



Council Meeting: March 3, 2009

SUBJECT: Approval of a Disposition & Development Agreement between the City and Mid-Peninsula Housing Coalition regarding assignment of a ground lease and development of 124 Units of Affordable Senior Housing at 660 S. Fair Oaks Avenue

REPORT IN BRIEF

For nearly twenty years, the City and the County of Santa Clara have been collaborating on a long-range plan to develop an affordable senior housing project on what has been relatively underutilized County property at the site of the former county health clinic building on the corner of Fair Oaks and Garland Avenues, at 660 S. Fair Oaks Avenue. The old county clinic was recently demolished and a new, larger Valley Health Clinic was built by the County to replace it. The current plans to redevelop the site include: 1) allowing a non-profit housing developer, Mid-Peninsula Housing Coalition (MPHC), to build a 124-unit apartment project for very low income seniors on the southern portion of the property, and 2) replacing the existing surface parking for the clinic with a parking structure to be located on the northeastern corner of the parcel, between the clinic and the eastern property line.

On November 25, 2008 the Council approved a ground lease agreement with the County of Santa Clara for the portion of the County property to be the site of the senior apartment project. The lease agreement allows the City (and/or its assignee, MPHC) to construct a senior housing development on the leased portion of the county property, in exchange for a lump-sum lease payment of approximately \$5.667 million for an 85-year lease term. This payment includes an initial lease payment of \$450,000, plus \$5,050,000 for construction of the parking garage to replace the clinic's surface parking, plus \$167,000 for the cost to demolish the prior county clinic (already completed).

The draft Disposition and Development Agreement (DDA), included as Attachment A to this Report, sets forth the terms under which the City may provide \$5.667 million in Housing funds toward development of the senior housing project. The DDA includes financing terms, development requirements including design considerations, long-term affordability covenants and property management requirements.

BACKGROUND

The City and County have been discussing the potential for developing senior housing on the surface parking of this county clinic site for nearly 20 years, in order to help meet the increasing need for more affordable housing for very low income seniors in Santa Clara County, particularly in the Sunnyvale area. Following more detailed negotiations between the parties in recent years, the City issued a Request for Proposals (RFP) in November 2007 to select a non-profit housing developer to build and manage the envisioned affordable senior rental housing at this site, adjacent to the newly built Santa Clara Valley Medical Clinic. In February 2008, through the RFP process, the City selected the non-profit housing developer Mid-Peninsula Housing Coalition (MPHC) to build and operate the proposed senior housing.

The City Council approved an Exclusive Negotiating Rights Agreement (ENRA) with MPHC on April 8, 2008. The ENRA outlined the responsibilities of the parties during the pre-development phase. The ENRA granted the developer the exclusive right to negotiate the assignment of the City's rights under a long-term ground lease to develop and manage the senior housing project. The ENRA also identified project management responsibilities and financial contributions required of the developer during the term of the ENRA.

In July 2008, the City provided a conditional funding commitment of \$1.2 million in HOME funds to MPHC for this housing project. As a match, MPHC agreed to contribute \$500,000 toward the County ground lease, in addition to the City commitment of \$5.67million (including the HOME funds), for a total payment of \$6.167 million to the County for the 85-year lease of the housing site. The senior housing units will be affordable to very low and extremely low income seniors, under several long-term regulatory agreements with various funding agencies, including the City, the County Housing Authority/HUD, and the State, among others.

In November 2008 the Council formally approved the ground lease agreement with the County of Santa Clara, which has since been signed by both parties. The agreement includes the lease payment terms described above, as well as specifics regarding the leased area, construction of the parking garage for the County clinic, timing and other related details. Over the past several months, City staff and counsel, in consultation with MPHC, have developed the proposed DDA. The terms of the DDA are described in the following sections of this report.

EXISTING POLICY

The Housing and Community Revitalization Sub-Element of the Sunnyvale General Plan contains two goals relevant to this project:

Approval of Disposition & Development Agreement for 660 S. Fair Oaks

March 3, 2009

Page 3 of 6

- *Goal E:* Maintain and increase housing units affordable to households of all income levels and ages.
- *Goal F:* Improve housing conditions for people with special needs: Assist new housing developments and housing support services for the elderly.

The proposed senior housing project would support both of these goals, and its 124 new very low and extremely low income units would constitute a significant number of the very low income housing units needed to meet City's Regional Fair Share Housing Goals, established by the Association of Bay Area Governments (ABAG). City support of this project will clearly demonstrate the City's intent and commitment to supporting quality affordable housing projects. Such concrete actions to create affordable housing are a crucial part of obtaining State certification of the 2009-2014 Housing Sub-Element Update, currently in progress.

The project also supports the smart growth policies currently in various other elements of the General Plan, in particular the Land Use and Transportation Sub-Element. In addition to being consistent with City policies, the project's infill development concept, takes advantage of an underutilized public property with convenient amenities for seniors. These include a bus stop providing transit access to nearby shopping and other services, and on-site pedestrian access to various health services at the Valley Health Clinic.

DISCUSSION

The proposed DDA sets forth the timing, financing, performance requirements, and related terms under which the City, current lessee of the county housing site, would assign the ground lease to MPHC, to allow MPHC to develop and operate the affordable senior housing project for the long term. The housing covenants will require MPHC to build and operate the 124 housing units, including two management units, for extremely low and very low income seniors. In addition, the terms of the ground lease require the lessee (or assignee) to construct a parking garage that will provide 210 replacement parking spaces for the County Clinic, plus five surface parking spaces along the perimeter of the structure.

Project Financing

The project has been awarded a long-term operating subsidy from HUD in the form of 120 "project-based vouchers" to allow the rents to be affordable to very low and extremely low income independent seniors, while providing enough operating cash flow to ensure quality, reliable property management and maintenance, for up to thirty years. In order to further leverage the city financing with other available funding programs, the housing development will be split into two distinct site areas, to be owned by two sole-purpose entities controlled by MPHC, with two leased property descriptions, although the two

Approval of Disposition & Development Agreement for 660 S. Fair Oaks

March 3, 2009

Page 4 of 6

ground leases will otherwise have exactly the same lease provisions. Project A will include 75 apartments, with a construction cost of \$26 million and Project B will include 50 apartments, with a cost of \$17 million. Both projects will be able to utilize the project-based vouchers provided by the Housing Authority, allowing the project to serve extremely and very low income tenants. The two housing projects will appear to be one structure and have been reviewed by the City Planning staff as one project. Both projects will be constructed at the same time, under one construction contract.

The Disposition and Development Agreement includes the terms for provision of the City's Housing Mitigation and HOME funds, and requirements for MPHC to finance, construct and operate the housing project. The DDA also outlines the development costs, contingencies and responsibilities of the developer, and sets forth the City affordability restrictions, which require at least 30% of the units to be reserved for extremely low income seniors, and the balance for very low income seniors, for a term of 55 years. The DDA includes exhibits detailing the sources and uses of City funds for the project, the overall project Financial Plan, and forms for the grant and loan documents and regulatory agreements to be executed by the parties at the appropriate time, prior to disbursement of City funds.

Development Approvals and Design Review

The housing development, as proposed, consists of 124 units of senior housing units in a four-story building over podium parking, built as two distinct components (Project A and Project B) at the same time.

The detailed design and Planning Commission review of the senior housing project is described more fully in the Planning Report to Council, also on this meeting Agenda. Although the parking structure, as a County facility on County-owned land, does not require City permitting review, the proposed structure has been reviewed by the Planning Commission at hearing on February 9, 2009, and they provided some design suggestions for the Council's consideration, including: additional landscape buffering, increased setbacks, submerging of one or more levels of the garage, and/or greater façade detail and variety on the garage.

Staff consulted with County facilities management regarding these suggestions, and the County agreed to most of the suggestions except for the increased setbacks, due to loss of surface parking spaces that would result. They also stipulated that the improved landscaping and architecture should not require any additional maintenance time and expense beyond that originally proposed. Regarding submerging the garage one or more levels, the cost would exceed \$1 million. However, an option has been developed to submerge the eastern half of the garage one-half level, which would reduce the easterly wall height from 37 feet to 27 feet (overall 10 foot reduction). The additional cost to submerge

Approval of Disposition & Development Agreement for 660 S. Fair Oaks

March 3, 2009

Page 5 of 6

the garage one half level has been estimated at \$200,000. Staff is recommending that the Council allocate HOME funds for this additional expense.

Project Timeline

The following is a draft of the timeline for the proposed project, including project review, preliminary site work, construction of the garage, and housing construction.

<u>Date</u>	<u>Activity</u>
March 2009	City Council consideration of Development Permits and DDA
April 2009	Begin garage construction
April 2009	Apply for financing for housing project
June 2009	Apply for building permits for housing
September 2009	Complete Garage; begin construction of housing project
December 2010	Complete construction

The garage construction would begin in April 2009, and be completed by September 2009. The construction of the housing will begin after MPHC has secured all necessary financing commitments for the project, anticipated to occur no later than September 2009. The housing construction is anticipated to take approximately 18 months to complete.

FISCAL IMPACT

The City contribution contemplated under the proposed DDA includes \$4,467,000 in Housing Mitigation funds and \$1.2 million in federal HOME funds, which the City conditionally committed to the project on July 22, 2008. The total estimated development cost is approximately \$347,000 per unit. The City funding amount provided in the proposed DDA equals approximately \$45,000 per unit, or 13% of the cost of each housing unit. In addition, MPHC has requested a short-term bridge loan of \$500,000 from the City, to pay for their final lease payment to the County. The bridge loan would be needed when the housing construction begins, for a term of 18 months, and could be funded with Housing Mitigation funds, which can be appropriated in the FY 2009-10 Recommended budget. If Council wishes to implement the option to partially submerge the garage, the City could allocate an additional \$200,000 for the project. There are sufficient funds available in the HOME fund to provide this increase, which can be included as a proposed expenditure in the Draft FY 2009-10 Action Plan and the FY 2009-10 Recommended Budget.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, in the Council Chambers lobby, in the Office of the City Clerk, at the Library, Senior Center, Community Center and

Approval of Disposition & Development Agreement for 660 S. Fair Oaks

March 3, 2009

Page 6 of 6

Department of Public Safety; posting the agenda and report on the City's Web site; and making the report available at the Library and the Office of the City Clerk.

