

# CONSTRUCTION LOAN AGREEMENT

(Shared Appreciation Loan)

THIS CONSTRUCTION LOAN AGREEMENT ("**Agreement**") is executed as of April 24, 2018, by and between AYALA & 210 PARTNERS, LLC, a Delaware limited liability company ("**Borrower**"), and the CITY OF RIALTO, a California municipal corporation ("**Lender**").

## RECITALS:

- A. Borrower owns or will own that certain unimproved real property located at the northeast corner of Renaissance Parkway and Ayala Drive in the City of Rialto, County of San Bernardino, State of California as legally described on Exhibit A ("**Property**").
- B. Borrower proposes to construct certain on-site horizontal non-public improvements on the Property consisting of grading, dry utilities, paving, curbs, storm drains, sewer lines, water lines, fire line, fencing and landscaping together with related structures and appurtenances in accordance with plans and specification approved by Lender ("**Improvements**").
- C. Borrower has requested that Lender provide the Loan (as defined below) for the purpose of funding the construction of the Improvements.
- D. The parties agree that in addition to repayment of the principal amount of the Loan (as defined below), Borrower shall also pay a portion of the Net Profits (as defined below) as contingent interest.

NOW, THEREFORE, Borrower and Lender hereby agree as follows:

## ARTICLE 1. DEFINITIONS

**1.1. Defined Terms.** The following capitalized terms generally used in this Agreement shall have the meanings as defined herein below. Certain other capitalized terms used only in specific sections of this Agreement are defined in such sections.

"**Account**" means Borrower's account with Bank into which Loan proceeds will be deposited.

"**Affiliate**" means, as to any person or entity, any person or entity which, directly or indirectly, controls, is controlled by or is under common control with, or which has the power to control the management or operations of, such person or entity.

"**Application for Payment**" shall have the meaning set forth in Exhibit D for the distribution of the Loan.

**“Assignment of Contracts”** shall mean the assignment of any and all Construction Agreement applicable to the Improvements (including but not limited to planning, design and construction) on the form attached as Exhibit E.

**“Bank”** means a bank mutually chosen by Borrower and Lender.

**“Bankruptcy Code”** means the Bankruptcy Reform Act of 1978 (11 U.S.C.A. §§ 101 to 1330) as now or hereafter amended or recodified.

**“Base Interest”** shall have the meaning defined in Section 2.2.

**“Bonded Work”** shall have the meaning ascribed to such term in Section 8.1.

**“Borrower”** shall have the meaning ascribed in the Preamble of this Agreement.

**“Borrower’s Funds”** means all funds of Borrower deposited with Lender into Borrower’s Funds Account maintained with Bank pursuant to the terms and conditions of this Agreement.

**“Borrower’s Funds Account”** means the account with Bank into which all funds deposited with Lender pursuant to this Agreement shall be placed.

**“Business Day”** means a day of the week (but not a Saturday, Sunday or holiday) on which the offices of Bank are open to the public for carrying on substantially all of Bank’s business functions. Unless specifically referenced in this Agreement as a Business Day, all references to “days” shall be to calendar days.

**“Certificate of Approval”** means a certificate in the form of Exhibit F.

**“Completion Date”** means the date upon which Borrower satisfies the last of the conditions for the release of the Retention (as provided in Exhibit D) currently estimated to be **October 1, 2018**, the date by which construction of the Improvements must be completed subject to extension pursuant to change orders approved by Lender as provided herein or pursuant to the provisions of Section 4.3.

**“Construction Agreement”** shall mean, if applicable under Section 4.3, a construction agreement for the Improvements or other work required under this Agreement executed by Borrower.

**“Contingent Interest”** shall have the meaning defined in Section 2.2.

**“Contractor”** shall mean, if applicable, the general contractor approved by Lender pursuant to Section 4.3.

**“Deed of Trust”** means that certain Construction Deed of Trust with Assignment of Rents, Security Agreement and Fixture Filing of even date herewith executed by Borrower, as Trustor, to Commonwealth Land Title Company, as Trustee, for the benefit of Lender, as Beneficiary, as hereafter amended, supplemented, replaced or

modified.

**“Default”** (or **“Event of Default”**) shall have the meaning ascribed to such term in Section 11.1.

**“Development and Management Agreements”** means any development management agreement by and between Borrower, as owner, and any manager or additional contract for development management, property management and/or brokerage services for the Property, and any amendment thereof, in each case, that has been approved by Lender.

**“Distribution”** means any transfer of cash or other property from Borrower to any constituent member or statutory manager thereof, whether characterized as a distribution, dividend, redemption, fee, repayment of a loan or otherwise, but excluding the payment of any fees, commissions or expenses pursuant to the Development and Management Agreements prior to the date that Lender requires Borrower to terminate any Development and Management Agreements under the provisions of Section 11.6 and following the date of any reinstatement of any terminated Development and Management Agreements under the provisions of Section 11.6.

**“Distribution Control Agent”** means a construction disbursement control company to provide construction disbursement services for the Loan as may be selected by Lender at Borrower’s expense. Lender anticipates retaining the services of National Builders Control, Inc. (Department of Business Oversight Joint Control License No. 963-1293) to serve as the Distribution Control Agent located at 1110 East Main Street, Alhambra, CA 91801.

**“Effective Date”** means the date the Deed of Trust is recorded in the Official Records of the County of San Bernardino.

**“Engineer”** means Kimley-Horn and Associates, Inc., a North Carolina corporation, which principal place of business located at 421 Fayetteville Street, Suite 600, Raleigh, NC 27601.

**“Engineer’s Agreement”** means that certain agreement dated May 16, 2017 by and between Borrower and Engineer for the design of the Improvements.

**“Environmental Report”** means the reports actually received by Lender as contemplated in Section 3.1(d) of this Agreement.

**“Grant Deed”** means the Grant Deed by which Borrower has acquired title to the Property.

**“Grant Deed Covenants”** means the Special Covenants as defined in the Grant Deed.

**“Hazardous Materials”** shall have the meaning ascribed to such term in Section

7.1(a).

**“Hazardous Materials Claims”** shall have the meaning ascribed to such term in Section 7.1(c).

**“Hazardous Materials Laws”** shall have the meaning ascribed to such term in Section 7.1(b).

**“Improvements”** shall have the meaning ascribed to such term in Recital B and specifically summaries on Exhibit C in accordance with the Approved Site Plan attached thereto as Exhibit C-1.

**“Interest”** shall mean both Base Interest and Contingent Interest.

**“Lender Payment Turnaround Period”** means, provided that Borrower delivers the applicable application for payment to the Disbursement Control Agent with a copy to Lender under cover of a written notice stating in bold, all-capitalized letters what the outside date for such Lender Payment Turnaround Period is for that specific application for payment which is ten (10) calendar days from delivery of the complete Application for Payment.

**“Loan”** means the principal sum of Three Million Seven Hundred Thousand Dollars (\$3,700,000) that Lender agrees to lend and Borrower agrees to borrow, pursuant to the terms and conditions of this Agreement.

**“Loan Documents”** means those documents listed in Exhibit B as Loan Documents as same may be amended, supplemented, replaced or modified as permitted by this Agreement.

**“Maturity Date”** means March 31, 2020 as may be extended pursuant to the terms set forth in Section 2 of the Note.

**“Net Profits”** shall have the meaning as set forth in Section 2.2.

**“Net Sales Proceeds”** shall have the meaning set forth in Section g.6. of Exhibit F.

**“Note”** means that certain Construction Promissory Note Secured by Deed of Trust of even date herewith, in the original principal amount of the Loan, executed by Borrower and payable to the order of Lender, as may be amended, supplemented, replaced or modified as permitted by this Agreement.

**“Obligee”** shall have the meaning ascribed to such term in Section 8.1.

**“Organizational Documents of Borrower”** means the formation documents for Borrower.

**“Other Related Documents”** means those documents, as hereafter amended, supplemented, replaced or modified from time to time, properly executed listed in

Exhibit B as “Other Related Documents.”

“**Out of Balance Notice**” shall have the meaning ascribed to such term in Section 3.1(b).

“**Plans and Specifications**” means those certain plans and specification for the Improvements dated \_\_\_\_, 201\_ prepared by the Engineer to be approved by Lender.

“**Principal Subs**” shall have the meaning ascribed to such term in Section 4.6.

“**Project Entitlements**” means as **approved by the City of Rialto as Precise Plan of Design (PPD) Number 2017-0066.**

“**Project CC&Rs**” shall mean covenants, conditions and restriction agreement to be recorded against the Property to integrate the entire Property as a coordinated project to provide for common ingress/egress, parking, maintenance and operational issues and use restrictions which shall be recorded against all the Parcels in the Official Records of San Bernardino County which form shall be approved by Lender.

“**Property**” shall have the meaning ascribed to such term in Recital A.

“**Purchase Money Note**” shall mean that certain Promissory Note Secured by Deed of Trust in the amount of Three Million Seven Hundred Thousand Dollars (\$3,700,000) which is a portion of the purchase price for the Property and payable to the City of Rialto (“**Purchase Money Lender**”).

“**Purchase Money Deed of Trust**” means that certain deed of trust executed by Borrower against the Property which secures the Purchase Money Note.

“**Required Approval Matter**” means any matter requiring the consent of Lender under the Loan Documents including, without limitation, the following: (1) contracts for which Lender approval is required hereunder as contemplated in Sections 4.3 and 4.4; (2) Plans and Specifications and changes thereto for which Lender approval is required hereunder, as contemplated in Section 4.5; (3) Borrower’s contracting for any materials, equipment, fixtures or other parts or components of the Improvements in which any third party will retain any interest for which Lender approval is required hereunder, as contemplated in Section 4.7; (4) the inclusion of the Property in any assessment district or community facilities district for which Lender approval is required hereunder, as contemplated in Section 4.10; (5) formation and authorization documents of Borrower, and modifications thereto, for which Lender approval is required under this Agreement; (6) the issuance of any Set Aside Letter for which Lender approval is required hereunder, as contemplated in Section 8.1; (7) any Subdivision Map for which Lender approval is required hereunder, as contemplated in Section 9.4; (8) assignment of all or any portion of Borrower’s interest under the Loan Documents or any monies due or to become due thereunder for which Lender approval is required under this Agreement; and (9) any transfer, encumbrance or sale of any portion of the Property for which Lender’s approval is required.

**“Required Equity Contribution”** means any Borrower’s funds required by Lender to be deposited in Borrower’s Funds Account pursuant to this Agreement.

**“Retention”** means the ten percent (10%) of the amount of the Application for Payment which shall be retained by Lender until the final distribution of Loan funds.

**“Secured Obligations”** shall have the meaning ascribed to such term in the Deed of Trust.

**“Security Agreement”** means the security agreement as set forth in the Deed of Trust providing a security interest in all personal property set forth therein, together with a UCC-1 filing.

**“Set Aside Letter”** shall have the meaning ascribed to such term in Section 8.1.

**“Subdivision Map”** shall have the meaning ascribed to such term in Section 9.6.

**“Surety”** shall have the meaning ascribed to such term in Section 8.1.

**“Title Policy”** means an ALTA extended loan policy issued by Commonwealth Land Title Insurance Company insuring the Deed of Trust in second lien position (subject to the Purchase Money Deed of Trust in first lien position) in the amount of the Loan subject to such exceptions approved by Lender together with such endorsements and other coverage required by Lender in accordance with Section 5.1.

**“Unsecured Note”** means that certain **Memorandum of Understanding dated December 2, 2015 executed by between Eastborne Investment, LLD and Fernando Acosta RE INC. both parties of the Borrower in favor of (“Unsecured Lender”)**. **As of the date of this Agreement, the balance of the Unsecured Note is Six Hundred and Twenty-Six Thousand Dollars (\$626,000), which has be verified by the Unsecured Lender.** Borrower is specifically prohibited from borrowing any additional sums under the Unsecured Note.

