

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

City of Sunnyvale
Community Development Department
Housing Division
P.O. Box 3707
Sunnyvale, CA 94088-3707
Attn: Housing Officer

No fee for recording pursuant to
Government Code Section 27383

(Space above for Recorder's Use)

APN(s): [_____]

**BELOW MARKET RATE HOUSING
DEVELOPER AGREEMENT AND DECLARATION OF RESTRICTIVE COVENANTS**

(Affordable Ownership Units)

[Insert Developer Name, Project Name]

This BELOW MARKET RATE HOUSING DEVELOPER AGREEMENT AND DECLARATION OF RESTRICTIVE COVENANTS ("**Agreement**") is entered into as of this _____ day of _____, 2015, by and between the CITY OF SUNNYVALE, a charter city and municipal corporation (the "**City**"), and _____, a _____ (the "**Developer**") (together the "**Parties**"), with reference to the following facts:

A. The City has adopted a Below Market Rate Ownership Housing Ordinance, Sunnyvale Municipal Code ("**SMC**"), Title 19, Article 5, Chapter 67 (the "**BMR Ordinance**") which requires that twelve and one half percent (12.5%) of residential units developed in new ownership housing and/or mixed-use developments containing eight (8) or more single-family, townhome or condominium dwelling units ("**Units**") be affordable to lower and moderate income households (the "**BMR Units**" or individually, the "**BMR Unit**"). The BMR Ordinance allows, under specified circumstances, the Developer to provide an alternative means of compliance. In calculating the number of BMR Units required for a development, any fractional unit required shall be satisfied by either developing one additional BMR Unit or by paying an in-lieu fee equal to the in-lieu fee for one whole BMR Unit multiplied by the fraction required (the "**Fractional In-Lieu Fee**") as set forth in Section 19.67.040 of the SMC¹. The BMR Ordinance is administered by the City's Community Development Department, Housing Division.

B. Developer is the owner of certain real property located at [street address] in the City of Sunnyvale, California described in attached Exhibit A incorporated herein by this reference (the "**Property**"). In consideration of certain valuable land use and economic benefits conferred

¹ Unless indicated otherwise, all section references are to the Sunnyvale Municipal Code and to any successor provisions.

by the City upon the Property, Developer, for itself, its successors, heirs, grantees and assigns, hereby agrees to comply with the BMR Ordinance, as may be amended, as applied to the Property.

C. Developer has received a discretionary approval from the City to construct a total of _____ () Units known as Development Name (hereinafter referred to as the "**Project**") on the Property, and has applied for a final subdivision map for the Property (Tract Map No. _____). Pursuant to the BMR Ordinance and the conditions of approval included in the Project's land use entitlements (the "**Project Conditions**"), Developer is required to comply with the BMR Ordinance and to execute and record this Agreement prior to approval of any final or parcel map or issuance of any building permit, whichever occurs first (individually, a "**First Approval**").

D. This Agreement is executed in conjunction with the First Approval for a total of NUMBER (#) Units in the Project, which total consists of NUMBER (#) market-rate units (the "**Market Rate Units**") and NUMBER (#) BMR units.

E. Developer is required by the Ordinance to sell all BMR Units to Eligible Households at Affordable Sales Prices as described in this Agreement.

"Market Rate Units" are Units which are not BMR Units. **"Affordable Units"** are all BMR Units.

F. Developer is required by the BMR Ordinance and the Project Conditions to enter into a Below Market Rate (BMR) housing agreement as provided by the Ordinance, on terms acceptable to the City Attorney and the Community Development Director (the "**Director**"). This Agreement is a Below Market Rate (BMR) housing agreement pursuant to the BMR Ordinance and the Project Conditions and shall be executed as a condition of First Approval for the Project. This Agreement shall be recorded against the Property prior to the recordation of the parcel map or final subdivision map, in the case of subdivision of the Property, or prior to issuance of building permits for the Property in the case of all other land use permits.

G. Developer is required by the BMR Ordinance to specify in the BMR housing agreement how Developer will comply with the provisions of the BMR Ordinance. Developer's means of compliance is specified in attached Exhibit B incorporated herein by this reference. If Developer applied for an alternative means of compliance available under Section 19.67.090, and the City Council of the City received and approved such alternative, then the provisions of Recital H below shall not apply. In such case, an "**Alternative Compliance Plan**" shall be included in Exhibit B and shall be applicable and fully implemented to satisfy the Project requirements under the BMR Ordinance. Any Alternative Compliance Plan as provided in Exhibit B shall prevail in the event of any conflict between that plan and Articles 2-4 below.

