervisors**” means the Board of Supervisors of the City and County of San Francisco.

“**Building Permit(s)**” means a permit or permits issued by Port, in its regulatory capacity, which will allow Developer to commence Construction of the Improvements.

“**Burton Act**” means the provisions of Chapter 1333 of the Statutes of 1968 of the California Legislature, as amended, providing for the transfer to the City from the State, subject to specified terms, conditions and reservations, of the control and management of the certain tide and submerged lands comprising the Harbor of San Francisco.

“**Certificate of Completion**” is described in *Section 12*.

“**Certified Total Project Cost and Equity Statement**” is defined in *Section 11.2(a)*.

“**Chapter 12T**” is defined in *Section 16.25(a)*.

“**City**” means the City and County of San Francisco, a municipal corporation. City shall refer to the City operating by and through its Port Commission, where appropriate. All references to the City includes Port.

“**City Projects**” is defined in *Section 9.14*.

“**Close of Escrow**” means the Delivery of the Site by Port to Developer through the Escrow.

“**Closing Costs**” is defined in *Section 4.2(c)*.

“**CMD**” means the Contract Monitoring Division of the City’s General Services Agency.

“**Completion**” or “**Completed**” is defined in *Section 12.1(c)*.

“**Conditional Use Permit**” means the Conditional Use Authorization for the Project issued by the Planning Commission on May 2, 2019 by Motion No. 20444, including all the conditions attached in *Exhibit A* to such motion.

“**Construction**” means all new construction, replacement, rehabilitation, and demolition occurring on the Site, or where applicable, off-Site, pursuant to this Agreement and the Lease. “**Construct**” will have a correlative meaning.

“**Construction Contract**” is defined in *Section 4.4(a)(xv)*.

“**Construction Documents**” is defined in *Section 9.2*.

“**Consultant Invoice**” is defined in *Section 2.5(c)*.

“**Control**” means the ownership (indirect or direct) by one Person of more than fifty percent (50%) of the profits, capital, or beneficial interest of another Person, and “**Controlled**” and “**Controlling**” have correlative meanings.

“**Core Benefits**” is defined in *Section 16.1(c)*.

“**Deferred ENA Negotiation Fee**” is defined in *Section 2.3*.

“**Deferred Items**” is defined in *Section 12.1(b)*.

“**Delayed Completion Fee**” is defined in *Section 2.7*.

“**Delayed Party**” is defined in *Section 17(a)*.

“**Deliver**” or “**Delivery**” means execution and delivery through Escrow by Port to Developer, of a leasehold estate in the Site.

“**Developer**” means TZK Broadway, LLC, a California limited liability company, or any successor permitted under this Agreement.

“**Developer Event of Default**” is defined in *Section 15.1*.

“**Developer’s Certified Total Project Cost and Equity Statement**” is defined in *Section 11.2(a)*.

“**Development Budget**” means the budget for the Improvements based on the Final Construction Documents and the Final Pro-Forma. The Development Budget will show a balanced sources and uses of funds that include the total development cost for Construction of the Improvements, including line items for Pre-LDDA Costs, permits, fees, exactions, architectural and engineering costs, Hard Costs, other Soft Costs, Permissible Financing Costs, and insurance and bonding costs, along with the sources of funds. The Development Budget will be substantially in the form of the Anticipated Development Budget attached hereto as *Exhibit J*.

“**Disabled Access Laws**” means all Laws related to access for persons with disabilities including the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. and disabled access laws under Port’s building code.

“**Effective Date**” is defined in *Section 18.22*.

“**ENA**” means the Exclusive Negotiation Agreement between the Parties and dated September 10, 2015.

“**ENA Negotiation Fee**” is defined in *Section 2.3*.

“**Environmental Financial Performance Deposit**” is defined in the Lease.

