

## **CONSTRUCTION FEE CREDIT AND REIMBURSEMENT AGREEMENT DEVELOPMENT IMPACT FEE PROGRAM**

This CONSTRUCTION FEE CREDIT AND REIMBURSEMENT AGREEMENT ("Agreement") is entered into this 9th day of August, 2022, by and between the CITY OF RIALTO, a California municipal corporation ("City"), and Rialto Apartments, LLC, a California limited liability company, ("Developer"). City and Developer are sometimes hereinafter referred to individually as "Party" and collectively as "Parties".

### **RECITALS**

A. Developer proposes to develop approximately 8.02 acres of real property located at 534 E. Foothill Boulevard (identified as APN 0133-174-07, -08, -09, and -31) within the Residential-Mixed Use (R-MU) land use district of the Foothill Boulevard Specific Plan in the City of Rialto, County of San Bernardino, California, and more specifically described in the legal description attached to and incorporated within this Agreement as **Exhibit A** ("Property").

B. To facilitate development of the Property, Developer has requested from City certain entitlements and/or building permits for the construction of a 204-unit apartment complex comprised of seven three-story buildings, with one- to three-bedroom residential units ranging between 702 square feet to 1,106 square feet ("Project"). The project will include the construction of a leasing office and clubhouse building, with a recreational pool and barbeque area for residential use. The Project was approved by the City Planning Commission on January 26, 2022, via Resolution No. 2022-11, subject to the Conditions of Approval set forth therein.

C. As a condition to City's approval for the Project, City has required Developer to, among other things, widen Foothill Boulevard across the frontage and restriping across the frontage and east to Eucalyptus Avenue ("Road Widening Work"), the construction of a raised landscaped median from Acacia Avenue east to the easterly driveway of the Project ("Median Work"), and the design and installation of a traffic signal at the easterly driveway to the Property ("Traffic Signal Work") (collectively the "Public Improvements"), as described on the approved plans and specifications as may be on file with the Office of the City Engineer (such plans and specifications, with any changes approved by City and Developer, are collectively referred to herein as the "Plans and Specifications").

D. Chapter 3.33 of the Rialto Municipal Code establishes development impact fees and fair share fees ("DIF") to finance public facilities in furtherance of the goals and objectives of the City's general plan, various facility master plans, capital improvement plans, and the nexus reports described in Section 3.33.030, as they may be amended from time to time (collectively, "Nexus Reports"). The imposition of DIF ensures that new development in the City bears its proportionate share of the cost of public facilities necessary to accommodate such development, which thereby promotes and protects the public health, safety, and welfare.

E. Pursuant to Section 3.33.100 of the Rialto Municipal Code, Developer may receive and the City may grant credit towards the DIF for construction of eligible public improvements or facilities as contained in and in accordance with the Nexus Reports or special studies; provided, however, the amount of the fee credit or reimbursement shall not exceed the amount of the DIF assessed for which the fee credit or reimbursement is granted, unless the City Council also approves a reimbursement agreement.

F. City and Developer now desire to enter into this Agreement for the following purposes: (i) to provide for the timely construction and completion of the Public Improvements, (ii) to ensure that construction of the Public Improvements is undertaken in accordance with the Plans and Specifications, (iii) to provide a means by which the Developer's costs for construction of the Public Improvements is offset against Developer's obligation to pay the applicable DIF for the Project, in accordance with the Nexus Reports and -special studies, and (iv) to provide for reimbursement of costs in excess of the credit granted for eligible improvements, if any.

**NOW, THEREFORE**, for the purposes set forth herein, and for good and valuable consideration, the adequacy of which is hereby acknowledged, Developer and City hereby agree as follows:

### **TERMS**

**1. Incorporation of Recitals.** The Recitals above are a substantive part of this Agreement.

**2. Construction of Public Improvements.** Prior to the issuance of a Certificate of Occupancy, unless both Parties agree to an extension in writing, and except as provided in this Agreement, Developer shall construct or have constructed, at its own cost and expense, the Public Improvements in accordance with the Plans and Specifications. Developer (or its contractors) shall provide all equipment, tools, materials, labor, tests, design work, and engineering services necessary to fully and adequately complete the Public Improvements.

**2.1 Pre-approval of Plans and Specifications.** Developer is prohibited from commencing work on any portion of the Public Improvements until the Plans and Specifications for that portion of the Public Improvements have been submitted to and approved by City. Approval by City shall not relieve Developer from ensuring that all Public Improvements conform to all other requirements and standards set forth in this Agreement.

**2.2 Permits and Notices.** Prior to commencing any work, Developer (through its contractors) shall, at its sole cost and expense, obtain all necessary permits and licenses and give all necessary and incidental notices required for the lawful construction of the Public Improvements and performance of Developer's obligations under this Agreement. Developer (through its contractors) shall conduct the work in full compliance with the regulations, rules, and other requirements contained in this Agreement, any applicable law, and any permit or license issued to Developer.

2.3 Public Works Requirements. Developer shall ensure that the bidding, awarding, and construction of the Public Improvements are undertaken as if such Public Improvements were constructed as a public works project under the direction and authority of City, pursuant to the applicable provisions of the Public Contract Code.

(a) Prior to soliciting or awarding the bid for any portion of the Public Improvements, Developer shall submit the bid packet and a set of construction drawings signed by Developer or another authorized representative designated by Developer for the work being bid to the City Engineer ("**City Engineer**") for review and approval, which approval shall be granted or denied within fifteen (15) calendar days after submission of such bid packet. If the City Engineer denies approval of such bid packet and construction drawings, the City Engineer shall specify the reasons for such disapproval and Developer shall resubmit a revised bid packet for review and approval until such approval is obtained.