H. If no Alternative Compliance Plan is provided in Exhibit B, in order to satisfy the Project Conditions, Developer hereby agrees to provide twelve and one half percent (12.5%) of the Units within the Project as BMR Units, including payment of a Fractional In-Lieu Fee or

provision of one additional BMR Unit for any fractional BMR Unit required, as further described herein, and to sell the BMR Units to Low and Moderate Income Households at Affordable Sales Prices as described in Article 4 below.

I. Developer also agrees not to include any covenants, conditions and restrictions that would increase the proportion of the homeowners' association dues or assessments payable by any BMR Unit(s) compared to that of the Market Rate Units, nor to make any subsequent amendments to the covenants, conditions and restrictions to that effect. This provision shall create a right of judicial enforcement by the City or the homeowner of any affected BMR unit.

J. Developer acknowledges and agrees that the Project Conditions provided adequate and proper notice pursuant to Government Code Section 66020 of Developer's right to protest any requirements for fees, dedications, reservations, and other exactions as may be included in this Agreement, that no protest in compliance with Section 66020 was made within ninety (90) days of the date that notice was given, and that the period has expired in which Developer may protest any and all fees, dedications, reservations, and other exactions as may be included in this Agreement.

NOW, THEREFORE, it is mutually agreed by and between the Parties as follows. The Parties agree and acknowledge that the above recitals are true and accurate, and are incorporated into this Agreement by this reference.

ARTICLE 1. DEFINITIONS AND EXHIBITS

Section 1.1. Definitions. The following terms have the following meanings in this Agreement:

(a) "Affordable Sales Price" means the maximum allowable sales price for a BMR Unit in effect at the time of its initial (first) sale to an Eligible Household. The Affordable Sales Price is a price that includes a reasonable down payment and results in projected average monthly housing payments during the first calendar year of a household's occupancy, including interest, principal, mortgage insurance, property taxes, homeowners' insurance, homeowners' association dues, if any, and a reasonable allowance for utilities, property maintenance and repairs, not exceeding the following:

One-twelfth (1/12th) of thirty percent (30%) of one hundred percent (100%) of Median Income. The Director may adjust the percentage of Median Income to between eighty percent (80%) and one hundred ten percent (110%) to address major shifts in the housing market or other related economic conditions affecting the demand for BMR Units.

The Affordable Sales Price shall be determined for a household size based on the number of bedrooms in the Unit plus one. The Director shall determine the sales prices of BMR Units by any

reasonable method pursuant to the BMR Ordinance so long as average monthly housing payments do not exceed those permitted by this subsection (a). Affordable Sales Prices are adjusted annually by the Director and published on the City's web site.

(b) "Affordable Rent" means monthly housing expenses, including all fees for housing services and a reasonable allowance for utilities, not exceeding one twelfth (1/12th) of thirty percent (30%) of seventy percent (70%) of Median Income.

(c) "Affordable Units" are defined in Recital E.

(d) "Agreement" is this Below Market Rate Housing Developer Agreement and Declaration of Restrictive Covenants.

(e) "Alternative Compliance Plan" is defined in Recital I.

(f) "BMR Ordinance" is defined in Recital A.

(g) "BMR Units" are defined in Recital A.

(h) "City" is defined in the first paragraph on page 1 of this Agreement.

(i) "Developer" is defined in the first paragraph on page 1 of this Agreement.

(j) "Director" means the Community Development Director of the City or successor position.

(k) "Eligible Buyer" means a Moderate Income Household or a Lower Income Household which has been determined by the City to be eligible to purchase a BMR Unit in compliance with the BMR Ordinance, the Program Guidelines, and this Agreement.

(l) "First Approval" is defined in Recital D.

(m) "Fractional In-Lieu Fee" is defined in Recital A.

(n) "Homebuyer/City Deed of Trust" means the deed of trust, in the form provided by the City, executed by each buyer of a BMR Unit at the time of purchase of the BMR Unit that secures the buyer's performance under the Resale Restriction and the Homebuyer/City Note.

(o) "Homebuyer/City Note" means the promissory note, in the form provided by the City and, executed by each buyer of a BMR Unit at the time of purchase of the BMR Unit.

(p) "Household Income" means the combined gross, pre-tax income of all adult occupants of the applicant household, as further defined in the Program Guidelines.

(q) "Incentives" are defined in Recital E.

(r) "Low Income Household" means a household with a Household Income between fifty percent (50%) and eighty percent (80%) of Median Income.

(s) "Market Rate Units" are defined in Recital G.

(t) "Median Income" means the median Household Income in Santa Clara County as determined periodically by the State of California pursuant to California Code of Regulations, Title 25, Section 6932 (or successor provision), or as otherwise established by the City pursuant to Chapter 19.67.