ALTERNATIVES

1. Approve the attached Disposition and Development Agreement (DDA) with Mid-Peninsula Housing Coalition.
2. Approve the DDA with modifications.
3. Direct staff to include an additional \$200,000 in HOME funds for this project in the Draft FY 2009-10 Action Plan, to be considered by Council in May 2009.
4. Do not approve the proposed DDA or additional funding for the garage.

RECOMMENDATION

Staff recommends that the City Council approve Alternatives 1 and 3.

Approval of the Disposition and Development Agreement for 660 S. Fair Oaks, Sunnyvale, Attachment A, between the City of Sunnyvale and Mid-Peninsula Housing Coalition, will allow for the assignment of the ground lease to MPHC and City funding for the development of 124 units of senior affordable housing. Including an additional \$200,000 in HOME funds for the project in the Draft FY 2009-10 Action Plan will enable MPHC to partially submerge the County garage.

Reviewed by:

Hanson Hom, Director, Community Development Department
Prepared by: Suzanne Isé, Housing Officer

Approved by:

Mary Bradley
Finance Director

Approved by:

Gary Luebbers
City Manager

Attachments

- A. Draft Disposition and Development Agreement

DISPOSITION AND DEVELOPMENT AGREEMENT

by and between

CITY OF SUNNYVALE,
a municipal corporation

and

MID-PENINSULA HOUSING COALITION,
a California nonprofit public benefit corporation

TABLE OF CONTENTS

	<u>Page</u>
1. Recitals.....	1
2. City’s Financial Contribution	1
2.1 Overview.....	1
2.2 Bridge Loan	2
2.3 HOME Funds.....	2
2.4 Housing Mitigation Funds	2
3. Developer Pre-Disposition Requirements.....	2
3.1 Preliminary Site Plans and Elevations	3
3.2 Financial Plan.....	3
3.3 Construction Plans; Housing Improvements	3
3.4 Contractor and Architect.....	4
3.5 Permits and Approvals.....	4
3.6 Construction Loan Financing.....	4
3.7 Ground Leases	5
3.8 City Financing Documents	5
3.9 Performance and Payment Bonds	5
4. Pre-Disposition; Compliance with Ground Leases.....	5
4.1 Obligations.....	5
4.2 Communication; Waivers	6
4.3 Post-Closing.....	6
4.4 Termination Rights	6
5. Pre-Disposition; Construction of Parking Garage	6
5.1 General.....	6
5.2 City Conditions	6
5.3 Construction Contract	7
5.4 Advancement of Funds	7
5.5 Progress Reports	7
5.6 Equal Opportunity.....	8
5.7 City Review	8
5.8 Assignment of Ground Lease(s) Prior to Completion	8
6. Developer’s Pre-Disposition Conditions	8
6.1 Title.....	8
6.2 City Approvals.....	8
6.3 Construction Loan.....	9
6.4 City’s Financial Contribution	9
6.5 Development Approvals	9
7. Closing; Disposition of Property	9
7.1 Ground Leases	9
7.2 Opening Escrow.....	9
7.3 Close of Escrow	9
7.4 Costs of Escrow and Closing	10

8.	Post-Closing; Construction of Housing Improvements	10
8.1	Compliance with Applicable Laws and Ground Leases	10
8.2	Change in Plans or Budget.....	10
8.3	Completion of Housing Improvements.....	10
8.4	Progress Reports	10
8.5	Equal Opportunity.....	11
8.6	Prevailing Wages	11
8.7	City Review	11
8.8	Certificate of Completion	11
9.	Post-Construction Provisions.....	12
9.1	Affordability Restrictions	12
9.2	Maintenance of Housing Project.....	12
9.3	No Discrimination.....	12
10.	No Assignments	13
10.1	Changes Only Pursuant To This Agreement	13
10.2	No Encumbrances Except for Development Purposes	13
11.	Early Termination, Default and Remedies.....	13
11.1	No Fault of Parties	13
11.2	Fault of City	14
11.3	Fault of Developer	14
11.4	Construction Plans	14
12.	General Provisions	15
12.1	Notices, Demands and Communications	15
12.2	Conflict of Interests.....	15
12.3	Non-Liability of City Officials, Employees and Agents	15
12.4	Enforced Delay	15
12.5	Inspection of Books and Records	16
12.6	Indemnity by Developer	16
12.7	Insurance	16
12.8	Rights and Remedies Cumulative.....	17
12.9	Real Estate Commissions.....	17
12.10	Reasonable Approvals	17
12.11	Applicable Law	17
12.12	Severability	18
12.13	Legal Actions.....	18
12.14	Binding Effect.....	18
12.15	Relationship of Parties	18
12.16	No Warranties	18
12.17	Time is of the Essence	19
12.18	Complete Understandings of the Parties.....	19
12.19	Good Faith	19
12.20	City Approval.....	19
12.21	Termination.....	19

DISPOSITION AND DEVELOPMENT AGREEMENT

THIS DISPOSITION AND DEVELOPMENT AGREEMENT is entered into as of March ___, 2009 (“Effective Date”), by and between the City of Sunnyvale, a municipal corporation (“City”), and Mid-Peninsula Housing Coalition, a California nonprofit public benefit corporation (“Developer”).

RECITALS

A. The City has entered into two ground leases with the County of Santa Clara (collectively “County”) for approximately 25,301 square feet of real property (“Ground Lease A”) and approximately 16,143 square feet of real property (“Ground Lease B”) (collectively, the “Ground Leases”), located in the City of Sunnyvale, California, which real property is more particularly described in Exhibit A attached hereto and made a part hereof (the “Property”).

B. The City and Developer previously entered into negotiations pursuant to which Developer, or an affiliate, anticipates receiving an assignment of the Ground Leases from the City and developing and constructing on the Property a 124 unit senior affordable housing project and related improvements and amenities (the “Housing Project”) in two concurrent phases: Phase A consisting of 74 units (“Phase A”) and Phase B consisting of 50 units (“Phase B”). The Housing Project is further depicted on the site plan attached hereto as part of Exhibit B.

C. Developer shall also construct a parking garage in the location reflected on Exhibit B for the benefit of the County to replace surface parking used by the County that will be lost as a result of the development and operation of the Housing Project (the “Parking Garage”).

D. The purpose of this Agreement is to provide the terms and conditions under which the City shall assign its rights to the Ground Leases, the City will contribute certain funds for the benefit of the Housing Project, and Developer shall develop the Property and construct improvements in connection therewith.

E. The City has concluded that Developer has the necessary expertise, skill and ability to carry out the commitments herein contained and that this Agreement is in the best interests and will materially contribute to the City of Sunnyvale.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

1. **Recitals.** The parties hereby confirm the accuracy of the foregoing Recitals which are incorporated herein by this reference.
2. **City’s Financial Contribution.**

2.1 **Overview.** This Section 2 sets forth the City’s financial contribution to the Housing Project, which is summarized in Exhibit C-1 for Phase A and Phase B, respectively (collectively, the “City’s Financial Contribution”). The sources and uses of the City’s Financial

Contribution are summarized in Exhibit C-2. In no event shall the City be responsible for any additional amounts in excess of the City's Financial Contribution.

2.2 Bridge Loan. The City shall provide an interest-free bridge loan to Developer in the amount of Five Hundred Thousand Dollars (\$500,000) ("Bridge Loan"). Three Hundred Twenty-Five Thousand Dollars (\$325,000) of the Bridge Loan will be advanced by the City and paid directly to the County for a portion of the third installment of Base Rent payable pursuant to the terms of the Ground Leases. Developer shall be responsible for the timely payment of the remaining portion of the third installment of Base Rent to the County. The balance of the Bridge Loan, in the amount of One Hundred Seventy-Five Thousand Dollars (\$175,000), shall be disbursed by the City to Developer for purposes of landscaping and off-site improvements. The Bridge Loan shall be due and payable in full by Developer immediately upon Developer's receipt of the final installment of the investor capital contribution following construction of the Housing Improvements (but in no event later than one (1) year following the City's delivery of the City Certificates of Completion pursuant to Section 8.8 below). The Bridge Loan shall be evidenced by a non-interest bearing Promissory Note and secured by a Leasehold Deed of Trust, in such form as reasonably required by the City ("Bridge Loan Documents"). The Bridge Loan Documents shall be executed by Developer prior to the City's payment of the third installment of Base Rent or the disbursement of any funds.

2.3 HOME Funds. The City shall loan One Million Two Hundred Thousand Dollars (\$1,200,000) in HOME Investment Partnerships Act ("HOME") funds for Phase A of the Housing Project. Without limiting Developer's obligations hereunder or applicable law, Developer covenants and agrees to comply with all requirements applicable to the use of HOME funds for the Housing Project, including without limitation all applicable administrative and record-keeping requirements under the federal HOME Investment Partnership Act and 24 CFR Part 92, as amended. The City's contribution of the HOME funds will be evidenced by a Promissory Note (which shall bear simple interest of three percent (3%) per annum and be payable in full upon fifty five (55) years following the City's issuance of a certificate of occupancy for Phase A of the Housing Project), Loan Agreement, HOME Regulatory Agreement and Leasehold Deed of Trust with Assignment of Rents, in such form as reasonably required by the City ("HOME Loan Documents"). The Home Loan Documents (excluding the HOME Regulatory Agreement and Leasehold Deed of Trust with Assignment of Rents, which shall be executed and recorded in connection with Closing, as defined in Section 7.2 below) shall be executed by Developer by no later than thirty (30) days following the Effective Date.