(b) Developer shall obtain bids for the construction of the Public Improvements in a manner which has been approved by the City Engineer. Developer shall provide the City Engineer with copies of all bids received from contractors and a bid summary in a form approved by the City Engineer to assure that the contractor and subcontractors adhere to the applicable legal requirements for public works projects. The contract or contracts for the construction of the Public Improvements shall be awarded to the responsible bidder(s) submitting the lowest responsive bid(s) for the construction of the Public Improvements, as determined by Developer in its good faith discretion. Developer shall enter into a construction contract with each contractor selected to perform work on the Public Improvements (after competitive bidding as set forth above), (each, a "**Construction Contract**") for the performance of the Work set forth in the selected bid, and the terms of each Construction Contract entered into by Developer and each contractor or subcontractor shall be reasonably acceptable to the City Engineer. Developer shall submit to City a copy of each executed Construction Contract for the Public Improvements within fifteen (15) days after execution thereof.

(c) Developer's general contractor for the construction of the Public Improvements ("**General Contractor**") shall pay prevailing wages (in accordance with Articles 1 and 2 of Chapter 1, Part 7, Division 2 of the Labor Code) and to otherwise comply with applicable provisions of the Labor Code, the Government Code, and the Public Contract Code relating to public works projects of cities/counties and as required by the procedures and standards of City with respect to the construction of its public works projects or as otherwise directed by the City Engineer.

(d) All contractors shall be required to provide proof of insurance coverage throughout the term of the construction of the Public Improvements which they will construct in conformance with Section 14 of this Agreement.

2.4 Compliance with Plans and Specifications. The Public Improvements shall be completed in accordance with the Plans and Specifications as approved by City.

2.5 Standard of Performance. Developer and its contractors shall perform all work required in constructing the Public Improvements in a skillful and workmanlike manner, and consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. Developer represents and maintains that it or its contractors shall be skilled in the professional calling necessary to perform the work. Developer warrants that all of its employees and contractors shall have sufficient skill and experience to perform the work assigned to them, and that they shall have all licenses, permits, qualifications, and approvals of whatever nature that are legally required to perform the work, and that such licenses, permits, qualifications, and approvals shall be maintained throughout the term of this Agreement.

2.6 Alterations to Public Improvements. All work shall be done and the Public Improvements completed as shown on the Plans and Specifications, and any changes to the Plans and Specifications mutually agreed upon by City and Developer. If Developer desires to make any changes to the Plans and Specifications, it shall provide written notice to the City of the proposed changes. City shall have ten (10) business days after receipt of such written notice to administratively approve or disapprove the changes, which approval shall not be unreasonably withheld, conditioned, or delayed. If City fails to provide written notice to Developer of its approval or disapproval of the changes within such ten (10) business day period, City will be deemed to have disapproved the changes to the Plans and Specifications. Any and all changes in the Plans and Specifications to be completed may be accomplished without first giving prior notice of those changes to Developer's surety for this Agreement.

**3. Maintenance of Improvements.** City shall not be responsible or liable for the maintenance or care of, and shall exercise no control over, the Public Improvements until the Public Improvements are accepted by City. Developer shall have no obligation to make the Public Improvements available for public use at any time before the Public Improvements are accepted by City pursuant to Section 8 below. Prior to City's acceptance of the Public Improvements, any use by any person of all or any portion of the Public Improvements shall be at the sole and exclusive risk of Developer. Developer shall maintain all of the Public Improvements in a state of good repair until they are completed by Developer and accepted by City, and until the security for the performance of this Agreement is released. It shall be Developer's responsibility to initiate all maintenance work, but if Developer fails to do so, Developer shall promptly perform such maintenance work when notified to do so by City. If Developer fails to properly prosecute its maintenance obligation under this section, City may, upon written notice and Developer's failure to remedy as provided in Section 11, do all work necessary for such maintenance, and the cost of that maintenance shall be the responsibility of Developer and its surety under this Agreement. City shall not be responsible or liable for any damages or injury of any nature in any way related to or caused by the Public Improvements or their condition prior to acceptance, except to the extent such damage or injury is caused by the negligence or willful misconduct of City, its elected officials, employees and/or agents.

**4. Fees and Charges.** Prior to the issuance of a building permit for the Project, Developer shall pay all required DIF (excluding the Regional Traffic Fee and Street Median Fee as discussed in Section 5), fair share fees, and all other normal and customary taxes, processing fees, and charges arising out of the construction of the Project and Public Improvements, including, but not limited to, all plan check, design review, engineering, inspection, sewer treatment connection fees, and other service or impact fees established by the City. Developer shall receive such credits and/or reimbursements for the Public Improvements constructed in accordance with the provisions set forth in the Rialto Municipal Code and as set forth in this Agreement.

**5. Fee Credits and Reimbursements.**

5.1 Required Fees. The Project is required to pay the following fees:

(a) *Regional Traffic Development Impact Fee.* City and Developer acknowledge that as of the date of this Agreement and based upon the Conditions of Approval for the Project, the total amount of Regional Traffic Development Impact Fee assessed by and owing to City is Four Hundred Ninety-Nine Thousand Three Hundred Ninety-Two Dollars and Zero Cents (\$499,392.00), the “**Regional Traffic Fee.**”

(b) *Street Median Development Impact Fee.* City and Developer acknowledge that as of the date of this Agreement and based upon the Conditions of Approval for the Project, the total amount of the Street Median Development Impact Fee related to Developer’s proportionate share of the costs to construct the Project assessed by and owing to City is Seven Thousand One Hundred Seventy-Two Dollars and Sixty-Four Cents (\$7,172.64), the “**Street Median Fee.**”

Collectively, the Regional Traffic Fee and Street Median Fee are the “**Fee Obligations.**” The City may from time to time adjust the development impact fees applicable to the Project, and the Developer remains subject to any such changes depending upon the date when it pulls building permits. In such event, the City and Developer agree to recalculate the fee credits, and reimbursements (if any).

5.2 Credit Offset Against Fee Obligations. In consideration for Developer’s obligation under this Agreement to construct the Public Improvements (if not constructed by others), the City shall apply a credit to offset some or all of the Fee Obligations (the “**Fee Credits**”).