“**Environmental Laws**” means any present or future federal, state or local Laws or policies relating to Hazardous Material (including the Handling, Release, or Remediation) or to human health and safety, industrial hygiene or environmental conditions in the environment, including structures, soil, air, air quality, water, water quality and groundwater conditions, and any environmental mitigation measure adopted under Environmental Law affecting any portion of the Site.

“**Environmental Notice**” is defined in *Section 7(b)*.

“**Environmental Oversight Deposit**” is defined in the Lease.

“**Environmental Protection Plan**” means the environmental protection plan described in *Section 9.1(f)*.

“**Environmental Regulatory Action**” when used with respect to Hazardous Materials means any inquiry, investigation, enforcement, Remediation, agreement, order, consent decree, compromise, or other action that is threatened, instituted, filed, or completed by an Environmental Regulatory Agency in relation to a Release of Hazardous Materials, including both administrative and judicial proceedings.

“**Environmental Regulatory Agency**” means the EPA, OSHA, any California Environmental Protection Agency board, department, or office, including the Department of Toxic Substances Control and the San Francisco Bay Regional Water Quality Control Board, Cal-OSHA, the Bay Area Air Quality Management District, the San Francisco Department of Public Health, the San Francisco Fire Department, SFPUC, Port, or any other Regulatory Agency now or later authorized to regulate Hazardous Materials.

“**EPA**” means the United States Environmental Protection Agency.

“**Escrow**” is defined in *Section 4.2(a)*.

“**Exacerbate**” or “**Exacerbating**” when used with respect to Hazardous Materials means any act or omission that increases the quantity or concentration of Hazardous Materials in the affected area, causes the increased migration of a plume of Hazardous Materials in soil, groundwater, or bay water, causes a Release of Hazardous Materials that had been contained until the act or omission, or otherwise requires Investigation or Remediation that would not have been required but for the act or omission. Exacerbate also includes the disturbance, removal or generation of Hazardous Materials in the course of Developer’s operations, Investigations, maintenance, repair, and Construction. “**Exacerbation**” has a correlating meaning.

“**Executive Director**” means the Executive Director of Port or his or her designee.

“**Extended Target Close Date**” is defined in *Section 4.3(b)*.

“**Extended Target Final Inspection Date**” is defined in *Section 10.2(a)*.

“**Extensive renovations**” is defined in *Section 16.29*.

“**Exterior Improvements**” means any improvements, furnishings, fixtures, or equipment located in the exterior areas of the Site (whether public access or not and including the roof)

and/or located in the public access areas of the Buildings, which may include mechanical equipment, photovoltaic panels, satellite dishes, antennae and other communication equipment, public art, bollards, flower baskets, benches, tables, chairs, umbrellas, heaters, railings, gates, trash receptacles, cleats, Signs, kiosks, flagpoles, canopies, awnings, landscaping, planter boxes, light poles, lighting fixtures, fountains, ticket booths, bicycle racks, plaques, markers, tents, models, other street furniture, and paving or other surface treatments.

“Final Certificate of Occupancy” means issuance by Port’s building department of a Certificate of Final Completion and Occupancy for the applicable Improvements [that will permit occupancy of the Improvements/ will allow the hotel and Teatro to open to the public/commence operations].

“Final Construction Documents” is defined in *Section 9.2(a)(iii)*.

“Finally Granted” means that the action is final, binding and non-appealable and all applicable statutes of limitation relating to such action, including with respect to CEQA, shall have expired without the filing or commencement of any judicial or administrative action or proceeding in a court of competent jurisdiction with regard to such action.

“Force Majeure” is defined in *Article 17*.

“graffiti” is defined in *Section 16.8*.

“Handle” or **“Handling”** when used with reference to Hazardous Materials means to use, generate, manufacture, process, produce, package, treat, transport, store, emit, discharge, or dispose of any Hazardous Material.

“Hard Costs” is defined in *Section 11.1*.