**1.2. Exhibits Incorporated.** The following exhibits are attached hereto, are hereby incorporated into this Agreement:

|           |                               |
|-----------|-------------------------------|
| Exhibit A | Legal Description of Property |
| Exhibit B | Documents                     |
| Exhibit C | Required Improvements         |
| Exhibit D | Construction Budget           |
| Exhibit E | Disbursement Process          |
| Exhibit F | Partial Release Provisions    |
| Exhibit G | Certificate of Approval       |

## ARTICLE 2. LOAN

**2.1. Loan.** By and subject to the terms of this Agreement, Lender agrees to lend to Borrower and Borrower agrees to borrow from Lender the principal sum of Three Million Seven Hundred Thousand Dollars (\$3,700,000), said sum to be evidenced by the Note of even date herewith. The Note shall be secured, in part, by the Deed of Trust, of even date herewith, encumbering the Property. The Loan funds shall be periodically disbursed to or on behalf of Borrower pursuant to the terms of this Agreement and shall be used to finance the acquisition of the Property and construction of the Improvements and for such other purposes and uses as may be permitted under this Agreement and the Loan Documents.

### **2.2 Interest.**

- a. Base Interest.** Borrower shall pay to Lender interest at the rate of six percent (6%) on the outstanding principal in accordance with the terms of the Note ("**Base Interest**").
- b. Contingent Interest.** Borrower shall also pay contingent interest to Lender as follows ("**Contingent Interest**"):
  - i. One Hundred Percent (100%) of all revenue derived by Borrower from the Property including, but not limited to, all reimbursements and fees paid by third parties to Borrower for on-site signs (monument and freeway signs) and prorate reimbursement of improvements **BUT EXCLUDING** sales of the Parcels.
  - ii. Lender shall be paid fifty percent (50%) of the first Two Hundred Thousand Dollars (\$200,000) of Net Profits (as defined below.)
  - iii. After payment of the amount paid to lender under the foregoing subsection ii, Lender shall be paid thirty percent (30%) of the Net Profits.

"**Net Profits**" shall be calculated in accordance with generally accepted accounting principles and shall include (i) all income from the Property, and (ii) all expenses including the purchase price for the Property and Base Interest but shall **not** include any payments due to defaults by Borrower nor any release prices paid to Lender as specified in Exhibit F.

The amounts paid to Lender as Contingent Interest shall be in addition to any amounts to be paid to Lender as partial release prices.

**2.3. Loan Documents.** Borrower shall deliver to Lender concurrently with this Agreement each of the documents, properly executed and acknowledged, as applicable, described in Exhibit B as Loan Documents, together with those documents described in Exhibit B as Other Related Documents. Notwithstanding anything to the contrary contained elsewhere within this Agreement, the lien of the Deed of Trust shall not secure any obligation not specifically referenced therein as being secured by the

Deed of Trust.

**2.4. Effective Date.** The date of the Loan Documents is for reference purposes only. The Effective Date of this Agreement and of the Loan Documents shall be the date the Deed of Trust is recorded in the Office of the County Recorder of San Bernardino County.

**2.5. Maturity Date; Prepayment.** Upon the Maturity Date, all sums due and owing under this Agreement and the other Loan Documents shall be repaid in full. All payments due to Lender under this Agreement, whether at the Maturity Date or otherwise, shall be paid in immediately available funds. No portion of the Loan may be prepaid by Borrower except (i) to the extent concurrently with the partial release of a portion of the Property pursuant to Section 2.7; and (ii) after the Improvements have been completed and the Project CC&Rs have been recorded.

**2.6. Credit for Payments.** Any payment made by Borrower shall be credited as of the Business Day received, provided such payment is received by Lender no later than 2:00 pm on a Business Day and constitutes immediately available funds.

**2.7. Full Repayment and Reconveyance.** Upon receipt of all sums owing and outstanding under the Loan Documents, Lender shall issue a full reconveyance of the Property and Improvements from the lien of the Deed of Trust and otherwise release Lender's security interest in all other personal property collateral that secure the Loan; provided, however, that all of the following conditions shall be satisfied at the time of, and with respect to, such reconveyance: (a) Lender shall have received all escrow, closing and recording costs, the costs of preparing and delivering such reconveyance and any sums then due and payable under the Loan Documents, and (b) Lender shall have received a written release satisfactory to Lender of any set aside letter, letter of credit or other form of undertaking which Lender has issued to any surety, governmental agency or any other party in connection with the Loan and/or the Property and Improvements. Lender's obligation to make further disbursements under the Loan shall terminate as to any portion of the Loan undisbursed as of the date of issuance of such full release or reconveyance, and any commitment of Lender to lend any undisbursed portion of the Loan shall be canceled.

**2.8. Partial Releases.** Prior to the Maturity Date, Borrower may obtain a release of a Parcel from the Deed of Trust upon satisfaction of all the terms and conditions set forth in Exhibit F.

**2.9. Certificates of Approval.** With respect to any Required Approval Matter, if Borrower submits to Lender a properly completed and factually accurate Certificate of Approval, such matter shall be deemed disapproved by Lender if Lender does not issue an approval of such request within ten (10) Business Days following Lender's receipt thereof.

### **ARTICLE 3. DISBURSEMENT**

**3.1. Conditions Precedent.** Lender's obligation to make any disbursements or take any



other action under the Loan Documents shall be subject at all times to satisfaction of each of the following conditions precedent:

- a. There shall exist no Default under this Agreement, a default under any of the other Loan Documents, event, omission or failure of condition which would constitute a Default after notice or lapse of time, or both.
- b. Any undisbursed Loan funds together with all sums, if any, to be provided by Borrower as shown in Construction Budget shall be at all times equal to or greater than the amount which Lender from time to time reasonably determines necessary to: (i) pay, through completion, all costs of renovation, development and construction of the Improvements in accordance with the Loan Documents; (ii) pay all sums which may accrue under the Loan Documents prior to repayment of the Loan; and (iii) enable Borrower to perform and satisfy all of the covenants of Borrower contained in the Loan Documents. If Lender reasonably determines at any time that the undisbursed Loan funds are insufficient for said purposes, Lender may deliver to Borrower written notice demanding that Borrower then deposit funds equal to such deficiency in Borrower's Funds Account ("**Out of Balance Notice**"), in which event Borrower shall deposit the amount of such deficiency in Borrower's Funds Account within thirty (30) days after the date of delivery of the applicable Out of Balance Notice.
- c. Lender shall have received all Loan Documents, other documents, instruments, policies, and forms of evidence or other materials requested by Lender under the terms of this Agreement or any of the other documents reasonably requested by Lender.
- d. Lender acknowledges that it has received and approved in form and substance satisfactory to Lender: (i) a soils report for the Property and Improvements; (ii) an environmental questionnaire and environmental site assessment with respect to the presence, if any, of Hazardous Materials on the Property and Improvements; (iii) two sets of the Plans and Specifications, certified as complete by the Engineer (or if the Plans and Specifications for the entirety of the Improvements are not then complete or some portion of the Improvements are to be constructed using a design/build process, in either such case pursuant to partial Plans and Specifications approved by Lender under the provisions of Section 4.6 of this Agreement and for which a valid building permit has been issued, then such portion of the Plans and Specifications to the extent that payment for such portion of the Improvements is to be covered by a current disbursement request), together with evidence of all necessary or appropriate approvals of governmental agencies; (iv) copies of all agreements which are material to completion of the Improvements; (v) copies of all building permits and similar permits, licenses, approvals, development agreements and other authorizations of governmental agencies required in connection with the development of the Property and Improvements; and (vi) copies of any initial study, negative declaration, mitigated negative

declaration, environmental impact report, notice of determination or notice of exemption prepared, adopted, certified or filed by any governmental agency in connection with the Property.

- e. Lender shall have received and approved evidence reasonably acceptable to Lender that Borrower has invested the Required Equity Contribution, if any, into the acquisition and development of the Property and Improvements, either as shown on Construction Budget or otherwise.

**3.2. Account, Pledge and Assignment, and Disbursement Authorization.** The proceeds of the Loan and Borrower's Funds, when qualified for disbursement, shall be deposited into the Account or otherwise disbursed to or for the benefit or account of Borrower under the terms of this Agreement. Disbursements hereunder may be made by Lender upon the written request of any person who has been authorized by Borrower to request such disbursements until such time as written notice of Borrower's revocation of such authority is received by Lender at the address shown in Exhibit E. As additional security for Borrower's performance under the Loan Documents, Borrower hereby irrevocably pledges and assigns to Lender the Account and all monies at any time deposited in the Account and shall execute such documents as required by Lender to secure such assignment, including, but not limited to, an account control agreement with the Bank.

**3.3. Borrower's Funds Account, Pledge and Assignment.** Except as otherwise provided in this Agreement, all of Borrower's Funds which are deposited with Lender by Borrower as shown in Construction Budget or any other provision of the Loan Documents, shall be placed in Borrower's Funds Account for disbursement under this Agreement. As additional security for Borrower's performance under the Loan Documents, Borrower hereby irrevocably pledges and assigns to Lender Borrower's Funds Account and all monies at any time deposited in Borrower's Funds Account and Borrower shall execute such documents as required by Lender to secure such assignment, including, but not limited to, an account control agreement with the Bank.

**3.4. Loan Disbursement Process.** Subject to the conditions set forth in Section 3.1(b), the proceeds of the Loan and Borrower's Funds shall be disbursed in accordance with the terms and conditions set forth in Exhibit E. Disbursements made after any deposit of Borrower's Funds shall be made first from Borrower's Funds Account until depleted. All disbursements shall be held by Borrower in trust and applied by Borrower solely for the purposes for which the funds have been disbursed. Lender has no obligation to monitor or determine Borrower's use or application of the disbursements.

## **ARTICLE 4. CONSTRUCTION**

**4.1. Commencement and Completion.** Borrower shall promptly commence construction of the Improvements without delay after recordation of the Deed of Trust and shall diligently prosecute same to completion on or before the earlier of the date specified in any applicable permits for the Project Entitlements or the Completion Date. Prior to commencing construction, Borrower shall obtain all applicable governmental

permits and deliver copies of same to Lender.

**4.2. Force Majeure.** The time within which construction of the Improvements must be completed shall be extended for a period of time equal to the period of any delay directly affecting construction which is caused by fire, earthquake or other acts of God, unexpected inclement weather, utility shortages or interruptions, strike, lockout, acts of public enemy, riot, insurrection, or governmental regulation of the sale or transportation of materials, supplies or labor, the failure of any governmental authority to issue any Project Entitlement for reasons beyond Borrower's reasonable control, the failure of any condition of approval on any Project Entitlement for any reason beyond Borrower's reasonable control, or any moratorium enacted by any governmental authority over Borrower's opposition that prohibits, impairs, delays or restricts development of the Improvements; provided, however, that Borrower shall furnish Lender with written notice satisfactory to Lender evidencing any such delay within ten (10) days after the occurrence of any such delay. In no event shall the time the anticipated date for completion of the Improvements be extended beyond the Maturity Date or more than one hundred twenty (120) days beyond the Completion Date as scheduled prior to such delay.

**4.3. Construction Agreement.** Borrower is acting as an owner-builder. However, if Borrower subsequently elects to retain a licensed general contractor to perform the work, Borrower shall notify Lender and provide evidence of Contractor's qualifications and financial strength as well as the Construction Agreement pursuant to the terms and conditions of which Contractor is to construct the Improvements. Lender shall have the right to approve in its reasonable discretion under the circumstances the Contractor and the Construction Agreement. If approved by Lender, Borrower shall require Contractor to perform in accordance with the terms of the Construction Agreement and shall not amend, modify or alter the Construction Agreement without Lender's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. Borrower shall execute, upon Lender's request, an assignment of Borrower's rights under the Construction Agreement to Lender as security for Borrower's obligations under this Agreement and the other Loan Documents and shall cause the Contractor to consent to any such assignment.

**4.4. Engineer's Agreement.** Borrower and Engineer have entered into the Engineer's Agreement, pursuant to which Engineer is to design the Improvements. Borrower shall use its best efforts to require Engineer to perform in accordance with the terms of the Engineer's Agreement and shall not amend, modify or alter the Engineer's Agreement without Lender's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. Upon Lender's request, Borrower shall execute an assignment of the Engineer's Agreement and the Plans and Specifications to Lender as additional security for Borrower's performance under this Agreement and the other Loan Documents and shall cause the Engineer to consent to any such assignment.