(u) "Moderate Income Household" means a household with a Household Income between eighty percent (80%) and one hundred twenty percent (120%) of Median Income.

(v) "Parties" are defined in the first paragraph on page 1 of this Agreement.

(w) "Program Guidelines" shall mean the Below Market Rate Program Guidelines established by the Director to implement the BMR Ordinance.

(x) "Project" is defined in Recital D.

(y) "Project Conditions" are defined in Recital D.

(z) "Property" is defined in Recital C.

(aa) "Referral List" shall mean the list of Eligible Households qualified to purchase BMR Units, which is provided by the City to the Developer pursuant to Section 7 below.

(bb) "Resale Restriction" means the Occupancy, Resale and Refinancing Restriction Agreement with Option to Purchase, in the form provided by the City, to be executed by each buyer of a BMR Unit and recorded against the BMR Unit at the time of purchase by the buyer.

(cc) "SMC" is the Sunnyvale Municipal Code.

(dd) "Units" are defined in Recital A.

Section 1.2. Exhibits. The following exhibits are attached to this Agreement:

Exhibit A Legal Description of the Property

Exhibit B Compliance Plan (Alternative or Standard)

Exhibit C In-Lieu Fee Payment Procedures and Amount

Exhibit D Map Showing Location of BMR Units and Schedule of BMR Units

**ARTICLE 2.
CONSTRUCTION OF PROJECT AND BMR UNITS**

Section 2.1. Construction of BMR Units. The BMR Units shall be constructed in proportion to construction of the Market-Rate Units. No building permit shall be issued for any Market-Rate Unit unless a proportional number of building permits have been issued for BMR Units (generally one building permit for a BMR Unit for each seven Market-Rate Units issued building permits), and no certificates of occupancy or final inspections shall be issued for any Market-Rate Units unless a proportional number of certificates of occupancy or final inspections have been issued for BMR Units. The Director may approve a modified construction schedule if this timing requirement will create unreasonable delays in the issuance of certificates of occupancy for Market-Rate Units and if the Developer provides satisfactory assurance, as approved by the Director at the Director's sole discretion, that the BMR Units will be completed.

(a) Number of BMR Units. As a condition to the satisfaction of Developer's affordable housing requirements for the Project pursuant to the BMR Ordinance, the Developer shall construct and sell a total of **NUMBER (#)** BMR Units within the Project. To satisfy any fractional BMR Unit requirement, Developer has opted to (*initial selected option below*):

_____ Provide one additional BMR unit as an alternative to payment of an in-lieu fee for the fractional unit requirement of **X/tenths (X%)**, which additional BMR unit is included in the total shown above in this Section 3; or

_____ Pay an In-Lieu Fee for any Fractional Unit required in accordance with the payment procedures and amount set forth in Exhibit C attached hereto and incorporated herein.

**ARTICLE 3.
LOCATION AND APPROVAL OF BMR UNITS**

Section 3.1. Location. The BMR Units shall be located within the Project as shown in the attached Exhibit D and as identified in Project Plans and below with the following unique identifying numbers (specify lot, building and/or unit numbers):

Bedrooms per Unit	Lot or Building Number	Unit Number(s)

Section 3.2. Approval. The BMR Units identified above shall be deemed approved by the City upon recordation of this Agreement. If, after recordation of this Agreement, Developer wants to change the location or plan type of any BMR Unit within the Project, Developer shall submit a written request for such change to the Community Development Director, who shall have sole discretion to approve or deny such request.

Section 3.3. Appearance, Size and Bedroom Count of BMR Units.

(a) The appearance of the BMR Units shall be indistinguishable in the exterior from the Market Rate Units, consistent with the designs provided for the Project land use approvals, and shall meet all requirements set forth in Section 19.67.060. Developer shall provide BMR Units in the Project in accordance with the schedule in Exhibit D. Once completed, the BMR Units shall remain unoccupied, shall not be used as storage space, and shall remain in a saleable condition until sold to Eligible Buyers at Affordable Sales Prices.

(b) Location and Characteristics of BMR Units. The BMR Units shall be located within the Project with the characteristics as shown in the attached Exhibit D incorporated herein by this reference.

ARTICLE 4. SALE OF BMR UNITS

Section 4.1. Sale by Developer to Eligible Households; City Referral List.