2.4 Housing Mitigation Funds. The City shall loan or grant Four Million Four Hundred Sixty-Seven Thousand Dollars (\$4,467,000) in City Housing Mitigation Funds, to be allocated between Phase A and Phase B as provided in Exhibit C-1. The City's contribution of the Housing Mitigation Funds to the Housing Project will be evidenced by a Promissory Note, Loan Agreement, Housing Fund Regulatory Agreement and Leasehold Deed of Trust with Assignment of Rents with respect to Phase A and a Grant Agreement, forgivable Promissory Note, Housing Fund Regulatory Agreement and Leasehold Deed of Trust with Assignment of Rents with respect to Phase B, in such forms as reasonably required by the City ("Housing Mitigation Fund Documents"). The Housing Mitigation Fund Documents (excluding the Housing Fund Regulatory Agreements and Leasehold Deeds of Trust with Assignment of Rents,

which shall be executed and recorded in connection with Closing) shall be executed by Developer within thirty (30) days following the Effective Date.

3. **Developer Pre-Disposition Requirements.** The provisions of this Section 3 set forth covenants as well as the conditions precedent to the City's obligation to assign the Ground Leases to Developer and Developer's commencement of construction of the Housing Improvements, as defined below. Developer acknowledges that no extensions of any applicable dates or time limits set forth in this Section 3 shall be effective unless such date or time limit is extended by the City at the discretion of its City Manager.

3.1 **Preliminary Site Plans and Elevations.** Prior to the execution of this Agreement, Developer has submitted to the City the preliminary site plan and building elevations for the Housing Project and Parking Garage, collectively referred to as the "Preliminary Plans." The Preliminary Plans for the Housing Project call for the improvement of the Property with a 124 unit senior affordable housing project in a four-story building over podium parking and related site improvements and amenities (collectively referred to here as the "Housing Improvements"). The Preliminary Plans for the Parking Garage call for a parking structure providing at least 210 parking spaces and related site improvements. The "Parking Garage Improvements" are further described and defined in the Ground Leases.

3.2 **Financial Plan.** Prior to the execution of this Agreement, Developer has submitted to the City a preliminary financial plan for the development of the Housing Improvements and the operation of the Housing Project, which is summarized in Exhibit D. Not later than one hundred fifty (150) days after the Effective Date, Developer shall submit a final Financing Plan for the development of the Housing Improvements and operation of the Housing Project, which shall be subject to the City's review and approval. The Financing Plan shall include (i) a cost breakdown by major cost category; (ii) a cash flow projection for completion of construction, (iii) a pro forma for operation of the Housing Project, (iv) identification of the sources of necessary funds to pay, when due, the costs indicated in the cash flow projection, (v) the sources of construction and permanent financing, (vi) financial statements or other evidence in form satisfactory to the City demonstrating that Developer has sufficient additional capital funds available and is committing such funds to cover the difference, if any, between costs of development of the Housing Improvements and the amount available to Developer from external sources to pay all anticipated development costs and (vii) such other information or documents reasonably requested by the City. If the proposed Financing Plan is not approved by the City, then the City shall notify Developer in writing of the reasons for disapproval. Developer shall thereafter submit to the City a revised proposed Financing Plan within fifteen (15) days of the notification of disapproval. The City shall approve or disapprove the revised proposed Financing Plan within ten (10) days of receipt. As a condition precedent to the City's obligation to assign the Ground Leases, Developer shall also submit to the City prior to Closing evidence reasonably satisfactory to the City that any conditions to the release or expenditure of funds described in the approved Financing Plan and the other sources of funding for the development of the Housing Improvements and the operation of the Housing Project have been met or will be met at the Closing and that the necessary funds will be available at the Closing for commencing construction of the Housing Improvements.

3.3 Construction Plans; Housing Improvements . Not later than one hundred fifty (150) days after the Effective Date, Developer shall submit to the City, for its review and approval, Construction Plans for the Housing Improvements, which shall include a construction management plan that sets forth Developer's plan for addressing the conditions of approval and mitigation measures for the Housing Improvements (including, without limitation, parking, traffic and the use of Garland Avenue). As used herein with respect to the Housing Improvements, "Construction Plans" mean all construction documentation that Developer and Developer's contractor(s) shall use in constructing the Housing Improvements (including landscaping, parking, and common and public areas, if applicable) and shall include, but not necessarily be limited to, final engineering drawings and landscaping plans and specifications and a time schedule for construction of the Housing Improvements. In addition, Developer shall concurrently submit to the City a Construction Budget. As used herein with respect to the Housing Improvements, "Construction Budget" means a cost breakdown by major cost category for the construction of the Housing Improvements in accordance with then current plans. The Construction Plans and Construction Budget, or any proposed material change, modification, revision or alteration thereto or therefrom, shall be approved or disapproved by the City within thirty (30) days of submittal. If the proposed Construction Plans or Construction Budget is not approved by the City, then the City shall notify Developer in writing of the reasons for disapproval. Developer shall thereafter submit to the City revised Construction Plans or Construction Budget within fifteen (15) days of the notification of disapproval. The City shall approve or disapprove the revised Construction Plans or Construction Budget within ten (10) days of receipt. For the purposes of this Section 3.3, a material change or deviation in the Construction Plans shall include (but is not limited to) any change in the parking available on-site, any change in the number of residential units or the amenities to be provided to the residents, or a change in the location, elevation or configuration of the building from that shown in the Preliminary Plans, and a material change in the Construction Budget shall mean changes in budget line items that result in a net increase of ten percent (10%) or more of the aggregate costs set forth in the Construction Budget.

3.4 Contractor and Architect. As a condition precedent to the City's obligation to assign the Ground Leases, the City shall have approved, in its reasonable discretion, Developer's selection of a general contractor and the form of construction contract for the Housing Improvements. Any proposed contractor and construction contract shall be approved or disapproved by the City within fifteen (15) days of submittal. All construction contracts shall contain the equal opportunity covenants described in Section 8.5 below and comply with all of the applicable requirements in the Ground Leases. Developer previously has retained Jon Worden Architects as the architect. The selection of the generator contractor by Developer and any proposed replacement of the architect shall require the prior written consent of the City, which consent shall be granted or denied by the City within fifteen (15) days of Developer's written request.

3.5 Permits and Approvals. As a condition precedent to the City's obligation to assign the Ground Leases, Developer shall have obtained from the City and County all permits and approvals necessary for the construction of the Housing Improvements. Developer acknowledges that execution of this Agreement by the City does not limit in any manner the discretion of the City in the approval process, and does not relieve Developer from the obligation to obtain all necessary permits and approvals, including building permits. Developer shall

promptly pay when due all customary and reasonable fees and charges of the City in connection with the processing and consideration of the City permits and approvals.

3.6 Construction Loan Financing. As a condition precedent to the City's obligation to assign the Ground Leases, construction lender(s) satisfactory to the City in its reasonable discretion shall be prepared to provide construction financing for the Housing Improvements (the "Construction Loan(s)"), on the following basic terms:

(a) the lenders shall be financial institutions or other commercial lenders in the business of making construction loans, or public agencies providing financing for affordable housing projects;

(b) Developer's assignees pursuant to Section 10.1 shall be the borrowers with respect to the Construction Loan;

(c) the Construction Loan shall be in an amount reasonably determined to be sufficient to complete the Housing Improvements in accordance with the Construction Plans and disbursements of the Construction Loan shall be made in accordance with the lender's standard disbursement requirements (the parties acknowledge that, among other things, the lender's approval of the Construction Plans and the Construction Budget shall be conditions precedent to any disbursements of Construction Loan proceeds towards construction of the Housing Improvements);

(d) the Construction Loan shall be secured by Developer's leasehold estate created by the Ground Leases;

(e) the Construction Loan shall have an initial term of not less than twelve (12) months with one (1) six (6) month extension option;

(f) the Construction Loan shall be evidenced by loan documents reviewed and approved by the City in its reasonable discretion. Any proposed loan documents shall be approved or disapproved by the City within fifteen (15) days of submittal; and

(g) the City shall be given reasonable rights of notice and cure with respect to any defaults under the Construction Loan.

3.7 Ground Leases. As a condition precedent to the City's obligation to assign the Ground Leases, Developer shall have complied with, and discharged on behalf of the City the obligations of Tenant to the extent arising under the Ground Leases (except as other provided in Section 4 below), including the completion of the Parking Garage Improvements, as further described in Section 5 below.

3.8 City Financing Documents. Developer shall have executed the Bridge Loan Documents, HOME Loan Documents and Housing Mitigation Fund Documents (as required by Section 2) and complied with the applicable terms, conditions and requirements thereof to the extent arising prior to Closing.

3.9 Performance and Payment Bonds. Developer shall secure the performance and payment bonds for the Housing Improvements required by the Ground Leases, naming the City as a co-obligee.

4. **Pre-Disposition; Compliance with Ground Leases.**

4.1 Obligations. Developer covenants and agrees to comply with all of the terms, conditions and requirements of the Ground Leases to the extent such terms, conditions and requirements are applicable during the term of this Agreement. Except for the obligations to make the payments of Rent under the Ground Leases (a portion of which shall be paid directly to the County by the City as part of the City's Financial Contribution as provided in Section 2), Developer shall be responsible for the timely payment of One Hundred Seventy Five Thousand Dollars (\$175,000) of the third installment of Base Rent pursuant to the Ground Leases and for performing all other obligations under the Ground Leases to the extent applicable during the term of this Agreement, whether accruing before or after the Closing. Nothing in this Agreement shall be deemed to limit the foregoing or Developer's obligations under the Ground Leases. The foregoing shall not require that Developer commence construction of the Housing Improvements, unless and until the Closing occurs.