**4.5. Plans and Specifications.**

**(a) Changes; Lender Consent.** Except as otherwise provided in this Agreement,

Borrower shall not make any changes in the Plans and Specifications or the Improvements without Lender's prior written consent. Without limiting the above, Lender agrees that Borrower may make minor changes in the Plans and Specifications and Improvements without Lender's prior written consent, provided that such changes do not violate any of the conditions specified herein. Notwithstanding the foregoing, Lender shall not have any approval rights respecting any change in the Plans and Specifications or the Improvements if such change follows inevitably from previously approved Plans and Specifications or changes thereto. Borrower shall at all times maintain, for inspection by Lender, a set of working drawings of the Improvements.

**(b) Changes; Submission Requirements.** Borrower shall submit any proposed change in the Plans and Specifications requiring Lender's consent to Lender prior to the commencement of construction relating to such proposed change, at least ten (10) Business Days prior to the commencement of construction. Requests for any change which requires consent shall be accompanied by working drawings (or appropriate submittals) and a written description of the proposed change, submitted on a change order form acceptable to Lender, signed by Borrower and, if required by Lender, also by the Engineer. At its option, Lender may require Borrower to provide: (i) evidence reasonably satisfactory to Lender of the cost and time necessary to complete the proposed change; and (ii) a deposit in the amount of any increased costs into Borrower's Funds Account.

**(c) Consent Process.** Borrower acknowledges that Lender's review of any changes and required consent may result in delays in construction and hereby consents to any such delays. Nevertheless, Lender shall use commercially reasonable efforts to respond to requests for approval within the time periods provided in this Agreement.

**(d) Final Plans and Specifications.** Upon completion of the Improvements, Borrower shall deliver to Lender within sixty (60) days a set of final, as-built Plans and Specifications.

**4.6. Contractor/Construction Information.** Borrower shall deliver to Lender in a form acceptable to Lender: (a) a list detailing the name, address and phone number of each contractor, subcontractor and material supplier to be employed or used for construction of the Improvements who is under contract or otherwise has been selected to supply goods or services or perform work for the Project costing in excess of Five Thousand Dollars (\$5,000) in the aggregate and any other person or entity who delivers a Preliminary Notice to Owner or Lender (collectively, "**Principal Subs**") together with the dollar amount, including changes, if any, reflected in each contract and subcontract for the Principal Subs, and the portion thereof, if any, paid through the date of such list of Principal Subs; (b) copies of each contract and subcontract identified in such list of Principal Subs, including any changes thereto; (c) a cost breakdown of the projected total cost of constructing the Improvements, and that portion, if any, of each cost item which has been incurred; and (d) a construction progress schedule detailing the progress of construction and the projected sequencing and completion time for uncompleted work, all as of the date of such schedule. All contracts and subcontracts

shall require bonds to be issued in accordance with Section 4.10.

Borrower agrees that Lender's approval of any contractor, subcontractor or material supplier if and to the extent permitted under the terms of this Agreement shall not constitute a warranty or representation of qualification by Lender. Lender may contact any contractor, subcontractor or material supplier to discuss the course of construction.

**4.7. Prohibited Contracts.** Without Lender's prior written consent, Borrower shall not contract for any materials, furnishings, equipment, fixtures or other parts or components of the Improvements, if any third party shall retain any ownership interest (other than lien rights created by operation of law) in such items after their delivery to the Property and Improvements. Borrower shall have twenty (20) days to effect the removal of any such retained interest not otherwise permitted above, or, provided that such interest or the holder's realization thereon will not jeopardize Borrower's title to or use of the Property, if such retained interest cannot be reasonably removed in such period, Borrower shall have commenced such removal within such time and shall diligently pursue its removal until completed.

**4.8. Liens and Stop Notices.** If a claim of lien is recorded which affects the Property or Improvements or a bonded stop notice is served upon Lender, within twenty (20) calendar days after such recording or service or within five (5) Business Days after Lender's demand, whichever occurs first, Borrower, at Borrower's election, shall do one of the following: (a) pay and discharge the claim of lien or bonded stop notice; (b) effect the release thereof by recording or delivering to Lender a surety bond in sufficient form and amount; or (c) provide Lender with other assurances which Lender deems, in its sole discretion, to be satisfactory for the payment of such claim of lien or bonded stop notice and for the full and continuous protection of Lender from the effect of such lien or bonded stop notice.

**4.9. Construction Responsibilities.** Borrower shall construct the Improvements in a workmanlike manner substantially in accordance with the Plans and Specifications and the recommendations of any soils or engineering report approved by Lender pursuant to Section 3.1(d) above. Borrower shall substantially comply with all applicable laws, ordinances, rules, regulations, building restrictions, recorded covenants and restrictions, and requirements of all regulatory authorities having jurisdiction over the Property or Improvements, including, but not limited to, payment of prevailing wages if applicable. Borrower shall be solely responsible for all aspects of Borrower's business and conduct in connection with the Property and Improvements, including, without limitation, for the quality and suitability of the Plans and Specifications and their compliance with all governmental requirements, the supervision of the work of construction, the qualifications, financial condition and performance of all engineers, contractors, material suppliers, consultants and property managers, and the accuracy of all applications for payment and the proper application of all disbursements. Lender is not obligated to supervise, inspect or inform Borrower or any third party of any aspect of the construction of the Improvements or any other matter referred to above.

**4.10. Bonds.** Borrower will procure and deliver to Lender and will require all

contractors and all subcontractors to procure and deliver to Lender, dual obligee performance and labor and material payment bonds in form, substance, and amount satisfactory to Lender that Lender may require by notice to Borrower. Borrower will deliver to Lender an original of each bond for Lender's approval.

**4.11. Assessments and Community Facilities Districts.** Without Lender's prior written consent, Borrower shall not cause or suffer to become effective or otherwise consent to the formation of any assessment district or community facilities district which includes all or any part of the Property and Improvements. Nor shall Borrower cause or otherwise consent to the levying of special taxes or assessments against the Property and Improvements by any such assessment district or community facilities district.

**4.12. Delay.** Borrower shall promptly notify Lender in writing of any event causing delay or interruption of construction, or the timely completion of construction. The notice shall specify the particular work delayed, and the cause and period of each delay.

**4.13. Inspections.** Lender shall have the right, but not the obligation, to enter upon the Property at all reasonable times to inspect the Improvements and the construction work to verify information disclosed or required pursuant to this Agreement. Any inspection or review of the Improvements by Lender is solely to determine whether Borrower is properly discharging its obligations to Lender and may not be relied upon by Borrower or by any third party as a representation or warranty of compliance with this Agreement or any other agreement. Lender owes no duty of care to Borrower or any third party to protect against, or to inform Borrower or any third party of, any negligent, faulty, inadequate or defective design or construction of the Improvements as determined by Lender.

**4.14. Surveys.** Upon Lender's written request, Borrower shall promptly deliver to Lender: (a) a current survey of the Property showing the location of the Improvements on the Property (as constructed as of the date of such survey), all easements, encroachments and applicable governmental setbacks; and (b) upon completion of the Improvements, an as-built survey acceptable to a title insurer for purposes of issuing an ALTA policy of title insurance. All such surveys shall be performed and certified by a licensed engineer or surveyor acceptable to the title insurer.

## **ARTICLE 5. INSURANCE**

Borrower shall, while any obligation of Borrower under any Loan Document remains outstanding, maintain at Borrower's sole expense, with licensed insurers approved by Lender, the following policies of insurance in form and substance satisfactory to Lender:

**5.1. Title Insurance.** A Title Policy insuring Lender of the validity and the priority of second lien of the Deed of Trust upon the Property and Improvements, in the principal amount of the Loan plus Three Hundred Dollars (\$300,000) for Contingent Interest, in the form as required by Lender and subject only to matters approved by Lender in writing. During the term of the Loan, Borrower shall cause to be delivered to Lender: (a)

the title endorsements as specified as a condition to the disbursements under Exhibit E; (b) an ALTA 30.1-06 endorsement; (c) applicable endorsement(s) specified as part of a partial release in compliance with Exhibit E; and (d) within five (5) Business Days after Lender's written request, such other endorsements to the Title Policy as Lender may reasonably require.

**5.2. Property Insurance.** A Builder's Risk Completed Value Hazard Insurance policy, including, without limitation, such endorsements as Lender may require, insuring Lender against damage to the Property and Improvements in an amount acceptable to Lender. Lender shall be named on the policy under a Lender's Loss Payable Endorsement.

**5.3. Flood Hazard Insurance.** A policy of flood insurance, as required by applicable governmental regulations, or as deemed necessary by Lender.

**5.4. Liability Insurance.** A policy of commercial general liability insurance with limits as required by Lender, insuring against liability for injury and/or death to any person and/or damage to any property occurring on the Property and/or in the Improvements from any cause whatsoever.

**5.5. General.** Borrower shall provide to Lender the originals of all required insurance policies, or other evidence of insurance acceptable to Lender from issuers licensed in California with coverage in the amount specified by Lender and with all terms, provisions and endorsements as reasonably satisfactory to Lender. All insurance policies shall provide that the insurance shall not be cancelable or materially changed without ten (10) days prior written notice to Lender. Lender shall be named under a Lender's Loss Payable Endorsement on all insurance policies which Borrower actually maintains with respect to the Property and Improvements. Borrower shall provide to Lender evidence of any other hazard insurance Lender may deem necessary at any time during the Loan.

## **ARTICLE 6. REPRESENTATIONS AND WARRANTIES**

As a material inducement to Lender's entry into this Agreement, Borrower represents and warrants to Lender as of the Effective Date and as of the date each Application for Payment is submitted to Lender pursuant to Exhibit E (provided, however, that to the extent circumstances have changed for reasons beyond the reasonable control of Borrower such that Borrower must qualify such representations and warranties as of the date of delivery of any such Application for Payment, such qualification, to the extent it renders the applicable representation materially untrue or breaches the applicable warranty, shall merely be a failure of condition to Lender's obligation to disburse funds under the provisions of Exhibit E, as opposed to constituting a Default) that:

**6.1. Authority/Enforceability.** Borrower is in compliance with all laws and regulations applicable to its organization, existence and transaction of business and has all necessary rights and powers to own, develop and operate the Property and Improvements as contemplated by the Loan Documents.

**6.2. Binding Obligations.** Borrower is authorized to execute, deliver and perform its obligations under the Loan Documents and such obligations are and shall continue to be valid and binding obligations of Borrower.

**6.3. Formation and Organizational Documents.** Borrower has delivered to Lender all formation and organizational documents of Borrower and all such formation and organizational documents remain in full force and effect and have not been amended or modified since they were delivered to or otherwise approved by Lender. Borrower shall immediately provide Lender with copies of any amendments or modifications of the formation or organizational documents, to the extent permitted hereunder.

**6.4. No Violation.** Borrower's execution, delivery, and performance under the Loan Documents do not: (a) require any consent or approval not heretofore obtained under any partnership agreement, operating agreement, limited liability company agreement, articles of incorporation, bylaws or other document; (b) materially violate any governmental requirement applicable to the Property and Improvements or any other statute, law, regulation or ordinance or any order or ruling of any court or governmental entity; (c) materially conflict with, or constitute a material breach or default or permit the acceleration of obligations under any agreement, contract, lease, or other document by which Borrower is or the Property and Improvements are bound or regulated; or (d) materially violate any statute, law, regulation or ordinance, or any order of any court or governmental entity.

**6.5. Compliance with Laws.** Borrower has, and at all applicable times shall have obtained, all permits, licenses, exemptions, and approvals necessary to construct the Improvements, and shall maintain substantial compliance with all governmental requirements applicable to the Property and Improvements and all other applicable statutes, laws, regulations and ordinances necessary for the transaction of its business.

**6.6. Litigation.** Except as disclosed to Lender in writing, there are no claims, actions, suits, or proceedings pending, or to Borrower's knowledge threatened, against Borrower or affecting the Property or Improvements that are of a material nature and that, if successfully prosecuted against Borrower would create a material adverse change in the financial condition of Borrower.