(a) At the time of this Agreement, the estimated cost to construct the Public Improvements is One Million Eight Hundred Forty-Seven Thousand Nine Hundred Thirty-Eight Dollars and Zero Cents (\$1,847,938.00), as set forth in **Exhibit B** (the “Estimated Construction Costs”), comprised of \$214,572 for the construction of the Median Work, \$1,100,341 for the road widening and restriping work (“Road Widening Work”), and \$533,025 the Traffic Signal Work. The Parties acknowledge that the actual cost may exceed the estimate.

(b) The actual amount of Fee Credits and, if applicable, reimbursement amount for each impact fee shall be calculated as provided in Sections 5.4 and 5.5.

(c) Application of the Estimated Credit Amounts/Reimbursement Amount Against the Fee Obligations. In consideration for Developer's obligation under this Agreement to construct the Public Improvements, the City shall grant the following credits and/or reimbursements to Developer:

(i) The Estimated Construction Costs for the eligible Regional Traffic Fee Improvements is One Million One Hundred Thousand Three Hundred Forty One Dollars and Zero Cents (\$1,100,341.00),<sup>1</sup> and the Estimated Regional Traffic Fee Obligation is Four Hundred Ninety-Nine Thousand Three Hundred Ninety-Two Dollars and Zero Cents (\$499,392.00). The City shall therefore grant Developer a full credit when due for the Regional Traffic Fee Obligation and reimburse Developer the amount of Six Hundred Thousand Nine Hundred Forty Nine Dollars and Zero Cents (\$600,949.00).

(ii) The Estimated Construction Costs for the eligible Street Median Fee Improvements is Two Hundred Fourteen Thousand Five Hundred Seven Two Dollars and Zero Cents (\$214,572.00), and the Estimated Street Median Development Impact Fee Obligation is Seven Thousand One Hundred Seventy-Two Dollars and Sixty-Four Cents (\$7,172.64). The City shall therefore grant Developer a full credit when due for the Street Median Fee Obligation and reimburse Developer the amount of Two Hundred Seven Thousand Three Hundred Ninety-Nine Dollars Thirty-Six Cents (\$207,399.36).

(d) *Other Fee Obligations.* In addition to the Fee Obligations specified herein, the Developer may owe the City other DIF or fees that are not otherwise subject to a fee credit or reimbursement pursuant to this Agreement.

### 5.3 Traffic Signal Work

As a condition of approval of the Project, Developer is required to perform the Traffic Signal Work which is estimated to be Five Hundred Thirty-Three Thousand Twenty Five Dollars and Zero Cents (\$533,025.00). The Traffic Signal Work will benefit both the Project and the adjacent shopping center, but is not eligible for credit against the Regional Traffic Fee Obligation or Street Median Fee Obligation. Developer is obligated to fund their fair share of the cost of the Traffic Signal Work, which is equal to 22.59% of the total cost or an estimated One Hundred Twenty Thousand Four Hundred Ten Dollars and Thirty Five Cents (\$120,410.35), with the City reimbursing the remaining 77.41% or an estimated Four Hundred Twelve Thousand Six Hundred Fourteen Dollars and Sixty Five Cents (\$412,614.65) (the "City Share"). The City's obligation to reimburse

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<sup>1</sup> Landscaping improvements are not eligible to be credited against the Regional Traffic Fee Obligation; therefore, this figure represents the cost of the Road Widening Work, less the landscape and irrigation work identified in Exhibit B.

Developer and pay the City Share, as may be further adjusted pursuant to Section 5.4, will not be subject to Section 5.5.4 and the City shall pay Developer the City Share within thirty (30) days of the City's approval of the final reconciliation as set forth in Section 5.4.

5.4 Reconciliation: Final Offset against the Fee Obligations. Upon completion of the Public Improvements by Developer, Developer shall submit to the City Engineer such information as the City Engineer may require to calculate and verify the total eligible and actual costs incurred by Developer to construct the Public Improvements (the "**Verified Construction Costs**").

The term "**Actual Reimbursement Amount**" shall refer to the amount that is equal to the Verified Construction Costs for each of the eligible improvements, subject to a maximum fee credit equal to the Fee Obligations contained in Section 5.1, and shall be used for the purposes of the final reconciliation.

If the actual construction costs related to the Public Improvements as determined in this Section 5.4 are less than the Fee Obligations, then Developer shall pay the remaining balance to the City to fully satisfy Developer's Fee Obligations within thirty (30) days. If the Actual Reimbursement Amount exceeds the Estimated Reimbursement Amount, or the reimbursable work is not eligible for credit against any fee, then the City shall reimburse the Developer within thirty (30) days, subject to the limitations contained in Section 5.5.

5.5 Fee Credit/Reimbursement Limits. Notwithstanding anything to the contrary in this Section 5, the following limits apply with respect to credit and reimbursement of DIF:

5.5.1 DIF Categories. Developer acknowledges that DIF are imposed in various separate categories to fund specific public facilities. Credit against DIF may only be applied for eligible improvements identified in the specific DIF category. As an example, if Developer constructs a street improvement that is eligible for credit against the Regional Traffic Fee, Developer shall not receive credit against any other DIF (e.g., Street Median Fees) for the street improvement, provided that Developer has received credit in one specific DIF category.

5.5.2 Maximum Reimbursement. The amount of the Actual Reimbursement Amount shall not exceed the amount of the Verified Construction Costs as approved by the City Engineer.

5.5.3 Soft Costs. The City Engineer shall, in his/her sole reasonable discretion, determine the amount of reasonable soft costs eligible for reimbursement under the Fee Credit provision of Rialto Municipal Code Section 3.33.100. Such amounts may include the reasonable soft costs of the Developer related to the Public Improvements, such as indirect costs of construction, professional engineering, and design services, construction management, soils testing, administrative costs, permits, plan check fees, and inspections. For soft costs to be reimbursable to Developer pursuant

to this Agreement, City must be able to verify that such soft costs are specifically attributable to the specified Public Improvements for which reimbursement is being made, by reference to separate subcontract(s) or by another means approved by the City. The total amount of the soft costs shall not exceed fifteen percent (15%) of the amount eligible for reimbursement. The City Engineer may, in his/her reasonable discretion, reduce or disallow reimbursement for any costs he/she finds excessive or unreasonable.

