



REPORT TO COUNCIL

City of Sacramento

915 I Street, Sacramento, CA 95814-2604
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CONSENT
December 12, 2006

Honorable Mayor and
Members of the City Council

Title: Approve Standard-Form Agreements for Implementing North Natomas
Financing Plan

Location/Council District: North Natomas (District 1)

Recommendation: Adopt a **resolution** that **(1)** repeals Resolution Nos. 2000-429 and 2004-890; and **(2)** approves the following standard-form agreements for use in implementing the North Natomas Financing Plan:

- Non-Gateway Project Reimbursement and Credit Agreement for Construction of North Natomas Infrastructure
- Gateway Project Reimbursement and Credit Agreement for Construction of North Natomas Infrastructure
- Public Safety Project Reimbursement and Credit Agreement for Construction of North Natomas Infrastructure
- Acquisition and Shortfall Agreement (for CFD's)
- Agreement for Construction of Drainage Improvements
- Reimbursement and Credit Agreement North Natomas Land Acquisition Program
- Reimbursement/Credit Agreement Relating to Design and Construction of Park Improvements
- Agreement to Pay Fees and Costs (one Landowner)
- Agreement to Pay Fees and Costs (two or more Landowners)
- Credit Agreement for Construction of Water Facilities
- Agreement for Reimbursement for Overwidth Pavement Construction

Contact: Sini Makasini, Administrative Analyst, (916) 808-7967; Mark Griffin, Fiscal Manager, (916) 808-8788

Presenters: Not Applicable

Department: Planning

Division: Public Improvement Financing

Organization No: 4915

Description/Analysis:

Issue: Standard form agreements have been approved by City Council in the North Natomas Financing Plan area to assist in the administration of routine development circumstances. The City Manager is authorized to sign these agreements and the City Attorney is permitted to make non-substantive changes. Efficiencies can be further improved with a substantive modification to the agreements concerning development credit releases that allows the developer an advance of credits if the developer provides the City with an irrevocable standby letter of credit in a form acceptable to the City Attorney and issued by a bank approved by the City Treasurer.

A letter of credit solves a timing problem where building permits are needed before the infrastructure is completed. With credits advanced, the credits are available to be applied to permits when permits are issued. Credits cannot be applied retroactively. Amending this mechanism into a standard form agreement will further accelerate the process. In several situations, a standard form agreement would have accelerated permit issuance by 3 or 4 weeks.

This item is also housekeeping in nature. Over the years, several Resolutions have authorized additions and changes and the City Attorney's Office has revised several of these agreements by modifying the format and by correcting non-substantive errors such as misspellings, erroneous internal cross references, and superseded citations to law. The attached resolution will repeal prior Council actions, reauthorize all standard forms under one Resolution and approve the substantive modifications concerning letters of credit.

Policy Considerations: Adoption of the recommended resolution is consistent with the intention of the North Natomas Financing Plan to construct or acquire public infrastructure in a timely manner and to promote fairness and equity. Adoption is also consistent with the City's Strategic Plan goals to enhance and preserve the neighborhoods, improve and diversify the transportation system and support economic development.

Environmental Considerations: The City Council's action in approving the recommended resolution is solely for the purpose of implementing the previously approved North Natomas Financing Plan and thus is not a project for the purposes of the California Environmental Quality Act.

Committee/Commission Action: None

Rationale for Recommendation: The recommended resolution will enable landowners to receive fee credits in advance and use them against permit fees, with no risk or cost to the City.

Financial Considerations: There is no impact on the General Fund. The credit program of the North Natomas Financing Plan supports the reimbursement of developer costs for building approved public improvements. An advance of credits secured by an irrevocable letter of credit ensures that the facilities will be built, and at a cost approved in the plan. A demand on the letter of credit will occur if the facilities are not built or if credits are issued in excess of approved costs

Emerging Small Business Development (ESBD): None. No goods or services are being purchased.

Respectfully Submitted by: 
Mark Griffin
Fiscal Manager, Planning Department

Approved by: 
Carol Shearly
Director, Planning Department

Recommendation Approved:

Ray Kerridge
City Manager

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Attachment 1

BACKGROUND

By adopting Resolution Nos. 2000-429 and 2004-890, the City Council approved several standard-form agreements for use in North Natomas. Some of those agreements are no longer needed. Some have been revised by the City Attorney's Office to correct assorted non-substantive errors, and one—specifically, the Non-Gateway Project Reimbursement/Credit Agreement for Construction of North Natomas Infrastructure—has been amended twice by the City Council at the behest of staff. Because the problem addressed by these amendments is likely to come up again, staff now believes that the amendments should be incorporated into each of the three Reimbursement/Credit Agreements for Construction of North Natomas Infrastructure.

The need for the amendments arises from the provisions that govern the issuance of fee credits. Under the existing version of the Reimbursement/Credit Agreements, landowners can elect to construct elements of North Natomas infrastructure in return for the City's promise to reimburse the actual construction costs from two sources: revenues from North Natomas development fees, or credits against North Natomas development fees the landowner would otherwise have to pay when receiving building permits for development of its property. Importantly, the agreements provide that fee credits will not be issued until the improvements have been constructed and conveyed to the City. This provision poses few problems when a landowner doesn't intend to develop its property until after completion of the improvements. Sometimes, however, a landowner desires to develop before the improvements are completed, and if the landowner has no other projects on which to apply fee credits, then this provision greatly reduces the value of the credits to the landowner.

To address this problem, staff recommends that the City Council replace the three existing Reimbursement/Credit Agreement for Construction of North Natomas Infrastructure with new agreements (Attachments 3, 4, and 5). These new agreements are identical to the agreements being replaced except as follows:

- The addition of a new Section 4.3 that authorizes the issuance of fee credits before the landowner completes the improvements. As a condition for the advance issuance of credits, Section 4.3 requires that the landowner provide an irrevocable letter of credit equal to the amount of the credits. The City may draw on the letter of credit if the landowner fails to complete construction of the improvements as required. The City may then use the proceeds of the letter to complete the improvements itself.
- The deletion from Recital C and Section 1.3 of language allowing negotiated contracts for construction of the infrastructure, and the addition to Section 1.3 of language requiring that each contract require the payment of prevailing wages.

Approve Standard-Form Agreements
North Natomas Financing Plan

- The deletion from Section 3.2.2 of the Public Safety Project Reimbursement/Credit Agreement of language restricting the landowner's receipt of fee credits when the fees are financed through a community facilities district. This restriction is not legally required. Nor is it in the other Reimbursement/Credit Agreements.
- The formatting has been modified, and various typographical errors, misspellings, and erroneous internal cross-references and citations to law have been corrected.

In addition, staff recommends, on the advice of the City Clerk, that the proposed resolution not only approve the amended Reimbursement/Credit Agreements but also (a) re-approve the standard-form agreements that may still be needed to implement the North Natomas Financing Plan (including the non-substantive revisions by the City Attorney's Office, as described above) and (b) repeal Resolution Nos. 2000-429 and 2004-890. Doing this will consolidate all standard-form agreements in one approving resolution.

Attachment 2

RESOLUTION NO.

Adopted by the Sacramento City Council

**APPROVING STANDARD-FORM AGREEMENTS FOR IMPLEMENTING
THE NORTH NATOMAS FINANCING PLAN
AND
REPEALING RESOLUTION NUMBERS 2000-429 AND 2004-890**

BACKGROUND

- A. On July 18, 2000, by Resolution No. 2000-429, the City Council approved nine standard-form agreements for use by the City Manager within the North Natomas Community Plan Area. Resolution No. 2000-429 also authorized the City Manager (1) to execute the standard-form agreements for specific projects upon approval as to form by the City Attorney and (2) to make minor non-substantive changes in the standard-form agreements, with the approval of the City Attorney, when required for specific development projects. On November 23, 2004, by Resolution No. 2004-890, the City Council amended Resolution No. 2000-429 by adding a tenth standard-form agreement. Subsequently, the City Attorney's Office revised the format of, and corrected assorted non-substantive errors in, several of the standard-form agreements.

- B. Among the approved standard-form agreements are the "Non-gateway Project Reimbursement/Credit Agreement for Construction of North Natomas Infrastructure," the "Gateway Project Reimbursement/Credit Agreement for Construction of North Natomas Infrastructure," and the "Public Safety Project Reimbursement/Credit Agreement for Construction of North Natomas Infrastructure." Under these three agreements, a landowner can elect to construct elements of North Natomas infrastructure in return for the City's promise to reimburse the landowner's actual construction costs from two sources: revenues from North Natomas development fees, or credits against North Natomas development fees the landowner would otherwise have to pay when receiving building permits for development of its property. The agreements also provide that fee credits will not be issued until the improvements have been constructed and conveyed to the City. This limitation poses few problems when a landowner doesn't intend to develop its property until after completion of the improvements. Sometimes, however, a landowner desires to develop before the improvements are completed, and if the landowner has no other projects on which to apply fee credits, this limitation greatly reduces the value of the credits to the landowner.

- C. To accommodate landowners who desire to receive fee credits before construction of the improvements is completed, the City Council believes that it is in the public interest to amend the three agreements identified in Paragraph B above by adding (1) a provision that authorizes the issuance of fee credits before the landowner completes the improvements, so long as certain conditions are met; and (2) a provision obligating the landowner to competitively bid all contracts for construction of infrastructure and to require payment of prevailing wages.
- D. The City Council further believes, in the interest of administrative efficiency, that the standard-form contracts still needed to implement the North Natomas Financing Plan be re-adopted (with the non-substantive revisions made by the City Attorney's Office and the amendments described in Paragraph C) and that Resolution Numbers 2000-429 and 2004-890 be repealed.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

SECTION 1: The City Council finds that the statements in the Background are true and adopts them as findings.

SECTION 2: The standard-form agreements listed below and attached to this resolution are approved for use on specific projects within the North Natomas Community Plan area:

- Non-Gateway Project Reimbursement and Credit Agreement for Construction of North Natomas Infrastructure
- Gateway Project Reimbursement and Credit Agreement for Construction of North Natomas Infrastructure
- Public Safety Project Reimbursement and Credit Agreement for Construction of North Natomas Infrastructure
- Acquisition and Shortfall Agreement (for CFD's)
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- Reimbursement and Credit Agreement North Natomas Land Acquisition Program
- Reimbursement/Credit Agreement Relating to Design and Construction of Park Improvements
- Agreement to Pay Fees and Costs (one Landowner)
- Agreement to Pay Fees and Costs (two or more Landowners)
- Credit Agreement for Construction of Water Facilities
- Agreement for Reimbursement for Overwidth Pavement Construction

SECTION 3: The City Manager is authorized to sign the standard-form agreements identified in Section 2 above for specific projects within the North Natomas Community Plan area upon approval for legal form by the City Attorney's Office.

SECTION 4: The City Manager is authorized, with the approval of the City Attorney's Office, to make minor non-substantive changes to the standard-form agreements identified in Section 2 above when required for specific development projects. The City Council's approval is required for all major or substantive changes. The City Manager may, in his discretion, bring any individual standard-form agreement to the City Council for approval.

SECTION 5: Resolution Numbers 2000-429 and 2004-890 are repealed.

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EXHIBIT A

Non-Gateway Project Reimbursement-and-Credit Agreement for Construction of North Natomas Infrastructure

(Insert Project Description)

This Agreement is entered into on _____, 20___, by and between the City of Sacramento, a charter municipal corporation (hereafter "City"), on the one hand, and [Name of Landowner], a [type of entity] (hereafter "Landowner"), on the other, with respect to the following facts:

Recitals

- A. Landowner owns the land described in Exhibit "A" (the "Property").
- B. Development of the Property is subject to payment of the North Natomas Public Facilities Fee (the "Facilities Fee") in accordance with chapter 18.24¹ of the Sacramento City Code (the "Fee Ordinance").
- C. Landowner desires to construct the elements of North Natomas infrastructure (the "Project") as specified and depicted in Exhibit "B." The Project has been or will be constructed pursuant to plans approved by City, and the actual costs of construction of the Project are to be the result of a bidding process as approved in writing in advance by City.
- D. Subject to the credits against and reimbursements from the Facilities Fee as provided herein, Landowner is willing to construct the Project and to fund the entire costs of such construction. For purposes of this Agreement, "Project Costs" means costs related to all contracts for the construction of the Project, including change orders thereto, and costs associated with all other contracts for professional and other services necessary, in City's judgment, to implement and complete construction, together with planning and design costs and right-of-way acquisition costs, if any, associated with the Project. Project Costs shall include but not be limited to the engineering estimates and the Project elements included therein, which estimates are set forth in Exhibit "B"; construction inspection fees; and applicable plan-check fees, inspection fees, and Habitat Conservation Fees.
- E. Because the Project is designated for funding by the Facilities Fee, the Project is eligible for, and City desires to provide credits against and reimbursement from, the Facilities Fee for Landowner's eligible (as determined by City in its discretion) actual Project Costs, in accordance with the Fee Ordinance and subject to the terms and conditions of this Agreement.

¹ Formerly chapter 84.02. Citations to the Sacramento City Code throughout this Agreement shall include amendments or renumbering which occur after execution of this document.

Agreement

Now, therefore, in consideration of the foregoing and the mutual promises contained herein, City and Landowner hereby agree as follows:

Article 1. Construction of Project

- 1.1 Construction.** Landowner agrees to construct the Project, or cause it to be constructed, and to convey the Project, along with all interests in real property necessary for the operation, maintenance, and ownership thereof, to City or appropriate other public entities or utilities.
- 1.2 Plans and Specifications.** Landowner represents that it has obtained or will obtain approval of the plans and specifications for the Project from all appropriate departments of City and from any other public entity or public utility from which such approval must be obtained. Landowner covenants that the Project will be constructed in compliance with such approved plans and specifications and the adopted City Construction Specifications and Improvement Standards, subject to minor change orders as may be required that are substantially consistent with such plans and specifications. Copies of all plans and specifications shall be provided by Landowner to City's [Title] ("Director"). City agrees to use its best efforts and due diligence to review and approve such plans or provide comments thereto regarding any necessary corrections thereto, in a prompt and timely manner.
- 1.2.1 The City Construction Specifications and Standards shall be those in effect at the time of final approval by City of the design of the Project.
- 1.2.2 Landowner shall provide a site-construction superintendent ("Site Superintendent") and City shall provide a City project manager ("City Project Manager") who will serve as their respective points of contact with respect to such construction, who will be onsite as necessary, and who will generally be available by telephone or otherwise at all reasonable times.
- (a) The Site Superintendent shall have complete authority over the construction contractors and all subcontractors, with authority to order stoppage of work and minor changes to the work in order to comply with the Project Plans. The Site Superintendent may also, but need not have authority to, order minor design changes to meet unanticipated field conditions, provided that the same are consistent with the Project Plans.
- (b) The City Project Manager shall have complete authority over the City's construction inspectors, with authority to determine whether the work complies with the Project Plans. The City Project

Manager may also, but need not have authority to, approve minor design changes to meet unanticipated field conditions, provided that the same are consistent with the Project Plans.

- (c) **[Name]** is designated by Landowner as the Site Superintendent, until Landowner notifies City's [Name of Department] of his or her replacement. **[Name]** is designated by City as the City Project Manager, until the Director notifies Landowner of his or her replacement.

1.3 Commencement and Completion of Project. Subject to the provisions of Section 6.6 below, including, without limitation, the effect of inclement weather on Landowner's ability to commence or proceed with construction, Landowner shall commence the construction of the Project **within six months** of the final approval of the improvement plans by the City and thereafter shall diligently work to complete such construction in a timely and efficient manner. The contract for such construction shall be let as the result of a bidding process approved in writing in advance by the City and shall require the contractor to pay prevailing wages. The contract amount for such work shall be subject to the review and approval of the City, which approval shall not be unreasonably withheld.

1.4 Inspection. Landowner covenants that City and any other public entities or public utilities to whom any portion of the Project will be conveyed will be permitted to inspect the Project. City agrees to make inspectors available for inspection of the Project during such construction within at least **48 hours** of request therefor from Landowner.

1.4.1 Should a City inspector (the "Inspector") find any nonconformance or noncompliance with the Project Plans, the Inspector shall notify the City Project Manager and the Site Superintendent of such nonconformance or noncompliance, and the City Project Manager and the Site Superintendent shall jointly determine the nature of the corrective action to be taken. Corrective action taken pursuant to the agreement between the City Project Manager and the Site Superintendent shall be deemed to be in accordance with the Project Plans.

1.4.2 If the City Project Manager and the Site Superintendent are unable to agree upon the corrective action to be taken, the City Project Manager may order that work on the nonconforming or noncomplying item(s) or area(s) be stopped. If the City Project Manager orders work to stop, then—

- (a) Landowner shall comply with all requirements of any stop work order and must obtain City's approval before work can resume on that item(s) or in that area(s); and

- (b) the City Project Manager, the Site Superintendent, and such other representatives of City and Landowner as are necessary or appropriate to evaluate, discuss, and resolve the situation shall promptly meet and confer regarding the measures necessary to correct the nonconforming or noncomplying items(s) or area(s).

1.5 Performance and Payment Bonds. Landowner covenants to comply with all applicable City performance and payment bonding requirements (and such other bonding requirements as may be specified by other public entities and/or public utilities) with respect to the construction of the Project. Landowner may satisfy the obligation to post bonds with an assignment to City of the contractor's bond or through the posting of bonds, letters of credit, or other security instruments acceptable to City, in accordance with applicable City requirements; provided, however, that all such bonds, letters of credit, or other security instruments must meet all requirements that would apply for security to be posted by a contractor, quantitatively and qualitatively, if City and not Landowner were contracting to construct the Project.

1.6 Insurance. Landowner shall furnish to City a certificate or certificates substantiating the fact that it has taken out the insurance hereinafter set forth for the period covered by this Agreement with an insurance carrier acceptable to City in a form satisfactory to City. Each certificate shall bear an endorsement precluding the cancellation or reduction in coverage of any policy covered by such certificate before the expiration of **30 days** after City has received notification of such cancellation or reduction by registered mail. The minimum insurance coverage shall be as follows:

Public-liability and property-damage insurance that includes but is not limited to personal injury, property damage, losses related to independent contractors, products and equipment, explosion, collapse, and underground hazards, in the amount of not less than a combined single limit of **one million dollars** for one or more persons injured and property damage in each occurrence. The public-liability and property-damage insurance shall also name City as an additional insured. This insurance shall directly protect City as well as Landowner and its agents. The insurer shall assume the defense of City and City's officers, employees, and agents from suits, actions, damages, or claims of every type and description to which they may be subjected or put by reason of, or resulting from, the construction or installation of the Project. The insurance policy shall expressly state that the above terms are in effect.

If Landowner fails to maintain such insurance, City may take out insurance to cover damages of the above-mentioned classes for which City might be held liable on account of Landowner's failing to pay such damages, and may recover the amount of the premiums for such insurance from Landowner or retain such amount from any monies due Landowner under this Agreement. Failure of City to

obtain such insurance shall in no way relieve Landowner from any of its responsibilities under this Agreement.

1.7 Contracts and Change Orders. Landowner shall be responsible for entering into all contracts and any change orders required for the construction of the Project.