“Hazardous Material” means any substance, waste, or material that is now or in the future designated by any Regulatory Agency to be capable of posing a present or potential risk of injury to human health or safety, the environment, or property. This definition includes anything designated or defined in any Environmental Law as hazardous, hazardous substance, hazardous waste, toxic, pollutant, or contaminant; any asbestos, asbestos containing materials, and PACMs, whether or not part of the structure of any existing improvements, buildings or structures on the Site, any Improvements to be constructed on the Site by or on behalf of Developer, or occurring in nature; and other naturally-occurring substances such as petroleum, including crude oil or any fraction, and natural gas or natural gas liquids and lead containing materials.

“Hazardous Material Claim” means any Environmental Regulatory Action or any Claim made or threatened by any third party against the Indemnified Parties, or the Site, relating to damage, contribution, cost recovery compensation, loss or injury resulting from the presence or Release of any Hazardous Materials, including Losses based in common law. Hazardous Materials Claims include Investigation and Remediation costs, fines, natural resource damages, damages for decrease in value of the Site or other Port property, the loss or restriction of the use or any amenity of the Site or other Port property, and Attorneys’ Fees and Costs, and consultants’ fees and experts’ fees and costs.

“Hotel” means a public, independent lodging establishment having approximately 100-200 separately keyed guest rooms that provides superior services, facilities and amenities for its guests at the Approved Operating Standards (as defined in the Lease), who are primarily short-term destination and business travelers looking for design, service, location and amenities, but which do not necessarily provide all of the services of a full-service hotel, such as full-service conference, meeting and catering facilities, a full-service health club and spa, or other full-service recreational facilities.

“Hotel Opening Date” is defined in *Section 11.1*.

“Improvements” mean all physical Construction on the Site (and off-Site where so designated in the Scope of Development) and all buildings, structures, fixtures and other

improvements erected, built, renovated, rehabilitated, restored, placed, installed or constructed upon or within the Site on or after the Effective Date, as further described in the Scope of Development and elsewhere in this Agreement.

“**Indemnified Parties**” means City, including all of its boards, commissions, departments, agencies and other subdivisions, including Port, all of the Agents of the City, and their respective heirs, legal representatives, successors and assigns, and each of them.

“**Indemnify**” means indemnify, protect, defend and hold harmless. “**Indemnification**” and “**Indemnity**” have correlative meanings.

“**Initial Period to Close Escrow**” is defined in *Section 2.1*.

“**Investigate**” or “**Investigation**” when used with reference to Hazardous Materials means any activity undertaken to determine and/or characterize the nature and extent of Hazardous Materials that may be located in, on, under, around, or about the Site or any Improvements thereon, or which have been, are being, or threaten to be Released into the environment. Investigation shall include preparation of site history reports, performing equipment and facility testing such as testing the integrity of secondary containment and above and underground tanks or pipes, and sampling and analysis of environmental conditions in, on, under, around, or about the Site or any Improvements thereon and continuing until the appropriate Regulatory Agency has-issued a no further action letter, lifted a clean-up order, or taken similar action.

“**Invitees**” when used with respect to Developer means the customers, patrons, invitees, guests, members, licensees, assignees and subtenants of the tenant under the Lease and the customers, patrons, invitees, guests, members, licensees, assignees and sub-tenants of subtenants.

“**Joint Escrow Instructions**” is defined in *Section 4.2(b)*.

“**IPM**” is defined in *Section 16.9*.

“**IPM Ordinance**” is defined in *Section 16.9*.

“**Kenwood**” means Kenwood Investments No. 6, LLC.

“**Laws**” means all present and future applicable laws, ordinances, rules, regulations, permits, codes, authorizations, orders and requirements, whether or not foreseen or unforeseen, or in the contemplation of the Parties, which may affect or be applicable to the Site or any part of the Site (including use of the Site and the buildings and Improvements on or affixed to the Site), including all consents or approvals (including Regulatory Approvals) required to be obtained from or issued by, and all rules and regulations of, and all building and zoning laws (including the Waterfront Plan) of, all federal, state, county and municipal governments, the departments, bureaus, agencies or commissions thereof, authorities, board of officers, any national or local board of fire underwriters, or any other body or bodies exercising similar functions, having or acquiring jurisdiction of the Site or any part thereof, the use thereof and of the buildings and Improvements thereon; and similarly the phrase “**Law**” shall be construed to mean the same as the above in the singular as well as the plural.