5.5.4 Availability of Unencumbered Impact Fees. City and Developer acknowledge that the City is estimated to owe Developer a reimbursement of Six Hundred Thousand Nine Hundred Forty-Nine Dollars and Zero Cents (\$600,949.00) related to the Road Widening Work, and Two Hundred Seven Thousand Three Hundred Ninety-Nine Dollars Thirty-Six Cents (\$207,399.36) related to the Median Work, with such reimbursement amounts to be adjusted pursuant to Section 5.4. However, in the event that the City's reimbursement obligation under this Section 5 exceeds available funds, and at the time such reimbursement is due, there is insufficient funds in the City's account for the relevant Impact Fees, then the City may elect, exercisable by written notice delivered to Developer (a "**Deferral Notice**"), to defer the payment of such amounts until the time the funds become available in the City's account for the relevant Impact Fees, which Deferral Notice shall set forth the amount of such Deferral (the "**Deferral Amount**"), the applicable Section of this Agreement to which such reimbursement obligation relates, and shall set forth the City's continuing obligation to reimburse Developer for the Deferral Amount. Such Deferral Amount shall not accrue interest. Upon written request from Developer from time to time, the City shall execute a statement prepared by Developer acknowledging the then outstanding Deferral Amount as of the date of such request (a "**Deferral Amount Statement**"). Developer shall have no right to receive the Deferral Amount unless and until all of the following are met: (i) the Public Improvements are completed and accepted in accordance with the requirements of Section 5.6 of this Agreement, (ii) the City has sufficient funds in the City's relevant Impact Fee account to pay the Deferral Amount, and (hi) the City Council appropriates said funds to pay the Deferral Amount in accordance with the priority schedule for City Council approved projects. City Council may appropriate the funds by resolution. Developer acknowledges and agrees that the City and other developers may be reimbursed before Developer. No additional project or projects shall be given advanced priority after this Agreement is executed.

5.6 Conditions Precedent to Final Credit. The City's obligation to provide fee credits for the Public Improvements pursuant to this Agreement is conditioned upon the prior satisfaction by Developer or written waiver by the City Manager of each of the following Conditions Precedent within the times designated below:

5.6.1 Completion of Construction. Developer shall have completed the construction of the entire Project and the Public Improvements, and notices of completion shall have been recorded in relation to the Project and the Public Improvements, in accordance with California Civil Code Sections 8182 (as applicable), and thirty-five (35) days shall have elapsed since the recordation of such notices of completion. The purposes of this provision are to ensure that the Public Improvements



will be independently functional and to maintain consistency with vesting rights, and nothing herein shall be deemed to make any part of the Project other than the Public Improvements a public work.

5.6.2 Submission of Bills/Invoices. Developer shall have made full and complete payment of all undisputed claims for work performed on the Public Improvements, or in the event of a dispute between Developer and the General Contractor or a subcontractor, Developer shall have obtained a commercially reasonable bond reasonably satisfactory to the City to release any applicable mechanics' lien or stop notice, and Developer shall have submitted and the City shall have approved a written request for the reimbursement, including copies of all bills and/or invoices evidencing the hard costs of constructing the Public Improvements actually incurred by Developer.

5.6.3 As-Built Drawings. Developer shall have submitted two (2) sets of final as-built drawings for the Public Improvements to the City Engineer, as provided in Section 8.

5.6.4 Acceptance of Required Public Improvements by the City. The City, through the City Manager upon a recommendation of the City Engineer pursuant to the provisions of Rialto Municipal Code Section 2.48.260, shall have accepted title to the Public Improvements, and Developer shall have provided the maintenance guarantees and landscaping requirements reasonably required by the City. The City agrees it will not unreasonably withhold or condition its acceptance of title to the Public Improvements.

5.6.5 No Default. Developer shall not be in Default in any of its obligations under the terms of this Agreement, and all representations and warranties of Developer contained herein shall be true and correct in all material respects.

**6. City/County Inspection of Public Improvements.** Developer shall, at its sole cost and expense, and at all times during construction of the Public Improvements, maintain reasonable and safe facilities and provide safe access for inspection by City of the Public Improvements and areas where construction of the Public Improvements is occurring or will occur.

**7. Liens.** Upon the expiration of the time for the recording of claims of liens as prescribed by Sections 8412 and 8414 of the Civil Code with respect to the Public Improvements, Developer shall provide to the City such evidence or proof as the City shall reasonably require that all persons, firms, and corporations supplying work, labor, materials, supplies, and equipment to the construction of the Public Improvements have been paid, and that no claims of liens have been recorded by or on behalf of any such person, firm, or corporation. Rather than await the expiration of the said time for the recording of claims of liens, Developer may elect to provide to the City a title insurance policy or other security reasonably acceptable to the City guaranteeing that no such claims of liens will be recorded or become a lien upon any of the Property.

**8. Acceptance of Improvements; As-Built or Record Drawings.** If the Public Improvements are completed by Developer in accordance with the Plans and Specifications, the City shall be authorized to accept the Public Improvements. The City may, in its reasonable discretion, accept fully completed portions of the Public Improvements prior to such time as all of the Public Improvements are complete, which shall not release or modify Developer's obligation to complete the remainder of the Public Improvements. Upon the total or partial acceptance of the Public Improvements by City, Developer shall file with the Recorder's Office of the County of San Bernardino a notice of completion for the accepted Public Improvements in accordance with California Civil Code Section 8182 ("**Notice of Completion**"), at which time the accepted Public Improvements shall become the sole and exclusive property of City without any payment therefor. Notwithstanding the foregoing, City may not accept any Public Improvements (or the applicable portion thereof) unless and until Developer provides two (2) sets of "as-built" or record drawings or plans to the City for all such Public Improvements (or the applicable portion thereof). The drawings shall be certified and shall reflect the condition of the Public Improvements as constructed, with all changes incorporated therein.