1.7.1 So long as the contracts and change orders are substantially consistent with the approved plans and specifications and are consistent with City Standards, as determined by Landowner's project engineer, Landowner shall not be obligated to obtain the approval of Director therefor; provided, however, that any change orders that will increase the cost of the Project by more than 10% shall be subject to the prior approval of Director. City Project Manager's approval shall not be required for those change orders which do not require approval of the Director.

1.7.2 Except as otherwise provided in Section 1.7.3, Landowner agrees to make changes in the construction of the Project as requested by City.

- (a) As to changes which are necessary in order to comply with approved plans and specifications, Landowner shall pay for all such changes.
- (b) City agrees to pay Landowner for changes requested by it when such changes are discretionary changes requested by City; provided, however, that Landowner shall provide a written statement of the estimated cost of the change, prior to constructing such change. If Landowner fails to provide a written statement of the estimated cost of the change within **10 days** following receipt of a written request from City for such statement made after the nature of the change is finally determined, Landowner shall make such change and City shall not be required to pay for such change.

1.7.3 Except for those changes that are necessary to comply with approved plans and specifications, Landowner shall **not** be obligated to make changes requested by City where any one of the following applies:

- (a) the same would result in unreasonable delay to the Project;
- (b) City has failed to approve the estimated cost before construction of the change would otherwise begin; or
- (c) the change would increase the cost of the Project beyond the sum of (1) the City-approved budget for the Project; plus (2) the additional funds City has agreed to pay pursuant to Section 1.7.2 above.

Article 2. City Acceptance; Conveyance fo Project

- 2.1 **Acceptance and Conveyance.** When Landowner completes construction of the Project and the Project has been formally accepted by City, the Project shall automatically become the property of City. Upon such completion, Landowner shall take all actions necessary to convey to and vest in City full, complete, and clear title in the Project and in all of the underlying real property interests (easement and/or fee), including those necessary for maintenance and access. City will not formally accept the Project unless and until such title has been conveyed to City. For purposes of this Agreement, City acceptance means final completion in accordance with the approved plans and specifications for the Project, which has been finally inspected and approved by City for acceptance into its infrastructure system, as evidenced by a written statement or letter to that effect signed by or on behalf of City.
- 2.2. **Release of Liens.** Upon completion, Landowner shall provide, in form satisfactory to the Director, evidence that all of the costs of the Project have been fully paid, including all lien claims. Upon request of the Director, Landowner shall provide lien releases under California Civil Code section 3262, subdivision (d), to assure that payment of any outstanding claims of Landowner's contractors, subcontractors, and suppliers have been paid.
- 2.3 **Indemnification.**
- 2.3.1 *Indemnification by Landowner.* Subject to the provisions of this Section 2.3, Landowner agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against any and all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions in connection with the design, construction, operation, maintenance, or repair of the Project by any of the following: Landowner; any of Landowner's engineers, contractors, or subcontractors; or any other person or entity employed by or acting on behalf of or as the authorized agent for Landowner or any of Landowner's engineers, contractors, or subcontractors. Provided, however, that Landowner shall not be liable hereunder to indemnify, defend, or hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents against Claims alleging sole and active negligence of City in its functions of design review, approval, or construction inspection in connection with the Project; provided further, that nothing in this Agreement shall be construed as a waiver by City of any immunity or defense it may have relating to any such Claim, including without limitation immunity or

defenses relating to design review and/or approval and/or construction inspection.

- 2.3.2 *Indemnification Regarding Hazardous Substances.* Landowner further agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or damage to the environment to the extent arising from any use, storage, treatment, transportation, release, or disposal on, about, or around the portion of the Landowner Property on which the detention basin or any of the Project or the easements that are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined in **Exhibit "C,"** attached hereto and incorporated herein by this reference, by any person or entity (except persons or entities acting on City's behalf or under City's control), occurring on or at any time prior to the date the Project and the associated real property interests are conveyed to City as provided in this Agreement. The foregoing indemnification obligation shall not apply to the incorporation of building materials as part of the Project, provided that such incorporation is performed in accordance with applicable laws and is not in violation of Environmental Laws in effect at the time of such incorporation.
- 2.3.3 *Indemnification Regarding Application of Credits and Reimbursements.* Landowner further agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, injury to property interests, property damage, or violation of any law or regulation to the extent arising from any actions or omissions in connection with the application or calculation of credits and/or reimbursement authorized by City pursuant to this agreement.
- 2.3.4 *Duration of Indemnification Obligations.* The indemnification and hold harmless agreement made by Landowner in Section 2.3.1 above, with respect to the Project, and/or each part thereof constructed by Landowner, shall expire on the date which is **one year** after the completion of the Project and acceptance thereof by City (hereafter the "Expiration Date"), provided that Section 2.3.1 above shall not expire and shall remain in effect with respect to any Claims that are made, initiated, claimed, filed, or assessed at any time prior to the Expiration Date, or which relate to (directly or indirectly) any such Claims. The indemnification and hold harmless agreement made by Landowner in Section 2.3.2 above shall survive the termination of this Agreement

until the date which is **two years** after the completion of such phase and acceptance thereof by City. Section 2.3.2 above shall not expire, however, and shall remain in effect with respect to any Claims that are made, initiated, claimed, filed, or assessed at any time prior to such date, or which relate to (directly or indirectly) any such Claims. The provisions of this Section 2.3.4 shall apply only with respect to the indemnification and hold harmless provisions of this Agreement and shall not affect the liability, if any, that Landowner might have under applicable law to the extent Landowner is a contaminator of the Landowner Property. The provisions of this Section 2.3.4 shall not expire and shall survive the termination of this Agreement.

2.3.5 *Additional Provisions Regarding Indemnification Obligations.* The parties further agree and understand as follows:

- (a) City does not waive, and shall not be deemed to waive, any rights against Landowner that it may have by reason of the aforesaid indemnity and hold harmless agreements because of any insurance coverage provided pursuant to Section 1.6.
- (b) Except as may otherwise be specifically and expressly provided in Section 2.3.1 relating to Claims based upon allegations of sole and active negligence on the part of City, the aforesaid indemnity and hold harmless agreements shall not be limited or waived in any way based upon the fact that City has or shall have prepared, supplied, or approved of plans and/or specifications for the Project, or has or shall have inspected or failed to inspect construction of the Project.
- (c) The scope of the aforesaid indemnity and hold harmless agreements is to be construed broadly and liberally to provide the maximum coverage for City in accordance with their terms.
- (d) No specific term or word contained in this section shall be construed as a limitation on the scope of the indemnification and defense rights and obligations of the parties unless specifically so provided.
- (e) Landowner shall cause all engineering and construction contracts relating to the Project to require the engineer or contractor to fully and without limitation indemnify, defend, and hold harmless City and its elective and appointive boards, commissions, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions of such professional in connection with the design, construction, maintenance, operation, or repair of

the Project by the engineer or contractor or by any other person or entity employed by or acting as the authorized agent for the engineer or contractor, but only to the extent that such professional or other party has contractual responsibility for a portion or aspect of the Project. For example, a contractor responsible for constructing a portion of the Project would not be held responsible for the design, nor would an engineer who designed a portion of the Project be held responsible for construction not in accordance with the design. So long as the construction contract contains the language contained in Exhibit "D," attached hereto and incorporated herein by this reference, or other language approved in writing by City, and if City is satisfied in its judgment with the adequacy of the engineer's or contractor's insurance, Landowner shall be deemed to have satisfied its obligation under this Section 2.3.5(e) to obtain for the City indemnification and defense obligations on the part of Landowner's engineers and contractors.

2.3.6 *Waiver by Landowner.* In addition to Landowner's obligations to indemnify, hold harmless, and defend City as set forth above, Landowner and its assigns, transferees, and successors waive and release all claims of whatever sort or nature that may arise against City or City's officers, employees, and agents in connection with the design or construction of the Project. The provisions of this Section 2.3.6 shall not apply to discretionary changes to the Project that were required by City unless all of the following apply: (a) the discretionary changes required by City were approved by Landowner's engineers; and (b) Landowner's engineers have provided to Landowner, pursuant to a contract between Landowner and its engineers, errors-and-omissions insurance or similar professional-liability insurance coverage that covers the Project, including all discretionary changes required by City.

2.3.7 *Unknown Claims.* This waiver and release shall include any and all claims arising under section 1542 of the California Civil Code, which provides that:

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

Thus, notwithstanding the provisions of section 1542, and for the purpose of implementing a full and complete release, the parties hereto expressly acknowledge that this Agreement is intended to release and extinguish, without limitation, all claims as described in this Section 2.3 that the parties do not know or suspect to exist. The provisions of this Section 2.3 shall survive termination of this Agreement.

2.3.8 *Indemnification by City.* City further agrees and covenants to fully indemnify, defend, and hold harmless Landowner and Landowner's directors, members, shareholders, partners, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or damage to the environment—

- (a) to the extent arising from any City use, storage, treatment, transportation, release, or disposal on, about, or around the portion of the Landowner Property on which the Project or the easements that are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined above, by any person or entity (except persons or entities acting on Landowner's behalf or under Landowner's control), occurring on or at any time after the date the Project and the easements are conveyed to City as provided in this Agreement;
- (b) arising from any act or omission (including but not limited to those covered by Section 2.3.8(a)) on the part of City or its agents or employees in the use and operation of the Project; or
- (c) occurring on or at any time arising from any entry upon the Landowner Property by City or by City's agents, employees, or contractors pursuant to the provisions of Article 1 of this Agreement.

2.4 **Warranty.** Landowner warrants the Project as to materials and workmanship for one year following acceptance of the Project by City, and should any failure of the Project or any portion thereof occur within a period of one year after final acceptance thereof by City, Landowner shall promptly cause the needed repairs to be made without any expense or cost to City. City is authorized to make repairs if Landowner fails to make, or undertake with due diligence, the necessary repairs within 20 days after it is given written notice of such failure. In case of emergency when delay would cause serious hazard to the public, the necessary repairs may be made by City without prior notice to Landowner. In all cases of failure of the Project within the warranty period where City has taken action in accordance with this paragraph, Landowner shall reimburse City for any and all costs or expenses, direct and indirect, incurred by City, and City may deduct the outstanding amount thereof from any reimbursement due to Landowner hereunder.

Article 3. Reimbursement

3.1 **Reimbursement Amount.** Reimbursement occurs either when credits are applied against Facilities Fees owed by Landowner or when Landowner is reimbursed from Facilities Fees collected by City. The method and manner of applying fee credits is set forth more particularly in Article 4 herein. Upon full

completion of the Project, and upon City acceptance of the Project, Landowner shall be entitled to reimbursement for the entire amount of the eligible (as determined by City in its discretion) actual Project Costs incurred by Landowner for construction of the Project in accordance with the terms of this Agreement (the "Reimbursement Amount"). The amount of such reimbursement shall be subject to City review and written approval of the Project Costs incurred by Landowner. Landowner shall provide copies of all contracts, change orders, and invoices for the costs of the work and such other documentation as may be requested by City to verify the total Project Costs incurred by Landowner. In accordance with section 18.24.130 of the Fee Ordinance, the Reimbursement Amount, as reduced from time to time by reimbursements paid and credits taken against the Facilities Fee pursuant to this Agreement, shall be subject to adjustments for inflation calculated consistent with the provisions of section 18.24.140 but shall not otherwise accrue interest.

3.2 Sources for Reimbursement. Nothing in this Agreement shall be construed to create an obligation of, or be attributable to, City's general or special funds, or any other funds in the hands of City or its accounts now and in the future, except as otherwise expressly provided herein. City's obligation hereunder to provide reimbursement is limited to the following sources of funds, to the extent funds are available therefrom and not otherwise committed for reimbursement by City to others:

3.2.1 Facility Fees that are paid to City pursuant to the Fee Ordinance for North Natomas, which fees shall be maintained by City in a separate Facilities Fee account (the "Facilities Account") and shall not be commingled with any other development or impact fees collected with respect to North Natomas, including, without limitation, any transit fees or drainage fees collected pursuant to the Fee Ordinance. Landowner acknowledges that a portion of such Facilities Fees, up to but not in excess of 3% of the Facilities Fees, will be retained by City to defer City's cost to administer the Fee Program and that an additional share of the Facilities Fees, not to exceed 7%, will be deposited in an account separate from the Facilities Account for reimbursement of costs of certain planning studies incurred by others for North Natomas pursuant to other reimbursement agreements with City, until the agreements have been fully paid. Landowner further acknowledges that the Facilities Fees to be paid by other landowners may be offset or reduced by credits in consideration of the construction of other Fee-related improvements, which may result in no money being paid into the Facilities Account by landowners who install "Public Safety Improvements" (i.e., off-site improvements contained in the North Natomas Finance Plan that are a public-safety concern and are not a direct result of any one development) or "Gateway Improvements" (as that term is defined in the North Natomas Finance Plan and Nexus Study) or only 57% of the Facilities Fees being paid by landowners who install "Non-gateway Improvements" (as that term is defined in the

North Natomas Finance Plan and Nexus Study), until such credits are exhausted.

3.2.2 Funds generated through public-financing mechanisms consistent with the North Natomas Finance Plan and created and implemented by City in its sole and exclusive discretion, which include funds for the acquisition of the Project and/or the payment of reimbursement to Landowner for financing some or all of the Project Costs pursuant to this Agreement. In no event shall credits and/or reimbursement from any public financing mechanism(s) exceed Landowner's eligible (as determined by City in its discretion) actual Project Costs. Nothing in this subsection shall affect (a) the status of Landowner's right, if any, to protest or otherwise challenge such public-financing mechanisms, in whole or in part, or (b) any previous waiver of such rights.

3.3 **Timing of Reimbursement.** Upon full completion of the Project and acceptance thereof by City, subject to the reimbursement priority described in Section 3.4 below, City will pay Landowner the amount then available in the Facilities Account for reimbursement up to, but not in excess of, the approved Reimbursement Amount for the Project. Thereafter, on a quarterly basis, commencing on the first of the calendar month following completion of the Project and continuing on the first of each month thereafter until the Reimbursement Amount is reduced to zero, City will pay Landowner the amount then available for reimbursement in the Facilities Account, up to the then outstanding Reimbursement Amount.

3.4 **Priority for Reimbursement.** Landowner acknowledges and agrees that the timing of reimbursement from the Facilities Account will be subject to the priorities and principles set forth below and in **Exhibits "F" and "G,"** attached hereto and incorporated herein by this reference:

3.4.1 *Prior Agreements.* City has previously entered into Public Safety Project and Gateway Project Reimbursement/Credit agreements with other landowners in the North Natomas Finance Plan Area for the funding of certain Fee-related improvements, which prior agreements are described in **Exhibit "E,"** attached hereto and incorporated herein by this reference ("Prior Agreements"). City has committed thereunder to use the first funds received by City under the Fee Ordinance to reimburse those landowners for the financing of such improvements, to the extent such reimbursement is not otherwise satisfied by credits against fees or other public-financing mechanisms. Accordingly, Landowner agrees that the funds in the Facilities Account will not be "available" for reimbursement under this Agreement unless and until the reimbursement obligations of City under the Prior Agreements are either satisfied or the priority for reimbursement thereunder is adjusted in accordance with the terms of such agreements. If a Prior Agreement is inadvertently not included within **Exhibit "E,"** then such agreement shall nevertheless retain its priority, if any, over this Agreement.

3.4.2 *Emergency Use of Funds.* Landowner agrees that funds within the Facilities Account will not be "available" for reimbursement under this Agreement if City determines, in its sole and exclusive discretion, that such funds must be expended upon an infrastructure project in the North Natomas Finance Plan area for any one of the following limited purposes:

- (a) the project is essential to preserve public health and safety or to protect public health and safety against an immediate risk;
- (b) the project is required as a result of a federal or state mandate;
- (c) the project is required to meet federal or state air-quality requirements; or
- (d) the project is required as a result of, or is needed to alleviate the effects of, an act of God or other disaster.

If City is required to exercise its discretion pursuant to this Section 3.4.2, City agrees to make reasonable efforts to replenish the reimbursement account.

3.4.3 *Subsequent Public Safety and Gateway Improvement Agreements.* Agreements entered into by City to provide reimbursements for the construction projects defined by City as public-safety project or gateway-project improvements, including but not limited to the Truxel Road Extension Project, will have superior priority to reimbursement over Landowner's right to reimbursement for the Project to be installed pursuant to this Agreement, as if the reimbursement for such public-safety or gateway improvement(s) had been entered into prior to the date of this Agreement, subject to adjustment in such priority pursuant to the terms of such subsequent agreements. Whether an improvement or project is a public-safety or gateway improvement or project shall be determined in the sole and exclusive discretion of City.

3.4.4 *Subsequent Non-Gateway Improvements.* Agreements entered into by the City, whether entered into before or after this Agreement, to provide reimbursements for the construction of non-gateway improvements shall, in the same fashion as this Agreement, be subject to the principles and policies set forth in Exhibits "F" and "G," attached hereto and incorporated herein by this reference.

3.4.5 *Adjustment of Priority.* Upon any failure of Landowner to timely commence or diligently complete construction of the Project, and subject further to Landowner's failure to cure such breach within 30 days of a written demand to commence or diligently proceed with the

work to completion, City may find that Landowner is in default of this Agreement. Upon any such default, City may elect to adjust the priority for reimbursement to occur after full reimbursement to any other landowners who have then entered into similar reimbursement/credit agreements subsequent to this Agreement for the construction of non-gateway improvements. The intent of this paragraph is to encourage the timely commencement and completion of the Project. City acknowledges that any such adjustment shall not affect Landowner's right to take credits against Fees as provided herein.

3.5 Agreements with Other Landowners. To protect such reimbursement to Landowner, City agrees that any and all other credit/reimbursement agreements involving reimbursements from the Facilities Fee will include the following terms:

3.5.1 The credit/reimbursement amount under the other agreements shall be based on the actual costs incurred for the improvements, as reviewed and approved by City, and the contracts for such work shall be awarded based on a competitive bid as required for comparable City public-works projects; and

3.5.2 Similarly, the provision of credits by City to other landowners for other project improvements will reduce the flow of funds to the Facilities Account and defer Landowner's reimbursement under this Agreement. So long as reimbursements are outstanding under this Agreement, City agrees that it will limit the amount of any credit that can be applied against the Facilities Fee, as and when building permits are issued within a landowner's property, as follows:

(a) If the credits are generated by the construction of Non-gateway Improvements, the maximum amount of credits that can be applied at the time of building permit issuance shall be **43%** of the then Facilities Fee.

(b) If the credits are generated by the construction of public-safety-project or gateway-project improvements, then **100%** of the credits can be applied at the time of building permit issuance, subject to such landowner's payment of its fair share of the City's costs to administer the Fee Program, up to, but not in excess of, **3%** of the then-existing Facilities Fee (e.g., if the City's costs of administration equaled 3%, then the maximum amount of credits that could be taken would be 97% of the Facilities Fee).

3.6 Impact of Assignment on Reimbursement Amount. If and to the extent Landowner assigns its right to reimbursements and credits under this Agreement in accordance with the provisions of Article 5 below, City's obligation to reimburse Landowner and such approved assignees shall be made in proportion to the

outstanding portions of the Reimbursement Amount then held by Landowner and such assignees thereof approved by the City pursuant to Article 5.