4.2 Communication; Waivers. Developer shall copy the City with any and all notices or other written communications made in connection with the Ground Leases. At City's election, the City may participate in any meetings with the County and Developer related to the Ground Leases. Developer acknowledges and agrees that any waiver of the requirements under the Ground Leases by the County shall also require the written waiver thereof by the City.

4.3 Post-Closing. The Ground Lease Assignments (as defined in Section 7.2 below) that shall be executed by Developer in connection with Closing shall incorporate the terms of this Section 4. Following the Closing, the City shall be a third party beneficiary of Developer's performance of the covenants and obligations in the Ground Leases.

4.4 Termination Rights. The parties acknowledge that the City, as the Tenant under the Ground Leases, has certain termination rights pursuant to Section 202 thereof. The City shall retain the sole right to exercise such termination rights pursuant to the terms of the Ground Leases; provided, however, the City shall consult with Developer regarding the estimated costs of constructing the Parking Garage Improvements and shall meet and confer with Developer prior to delivering any notice of termination to the County under the Ground Leases.

5. **Pre-Disposition; Construction of Parking Garage .**

5.1 General. Developer shall construct the Parking Garage Improvements pursuant to all of the terms and conditions of the Ground Leases and shall obtain all consents and approvals from the County as required thereunder.

5.2 City Conditions. Prior to the commencement of any work on the construction of the Parking Garage Improvements, Developer shall submit to the City, for its review, comment and written approval, the following: (i) final Construction Plans for the Parking Garage Improvements, that includes a construction management plan that outlines Developer's measures for addressing the conditions of approval and mitigation measures related to the

construction of the Parking Garage Improvements (including, without limitation, parking, traffic and the use of Garland Avenue) and (ii) a final Construction Budget for the Parking Garage Improvements setting forth in detail the cost of the Parking Garage Improvements. Developer shall also secure the performance and payment bonds required by the Ground Leases, naming the City as a co-obligee and all permits and approvals necessary for the construction of the Parking Garage Improvements from the City and County. As used herein with respect to the Parking Garage Improvements, "Construction Plans" mean all construction documentation that Developer and Developer's contractor(s) shall use in constructing the Parking Garage Improvements (including landscaping, parking, and common and public areas, if applicable) and shall include, but not necessarily be limited to, final engineering drawings and landscaping plans and specifications and a time schedule for construction of the Parking Garage Improvements. As used herein with respect to the Parking Garage Improvements, "Construction Budget" means a cost breakdown by major cost category for the construction of the Parking Garage Improvements in accordance with the final Construction Plans. Any changes to the Construction Budget or Construction Plans for the Parking Garage Improvements shall be subject to the City's review and written approval, which shall not be unreasonably withheld.

5.3 Construction Contract. The parties acknowledge and agree that the Parking Garage Improvements will be constructed pursuant to a design-build agreement between the Developer and Douglas Ross Construction, Inc. The City shall have the right to review, comment upon, and approve the proposed form of construction agreement and related documents for the Parking Garage Improvements (the "Construction Documents"). The Construction Documents shall include a retainage schedule that is acceptable to the City. Any change orders under the Construction Documents shall be subject to the City's review and written approval. The City shall be identified as a third party beneficiary of the obligations of the contractor under the Construction Documents. In the event this Agreement terminates for any reason, City shall, upon written notice to the contractor(s), have the right to perform the obligations, and exercise the rights, of Developer pursuant to the Construction Documents.

5.4 Advancement of Funds. As part of the City's Financial Contribution (as further described and defined in Section 2 above), the City shall advance, no more frequently than on a monthly basis, the out-of-pocket costs that have been incurred by Developer pursuant to the Construction Contracts for the construction of the Parking Garage Improvements, subject to a cap of \$5,050,000 (the "Maximum Committed Amount"). In no event shall the City have any obligation to advance in excess of the Maximum Committed Amount for the construction and completion of the Parking Garage Improvements. Any costs in excess of the Maximum Committed Amount shall be the sole responsibility of Developer and paid by Developer. Sufficient supporting documentation must be submitted with each request for an advance and shall include documentation reflecting the tasks performed, percentage completion of the work, a list of the services and materials associated with the request, and such other information, documents, certifications, estoppels, and lien or other releases as requested by the City from time-to-time. Whether or not any such certification is required or given, and if given, whether or not each of the following representations shall be expressly set forth therein, by submitting any request for an advance, Developer shall be deemed to make to the City the following representations: (i) the information set forth in the request is, to Developer's best knowledge after due inquiry, true and complete; (ii) the documents submitted in support of the draw request are true and complete copies of the applicable documents, and Developer knows of no inaccurate

statements therein, except as Developer has expressly informed the City otherwise in writing at the time that the same were submitted, and (iii) all items shown on the request are bona fide costs for items set forth in the approved Construction Budget. Payment will be made within fifteen (15) calendar days following the City's receipt of invoice and satisfactory supporting documentation. No default, breach or event of default on behalf of Developer under this Agreement shall have occurred and be continuing as of the time of a request for the payment of an advance or on the date of funding of such advance.

5.5 Progress Reports. Until construction of the Parking Garage Improvements has been completed, Developer authorizes the City to have full access to all building inspection reports and other information at the City to assist the City in reviewing the actual progress of construction. Developer shall allow the City to review construction documents and records maintained by Developer (including those of its contractors and subcontractors) in the ordinary course of the construction as may be reasonably requested by the City. Developer shall prepare and deliver to City, on a monthly basis, a written progress report summarizing the monthly progress and identifying any issues or delays related to the Parking Garage. Developer shall permit the City, through its officers, agents, or employees, to enter the Property at all reasonable times to inspect the work of construction to determine that such work is in conformity with the approved Construction Plans or to inspect the project for compliance with this Agreement. The rights granted to the City pursuant to this section are in addition to any rights of entry and inspection the City may have in exercising its municipal regulatory authority.

5.6 Equal Opportunity. During the construction of the Parking Garage Improvements, Developer shall not discriminate on the basis of race, religion, sex, or national origin in the hiring, firing, promoting or demoting of any person engaged in the construction work and shall require its contractors and subcontractors to refrain from discrimination on such basis.

5.7 City Review. Developer will be solely responsible for all aspects of its conduct in connection with the Parking Garage Improvements, including, but not limited to, the quality and suitability of the plans and specifications, the supervision of construction work, and the qualifications, financial conditions, and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants, and property managers. Any review or inspection undertaken by the City pursuant to the terms of this Agreement is solely for the purpose of determining whether Developer is properly discharging its obligations to the City, and should not be relied upon by Developer or by any third parties as a warranty or representation by the City as to the quality of the design or construction of the Parking Garage Improvements.

5.8 Assignment of Ground Lease(s) Prior to Completion. Notwithstanding anything to the contrary contained in this Agreement, the City may elect in its reasonable discretion, following a written request from Developer, to assign the Ground Leases to Developer prior to the completion of the construction of the Parking Garage Improvements if (a) the construction of the Parking Garage Improvements are proceeding in accordance with the terms of this Agreement, the Construction Documents and the Ground Leases with no liens or stop notices filed in connection therewith and (b) the closing of the assignment of one or both of the Ground Leases at such time is required to satisfy the conditions of any of the financing commitments for the Housing Improvements.

6. **Developer's Pre-Disposition Conditions** The provisions of this Section 6 set forth the conditions precedent to Developer's obligation to enter into the assignment of the Ground Leases of the Property with the City.

6.1 **Title**. The Title Company (as defined in Section 7.2 below) shall be prepared to issue to Developer ALTA policies of leasehold title insurance, insuring Developer's leasehold estates in the Property pursuant to the Ground Leases.

6.2 **City Approvals**. The City shall have approved the Construction Plans and the Construction Budget for the Housing Improvements pursuant to Section 3.3 above and the architect, general contractor and construction contracts for the Housing Improvements pursuant to Section 3.4 above.

6.3 **Construction Loan**. The lender(s) providing the Construction Loan(s) described in Section 3.6 above shall be prepared to close such loan and Developer shall have executed all loan documents required in connection therewith.

6.4 **City's Financial Contribution**. The City has provided the City's Financial Contribution upon the terms and conditions provided by this Agreement.

6.5 **Development Approvals**. Developer shall have obtained the City and County approvals with respect to the Housing Improvements described in Section 3.5 above.

7. **Closing; Disposition of Property**

7.1 **Ground Leases**. In the event that the conditions set forth in Sections 3, 4, 5 and 6 above are satisfied, the City shall assign all rights and benefits as Tenant under the Ground Leases to Developer (or its permitted assignees, as provided by Section 10.1 below), and Developer shall assume all of the obligations of the Tenant under the Ground Leases from the County, on the terms, covenants, and conditions of the Ground Leases.

7.2 **Opening Escrow**. To accomplish the assignment of the Ground Leases, the parties shall utilize First American Title Company, 1737 North First Street, Suite 500, San Jose, CA 95112, Attn: Laura Denton (the "Title Company"). The parties shall execute and deliver to the Title Company: (i) a recordable Memorandum of this Agreement ("Memorandum") for both Phase A and Phase B, (ii) an Assignment and Assumption of the Ground Leases for both Phase A and Phase B, which shall be in the form reasonably requested by the City and include such provisions as may be required by the County pursuant to the Ground Leases ("Ground Lease Assignments"), (iii) the regulatory agreements and leasehold deeds of trust as described and required by Section 2 above, and (iv) such written instructions as may be reasonably required to accomplish the terms hereof, so long as such instructions are consistent with this Agreement. The "Closing" shall occur on the date that the Memorandum and Ground Lease Assignments are recorded in the Official Records of the County of Santa Clara.