“**LBEs**” is defined in *Section 16.4*.

“**LDDA Fee**” is defined in *Section 2.1*.

“**LDDA Term**” is defined in *Section 1.2*.

“**LDDA Termination Fee**” is defined in *Section 2.4*.

“**Lease**” means the Lease No. L-16585 of the Site to be entered into by the Parties, effective as of the Close of Escrow, substantially in the form of Lease attached hereto as *Exhibit B*.

“**LEED**” means the Leadership in Energy and Environmental Design Green Building Rating System, developed by the U.S. Green Building Council.

“**LEED Gold Certification**” means issuance by the U.S. Green Building Council of a LEED certification of gold or higher for the Improvements.

“**Litigation Force Majeure**” is defined in *Section 17(c)*.

“**Local Hiring Requirements**” is defined in *Section 16.26*.

“**Loss**” or “**Losses**” when used with reference to any Indemnity means any and all claims, demands, losses, liabilities, damages (including foreseeable and unforeseeable consequential damages), liens, obligations, interest, injuries, penalties, fines, lawsuits and other proceedings, judgments and awards and costs and expenses (including reasonable Attorneys’ Fees and Costs, and consultants’ fees and costs) of whatever kind or nature, known or unknown, contingent or otherwise.

“**Memorandum of Agreement**” means the memorandum of this Agreement, suitable for recordation in the Official Records and in the form of *Exhibit K*.

“**Memorandum of Lease**” means the memorandum of the Lease, suitable for recordation in the Official Records and in the form of *Exhibit L*.

“**Mitigation Monitoring and Reporting Program**” means the mitigation and improvement measures relating to Construction of the Improvements by Developer, as described in *Exhibit L*.

“**Mobilization and Staging Plan**” means Developer’s plan for construction vehicle routing, parking, and staging during Construction of the Improvements.

“**Mortgage**” means a mortgage, deed of trust, or similar security instrument of tenant’s leasehold interest under the Lease permitted in accordance with the terms of the Lease and that is recorded in the Official Records.

“**Mortgagee**” means the holder or holders of a Mortgage and as defined in the Lease.

“**Mutual Termination Agreement**” is defined in *Recital E*.

“**Nondiscrimination in Contracts and Benefits**” is defined in *Section 16.1(d)*.

“**Nutritional Standards Requirements**” is defined in *Section 16.28*.

“**Official Records**” means, with reference to the recordation of documents, the Official Records of the City and County of San Francisco.

“**OLSE**” means the City’s Office of Labor Standards Enforcement.

“**Outside Close Date**” is defined in *Section 4.3(f)*.

“**Outside Transaction Costs**” is defined in *Section 2.5(c)*.

“**Overpayment**” is defined in *Section 2.5(c)*.

“**Party**” means Port or Developer, as a party to this Agreement; Parties means both Port and Developer, as parties to this Agreement.

“**Payment Advance**” is defined in *Section 2.5(c)*.

“**Performance Bond**” means a payment and performance bond issued by a responsible surety company licensed to do business in the State and in form acceptable to Port from Developer’s contractors naming Port as co-obligee, in a principal amount no less than one hundred percent (100%) of the estimated cost of the Improvements, to ensure Port against any liability for mechanics’ and materialmen’s liens, stop notices and to ensure completion of the Improvements.

“**Performance Dates**” is defined in *Section 4.3(d)*.

“**Permissible Financing Costs**” is defined in *Section 11.1*.

“**Permitted Title Exceptions**” is defined in *Section 4.7(a)* and includes the items set forth in *Exhibit F*.