**6.7. Financial Condition.** All financial statements and information relating to the financial condition of Borrower, the Property, and the Improvements, which have been heretofore and hereafter are delivered to Lender by Borrower, fairly and accurately represent as of the date of such delivery the financial condition of the subject thereof and have been prepared (except as noted therein) in accordance with generally accepted accounting principles consistently applied. Borrower acknowledges and agrees that Lender may request and obtain additional information from third parties regarding any of the above, including, without limitation, credit reports.

**6.8. Loan Proceeds and Adequacy.** The undisbursed Loan proceeds, together with Borrower's Funds and all other sums, if any, to be provided by Borrower as shown in the Construction Budget are sufficient to construct the Improvements in accordance with



the terms and conditions of this Agreement.

**6.9. Accuracy.** All reports, documents, instruments, information and forms of evidence delivered to Lender concerning the Loan or security for the Loan or required by the Loan Documents are accurate, correct and sufficiently complete to give Lender true and accurate knowledge of their subject matter, and do not contain any material misrepresentation or omission.

**6.10. Tax Liability.** Borrower has filed all required federal, state, county and municipal tax returns and has paid all taxes and assessments owed and payable by Borrower or with respect to the Property, and Borrower has no knowledge of any basis for any additional payment with respect to any such taxes and assessments.

**6.11. Utilities.** All utility services, including, without limitation, gas, water, sewage, electrical and telephone, necessary for the development and occupancy of the Property and Improvements are available at or within the boundaries of the Property, or Borrower has taken all steps reasonably necessary to date to assure that all such services will be available upon completion of the Improvements.

**6.12. Compliance.** Borrower is familiar with and in substantial compliance with all governmental requirements for the development of the Property and construction of the Improvements and will substantially conform to and comply with all governmental requirements and the Plans and Specifications.

**6.13. Americans With Disabilities Act Compliance.** To the extent applicable, the Improvements have been or will be designed and shall be constructed and completed, and thereafter maintained, in general accordance and substantial compliance with all of the requirements of the Americans with Disabilities Act, of July 26, 1990, Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C.A. §§ 12101 to 12213, as amended from time to time. Borrower shall be responsible for all ADA compliance costs; provided however, Lender acknowledges and agrees that construction and operation of portions of the Improvements which are intended to satisfy the foregoing representation and warranty and any related covenant of Borrower may be funded by the Loan.

**6.14. Business Loan.** The Loan is a business loan transaction in the stated amount solely for the purpose of carrying on the business of Borrower and none of the proceeds of the Loan will be used for the personal, family or agricultural purposes of Borrower.

## **ARTICLE 7. HAZARDOUS MATERIALS**

**7.1. Special Representations and Warranties.** Without in any way limiting the other representations and warranties set forth in this Agreement, and after reasonable investigation and inquiry, and except as disclosed in the Environmental Report or otherwise disclosed in writing to Lender prior to the date of this Agreement, Borrower hereby specially represents and warrants to the best of Borrower's knowledge as of the date of this Agreement as follows:

**(a) Hazardous Materials.** The Property and Improvements are not and have not

been a site for the use, generation, manufacture, storage, treatment, release, threatened release, discharge, disposal, transportation or presence of any oil, flammable explosives, asbestos, urea formaldehyde insulation, radioactive materials, hazardous wastes, toxic or contaminated substances or similar materials, including, without limitation, any substances which are “hazardous substances,” “hazardous wastes,” “hazardous materials,” “toxic substances,” “wastes,” “regulated substances,” “industrial solid wastes,” or “pollutants” under the Hazardous Materials Laws, as described below, and/or other applicable environmental laws, ordinances or regulations (collectively, the “**Hazardous Materials**”). “Hazardous Materials” shall not include commercially reasonable amounts of such materials used in the ordinary course of preparation of the Property for construction, construction of the Improvements and operation of the Property which are used and stored in accordance with all applicable environmental laws, ordinances and regulations.

**(b) Hazardous Materials Laws.** The Property and Improvements are in substantial compliance with all laws, ordinances and regulations relating to Hazardous Materials (“Hazardous Materials Laws”), including, without limitation: the Clean Air Act, as amended, 42 U.S.C.A. §§ 7401 to 7449; the Federal Water Pollution Control Act, as amended, 33 U.S.C.A. §§ 1251 to 1274; the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C.A. §§ 6901 to 6908a; the Comprehensive Environment Response, Compensation and Liability Act of 1980, as amended (including the Superfund Amendments and Reauthorization Act of 1986, “CERCLA”), 42 U.S.C.A. §§ 9601 to 9628; the Toxic Substances Control Act, as amended, 15 U.S.C.A. §§ 2601 to 2629; the Occupational Safety and Health Act, as amended, 29 U.S.C.A. § 651, the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C.A. §§ 11001 to 11005; the Mine Safety and Health Act of 1977, as amended, 30 U.S.C.A. §§ 801 to 804; the Safe Drinking Water Act, as amended, 42 U.S.C.A. §§ 300f to 300j-26; and all comparable state and local laws, laws of other applicable jurisdictions or orders and regulations.

**(c) Hazardous Materials Claims.** There are no claims or actions (“**Hazardous Materials Claims**”) pending or threatened against Borrower, the Property or Improvements by any governmental entity or agency or by any other person or entity relating to Hazardous Materials or pursuant to the Hazardous Materials Laws.

## **7.2. Hazardous Materials Covenants.** Borrower agrees as follows:

**(a) No Hazardous Activities.** Except for the implementation of remediation programs or plans required under agreements, orders or consent decrees referenced in the Environmental Report, Borrower shall not cause or permit the Property or Improvements to be used as a site for the use, generation, manufacture, storage, treatment, release, discharge, disposal, transportation or presence of any Hazardous Materials.

**(b) Compliance.** Except to the extent such compliance is to be the result of the implementation of remediation programs or plans required under agreements, orders or consent decrees referenced in the Environmental Report, Borrower shall

comply and cause the Property and Improvements to comply with all Hazardous Materials Laws.

**(c) Notices.** Except for those matters set forth in the Environmental Report or otherwise disclosed in writing to Lender prior to the date of this Agreement, Borrower shall immediately notify Lender in writing of: (i) the discovery of any Hazardous Materials on, under or about the Property and Improvements; (ii) any knowledge by Borrower that the Property and Improvements are not in material compliance with any Hazardous Materials Laws; (iii) any Hazardous Materials Claims; and (iv) the discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Property that could cause the Property or any part thereof to be designated as Border Zone Property.

**(d) Remedial Action.** Except with respect to any Hazardous Materials, violations of Hazardous Materials Laws and Hazardous Materials Claims that are to be remedied by the implementation of remediation programs or plans required under agreements, orders or consent decrees referenced in the Environmental Report, in response to the presence of any Hazardous Materials on, under or about the Property or Improvements, Borrower shall immediately take, at Borrower's sole expense, all remedial action required by any Hazardous Materials Laws or any judgment, consent decree, settlement or compromise in respect to any Hazardous Materials Claims.

**(e) Inspection by Lender.** Upon reasonable prior notice to Borrower, Lender, its employees and agents, may from time to time (whether before or after the commencement of a nonjudicial or judicial foreclosure proceeding) enter and inspect the Property and Improvements for the purpose of determining the existence, location, nature and magnitude of any past or present release or threatened release of any Hazardous Materials into, onto, beneath or from the Property and Improvements.

**(f) Hazardous Materials Indemnity.** BORROWER HEREBY AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER, ITS DIRECTORS, OFFICERS, MEMBERS, MANAGERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS FROM AND AGAINST ANY AND ALL LOSSES, DAMAGES, LIABILITIES, CLAIMS, ACTIONS, JUDGMENTS, COURT COSTS AND LEGAL OR OTHER EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND EXPENSES) WHICH LENDER MAY INCUR AS A DIRECT OR INDIRECT CONSEQUENCE OF THE USE, GENERATION, MANUFACTURE, STORAGE, DISPOSAL, THREATENED DISPOSAL, TRANSPORTATION OR PRESENCE OF HAZARDOUS MATERIALS IN, ON, UNDER OR ABOUT THE PROPERTY OR IMPROVEMENTS. BORROWER SHALL IMMEDIATELY PAY TO LENDER UPON DEMAND ANY AMOUNTS OWING UNDER THIS INDEMNITY, TOGETHER WITH INTEREST FROM THE DATE THE INDEBTEDNESS ARISES UNTIL PAID AT THE RATE OF INTEREST APPLICABLE TO THE PRINCIPAL BALANCE OF THE NOTE. BORROWER'S DUTY AND OBLIGATIONS TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER SHALL SURVIVE THE CANCELLATION OF THE

NOTE AND THE RELEASE, RECONVEYANCE OR PARTIAL RECONVEYANCE  
OF THE DEED OF TRUST.

**ARTICLE 8. SET ASIDE LETTERS**

**8.1. Set Aside Letters.** If, at Borrower's request, Lender issues any letter or letters ("**Set Aside Letter**") to any governmental agency ("**Obligee**") or bonding company ("**Surety**") whereby Lender agrees to allocate Loan proceeds for the construction of off-site, common area, or other improvements required by any governmental agency or for which bonds may be required ("**Bonded Work**") in connection with the development of the Property, Borrower represents, warrants, covenants and agrees as follows:

(a) The sum which Borrower requests that Lender allocate for the Bonded Work shall be sufficient to pay for the construction and completion cost of the Bonded Work in accordance with any agreement between Borrower and Obligee or as may be required under the Project Entitlements, and a copy of such agreement shall be furnished to Lender by Borrower prior to and as a condition precedent to the issuance by Lender of any Set Aside Letter;

(b) Lender is irrevocably and unconditionally authorized to disburse to the Obligee or Surety all or any portion of said allocated Loan proceeds upon a demand of such Surety or Obligee made in accordance with the terms and conditions of the Set Aside Letter;

(c) Any disbursements or payments which Lender makes or may be obligated to make under any Set Aside Letter, whether made directly to the Surety, Obligee, or to others for completion of all or part of the Bonded Work, shall be deemed a disbursement under this Agreement to or for the benefit or account of Borrower;

(d) BORROWER SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER FROM ANY CLAIM, DEMAND, CAUSE OF ACTION, DAMAGE, LOSS OR LIABILITY, INCLUDING, WITHOUT LIMITATION, ANY COURT COSTS AND ATTORNEYS' FEES AND EXPENSES, WHICH LENDER MAY SUFFER OR INCUR AS A DIRECT OR INDIRECT CONSEQUENCE OF ITS ISSUANCE OF OR COMPLIANCE WITH ANY REQUESTED SET ASIDE LETTER. BORROWER SHALL PAY ANY INDEBTEDNESS ARISING UNDER THIS INDEMNITY TO LENDER IMMEDIATELY UPON DEMAND OF LENDER. BORROWER'S DUTY TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER HEREUNDER SHALL SURVIVE THE RELEASE AND CANCELLATION OF THE NOTE AND THE FULL OR PARTIAL RELEASE OR RECONVEYANCE OF THE DEED OF TRUST OR OTHER LOAN DOCUMENTS;

(e) Lender shall have no obligation to release any collateral or security under the Loan Documents unless and until Lender has received a full and final written release of its obligations under each Set Aside Letter; and

(f) Lender is not obligated to issue any Set Aside Letter and may refuse to do so in Lender's sole and absolute discretion.

## ARTICLE 9. COVENANTS OF BORROWER

**9.1. Compliance with Grant Deed of Covenants.** Borrower shall comply with all the Grant Deed Special Covenants.

**9.2. Prevailing Wages.** Borrower shall pay prevailing wages for the construction of the Improvements.

**9.3 Expenses.** Borrower shall immediately pay Lender upon demand all Lender's reasonable out-of-pocket costs and expenses actually incurred by Lender in connection with: (a) the preparation of this Agreement, all other Loan Documents and Other Related Documents contemplated hereby; (b) the administration of this Agreement, the other Loan Documents and Other Related Documents for the term of the Loan; and (c) the enforcement or satisfaction by Lender of any of Borrower's obligations under this Agreement, the other Loan Documents or the Other Related Documents. For all purposes of this Agreement, Lender's costs and expenses shall include, without limitation, all appraisal fees, cost engineering and inspection fees, legal fees and expenses, accounting fees, environmental consultant fees, auditor fees, and the cost to Lender of any title insurance premiums, title surveys, reconveyance and notary fees. Borrower recognizes and agrees that Lender may, at its option, require inspection of the Property and Improvements by an independent supervising Engineer and/or cost engineering specialist: (i) prior to each advance; (ii) at least once each month during the course of construction even though no disbursement is to be made for that month; (iii) upon completion of the Improvements; and (iv) at least semi-annually thereafter during the term of the Loan. To the extent that any of the foregoing are performed or incurred by employees of Lender or any Affiliate of Lender, no such costs, or any associated travel, lodging, subsistence or other expenses for such goods and services shall be owed by Borrower.