7.3 **Close of Escrow**. The above mentioned escrow shall close on or before December 31, 2009 ("Closing Date"); provided, however, the parties may extend the Closing Date upon written notice to the other in order to allow reasonable time to satisfy the conditions precedent set forth above. The written notice shall specify the reason(s) for the requested

extension of the Closing Date and the amount of time reasonably requested to satisfy the outstanding condition(s). In the event Developer is unable to secure the financing commitments necessary for the Housing Project by the Closing Date, Developer may extend the Closing Date for up to three one (1) year periods (subject to the Outside Closing Date) to obtain the financing commitments in accordance with the approved Financing Plan required for the Housing Project. For each extension, Developer shall meet and confer with the City to discuss the status and availability of financing for the Housing Project and provide any information or documentation requested by City in connection with the extension. The extension of the Closing Date for financing-related purposes shall be subject to Developer diligently pursuing at all times the financing required for the Housing Project, including the preparation and submission of qualified applications for the financing commitments in each applicable funding cycle, and providing periodic updates to the City, upon the City's request, of Developer's efforts to obtain the financing for the Housing Project. In addition to the foregoing, Developer shall be responsible for coordinating any delay in the commencement of the construction of the Housing Improvements with the County pursuant to the Ground Leases. The right of extension set forth in this paragraph shall not serve to excuse or extend Developer's delivery requirement under Section 3 above. Notwithstanding anything to the contrary in this Agreement, in no event shall the Closing Date be extended beyond December 31, 2012 ("Outside Closing Date").

7.4 Costs of Escrow and Closing. Developer shall pay all title insurance premiums, conveyance and transfer taxes, recording fees, and escrow fees related to this transaction.

8. Post-Closing; Construction of Housing Improvements

8.1 Compliance with Applicable Laws and Ground Leases. Developer shall cause all work performed in connection with construction of the Housing Improvements to be performed in compliance with (a) all applicable laws, ordinances, rules and regulations of federal, state, county or municipal governments or agencies now in force or that may be enacted hereafter, (b) all directions, rules and regulations of any fire marshal, health officer, building inspector, or other officer of every governmental agency now having or hereafter acquiring jurisdiction, and (c) the terms and provisions of the Ground Leases.

8.2 Change in Plans or Budget. If Developer desires to make any material change in the Construction Plans or the Construction Budget for the Housing Improvements as approved pursuant to Section 3.3, Developer shall submit the proposed change to the City for its approval which approval shall not be unreasonably withheld within ten (10) days following receipt by the City. If rejected within such time period, the previously approved Construction Plans and/or Construction Budget shall continue to remain in full force and effect. Any change in the Construction Plans required in order to comply with applicable codes shall be approved by the City, so long as such changes are approved by the County pursuant to the Ground Leases (to the extent the County's approval is required) and do not substantially nor materially change the architecture, design, parking spaces, number of units, or other amenities of the Housing Improvements as shown on the latest approved Construction Plans.

8.3 Completion of the Housing Improvements. Developer shall diligently pursue completion of the Housing Improvements in accordance with the schedule of completion

to be prepared by Developer and approved by the City prior to the Closing Date. Developer, for itself, its successors and assigns, hereby agrees to comply with all covenants and conditions contained in the loan documents governing the Construction Loan related to the construction of the Housing Improvements. Developer shall copy the City with any and all notices or other written communications made in connection with the Construction Loan(s), including without limitation all disbursement requests and all financial information required by the lender(s).

8.4 Progress Reports. Until construction of the Housing Improvements has been completed, Developer authorizes the City to have full access to all building inspection reports and other information at the City to assist the City in reviewing the actual progress of construction. Developer shall allow the City to review construction documents and records maintained by Developer in the ordinary course of the construction as may be reasonably requested by the City. Developer shall prepare and deliver to City, on a monthly basis, a written progress report summarizing the monthly progress and identifying any issues related to the Housing Improvements. Developer shall permit the City, through its officers, agents, or employees, to enter the Property at all reasonable times to inspect the work of construction to determine that such work is in conformity with the approved Construction Plans or to inspect the Property for compliance with this Agreement. The City is under no obligation to (a) supervise construction, (b) inspect the Property, or (c) inform Developer of information obtained by the City during any inspection. Developer shall not rely upon the City for any supervision or inspection. The rights granted to the City pursuant to this section are in addition to any rights of entry and inspection the City may have in exercising its municipal regulatory authority.

8.5 Equal Opportunity. During the construction of the Housing Improvements, Developer shall not discriminate on the basis of race, religion, sex, or national origin in the hiring, firing, promoting or demoting of any person engaged in the construction work and shall require its contractors and subcontractors to refrain from discrimination on such basis.

8.6 Prevailing Wages. Developer shall pay, or cause to be paid, prevailing rates of wages for construction work done in connection with the Housing Improvements. Developer shall indemnify, defend and hold the City, and its officers and employees, harmless against all claims made against Developer which arise out of or in connection with any failure or purported failure to pay prevailing wages.

8.7 City Review. Developer will be solely responsible for all aspects of its conduct in connection with the Housing Improvements, including, but not limited to, the quality and suitability of the plans and specifications, the supervision of construction work, and the qualifications, financial conditions, and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants, and property managers. Except for review for its own purposes under Section 3, the City is under no duty to review the plans and specifications, or to inspect construction of the Housing Improvements pursuant to this Agreement. Any review or inspection undertaken by the City pursuant to this Agreement is solely for the purpose of determining whether Developer is properly discharging its obligations to the City, and should not be relied upon by Developer or by any third parties as a warranty or representation by the City as to the quality of the design or construction of the Housing Improvements.

8.8 Certificate of Completion. When the obligations of Developer under this Section 8 and other provisions of this Agreement have been met with respect to the Housing Improvements, Developer shall request that the City issue a certificate to such effect (a “City Certificate of Completion”) for Phase A and Phase B, respectively, in a form recordable in the Official Records of the County of Santa Clara, which the City shall respond to within thirty (30) days of such a request. If Developer requests issuance of a City Certificate of Completion, but the City refuses, then the City shall provide Developer with a detailed written explanation of the basis for its refusal within ten (10) days of Developer's request. Notwithstanding the foregoing, if Developer requires the recording of the City Certificate of Completion prior to the full and satisfactory completion of the Housing Improvements pursuant to the terms of this Agreement, then prior to, and as a condition of, the issuance of the City Certificate of Completion, Developer shall post a bond, letter of credit or cash deposit in favor of the City, equal to the value of any work not satisfactorily completed by Developer on the Property (as reasonably determined by the City), which shall be completed without unreasonable delay. Upon full and satisfactory completion of the Housing Improvements, the City shall promptly release or return the bond, letter of credit or cash deposit. The City Certificate of Completion shall not be deemed a notice of completion under the California Civil Code, nor shall it constitute evidence of compliance with or satisfaction of any obligation of Developer to any holder of a deed of trust securing money loaned to finance the Housing Improvements or any portion thereof.

9. **Post-Construction Provisions**

9.1 Affordability Restrictions. All units in the Housing Project shall be affordable to very low income seniors (aged 62 years or older, with a gross household income not in excess of 50% of Santa Clara County Area Median Income (“AMI”)); and with at least thirty percent (30%) of the units being set-aside for extremely low income seniors with a gross household income not in excess of 30% AMI (“Affordability Restrictions”). At Closing, the parties shall record regulatory agreements against the Property requiring compliance with the foregoing Affordability Restrictions for a period of fifty-five (55) years.

9.2 Maintenance of Housing Project. Developer shall cause all portions of the Development owned by Developer to be well maintained and repaired in a condition reasonably acceptable to the City, including but not limited to cleaning, painting, plumbing, carpentry, grounds care and such other maintenance and repairs as may be necessary.

9.3 No Discrimination. The following shall be included in any document evidencing the transfer of the Property (or portion thereof) and in any subsequent conveyances thereof:

“The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of race, color, creed, religion, sex, marital status, national origin, gender, disability, sexual orientation or ancestry in the sale, lease, sublease, transfer, use occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall

the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises so conveyed. The foregoing covenant shall run with the land.”

Developer shall include the following in any leases for the Housing Project:

“The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions: That there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, creed, religion, sex, marital status, national origin, gender, disability, sexual orientation or ancestry, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself, or any person claiming under or through him or her, establish or permit any such practices or discrimination or segregation with reference to the selection, location, number, use or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased.”

10. **No Assignments**

10.1 **Changes Only Pursuant To This Agreement.** The qualifications, experience and expertise of Developer is of particular concern to the City. It is because of these qualifications, experience and expertise that the City has entered into this Agreement. Developer may not assign or transfer any of its rights or obligations hereunder without the prior written consent of the City, which consent the City may withhold or condition in its sole and absolute discretion. Notwithstanding the foregoing, following the completion of the Parking Garage Improvements and the County’s acceptance thereof pursuant to the provisions of the Ground Leases, Developer may assign its rights, upon thirty (30) days advance written notice to City, to single purpose entities controlled and owned by Developer, directly or indirectly, for purposes of the assignment of the Ground Leases. The foregoing assignments shall not release Developer of its obligations hereunder.

10.2 **No Encumbrances Except for Development Purposes.** Notwithstanding any other provision of this Agreement, mortgages and deeds of trust, or any other reasonable method of security (including assignment of leases or ground leases to a lender as security for a loan), are permitted to be placed upon the Property, but only for the purpose of securing loans of funds to be used for the design and construction of Housing Improvements and any other expenditures reasonably necessary and appropriate to develop the Property under this Agreement.

11. **Early Termination, Default and Remedies.**

11.1 **No Fault of Parties.** The parties acknowledge that the termination of this Agreement resulting from the failure of any condition precedent to the assignment of the Ground Leases to be satisfied, despite the diligent and good faith efforts of the parties, shall not constitute a default on the part of any party hereto and, thereafter, neither party shall have any rights against or liability to the other. If this Agreement is terminated because of Developer's inability to obtain the financing commitments for the Housing Project required by the approved Financing Plan (despite Developer's diligent and good faith efforts in connection therewith and for no fault of the Developer), the City agrees that the promissory notes evidencing the City's Financial Contribution set forth in Section 2 shall be cancelled and no amounts shall be payable thereunder (excluding any amounts that have been previously advanced by the City pursuant to the Bridge Loan, which shall be due and payable in connection with such termination). In the event of the foregoing termination, the parties shall execute such documents as necessary to cancel the promissory notes, terminate the funding-related agreements, and remove any and all of Developer's rights and interests in the Property and Ground Leases.