(a) On or before completion of the Project, Developer shall sell the BMR Units to Eligible Buyers at prices not in excess of the then-current BMR Prices provided by the City, and in compliance with all provisions of Section 19.67.070 and this Agreement. The City or its designee shall verify buyer's eligibility pursuant to the BMR Ordinance and the Program Guidelines before Developer may accept a buyer's offer to purchase. At least sixty (60) days, but no more than ninety (90) days, before the anticipated completion of a BMR Unit, the Developer shall provide the City with written notice of the availability of the BMR Unit which is for sale, including the Unit size (square footage and number of bedrooms), lot/building/unit number, street address, Developer name and Tract number, using the Notice of Intent to Sell form provided by the City. City shall notify Developer within thirty (30) days of the receipt of Developer's notification of the Affordable Sales Prices currently applicable to each BMR Unit.

(b) The City shall then proceed to notify potential purchasers on the City's BMR interest list of the BMR Unit availability, direct buyers to view the BMR Unit, and solicit eligibility applications from prospective purchasers. City shall refer Eligible Buyers to Developer or Developer's sales agent in the order that they have been deemed eligible by the City (the "Referral List"). Eligible Buyers shall submit purchase offers directly to Developer, and Developer shall accept offers to purchase in the order received, provided that such offers include a letter from the City certifying buyer's eligibility, a valid check for the required good faith deposit, and a preliminary first mortgage loan approval. Developer shall conduct any additional screening of applicants deemed necessary and not in violation of fair housing laws or the Program

Guidelines. Concurrently with City's marketing efforts, Developer shall also market the BMR Units openly and in the same general manner as the Market-Rate Units, allow prospective buyers to view the BMR Units, model units or floor plans, disclosure documents, and any other relevant sales materials, as may be available. Developer's sales agents shall provide the same general quality of customer service to the BMR buyers as provided to market-rate buyers, shall display information about the availability of the BMR Units in a readily noticeable manner in the sales office and/or Project sales website, shall disclose the BMR restrictions to any prospective buyers in a timely manner, and shall refer any prospective buyers of the BMR Units to the City for verification of eligibility. Developer may at any time contact the City to request additional referrals if necessary. Selected applicants shall be responsible for obtaining their own financing for the BMR Units. Developer shall comply with applicable fair housing laws in the marketing and sale of the BMR Units. Purchase contracts between Developer and Eligible Buyers shall include requirements that buyers execute documents for the benefit of the City as described in Section 9 below.

(c) Notwithstanding the City's obligation to provide the Referral List to the Developer as set forth in subparagraph (b) of this Section, the Developer shall also be independently responsible to make good faith efforts to market and sell the BMR Units in compliance with this Agreement, and shall cooperate with City in good faith in the effort to sell the BMR Units to Eligible Buyers in a timely manner. The Developer shall comply with applicable fair housing laws in the marketing and sale of the BMR Units.

(d) Once Developer has accepted an offer from an Eligible Household, Developer shall allow at least ninety (90) days from the date escrow has been opened or from the date of issuance of a certificate of occupancy for the BMR Unit, whichever is later, for escrow to close, whether to the original Buyer or to a subsequent City-approved Buyer. If an Eligible Buyer fails to close escrow within the applicable ninety (90)-day period, Developer shall notify City of any intent to dissolve escrow at least ten (10) business days prior to dissolution. In the event of a dissolution, Developer shall allow the City to purchase the BMR Unit at the Affordable Sales Price or to assign its right to a designee for an additional period of thirty business (30) days commencing from the date of dissolution of escrow. If escrow has not closed within thirty (30) business days of dissolution, Developer may sell the BMR Unit at its fair market value and pay to the City's BMR Fractional In-Lieu Fee fund an amount equal to the difference between the actual contract sale price of the BMR Unit and the Affordable Sales Price.

(e) If Developer has not received any purchase offer from an Eligible Buyer for a BMR Unit within ninety (90) days after the BMR Unit receives a Certificate of Occupancy from the City Building Division, the Developer shall provide a ninety (90) days' notice to the City and shall satisfy any further conditions that may be reasonably required by the City, including but not limited to, further efforts to find an Eligible Buyer, additional marketing by the Developer, and/or sale to the City or its designee, which may include a non-profit affordable housing organization or an Eligible Buyer. If City or its designee has not submitted a bona fide offer to purchase the BMR Unit at the Affordable Sales Price within forty-five (45) days of receiving Developer's notice, and/or if escrow has not closed on the BMR Unit sale within an additional sixty (60) days from date of Developer's acceptance of such offer under this Section, Developer may sell the BMR

Unit at its fair market value and pay to the City's BMR Fractional In-Lieu Fee fund an amount equal to the difference between the actual contract sale price and the Affordable Price.