**9. Warranty and Guaranty.** Developer hereby warrants and guarantees all the Public Improvements against any defective work or labor done, or defective materials furnished in the performance of this Agreement, including the maintenance of the Public Improvements, for a period of one (1) year following completion of the work and acceptance by City ("**Warranty**"). During the Warranty, Developer shall repair, replace, or reconstruct any defective or otherwise materially unsatisfactory portion of the Public Improvements, in accordance with the Plans and Specifications. All repairs, replacements, or reconstruction during the Warranty shall be at the sole cost and expense of Developer. As to any Public Improvements which have been repaired, replaced, or reconstructed during the Warranty, Developer hereby agree to provide a warranty for a one (1) year period following City acceptance of the repaired, replaced, or reconstructed Public Improvements. Nothing herein shall relieve Developer from any other liability it may have under federal, state, or local law to repair, replace, or reconstruct any Public Improvement following expiration of the Warranty or any extension thereof. Developer's warranty obligation under this section shall survive the expiration or termination of this Agreement.

**10. Administrative Costs.** If Developer fails to construct and install all or any part of the Public Improvements, or if Developer fails to comply with any other obligation contained herein, Developer and its surety shall be jointly and severally liable to City for all administrative expenses, fees, and costs, including reasonable attorneys' fees and costs, incurred in obtaining compliance with this Agreement or in processing any legal action or for any other remedies permitted by law.

**11. Default; Notice; Remedies.**

11.1 Notice. Subject to the *force majeure* provisions of Section 15.16 below, if Developer neglects, refuses, or fails to fulfill or timely complete any obligation, term, or condition of this Agreement, or if City determines there is a violation of any federal, state, or local law, ordinance, regulation or code, City may at any time thereafter

declare Developer to be in default or violation of this Agreement and make written demand upon Developer or its surety, or both, to immediately remedy the default or violation ("**Notice of Default**"). Developer shall substantially commence the work required to remedy the default or violation within five (5) business days of the Notice of Default. If the default or violation constitutes an immediate threat to the public health, safety, or welfare, City may provide the Notice of Default verbally, and Developer shall substantially commence the required work within twenty-four (24) hours thereof. Immediately upon City's issuance of the Notice of Default, Developer and its surety shall be liable to City for all costs of construction and installation of the Public Improvements and all other administrative costs or expenses, as provided for in Section 10 of this Agreement.

11.2 Failure to Remedy; City/County Action. If the work required to remedy the noticed default or violation is not commenced within the time required under Section 11.1 of this Agreement and diligently prosecuted to completion, City may complete all remaining work, arrange for the completion of all remaining work, and/or conduct such remedial activity as in its reasonable discretion it believes is required to remedy the default or violation. All such work or remedial activity shall be at the sole and absolute cost and expense of Developer and its surety, without the necessity of giving any further notice to Developer or surety. In the event City elects to complete or arrange for completion of the remaining work and the Public Improvements, City may require all work by Developer or its surety to cease in order to allow adequate coordination by City.

11.3 Other Remedies. No action by City pursuant to this Section 11 shall prohibit City from exercising any other right or pursuing any other legal or equitable remedy available under this Agreement or any federal, state, or local law. City may exercise its rights and remedies independently or cumulatively, and City may pursue inconsistent remedies. City may institute an action for damages, injunctive relief, or specific performance.

12. Security; Surety Bonds. Prior to the commencement of any work on the Public Improvements, Developer or its contractor shall provide City with surety bonds in the amounts and under the terms set forth below or, at the Developer's request, in lieu of surety bonds, a letter of credit or letters of credit by a banking institution with a rating to be approved by the City and terms to be approved by the City ("**Security**"). The amount of the Security shall be based on the estimated actual costs (the "**Estimated Costs**") to construct the Public Improvements, as determined by City after Developer has awarded a contract for construction of the Public Improvements to the lowest responsive and responsible bidder in accordance with this Agreement. If City determines, in its sole and absolute discretion, that the Estimated Costs have changed, Developer or its contractor shall adjust the Security in the amount requested by City. Developer's compliance with this Section 12 shall in no way limit or modify Developer's indemnification obligation provided in Section 13 of this Agreement.

12.1 Performance Bond. To guarantee the construction of the Public Improvements and faithful performance of all the provisions of this Agreement, to protect City if Developer is in default as set forth in Section 11, and to secure the Warranty of the Public Improvements, Developer or its contractor shall provide City a faithful performance

bond in an amount which sum shall be not less than one hundred percent (100%) of the Estimated Costs. The City may, in its reasonable discretion, partially release a portion or portions of the security provided under this section as the Public Improvements are accepted by City, provided that Developer is not in default on any provision of this Agreement and the total remaining security is not less than twenty percent (20%) of the Estimated Costs. All security provided under this section shall be released at the end of the Warranty period, provided that Developer is not in default on any provision of this Agreement.

12.2 Labor & Material Bond. To secure payment to the contractors, subcontractors, laborers, materialmen, and other persons furnishing labor, materials, or equipment for performance of the Public Improvements and this Agreement, Developer or its contractor shall provide City a labor and materials bond in an amount which sum shall not be less than one hundred percent (100%) of the Estimated Costs. The security provided under this section shall be released by City six (6) months after the date City accepts the Public Improvements.

12.3 Additional Requirements. The surety for any surety bonds provided as Security shall have a current A.M. Best rating of at least "A" and FSC-VIII, shall be licensed to do business in California. As part of the obligation secured by the Security and in addition to the face amount of the Security, Developer and, its contractor or the surety shall secure the costs and reasonable expenses and fees, including reasonable attorneys' fees and costs, incurred by City in enforcing the obligations of this Agreement. Developer and its contractor and the surety shall stipulate and agree that no change, extension of time, alteration, or addition to the terms of this Agreement, the Public Improvements, or the Plans and Specifications shall in any way affect its obligation on the Security.

12.4 Evidence and Incorporation of Security. Evidence of the Security shall be provided on the forms deemed acceptable by the City, and when such forms are completed to the satisfaction of City, the forms and evidence of the Security shall be incorporated herein by this reference.