**9.4. ERISA Compliance.** Borrower shall at all times comply with the provisions of ERISA with respect to any retirement or other employee benefit plan to which it is a party as employer, and as soon as possible after Borrower knows, or has reason to know, that any Reportable Event (as defined in ERISA) with respect to any such plan of Borrower has occurred, it shall furnish to Lender a written statement setting forth details as to such Reportable Event and the action, if any, which Borrower proposes to take with respect thereto, together with a copy of the notice of such Reportable Event furnished to the Pension Benefit Guaranty Corporation.

**9.5. Revenue to be Applied to Debt Service.** During the term of the Loan, no Distributions shall be made or distributed to any partner, venturer, member or equity investor of Borrower.

**9.6. Subdivision Map.** Prior to recording Parcel Map 19898 covering the Property (collectively, "**Subdivision Map**"), Borrower shall submit said Subdivision Map to Lender for Lender's review and approval, which approval shall not be unreasonably withheld. Within ten (10) Business Days after Lender's receipt of such Subdivision Map, Lender shall provide Borrower written notice if Lender disapproves of said Subdivision

Map. Lender shall be deemed to have approved the Subdivision Map if such notice is not so provided to Borrower. Within five (5) Business Days after Lender's request, Borrower shall execute, acknowledge and deliver to Lender such amendments to the Loan Documents as Lender may reasonably require to reflect the change in the legal description of the Property resulting from the recordation of any Subdivision Map. In connection with and promptly after the recordation of any amendment or other modification to the Deed of Trust recorded in connection with such amendments, Borrower shall deliver to Lender, at Borrower's sole expense, a title endorsement to the Title Policy in form and substance satisfactory to Lender insuring the continued first priority lien of the Deed of Trust. Subject to the execution and delivery by Borrower of any documents required under this Section, Lender shall, if required by applicable law, sign any Subdivision Map approved, or deemed to be approved, by Lender pursuant to this Section.

**9.7. Further Assurances.** Upon Lender's request and at Borrower's sole cost and expense, Borrower shall execute, acknowledge and deliver any other instruments and perform any other acts necessary, desirable or proper, as determined by Lender, to carry out the purposes of this Agreement and the other Loan Documents or to perfect and preserve any liens created by the Loan Documents.

**9.8. No Assurances by Lender as Public Agency.** Borrower specifically understands and agrees that Lender, as a municipality, is not making any representations or warranties of any kind with respect to development or use for the Property. Borrower is aware that, notwithstanding current zoning for the Property, zoning and other laws can change in the future. Notwithstanding this Agreement, Borrower understands and agrees that (i) any proposed project for the Property will be subject to the standard approval processes as required by the Rialto Municipal Code and applicable law; and (ii) as a governmental agency, Lender cannot bind itself with respect to discretionary actions or approvals in this Agreement.

**9.9. Assignment.** Without the prior written consent of Lender, Borrower shall not assign Borrower's interest under any of the Loan Documents, or in any monies due or to become due thereunder, and any assignment without such consent shall be void. In this regard, Borrower acknowledges that Lender would not make this Loan except in reliance on Borrower's expertise, reputation, prior experience in developing and constructing commercial real property, Lender's knowledge of Borrower, and Lender's understanding that this Agreement is more in the nature of an agreement involving personal services than a standard loan where Lender would rely on security which already exists.

**9.10. Management of Property.** Without the prior written consent of Lender, Borrower shall not enter into any agreement providing for the management, leasing, operation or brokerage services for the Property.

**9.11. Governing Documents.** Without the prior written consent of Lender, Borrower shall not modify or permit to be modified the formation or organizational documents of Borrower, or any partners, joint venturers or members thereof.

## ARTICLE 10. REPORTING COVENANTS

**10.1. Financial Information.** Borrower hereby consents to Lender's obtaining from third parties copies of any and all reports that Borrower delivers to any party under the provisions of the limited liability company agreement or operating agreement of Borrower.

To the extent not otherwise obtained as provided above, within thirty (30) days after Lender's request, Borrower shall also deliver to Lender such quarterly and other financial information regarding the Property or Borrower as Lender may request from time to time. If audited financial information is prepared, Borrower shall deliver to Lender copies of that information within fifteen (15) days after its final preparation. Except as otherwise agreed to by Lender, all such financial information shall be prepared in accordance with generally accepted accounting principles consistently applied. Upon written request of Lender, Borrower shall use best efforts to obtain and deliver to Lender any specific financial reports and information pertaining to the members, managers, partners and shareholders of Borrower.

**10.2. Books and Records.** Borrower shall maintain complete books of account and other records for the Property and Improvements and for disbursement and use of the proceeds of the Loan and Borrower's Funds, and the same shall be available for inspection and copying by Lender upon reasonable prior notice.

## ARTICLE 11. DEFAULTS AND REMEDIES

**11.1. Default.** The occurrence of any one or more of the following shall constitute an event of default ("**Default**" or "**Event of Default**") under this Agreement and the other Loan Documents:

- a. **Monetary.** Borrower's failure to pay within ten (10) Business Days following the date of delivery of written notice from Lender to Borrower that such amount was not received when due, any sums payable under the Note or any of the other Loan Documents or Borrower's failure to deposit any Borrower's Funds as and when required under this Agreement; provided, however, that if such written notice from Lender is an Out of Balance Notice, then, in lieu of such 10-Business Day period, Borrower shall have a thirty (30) day period following the date of delivery of such Out of Balance Notice before a Default shall occur in which to deposit funds equal to the amount of the applicable deficiency into Borrower's Funds Account, as contemplated by the provisions of Section 3.1(b); further, provided, however, that no such notice or cure period shall apply at maturity or upon acceleration; or
- b. **Prevailing Wages.** Borrower's failure to pay prevailing wages in accordance with Section 9.2; or
- c. **Grant Deed Covenants.** Borrower's failure to comply with the Grant Deed Covenants; or

- d. **Unsecured Note.** Borrower borrows any additional amounts from the Unsecured Lender or any third party; or
- e. **Performance of Obligations.** Borrower's failure to perform any obligation in addition to those in Section 11.1(a) above under any of the Loan Documents within thirty (30) days following the date of delivery of written notice from Lender; provided, however, that if a longer or shorter cure period is expressly provided for the remedy of any such failure, Borrower's failure to perform will not constitute a Default until such longer or shorter date as the specified cure period expires; but provided further, however, if such Default is curable, but the nature of such failure is such that it cannot reasonably be cured within said thirty (30) days (or longer or shorter specified cure period), then if Borrower fails to commence a cure thereof within said time and thereafter fails to diligently pursue a cure thereof and fails to complete same within sixty (60) days after Lender's written demand; or
- f. **Construction; Use.** (i) There is any material deviation in the work of construction from the Plans and Specifications or governmental requirements from that required under this Agreement or the appearance or use of defective workmanship or materials in constructing the Improvements, and Borrower fails to remedy the same to Lender's satisfaction within ten (10) Business Days after Lender's written demand to do so, or if the nature of such deviation or defect is curable but such that it cannot reasonably be cured within said ten (10) Business Days, then if Borrower fails to commence a cure thereof within said ten (10) Business Days and thereafter fails to diligently pursue a cure thereof and complete same within ninety (90) days after Lender's written demand; or (ii) there is a cessation of construction of the Improvements prior to completion for a continuous period of more than fifteen (15) days; or (iii) the construction of any of the Improvements in accordance with the Loan Documents is prohibited, enjoined or delayed for a continuous period of more than forty-five (45) days; or (iv) utilities or other public services are curtailed for a continuous period of more than thirty (30) days; or
- g. **Liens, Attachment; Condemnation.** (i) The recording of any claim of lien against the Property or Improvements or the service on Lender of any bonded stop notice relating to the Loan and the continuance of such claim of lien or bonded stop notice for twenty (20) days without discharge, satisfaction or provision for payment being made by Borrower in a manner satisfactory to Lender, subject to the provisions of Section 4.8 hereof and the Deed of Trust; or (ii) the condemnation, seizure or appropriation of, or occurrence of an uninsured casualty with respect to any material portion of the Property or Improvements that is not otherwise offset by Borrower's deposit of sufficient restoration funds (including any applicable deductible amount under any applicable policy of casualty insurance) into Borrower's Funds Account within forty-five (45) days after the occurrence of such event; or (iii) the sequestration or attachment of, or any levy or execution upon any of the Property or Improvements, any other collateral provided by Borrower under any of the



Loan Documents, any monies in the Account or in Borrower's Funds Account, or any substantial portion of the other assets of Borrower, which sequestration, attachment, levy or execution is not released, expunged or dismissed prior to the earlier of forty-five (45) days or the sale of the assets affected thereby; or

- h. Representations and Warranties.** The material failure of any representation or warranty of Borrower in any of the Loan Documents to be true, correct and complete as of the date made, and the continuation of such failure for more than five (5) Business Days after written notice to Borrower from Lender requesting that Borrower cure such failure; or
- i. Voluntary Bankruptcy; Insolvency; Dissolution.** (i) The filing of a petition by Borrower for relief under the Bankruptcy Code, or under any other present or future state or federal law regarding bankruptcy, reorganization or other debtor relief law; (ii) a general assignment by Borrower for the benefit of creditors; or (iii) Borrower applying for, or the appointment of, a receiver, trustee, custodian or liquidator of Borrower or any of its property; or
- j. Involuntary Bankruptcy.** (i) The filing of any pleading or an answer by Borrower in any involuntary proceeding under the Bankruptcy Code or other debtor relief law which admits the jurisdiction of the court or the petition's material allegations regarding Borrower's insolvency; or (ii) the failure of Borrower to effect a full dismissal of any involuntary petition under the Bankruptcy Code or under any other debtor relief law that is filed against Borrower or in any way restrains or limits Borrower or Lender regarding the Loan, the Property or the Improvements, prior to the earlier of the entry of any court order granting relief sought in such involuntary petition, or forty-five (45) days after the date of filing of such involuntary petition; or
- k. Members.** The occurrence of any of the events specified in Section 11.1(g) or 11.1(i) to any members of Borrower; or
- l. Change in Management or Control.** The occurrence of any management or ownership change in Borrower or in the partners, venturers or members of Borrower without the prior written consent of Lender; or
- m. Loss of Priority.** The failure at any time of the Deed of Trust to be a valid second lien (subordinate only to the Purchase Money Deed of Trust) upon the Property or any portion thereof, other than as a result of any release or reconveyance of the Deed of Trust with respect to all or any portion of the Property and Improvements pursuant to the terms and conditions of this Agreement; or
- n. Purchase Money Deed of Trust.** Any default under the Purchase Money Note or Purchase Money Deed of Trust; or
- o. Transfer of Property.** Any transfer, encumbrance, sale or lease of the Property, in whole or in part, or any change of management or ownership of

Borrower without the prior written consent of Lender; or

- p. Hazardous Materials.** The discovery of any significant Hazardous Materials in, on or about the Property or Improvements subsequent to the Effective Date (to the extent not disclosed in the Environmental Report or otherwise disclosed in writing to Lender prior to the date of this Agreement); provided, however, if such Default is curable, but the nature of such failure is such that it cannot reasonably be cured within thirty (30) days, then if Borrower fails to commence a cure thereof within said time and thereafter fails to diligently pursue a cure thereof and fails to complete same within ninety (90) days after Lender's written demand. Any such Hazardous Materials shall be "significant" for this purpose if said Hazardous Materials, in Lender's sole discretion, have a materially adverse impact on the value of the Property and Improvements.