(f) If a BMR Unit is sold at fair market value as specified in subparagraphs (d) or (e) above, such BMR Unit shall not be subject to any requirements of this Agreement following City's receipt of applicable in-lieu fee payment. Upon receipt of such payment, City shall provide Developer with a recordable document releasing the Unit from the BMR restrictions.

Section 4.2. Affordable Sales Prices. Pursuant to Section 19.67.070(d) of the BMR Ordinance, the BMR Units shall be sold to Eligible Buyers at sales prices that do not exceed Affordable Sales Prices established by the City. Affordable Sales Prices for the BMR Units in effect on the date of this Agreement (and subject to change annually thereafter) are shown in Exhibit F attached hereto and incorporated herein. Developer acknowledges and agrees that Affordable Sales Prices are determined based on current income levels in Santa Clara County, changes to which are published annually by the State of California, Department of Housing and Community Development, and other housing cost factors required to be considered under the BMR Ordinance. Developer agrees that the Affordable Sales Prices of the BMR Units shall be calculated by the City in its reasonable exercise of discretion in interpreting the requirements of the BMR Ordinance and the Program Guidelines, and that the City's calculation of Affordable Sales Prices shall be determinative and binding upon Developer. The Affordable Sales Price established for each BMR Unit by the City shall be the absolute maximum price that the Developer or any other person may charge for the BMR Unit or may receive as compensation for the BMR Unit. The Developer or other seller may not charge or receive any additional amount for a BMR Unit regardless of whether the additional amount is (a) for options, upgrades or additional improvements to the Unit, (b) paid through escrow or outside of escrow, (c) paid prior to, after or as part of the purchase escrow or (d) paid in cash or in kind, unless a reasonable accommodation is approved by the City for buyers requiring options or accommodations related to a disability, in which any additional cost shall be paid through escrow with prior written approval by City.

Section 4.3. Homebuyer Documents and Security Instruments. Prior to the sale of each BMR Unit, Developer shall ensure that:

(a) The Eligible Buyer and the City execute a Resale Restriction. The Resale Restriction shall be recorded against the BMR Unit Property at close of escrow on the Sale to the Eligible Buyer. The Resale Restriction shall be recorded immediately following the Grant Deed to the Eligible Buyer, unless otherwise approved in writing by the City.

(b) The Eligible Buyer signs a Homebuyer/City Note that obligates the Eligible Buyer to pay the City any excess sales proceeds or excess rents received by the Eligible Buyer if the Eligible Buyer fails to comply with the Resale Restriction on rental or resale of the BMR Unit.

(c) The Eligible Buyer signs a Homebuyer/City Deed of Trust to secure performance of the Eligible Buyer's covenants under the Resale Restriction and payment of the amounts due under the Homebuyer/City Note if the Eligible Buyer fails to comply with the terms of the Resale Restriction. The Homebuyer/City Deed of Trust shall be recorded against the BMR

Unit, subordinate only to the Resale Restriction and the lien for the first mortgage loan obtained by the Eligible Buyer to finance the purchase of the BMR Unit (and second mortgage loan if such loan is provided by a public agency which requires such subordination and with prior written approval from City).

Section 4.4. City Approval of Documents. The following documents, to be approved in writing by the City, shall be used in connection with the development and sale of the BMR Units. Approval of the following documents by the City shall be required prior to the Developer's offering the BMR Units for sale:

(a) A schedule of Affordable Sales Prices for the BMR Units (to be prepared by the City, following Developer's request).

(b) Standard Form of Purchase and Sale Agreements for sale of the BMR Units (to be prepared by Developer and submitted to the City for review and approval for consistency with this Agreement).

(c) Form of Resale Restriction, Homebuyer/City Note, and Homebuyer/City Deed of Trust, and Form of Notice of Intent to Sell (to be prepared by the City, following Developer's request).

(d) The preliminary Bureau of Real Estate public report for the Project, including the BMR Units (to be obtained by the Developer and submitted to the City).

(e) Form escrow instructions for sale of the BMR Units (to be prepared by Developer and submitted to the City for review and approval). Closing costs and title insurance costs shall be shared equally between Developer and buyer. Developer may not charge buyers of BMR Units any fees that are not charged to purchasers of Market-Rate Units.

Section 4.5. Compliance Reports, Inspections, Monitoring. Within five (5) days following the sale of any BMR Unit by the Developer to a Homebuyer, Developer shall forward, or shall cause escrow officer to forward to the City, copies of the buyer's and seller's settlement statement and all closing documents, including Resale Restriction, Homebuyer/City Note, and Homebuyer/City Deed of Trust executed in connection with the sale. Developer shall retain all records related to compliance with obligations under this Agreement and the Ordinance for a period not less than five (5) years from the date of sale of all units in the Project, and make them available to City employees or others designated by the City for inspection and copying on five (5) business days' written notice.