**13. Indemnification.** Developer shall defend, indemnify, and hold harmless City, its elected officials, employees, and agents from any and all actual or alleged claims, demands, causes of action, liability, loss, damage, or injury to property or persons, including wrongful death, whether imposed by a court of law or by administrative action of any federal, state, or local governmental agency, arising out of or incident to any acts, omissions, negligence or willful misconduct of Developer in connection with the performance of this Agreement ("**Claims**"). This indemnification includes, without limitation, the payment of all penalties, fines, judgments, awards, decrees, attorneys' fees, and related costs or expenses, and the reimbursement of City, its elected officials, employees, and/or agents for all legal expenses and costs incurred by each of them. This indemnification excludes only such portion of any Claim which is caused by and to the extent of the negligence or willful misconduct of City, its elected officials, employees and/or agents, as determined by a court or administrative body of competent jurisdiction. Developer's obligation to indemnify shall survive the expiration or termination of this

Agreement, and shall not be restricted to insurance proceeds, if any, received by City, its elected officials, employees, or agents.

#### **14. Insurance.**

14.1 Types; Amounts. Developer shall procure and maintain, and shall require its contractors to procure and maintain, during performance of this Agreement, insurance of the types and in the amounts described below ("**Required Insurance**"). If any of the Required Insurance contains a general aggregate limit, such insurance shall apply separately to this Agreement or be no less than two times the specified occurrence limit.

14.1.1 General Liability. Occurrence version general liability insurance, or equivalent form, with a combined single limit of not less than Two Million Dollars (\$2,000,000) per occurrence for bodily injury, personal injury, and property damage.

14.1.2 Business Automobile Liability. Business automobile liability insurance, or equivalent form, with a combined single limit of not less than One Million Dollars (\$1,000,000) per occurrence. Such insurance shall include coverage for the ownership, operation, maintenance, use, loading, or unloading of any auto owned, leased, hired, or borrowed by the insured or for which the insured is responsible.

14.1.3 Workers' Compensation. Workers' compensation insurance with limits as required by the Labor Code of the State of California and employers' liability insurance with limits of not less than One Million Dollars (\$1,000,000) per occurrence, at all times during which insured retains employees.

14.1.4 Professional Liability. For any consultant or other professional who will engineer or design the Public Improvements, liability insurance for errors and omissions with limits not less than Two Million Dollars (\$2,000,000) per occurrence, shall be procured and maintained for a period of five (5) years following completion of the Public Improvements. Such insurance shall be endorsed to include contractual liability.

14.2 Deductibles. Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either: (a) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its elected officials, officers, employees, agents, and volunteers; or (b) Developer and its contractors shall provide a financial guarantee satisfactory to City guaranteeing payment of losses and related investigation costs, claims, and administrative and defense expenses.

14.3 Additional Insured; Separation of Insureds. The Required Insurance, except for the professional liability and workers' compensation insurance, shall name City as an additional insured with respect to work performed by or on behalf of Developer or its contractors, including any materials, parts, or equipment furnished in connection therewith. The Required Insurance shall contain standard separation of insureds

provisions, and shall contain no special limitations on the scope of its protection to City, its elected officials, officers, employees, or agents.

14.4 Primary Insurance; Waiver of Subrogation. The Required Insurance shall be primary with respect to any insurance or self-insurance programs covering City, its elected officials, officers, employees, or agents. The policy required for workers' compensation insurance shall provide that the insurance company waive all right of recovery by way of subrogation against City in connection with any damage or harm covered by such policy.

14.5 Certificates; Verification. Developer and its contractors shall furnish City with original certificates of insurance and endorsements effecting coverage for the Required Insurance. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements must be received and approved by City before work pursuant to this Agreement can begin. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

14.6 Term; Cancellation Notice. Developer and its contractors shall maintain the Required Insurance for the term of this Agreement and shall replace any certificate, policy, or endorsement which will expire prior to that date. All policies shall, to the extent available from commercially reasonable insurance providers, be endorsed to provide that the Required Insurance shall not be suspended, voided, reduced, canceled, or allowed to expire except on thirty (30) days' prior written notice to City.

14.7 Insurer Rating. Unless approved in writing by City, all Required Insurance shall be placed with insurers licensed to do business in the State of California and with a current A.M. Best rating of at least "A-" and FSC-VIII.

## **15. Miscellaneous.**

15.1 Assignment. Developer may assign by contract all or a portion of its rights and obligations pursuant to this Agreement to a third party purchaser of Developer ("**Assignment**"), subject to the approval of the City Manager in his/her reasonable discretion. Developer and purchaser/assignee ("**Assignee**") shall provide to the City Manager such reasonable proof as it may require that Assignee has the ability and financial commitment to undertake the Project and complete the Public Improvements. Developer and Assignee shall provide documentation and proof as may be deemed necessary to satisfy the City Manager. Any assignment pursuant to this section shall not be effective unless approved by the City and Developer and Assignee have executed an assignment agreement. Upon completion of the foregoing, and upon Assignee's provisions of adequate surety bonds as required under Section 12, the City shall release Developer's surety bonds.

15.2 Relationship Between the Parties. The Parties hereby mutually agree that this Agreement shall not operate to create the relationship of partnership, joint venture, or agency between City and Developer. Developer's contractors are exclusively

and solely under the control and dominion of Developer. Nothing herein shall be deemed to make Developer or its contractors an agent or contractor of City.

15.3 Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority make this Agreement and bind each respective Party.