Notwithstanding any of the foregoing or anything to the contrary in this Agreement, to the extent that any Default can be cured by the payment of money directly to Lender, to Borrower's Funds Account or to any third party to reimburse same for materials or services already delivered or performed or for the purpose of delivering materials or performing services which if so done would cure said Default, the applicable cure period specified in this Agreement shall be extended by an additional sixty (60) days to allow Borrower to undertake any necessary capital calls or to seek or arrange the necessary partnership loans.

**11.2. Acceleration upon Default; Remedies.** Upon the occurrence of any Default, Lender may, at its sole option, declare all sums owing to Lender under the Note, this Agreement and the other Loan Documents immediately due and payable. Upon such acceleration, Lender may, in addition to all other remedies permitted under this Agreement and the other Loan Documents and at law or equity, apply any sums in the Account and Borrower's Funds Account to the sums owing under the Loan Documents and any and all obligations of Lender to fund further disbursements under the Loan shall terminate.

**11.3. Disbursements to Third Parties.** Upon the occurrence of a Default occasioned by Borrower's failure to pay money to a third party as required by this Agreement, Lender may, but shall not be obligated to, make such payment from the Loan proceeds, Borrower's Funds, or other funds of Lender. If such payment is made from proceeds of the Loan or from Borrower's Funds, Borrower shall immediately deposit with Lender, upon written demand, an amount equal to such payment. If such payment is made from funds of Lender, Borrower shall immediately repay such funds upon written demand of Lender. In either case, the Default with respect to which any such payment has been made by Lender shall not be deemed cured until such deposit or repayment (as the case may be) has been made by Borrower to Lender.

**11.4. Lender's Completion of Construction.** Upon the occurrence of a Default, Lender may, upon five (5) Business Days prior written notice to Borrower, and with or without legal process, take possession of the Property and Improvements, remove Borrower and all agents, employees and contractors of Borrower from the Property and

Improvements, complete the work of construction and market for sale the Property and/or Improvements. For this purpose, Borrower irrevocably appoints Lender as its attorney-in-fact, which agency is coupled with an interest. As attorney-in-fact, Lender may, in Borrower's name, take or omit to take any action Lender may deem appropriate with respect to third parties, including, without limitation, exercising Borrower's rights under all contracts concerning the Property and/or Improvements, but excluding the Loan Documents.

**11.5. Lender's Cessation of Construction.** If Lender determines at any time that the Improvements are not being constructed substantially in accordance with the requirements under this Agreement, then upon the occurrence of a Default therefor, Lender may, upon five (5) Business Days prior written notice to Borrower, immediately cause all construction to cease on any of the Improvements affected by the condition of nonconformance. Borrower shall thereafter not allow any construction work, other than corrective work, to be performed on any of the Improvements affected by the condition of nonconformance until such time as Lender notifies Borrower in writing that the nonconforming condition has been corrected.

**11.6. Termination or Continuation of Development and Management Agreements.** Upon the occurrence of a Default wherein Lender elects to accelerate the Loan and records a notice of default to foreclose the lien of the Deed of Trust, Lender may elect to require Borrower to terminate any Development and Management Agreements (and Borrower shall immediately do so), without any termination fee or penalty, provided that all fees and expenses previously accrued thereunder up to the effective date of such termination are paid in full; provided however, so long as the Development and Management Agreements are not terminated, the respective party or parties performing services thereunder shall be entitled to continue to receive all fees and expenses owed such party or parties under any applicable Development and Management Agreements.

**11.7. Repayment of Funds Advanced.** Any funds expended by Lender in the exercise of its rights or remedies under this Agreement and the other Loan Documents shall be payable to Lender upon demand, together with interest at the rate applicable to the principal balance of the Note from the date the funds were expended.

**11.8. Rights Cumulative, No Waiver.** All Lender's rights and remedies provided in this Agreement and the other Loan Documents, together with those granted by law or at equity, are cumulative and may be exercised by Lender at any time. Lender's exercise of any right or remedy shall not constitute a cure of any Default unless all sums then due and payable to Lender under the Loan Documents are repaid and Borrower has cured all other Defaults. No waiver shall be implied from any failure of Lender to take, or any delay by Lender in taking, action concerning any Default or failure of condition under the Loan Documents, or from any previous waiver of any similar or unrelated Default or failure of condition. Any waiver or approval under any of the Loan Documents must be in writing and shall be limited to its specific terms.

## **ARTICLE 12. MISCELLANEOUS PROVISIONS**

**12.1. Indemnity.** BORROWER HEREBY AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER, ITS DIRECTORS, OFFICERS, MEMBERS, MANAGERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS FROM AND AGAINST ANY AND ALL LOSSES, DAMAGES, LIABILITIES, CLAIMS, ACTIONS, JUDGMENTS, COURT COSTS AND LEGAL OR OTHER EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND EXPENSES) WHICH LENDER MAY INCUR AS A DIRECT OR INDIRECT CONSEQUENCE OF: (A) THE PURPOSE TO WHICH BORROWER APPLIES THE LOAN PROCEEDS; (B) THE FAILURE OF BORROWER TO PERFORM ANY OBLIGATIONS AS AND WHEN REQUIRED BY THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS; (C) ANY FAILURE AT ANY TIME OF ANY OF BORROWER'S REPRESENTATIONS OR WARRANTIES TO BE TRUE AND CORRECT; (D) BORROWER'S FAILURE TO COMPLY WITH ALL APPLICABLE LAWS (INCLUDING BUT NOT LIMITED TO PAYMENT OF PREVAILING WAGES IF APPLICABLE TO THE PROJECT); OR (E) ANY ACT OR OMISSION BY BORROWER, ANY CONSTITUENT PARTNER OR MEMBER OF BORROWER, ANY CONTRACTOR, SUBCONTRACTOR OR MATERIAL SUPPLIER, ENGINEER, ENGINEER OR OTHER PERSON OR ENTITY WITH RESPECT TO ANY OF THE PROPERTY OR IMPROVEMENTS, EXCEPT TO THE EXTENT CAUSED OR CONTRIBUTED TO BY THE BAD FAITH, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LENDER. BORROWER SHALL IMMEDIATELY PAY TO LENDER UPON DEMAND ANY AMOUNTS OWING UNDER THIS INDEMNITY, TOGETHER WITH INTEREST FROM THE DATE THE INDEBTEDNESS ARISES UNTIL PAID AT THE RATE OF INTEREST APPLICABLE TO THE PRINCIPAL BALANCE OF THE NOTE. BORROWER'S DUTY AND OBLIGATIONS TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER SHALL SURVIVE CANCELLATION OF THE NOTE AND THE RELEASE, RECONVEYANCE OR PARTIAL RECONVEYANCE OF THE DEED OF TRUST.

**12.2. Form of Documents.** The form and substance of all documents, instruments, and forms of evidence to be delivered to Lender under the terms of this Agreement and any of the other Loan Documents shall be subject to Lender's approval and shall not be modified, superseded or terminated in any respect without Lender's prior written approval, except to the extent otherwise provided in this Agreement.

**12.3. No Third Parties Benefited.** No person other than Lender and Borrower and their permitted successors and assigns shall have any right of action under any of the Loan Documents.

**12.4. Notices.** All notices, demands, or other communications under this Agreement and the other Loan Documents shall be in writing and shall be delivered to the appropriate party at the address set forth below (subject to change from time to time by written notice to all other parties to this Agreement). All communications shall be deemed served upon (i) actual personally delivery; (ii) one day after deposited with a national carrier such as Parcel Post or Federal Express; or (iii) if mailed, then two (2) days after deposit in the United States Postal Service mail, certified postage prepaid-return receipt requested and addressed to the address of Borrower or Lender at the address specified. However, the nonreceipt of any communication as the result of any

change of address of which the sending party was not notified or as the result of a refusal to accept delivery shall be deemed receipt of such communication.

**Borrower:** AYALA & 210 PARTNERS, LLC.  
3415 S. Sepulveda Blvd., Suite 400  
Los Angeles, CA 90034  
Attn: Hooshang Namvar, Manager

**AND**

AYALA & 210 PARTNERS, LLC  
1130 N. Yucca Avenue  
Rialto, CA 92376  
Attn: Fernando Acosta, Authorized Agent

**Copy to:** Abram Roy, LLC.  
11400 W. Olympic Blvd. Suite 1450  
Los Angeles, CA 90064  
Attn: Richard Schloss, Esq.

**Lender:** City of Rialto  
150 S. Palm Avenue  
Rialto, CA 92376  
Attn: Robb Steel, City Administrator

**Copy to:** Aleshire & Wynder, LLP  
18881 Von Karman Ave.  
Suite 1700  
Irvine, CA 92612  
Attn: Fred Galante, City Attorney

**12.5. Attorney-in-Fact.** Borrower hereby irrevocably appoints and authorizes Lender, as Borrower's attorney-in-fact, which agency is coupled with an interest, to execute and/or record in Lender's or Borrower's name any notices, instruments or documents that Lender deems appropriate to protect Lender's interest under any of the Loan Documents.

**12.6. Actions.** Borrower agrees that Lender, in exercising the rights, duties or liabilities of Lender or Borrower under the Loan Documents, may commence, appear in or defend any action or proceeding purporting to affect the Property, the Improvements, or the Loan Documents and Borrower shall immediately reimburse Lender upon demand for all such expenses so incurred or paid by Lender, including, without limitation, attorney's fees and expenses and court costs.

**12.7. Right of Contest.** Borrower may contest in good faith any claim, demand, levy or assessment (other than liens and stop notices, subject to the provisions of Section 4.8 of this Agreement) by any person other than Lender which would constitute a Default if:

(a) Borrower pursues the contest diligently, in a manner which Lender determines is not prejudicial to Lender, and does not impair the rights of Lender under any of the Loan Documents; and (b) Borrower deposits with Lender any funds or other forms of assurance which Lender in good faith determines from time to time appropriate to protect Lender from the consequences of the contest being unsuccessful. Borrower's compliance with this Section shall operate to prevent such claim, demand, levy or assessment from becoming a Default.

**12.8. Relationship of Parties.** The relationship of Borrower and Lender under the Loan Documents is, and shall at all times remain, solely that of borrower and lender, and Lender neither undertakes nor assumes any responsibility or duty to Borrower or to any third party with respect to the Property or Improvements, except as expressly provided in this Agreement and the other Loan Documents.

**12.9. Delay Outside Lender's Control.** Lender shall not be liable in any way to Borrower or any third party for Lender's failure to perform or delay in performing under the Loan Documents if such failure to perform or delay in performing results directly or indirectly from, or is based upon, the action, inaction, or purported action, of any governmental or local authority, or because of war, rebellion, insurrection, strike, lock-out, boycott or blockade (whether presently in effect, announced or in the sole judgment of Lender deemed probable), or from any Act of God or other cause or event beyond Lender's control.

**12.10. Attorney's Fees and Expenses; Enforcement.** If any attorney is engaged by Lender to enforce or defend any provision of this Agreement, any of the other Loan Documents or Other Related Documents, or as a consequence of any Default under the Loan Documents, with or without the filing of any legal action or proceeding, and including, without limitation, any fees and expenses incurred in any bankruptcy proceeding of Borrower, then Borrower shall immediately pay to Lender, upon demand, the amount of all attorney's fees and expenses and all costs incurred by Lender in connection therewith, together with interest thereon from the date of such demand until paid at the rate of interest applicable to the principal balance of the Note as specified therein.

**12.11. Immediately Available Funds.** Unless otherwise expressly provided for in this Agreement, all amounts payable by Borrower to Lender shall be payable only in United States currency, immediately available funds.

**12.12. Lender's Consent.** Wherever in this Agreement there is a requirement for Lender's consent and/or a document to be provided or an action taken "to the satisfaction of Lender", it is understood by such phrase that Lender shall exercise its consent, right or judgment in a reasonable manner given the specific facts and circumstance applicable at the time.

**12.14. Lender's Agents.** Lender may designate an agent or independent contractor to exercise any of Lender's rights under this Agreement and any of the other Loan Documents. Any reference to Lender in any of the Loan Documents shall include

Lender's agents, employees or independent contractors. Borrower shall pay the costs of such agent or independent contractor either directly to such person or to Lender in reimbursement of such costs, as applicable. Lender hereby appoints its City Administrator as its agent and authorizes the City Administrator to execute approvals or extensions under any Loan Documents on behalf of Lender.