Section 4.6. Homeowners' Association Dues. Developer agrees not to impose any covenants, conditions and restrictions that would increase the proportion of the homeowners' association dues or assessments payable by any BMR Unit compared to that of the Market Rate Units, nor to make any subsequent amendments to the covenants, conditions and restrictions to that effect. This provision shall create a right of judicial enforcement by the City or the owner of any affected BMR Unit.

ARTICLE 5. ENFORCEMENT

Section 5.1. Covenants Running with the Land. The City and Developer hereby declare their express intent that the covenants and restrictions set forth in this Agreement shall apply to and bind Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until terminated in accordance with Section 5.2. Until all or portions of the Property are expressly released from the burdens of this Agreement, each and every contract, deed or other instrument hereafter executed covering or conveying the Property or any portion thereof shall be held conclusively to have been executed, delivered, and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed or other instrument. In the event of foreclosure or transfer by deed-in-lieu of all or any portion of the Property prior to completion and sale of all of the BMR Units, title to all or any portion of the Property shall be taken subject to this Agreement. Developer acknowledges that compliance with this Agreement is a requirement of the BMR Ordinance, and the Project Conditions, and that no event of foreclosure or trustee's sale may remove these requirements from the Property.

Section 5.2. Release of Property From Agreement.

(a) Upon sale of one hundred percent (100%) of the BMR Units in compliance with this Agreement and payment of any Fractional In-Lieu Fee, the entire Property shall be released from the burdens of this Agreement.

(b) Prior to the sale of all BMR Units, upon sale of each of the Units in the Project to an individual buyer, City shall execute and record a release of each such Unit from the burdens of this Agreement if at the time the Developer is in compliance with all terms of this Agreement, including, without limitation, Developer's obligations to market and sell BMR Units concurrently with Market-Rate Units.

Section 5.3. Default. Failure of the Developer to satisfy any of Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the City will constitute a default under this Agreement and a failure to satisfy the Project Conditions and the BMR Ordinance. In addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under the Subdivision Map Act, the BMR Ordinance, or otherwise, including but not limited to:

(a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the Project, including without limitation final inspections for occupancy and/or certificates of occupancy;

(b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;

(c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under the BMR Ordinance, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;

(d) prosecuting a misdemeanor against any person who has allowed to be sold or rented a BMR Unit at a price or rent, as applicable, exceeding the maximum allowed under this Agreement or to a household that is not an Eligible Household, or who has otherwise violated the BMR Ordinance or any other agreement, restriction or requirement authorized or imposed under the BMR Ordinance; or

(e) requiring the Developer or his/her successors in interest to the Property to pay the City rent for a BMR Unit from the date of any unauthorized use of the BMR unit, and

(f) any other means authorized under the City of Sunnyvale Municipal Code.

Section 5.4. Remedies Cumulative. No right, power, or remedy given to the City by the terms of this Agreement or the BMR Ordinance is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such document, the BMR Ordinance, or by any statute or ordinance or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

Section 5.5. Attorney's Fees and Costs. The City shall be entitled to receive from the Developer or any person violating the requirements of this Agreement, in addition to any remedy otherwise available under this Agreement or at law or equity, whether or not litigation is instituted, the costs of enforcing this Agreement, including without limitation reasonable attorneys' fees and the costs of City staff time.

ARTICLE 6. GENERAL PROVISIONS

Section 6.1. Appointment of Other Agencies. At its sole discretion, the City may designate, appoint or contract with any other public agency, for-profit or non-profit organization to perform some or all of the City's obligations under this Agreement.

Section 6.2. Records. Developer shall retain all records related to compliance with obligations under this Agreement for a period not less than five (5) years from the date of origination of such records, and make them available to City employees or others designated by the City for inspection and copying on five (5) business days' written notice. The City shall be entitled to monitor compliance with this Agreement and the BMR Ordinance, and Developer shall

cooperate with City monitoring, including providing records related to the BMR Units upon request of the City.

Section 6.3. Nondiscrimination. All of the BMR Units shall be available for sale to members of the general public. The Developer shall not give preference to any particular class or group of persons in selling the BMR Units, except to the extent that the BMR Units are required to be sold to Eligible Households fitting the preferences set forth in Section 19.67.070 of the Sunnyvale Municipal Code, who include qualified public school employees, city employees, childcare workers, persons who live in the City and persons who work in the City; provided, however, there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, creed, religion, sex, sexual orientation, marital status, national origin, source of income (e.g., SSI), age (except for lawful senior housing), ancestry, or disability, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of any Unit nor shall the Developer or any person claiming under or through the Developer, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, sale or occupancy of any Unit or in connection with the employment of persons for the construction, operation and management of the Project.