“**Person**” means any individual, partnership, corporation (including any business trust), limited liability company, joint stock company, trust, unincorporated association, joint venture or any other entity or association, the United States, or a federal, state or political subdivision thereof.

“**Personal Property**” is defined in the Lease.

“**Port**” means the City and County of San Francisco acting by and through the San Francisco Port Commission.

“**Port Event of Default**” is defined in *Section 15.3*.

“**Port’s Sign Guidelines**” is defined in *Exhibit M*.

“**Port Statement**” is defined in *Section 2.5(c)*.

“**Pre-LDDA Costs**” is defined in *Section 11.1*.

“**Preliminary Construction Documents**” is defined in *Section 9.2(a)(ii)*.

“**preservative-treated wood containing arsenic**” is defined in *Section 16.12*.

“**Prevailing Wage Requirements**” is defined in *Section 16.17(a)*.

“**Prior Theater Lease**” is defined in *Recital E*.

“**Project**” is defined in *Recital J*.

“**Project Cost**” is defined in *Section 11.1*.

“**Project Materials**” is defined in *Section 15.6*.

“**Project Requirements**” is defined in *Section 9.1(b)*

“**Public Trust**” means the public trust for commerce, navigation and fisheries, including the statutory trust imposed by the Burton Act.

“**Qualification Determination**” is defined in *Recital M*.

“**Quarterly Project Cost and Equity Statement**” is defined in *Section 9.8(a)*.

“**Record Drawings**” is defined in *Section 9.9(a)*.

“**Regulatory Agency**” and “**Regulatory Agencies**” means any local, regional, state or federal governmental agency or political subdivision having jurisdiction over the Site, Construction of the Improvements, including EPA, the California Environmental Protection Agency, RWQCB, the Army Corps of Engineers, SFPUC, and Port’s Chief Harbor Engineer.

“**Regulatory Approval**” means any authorization, approval, endorsement, amendment of any existing plans (including the Waterfront Plan), or permit required by any Regulatory Agency to Construct the Improvements, or determination of trust consistency by State Lands that Developer’s Construction of the Improvements and its proposed use of the Site is consistent with the Public Trust.

“**Release**” when used with respect to Hazardous Materials means any actual or imminent introduction, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, Exacerbation, escaping, leaching, dumping, or disposing into or inside any existing improvements, buildings or structures, or any Improvements constructed under this Agreement by or on behalf of Developer, or in, on, under or about the Site or any portion of the Site, other Port property, or the environment.

“**Remediate**” or “**Remediation**” when used with reference to Hazardous Materials means any activities undertaken to clean up, remove, contain, treat, stabilize, monitor, abate, remediate, remedy, or otherwise control Hazardous Materials, or to restore the affected area to the standard required by the applicable Environmental Regulatory Agency in accordance with applicable Environmental Laws and any additional Port requirements. “**Remediation**” includes those actions included within the definition of “**remedy**” or “**remedial action**” in California Health and Safety Code Section 25322, “**remove**” or “**removal**” in California Health and Safety Code Section 25323, and the creation of a remedial work plan to be approved by the appropriate Regulatory Agency when required.

“**Request for approval**” is defined in *Section 18.1(b)*.

“**Required Element**” is defined in *Section 9.5(a)*.

“**ROWS**” defined in *Recital C*.

“**RWQCB**” means the State of California Regional Water Quality Control Board.

“**saltwater immersion**” is defined in *Section 16.12*.

“**Schedule of Performance**” means the Schedule of Performance attached hereto as *Exhibit N*, as may be subsequently amended and approved in writing by Port from time to time.