**12.15. Tax Service.** Lender is authorized to secure, at Borrower's expense, a tax service contract with a third-party vendor which shall provide tax information on the Property and Improvements satisfactory to Lender.

**12.16. WAIVER OF RIGHT TO TRIAL BY JURY.** EACH PARTY TO THIS AGREEMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION (a) ARISING UNDER THE LOAN DOCUMENTS, INCLUDING, WITHOUT LIMITATION, ANY PRESENT OR FUTURE MODIFICATION THEREOF OR (b) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THE LOAN DOCUMENTS (AS NOW OR HEREAFTER MODIFIED) OR ANY OTHER INSTRUMENT, DOCUMENT OR AGREEMENT EXECUTED OR DELIVERED IN CONNECTION HERewith, OR THE TRANSACTIONS RELATED HERETO OR THERETO, IN EACH CASE WHETHER SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION IS NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF ANY RIGHT THEY MIGHT OTHERWISE HAVE TO TRIAL BY JURY.

**12.17. Severability.** If any provision or obligation under this Agreement and the other Loan Documents shall be determined by a court of competent jurisdiction to be invalid, illegal or unenforceable, that provision shall be deemed severed from the Loan Documents and the validity, legality and enforceability of the remaining provisions or obligations shall remain in full force as though the invalid, illegal, or unenforceable provision had never been a part of the Loan Documents, provided, however, that if the rate of interest or any other amount payable under the Note or this Agreement or any other Loan Document, or the right of collectability therefor, are declared to be or become invalid, illegal or unenforceable, Lender's obligations to make advances under the Loan Documents shall not be enforceable by Borrower.

**12.18. Heirs, Successors and Assigns.** Except as otherwise expressly provided under the terms and conditions of this Agreement, the terms of the Loan Documents shall bind and inure to the benefit of the heirs, successors and assigns of the parties.

**12.19. Time.** Time is of the essence of each and every term of this Agreement.

**12.20. Headings.** All article, section or other headings appearing in this Agreement and any of the other Loan Documents are for convenience of reference only and shall be disregarded in construing this Agreement and any of the other Loan Documents.

**12.21. Governing Law.** This Agreement shall be governed by, and construed and enforced in accordance with the laws of the State of California except to the extent preempted by federal laws. Borrower and all persons and entities in any manner obligated to Lender under the Loan Documents consent to the jurisdiction of any federal or state court within the State of California having proper venue and also consent to service of process by any means authorized by California or federal law.

**12.22. Integration; Interpretation.** The Loan Documents contain or expressly incorporate by reference the entire agreement of the parties with respect to the matters contemplated therein and supersede all prior negotiations or agreements, written or oral. The Loan Documents shall not be modified, amended or supplemented except by written instrument executed by both parties. Any reference in any of the Loan Documents to the Property or Improvements shall include all or any part of the Property or Improvements. Any reference to the Loan Documents includes any amendments, renewals or extensions now or hereafter approved by Lender in writing.

**12.23. Joint and Several Liability.** The liability of all persons and entities obligated in any manner under this Agreement and any of the Loan Documents as Borrower shall be joint and several.

**12.24. Authority.** Each individual executing this Agreement on behalf of Borrower represents, warrants and covenants to Lender that (a) such person is duly authorized to execute and deliver this Agreement on behalf of Borrower in accordance with authority granted under its organizational documents, and (b) Borrower is bound under the terms of this Agreement.

**12.25. Counterparts.** This Agreement, any of the other Loan Documents (except for the Note, the Deed of Trust, and any other documents which require original execution), any Other Related Documents and any subsequent modifications, amendments, waivers, consents or supplements thereof, if any, may be executed in any number of counterparts, each of which when executed and delivered shall be deemed to be an original and all such counterparts together, shall constitute one and the same instrument.

**[SIGNATURES ON THE FOLLOWING PAGE]**



IN WITNESS WHEREOF, Borrower and Lender have executed this Agreement as of the date appearing on the first page of this Agreement.

**BORROWER:**

AYALA & 210 PARTNERS, LLC,  
a Delaware limited liability company

By: \_\_\_\_\_  
Hooshang Namvar  
Managing Member

**LENDER:**

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

By: \_\_\_\_\_  
Deborah Robertson, Mayor

Dated: \_\_\_\_\_, 2018

**ATTEST:**

By: \_\_\_\_\_  
Barbara A. McGee  
City Clerk

**APPROVED AS TO FORM:**

ALESHIRE & WYNDER, LLP

By: \_\_\_\_\_  
Fred Galante, City Attorney

## **EXHIBIT A**

### **DESCRIPTION OF PROPERTY**

That certain real property in the City of Rialto, County of San Bernardino, State of California legally described as follows:

**NEED TO ADD**

**EXHIBIT B**  
**DOCUMENTS**

**A. Loan Documents.** The documents listed below and amendments, modifications and supplements thereto which have received the prior written consent of Lender, together with any documents executed in the future that are approved by Lender and that recite that they are “**Loan Documents**” for purposes of this Agreement are collectively referred to herein as the Loan Documents.

Construction Loan Agreement

Construction Note Secured by Deed of Trust

Construction Deed of Trust, Security Agreement and Fixture Filing

UCC-1 Filing

Assignment of Construction Agreements

Assignment of Plans and Specifications

Account Control Agreement

**B. Other Related Documents** (Which Are Not Loan Documents):

Borrower's formation documents

Engineer's Agreement

Plans and Specifications

Disbursement Control Agreement (with Construction Disbursement Agent)

Title Policy

**EXHIBIT C**  
**REQUIRED IMPROVEMENTS**

**NEED TO ADD**

EXHIBIT C-1  
APPROVED SITE PLAN



## **EXHIBIT D**

### **CONSTRUCTION BUDGET**

The Construction Budget set forth herein represents an analysis of the total costs necessary in Borrower's estimation to perform Borrower's obligations to construct the Improvements and perform all its obligations under the Loan Documents.

## EXHIBIT E

### DISBURSEMENT PROCESS

**A. Timing of Disbursement.** Unless another provision of this Agreement specifies otherwise, on or before the fifteenth (15th) day of each month, Borrower shall submit to the Disbursement Control Agent together with a copy to Lender a written itemized statement executed by Borrower in a form acceptable to Lender ("**Application for Payment**") setting forth:

1. A description of the work performed, material supplied and/or costs incurred or due for which disbursement is requested with respect to any line item ("**Item**") shown in the Disbursement Budget. Notwithstanding the amount of any line item shown in the Disbursement Budget, Borrower, with Lender's approval, may reallocate amounts among the line items by allocating cost savings in any line item to Contingency, and amounts from the Contingency to any line item with a cost overrun with the prior written approval of Lender; and
2. The total amount incurred, expended and/or due for each requested Item less prior disbursements.

Each Application for Payment by Borrower shall constitute a representation and warranty by Borrower that Borrower is in compliance with all the conditions precedent to a disbursement specified in this Agreement. With respect to Borrower's remaking of the representations and warranties set forth in Article 6 of this Agreement on the date of submission of each Application for Payment, to the extent circumstances have changed for reasons beyond the reasonable control of Borrower such that Borrower must qualify such representations and warranties as of the date of delivery of any such Application for Payment, such qualification, to the extent it renders the applicable representation materially untrue or breaches the applicable warranty, shall merely be a failure of condition to Lender's obligation to disburse funds under the provisions of this Exhibit D, as opposed to constituting an Event of Default.

**B. Lender's Right to Condition Disbursements.** Lender shall have the right to condition any disbursement upon Lender's receipt in the appropriate form of the following submissions and Lender's reasonable determination that such submissions comply with all the following requirements:

1. The Application for Payment and an itemized requisition for payment.
2. Bills, invoices, documents of title, vouchers, statements, receipts and any other documents evidencing the total amount expended, incurred or due for any requested Items.
3. Compliance with all requirements of the Construction Disbursement Agent including a lien release, joint check or voucher system acceptable to Lender for payments or disbursements to any contractor, subcontractor, materialman, supplier or lien claimant.

4. An appropriate endorsement(s) to the Title Policy as required by Lender.
5. Borrower has an authorized person representing Borrower complete the Affidavit of Borrower for Construction Loan Advance in the form attached hereto as Attachment 1 and deliver same with the Application for Payment.
6. Engineer's, inspector's and/or engineer's periodic certifications of work that has been completed and its conformance to the Plans and Specifications and governmental requirements based upon any such Engineer's, inspector's and/or engineer's periodic physical inspections of the Property and Improvements.
7. Waivers and releases of any mechanics' lien, stop notice claim, equitable lien claim or other lien claim rights as specified under California law which shall be (i) conditional lien releases unless payment is made directly by the Construction Disbursement Agent for costs to be paid from the current Application for Payment, and (ii) unconditional lien releases for all prior amounts which have been previously been disbursed by Lender for which conditional lien releases had been secured.
8. A written release executed by any surety to whom Lender has issued or will issue a set-aside letter and/or any public entity or agency which is a beneficiary under any instrument of credit, set-aside letter or standby letter of credit which Lender has issued or will issue with respect to the Loan.
9. For final payment only with respect to all or any separate, independent portion of the Improvements, valid, recorded Notice(s) of Completion for the Improvements or any portions of the Improvements for which Notice(s) of Completion may be recorded under applicable law, and final payment lien release waivers (conditional with respect to costs to be paid from such final payment, and unconditional for all other costs).
10. Certificate of Substantial Completion from the Engineer prior to distribution of the Retention.
11. Any other document, requirement, evidence or information that Lender may have reasonably requested under any provision of the Loan Documents at least five (5) days prior to the applicable Application for Payment.
12. Except with respect to items covered under Sections 14 and 15 below, evidence that any goods, materials, supplies, fixtures or other work in process for which disbursement is requested have been incorporated into the Improvements.
13. In the event any Application for Payment includes the cost of materials stored at a location other than the Property ("**Offsite Materials**"), each of the following: (a) evidence that the Offsite Materials have been purchased by Borrower, have been segregated from other materials in the facility and have been appropriately marked to indicate Borrower's ownership thereof and Lender's security interest therein; and (b) evidence that the Offsite Materials are insured as required by this



Agreement.

14. In the event that any Application for Payment includes the cost of materials stored on the Property ("**Onsite Materials**"), each of the following:
  - (a) evidence that the Onsite Materials have been purchased for or by Borrower;
  - (b) evidence that the Onsite Materials are insured as required hereunder; and
  - (c) evidence that the Onsite Materials are stored in an area on the Property for which adequate security is provided against theft and vandalism.

Borrower acknowledges that this approval process may result in disbursement delays and Borrower hereby consents to all such delays; provided, however, that Lender shall use commercially reasonable efforts to disburse funds for all approved Items in any Application for Payment within the applicable Lender Payment Turnaround Period.

**C. Interest Disbursement.** As long as the balance for the interest in the Budget is sufficient and without an Application for Payment, Lender shall automatically distribute the sum equal to the monthly interest payment to itself on the first day of each month. Upon Borrower's request, Lender shall provide a written statement of the amount of the payment made for each month. After the interest amount in the Budget has been expended, Borrower shall make such payment to Lender on the first day of each month.

**D. Disbursement of Retention.** Any Retention shall be distributed to Borrower upon Borrower's delivery to Lender of (1) the applicable unconditional lien releases specified above; (2) the applicable certificate(s) specified above; and (3) certificate of completion of the Improvements in accordance with the Plans and Specifications issued by the Engineer.

**E. Partial Disbursements.** No disbursement shall be made for a particular Application for Payment unless all required supporting materials are included for the Items.