11.2 **Fault of City.** The following events each constitute a basis for Developer to take action against the City:

(a) Upon the satisfaction or waiver of all conditions precedent running in its favor, the City without good cause fails to convey the Property to Developer in the manner described herein; or

(b) The City fails to provide the City's Financial Contribution (except in the event the City fails to provide the City's Financial Contribution due to Developer's failure to comply with the provisions of this Agreement or related agreements).

Upon the happening of any of the above described events, Developer shall first notify the City in writing of its purported breach or failure, giving the City ten (10) days from receipt of such notice to cure such breach or failure or if the nature of the breach or failure is such that it cannot reasonably be cured in ten (10) days, then giving the City such longer period as reasonably may be required for such cure provided that City commences action to cure the breach or default within said ten (10) day period and thereafter diligently pursues the cure to completion. In the event City does not then so cure or commence to cure within said ten (10) days, then Developer thereafter shall have the right to terminate this Agreement, and any other rights afforded it by law or in equity.

11.3 **Fault of Developer.** The following events each constitute a basis for the City to take action against Developer:

(a) Developer refuses to accept conveyance from the City of the Property within the time periods, and under such terms as herein called for;

(b) Developer fails to commence construction of the Housing Improvements or to complete same within the time limits set forth in the loan documents evidencing the Construction Loan or commits any other material default thereunder which remains uncured following any applicable notice and cure period; or

(c) Developer breaches any other provision of this Agreement.

Upon the happening of any of the above described events, the City shall first notify Developer in writing of its purported breach, failure or act above described, giving Developer ten (10) days from receipt of such notice to cure such breach, failure, or act, or if the nature of the breach or failure is such that it cannot reasonably be cured in ten (10) days, then giving Developer such longer period as reasonably may be required for such cure or action provided that Developer commences action to cure the breach or default within said ten (10) day period and thereafter diligently pursues the cure to completion. In the event Developer does not then so cure within said ten (10) days, or in the event that Developer does not commence curing a default which is not curable within said ten (10) days, the City thereafter shall be afforded the right to terminate this Agreement and any other rights and remedies afforded it by law or equity.

11.4 Construction Plans. If this Agreement is terminated pursuant to Sections 11.1 or 11.3 above, Developer shall deliver to the City copies of, and assign any rights to, any development or construction plans that Developer has had prepared for the Housing Improvements and Parking Garage Improvements.

12. **General Provisions**

12.1 Notices, Demands and Communications. Formal notices, demands, and communications between the City and Developer shall be given by: (i) nationally recognized overnight delivery service such as Federal Express, DHL or UPS, (ii) registered or certified mail, postage prepaid, return receipt requested, or (iii) delivered personally, to the offices of the City and Developer as follows:

CITY: City of Sunnyvale
456 West Olive Avenue
Sunnyvale, CA 94088-3707
Attn: City Manager

City of Sunnyvale
456 West Olive Avenue
Sunnyvale, CA 94088-3707
Attn: City Attorney

DEVELOPER: Mid-Peninsula Housing Coalition
303 Vintage Park Drive, Suite 250
Foster City, CA 94404
Attn: President

Such written notices, demands and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate by mail as provided in this Section 12.1.

12.2 Conflict of Interests. No member, official or employee of the City shall make any decision relating to the Agreement which affects his or her personal interests or the

interests of any corporation, partnership or association in which he or she is directly or indirectly interested.

12.3 Non Liability of Officials, Employees and Agents. No member, official, employee, representative or agent of either party shall be personally liable, or any successor in interest, in connection with or under the terms of this Agreement.

12.4 Enforced Delay. The performance by either party hereunder shall not be deemed to be in default where delays or defaults are due to war; insurrection; strikes; lock outs; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; lack of transportation; governmental restrictions (excluding those imposed by the City or the County); litigation (including suits filed by third parties concerning or arising out of this Agreement); unforeseeable weather or soils conditions which will necessitate delays; unforeseeable inability to secure necessary labor, materials or tools; delays of any contractor, sub contractor or supplier outside the reasonable control of the parties; acts of the other party in violation of the terms of this Agreement; acts or failure to act of any public or governmental entity (other than the acts or failure to act of the City pursuant to this Agreement or the County pursuant to the Ground Leases); or any other causes beyond the control or without the fault of the party claiming an extension of time to perform. The party claiming such extension shall send written notice of the extension to the other within thirty (30) days from the commencement of the cause. Times of performance under this Agreement may also be extended in writing by the City and Developer by mutual agreement of Developer and the City Manager unless the City Manager, in his or her discretion, refers the matter of extension to the City Council.

12.5 Inspection of Books and Records. The City has the right at all reasonable times to inspect on a confidential basis the books, records and all other documentation of Developer pertaining to its obligations under this Agreement.

12.6 Indemnity by Developer.

(a) Except as provided in subsection (d) below, Developer shall defend, indemnify, and hold harmless the City for any claim (“Claim”) against the City of any nature whatsoever arising out of or in connection with Developer’s purported acts or omissions on or about, or Developer’s occupancy, use or operation of, the Property or Developer’s performance or non-performance under or with respect to this Agreement, the Construction Documents or the Ground Leases. If any Claim is attributable to an action or omission of Developer’s construction contractor, such contractor shall also defend, indemnify and hold harmless the City against the Claim arising out of or in connection with Developer’s construction contractor’s purported acts or omissions on or about the Property.

(b) Upon knowledge of any Claim, the City shall promptly notify Developer and its construction contractor thereof in writing. Upon receipt of such written notice, Developer, and, if applicable, its construction contractor, shall defend at their own expense any suit based on the Claim. Such defense shall include provision of separate and independent counsel for the City where the City requires such counsel because the City reasonably determines that it cannot be adequately represented by Developer’s counsel. The City shall have the right to

choose such independent counsel. If any judgment or claims against the City shall be allowed, Developer and, if applicable, its construction contractor shall pay or satisfy such judgment or claims and pay all costs and expenses in connection therewith.

(c) Developer, the City, and Developer's construction contractor shall have an affirmative duty to cooperate with one another in the conduct of any suit arising from this Agreement or from development of the Property pursuant to this Agreement; provided, however, that such duty to cooperate shall be limited by any bona fide conflict of interest which arises during the course of any such suit.

(d) The foregoing provisions for Developer's indemnification of the City shall not apply to the extent that a Claim arises out of the gross negligence or willful misconduct of the City with respect to the Property or the Ground Leases.

12.7 Insurance.

(a) Developer shall maintain in force during the term of this Agreement public liability and property damage insurance, including personal injury, contractual, and owned and non owned automobiles, with such coverage and limits as may be reasonably requested by the City from time to time, but in no event for less than the sum of five million dollars (\$5,000,000) combined single limit.

(b) Public liability insurance policy or policies shall name the City as an additional insured, and any policy or policies shall contain cross liability endorsements. An endorsement shall be provided which states the coverage is primary insurance and that no other insurance affected by the City will be called upon to contribute to a loss under this coverage.

(c) Developer (and its contractor and sub-contractors) shall also comply with all of the insurance requirements set forth in the Ground Leases and procure, at its own expense, the coverage required therein. To the extent that the County is required to be listed as an additional insured pursuant to such policies, Developer shall also cause the City to be an additional insured.

(d) A certificate evidencing such insurance coverage or coverages shall be filed with the City prior to the commencement of the term of this Agreement, and said certificate shall provide that such insurance coverage will not be canceled or reduced without at least thirty (30) days' prior written notice to the City.

(e) If such coverage is to be canceled or reduced, Developer shall, not later than thirty (30) days prior thereto, file with the City a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies. Upon failure to so file such certificate, the City may, upon five (5) business days notice to Developer and at its option, procure such insurance coverage at Developer's expense, and Developer shall promptly reimburse the City for such expense upon receipt of billing from the City.

(f) Nothing herein shall be deemed to limit Developer's insurance obligations under the Ground Leases.

12.8 Rights and Remedies Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies are cumulative, and the exercise or failure to exercise one or more of such rights or remedies by either party shall not preclude the exercise by it, at the same time or different times, of any right or remedy for the same default or any other default.

12.9 Real Estate Commissions. Neither party shall be responsible to the other for any real estate commissions or brokerage fees which may arise from this Agreement or otherwise be incurred by the other party.

12.10 Reasonable Approvals. Unless this Agreement provides otherwise, where an action under this Agreement requires approval of a party, such approval shall not be unreasonably withheld.

12.11 Applicable Law. This Agreement shall be interpreted under and pursuant to the laws of the State of California.

12.12 Severability. If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

12.13 Legal Actions. In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the party prevailing in any such action shall be entitled to recover against the party not prevailing all reasonable attorney's fees and costs incurred in such action.

12.14 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors in interest and assigns of each of the parties hereto except that there shall be no transfer of any interest by any of the parties hereto except pursuant to the terms of this Agreement. Any reference in this Agreement to a specifically named party shall be deemed to apply to any successor, heir, administrator, executor or assign of such party who has acquired an interest in compliance with the terms of this Agreement, or under law.

12.15 Relationship of Parties. Nothing in this Agreement is intended to or does establish the parties as partners, co-venturers, or principal and agent with one another.