Section 6.4. Hold Harmless. Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (hereinafter collectively referred to as "Indemnitees"), and any of them, from and against all loss, all risk of loss and all damage (including expense) sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the BMR Units, or Developer's performance or non-performance under this Agreement, including claims pursuant to California Labor Code Section 1720 et seq., and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the City. The provisions of this Section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this Section shall remain in full force and effect.

Section 6.5. Notices. All notices required pursuant to this Agreement shall be in writing and may be given by personal delivery or by registered or certified mail, return receipt requested, to the Party to receive such notice at the addressed set forth below:

TO THE CITY:

City of Sunnyvale
Community Development Department, Housing Division
P.O. Box 3707 / 456 W. Olive Ave.
Sunnyvale, CA 94088-3707
Attn: Housing Officer

TO THE DEVELOPER:

Attn: _____

Any Party may change the address to which notices are to be sent by notifying the other Parties of the new address, in the manner set forth above.

Section 6.6. Integrated Agreement. This Agreement constitutes the entire Agreement between the Parties and no modification hereof shall be binding unless reduced to writing and signed by the Parties hereto.

Section 6.7. Each Party's Role in Drafting the Agreement. Each Party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, neither Party shall rely upon Civil Code Section 1654 in order to interpret any uncertainty in the meaning of the Agreement.

Section 6.8. Amendment of Agreement. Major amendments to this Agreement, including any proposal to change any approved Compliance Plan or to make any changes in the Project or the Project Conditions, shall be subject to the review and approval of the decision-making body which approved the Project. Minor amendments to this Agreement may be approved by the Director. Upon approval, a new Agreement containing the amendments shall be executed and recorded.

Section 6.9. No Claims. Nothing contained in this Agreement shall create or justify any claim against the City by any person that Developer may have employed or with whom Developer may have contracted relative to the purchase of materials, supplies or equipment, or the furnishing or the performance of any work or services with respect to the Property or the construction of the Project or construction of the BMR Units.

Section 6.10. Applicable Law. This Agreement shall be governed by California law. Venue shall be the County of Santa Clara.

Section 6.11. Waivers. Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

Section 6.12. Title of Parts and Sections. Any titles of the sections, subsections, or subparagraphs of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

Section 6.13. Multiple Originals; Counterpart. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

Section 6.14. Recording of Agreement. The Developer shall cause this Agreement to be recorded against the Property in the Official Records of the County of Santa Clara.

Section 6.15. Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless be and remain in full force and effect.

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

DEVELOPER:

CITY:

_____, a California City of Sunnyvale, a municipal corporation

By: _____
Insert Name

By: _____
Suzanne Isé

Its: _____

Its: Housing Officer _____

APPROVED AS TO FORM:

By: _____
Robert Boco

Its: Sr. Assistant City Attorney _____

"A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document."

STATE OF CALIFORNIA)SS
COUNTY OF _____)

On _____ before me _____, Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary

"A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document."

STATE OF CALIFORNIA)SS
COUNTY OF _____)

On _____ before me _____, Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

EXHIBIT B

COMPLIANCE PLAN

[If alternative approved, complete top portion & delete bottom portion; retitle "Alternative Compliance Plan"]

On [insert Council meeting date] Developer received Council approval to comply with the requirements of SMC 19.67 through the alternative method indicated below:

- a. Payment of In-Lieu Fees pursuant to 19.67.090 (b) and Exhibit C to this Agreement.
- b. Transfer of Credits, as set forth in 19.67.090 (c) and as further described in the attached Plan.
- c. Unit Conversion Program, as set forth in 19.67.090 (d) and as further described in the attached Plan;

OR

Not applicable (_____) *initial*

Developer has not received approval for any of the alternatives under 19.67.090 and shall provide BMR Units within the Project in accordance with SMC 19.67.040 *et seq.* (standard compliance) and as further set forth within the body of this Agreement.

Certified by:

DEVELOPER: _____
Name Date

CITY: _____
Name Date

EXHIBIT C

PAYMENT PROCEDURES AND AMOUNT OF IN-LIEU FEE

Top portion will be completed by City.

In-Lieu Fee Amount Due:

- Fractional Unit Fee only: 0. [redacted] BMR Units (round to nearest tenth)
Estimated Fractional Fee Amount Due = \$ [redacted]

- In-Lieu Fees for Entire BMR Obligation: ____ BMR Units (round to nearest tenth)
Amount to be determined at close of escrow for each home.