## ATTACHMENT 1

### AFFIDAVIT OF BORROWER FOR CONSTRUCTION LOAN ADVANCE

\_\_\_\_\_ (“**Affiant**”) being duly sworn, deposes and says:

That Affiant is the \_\_\_\_\_ of AYALA & 210 PARTNERS, LLC, a Delaware limited liability company (“**Borrower**”), and has made due investigation as to matters hereinafter set forth and does hereby certify the following to induce CITY OF RIALTO, a California municipal corporation (“**Lender**”) to make and advance the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to Borrower pursuant to the terms of that certain Construction Loan Agreement, dated \_\_\_\_\_, 201\_\_\_\_ (“**Loan Agreement**”) between Lender and Borrower, and as part of Application for Payment #\_\_\_\_\_ dated \_\_\_\_\_, 201\_\_\_\_, the date on which this Affidavit is sworn to by Affiant, being submitted to Lender herewith:

1. All representations and warranties contained in the Loan Agreement are true and accurate in all material respects as of the date hereof.
2. No Event of Default exists under the Loan Agreement, the Note, the Deed of Trust, or under any other Loan Document, and no event or condition has occurred and is continuing or existing or would result from the advance about to be made which, with the lapse of time or the giving of notice, or both, would constitute such an Event of Default.
3. Construction of the Improvements has been carried on with reasonable dispatch and has not been discontinued at any time for reasons within the control of Borrower; the Improvements have not been damaged by fire or other casualty; and no part of the Property has been taken by eminent domain and no proceedings or negotiations therefor are pending or threatened.
4. Construction of the Improvements is progressing in such manner so as to insure completion thereof in substantial accordance with the Plans on or before the Completion Date.
5. All funds received from Lender previously as advances under the Loan Agreement have been expended or are being held in trust for the sole purpose of paying costs of construction (“**Costs**”) previously certified to Lender in Applications for Payments; and no part of said funds has been used, and the funds to be received pursuant to the Application for Payment submitted herewith shall not be used, for any other purpose. No item of Costs previously certified to Lender in an Application for Payment remains unpaid or unprovided for as of the date of this Affidavit.
6. All of the statements and information set forth in the Application for Payment being submitted to Lender herewith are true and correct in every material respect at the date hereof, and all Costs certified to Lender in said Application for Payment accurately reflect the precise amounts due, or where such Costs have not yet been billed to Borrower, the same accurately reflect Borrower’s best estimates of the

amounts that will become due and owing during the period covered by said Application for Payment. All the funds to be received pursuant to said Application for Payment shall be used solely to pay the items of cost specified therein or for reimbursing Borrower for such items previously paid by Borrower.

7. Nothing has occurred subsequent to the date of the Loan Agreement which has or may result in the creation of any lien, charge or encumbrance on the Property or the Improvements or any part thereof, or anything affixed to or used in connection therewith or which has or may substantially and adversely impair the ability of Borrower to make all payments of principal and interest on the Note, the ability of Borrower to meet its obligations under the Loan Agreement.
8. None of the labor, materials, overhead or other items of expense specified in the Application for Payment submitted herewith have previously been made the basis of any Application for Payment by Borrower or of any payment by Lender.
9. The status of construction of the Improvements is as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.
10. The estimated aggregate cost of completing the Improvements including but not limited to labor, materials, architectural and engineering fees, management, financial and other overhead costs and expenses, does not exceed \_\_\_\_\_ Dollars (\$\_\_\_\_\_).
11. All conditions to the advance referred to above and to be made in accordance with the Application for Payment submitted herewith in addition to those to which reference is made in this Affidavit have been met in accordance with the terms of the Loan Agreement.
12. Affiant represents, warrants and covenants to Lender that (a) Affiant is duly authorized to execute and deliver this Agreement on behalf of Borrower in accordance with authority granted under its organizational documents, and (b) Borrower is bound under the terms hereof.

The capitalized terms used herein have the meaning given thereto in the Loan Agreement.

**AFFIANT:**

Dated: \_\_\_\_\_, 201\_\_

\_\_\_\_\_

Name: \_\_\_\_\_

## EXHIBIT F

### PARTIAL RELEASE PROVISIONS

At any time, from time-to-time, provided that (i) no Default exists, or (ii) no facts exist that would constitute a Default with the giving of notice or the passage of time, or both, under this Loan Agreement, the Deed of Trust, the Note, or any other Loan Document between Lender and Borrower relating to the Loan, Borrower shall be entitled to partial release of a portion of the Property (a "**Parcel**"), upon and subject to the following conditions:

- a. Any portion of the Property to be released must be a legal parcel under Final Map 19898.
- b. The Project CC&Rs have been recorded against the entire Property.
- c. Borrower shall provide to Lender a fully executed copy of a purchase and sale agreement for the applicable Parcel for Lender's review and approval as to (i) the sales price of the Parcel; and (ii) the agreement shall include restrictions for the use of the Parcel consistent with the specific use restriction for that Parcel as set forth in the Grant Deed ("**End-User Sale Agreement**"). The End-User Sale Agreement shall require all cash at closing.
- d. Grantor under the Grant Deed will concurrently issue the Release of Covenants in accordance with Section 1 of the Grant Deed.
- e. The buyer under the End-User Sale Agreement will be the actual end user qualified under the provisions and requirements of the Grant Deed and have obtained all land use and project entitlements for the required project from the applicable governmental entities ("**Approved Project**"). The End-User covenants to commence and complete the Approved Project pursuant to a specified schedule in a recorded document in favor of Developer and in which Lender is a third-party beneficiary as long as this Loan is outstanding.
- f. The Parcels may **only** be released in the following specific order:
  - 1. Parcel 1.
  - 2. Parcel 2.
  - 3. Parcels 6.
  - 4. Parcel 3, 4 &/or 5.
- g. The release prices for the Parcels shall be determined as follows ("**Release Price**").

1. **FMV.** Lender approves the sale price specified in the End-User Sale Agreement which must not be less than the fair market value and to an end-user consistent with the requirements in the Grant Deed.
2. **Parcel 1 Release Price:** The release price for Parcel 1 shall be calculated as follows:
  - a. Fifty percent (50%) of the Net Sale Proceeds (as defined below) shall be paid to the Unsecured Lender but not more than the remaining balance of the Unsecured Note. Unsecured Lender must provide a written verification under penalty of perjury of the current balance of the Unsecured Note. The amount to be paid to the Unsecured Lender must be paid by escrow directly to the Unsecured Lender upon receipt of the verification.
  - b. The balance of the Net Sale Proceeds must be paid directly by escrow to Lender to be applied in accordance with the Note.
3. **Parcel 2 Release Price:** If there is any outstanding balance under the Unsecured Note, the release price for Parcel 2, the Net Sale Proceeds shall be paid as follows:
  - a. To the Unsecured Lender but not more than the remaining balance of the Unsecured Note. Unsecured Lender must provide a written verification under penalty of perjury of the current balance of the Unsecured Note. The amount to be paid to the Unsecured Lender must be paid by escrow directly to the Unsecured Lender upon receipt of the verification.
  - b. The entire remaining balance, if any, of the Net Sale Proceeds must be paid directly by escrow to Lender to be applied in accordance with the Note.
4. **Parcel 3, 4, 5 & 6 Release Prices:** Once the Unsecured Note is paid in full, one hundred percent (100%) of the Net Sale Proceeds from the sale of Parcel 3, 4, 5 and/or 6 shall be paid by Escrow to Lender until the Note is paid in full.
5. **Overriding Limitation:** Notwithstanding the foregoing provisions for the calculation of release prices, after the release of a Parcel, the fair market value of the Parcels remaining secured by the Deed of Trust **must be equal** to not less than one hundred ten percent (110%) of the sum of (i) the remaining amount of the Loan, plus (ii) the remaining amount of the Purchase Money Deed of Trust. If requested by Lender, an appraisal of the remaining property shall be provided by Borrower to Lender from a MAI appraiser satisfactory to Lender.

**6. Net Sale Proceeds Definition:** “**Net Sale Proceeds**” shall mean the approved sale price of the Parcel less the following applicable items:

- i. The partial release amount to be paid to the Purchase Money Lender under the Purchase Money Deed of Trust for the applicable Parcel.
- ii. A commission to a third party broker not to exceed (a) two percent (2%) for sale of Parcel 1; (b) five percent (5%) for the sale of Parcel 2; and (iii) four percent (4%) for Parcel 3, 4, 5 & 6, but not more than the actual fees payable.
- iii. Standard title charges applicable to providing an ALTA non-extended title policy to the Buyer, but not to exceed the actual title charges.
- iv. Standard escrow charges applicable to commercial transactions in the County of San Bernardino, but not to exceed the actual charges.
- v. Non-delinquent real property taxes applicable to the Parcel.
- vi. Reimbursement to Developer of the amount of real property taxes it has actually paid excluding any penalties or fees for delinquent payments.
- vii. All Interest (both accrued Base Interest and the applicable amount of the Contingent Interest) to be paid to Lender.
- viii. A developer fee to be paid to Borrower as follows:
  - 1. Parcel 1: \$50,000.
  - 2. Parcel 2: \$50,000.
  - 3. Parcel 6: \$50,000
  - 4. First multi-tenant parcel sold: \$75,000.
  - 5. Second multi-tenant parcel sold: \$75,000.
  - 6. Third multi-tenant parcel sold: \$50,000.
- h. Concurrently with any partial release under the Deed of Trust, the same Parcel must also be released from the Purchase Money Deed of Trust pursuant to the terms thereof.
- i. Easement rights granted, conveyed, transferred, and assigned hereunder to Beneficiary which are appurtenant to individual Parcels will automatically be

released to Borrower from time-to-time with the release of any Parcels from the Deed of Trust, provided, however, such easement rights to be released will only be released as to the Parcels released and Beneficiary will retain such easement rights to all Property and improvements thereto, if any, remaining encumbered by the Deed of Trust.

- j. The portions of the Property remaining subject to the Deed of Trust shall have adequate ingress and egress and direct access to dedicated public streets and utilities.
- k. The following procedures shall be used for all releases:
  - i. Borrower's written request for the release must give the legal description of the portion of the Property to be released and must request Beneficiary to deposit its authorization for the partial release and its demand for payment and conditions including a specified escrow, which must be a title company or escrow company qualified and licensed to do an escrow business in California. The request must state the name and address of the escrow holder where the authorization for the partial release and demand are to be sent, the name of the escrow officer, and the escrow number.
  - ii. A new title policy or applicable endorsement as required by Lender to the Loan Title policy must be issued as a condition to the release.
  - iii. Within a reasonable time after its approval of a release, Beneficiary will deposit the authorization for the partial release and its demand in the escrow, but Beneficiary shall be obligated to do so only if Beneficiary has received from Borrower satisfactory evidence that all of the conditions to the release set forth herein have been satisfied.
  - iv. No release by Beneficiary will affect any of Borrower's obligations under the Deed of Trust or the other loan documents, except to the extent that payment is actually received by Lender. Any payments made to Lender for a release of a Parcel will be credited against the indebtedness secured by the Deed of Trust only upon actual receipt of the funds by Lender. Checks received by Lender will not be considered as payment until they are collected. Borrower will be fully responsible for the proper performance of Lender's demand by the escrow holder.
  - v. Borrower will pay all costs and expenses incurred in connection with any releases, including, but not limited to, any and all trustee's fees, reconveyance fees, recording fees, premiums for title insurance endorsements, Lender's costs in connection with such release(s), and escrow fees.





**EXHIBIT G**

**CERTIFICATE OF APPROVAL**

This is a Certificate of Approval as defined in that certain Construction Loan Agreement between AYALA & 210 PARTNERS, LLC, a Delaware limited liability company as Borrower, and the City of Rialto, as Lender, dated as of \_\_\_\_\_, 201\_\_.

All capitalized and undefined terms used in this Certificate shall have the meanings given them in such Construction Loan Agreement.

Borrower hereby certifies to Lender that *[since the date of the immediately preceding Certificate of Approval/since the date of the execution of the Loan Agreement]*, the following matters, which require the approval of Lender under the Loan Documents:

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The undersigned hereby certifies that the matters set forth above are true and correct as of this date.

Dated: \_\_\_\_\_, 20\_\_

**BORROWER:**

AYALA & 210 PARTNERS, LLC,  
a California limited liability company

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

Its: \_\_\_\_\_

☐

**APPROVED BY LENDER**

☐

**DISAPPROVED BY LENDER**

CITY OF RIALTO,  
a municipal corporation

By: \_\_\_\_\_  
City Administrator

Dated: \_\_\_\_\_, 201\_\_