Article 4. Fee Credits

- 4.1 Credit Against Development Fees.** Upon full completion of the Project, and upon actual formal City acceptance of the Project, Landowner shall be entitled to credits (collectively, "Fee Credits," individually, a "Fee Credit") against the North Natomas Public Facility Fees (the "Fee") which would otherwise be collected in connection with the issuance of each building permit issued for all or a portion of the Property, equal to the "Credit Amount." The fee-credit principles expressed in this Section 4.1 shall be interpreted and applied to achieve fairness and equity to all parties, including City, while not allowing a party to obtain economic or other advantage through arbitrage or otherwise. Subject to the fair-share payment for City's Fee-administration costs described below, Landowner may credit 43% of its outstanding Reimbursement Amount against the Facilities Fee that would otherwise be payable by Landowner with respect to the Property upon issuance of a building permit for any building within the Property, until such Reimbursement Amount is exhausted through such credits and any reimbursement hereunder. Landowner acknowledges that the fee credit shall not apply against Landowner's fair share of City's costs and expenses to administer the Fee Program and reimbursement agreements related thereto and Landowner shall be obligated to pay such portion of the Fee as it pulls building permits within the Property, notwithstanding any outstanding balance of the Reimbursement Amount, up to, but not in excess of, 3% of the then-existing Facilities Fee.
- 4.2 Fee Deferral.** If City adopts a Fee Deferral Plan that provides for deferral of the Facilities Fee, and if Landowner elects to participate in such Fee Deferral Plan, then Landowner's fee credit shall be applied against the then-existing Facilities Fee in accordance with the foregoing provisions to determine the net outstanding fee. The fee deferral shall then be applied against the net outstanding fee to determine the annual installments of principal and interest to be paid pursuant to such Fee Deferral Plan.
- 4.3 Advance Issuance of Fee Credits.** Notwithstanding Section 4.1, Landowner shall be entitled to Fee Credits before full completion of the Project and actual formal City acceptance of the Project if all of the following conditions are satisfied:
- 4.3.1 *Bonds.* Landowner has complied with Section 1.5, concerning performance and payment bonds.
- 4.3.2 *Letter of Credit.* Landowner provides City with an irrevocable letter of credit in an amount that is no less than \$_____ as security for Landowner's performance under this Agreement ("Letter of Credit").
- (a) The Letter of Credit must be in a form acceptable to the City Attorney's Office, in that office's sole discretion, and, by its

express terms, must be unconditional and absolutely free of defenses on the part of Landowner and the financial institution that issues it. The financial institution that issues the Letter of Credit must be a commercial bank lawfully operating within the United States and acceptable to the City Treasurer's Office, in that office's sole discretion.

- (b) The term of the Letter of Credit must be at least **12 months**, and the Letter of Credit must provide that City may draw upon it by presenting one or more site drafts, each accompanied by a signed-and-dated demand letter worded substantially as follows:

I, the [title] of the City of Sacramento, demand payment of the sum of _____ U.S. Dollars (\$_____) representing a partial/[full draw upon the amount of your Irrevocable Letter of Credit No. _____. This sum represents payment due to the city under the reimbursement-and-credit agreement between [Landowner's name] and the city that is dated _____, 20__, and designated by the city as Agreement No. _____.

- (c) While this Agreement is in effect, Landowner must replace the Letter of Credit (and any replacement Letter of Credit) at least **30 days** before its expiration date. The replacement Letter of Credit must be identical to the Letter of Credit being replaced, except that it must have an expiration date that is no sooner than **12 months** following the expiration date of the Letter of Credit being replaced.

4.3.3 *Issuance of Fee Credits.* Landowner must make a written request for issuance of Fee Credits in accordance with this Section 4.3. City will verify that the required performance and payment bonds are in place and will determine, in its sole discretion, the amount of Fee Credits that may be issued in response to the written request. City will issue Fee Credits to Landowner in an amount equal to the Fee Credits allowable under this Agreement and City's policies and procedures for issuance of the credits. Total Fee Credits issued under this Section 4.3 may not exceed the amount of the Letter of Credit delivered by Landowner.

4.3.4 *Repayment.* If City issues Fee Credits to Landowner that, in the aggregate, exceed the total amount that may be issued in accordance with this Agreement and City's policies and procedures for issuance of the credits, then Landowner agrees to repay City the full amount of the excess within **15 days** after receiving City's written demand. Similarly, if the final calculation of Fee Credit amounts under this Agreement results in City having issued Fee Credits to Landowner in excess of

those provided in this Agreement, then Landowner agrees to repay City the full amount of the excess within **15 days** after receiving City's written demand.

4.3.5 *Drawing Upon the Letter of Credit.* City may draw on the Letter of Credit as follows:

- (a) If Landowner fails to complete construction of the Project as required by this Agreement, then City will have the absolute right to draw upon the Letter of Credit in an amount City determines, in its sole discretion, to be necessary to complete construction.
- (b) If repayment is due under Section 4.3.4 and Landowner does not repay City within the time specified in Section 4.3.4, then City will be entitled to draw against the Letter of Credit in an amount equal to the repayment amount then due. A draw under this Section 4.3.5(b) will be a partial draw under the Letter of Credit and will leave the balance of the Letter of Credit intact.
- (c) If Landowner fails to provide City with a replacement Letter of Credit within the time specified in Section 4.3.2(c), then City will be entitled to draw against the Letter of Credit in an amount equal to the total amount of Fee Credits that Landowner has received under this Agreement as of the time of the draw. If City makes a draw under this Section 4.3.5(c), then—
 - (1) City will hold the amount drawn, with no obligation to pay Landowner interest, until (A) City determines that Landowner cannot or will not complete the Project as required by this Agreement (in which event City may use the amount drawn to complete the Project) or (B) Landowner completes the Project in full and City formally accepts the Project (in which event City will return the amount drawn to Landowner); and
 - (2) City will not be obligated to issue additional Fee Credits under this Agreement unless and until (A) Landowner completes the Project in full and City formally accepts the Project or (B) Landowner furnishes City with a replacement Letter of Credit that complies with Section 4.3.2 above.

4.3.6 *Release of Letter of Credit.* City will release the Letter of Credit if and when Landowner completes the Project in full and City formally accepts the Project.

Article 5. Assignments of Reimbursement and Credits

5.1 Assignment of Reimbursement Rights. Landowner may assign the rights under this Agreement to receive reimbursements and take credits against the Facilities Fee to be assessed against any development within North Natomas to any person or entity, subject to and in accordance with the terms of this Article 5. All assignments of the right to credits and reimbursements pursuant to this Article 5 shall be subject to City's prior written consent, which consent shall not be unreasonably withheld or delayed. Landowner acknowledges and agrees that City shall have the discretion to deny an assignment of rights to credits and reimbursements under this Agreement on the basis of excessive fractionalization of the available credits and reimbursements, provided that City shall not deny an assignment that represents an amount equal to at least **\$50,000** of Landowner's reimbursement and credit rights. In addition, City shall be entitled to calculate and assess as a condition of its consent to any such assignment, a reasonable fee for the review, approval, and administration thereof.

5.2 Acknowledgment of Agreement; Assumption. In addition to the approval of City, any such assignment shall be subject to an express written assumption by the assignee, whereby the assignee agrees to be subject to all the provisions of this Agreement with respect to the application and interpretation of the fee-credit and fee-reimbursement provisions, including, without limitation, the obligation to pay the portion of the Facilities Fee required to cover City's cost of administration thereof, notwithstanding the existence of any such right to credits and reimbursements. The assignment agreement shall contain a provision whereunder Landowner and the assignee agree to fully and completely indemnify and defend City from any liability relating to the assignment of rights.

5.3 Allocation of Reimbursements. If and to the extent Landowner assigns its right to reimbursements under this Agreement in accordance with the provisions of this Article 5, City's obligation to reimburse Landowner and such approved assignees shall be made in proportion to the then-outstanding portions of the Reimbursement Amount then held by Landowner and such assignees thereof approved by City pursuant to this Article 5.

5.4 Disputes Between Landowner and Assignee. Landowner and any assignee thereof acknowledge and agree that in the event of any dispute between Landowner and/or any assignee and/or City regarding the legal ownership of the rights to credits and reimbursements hereunder, City may withhold any cash reimbursement and may disallow the use of any Fee Credits unless and until either—

5.4.1 all parties to the dispute have executed an agreement in a form acceptable to the City Attorney specifying the legal ownership of such rights and the manner in which such rights will be exercised, which agreement shall contain acceptable indemnification and defense provisions, or

5.4.2 one of the parties has obtained a court order determining as against the disputing parties the legal ownership of such rights and the manner in which such rights will be exercised.

5.5 City Policy and Procedure. Landowner acknowledges, for itself and its successors in interest to the Property, that the reimbursement and credit rights hereunder do not run with the Property and that adopted City policies and procedures relating to assignment of Fee Credits and reimbursements, as such policies and procedures may be amended from time to time, shall apply to Landowner and its successors in interest to the Property. Current City policies and procedures are as set forth in **Exhibit "H,"** attached hereto and incorporated herein by this reference. City agrees that it shall not give any Fee Credits to any subsequent purchaser or encumbrancer of any portion of the Property unless such subsequent purchaser or encumbrancer has a separate, written assignment of these Fee Credits from Landowner (or a previously approved assignee thereof), which written assignment has been approved by City in accordance with the provisions of this Article 5.

Article 6. Miscellaneous

6.1 Entire Agreement. This Agreement represents the entire agreement of the parties relating to the subjects covered by this Agreement. Oral and written statements, representations, and agreements not included within this Agreement shall have no force or effect whatsoever, and shall be deemed to have been superseded by this Agreement.

6.2 Attorneys' Fees. The prevailing party in any proceedings, judicial or otherwise, brought to enforce the terms of this Agreement shall be entitled to reasonable attorney's fees and costs in prosecuting or defending such proceedings.

6.3 Notices. Any notice required or elected to be given hereunder shall be given by placing the notice in the United States mail, postage prepaid, and addressed in accordance with the provisions of this Section 6.3. Unless the text of this Agreement otherwise provides, notice shall be deemed to have been given on the date that the notice was placed in the mail in accordance herewith. Notice to Landowners, or to any individual Landowner, shall be given to the single address set forth below.

6.3.1 If to City: City Manager
915 "I" Street, Fifth Floor
Sacramento, CA 95814

6.3.2 If to Landowner: [Name of contact]
[Name of business]
[Street address]
[City, state, zip code]

6.4 **Effective Date.** This Agreement shall become effective upon its execution by all parties.

6.5 **Mediation and Arbitration.**

6.5.1 Any dispute or controversy between all or a portion of the parties to this Agreement relating to the interpretation and enforcement of their rights and obligations under this Agreement shall be resolved solely by mediation and arbitration in accordance with the provisions of this Section 6.5. The mediation and arbitration procedures shall be commenced by any party to this Agreement by serving by a Notice of Dispute ("Notice") on the parties pursuant to Section 6.3. The Notice generally shall describe the nature of the dispute and specify the date of its mailing. The Notice shall require each party to notify the party serving the Notice of its intention to participate in the mediation and arbitration procedures within **five days** of the date of mailing of the Notice. For purposes of this Section 6.5 only, the party serving the Notice and all other parties indicating an intention to participate in the mediation and arbitration procedures shall be referred to herein as the "Disputing Parties," and shall be the only parties entitled to participate in said procedures.

6.5.2 With respect to any dispute or controversy between Disputing Parties that is to be resolved by mediation and arbitration as provided in Section 6.5.1, the Disputing Parties shall attempt in good faith first to mediate such dispute and use their best efforts to reach agreement on the matters in dispute. Within **15 days** of the mailing of the Notice, the party serving the Notice shall attempt to employ the services of a third person ("Mediator") mutually acceptable to the Disputing Parties to conduct such mediation. The cost of the Mediator shall be borne equally by the Disputing Parties. The mediation shall take place within **10 days** of the appointment of such Mediator. If the Disputing Parties are unable to agree on such Mediator, or, if on completion of such mediation, the parties are unable to agree and settle the dispute, then the dispute shall be referred to arbitration in accordance with the following subsections.

6.5.3 Any dispute or controversy between Disputing Parties that is to be resolved by arbitration as provided in the foregoing subsections shall be settled and decided by arbitration conducted by the American Arbitration Association in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as then in effect, except as provided below. Any such arbitration shall be held and conducted in Sacramento, California before one arbitrator who shall be selected by mutual agreement of the parties. If agreement is not reached on the selection of an arbitrator within **15 days** after referral to arbitration, then

such arbitrator shall be appointed by the Presiding Judge of the Superior Court of Sacramento County as soon as practicable.

- 6.5.4 The provisions of the Commercial Arbitration Rules of the American Arbitration Association shall apply and govern such arbitration, subject, however, to the following:
- (a) Any referral to arbitration shall be barred after the date that institution of legal or equitable proceedings based on the subject controversy or dispute would be barred by the applicable statute of limitations.
 - (b) The arbitrator appointed must be a former or retired judge or an attorney with at least 10 years' experience in real property, commercial, and municipal law.
 - (c) The Disputing Parties mutually may elect to have all proceedings involving the Disputing Parties reported by a certified shorthand court reporter and written transcripts of the proceedings prepared and made available to the Disputing Parties. If fewer than all of the Disputing Parties desire the use of a court reporter and preparation of written transcripts, then the issue of whether or not to retain a court reporter shall be submitted to the arbitrator who, in his or her sole discretion, shall determine whether such use and preparation is necessary or beneficial to the proceedings and the interests of all Disputing Parties in resolving the dispute.
 - (d) The arbitrator shall prepare in writing and provide to the Disputing Parties factual findings and the reasons on which the decision of the arbitrator is based.
 - (e) The matter shall be heard by the arbitrator and the final decision by the arbitrator must be made within **90 days** from the date of the appointment of the arbitrator. The arbitration hearing date shall be established by the arbitrator, which date must be within such period of time that the arbitrator, in his or her sole discretion, determines to be sufficient to meet the foregoing time constraints.
 - (f) The prevailing party shall be awarded reasonable attorney's fees and costs incurred in connection with the arbitration, unless the arbitrator for good cause determines otherwise.
 - (g) Costs and fees of the arbitrator and court reporter, if any, shall be borne equally by the Disputing Parties. The cost of preparing any transcript of the proceedings shall be the responsibility of the Disputing Party or Parties requesting such preparation.

- (h) The award or decision of the arbitrator shall be final and judgment may be entered on it in accordance with applicable law in any court having jurisdiction over the matter.
- (i) The provisions of title 9 of part 3 of the California Code of Civil Procedure, commencing with section 1282 and including section 1283.05, and successor statutes, permitting, among other things, expanded discovery proceedings shall be applicable to all disputes that are arbitrated under this section 6.5.

6.6 Enforced Delay, Extension of Times of Performance. In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default where delays or default are due to war, insurrection, strikes, walkouts, riots, floods, drought, rain, earthquakes, fires, casualties, acts of God, governmental restrictions imposed or mandated by other governmental entities, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulation, litigation, or similar bases for excused performance. If written notice of such delay is given to City within **30 days** of the commencement of such delay, an extension of time for such cause shall be granted for the period of the enforced delay, or longer as may be mutually agreed upon.

6.7 Preparation Fees. Landowner shall pay to City the sum of **\$1,500**, representing the costs associated with the City Attorney's services in negotiating and drafting this Agreement.

City of Sacramento

[Landowner]

By: _____
Ray Kerridge
City Manager

By: _____
[Name]
[Title]

Attest:

Approved for Legal Form

By: _____
City Clerk

By: _____
Senior Deputy City Attorney

EXHIBIT A

LANDOWNER PROPERTY DESCRIPTION

EXHIBIT B

PROJECT INFRASTRUCTURE ELEMENTS

Note: This exhibit must include both a description (and depiction, i.e., plans) of the project and a summary of cost estimates for the project (see Recital D).

EXHIBIT C

HAZARDOUS SUBSTANCES

- A. **No Review, Examination, or Assessment.** The parties acknowledge and understand that City has not conducted any review, examination or assessment to assess, identify or detect the presence of any Hazardous Substances, as defined below, on, under or around Landowner Property. As between the City and Landowner, any liability associated with the presence of any Hazardous Substances on, under or around the Landowner Property, including any interests in said property dedicated to City as provided herein, shall be governed by the indemnity provisions of this Agreement, regardless of whether any such review, examination or assessment is conducted.
- B. **Definitions.**
- (1) As used herein, the term "Hazardous Substances" means:
- (a) Those substances included within the definitions of hazardous substance, hazardous waste, hazardous material, toxic substance, solid waste, or pollutant or contaminant under any Environmental Law, as defined below;
 - (b) Those substances listed in the United States Department of Transportation Table [49 C.F.R. § 172.101], or by the Environmental Protection Agency, or any successor agency, as hazardous substances [40 C.F.R. Part 302];
 - (c) Other substances, materials, and wastes that are or become regulated or classified as hazardous or toxic under federal, state or local laws or regulations; and
 - (d) Any material, waste, or substance that is—
 - (i) a petroleum or refined petroleum product;
 - (ii) asbestos;
 - (iii) polychlorinated biphenyl;
 - (iv) designated as a hazardous substance pursuant to 33 U.S.C. § 1321 or listed pursuant to 33 U.S.C. § 1317;
 - (v) a flammable explosive; or
 - (vi) a radioactive material.
- (2) As used herein, the term "Environmental Law" means all federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees or requirements of any government authority regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance, or pertaining to environmental conditions on, under, or about the detention basin site

or any of the easement areas which Landowner is required to and does convey to City pursuant to this Agreement, as now or may at any later time be in effect, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [42 U.S.C. § 9601 et seq.]; the Resource Conservation and Recovery Act of 1976 (RCRA) [42 U.S.C. § 6901 et seq.]; the Clean Water Act, also known as the Federal Water Pollution Control Act (FWPCA) [33 U.S.C. § 1251 et seq.]; the Toxic Substances Control Act (TSCA) [15 U.S.C. § 2601 et seq.]; the Hazardous Materials Transportation Act (HMTA) [49 U.S.C. § 1801 et seq.]; the Insecticide, Fungicide, Rodenticide Act (7 U.S.C. § 136 et seq.); the Superfund Amendments and Reauthorization Act [42 U.S.C. § 6901 et seq.]; the Clean Air Act [42 U.S.C. § 7401 et seq.]; the Safe Drinking Water Act [42 U.S.C. § 300f et seq.]; the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.]; the Surface Mining Control and Reclamation Act [30 U.S.C. § 1201 et seq.]; the Emergency Planning and Community Right to Know Act [42 U.S.C. § 11001 et seq.]; the Occupational Safety and Health Act [29 U.S.C. §§ 655 and 657]; the California Underground Storage of Hazardous Substances Act [Health and Safety Code § 25280 et seq.]; the California Hazardous Substances Account Act [Health and Safety Code § 25100 et seq.]; the California Safe Drinking Water and Toxic Enforcement Act [Health and Safety Code § 24249.5 et seq.]; the Porter-Cologne Water Quality Act [Water Code § 13000 et seq.], together with any amendments of or regulations promulgated under the statutes cited above, and any other federal, state or local law, statute, ordinance or regulation now in effect or later enacted that pertains to the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water, or land use.