15.4 Notices. Any notice, demand, request, consent, approval, or communication either party desires or is required to give to the other party or any person shall be in writing and either served personally, communicated by fax or electronic mail, or sent by prepaid, first-class mail to the address set forth below. Notice shall be deemed communicated immediately upon personal delivery, fax or email receipt, or seventy-two (72) hours from the time of mailing if mailed as provided in this Section:

|               |   |
|---------------|---|
| To City:      | City of Rialto<br>150 S. Palm Avenue<br>Rialto, CA 92376<br>Attn: City Manager<br>Fax: (909) 820-2527               |
| With Copy to: | Burke, Williams & Sorensen, LLP<br>Attn: Eric Vail<br>1770 Iowa Avenue<br>Suite 240<br>Riverside, CA 92507-2479     |
| To Developer: | Rialto Apartment, LLC<br>Attn: Richard Munkvold<br>2151 E. Convention Center Way<br>Suite 222<br>Ontario, CA 91764  |
| With Copy to: | Rialto Apartments, LLC<br>Attn: Steven B. Imhoof<br>2151 E. Convention Center Way<br>Suite 222<br>Ontario, CA 91764 |

15.5 Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate, or convenient to attain the purposes of this Agreement.

15.6 Construction; References; Captions. The Parties agree that the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days, unless specified therein.

All references to Developer include all personnel, employees, agents, and contractors of Developer, except as otherwise specified in this Agreement. All references to City include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

15.7 Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

15.8 Waiver. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a Party shall give the other Party any contractual right by custom, estoppel, or otherwise.

15.9 Binding Effect. Each and all of the covenants and conditions shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns. This section shall not be construed as an authorization for any Party to assign any right or obligation.

15.10 No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

15.11 Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

15.12 Governing Law; Consent to Jurisdiction and Venue. This Agreement shall be construed in accordance with and governed by the laws of the State of California. Any legal action or proceeding brought to interpret or enforce this Agreement, or which in any way arises out of the Parties' activities undertaken pursuant to this Agreement, shall be filed and prosecuted in the appropriate California State Court in the County of San Bernardino, California. Each Party waives the benefit of any provision of state or federal law providing for a change of venue to any other court or jurisdiction including, without limitation, a change of venue based on the fact that a governmental entity is a party to the action or proceeding, or that a federal right or question is involved or alleged to be involved in the action or proceeding. Without limiting the generality of the foregoing waiver, Developer expressly waives any right to have venue transferred pursuant to California Code of Civil Procedure Section 394.

15.13 Time is of the Essence. Time is of the essence in this Agreement, and the Parties agree to execute all documents and proceed with due diligence to complete all covenants and conditions.

15.14 Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original and which collectively shall constitute one instrument.



15.15 City Officers and Employees. No officer or employee of the City shall be personally liable to Developer or any successors in interest in the event of any default or breach by the City or for any amount that may become due to Developer or any successor(s) in interest or for breach of any obligation of the terms of this Agreement. No officer or employee of Developer shall be personally liable to the City or any successor(s) in interest in the event of any default or breach by Developer or for any amount that may become due to the City or their successors in interest or for breach of any obligation of the terms of this Agreement.

15.16 Force Majeure. Developer agrees that the time within which it shall be required to perform any act under this Agreement shall not be extended except as follows: (i) the Developer is delayed by the City (including, without limitation, restrictions on priority, initiative or referendum, or moratoria), in which case Developer shall provide written notice to the City specifically describing the nature and extent of the delay caused by the City and Developer's detailed efforts to avoid such delay, which references this Section and deliver such notice within twenty (20) days of discovering such delay, and Developer's obligations shall be extended for such time as the City deems reasonable as a result of the delay if and only if Developer provides such written notice to the City within such time; or (ii) the Developer is delayed due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties, natural disasters, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, processing with any governmental agencies, unusually severe weather, economic recession or depression as defined by the National Bureau of Economic Research, or any other similar causes beyond the control of Developer or without the fault of Developer. An extension of time for any such cause shall be for the period of the enforced delay equal to the number of days during which Developer's performance was delayed and shall commence to run from the time of the commencement of the cause, if written notice by Developer claiming such extension is sent to the City within twenty (20) days of knowledge of the commencement of the cause.

15.17 Entire Agreement. This Agreement contains the entire agreement between City and Developer and supersedes any prior oral or written statements or agreements between City and Developer.

[SIGNATURES OF PARTIES ON NEXT PAGE]

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

**CITY:**

**CITY OF RIALTO,  
a California municipal corporation**

By: \_\_\_\_\_  
Marcus Fuller, City Manager

**ATTEST:**

By: \_\_\_\_\_  
Barbara McGee, City Clerk

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Eric S. Vail, City Attorney

**DEVELOPER:**

**Rialto Apartments, LLC  
A California limited liability company**

By: \_\_\_\_\_

Name: \_\_\_\_\_  
Richard Munkvold, CFO

## **EXHIBIT A**

### **LEGAL DESCRIPTION OF PROPERTY**

The land referred to in this report is situated in the City of Rialto, the County of San Bernardino, State of California, and is described as follows:

Parcel No. A:

The East 1/2 of the East 1/2 of the West 1/2 of Farm Lot 62, according to Map of Town of Rialto and adjoining subdivision, in the City of Rialto, County of San Bernardino, State of California, as per Plat Recorded in Book 4 of Maps, Page 11, Records of said County.

Parcel No. B:

The East 5 feet of the West 1/2 of the East 1/2 of the West 1/2 of Farm Lot 62, according to the Map of Town of Rialto and adjoining subdivision, in the City of Rialto, County of San Bernardino, State of California, as per Plat recorded in Book 4 of Maps, Page 11, records of said County.

Parcel No. C:

The West 1/2 of the East 1/2 of the West 1/2, excepting the East 5 feet thereof, and the East 5 feet of the West 1/2 of the West 1/2 of Lot 62, according to the Map of Town of Rialto and adjoining subdivision, in the City of Rialto, County of San Bernardino, State of California, as per plat recorded in Book 4 of Maps, Page 11, records of said County.

Excepting therefrom those portions conveyed to the City of Rialto for street and highway purposes by deed recorded in Book 4198, Page 279, Official Records, described as follows:

The North 8.75 feet of the South 50 Feet of the West 165.08 Feet of the East 335.16 feet of the West 34 of Lot 62, Town of Rialto and adjoining subdivision, as per plat recorded in Book 4 of Maps, Page 11, records of said County.

Areas and distances measured to the center of adjoining streets.