Verified by Housing Officer: _____
Signature Date

Payment Procedures

A. For Fractional Unit Fees Only:

1. Developer shall provide City Housing staff with a list of estimated sales prices for each plan type or unit size of Market Rate Units in the Project. Sales price estimates shall be supported by appraisals prepared within three months of submittal, or comparable third-party documentation acceptable to the City.
2. Staff will calculate and notify Developer of the Estimated Fee Amount based on the following formula pursuant to the rate provided in SMC 19.67:
[Fractional Amount Due divided by Total Number of BMR Units Due (whole and fractional units)] multiplied by Seven percent (7%) = Fractional Fee Rate
Fractional Fee Rate multiplied by the sum of the Estimated Sales Prices of each Market-Rate Unit = Estimated Fractional Fee Amount (for entire Project)
3. Developer shall pay the Estimated Fractional Fee Amount to the City BMR In-Lieu Fee Fund prior to issuance of the first building permit for the Project.
4. Prior to close of escrow for the sale of the last Market Rate Unit in Project or release of the Project's maintenance bond by the City Public Works Department, whichever occurs first, Developer shall provide City with documentation consisting of Final HUD-1 forms or a list of contract sales prices of all closed sales of Market Rate Units in Project, signed and certified as correct by Developer's escrow officer, for use in calculating the final Fractional Fee Amount ("Balance") due. City may audit escrow files of sales contracts or other escrow documents containing sales prices if acceptable documentation is not provided by Developer.
5. Staff shall notify Developer of any Balance due, or if applicable, any refund owed, within two weeks of receipt of documentation of closed sales. In the event of a balance owed, Developer shall have thirty days from receipt of City notice to pay such Balance in full.

6. If Developer fails to notify City within 90 days of close of escrow on the last Market Rate Unit, the a monthly late fee equal to 10% of the Balance due shall become due and payable for each month that the Balance remains unpaid, beginning on the 90th day after close of escrow, in addition to the Balance due.
7. In the case of any refund owed to Developer due to the Estimated Fee being higher than the final Fractional Fee Amount after all sales prices have been verified to City's satisfaction, Developer shall request refund by submitting a written request to City within 90 days of close of escrow of the last Market Rate Unit to be sold in Project. Any refund not requested within this time frame shall be permanently forfeited by Developer.
8. Developer hereby agrees to include this Exhibit E in its entirety along with Developer's escrow instructions for the sale of each Market Rate Unit, and to provide City staff with name, title, and contact information for the escrow officer in charge of Developer's Market Rate Unit escrows.

B. In-Lieu Fees for Entire BMR Obligation

1. Developer shall provide City Housing Division with name, title and contact information for the primary escrow officer handling project sales prior to issuance of the first building permit for the Project, or if not available at that time, within six months of the first building permit issuance.
2. Developer shall include a copy of this Exhibit E with Developer's escrow instructions for the Project's home sales.
3. City staff shall place a payment demand in escrow for each of the Market-Rate Units for a BMR in-lieu fee, due from seller's proceeds, equal to seven percent (7.0%) of the contract sales price of each home and payable to the City of Sunnyvale BMR In-Lieu Fee Fund.
4. After payment is received for each home, City shall provide Developer or Developer's designee (escrow officer or home buyer) with a recordable Release of Restrictions signed by the City releasing the home from the lien created by the BMR Housing Developer Agreement recorded against the Property.

Developer has reviewed and agreed to the provisions herein:

DEVELOPER

Name: _____

Title: _____

Date: _____

EXHIBIT D

MAP SHOWING LOCATION AND SCHEDULE OF BMR UNITS

Attach site map showing the location of the BMR Units.

Schedule of BMR Units to be Provided within the Project

Plan Type	Bedrooms per Unit	Approximate Area (S.F.)	Number of BMR Units to be Provided	Lot/Building/Unit Numbers

EXHIBIT E

**MAXIMUM INITIAL SALES PRICES FOR BMR UNITS AND MAXIMUM INCOME
LEVEL OF ELIGIBLE HOUSEHOLDS**

(Provided for reference. These limits are adjusted annually, as determined and published by the City. Developer shall apply and Project shall be subject to the BMR sales prices and income limits in effect at the time Developer submits Notice of Intent to Sell to City)

A. Affordable Sales Prices.

Number of Bedrooms	Maximum BMR Sales Price
0	
1	
2	
3	
4	
5	

B. Maximum Household Income of Eligible Households (Income Limits)

Household Size (Number of Persons)	Maximum Gross Annual Household Income – BMR Units
1	\$
2	\$
3	\$
4	\$
5	\$
6	\$

Note: Income limits for larger households available upon request from the City.