EXHIBIT D

CONSTRUCTION CONTRACT LANGUAGE

Contractor agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions by any of the following in connection with the design, construction, operation, maintenance, or repair of that portion of the Improvement designed or constructed by Contractor: Contractor; any of Contractor's engineers or subcontractors; or any other person or entity employed by, or acting on behalf of or as the authorized agent for, Contractor or any of Contractor's engineers or subcontractors.

EXHIBIT E
PRIOR AGREEMENTS

EXHIBIT F

**EXCERPTS FROM NORTH NATOMAS CREDIT AND
REIMBURSEMENT DATABASE MANUAL**

EXHIBIT G
REIMBURSEMENT RESOLUTION

EXHIBIT H
ASSIGNMENT POLICIES AND PROCEDURES

EXHIBIT B

Gateway Project Reimbursement-and-Credit Agreement for Construction of North Natomas Infrastructure

(Insert Project Description)

This Agreement is entered into on _____, 20 __, by and between the City of Sacramento, a charter municipal corporation (hereafter "City"), on the one hand, and [Name of Landowner], a [type of entity] (hereafter "Landowner"), on the other, with respect to the following facts:

Recitals

- A. Landowner owns the land described in Exhibit "A" (the "Property").
- B. Development of the Property is subject to payment of the North Natomas Public Facilities Fee (the "Facilities Fee") in accordance with chapter 18.24¹ of the Sacramento City Code (the "Fee Ordinance").
- C. Landowner desires to construct the elements of North Natomas infrastructure (the "Project") as specified and depicted in Exhibit "B." The Project has been or will be constructed pursuant to plans approved by City, and the actual costs of construction of the Project are to be the result of a bidding process as approved in writing in advance by City.
- D. Subject to the credits against and reimbursements from the Facilities Fee as provided herein, Landowner is willing to construct the Project and to fund the entire costs of such construction. For purposes of this Agreement, "Project Costs" means costs related to all contracts for the construction of the Project, including change orders thereto, and costs associated with all other contracts for professional and other services necessary, in City's judgment, to implement and complete construction, together with planning and design costs and right-of-way acquisition costs, if any, associated with the Project. Project Costs shall include but not be limited to the engineering estimates and the Project elements included therein, which estimates are set forth in Exhibit "B"; construction inspection fees; and applicable plan-check fees, inspection fees, and Habitat Conservation Fees.
- E. Because the Project is designated for funding by the Facilities Fee, the Project is eligible for, and City desires to provide credits against and reimbursement from, the Facilities Fee for Landowner's eligible (as determined by City in its discretion) actual Project Costs, in accordance with the Fee Ordinance and subject to the terms and conditions of this Agreement.

¹ Formerly Chapter 84.02. Citations to the Sacramento City Code throughout this agreement shall include amendments or renumbering which occur after execution of this document.

Agreement

Now, therefore, in consideration of the foregoing and the mutual promises contained herein, City and Landowner hereby agree as follows:

Article 1. Construction of Project

- 1.1 Construction.** Landowner agrees to construct the Project, or cause it to be constructed, and to convey the Project, along with all interests in real property necessary for the operation, maintenance, and ownership thereof, to City or appropriate other public entities or utilities.
- 1.2 Plans and Specifications.** Landowner represents that it has obtained or will obtain approval of the plans and specifications for the Project from all appropriate departments of City and from any other public entity or public utility from which such approval must be obtained. Landowner covenants that the Project will be constructed in compliance with such approved plans and specifications and the adopted City Construction Specifications and Improvement Standards, subject to minor change orders as may be required that are substantially consistent with such plans and specifications. Copies of all plans and specifications shall be provided by Landowner to City's [Title] ("Director"). City agrees to use its best efforts and due diligence to review and approve such plans or provide comments thereto regarding any necessary corrections thereto, in a prompt and timely manner.
- 1.2.1 The City Construction Specifications and Standards shall be those in effect at the time of final approval by City of the design of the Project.
- 1.2.2 Landowner shall provide a site-construction superintendent ("Site Superintendent") and City shall provide a City project manager ("City Project Manager") who will serve as their respective points of contact with respect to such construction, who will be onsite as necessary, and who will generally be available by telephone or otherwise at all reasonable times.
- (a) The Site Superintendent shall have complete authority over the construction contractors and all subcontractors, with authority to order stoppage of work and minor changes to the work in order to comply with the Project Plans. The Site Superintendent may also, but need not have authority to, order minor design changes to meet unanticipated field conditions, provided that the same are consistent with the Project Plans.
- (b) The City Project Manager shall have complete authority over the City's construction inspectors, with authority to determine whether the work complies with the Project Plans. The City Project

Manager may also, but need not have authority to, approve minor design changes to meet unanticipated field conditions, provided that the same are consistent with the Project Plans.

- (c) [Name] is designated by Landowner as the Site Superintendent, until Landowner notifies City's [Name of Department] of his or her replacement. [Name] is designated by City as the City Project Manager, until the Director notifies Landowner of his or her replacement.

1.3 Commencement and Completion of Project. Subject to the provisions of Section 6.6 below, including, without limitation, the effect of inclement weather on Landowner's ability to commence or proceed with construction, Landowner shall commence the construction of the Project **within six months** of the final approval of the improvement plans by the City and thereafter shall diligently work to complete such construction in a timely and efficient manner. The contract for such construction shall be let as the result of a bidding process approved in writing in advance by the City and shall require the contractor to pay prevailing wages. The contract amount for such work shall be subject to the review and approval of the City, which approval shall not be unreasonably withheld.

1.4 Inspection. Landowner covenants that City and any other public entities or public utilities to whom any portion of the Project will be conveyed will be permitted to inspect the Project. City agrees to make inspectors available for inspection of the Project during such construction within at least **48 hours** of request therefor from Landowner.

1.4.1 Should a City inspector (the "Inspector") find any nonconformance or noncompliance with the Project Plans, the Inspector shall notify the City Project Manager and the Site Superintendent of such nonconformance or noncompliance, and the City Project Manager and the Site Superintendent shall jointly determine the nature of the corrective action to be taken. Corrective action taken pursuant to the agreement between the City Project Manager and the Site Superintendent shall be deemed to be in accordance with the Project Plans.

1.4.2 If the City Project Manager and the Site Superintendent are unable to agree upon the corrective action to be taken, the City Project Manager may order that work on the nonconforming or noncomplying item(s) or area(s) be stopped. If the City Project Manager orders work to stop, then—

- (a) Landowner shall comply with all requirements of any stop-work order and must obtain City's approval before work can resume on that item(s) or in that area(s); and

- (b) the City Project Manager, the Site Superintendent, and such other representatives of City and Landowner as are necessary or appropriate to evaluate, discuss, and resolve the situation shall promptly meet and confer regarding the measures necessary to correct the nonconforming or noncomplying items(s) or area(s).

1.5 Performance and Payment Bonds. Landowner covenants to comply with all applicable City performance and payment bonding requirements (and such other bonding requirements as may be specified by other public entities and/or public utilities) with respect to the construction of the Project. Landowner may satisfy the obligation to post bonds with an assignment to City of the contractor's bond or through the posting of bonds, letters of credit, or other security instruments acceptable to City, in accordance with applicable City requirements; provided, however, that all such bonds, letters of credit, or other security instruments must meet all requirements that would apply for security to be posted by a contractor, quantitatively and qualitatively, if City and not Landowner were contracting to construct the Project.

1.6 Insurance. Landowner shall furnish to City a certificate or certificates substantiating the fact that it has taken out the insurance hereinafter set forth for the period covered by this Agreement with an insurance carrier acceptable to City in a form satisfactory to City. Each certificate shall bear an endorsement precluding the cancellation or reduction in coverage of any policy covered by such certificate before the expiration of **30 days** after City has received notification of such cancellation or reduction by registered mail. The minimum insurance coverage shall be as follows:

Public-liability and property-damage insurance that includes but is not limited to personal injury, property damage, losses related to independent contractors, products and equipment, explosion, collapse, and underground hazards, in the amount of not less than a combined single limit of **one million dollars** for one or more persons injured and property damage in each occurrence. The public-liability and property-damage insurance shall also name City as an additional insured. This insurance shall directly protect City as well as Landowner and its agents. The insurer shall assume the defense of City and City's officers, employees, and agents from suits, actions, damages, or claims of every type and description to which they may be subjected or put by reason of, or resulting from, the construction or installation of the Project. The insurance policy shall expressly state that the above terms are in effect.

If Landowner fails to maintain such insurance, City may take out insurance to cover damages of the above-mentioned classes for which City might be held liable on account of Landowner's failing to pay such damages, and may recover the amount of the premiums for such insurance from Landowner or retain such amount from any monies due Landowner under this Agreement. Failure of City to

obtain such insurance shall in no way relieve Landowner from any of its responsibilities under this Agreement.

1.7 Contracts and Change Orders. Landowner shall be responsible for entering into all contracts and any change orders required for the construction of the Project.

1.7.1 So long as the contracts and change orders are substantially consistent with the approved plans and specifications and are consistent with City Standards, as determined by Landowner's project engineer, Landowner shall not be obligated to obtain the approval of Director therefor; provided, however, that any change orders that will increase the cost of the Project by more than **10%** shall be subject to the prior approval of Director. City Project Manager's approval shall not be required for those change orders which do not require approval of the Director.

1.7.2 Except as otherwise provided in Section 1.7.3, Landowner agrees to make changes in the construction of the Project as requested by City.

- (a) As to changes which are necessary in order to comply with approved plans and specifications, Landowner shall pay for all such changes.
- (b) City agrees to pay Landowner for changes requested by it when such changes are discretionary changes requested by City; provided, however, that Landowner shall provide a written statement of the estimated cost of the change, prior to constructing such change. If Landowner fails to provide a written statement of the estimated cost of the change within **10 days** following receipt of a written request from City for such statement made after the nature of the change is finally determined, Landowner shall make such change and City shall not be required to pay for such change.

1.7.3 Except for those changes that are necessary to comply with approved plans and specifications, Landowner shall **not** be obligated to make changes requested by City where any one of the following applies:

- (a) the same would result in unreasonable delay to the Project;
- (b) City has failed to approve the estimated cost before construction of the change would otherwise begin; or
- (c) the change would increase the cost of the Project beyond the sum of (1) the City-approved budget for the Project; plus (2) the additional funds City has agreed to pay pursuant to Section 1.7.2 above.

Article 2: City Acceptance; Conveyance of Project

- 2.1 Acceptance and Conveyance.** When Landowner completes construction of the Project and the Project has been formally accepted by City, the Project shall automatically become the property of City. Upon such completion, Landowner shall take all actions necessary to convey to and vest in City full, complete, and clear title in the Project and in all of the underlying real property interests (easement and/or fee), including those necessary for maintenance and access. City will not formally accept the Project unless and until such title has been conveyed to City. For purposes of this Agreement, City acceptance means final completion in accordance with the approved plans and specifications for the Project, which has been finally inspected and approved by City for acceptance into its infrastructure system, as evidenced by a written statement or letter to that effect signed by or on behalf of City.
- 2.2 Release of Liens.** Upon completion, Landowner shall provide, in form satisfactory to the Director, evidence that all of the costs of the Project have been fully paid, including all lien claims. Upon request of the Director, Landowner shall provide lien releases under California Civil Code section 3262, subdivision (d), to assure that payment of any outstanding claims of Landowner's contractors, subcontractors, and suppliers have been paid.
- 2.3 Indemnification.**
- 2.3.1 *Indemnification by Landowner.*** Subject to the provisions of this Section 2.3, Landowner agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against any and all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions in connection with the design, construction, operation, maintenance, or repair of the Project by any of the following: Landowner; any of Landowner's engineers, contractors, or subcontractors; or any other person or entity employed by or acting on behalf of or as the authorized agent for Landowner or any of Landowner's engineers, contractors, or subcontractors. Provided, however, that Landowner shall not be liable hereunder to indemnify, defend, or hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents against Claims alleging sole and active negligence of City in its functions of design review, approval, or construction inspection in connection with the Project; provided further, that nothing in this Agreement shall be construed as a waiver by City of any immunity or defense it may have relating to any such Claim, including without limitation immunity or

defenses relating to design review and/or approval and/or construction inspection.

- 2.3.2 *Indemnification Regarding Hazardous Substances.* Landowner further agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or damage to the environment to the extent arising from any use, storage, treatment, transportation, release, or disposal on, about, or around the portion of the Landowner Property on which the detention basin or any of the Project or the easements that are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined in **Exhibit "C,"** attached hereto and incorporated herein by this reference, by any person or entity (except persons or entities acting on City's behalf or under City's control), occurring on or at any time prior to the date the Project and the associated real property interests are conveyed to City as provided in this Agreement. The foregoing indemnification obligation shall not apply to the incorporation of building materials as part of the Project, provided that such incorporation is performed in accordance with applicable laws and is not in violation of Environmental Laws in effect at the time of such incorporation.
- 2.3.3 *Indemnification Regarding Application of Credits and Reimbursements.* Landowner further agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, injury to property interests, property damage, or violation of any law or regulation to the extent arising from any actions or omissions in connection with the application or calculation of credits and/or reimbursement authorized by City pursuant to this agreement.
- 2.3.4 *Duration of Indemnification Obligations.* The indemnification and hold harmless agreement made by Landowner in Section 2.3.1 above, with respect to the Project, and/or each part thereof constructed by Landowner, shall expire on the date which is **one year** after the completion of the Project and acceptance thereof by City (hereafter the "Expiration Date"), provided that Section 2.3.1 above shall not expire and shall remain in effect with respect to any Claims that are made, initiated, claimed, filed, or assessed at any time prior to the Expiration Date, or which relate to (directly or indirectly) any such Claims. The indemnification and hold harmless agreement made by Landowner in Section 2.3.2 above shall survive the termination of this Agreement

until the date which is **two years** after the completion of such phase and acceptance thereof by City. Section 2.3.2 above shall not expire, however, and shall remain in effect with respect to any Claims that are made, initiated, claimed, filed, or assessed at any time prior to such date, or which relate to (directly or indirectly) any such Claims. The provisions of this Section 2.3.4 shall apply only with respect to the indemnification and hold harmless provisions of this Agreement and shall not affect the liability, if any, that Landowner might have under applicable law to the extent Landowner is a contaminator of the Landowner Property. The provisions of this Section 2.3.4 shall not expire and shall survive the termination of this Agreement.

2.3.5 *Additional Provisions Regarding Indemnification Obligations.* The parties further agree and understand as follows:

- (a) City does not waive, and shall not be deemed to waive, any rights against Landowner that it may have by reason of the aforesaid indemnity and hold harmless agreements because of any insurance coverage provided pursuant to Section 1.6.
- (b) Except as may otherwise be specifically and expressly provided in Section 2.3.1 relating to Claims based upon allegations of sole and active negligence on the part of City, the aforesaid indemnity and hold harmless agreements shall not be limited or waived in any way based upon the fact that City has or shall have prepared, supplied, or approved of plans and/or specifications for the Project, or has or shall have inspected or failed to inspect construction of the Project.
- (c) The scope of the aforesaid indemnity and hold harmless agreements is to be construed broadly and liberally to provide the maximum coverage for City in accordance with their terms.
- (d) No specific term or word contained in this section shall be construed as a limitation on the scope of the indemnification and defense rights and obligations of the parties unless specifically so provided.
- (e) Landowner shall cause all engineering and construction contracts relating to the Project to require the engineer or contractor to fully and without limitation indemnify, defend, and hold harmless City and its elective and appointive boards, commissions, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions of such professional in connection with the design, construction, maintenance, operation, or repair of

the Project by the engineer or contractor or by any other person or entity employed by or acting as the authorized agent for the engineer or contractor, but only to the extent that such professional or other party has contractual responsibility for a portion or aspect of the Project. For example, a contractor responsible for constructing a portion of the Project would not be held responsible for the design, nor would an engineer who designed a portion of the Project be held responsible for construction not in accordance with the design. So long as the construction contract contains the language contained in Exhibit "D," attached hereto and incorporated herein by this reference, or other language approved in writing by City, and if City is satisfied in its judgment with the adequacy of the engineer's or contractor's insurance, Landowner shall be deemed to have satisfied its obligation under this Section 2.3.5(e) to obtain for the City indemnification and defense obligations on the part of Landowner's engineers and contractors.

2.3.6 *Waiver by Landowner.* In addition to Landowner's obligations to indemnify, hold harmless, and defend City as set forth above, Landowner and its assigns, transferees, and successors waive and release all claims of whatever sort or nature that may arise against City or City's officers, employees, and agents in connection with the design or construction of the Project. The provisions of this Section 2.3.6 shall not apply to discretionary changes to the Project that were required by City unless all of the following apply: (a) the discretionary changes required by City were approved by Landowner's engineers; and (b) Landowner's engineers have provided to Landowner, pursuant to a contract between Landowner and its engineers, errors-and-omissions insurance or similar professional-liability insurance coverage that covers the Project, including all discretionary changes required by City.

2.3.7 *Unknown Claims.* This waiver and release shall include any and all claims arising under section 1542 of the California Civil Code, which provides as follows:

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

Thus, notwithstanding the provisions of section 1542, and for the purpose of implementing a full and complete release, the parties hereto expressly acknowledge that this Agreement is intended to release and extinguish, without limitation, all claims as described in this Section 2.3 that the parties do not know or suspect to exist. The provisions of this Section 2.3 shall survive termination of this Agreement.

2.3.8 *Indemnification by City.* City further agrees and covenants to fully indemnify, defend, and hold harmless Landowner and Landowner's directors, members, shareholders, partners, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or damage to the environment—

- (a) to the extent arising from any City use, storage, treatment, transportation, release, or disposal on, about, or around the portion of the Landowner Property on which the Project or the easements that are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined above, by any person or entity (except persons or entities acting on Landowner's behalf or under Landowner's control), occurring on or at any time after the date the Project and the easements are conveyed to City as provided in this Agreement;
- (b) arising from any act or omission (including but not limited to those covered by Section 2.3.8(a)) on the part of City or its agents or employees in the use and operation of the Project; or
- (c) occurring on or at any time arising from any entry upon the Landowner Property by City or by City's agents, employees, or contractors pursuant to the provisions of Article 1 of this Agreement.

2.4 **Warranty.** Landowner warrants the Project as to materials and workmanship for **one year** following acceptance of the Project by City, and should any failure of the Project or any portion thereof occur within a period of **one year** after final acceptance thereof by City, Landowner shall promptly cause the needed repairs to be made without any expense or cost to City. City is authorized to make repairs if Landowner fails to make, or undertake with due diligence, the necessary repairs within **20 days** after it is given written notice of such failure. In case of emergency when delay would cause serious hazard to the public, the necessary repairs may be made by City without prior notice to Landowner. In all cases of failure of the Project within the warranty period where City has taken action in accordance with this paragraph, Landowner shall reimburse City for any and all costs or expenses, direct and indirect, incurred by City, and City may deduct the outstanding amount thereof from any reimbursement due to Landowner hereunder.