12.16 No Warranties. The City expresses no warranty or representation to Developer as to fitness or condition of the Property which is the subject of this Agreement for the building or construction to be conducted thereon. Developer has performed its own review of the condition of the Property and the feasibility of the development of the Housing Improvements and operation of the Housing Project, including, but not limited to preparing preliminary site plans and elevations and performing soils testing, engineering studies and environmental site assessments. Developer acknowledges and agrees that Developer is relying solely upon its own inspections, investigations and review of available information to determine the same. Developer acknowledges and agrees that Developer is accepting the Property in its "AS IS" condition and "WITH ALL FAULTS, IF ANY," and is not relying on any warranties,

promises, understandings or representations, express or implied, of City or any representative, employee or agent of the City relating to the Property. The City does not represent or warrant the accuracy, completeness, or adequacy of any matters disclosed by City or its representatives, employees and agents. Developer acknowledges that Developer is a sophisticated and experienced owner and developer of properties similar to the Property, and that Developer, in determining whether to develop the Property pursuant to this Agreement, will undertake and rely upon its own inspections, analyses and evaluations of the Property. Developer, on behalf of itself and anyone claiming by, through or under Developer, hereby assumes the above-mentioned risks and hereby expressly waives any right Developer and anyone claiming by, through or under Developer, may have under Section 1542 of the California Civil Code, which reads as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

Developer's Initials: _____

12.17 Time is of the Essence. In all matters under this Agreement, the Parties agree that time is of the essence.

12.18 Complete Understandings of the Parties. This Agreement consists of the text of the Agreement and the attached Exhibits and constitutes the entire understanding and agreement of the parties.

12.19 Good Faith. The parties recognize that it is impractical in this Agreement to provide for every contingency which may arise during the life of the Agreement, and the parties hereby agree that it is their intention that this Agreement shall operate fairly between them and without detriment to the interests of either of them, and that, if during the term of this Agreement either party believes that this Agreement is operating unfairly, the parties will use their best efforts to agree on such action as may be necessary to remove the cause or causes of such unfairness. Without limiting the generality of the foregoing, to the extent that various materials may require the consent of the City and revision and resubmission by Developer, each party agrees to act diligently and in good faith in fulfilling such obligations hereunder.

12.20 City Approval. Unless specifically provided to the contrary herein, to the extent that the consent or approval of the City is required with respect to any matter set forth herein, the City Manager shall have the authority to act for the City, unless the City Manager, in his or her discretion, refers the matter to the City Council.

12.21 Termination. Subject to earlier termination as set forth herein, the parties' obligations to each other hereunder shall in any event terminate one (1) year following Developer's completion of the Housing Improvements and recordation of the City Certificates of Completion.

WHEREFORE, the parties have executed this Agreement as of the date first above written.

CITY OF SUNNYVALE,
a municipal corporation

By: _____
Name: _____
Title: _____

**MID-PENINSULA HOUSING
COALITION,** a California nonprofit public
benefit corporation

By: _____
Name: _____
Title: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

EXHIBIT A

PROPERTY

[attached]

**LEGAL DESCRIPTION
FOR LEASED PREMISES A**

Being a portion of Parcel A as said Parcel is shown on that certain Parcel Map, filed for record on May 6, 1982 in Book 500 of Maps at Page 6 in the County of Santa Clara, State of California and as corrected by Certificate of Correction recorded June 10, 1992 in Book G836, page 242, as Document No. 7386642 of Official Records, more particularly described as follows:

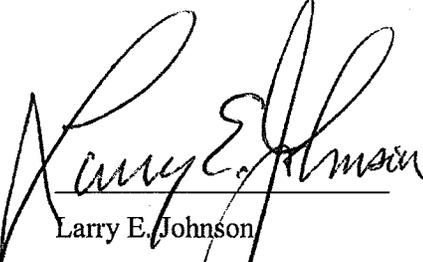
COMMENCING the southeasterly corner of Parcel B of said map, thence along the southerly line of said Parcels A and B, North 74°44'54" West, 152.80 feet to the **POINT OF BEGINNING**; thence continuing along said southerly line, North 74°44'54" West, 186.72 feet; thence leaving said southerly line the following eight (8) courses and distances: (1) North 15°15'06" East, 14.45 feet, (2) North 74°44'54" West 21.31 feet, (3) North 15°15'06" East, 113.25 feet, (4) South 74°45'16" East, 164.51 feet (6) South 15°14'04" West, 22.03 feet, (7) South 74°45'16" East, 43.52 feet and (8) South 15°15'06" West, 105.69 feet to the **POINT OF BEGINNING**.

CONTAINING: 25,302 square feet, more or less.

This real property description has been prepared by me, or under my direction, in conformance with the Professional Land Surveyors Act.

2/03/2009
Date

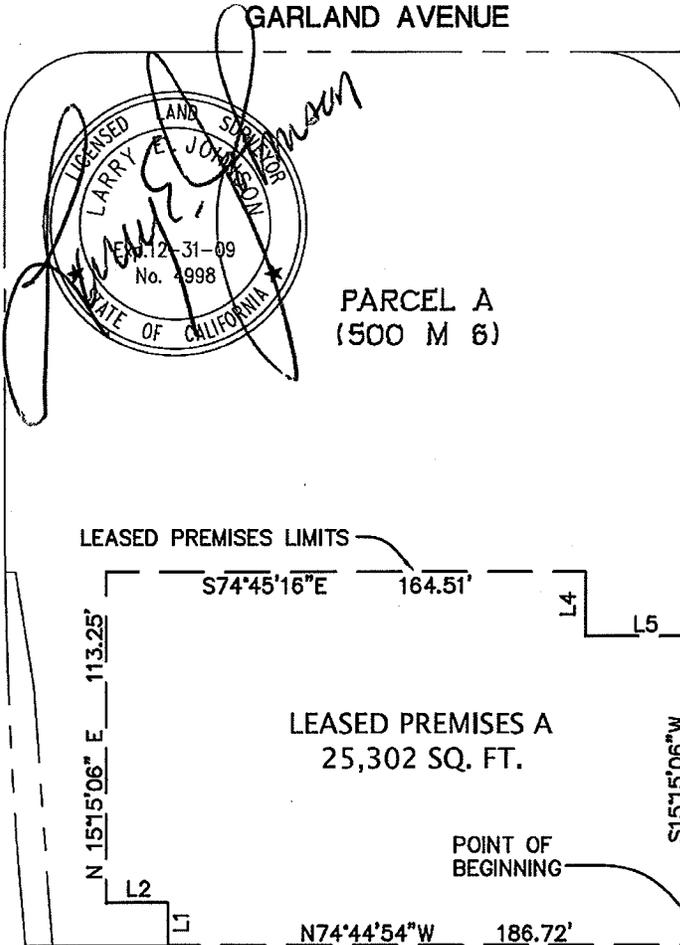



Larry E. Johnson
L.S. No. 4998
Expiration Date: 12-31-2009

CITY OF SUNNYVALE
 COUNTY OF SANTA CLARA
 STATE OF CALIFORNIA

FAIROAKS AVENUE

GARLAND AVENUE



PARCEL C
 (500 M 6)

PARCEL A
 (500 M 6)

LEASED PREMISES LIMITS

S74°45'16"E 164.51'

N 15°15'06" E 113.25'

LEASED PREMISES A
 25,302 SQ. FT.

POINT OF BEGINNING

S15°15'06"W
 105.69'

PARCEL B
 (500 M 6)

N74°44'54"W 186.72'

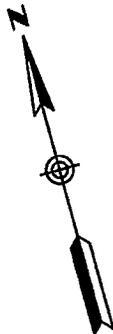
N74°44'54"W 152.80'

LEASED PREMISES LIMITS

POINT OF COMMENCEMENT
 SOUTHEASTERLY
 CORNER OF
 PARCEL B

LINE TABLE:

LINE	BEARING	DISTANCE
L1	N 15°15'06" E	14.45'
L2	N 74°44'54" W	21.31'
L3	S 06°07'19" W	40.46'
L4	N 15°14'04" E	22.03'
L5	S 74°45'16" E	43.52'



Scale 1" = 60 ft

PLAT TO ACCOMPANY DESCRIPTION OF
 LEASED PREMISES A



MARK THOMAS & COMPANY, INC.
 Providing Engineering, Surveying, and Planning Services

1880 Zanker Road
 San Jose, CA 95112
 (408) 463-5375

DESIGNED BY <u>CCB</u>	APPROVED ON <u>02/02/09</u>	JOB NO. <u>68-00608</u>	SHEET <u>2</u> / <u>2</u>
CHKD. BY <u>LEJ</u>	BY <u>LARRY E. JOHNSON</u>	FILE NO.	
DATE <u>02/02/09</u>	LS NO. 4998	12/31/08	
SCALE <u>1" = 60 FEET</u>			

**LEGAL DESCRIPTION
FOR LEASED PREMISES B**

Being a portion of Parcels A and B as said Parcels are shown on that certain Parcel Map, filed for record on May 6, 1982 in Book 500 of Maps at Page 6 in the County of Santa Clara, State of California and as corrected by Certificate of Correction recorded June 10, 1992 in Book G836, Page 242, as Document No. 7386642 of Official Records, more particularly described as follows:

BEGINNING at the southeasterly corner of Parcel B of said map, thence along the southerly line of said Parcels A and B, North 74°44'54" West, 152.80 feet; thence leaving said southerly line the following two (2) courses and distances: (1) North 15°15'06" East, 105.69 feet and (2) South 74°45'16" East, 152.67 feet to a point on the easterly line of said Parcel B; thence along said easterly line, South 15°10'50" West, 105.71 feet to the **POINT OF BEGINNING**.

CONTAINING: 16,144 square feet, more or less.

This real property description has been prepared by me, or under my direction, in conformance with the Professional Land Surveyors Act.