Also excepting therefrom those portions conveyed to the City of Rialto for street and highway purposes by deed recorded in Book 5659, Page 764, Official Records, described as follows:

The North 5.0 feet of the South 55.0 feet of the East 165.08 feet of the West 489.64 feet of Lot 62, Town of Rialto and adjoining subdivision, in the City of Rialto, County Of San Bernardino, State of California, as per plat recorded in Book 4 of Maps, Page 11, Records of said County.

Areas and distances measured to the center of adjoining streets.

Panel No. D:

Parcel 2 of Parcel Map No. 6899, in the City of Rialto, County of San Bernardino, State of California, as per plat Recorded in Book 65 of Parcel Maps, Page(s) 28, Records of said County.

Parcel E:

A portion of the West 1/2 of the West 1/2 of Lot 62, Town of Rialto, as per plat recorded in Book 4 of Maps, Page 11, records of said County, described as follows:

Beginning at a point in the North line of San Bernardino Avenue 5 Feet West of the East line of the West 1/2 of the West 1/2 of said lot measured along said line; thence North parallel to said East line to the North line of said lot; thence West along said North line to a point in the East line of Acacia Avenue; thence South along said East line 20 feet; thence East parallel to the North line of said Lot 160 feet thence South parallel to the East line of Acacia Avenue 246 feet; thence East parallel to the North line of said Lot 35.66 feet; thence South parallel to the East line of Acacia Avenue 356.85 feet to the North line of San Bernardino Avenue; thence East along said line 100 feet to the point of beginning.

Excepting therefrom that portion conveyed to Louis C. Giancola et in by deed recorded February 13, 1959 in Book 4730 Page 464, Official Records.

Also excepting therefrom that portion conveyed to Tonie Beard et ux by deed recorded February 13, 1959 in Book 4730 Page 466, Official Records.

Also excepting therefrom that portion conveyed to the City of Rialto for street and highway purposes by deed recorded August 23, 1957 in Book 4309 Page 525 Official Records.

Parcel 2:

Together with an easement for ingress and egress for road or driveway purposes over the North 20 feet of the West 310 feet of the land described in the deed recorded January 9, 1951 in Book 2699 Page 212, Official Records of said County.

The area and distances of the above described property are computed to the centers of the adjoining streets shown on said Map.

Assessor's Parcel Numbers(s):

- 1: 0133-171-07
- 2: 0133-171-08
- 3: 0133-171-09
- 4: 0133-171-31

## EXHIBIT B

### ESTIMATED CONSTRUCTION COSTS



7/6/2022

Rialto Foothill Apartments - Budget Estimate

534 E. Foothill Blvd. Rialto, CA 92376

Per Civil Exhibit Dated 4/04/22 Sht. 1 of 1 Prepared by Huitt-Zollars

| Qty                        | Unit | Scope                                 | Total        |
|----------------------------|------|---------------------------------------|--------------|
| <b>Street Improvements</b> |      |                                       |              |
| 2500                       | SF   | Concrete Removal                      | \$ 12,500    |
| 1990                       | SF   | AC Pavement Removal                   | \$ 9,950     |
| 1100                       | LF   | Sawcut A.C.                           | \$ 3,300     |
| 315                        | LF   | PCC 8" Curb & 18" Gutter              | \$ 15,750    |
| 4325                       | SF   | 4" PCC Sidewalk                       | \$ 43,250    |
| 4190                       | SF   | AC Pavement                           | \$ 41,900    |
| 3180                       | SF   | Concrete Pavement Commercial driveway | \$ 31,800    |
| 1                          | EA   | Adjust Sewer Manhole to Grade         | \$ 2,500     |
| 4                          | EA   | Water Services for Domestic and Fire  | \$ 101,000   |
| 1                          | EA   | New Fire Hydrant on Foothill          | \$ 51,000    |
| 1                          | EA   | Relocate existing Fire Hydrant        | \$ 5,000     |
| 2                          | EA   | Sewer Lateral                         | \$ 51,000    |
| 1                          | LS   | Signing and Striping for Foothill     | \$ 50,000    |
| 465                        | LF   | Underground of SCE OH Power Line      | \$ 435,000   |
| 1                          | LS   | Traffic Control                       | \$ 75,000    |
| 1                          | LS   | Indirect Costs (3%)                   | \$ 27,869    |
| 1                          | LS   | Contingency (15%)                     | \$ 143,523   |
|                            |      |                                       |              |
|                            |      | Estimated Total - Street Improvements | \$ 1,100,341 |

| Qty                        | Unit | Scope                                 | Total      |
|----------------------------|------|---------------------------------------|------------|
| <b>Median Improvements</b> |      |                                       |            |
| 7330                       | SF   | AC Pavement Removal                   | \$ 36,650  |
| 1400                       | LF   | Sawcut A.C.                           | \$ 4,200   |
| 1430                       | LF   | PCC Curb Only (Median)                | \$ 42,900  |
| 3160                       | SF   | AC Pavement                           | \$ 31,600  |
| 1                          | LS   | Landscape and Irrigation              | \$ 40,800  |
| 1                          | LS   | Traffic Control                       | \$ 25,000  |
| 1                          | LS   | Indirect Costs (3%)                   | \$ 5,435   |
| 1                          | LS   | Contingency (15%)                     | \$ 27,988  |
|                            |      |                                       |            |
|                            |      | Estimated Total - Median Improvements | \$ 214,572 |

| Qty                   | Unit | Scope                            | Total      |
|-----------------------|------|----------------------------------|------------|
| <b>Traffic Signal</b> |      |                                  |            |
| 1                     | EA   | Traffic Signal                   | \$ 450,000 |
| 1                     | LS   | Indirect Costs (3%)              | \$ 13,500  |
| 1                     | LS   | Contingency (15%)                | \$ 69,525  |
|                       |      |                                  |            |
|                       |      | Estimated Total - Traffic Signal | \$ 533,025 |

**TOTAL PUBLIC IMPROVEMENTS PROJECT COSTS**

**\$ 1,847,938**