Article 3: Reimbursement

3.1 **Reimbursement Amount.** Reimbursement occurs either when credits are applied against Facilities Fees owed by Landowner or when Landowner is reimbursed from Facilities Fees collected by City. The method and manner of applying fee credits is set forth more particularly in Article 4 herein. Upon full

completion of the Project, and upon City acceptance of the Project, Landowner shall be entitled to reimbursement for the entire amount of the eligible (as determined by City in its discretion) actual Project Costs incurred by Landowner for construction of the Project in accordance with the terms of this Agreement (the "Reimbursement Amount"). The amount of such reimbursement shall be subject to City review and written approval of the Project Costs incurred by Landowner. Landowner shall provide copies of all contracts, change orders, and invoices for the costs of the work and such other documentation as may be requested by City to verify the total Project Costs incurred by Landowner. In accordance with section 18.24.130 of the Fee Ordinance, the Reimbursement Amount, as reduced from time to time by reimbursements paid and credits taken against the Facilities Fee pursuant to this Agreement, shall be subject to adjustments for inflation calculated consistent with the provisions of section 18.24.140 but shall not otherwise accrue interest.

3.2 Sources for Reimbursement. Nothing in this Agreement shall be construed to create an obligation of, or be attributable to, City's general or special funds, or any other funds in the hands of City or its accounts now and in the future, except as otherwise expressly provided herein. City's obligation hereunder to provide reimbursement is limited to the following sources of funds, to the extent funds are available therefrom and not otherwise committed for reimbursement by the City to others:

3.2.1 Facility Fees that are paid to City pursuant to the Fee Ordinance for North Natomas, which fees shall be maintained by City in a separate Facilities Fee account (the "Facilities Account") and shall not be commingled with any other development or impact fees collected with respect to North Natomas, including, without limitation, any transit fees or drainage fees collected pursuant to the Fee Ordinance. Landowner acknowledges that a portion of such Facilities Fees, up to but not in excess of 3% of the Facilities Fees, will be retained by City to defer City's cost to administer the Fee Program and that an additional share of the Facilities Fees, not to exceed 7%, will be deposited in an account separate from the Facilities Account for reimbursement of costs of certain planning studies incurred by others for North Natomas pursuant to other reimbursement agreements with City, until the agreements have been fully paid. Landowner further acknowledges that the Facilities Fees to be paid by other landowners may be offset or reduced by credits in consideration of the construction of other Fee-related improvements, which may result in no money being paid into the Facilities Account by landowners who install "Public Safety Improvements" (i.e., off-site improvements contained in the North Natomas Finance Plan that are a public-safety concern and are not a direct result of any one development) or "Gateway Improvements" (as that term is defined in the North Natomas Finance Plan and Nexus Study) or only 57% of the Facilities Fees being paid by landowners who install "Non-gateway Improvements" (as that term is defined in the

North Natomas Finance Plan and Nexus Study), until such credits are exhausted.

3.2.2 Funds generated through public-financing mechanisms consistent with the North Natomas Finance Plan and created and implemented by City in its sole and exclusive discretion, which include funds for the acquisition of the Project and/or the payment of reimbursement to Landowner for financing some or all of the Project Costs pursuant to this Agreement. In no event shall credits and/or reimbursement from any public financing mechanism(s) exceed Landowner's eligible (as determined by City in its discretion) actual Project Costs. Nothing in this subsection shall affect (a) the status of Landowner's right, if any, to protest or otherwise challenge such public-financing mechanisms, in whole or in part, or (b) any previous waiver of such rights.

3.3 **Timing of Reimbursement.** Upon full completion of the Project and acceptance thereof by City, subject to the reimbursement priority described in Section 3.4 below, City will pay Landowner the amount then available in the Facilities Account for reimbursement up to, but not in excess of, the approved Reimbursement Amount for the Project. Thereafter, on a quarterly basis, commencing on the first of the calendar month following completion of the Project and continuing on the first of each month thereafter until the Reimbursement Amount is reduced to zero, City will pay Landowner the amount then available for reimbursement in the Facilities Account, up to the then outstanding Reimbursement Amount.

3.4 **Priority for Reimbursement.** Landowner acknowledges and agrees that the timing of reimbursement from the Facilities Account will be subject to the priorities and principles set forth below and in Exhibits "F" and "G," attached hereto and incorporated herein by this reference:

3.4.1 *Prior Agreements.* City has previously entered into Public Safety Project and Gateway Project Reimbursement/Credit agreements with other landowners in the North Natomas Finance Plan Area for the funding of certain Fee-related improvements, which prior agreements are described in Exhibit "E," attached hereto and incorporated herein by this reference ("Prior Agreements"). City has committed thereunder to use the first funds received by City under the Fee Ordinance to reimburse those landowners for the financing of such improvements, to the extent such reimbursement is not otherwise satisfied by credits against fees or other public-financing mechanisms. Accordingly, Landowner agrees that the funds in the Facilities Account will not be "available" for reimbursement under this Agreement unless and until the reimbursement obligations of City under the Prior Agreements are either satisfied or the priority for reimbursement thereunder is adjusted in accordance with the terms of such agreements. If a Prior Agreement is inadvertently not included within Exhibit "E," then such agreement shall nevertheless retain its priority, if any, over this Agreement.

3.4.2 *Emergency Use of Funds.* Landowner agrees that funds within the Facilities Account will not be "available" for reimbursement under this Agreement if City determines, in its sole and exclusive discretion, that such funds must be expended upon an infrastructure project in the North Natomas Finance Plan area for any one of the following limited purposes:

- (a) the project is essential to preserve public health and safety or to protect public health and safety against an immediate risk;
- (b) the project is required as a result of a federal or state mandate;
- (c) the project is required to meet federal or state air-quality requirements; or
- (d) the project is required as a result of, or is needed to alleviate the effects of, an act of God or other disaster.

If City is required to exercise its discretion pursuant to this Section 3.4.2, City agrees to make reasonable efforts to replenish the reimbursement account.

3.4.3 *Subsequent Public Safety and Gateway Improvement Agreements.* Except as otherwise provided by Section 3.4.5 below, all agreements entered into by City to provide reimbursements for the construction of other public-safety project or gateway-project improvements shall not affect the priority of reimbursement to Landowner for the Project to be installed pursuant to this Agreement.

3.4.4 *Subsequent Non-Gateway Improvements.* All agreements entered into by City, whether entered into before or after this Agreement, to provide reimbursements for the construction of non-gateway-project improvements shall not affect the priority of reimbursement to Landowner pursuant to this Agreement. Landowner acknowledges that if and when it enters into a separate agreement for the reimbursement of any non-gateway-project improvements to be constructed by Landowner, while reimbursements shall be on a first-agreed, first-reimbursed basis between the non-gateway-project improvements, any reimbursement therefor will first be subject to full reimbursement by City for all public-safety-project or gateway-project improvements, including the Project, whether the agreements for such public-safety-project or gateway-project improvements are entered into before or after the reimbursement agreement for the non-gateway-project improvements.

3.4.5 *Adjustment of Priority.* Upon any failure of Landowner to timely commence or diligently complete construction of the Project, and

subject further to Landowner's failure to cure such breach within 30 days of a written demand to commence or diligently proceed with the work to completion, City may find that Landowner is in default of this Agreement. Upon any such default, City may elect to adjust the priority for reimbursement to occur after full reimbursement to any other landowners who have then entered into similar reimbursement/credit agreements subsequent to this Agreement for the construction of non-gateway-project improvements. The intent of this paragraph is to encourage the timely commencement and completion of the Project. City acknowledges that any such adjustment shall not affect Landowner's right to take credits against Fees as provided herein.

3.5 Agreements with Other Landowners. To protect such reimbursement to Landowner, City agrees that any and all other credit/reimbursement agreements involving reimbursements from the Facilities Fee will include the following terms:

- 3.5.1 The credit/reimbursement amount under the other agreements shall be based on the actual costs incurred for the improvements, as reviewed and approved by City, and the contracts for such work shall be awarded based on a competitive bid as required for comparable City public works projects; and
- 3.5.2 Unless Landowner defaults under this Agreement and loses its priority for reimbursement, any reimbursements to be paid from the Facilities Account to another landowner shall be subject to the priority for reimbursement described in Section 3.4 above.
- 3.5.3 Similarly, the provision of credits by City to other landowners for other project improvements will reduce the flow of funds to the Facilities Account and defer Landowner's reimbursement under this Agreement. So long as reimbursements are outstanding under this Agreement, City agrees that it will limit the amount of any credit that can be applied against the Facilities Fee, as and when building permits are issued within a landowner's property, as follows:
 - (a) If the credits are generated by the construction of non-gateway-project improvements, then the maximum amount of credits that can be applied at the time of building permit issuance shall be 43% of the then-existing Facilities Fee; or
 - (b) If the credits are generated by the construction of public-safety-project or gateway-project improvements, then 100% of the credits can be applied at the time of building permit issuance, subject to such landowner's payment of its fair share of City's costs to administer the Fee Program, up to, but not in excess of, 3% of the then-existing Facilities Fee (e.g., if City's costs of

administration equaled 3%, then the maximum amount of credits that could be taken would be 97% of the Facilities Fee).

- 3.6 Impact of Assignment on Reimbursement Amount.** If and to the extent Landowner assigns its right to reimbursements and credits under this Agreement in accordance with the provisions of Article 5 below, City's obligation to reimburse Landowner and such approved assignees shall be made in proportion to the outstanding portions of the Reimbursement Amount then held by Landowner and such assignees thereof approved by the City pursuant to Article 5.

Article 4: Credits

- 4.1 Credit Against Development Fees.** Upon full completion of the Project, and upon actual formal City acceptance of the Project, Landowner shall be entitled to credits (collectively, "Fee Credits," individually, a "Fee Credit") against the North Natomas Public Facility Fees (the "Fee") which would otherwise be collected in connection with the issuance of each building permit issued for all or a portion of the Property, equal to the "Credit Amount." The fee-credit principles expressed in this Section 4.1 shall be interpreted and applied to achieve fairness and equity to all parties, including City, while not allowing a party to obtain economic or other advantage through arbitrage or otherwise. Subject to the fair-share payment for City's Fee-administration costs described below, Landowner may credit **97%** of its outstanding Reimbursement Amount against the Facilities Fee that would otherwise be payable by Landowner with respect to the Property upon issuance of a building permit for any building within the Property, until such Reimbursement Amount is exhausted through such credits and any reimbursement hereunder. Landowner acknowledges that the fee credit shall not apply against Landowner's fair share of City's costs and expenses to administer the Fee Program and reimbursement agreements related thereto and Landowner shall be obligated to pay such portion of the Fee as it pulls building permits within the Property, notwithstanding any outstanding balance of the Reimbursement Amount, up to, but not in excess of, **3%** of the then-existing Facilities Fee.
- 4.2 Fee Deferral.** If City adopts a Fee Deferral Plan that provides for deferral of the Facilities Fee, and if Landowner elects to participate in such Fee Deferral Plan, then Landowner's fee credit shall be applied against the then-existing Facilities Fee in accordance with the foregoing provisions to determine the net outstanding fee. The fee deferral shall then be applied against the net outstanding fee to determine the annual installments of principal and interest to be paid pursuant to such Fee Deferral Plan.
- 4.3 Advance Issuance of Fee Credits.** Notwithstanding Section 4.1, Landowner shall be entitled to Fee Credits before full completion of the Project and actual formal City acceptance of the Project if all of the following conditions are satisfied:
- 4.3.1 Bonds.** Landowner has complied with Section 1.5, concerning performance and payment bonds.

4.3.2 *Letter of Credit.* Landowner provides City with an irrevocable letter of credit in an amount that is no less than \$_____ as security for Landowner's performance under this Agreement ("Letter of Credit").

- (a) The Letter of Credit must be in a form acceptable to the City Attorney's Office, in that office's sole discretion, and, by its express terms, must be unconditional and absolutely free of defenses on the part of Landowner and the financial institution that issues it. The financial institution that issues the Letter of Credit must be a commercial bank lawfully operating within the United States and acceptable to the City Treasurer's Office, in that office's sole discretion.
- (b) The term of the Letter of Credit must be at least **12 months**, and the Letter of Credit must provide that City may draw upon it by presenting one or more site drafts, each accompanied by a signed-and-dated demand letter worded substantially as follows:

I, the [title] of the City of Sacramento, demand payment of the sum of _____ U.S. Dollars (\$_____) representing a partial/[full draw upon the amount of your Irrevocable Letter of Credit No. _____. This sum represents payment due to the city under the reimbursement-and-credit agreement between [Landowner's name] and the city that is dated _____, 20__, and designated by the city as Agreement No. _____.

- (c) While this Agreement is in effect, Landowner must replace the Letter of Credit (and any replacement Letter of Credit) at least **30 days** before its expiration date. The replacement Letter of Credit must be identical to the Letter of Credit being replaced, except that it must have an expiration date that is no sooner than **12 months** following the expiration date of the Letter of Credit being replaced.

4.3.3 *Issuance of Fee Credits.* Landowner must make a written request for issuance of Fee Credits in accordance with this Section 4.3. City will verify that the required performance and payment bonds are in place and will determine, in its sole discretion, the amount of Fee Credits that may be issued in response to the written request. City will issue Fee Credits to Landowner in an amount equal to the Fee Credits allowable under this Agreement and City's policies and procedures for issuance of the credits. Total Fee Credits issued under this Section 4.3 may not exceed the amount of the Letter of Credit delivered by Landowner.

- 4.3.4 *Repayment.* If City issues Fee Credits to Landowner that, in the aggregate, exceed the total amount that may be issued in accordance with this Agreement and City's policies and procedures for issuance of the credits, then Landowner agrees to repay City the full amount of the excess within **15 days** after receiving City's written demand. Similarly, if the final calculation of Fee Credit amounts under this Agreement results in City having issued Fee Credits to Landowner in excess of those provided for in this Agreement, then Landowner agrees to repay City the full amount of the excess within **15 days** after receiving City's written demand.
- 4.3.5 *Drawing Upon the Letter of Credit.* City may draw on the Letter of Credit as follows:
- (a) If Landowner fails to complete construction of the Project as required by this Agreement, then City will have the absolute right to draw upon the Letter of Credit in an amount City determines, in its sole discretion, to be necessary to complete construction.
 - (b) If repayment is due under Section 4.3.4 and Landowner does not repay City within the time specified in Section 4.3.4, then City will be entitled to draw against the Letter of Credit in an amount equal to the repayment amount then due. A draw under this Section 4.3.5(b) will be a partial draw under the Letter of Credit and will leave the balance of the Letter of Credit intact.
 - (c) If Landowner fails to provide City with a replacement Letter of Credit within the time specified in Section 4.3.2(c), then City will be entitled to draw against the Letter of Credit in an amount equal to the total amount of Fee Credits that Landowner has received under this Agreement as of the time of the draw. If City makes a draw under this Section 4.3.5(c), then—
 - (1) City will hold the amount drawn, with no obligation to pay Landowner interest, until (A) City determines that Landowner cannot or will not complete the Project as required by this Agreement (in which event City may use the amount drawn to complete the Project) or (B) Landowner completes the Project in full and City formally accepts the Project (in which event City will return the amount drawn to Landowner); and
 - (2) City will not be obligated to issue additional Fee Credits under this Agreement unless and until (A) Landowner completes the Project in full and City formally accepts the Project or (B) Landowner furnishes City with a replacement Letter of Credit that complies with Section 4.3.2 above.

- 4.3.6 *Release of Letter of Credit.* City will release the Letter of Credit if and when Landowner completes the Project in full and City formally accepts the Project.

Article 5: Assignments of Reimbursements

- 5.1 Assignment of Reimbursement Rights.** Landowner may assign the rights under this Agreement to receive reimbursements and take credits against the Facilities Fee to be assessed against any development within North Natomas to any person or entity, subject to and in accordance with the terms of this Article 5. All assignments of the right to credits and reimbursements pursuant to this Article 5 shall be subject to City's prior written consent, which consent shall not be unreasonably withheld or delayed. Landowner acknowledges and agrees that City shall have the discretion to deny an assignment of rights to credits and reimbursements under this Agreement on the basis of excessive fractionalization of the available credits and reimbursements, provided that City shall not deny an assignment that represents an amount equal to at least **\$50,000** of Landowner's reimbursement and credit rights. In addition, City shall be entitled to calculate and assess as a condition of its consent to any such assignment, a reasonable fee for the review, approval, and administration thereof.
- 5.2 Acknowledgment of Agreement; Assumption.** In addition to the approval of City, any such assignment shall be subject to an express written assumption by the assignee, whereby the assignee agrees to be subject to all the provisions of this Agreement with respect to the application and interpretation of the fee-credit and fee-reimbursement provisions, including, without limitation, the obligation to pay the portion of the Facilities Fee required to cover City's cost of administration thereof, notwithstanding the existence of any such right to credits and reimbursements. The assignment agreement shall contain a provision whereunder Landowner and the assignee agree to fully and completely indemnify and defend City from any liability relating to the assignment of rights.
- 5.3 Allocation of Reimbursements.** If and to the extent Landowner assigns its right to reimbursements under this Agreement in accordance with the provisions of this Article 5, City's obligation to reimburse Landowner and such approved assignees shall be made in proportion to the then-outstanding portions of the Reimbursement Amount then held by Landowner and such assignees thereof approved by City pursuant to this Article 5.
- 5.4 Disputes Between Landowner and Assignee.** Landowner and any assignee thereof acknowledge and agree that in the event of any dispute between Landowner and/or any assignee and/or City regarding the legal ownership of the rights to credits and reimbursements hereunder, City may withhold any cash reimbursement and may disallow the use of any Fee Credits unless and until either—

- 5.4.1 all parties to the dispute have executed an agreement in a form acceptable to the City Attorney specifying the legal ownership of such rights and the manner in which such rights will be exercised, which agreement shall contain acceptable indemnification and defense provisions; or
- 5.4.2 one of the parties has obtained a court order determining as against the disputing parties the legal ownership of such rights and the manner in which such rights will be exercised.

5.5 City Policy and Procedure. Landowner acknowledges, for itself and its successors in interest to the Property, that the reimbursement and credit rights hereunder do not run with the Property and that adopted City policies and procedures relating to assignment of Fee Credits and reimbursements, as such policies and procedures may be amended from time to time, shall apply to Landowner and its successors in interest to the Property. Current City policies and procedures are as set forth in **Exhibit "H,"** attached hereto and incorporated herein by this reference. City agrees that it shall not give any Fee Credits to any subsequent purchaser or encumbrancer of any portion of the Property unless such subsequent purchaser or encumbrancer has a separate, written assignment of these Fee Credits from Landowner (or a previously approved assignee thereof), which written assignment has been approved by City in accordance with the provisions of this Article 5.

Article 6: Miscellaneous

- 6.1 **Entire Agreement.** This Agreement represents the entire agreement of the parties relating to the subjects covered by this Agreement. Oral and written statements, representations, and agreements not included within this Agreement shall have no force or effect whatsoever, and shall be deemed to have been superseded by this Agreement.
- 6.2 **Attorneys' Fees.** The prevailing party in any proceedings, judicial or otherwise, brought to enforce the terms of this Agreement shall be entitled to reasonable attorney's fees and costs in prosecuting or defending such proceedings.
- 6.3 **Notices.** Any notice required or elected to be given hereunder shall be given by placing the notice in the United States mail, postage prepaid, and addressed in accordance with the provisions of this Section 6.3. Unless the text of this Agreement otherwise provides, notice shall be deemed to have been given on the date that the notice was placed in the mail in accordance herewith. Notice to Landowners, or to any individual Landowner, shall be given to the single address set forth below.