“**Schematic Drawings**” generally means: (a) perspective drawings sufficient to illustrate the Improvements; (b) a site plan at appropriate scale showing relationships of the Improvements and their respective uses, designating public access areas, open spaces, walkways, loading areas, streets, parking, and adjacent uses--adjacent existing and proposed streets, arcades and structures also should be shown; (c) building plans, floor plans and elevations at appropriate scale and in detail sufficient to describe the Improvements, the general architectural character, and the location and size of uses; and (d) building sections showing all typical cross sections at appropriate scale and height relationships of those areas noted above. Schematic Drawings for the Improvements include the Schematic Drawings dated August 23, 2018, which were reviewed and approved by the Port Commission at its September 10, 2019 public meeting pursuant to Resolution No. 19-36, a copy of which is attached as *Exhibit O*.

“**Scope of Development**” means the narrative document attached hereto as *Exhibit A*.

“**Second Notice**” is defined in *Section 9.5(b)*.

“**Security Deposit**” is defined in the Lease.

“**SFPUC**” means the San Francisco Public Utilities Commission.

“**SHPO**” means the State’s Historic Preservation Officer.

“**Sign**” means any sign, whether free-standing or affixed to a structure, flag, advertisement, poster, or banner.

“**Significant Change**” has the same meaning as the meaning in the Lease.

“**Site**” is defined in *Section 1.1*.

“**Soft Costs**” is defined in *Section 11.1*.

“**Sole Source Resolution**” is defined in *Recital L*.

“**Special City Requirements**” is defined in *Section 15.1(g)*.

“**State**” means the State of California.

“**State Lands**” means the California State Lands Commission, a State agency.

“**SWL**” means seawall lot.

“**Target Close Date**” is defined in *Section 4.3(a)*.

“**Target Close Date Extension Fee**” is defined in *Section 2.2*.

“**Target CO Date Extension Fee**” is defined in *Section 2.6*.

“**Teatro**” is defined in *Recital G*.

“**Term Sheet**” is defined in *Recital O*.

“**Third Party**” means against any Person other than Port, the City, any Indemnified Party, or against any Person other than Developer and its respective Agents, or both, as the context requires.

“**Title Company**” is defined in *Section 4.2(a)*.

“**Title Defect**” is defined in *Section 4.7(b)*.

“**Title Defect Cure Period**” is defined in *Section 4.7(b)*.

“**Total Project Cost**” is defined in *Section 11.1*.

“**Transaction Costs**” is defined in *Section 2.5(a)*.

“**Transaction Documents**” means this Agreement, the Lease, and any other agreements contemplated by such documents.

“**Transfer**” is defined in *Section 14.1*.

“**Underpayment**” is defined in *Section 2.5(c)*.

“**Unmatured Developer Event of Default**” means any default that, with the giving of notice or the passage of time, or both, would constitute a Developer Event of Default under this Agreement.

“**Unmatured Port Event of Default**” means any default that, with the giving of notice or the passage of time, or both, would constitute a Port Event of Default under this Agreement.

“**WDAC**” means the Waterfront Design Advisory Committee authorized under Planning Code Section 240, whose members are appointed by the City and Port, and that is advisory to the Port Commission and to the City’s Planning Commission.

“**WLUP**” means the Port of San Francisco Waterfront Land Use Plan, including the Waterfront Design and Access Element, for the approximately 7-1/2 miles of waterfront property under Port jurisdiction.

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IN WITNESS WHEREOF the Parties have caused this Agreement to be executed by their duly appointed representatives as of the date first above written.

Port: **CITY AND COUNTY OF SAN FRANCISCO,**
a municipal corporation act by and through the
SAN FRANCISCO PORT COMMISSION

By: _____
Name: _____
Title: Executive Director
Date Signed: _____

Developer: **TZK BROADWAY, LLC,**
a California limited liability company

By: _____
Name: _____
Title: _____
Date Signed: _____

APPROVED AS TO FORM:
DENNIS HERRERA, City Attorney

By: _____
Name: _____
Deputy City Attorney

Port Resolution No.: 19-36 on September 10, 2019
Board Resolution No.: [] on [], 2019]

EXHIBIT

Exhibit Test START HERE

DRAFT