2/03/2009
Date



Larry E. Johnson
Larry E. Johnson
L.S. No. 4998
Expiration Date: 12-31-2009

CITY OF SUNNYVALE
 COUNTY OF SANTA CLARA
 STATE OF CALIFORNIA

GARLAND AVENUE

FAIROAKS AVENUE



PARCEL A
 (500 M 6)

PARCEL C
 (500 M 6)

N 15°15'06" E
 105.69'

S 74°45'16" E 152.67'

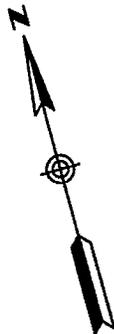
LEASED PREMISES B
 16,144 SQ. FT.

PARCEL B
 (500 M 6)

N 74°44'54" W 152.80'

S 15°10'50" W 105.71'

POINT OF
 BEGINNING



Scale 1" = 60 ft

PLAT TO ACCOMPANY DESCRIPTION OF
 LEASED PREMISES B



MARK THOMAS & COMPANY, INC.
 Providing Engineering, Surveying, and Planning Services

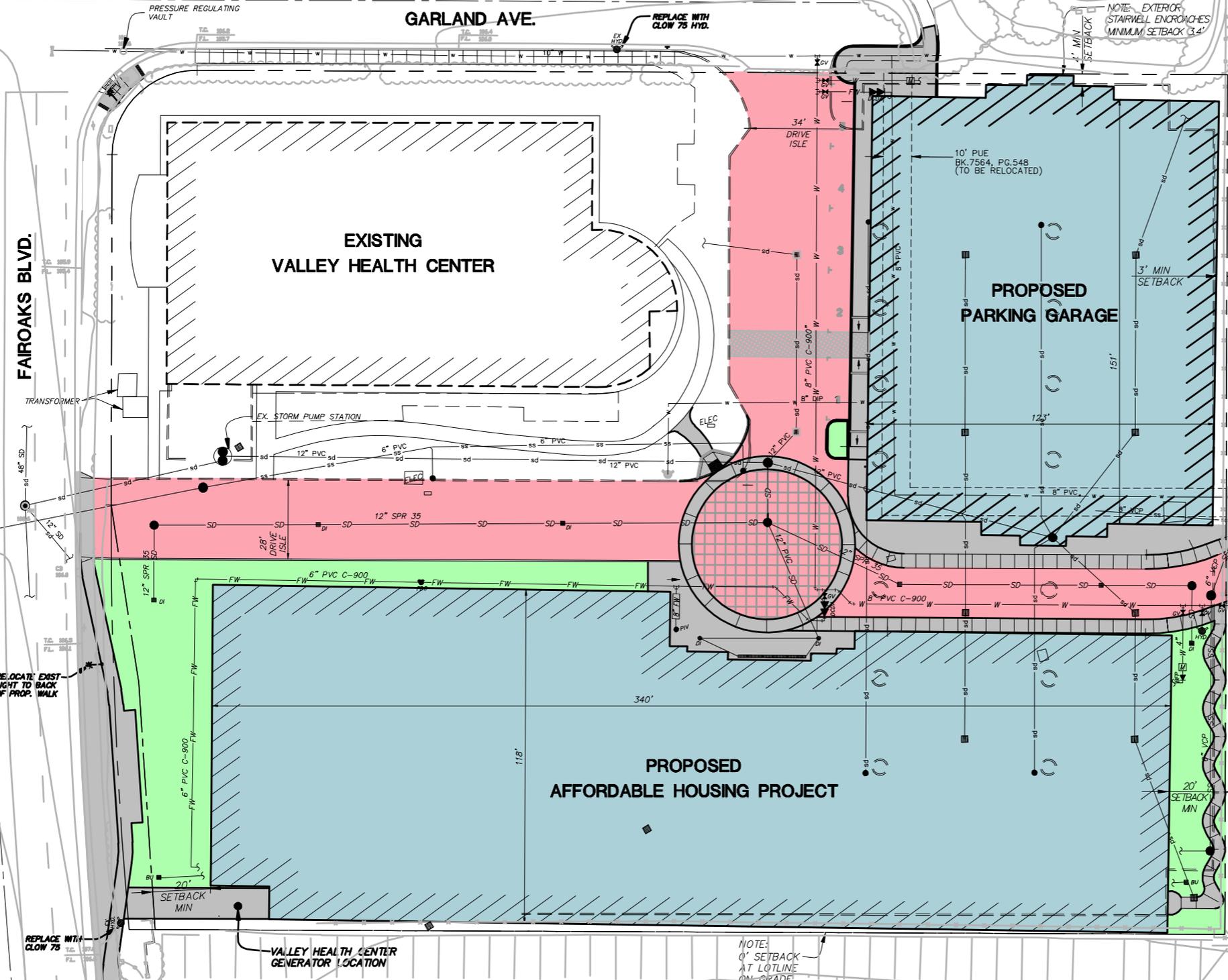
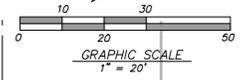
1960 Zenker Road
 San Jose, CA 95112
 (408) 453-5373

DESIGNED BY <u>CCB</u>	APPROVED ON <u>02/02/09</u>	JOB NO. 58-00908	SHEET 2 / 2
CHK. BY <u>LEJ</u>	BY <u>LARRY E. JOHNSON</u>	FILE NO.	
DATE <u>02/02/09</u>	LS NO. 4998	12/31/09	2
SCALE <u>1" = 60 FEET</u>			

EXHIBIT B

SITE PLAN

[attached]



STANDARD SYMBOLS & LEGEND

DESCRIPTION	EXISTING	PROPOSED
STORM DRAIN MAIN AND MANHOLE	sd	12" SD
SANITARY SEWER MAIN AND MANHOLE	ss	8" SS
SANITARY SEWER CLEAN OUT	ss	co 18" SS
FIRE WATER MAIN & VALVE	w	18" FW
DOMESTIC WATER MAIN & VALVE	w	8" W
FLAT GRATE INLET	sd	12" SD
CONCRETE WALK		
CURB, SIDEWALK & GUTTER		
VERTICAL CURB		
ELECTROLIER		
POST INDICATOR VALVE		
FIRE HYDRANT		
FIRE DETECTION CHECK		
HANDICAP RAMP		
PROPERTY LINE		
DRIVEWAY		
METER		
ROOF DRAIN BUBBLE UP		
BACKFLOW PREVENTOR		
DETECTOR CHECK VALVE APPARATUS		
GATE VALVE		
BUILDING FOOTPRINT		
CONCRETE		
LANDSCAPING		
ASPHALT		

FAIROAKS BLVD.

GARLAND AVE.

EXISTING VALLEY HEALTH CENTER

PROPOSED PARKING GARAGE

PROPOSED AFFORDABLE HOUSING PROJECT

GARLAND AVE.

RELOCATE EXIST LIGHT TO BACK OF PROP. WALK

REPLACE WITH CLOW 75

VALLEY HEALTH CENTER GENERATOR LOCATION

NOTE: 0' SETBACK AT LOTLINE ON-GRADE



MARK THOMAS & COMPANY, INC.
 Providing Engineering, Surveying, and Planning Services
 1960 Zanker Road
 San Jose, CA 95112
 (408) 453-5373

DESIGNED BY : CC
 DRAWN BY : MRW
 DATE : 10/27/08
 SCALE : AS NOTED
 MT&CO. JOB NO. : 58-0090B

NUM	DATE	BY	REVISIONS	CITY ENGINEER APPROVAL	DATE

EXHIBIT B

SUNNYVALE AFFORDABLE HOUSING PROJECT
TENTATIVE PARCEL MAP
 660 SOUTH FAR OAKS AVENUE, SUNNYVALE, CALIFORNIA

1
 OF 1
 FILE NO.
 58-0090E

EXHIBIT C-1

**SUMMARY OF CITY'S
FINANCIAL CONTRIBUTION**

	<u>Phase (Project) A</u>	<u>Phase (Project) B</u>
Bridge Loan	\$ 300,000	\$ 200,000
HOME Funds Loan	\$1,200,000	
Housing Mitigation	<u>\$2,200,200</u> Loan	<u>\$2,266,800</u> Revocable Grant
	<u>\$3,700,200</u>	<u>\$2,466,800</u>

EXHIBIT C-2

**SOURCES AND USES OF
CITY'S FINANCIAL CONTRIBUTION**

CITY'S PERMANENT FINANCING:

Sources

HOME Funds	\$1,200,000
<u>Housing Mitigation</u>	<u>\$4,466,800</u>
TOTAL	\$5,666,800

Uses

First Installment of Base Rent to County	\$ 167,000
Second Installment of Base Rent to County	\$ 450,000
<u>Required Off-Site Improvements (i.e., Parking Structure)</u>	<u>\$ 5,049,800</u>
TOTAL	\$ 5,666,800

CITY'S INTERIM FINANCING:

Sources

Bridge Loan (Short Term, Construction Period)	\$ 500,000
---	-------------------

Uses

Landscaping/Off-Sites	\$ 175,000
<u>Third Installment of Base Rent to County</u>	<u>\$ 325,000</u>
TOTAL	\$ 500,000

EXHIBIT D

SUMMARY OF DEVELOPER'S PRELIMINARY FINANCIAL PLAN

Project A	(74 Units)
City Contribution	\$ 3,400,200
Permanent FNMA Mortgage	\$ 5,692,241
Tax Credit Investor Proceeds	\$ 15,682,212
Infill Grant	\$ 1,363,000
Deferred Developer Fee	\$ 372,447
Total Project Sources/Cost	\$ 26,510,100

Project B	(50 Units)
City Contribution	\$ 2,207,373
Permanent FNMA Mortgage	\$ 3,427,618
Tax Credit Investor Proceeds	\$ 5,572,742
MHP	\$ 2,747,264
Infill Grant	\$ 1,001,758
CalHFA/AHP Residual Receipts Loan	\$ 250,000
Deferred Developer Fee	\$ 906,123
MHSA Rental	\$ 1,800,000
Total Sources/Cost	\$17,912,879