6.3.1 If to City: City Manager
915 "I" Street, Fifth Floor
Sacramento, CA 95814

6.3.2 If to Landowner: [Name of contact]
[Name of business]
[Street address]
[City, state, zip code]

6.4 **Effective Date.** This Agreement shall become effective upon its execution by all parties.

6.5 **Mediation and Arbitration.**

6.5.1 Any dispute or controversy between all or a portion of the parties to this Agreement relating to the interpretation and enforcement of their rights and obligations under this Agreement shall be resolved solely by mediation and arbitration in accordance with the provisions of this Section 6.5. The mediation and arbitration procedures shall be commenced by any party to this Agreement by serving by a Notice of Dispute ("Notice") on the parties pursuant to Section 6.3. The Notice generally shall describe the nature of the dispute and specify the date of its mailing. The Notice shall require each party to notify the party serving the Notice of its intention to participate in the mediation and arbitration procedures within **five days** of the date of mailing of the Notice. For purposes of this Section 6.5 only, the party serving the Notice and all other parties indicating an intention to participate in the mediation and arbitration procedures shall be referred to herein as the "Disputing Parties," and shall be the only parties entitled to participate in said procedures.

6.5.2 With respect to any dispute or controversy between Disputing Parties that is to be resolved by mediation and arbitration as provided in Section 6.5.1, the Disputing Parties shall attempt in good faith first to mediate such dispute and use their best efforts to reach agreement on the matters in dispute. Within **15 days** of the mailing of the Notice, the party serving the Notice shall attempt to employ the services of a third person ("Mediator") mutually acceptable to the Disputing Parties to conduct such mediation. The cost of the Mediator shall be borne equally by the Disputing Parties. The mediation shall take place within **10 days** of the appointment of such Mediator. If the Disputing Parties are unable to agree on such Mediator, or, if on completion of such mediation, the parties are unable to agree and settle the dispute, then the dispute shall be referred to arbitration in accordance with the following subsections.

6.5.3 Any dispute or controversy between Disputing Parties that is to be resolved by arbitration as provided in the foregoing subsections shall be settled and decided by arbitration conducted by the American Arbitration Association in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as then in effect, except

as provided below. Any such arbitration shall be held and conducted in Sacramento, California before one arbitrator who shall be selected by mutual agreement of the parties. If agreement is not reached on the selection of an arbitrator within **15 days** after referral to arbitration, then such arbitrator shall be appointed by the Presiding Judge of the Superior Court of Sacramento County as soon as practicable.

- 6.5.4 The provisions of the Commercial Arbitration Rules of the American Arbitration Association shall apply and govern such arbitration, subject, however, to the following:
- (a) Any referral to arbitration shall be barred after the date that institution of legal or equitable proceedings based on the subject controversy or dispute would be barred by the applicable statute of limitations.
 - (b) The arbitrator appointed must be a former or retired judge or an attorney with at least 10 years' experience in real property, commercial, and municipal law.
 - (c) The Disputing Parties mutually may elect to have all proceedings involving the Disputing Parties reported by a certified shorthand court reporter and written transcripts of the proceedings prepared and made available to the Disputing Parties. If fewer than all of the Disputing Parties desire the use of a court reporter and preparation of written transcripts, then the issue of whether or not to retain a court reporter shall be submitted to the arbitrator who, in his or her sole discretion, shall determine whether such use and preparation is necessary or beneficial to the proceedings and the interests of all Disputing Parties in resolving the dispute.
 - (d) The arbitrator shall prepare in writing and provide to the Disputing Parties factual findings and the reasons on which the decision of the arbitrator is based.
 - (e) The matter shall be heard by the arbitrator and the final decision by the arbitrator must be made within **90 days** from the date of the appointment of the arbitrator. The arbitration hearing date shall be established by the arbitrator, which date must be within such period of time that the arbitrator, in his or her sole discretion, determines to be sufficient to meet the foregoing time constraints.
 - (f) The prevailing party shall be awarded reasonable attorney's fees and costs incurred in connection with the arbitration, unless the arbitrator for good cause determines otherwise.

- (g) Costs and fees of the arbitrator and court reporter, if any, shall be borne equally by the Disputing Parties. The cost of preparing any transcript of the proceedings shall be the responsibility of the Disputing Party or Parties requesting such preparation.
- (h) The award or decision of the arbitrator shall be final and judgment may be entered on it in accordance with applicable law in any court having jurisdiction over the matter.
- (i) The provisions of title 9 of part 3 of the California Code of Civil Procedure, commencing with section 1282 and including section 1283.05, and successor statutes, permitting, among other things, expanded discovery proceedings shall be applicable to all disputes that are arbitrated under this section 6.5.

6.6 Enforced Delay, Extension of Times of Performance. In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default where delays or default are due to war, insurrection, strikes, walkouts, riots, floods, drought, rain, earthquakes, fires, casualties, acts of God, governmental restrictions imposed or mandated by other governmental entities, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulation, litigation, or similar bases for excused performance. If written notice of such delay is given to City within **30 days** of the commencement of such delay, an extension of time for such cause shall be granted for the period of the enforced delay, or longer as may be mutually agreed upon.

6.7 Preparation Fees. Landowner shall pay to City the sum of **\$1,500**, representing the costs associated with the City Attorney's services in negotiating and drafting this Agreement.

City of Sacramento

[Landowner]

By: _____
Ray Kerridge
City Manager

By: _____
[Name]
[Title]

Attest:

Approved for Legal Form

By: _____
City Clerk

By: _____
Senior Deputy City Attorney

EXHIBIT A
LANDOWNER PROPERTY DESCRIPTION

EXHIBIT B

PROJECT INFRASTRUCTURE ELEMENTS

Note: This exhibit must include both a description (and depiction, i.e., plans) of the project **and** a summary of cost estimates for the project (see Recital D).

EXHIBIT C

HAZARDOUS SUBSTANCES

- A. **No Review, Examination, or Assessment.** The parties acknowledge and understand that City has not conducted any review, examination or assessment to assess, identify or detect the presence of any Hazardous Substances, as defined below, on, under or around Landowner Property. As between the City and Landowner, any liability associated with the presence of any Hazardous Substances on, under or around the Landowner Property, including any interests in said property dedicated to City as provided herein, shall be governed by the indemnity provisions of this Agreement, regardless of whether any such review, examination or assessment is conducted.
- B. **Definitions.**
- (1) As used herein, the term "Hazardous Substances" means:
- (a) Those substances included within the definitions of hazardous substance, hazardous waste, hazardous material, toxic substance, solid waste, or pollutant or contaminant under any Environmental Law, as defined below;
 - (b) Those substances listed in the United States Department of Transportation Table [49 C.F.R. § 172.101], or by the Environmental Protection Agency, or any successor agency, as hazardous substances [40 C.F.R. Part 302];
 - (c) Other substances, materials, and wastes that are or become regulated or classified as hazardous or toxic under federal, state or local laws or regulations; and
 - (d) Any material, waste, or substance that is—
 - (i) a petroleum or refined petroleum product;
 - (ii) asbestos;
 - (iii) polychlorinated biphenyl;
 - (iv) designated as a hazardous substance pursuant to 33 U.S.C. § 1321 or listed pursuant to 33 U.S.C. § 1317;
 - (v) a flammable explosive; or
 - (vi) a radioactive material.
- (2) As used herein, the term "Environmental Law" means all federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees or requirements of any government authority regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance, or pertaining to environmental conditions on, under, or about the detention basin site

or any of the easement areas which Landowner is required to and does convey to City pursuant to this Agreement, as now or may at any later time be in effect, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [42 U.S.C. § 9601 *et seq.*]; the Resource Conservation and Recovery Act of 1976 (RCRA) [42 U.S.C. § 6901 *et seq.*]; the Clean Water Act, also known as the Federal Water Pollution Control Act (FWPCA) [33 U.S.C. § 1251 *et seq.*]; the Toxic Substances Control Act (TSCA) [15 U.S.C. §2601 *et seq.*]; the Hazardous Materials Transportation Act (HMTA) [49 U.S.C. § 1801 *et seq.*]; the Insecticide, Fungicide, Rodenticide Act (7 U.S.C. § 136 *et seq.*); the Superfund Amendments and Reauthorization Act [42 U.S.C. § 6901 *et seq.*]; the Clean Air Act [42 U.S.C. §7401 *et seq.*]; the Safe Drinking Water Act [42 U.S.C. § 300f *et seq.*]; the Solid Waste Disposal Act [42 U.S.C. § 6901 *et seq.*]; the Surface Mining Control and Reclamation Act [30 U.S.C. § 1201 *et seq.*]; the Emergency Planning and Community Right to Know Act [42 U.S.C. § 11001 *et seq.*]; the Occupational Safety and Health Act [29 U.S.C. §§ 655 and 657]; the California Underground Storage of Hazardous Substances Act [Health and Safety Code § 25280 *et seq.*]; the California Hazardous Substances Account Act [Health and Safety Code § 25100 *et seq.*]; the California Safe Drinking Water and Toxic Enforcement Act [Health and Safety Code § 24249.5 *et seq.*]; the Porter-Cologne Water Quality Act [Water Code § 13000 *et seq.*], together with any amendments of or regulations promulgated under the statutes cited above, and any other federal, state or local law, statute, ordinance or regulation now in effect or later enacted that pertains to the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water, or land use.

EXHIBIT D

CONSTRUCTION CONTRACT LANGUAGE

Contractor agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions by any of the following in connection with the design, construction, operation, maintenance, or repair of that portion of the Improvement designed or constructed by Contractor: Contractor; any of Contractor's engineers or subcontractors; or any other person or entity employed by, or acting on behalf of or as the authorized agent for, Contractor or any of Contractor's engineers or subcontractors.

EXHIBIT E
PRIOR AGREEMENTS

EXHIBIT F

**EXCERPTS FROM NORTH NATOMAS CREDIT AND
REIMBURSEMENT DATABASE MANUAL**

EXHIBIT G
REIMBURSEMENT RESOLUTION

EXHIBIT H

ASSIGNMENT POLICIES AND PROCEDURES

EXHIBIT C

Public-Safety Project Reimbursement-and-Credit Agreement for Construction of North Natomas Infrastructure

(Insert Project Description)

This Agreement is entered into on _____, 20__, by and between the **City of Sacramento**, a charter municipal corporation (hereafter "City"), on the one hand, and **[Name of Landowner]**, a [type of entity] (hereafter "Landowner"), on the other, with respect to the following facts:

Recitals

- A. Landowner owns the land described in **Exhibit "A"** (the "Property").
- B. Development of the Property is subject to payment of the North Natomas Public Facilities Fee (the "Facilities Fee") in accordance with chapter 18.24¹ of the Sacramento City Code (the "Fee Ordinance").
- C. Landowner desires to construct the elements of North Natomas infrastructure (the "Project") as specified and depicted in **Exhibit "B."** The Project has been or will be constructed pursuant to plans approved by City, and the actual costs of construction of the Project are to be the result of a bidding process as approved in writing in advance by City.
- D. Subject to the credits against and reimbursements from the Facilities Fee as provided herein, Landowner is willing to construct the Project and to fund the entire costs of such construction. For purposes of this Agreement, "Project Costs" means costs related to all contracts for the construction of the Project, including change orders thereto, and costs associated with all other contracts for professional and other services necessary, in City's judgment, to implement and complete construction, together with planning and design costs and right-of-way acquisition costs, if any, associated with the Project. Project Costs shall include but not be limited to the engineering estimates and the Project elements included therein, which estimates are set forth in **Exhibit "B"**; construction inspection fees; and applicable plan-check fees, inspection fees, and Habitat Conservation Fees.
- E. Because the Project is designated for funding by the Facilities Fee, the Project is eligible for, and City desires to provide credits against and reimbursement from, the Facilities Fee for Landowner's eligible (as determined by City in its discretion) actual Project Costs, in accordance with the Fee Ordinance and subject to the terms and conditions of this Agreement.

¹ Formerly chapter 84 02. Citations to the Sacramento City Code throughout this Agreement shall include amendments or renumbering that occur after execution of this Agreement.

Agreement

Now, therefore, in consideration of the foregoing and of the mutual promises contained herein, City and Landowner hereby agree as follows:

Article 1. Construction of Project

- 1.1 **Construction.** Landowner agrees to construct the Project, or cause it to be constructed, and to convey the Project, along with all interests in real property necessary for the operation, maintenance, and ownership thereof, to City or appropriate other public entities or utilities.
- 1.2 **Plans and Specifications.** Landowner represents that it has obtained or will obtain approval of the plans and specifications for the Project from all appropriate departments of City and from any other public entity or public utility from which such approval must be obtained. Landowner covenants that the Project will be constructed in compliance with such approved plans and specifications and the adopted City Construction Specifications and Improvement Standards, subject to minor change orders as may be required that are substantially consistent with such plans and specifications. Copies of all plans and specifications shall be provided by Landowner to City's [Title] ("Director"). City agrees to use its best efforts and due diligence to review and approve such plans or provide comments thereto regarding any necessary corrections thereto, in a prompt and timely manner.
- 1.2.1 The City Construction Specifications and Standards shall be those in effect at the time of final approval by City of the design of the Project.
- 1.2.2 Landowner shall provide a site-construction superintendent ("Site Superintendent") and City shall provide a City project manager ("City Project Manager") who will serve as their respective points of contact with respect to such construction, who will be onsite as necessary, and who will generally be available by telephone or otherwise at all reasonable times.
- (a) The Site Superintendent shall have complete authority over the construction contractors and all subcontractors, with authority to order stoppage of work and minor changes to the work in order to comply with the Project Plans. The Site Superintendent may also, but need not have authority to, order minor design changes to meet unanticipated field conditions, provided that the same are consistent with the Project Plans.
- (b) The City Project Manager shall have complete authority over City's construction inspectors, with authority to determine whether the work complies with the Project Plans. The City Project

Manager may also, but need not have authority to, approve minor design changes to meet unanticipated field conditions, provided that the same are consistent with the Project Plans.

- (c) [Name] is designated by Landowner as the Site Superintendent, until Landowner notifies City's [Name of Department] of his or her replacement. [Name] is designated by City as the City Project Manager, until the Director notifies Landowner of his or her replacement.

1.3 Commencement and Completion of Project. Subject to the provisions of Section 6.6 below, including, without limitation, the effect of inclement weather on Landowner's ability to commence or proceed with construction, Landowner shall commence the construction of the Project **within six months** of the final approval of the improvement plans by the City and thereafter shall diligently work to complete such construction in a timely and efficient manner. The contract for such construction shall be let as the result of a bidding process approved in writing in advance by the City and shall require the contractor to pay prevailing wages. The contract amount for such work shall be subject to the review and approval of the City, which approval shall not be unreasonably withheld.

1.4 Inspection. Landowner covenants that City and any other public entities or public utilities to whom any portion of the Project will be conveyed will be permitted to inspect the Project. City agrees to make inspectors available for inspection of the Project during such construction within at least **48 hours** of request therefor from Landowner.

1.4.1 Should a City inspector (the "Inspector") find any nonconformance or noncompliance with the Project Plans, the Inspector shall notify the City Project Manager and the Site Superintendent of such nonconformance or noncompliance, and the City Project Manager and the Site Superintendent shall jointly determine the nature of the corrective action to be taken. Corrective action taken pursuant to the agreement between the City Project Manager and the Site Superintendent shall be deemed to be in accordance with the Project Plans.

1.4.2 If the City Project Manager and the Site Superintendent are unable to agree upon the corrective action to be taken, the City Project Manager may order that work on the nonconforming or noncomplying item(s) or area(s) be stopped. If the City Project Manager orders work to stop, then—

- (a) Landowner shall comply with all requirements of any stop-work order and must obtain City's approval before work can resume on that item(s) or in that area(s); and

- (b) the City Project Manager, the Site Superintendent, and such other representatives of City and Landowner as are necessary or appropriate to evaluate, discuss, and resolve the situation shall promptly meet and confer regarding the measures necessary to correct the nonconforming or noncomplying items(s) or area(s).

1.5 Performance and Payment Bonds. Landowner covenants to comply with all applicable City performance and payment bonding requirements (and such other bonding requirements as may be specified by other public entities and/or public utilities) with respect to the construction of the Project. Landowner may satisfy the obligation to post bonds with an assignment to City of the contractor's bond or through the posting of bonds, letters of credit, or other security instruments acceptable to City, in accordance with applicable City requirements; provided, however, that all such bonds, letters of credit, or other security instruments must meet all requirements that would apply for security to be posted by a contractor, quantitatively and qualitatively, if City and not Landowner were contracting to construct the Project.

1.6 Insurance. Landowner shall furnish to City a certificate or certificates substantiating the fact that it has taken out the insurance hereinafter set forth for the period covered by this Agreement with an insurance carrier acceptable to City in a form satisfactory to City. Each certificate shall bear an endorsement precluding the cancellation or reduction in coverage of any policy covered by such certificate before the expiration of **30 days** after City has received notification of such cancellation or reduction by registered mail. The minimum insurance coverage shall be as follows:

Public-liability and property-damage insurance that includes but is not limited to personal injury, property damage, losses related to independent contractors, products and equipment, explosion, collapse, and underground hazards, in the amount of not less than a combined single limit of **one million dollars** for one or more persons injured and property damage in each occurrence. The public-liability and property-damage insurance shall also name City as an additional insured. This insurance shall directly protect City as well as Landowner and its agents. The insurer shall assume the defense of City and City's officers, employees, and agents from suits, actions, damages, or claims of every type and description to which they may be subjected or put by reason of, or resulting from, the construction or installation of the Project. The insurance policy shall expressly state that the above terms are in effect.

If Landowner fails to maintain such insurance, City may take out insurance to cover damages of the above-mentioned classes for which City might be held liable on account of Landowner's failing to pay such damages, and may recover the amount of the premiums for such insurance from Landowner or retain such amount from any monies due Landowner under this Agreement. Failure of City to

obtain such insurance shall in no way relieve Landowner from any of its responsibilities under this Agreement.

1.7 Contracts and Change Orders. Landowner shall be responsible for entering into all contracts and any change orders required for the construction of the Project.

1.7.1 So long as the contracts and change orders are substantially consistent with the approved plans and specifications and are consistent with City Standards, as determined by Landowner's project engineer, Landowner shall not be obligated to obtain the approval of Director therefor; provided, however, that any change orders that will increase the cost of the Project by more than **10%** shall be subject to the prior approval of Director. City Project Manager's approval shall not be required for those change orders which do not require approval of the Director.

1.7.2 Except as otherwise provided in Section 1.7.3, Landowner agrees to make changes in the construction of the Project as requested by City.

- (a) As to changes which are necessary in order to comply with approved plans and specifications, Landowner shall pay for all such changes.
- (b) City agrees to pay Landowner for changes requested by it when such changes are discretionary changes requested by City; provided, however, that Landowner shall provide a written statement of the estimated cost of the change, prior to constructing such change. If Landowner fails to provide a written statement of the estimated cost of the change within **10 days** following receipt of a written request from City for such statement made after the nature of the change is finally determined, Landowner shall make such change and City shall not be required to pay for such change.

1.7.3 Except for those changes that are necessary to comply with approved plans and specifications, Landowner shall **not** be obligated to make changes requested by City where any one of the following applies:

- (a) the same would result in unreasonable delay to the Project;
- (b) City has failed to approve the estimated cost before construction of the change would otherwise begin; or
- (c) the change would increase the cost of the Project beyond the sum of (1) the City-approved budget for the Project; plus (2) the additional funds City has agreed to pay pursuant to Section 1.7.2 above.

Article 2: City Acceptance; Conveyance of Project

2.1 Acceptance and Conveyance. When Landowner completes construction of the Project and the Project has been formally accepted by City, the Project shall automatically become the property of City. Upon such completion, Landowner shall take all actions necessary to convey to and vest in City full, complete, and clear title in the Project and in all of the underlying real property interests (easement and/or fee), including those necessary for maintenance and access. City will not formally accept the Project unless and until such title has been conveyed to City. For purposes of this Agreement, City acceptance means final completion in accordance with the approved plans and specifications for the Project, which has been finally inspected and approved by City for acceptance into its infrastructure system, as evidenced by a written statement or letter to that effect signed by or on behalf of City.

2.2 Release of Liens. Upon completion, Landowner shall provide, in form satisfactory to the Director, evidence that all of the costs of the Project have been fully paid, including all lien claims. Upon request of the Director, Landowner shall provide lien releases under California Civil Code section 3262, subdivision (d), to assure that payment of any outstanding claims of Landowner's contractors, subcontractors, and suppliers have been paid.

2.3 Indemnification.

2.3.1 Indemnification by Landowner. Subject to the provisions of this Section 2.3, Landowner agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against any and all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions in connection with the design, construction, operation, maintenance, or repair of the Project by any of the following: Landowner; any of Landowner's engineers, contractors, or subcontractors; or any other person or entity employed by or acting on behalf of or as the authorized agent for Landowner or any of Landowner's engineers, contractors, or subcontractors. Provided, however, that Landowner shall not be liable hereunder to indemnify, defend, or hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents against Claims alleging sole and active negligence of City in its functions of design review, approval, or construction inspection in connection with the Project; provided further, that nothing in this Agreement shall be construed as a waiver by City of any immunity or defense it may have relating to any such Claim, including without limitation immunity or

defenses relating to design review and/or approval and/or construction inspection.

- 2.3.2 *Indemnification Regarding Hazardous Substances.* Landowner further agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or damage to the environment to the extent arising from any use, storage, treatment, transportation, release, or disposal on, about, or around the portion of the Landowner Property on which the detention basin or any of the Project or the easements that are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined in Exhibit "C," attached hereto and incorporated herein by this reference, by any person or entity (except persons or entities acting on City's behalf or under City's control), occurring on or at any time prior to the date the Project and the associated real property interests are conveyed to City as provided in this Agreement. The foregoing indemnification obligation shall not apply to the incorporation of building materials as part of the Project, provided that such incorporation is performed in accordance with applicable laws and is not in violation of Environmental Laws in effect at the time of such incorporation.
- 2.3.3 *Indemnification Regarding Application of Credits and Reimbursements.* Landowner further agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, injury to property interests, property damage, or violation of any law or regulation to the extent arising from any actions or omissions in connection with the application or calculation of credits and/or reimbursement authorized by City pursuant to this agreement.
- 2.3.4 *Duration of Indemnification Obligations.* The indemnification and hold harmless agreement made by Landowner in Section 2.3.1 above, with respect to the Project, and/or each part thereof constructed by Landowner, shall expire on the date which is **one year** after the completion of the Project and acceptance thereof by City (hereafter the "Expiration Date"), provided that Section 2.3.1 above shall not expire and shall remain in effect with respect to any Claims that are made, initiated, claimed, filed, or assessed at any time prior to the Expiration Date, or which relate to (directly or indirectly) any such Claims. The indemnification and hold harmless agreement made by Landowner in Section 2.3.2 above shall survive the termination of this Agreement

until the date which is **two years** after the completion of such phase and acceptance thereof by City. Section 2.3.2 above shall not expire, however, and shall remain in effect with respect to any Claims that are made, initiated, claimed, filed, or assessed at any time prior to such date, or which relate to (directly or indirectly) any such Claims. The provisions of this Section 2.3.4 shall apply only with respect to the indemnification and hold harmless provisions of this Agreement and shall not affect the liability, if any, that Landowner might have under applicable law to the extent Landowner is a contaminator of the Landowner Property. The provisions of this Section 2.3.4 shall not expire and shall survive the termination of this Agreement.

2.3.5 *Additional Provisions Regarding Indemnification Obligations.* The parties further agree and understand as follows:

- (a) City does not waive, and shall not be deemed to waive, any rights against Landowner that it may have by reason of the aforesaid indemnity and hold harmless agreements because of any insurance coverage provided pursuant to Section 1.6.
- (b) Except as may otherwise be specifically and expressly provided in Section 2.3.1 relating to Claims based upon allegations of sole and active negligence on the part of City, the aforesaid indemnity and hold harmless agreements shall not be limited or waived in any way based upon the fact that City has or shall have prepared, supplied, or approved of plans and/or specifications for the Project, or has or shall have inspected or failed to inspect construction of the Project.
- (c) The scope of the aforesaid indemnity and hold harmless agreements is to be construed broadly and liberally to provide the maximum coverage for City in accordance with their terms.
- (d) No specific term or word contained in this section shall be construed as a limitation on the scope of the indemnification and defense rights and obligations of the parties unless specifically so provided.
- (e) Landowner shall cause all engineering and construction contracts relating to the Project to require the engineer or contractor to fully and without limitation indemnify, defend, and hold harmless City and its elective and appointive boards, commissions, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions of such professional in connection with the design, construction, maintenance, operation, or repair of

the Project by the engineer or contractor or by any other person or entity employed by or acting as the authorized agent for the engineer or contractor, but only to the extent that such professional or other party has contractual responsibility for a portion or aspect of the Project. For example, a contractor responsible for constructing a portion of the Project would not be held responsible for the design, nor would an engineer who designed a portion of the Project be held responsible for construction not in accordance with the design. So long as the construction contract contains the language contained in Exhibit "D," attached hereto and incorporated herein by this reference, or other language approved in writing by City, and if City is satisfied in its judgment with the adequacy of the engineer's or contractor's insurance, Landowner shall be deemed to have satisfied its obligation under this Section 2.3.5(e) to obtain for the City indemnification and defense obligations on the part of Landowner's engineers and contractors.

2.3.6 *Waiver by Landowner.* In addition to Landowner's obligations to indemnify, hold harmless, and defend City as set forth above, Landowner and its assigns, transferees, and successors waive and release all claims of whatever sort or nature that may arise against City or City's officers, employees, and agents in connection with the design or construction of the Project. The provisions of this Section 2.3.6 shall not apply to discretionary changes to the Project that were required by City unless all of the following apply: (a) the discretionary changes required by City were approved by Landowner's engineers; and (b) Landowner's engineers have provided to Landowner, pursuant to a contract between Landowner and its engineers, errors-and-omissions insurance or similar professional-liability insurance coverage that covers the Project, including all discretionary changes required by City.

2.3.7 *Unknown Claims* This waiver and release shall include any and all claims arising under California Civil Code section 1542, which provides as follows:

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

Thus, notwithstanding the provisions of section 1542, and for the purpose of implementing a full and complete release, the parties hereto expressly acknowledge that this Agreement is intended to release and extinguish, without limitation, all claims as described in this Section 2.3 that the parties do not know or suspect to exist. The provisions of this Section 2.3 shall survive termination of this Agreement.

- 2.3.8 *Indemnification by City.* City further agrees and covenants to fully indemnify, defend, and hold harmless Landowner and Landowner's directors, members, shareholders, partners, officers, employees, and agents from and against all Claims arising by reason of any death, bodily injury, personal injury, property damage, or damage to the environment—
- (a) to the extent arising from any City use, storage, treatment, transportation, release, or disposal on, about, or around the portion of the Landowner Property on which the Project or the easements that are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined above, by any person or entity (except persons or entities acting on Landowner's behalf or under Landowner's control), occurring on or at any time after the date the Project and the easements are conveyed to City as provided in this Agreement;
 - (b) arising from any act or omission (including but not limited to those covered by Section 2.3.8(a)) on the part of City or its agents or employees in the use and operation of the Project; or
 - (c) occurring on or at any time arising from any entry upon the Landowner Property by City or by City's agents, employees, or contractors pursuant to the provisions of Article 1 of this Agreement.

2.4 **Warranty.** Landowner warrants the Project as to materials and workmanship for one year following acceptance of the Project by City, and should any failure of the Project or any portion thereof occur within a period of one year after final acceptance thereof by City, Landowner shall promptly cause the needed repairs to be made without any expense or cost to City. City is authorized to make repairs if Landowner fails to make, or undertake with due diligence, the necessary repairs within 20 days after it is given written notice of such failure. In case of emergency when delay would cause serious hazard to the public, the necessary repairs may be made by City without prior notice to Landowner. In all cases of failure of the Project within the warranty period where City has taken action in accordance with this paragraph, Landowner shall reimburse City for any and all costs or expenses, direct and indirect, incurred by City, and City may deduct the outstanding amount thereof from any reimbursement due to Landowner hereunder.

Article 3: Reimbursement

3.1 **Reimbursement Amount.** Reimbursement occurs either when credits are applied against Facilities Fees owed by Landowner or when Landowner is reimbursed from Facilities Fees collected by City. The method and manner of applying fee credits is set forth more particularly in Article 4 herein. Upon full

completion of the Project, and upon City acceptance of the Project, Landowner shall be entitled to reimbursement for the entire amount of the eligible (as determined by City in its discretion) actual Project Costs incurred by Landowner for construction of the Project in accordance with the terms of this Agreement (the "Reimbursement Amount"). The amount of such reimbursement shall be subject to City review and written approval of the Project Costs incurred by Landowner. Landowner shall provide copies of all contracts, change orders, and invoices for the costs of the work and such other documentation as may be requested by City to verify the total Project Costs incurred by Landowner. In accordance with section 18.24.130 of the Fee Ordinance, the Reimbursement Amount, as reduced from time to time by reimbursements paid and credits taken against the Facilities Fee pursuant to this Agreement, shall be subject to adjustments for inflation calculated consistent with the provisions of section 18.24.140 but shall not otherwise accrue interest.

3.2 Sources for Reimbursement. Nothing in this Agreement shall be construed to create an obligation of, or be attributable to, City's general or special funds, or any other funds in the hands of City or its accounts now and in the future, except as otherwise expressly provided herein. City's obligation hereunder to provide reimbursement is limited to the following sources of funds, to the extent funds are available therefrom and not otherwise committed for reimbursement by City to others:

3.2.1 Facility Fees that are paid to City pursuant to the Fee Ordinance for North Natomas, which fees shall be maintained by City in a separate Facilities Fee account (the "Facilities Account") and shall not be commingled with any other development or impact fees collected with respect to North Natomas, including, without limitation, any transit fees or drainage fees collected pursuant to the Fee Ordinance. Landowner acknowledges that a portion of such Facilities Fees, up to but not in excess of 3% of the Facilities Fees, will be retained by City to defer City's cost to administer the Fee Program and that an additional share of the Facilities Fees, not to exceed 7%, will be deposited in an account separate from the Facilities Account for reimbursement of costs of certain planning studies incurred by others for North Natomas pursuant to other reimbursement agreements with City, until the agreements have been fully paid. Landowner further acknowledges that the Facilities Fees to be paid by other landowners may be offset or reduced by credits in consideration of the construction of other Fee-related improvements, which may result in no money being paid into the Facilities Account by landowners who install "Public Safety Improvements" (i.e., off-site improvements contained in the North Natomas Finance Plan that are a public-safety concern and are not a direct result of any one development) or "Gateway Improvements" (as that term is defined in the North Natomas Finance Plan and Nexus Study) or only 57% of the Facilities Fees being paid by landowners who install "Non-gateway Improvements" (as that term is defined in the

North Natomas Finance Plan and Nexus Study), until such credits are exhausted.

3.2.2 Funds generated through public-financing mechanisms consistent with the North Natomas Finance Plan and created and implemented by City in its sole and exclusive discretion, which include funds for the acquisition of the Project and/or the payment of reimbursement to Landowner for financing some or all of the Project Costs pursuant to this Agreement. In no event shall credits and/or reimbursement from any public financing mechanism(s) exceed Landowner's eligible (as determined by City in its discretion) actual Project Costs. Nothing in this subsection shall affect (a) the status of Landowner's right, if any, to protest or otherwise challenge such public-financing mechanisms, in whole or in part, or (b) any previous waiver of such rights.

3.3 **Timing of Reimbursement.** Upon full completion of the Project and acceptance thereof by City, subject to the reimbursement priority described in Section 3.4 below, City will pay Landowner the amount then available in the Facilities Account for reimbursement up to, but not in excess of, the approved Reimbursement Amount for the Project. Thereafter, on a quarterly basis, commencing on the first of the calendar month following completion of the Project and continuing on the first of each month thereafter until the Reimbursement Amount is reduced to zero, City will pay Landowner the amount then available for reimbursement in the Facilities Account, up to the then outstanding Reimbursement Amount.

3.4 **Priority for Reimbursement.** Landowner acknowledges and agrees that the timing of reimbursement from the Facilities Account will be subject to the priorities and principles set forth below and in Exhibits "F" and "G," attached hereto and incorporated herein by this reference:

3.4.1 *Prior Agreements.* City has previously entered into Public Safety Project and Gateway Project Reimbursement/Credit agreements with other landowners in the North Natomas Finance Plan Area for the funding of certain Fee-related improvements, which prior agreements are described in Exhibit "E," attached hereto and incorporated herein by this reference ("Prior Agreements"). City has committed thereunder to use the first funds received by City under the Fee Ordinance to reimburse those landowners for the financing of such improvements, to the extent such reimbursement is not otherwise satisfied by credits against fees or other public financing mechanisms. Accordingly, Landowner agrees that the funds in the Facilities Account will not be "available" for reimbursement under this Agreement unless and until the reimbursement obligations of City under the Prior Agreements are either satisfied or the priority for reimbursement thereunder is adjusted in accordance with the terms of such agreements. If a Prior Agreement is inadvertently not included within Exhibit "E," such agreement shall nevertheless retain its priority, if any, over this Agreement.

3.4.2 *Emergency Use of Funds.* Landowner agrees that funds within the Facilities Account will not be "available" for reimbursement under this Agreement if City determines, in its sole and exclusive discretion, that such funds must be expended upon an infrastructure project in the North Natomas Finance Plan area for any one of the following limited purposes:

- (a) the project is essential to preserve public health and safety or to protect public health and safety against an immediate risk;
- (b) the project is required as a result of a federal or state mandate;
- (c) the project is required to meet federal or state air-quality requirements; or
- (d) the project is required as a result of, or is needed to alleviate the effects of, an act of God or other disaster.

If City is required to exercise its discretion pursuant to this Section 3.4.2, City agrees to make reasonable efforts to replenish the reimbursement account.

3.4.3 *Subsequent Public Safety and Gateway Improvement Agreements.* Except as otherwise provided by Section 3.4.5 below, all agreements entered into by City to provide reimbursements for the construction of other public-safety project or gateway-project improvements shall not affect the priority of reimbursement to Landowner for the Project to be installed pursuant to this Agreement.

3.4.4 *Subsequent Non-Gateway Improvements.* All agreements entered into by City, whether entered into before or after this Agreement, to provide reimbursements for the construction of non-gateway-project improvements shall not affect the priority of reimbursement to Landowner pursuant to this Agreement. Landowner acknowledges that if and when it enters into a separate agreement for the reimbursement of any non-gateway-project improvements to be constructed by Landowner, while reimbursements shall be on a first-agreed, first-reimbursed basis between the non-gateway-project improvements, any reimbursement therefor will first be subject to full reimbursement by City for all public-safety project or gateway-project improvements, including the Project, whether the agreements for such public-safety-project or gateway-project improvements are entered into before or after the reimbursement agreement for the non-gateway-project improvements.

3.4.5 *Adjustment of Priority.* Upon any failure of Landowner to timely commence or diligently complete construction of the Project, and subject further to Landowner's failure to cure such breach within **30 days** of a written demand to commence or diligently proceed with the work to completion, City may find that Landowner is in default of this Agreement. Upon any such default, City may elect to adjust the priority for reimbursement to occur after full reimbursement to any other landowners who have then entered into similar reimbursement/credit agreements subsequent to this Agreement for the construction of non-gateway-project improvements. The intent of this paragraph is to encourage the timely commencement and completion of the Project. City acknowledges that any such adjustment shall not affect Landowner's right to take credits against Fees as provided herein.

3.5 **Agreements with Other Landowners.** To protect such reimbursement to Landowner, City agrees that any and all other credit/reimbursement agreements involving reimbursements from the Facilities Fee will include the following terms:

3.5.1 The credit/reimbursement amount under the other agreements shall be based on the actual costs incurred for the improvements, as reviewed and approved by City, and the contracts for such work shall be awarded based on a competitive bid as required for comparable City public works projects; and

3.5.2 Unless Landowner defaults under this Agreement and loses its priority for reimbursement, any reimbursements to be paid from the Facilities Account to another landowner shall be subject to the priority for reimbursement described in Section 3.4 above.

3.5.3 Similarly, the provision of credits by City to other landowners for other project improvements will reduce the flow of funds to the Facilities Account and defer Landowner's reimbursement under this Agreement. So long as reimbursements are outstanding under this Agreement, City agrees that it will limit the amount of any credit that can be applied against the Facilities Fee, as and when building permits are issued within a landowner's property, as follows:

(a) If the credits are generated by the construction of non-gateway-project improvements, then the maximum amount of credits that can be applied at the time of building permit issuance shall be **43%** of the then-existing Facilities Fee.

(b) If the credits are generated by the construction of public-safety project or gateway-project improvements, then **100%** of the credits can be applied at the time of building permit issuance, subject to such landowner's payment of its fair share of City's costs to administer the Fee Program, up to, but not in excess of,

3% of the then-existing Facilities Fee (e.g., if City's costs of administration equaled 3%, then the maximum amount of credits that could be taken would be 97% of the Facilities Fee).

- 3.6 Impact of Assignment on Reimbursement Amount.** If and to the extent Landowner assigns its right to reimbursements and credits under this Agreement in accordance with the provisions of Article 5 below, City's obligation to reimburse Landowner and such approved assignees shall be made in proportion to the outstanding portions of the Reimbursement Amount then held by Landowner and such assignees thereof approved by City pursuant to Article 5.

Article 4: Credits

- 4.1 Against Development Fees.** Upon full completion of the Project, and upon actual formal City acceptance of the Project, Landowner shall be entitled to credits (collectively, "Fee Credits," individually, a "Fee Credit") against the North Natomas Public Facility Fees (the "Fee") which would otherwise be collected in connection with the issuance of each building permit issued for all or a portion of the Property, equal to the "Credit Amount." The fee-credit principles expressed in this Section 4.1 shall be interpreted and applied to achieve fairness and equity to all parties, including City, while not allowing a party to obtain economic or other advantage through arbitrage or otherwise. Subject to the fair-share payment for City's Fee-administration costs described below, Landowner may credit 97% of its outstanding Reimbursement Amount against the Facilities Fee that would otherwise be payable by Landowner with respect to the Property upon issuance of a building permit for any building within the Property, until such Reimbursement Amount is exhausted through such credits and any reimbursement hereunder. Landowner acknowledges that the fee credit shall not apply against Landowner's fair share of City's costs and expenses to administer the Fee Program and reimbursement agreements related thereto and Landowner shall be obligated to pay such portion of the Fee as it pulls building permits within the Property, notwithstanding any outstanding balance of the Reimbursement Amount, up to, but not in excess of, 3% of the then-existing Facilities Fee.
- 4.2 Fee Deferral.** If City adopts a Fee Deferral Plan that provides for deferral of the Facilities Fee, and if Landowner elects to participate in such Fee Deferral Plan, then Landowner's fee credit shall be applied against the then-existing Facilities Fee in accordance with the foregoing provisions to determine the net outstanding fee. The fee deferral shall then be applied against the net outstanding fee to determine the annual installments of principal and interest to be paid pursuant to such Fee Deferral Plan.
- 4.3 Advance Issuance of Fee Credits.** Notwithstanding Section 4.1, Landowner shall be entitled to Fee Credits before full completion of the Project and actual formal City acceptance of the Project if all of the following conditions are satisfied:

4.3.1 *Bonds.* Landowner has complied with Section 1.5, concerning performance and payment bonds.

4.3.2 *Letter of Credit.* Landowner provides City with an irrevocable letter of credit in an amount that is no less than \$_____ as security for Landowner's performance under this Agreement ("Letter of Credit").

(a) The Letter of Credit must be in a form acceptable to the City Attorney's Office, in that office's sole discretion, and, by its express terms, must be unconditional and absolutely free of defenses on the part of Landowner and the financial institution that issues it. The financial institution that issues the Letter of Credit must be a commercial bank lawfully operating within the United States and acceptable to the City Treasurer's Office, in that office's sole discretion.

(b) The term of the Letter of Credit must be at least **12 months**, and the Letter of Credit must provide that City may draw upon it by presenting one or more site drafts, each accompanied by a signed-and-dated demand letter worded substantially as follows:

I, the [title] of the City of Sacramento, demand payment of the sum of _____ U.S. Dollars (\$_____) representing a partial/[full draw upon the amount of your Irrevocable Letter of Credit No. _____. This sum represents payment due to the city under the reimbursement-and-credit agreement between [Landowner's name] and the city that is dated _____, 20__, and designated by the city as Agreement No. _____.

(c) While this Agreement is in effect, Landowner must replace the Letter of Credit (and any replacement Letter of Credit) at least **30 days** before its expiration date. The replacement Letter of Credit must be identical to the Letter of Credit being replaced, except that it must have an expiration date that is no sooner than **12 months** following the expiration date of the Letter of Credit being replaced.

4.3.3 *Issuance of Fee Credits.* Landowner must make a written request for issuance of Fee Credits in accordance with this Section 4.3. City will verify that the required performance and payment bonds are in place and will determine, in its sole discretion, the amount of Fee Credits that may be issued in response to the written request. City will issue Fee Credits to Landowner in an amount equal to the Fee Credits allowable under this Agreement and City's policies and procedures for issuance

of the credits. Total Fee Credits issued under this Section 4.3 may not exceed the amount of the Letter of Credit delivered by Landowner.

- 4.3.4 *Repayment.* If City issues Fee Credits to Landowner that, in the aggregate, exceed the total amount that may be issued in accordance with this Agreement and City's policies and procedures for issuance of the credits, then Landowner agrees to repay City the full amount of the excess within **15 days** after receiving City's written demand. Similarly, if the final calculation of Fee Credit amounts under this Agreement results in City having issued Fee Credits to Landowner in excess of those provided for in this Agreement, then Landowner agrees to repay City the full amount of the excess within **15 days** after receiving City's written demand.
- 4.3.5 *Drawing Upon the Letter of Credit.* City may draw on the Letter of Credit as follows:
- (a) If Landowner fails to complete construction of the Project as required by this Agreement, then City will have the absolute right to draw upon the Letter of Credit in an amount City determines, in its sole discretion, to be necessary to complete construction.
 - (b) If repayment is due under Section 4.3.4 and Landowner does not repay City within the time specified in Section 4.3.4, then City will be entitled to draw against the Letter of Credit in an amount equal to the repayment amount then due. A draw under this Section 4.3.5(b) will be a partial draw under the Letter of Credit and will leave the balance of the Letter of Credit intact.
 - (c) If Landowner fails to provide City with a replacement Letter of Credit within the time specified in Section 4.3.2(c), then City will be entitled to draw against the Letter of Credit in an amount equal to the total amount of Fee Credits that Landowner has received under this Agreement as of the time of the draw. If City makes a draw under this Section 4.3.5(c), then—
 - (1) City will hold the amount drawn, with no obligation to pay Landowner interest, until (A) City determines that Landowner cannot or will not complete the Project as required by this Agreement (in which event City may use the amount drawn to complete the Project) or (B) Landowner completes the Project in full and City formally accepts the Project (in which event City will return the amount drawn to Landowner); and
 - (2) City will not be obligated to issue additional Fee Credits under this Agreement unless and until (A) Landowner completes the Project in full and City formally accepts the

Project or (B) Landowner furnishes City with a replacement Letter of Credit that complies with Section 4.3.2 above.

- 4.3.6 *Release of Letter of Credit.* City will release the Letter of Credit if and when Landowner completes the Project in full and City formally accepts the Project.

Article 5: Assignments of Reimbursements

- 5.1 **Assignment of Reimbursement Rights.** Landowner may assign the rights under this Agreement to receive reimbursements and take credits against the Facilities Fee to be assessed against any development within North Natomas to any person or entity, subject to and in accordance with the terms of this Article 5. All assignments of the right to credits and reimbursements pursuant to this Article 5 shall be subject to City's prior written consent, which consent shall not be unreasonably withheld or delayed. Landowner acknowledges and agrees that City shall have the discretion to deny an assignment of rights to credits and reimbursements under this Agreement on the basis of excessive fractionalization of the available credits and reimbursements, provided that City shall not deny an assignment that represents an amount equal to at least \$50,000 of Landowner's reimbursement and credit rights. In addition, City shall be entitled to calculate and assess, as a condition of its consent to any such assignment, a reasonable fee for the review, approval, and administration thereof.
- 5.2 **Acknowledgment of Agreement; Assumption.** In addition to the approval of City, any such assignment shall be subject to an express written assumption by the assignee, whereby the assignee agrees to be subject to all the provisions of this Agreement with respect to the application and interpretation of the fee-credit and fee-reimbursement provisions, including, without limitation, the obligation to pay the portion of the Facilities Fee required to cover City's cost of administration thereof, notwithstanding the existence of any such right to credits and reimbursements. The assignment agreement shall contain a provision whereunder Landowner and the assignee agree to fully and completely indemnify and defend City from any liability relating to the assignment of rights.
- 5.3 **Allocation of Reimbursements.** If and to the extent Landowner assigns its right to reimbursements under this Agreement in accordance with the provisions of this Article 5, City's obligation to reimburse Landowner and such approved assignees shall be made in proportion to the then-outstanding portions of the Reimbursement Amount then held by Landowner and such assignees thereof approved by City pursuant to this Article 5.
- 5.4 **Disputes Between Landowner and Assignee.** Landowner and any assignee thereof acknowledge and agree that in the event of any dispute between Landowner and/or any assignee and/or City regarding the legal ownership of the rights to credits and reimbursements hereunder, City may withhold any cash

reimbursement and may disallow the use of any Fee Credits unless and until either—

- 5.4.1 all parties to the dispute have executed an agreement in a form acceptable to the City Attorney specifying the legal ownership of such rights and the manner in which such rights will be exercised, which agreement shall contain acceptable indemnification and defense provisions; or
- 5.4.2 one of the parties has obtained a court order determining as against the disputing parties the legal ownership of such rights and the manner in which such rights will be exercised.

5.5 **City Policy and Procedure.** Landowner acknowledges, for itself and its successors in interest to the Property, that the reimbursement and credit rights hereunder do not run with the Property and that adopted City policies and procedures relating to assignment of Fee Credits and reimbursements, as such policies and procedures may be amended from time to time, shall apply to Landowner and its successors in interest to the Property. Current City policies and procedures are as set forth in **Exhibit "H,"** attached hereto and incorporated herein by this reference. City agrees that it shall not give any Fee Credits to any subsequent purchaser or encumbrancer of any portion of the Property unless such subsequent purchaser or encumbrancer has a separate, written assignment of these Fee Credits from Landowner (or a previously approved assignee thereof), which written assignment has been approved by City in accordance with the provisions of this Article 5.

Article 6: Miscellaneous

- 6.1 **Entire Agreement.** This Agreement represents the entire agreement of the parties relating to the subjects covered by this Agreement. Oral and written statements, representations, and agreements not included within this Agreement shall have no force or effect whatsoever, and shall be deemed to have been superseded by this Agreement.
- 6.2 **Attorneys' Fees.** The prevailing party in any proceedings, judicial or otherwise, brought to enforce the terms of this Agreement shall be entitled to reasonable attorney's fees and costs in prosecuting or defending such proceedings.
- 6.3 **Notices.** Any notice required or elected to be given hereunder shall be given by placing the notice in the United States mail, postage prepaid, and addressed in accordance with the provisions of this Section 6.3. Unless the text of this Agreement otherwise provides, notice shall be deemed to have been given on the date that the notice was placed in the mail in accordance herewith. Notice to Landowners, or to any individual Landowner, shall be given to the single address set forth below.

6.3.1 If to City: City Manager
915 "I" Street, Fifth Floor
Sacramento, CA 95814

6.3.2 If to Landowner: [Name of contact]
[Name of business]
[Street address]
[City, state, zip code]

6.4 **Effective Date.** This Agreement shall become effective upon its execution by all parties.

6.5 **Mediation and Arbitration.**

6.5.1 Any dispute or controversy between all or a portion of the parties to this Agreement relating to the interpretation and enforcement of their rights and obligations under this Agreement shall be resolved solely by mediation and arbitration in accordance with the provisions of this Section 6.5. The mediation and arbitration procedures shall be commenced by any party to this Agreement by serving by a Notice of Dispute ("Notice") on the parties pursuant to Section 6.3. The Notice generally shall describe the nature of the dispute and specify the date of its mailing. The Notice shall require each party to notify the party serving the Notice of its intention to participate in the mediation and arbitration procedures within **five days** of the date of mailing of the Notice. For purposes of this Section 6.5 only, the party serving the Notice and all other parties indicating an intention to participate in the mediation and arbitration procedures shall be referred to herein as the "Disputing Parties," and shall be the only parties entitled to participate in said procedures.

6.5.2 With respect to any dispute or controversy between Disputing Parties that is to be resolved by mediation and arbitration as provided in Section 6.5.1, the Disputing Parties shall attempt in good faith first to mediate such dispute and use their best efforts to reach agreement on the matters in dispute. Within **15 days** of the mailing of the Notice, the party serving the Notice shall attempt to employ the services of a third person ("Mediator") mutually acceptable to the Disputing Parties to conduct such mediation. The cost of the Mediator shall be borne equally by the Disputing Parties. The mediation shall take place within **10 days** of the appointment of such Mediator. If the Disputing Parties are unable to agree on such Mediator, or, if on completion of such mediation, the parties are unable to agree and settle the dispute, then the dispute shall be referred to arbitration in accordance with the following subsections.

- 6.5.3 Any dispute or controversy between Disputing Parties that is to be resolved by arbitration as provided in the foregoing subsections shall be settled and decided by arbitration conducted by the American Arbitration Association in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as then in effect, except as provided below. Any such arbitration shall be held and conducted in Sacramento, California before one arbitrator who shall be selected by mutual agreement of the parties. If agreement is not reached on the selection of an arbitrator within **15 days** after referral to arbitration, then such arbitrator shall be appointed by the Presiding Judge of the Superior Court of Sacramento County as soon as practicable.
- 6.5.4 The provisions of the Commercial Arbitration Rules of the American Arbitration Association shall apply and govern such arbitration, subject, however, to the following:
- (a) Any referral to arbitration shall be barred after the date that institution of legal or equitable proceedings based on the subject controversy or dispute would be barred by the applicable statute of limitations.
 - (b) The arbitrator appointed must be a former or retired judge or an attorney with at least 10 years' experience in real property, commercial, and municipal law.
 - (c) The Disputing Parties mutually may elect to have all proceedings involving the Disputing Parties reported by a certified shorthand court reporter and written transcripts of the proceedings prepared and made available to the Disputing Parties. If fewer than all of the Disputing Parties desire the use of a court reporter and preparation of written transcripts, then the issue of whether or not to retain a court reporter shall be submitted to the arbitrator who, in his or her sole discretion, shall determine whether such use and preparation is necessary or beneficial to the proceedings and the interests of all Disputing Parties in resolving the dispute.
 - (d) The arbitrator shall prepare in writing and provide to the Disputing Parties factual findings and the reasons on which the decision of the arbitrator is based.
 - (e) The matter shall be heard by the arbitrator and the final decision by the arbitrator must be made within **90 days** from the date of the appointment of the arbitrator. The arbitration hearing date shall be established by the arbitrator, which date must be within such period of time that the arbitrator, in his or her sole discretion, determines to be sufficient to meet the foregoing time constraints.

- (f) The prevailing party shall be awarded reasonable attorney's fees and costs incurred in connection with the arbitration, unless the arbitrator for good cause determines otherwise.
- (g) Costs and fees of the arbitrator and court reporter, if any, shall be borne equally by the Disputing Parties. The cost of preparing any transcript of the proceedings shall be the responsibility of the Disputing Party or Parties requesting such preparation.
- (h) The award or decision of the arbitrator shall be final and judgment may be entered on it in accordance with applicable law in any court having jurisdiction over the matter.
- (i) The provisions of title 9 of part 3 of the California Code of Civil Procedure, commencing with section 1282 and including section 1283.05, and successor statutes, permitting, among other things, expanded discovery proceedings shall be applicable to all disputes that are arbitrated under this section 6.5.

6.6 Enforced Delay, Extension of Times of Performance. In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default where delays or default are due to war, insurrection, strikes, walkouts, riots, floods, drought, rain, earthquakes, fires, casualties, acts of God, governmental restrictions imposed or mandated by other governmental entities, enactment of conflicting federal or state laws or regulations, new or supplementary environmental regulation, litigation, or similar bases for excused performance. If written notice of such delay is given to City within **30 days** of the commencement of such delay, an extension of time for such cause shall be granted for the period of the enforced delay, or longer as may be mutually agreed upon.

6.7 Preparation Fees. Landowner shall pay to City the sum of **\$1,500**, representing the costs associated with the City Attorney's services in negotiating and drafting this Agreement.

City of Sacramento

[Landowner]

By: _____
Ray Kerridge
City Manager

By: _____
[Name]
[Title]

Attest:

Approved for Legal Form

By: _____
City Clerk

By: _____
Senior Deputy City Attorney

EXHIBIT A
LANDOWNER PROPERTY DESCRIPTION

EXHIBIT B

PROJECT INFRASTRUCTURE ELEMENTS

Note: This exhibit must include both a description (and depiction, i.e., plans) of the project **and** a summary of cost estimates for the project (see Recital D).

EXHIBIT C

HAZARDOUS SUBSTANCES

- A. **No Review, Examination, or Assessment.** The parties acknowledge and understand that City has not conducted any review, examination or assessment to assess, identify or detect the presence of any Hazardous Substances, as defined below, on, under or around Landowner Property. As between the City and Landowner, any liability associated with the presence of any Hazardous Substances on, under or around the Landowner Property, including any interests in said property dedicated to City as provided herein, shall be governed by the indemnity provisions of this Agreement, regardless of whether any such review, examination or assessment is conducted.
- B. **Definitions.**
- (1) As used herein, the term "Hazardous Substances" means:
- (a) Those substances included within the definitions of hazardous substance, hazardous waste, hazardous material, toxic substance, solid waste, or pollutant or contaminant under any Environmental Law, as defined below;
 - (b) Those substances listed in the United States Department of Transportation Table [49 C.F.R. § 172.101], or by the Environmental Protection Agency, or any successor agency, as hazardous substances [40 C.F.R. Part 302];
 - (c) Other substances, materials, and wastes that are or become regulated or classified as hazardous or toxic under federal, state or local laws or regulations; and
 - (d) Any material, waste, or substance that is—
 - (i) a petroleum or refined petroleum product;
 - (ii) asbestos;
 - (iii) polychlorinated biphenyl;
 - (iv) designated as a hazardous substance pursuant to 33 U.S.C. § 1321 or listed pursuant to 33 U.S.C. § 1317;
 - (v) a flammable explosive; or
 - (vi) a radioactive material.
- (2) As used herein, the term "Environmental Law" means all federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees or requirements of any government authority regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance, or pertaining to environmental conditions on, under, or about the detention basin site

or any of the easement areas which Landowner is required to and does convey to City pursuant to this Agreement, as now or may at any later time be in effect, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [42 U.S.C. § 9601 *et seq.*]; the Resource Conservation and Recovery Act of 1976 (RCRA) [42 U.S.C. § 6901 *et seq.*]; the Clean Water Act, also known as the Federal Water Pollution Control Act (FWPCA) [33 U.S.C. § 1251 *et seq.*]; the Toxic Substances Control Act (TSCA) [15 U.S.C. §2601 *et seq.*]; the Hazardous Materials Transportation Act (HMTA) [49 U.S.C. § 1801 *et seq.*]; the Insecticide, Fungicide, Rodenticide Act (7 U.S.C. § 136 *et seq.*); the Superfund Amendments and Reauthorization Act [42 U.S.C. § 6901 *et seq.*]; the Clean Air Act [42 U.S.C. §7401 *et seq.*]; the Safe Drinking Water Act [42 U.S.C. § 300f *et seq.*]; the Solid Waste Disposal Act [42 U.S.C. § 6901 *et seq.*]; the Surface Mining Control and Reclamation Act [30 U.S.C. § 1201 *et seq.*]; the Emergency Planning and Community Right to Know Act [42 U.S.C. § 11001 *et seq.*]; the Occupational Safety and Health Act [29 U.S.C. §§ 655 and 657]; the California Underground Storage of Hazardous Substances Act [Health and Safety Code § 25280 *et seq.*]; the California Hazardous Substances Account Act [Health and Safety Code § 25100 *et seq.*]; the California Safe Drinking Water and Toxic Enforcement Act [Health and Safety Code § 24249.5 *et seq.*]; the Porter-Cologne Water Quality Act [Water Code § 13000 *et seq.*], together with any amendments of or regulations promulgated under the statutes cited above, and any other federal, state or local law, statute, ordinance or regulation now in effect or later enacted that pertains to the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water, or land use.

EXHIBIT D

CONSTRUCTION CONTRACT LANGUAGE

Contractor agrees and covenants to fully indemnify, defend, and hold harmless City and City's elective and appointive boards, commissions, officers, employees, and agents from and against all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage, or violation of any law or regulation to the extent arising from any actions or omissions by any of the following in connection with the design, construction, operation, maintenance, or repair of that portion of the Improvement designed or constructed by Contractor: Contractor; any of Contractor's engineers or subcontractors; or any other person or entity employed by, or acting on behalf of or as the authorized agent for, Contractor or any of Contractor's engineers or subcontractors.

EXHIBIT E
PRIOR AGREEMENTS