

**DEVELOPMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF SAN JOSE  
AND  
RIVERVIEW APARTMENT DEVELOPMENT LLC  
RELATIVE TO THE DEVELOPMENT OF  
THE RIVERVIEW PROJECT  
IN SAN JOSE**

This Development AGREEMENT ("AGREEMENT") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2012 (the "EFFECTIVE DATE") by and between the City of San Jose, a municipal corporation ("CITY"), and Riverview Apartment Development LLC, a Delaware limited liability company ("RIVERVIEW"), pursuant to the authority of Sections 65864 through 65869.5 of the California Government Code (the "DEVELOPMENT AGREEMENT STATUTE") and pursuant to CITY's powers as a charter city, including, without limitation, CITY Ordinance No. 28986 (the "DEVELOPMENT AGREEMENT ORDINANCE").

**RECITALS**

A. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the legislature of the State of California adopted the DEVELOPMENT AGREEMENT STATUTE that authorizes CITY and an applicant for a development project to enter into a development agreement establishing certain development rights in the real property that is the subject of the development project application.

B. RIVERVIEW owns in fee title that certain real property approximately 29.2 gross acres in size, located at 3469/71 North 1<sup>st</sup> Street in the City of San Jose, County of Santa Clara, State of California, and more particularly described in EXHIBIT "A" attached hereto and incorporated herein by this reference, entitled "Subject Property Legal Description" (the "SUBJECT PROPERTY"), and RIVERVIEW seeks to demolish existing structures and attendant infrastructure such as \_\_\_\_\_ on the SUBJECT PROPERTY and develop on the SUBJECT PROPERTY, consistent with CITY's Envision San José 2040 GENERAL PLAN (the "GENERAL PLAN") and CITY's North San José Area Development Policy (the "NORTH SAN JOSE POLICY"), as amended to the EFFECTIVE DATE, and in conformance with and as described in the DEVELOPMENT APPROVALS as defined in Recital N below, a development project consisting of up to 1,329 residential units, up to 45,000 square feet of commercial space, and a 5.1 acre public park (the "PROJECT"). A portion of the SUBJECT PROPERTY will be conveyed for street and park purposes, as shown in more detail upon the map attached hereto as EXHIBIT "C" which is incorporated herein by this reference, and such real property shall be excluded from the definition of and shall not be part of the SUBJECT PROPERTY for purposes of this AGREEMENT once the dedication of the land for such street and park purposes is fully effectuated. The

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environmental impacts of the PROJECT and this AGREEMENT were disclosed, analyzed and evaluated as a part of that certain Final Environmental Impact Report prepared for the NORTH SAN JOSE POLICY in conformance with the California Environmental Quality Act of 1970, together with state and local implementation regulations and ordinances, all as amended to the EFFECTIVE DATE (collectively, "CEQA"), together with that certain addendum to the Final Environmental Impact Report prepared for the NORTH SAN JOSE POLICY (collectively, the Final Environmental Impact Report and the addendum thereto are referred to as the "PROJECT ENVIRONMENTAL CLEARANCE"). On December 5, 2012, the Planning Commission for the City of San José reviewed and considered the PROJECT ENVIRONMENTAL CLEARANCE and determined that it is adequate, accurate and objective prior to recommending approval of this AGREEMENT to CITY Council.

D. On December 5, 2012, the Planning Commission of CITY, designated by the DEVELOPMENT AGREEMENT ORDINANCE as the advisory agency for purposes of development agreement review, considered this AGREEMENT at a duly noticed public hearing and made appropriate findings that the provisions of this AGREEMENT are consistent with the GENERAL PLAN, as amended, and the DEVELOPMENT AGREEMENT ORDINANCE.

E. The City Council, after conducting a duly noticed public hearing on December 11, 2012, considered, confirmed and approved that the PROJECT ENVIRONMENTAL CLEARANCE adequately addresses the environmental impacts of the PROJECT at the SUBJECT PROPERTY and this AGREEMENT, approved under its Ordinance No. \_\_\_\_\_ the form of this AGREEMENT, authorized the execution of this AGREEMENT, and found that the provisions of this AGREEMENT are consistent with the GENERAL PLAN, as amended, and the DEVELOPMENT AGREEMENT ORDINANCE.

F. The parties hereto believe and understand that development of the PROJECT on the SUBJECT PROPERTY in accordance with the GENERAL PLAN and NORTH SAN JOSE POLICY, as amended, the DEVELOPMENT APPROVALS, and the provisions and conditions of this AGREEMENT will provide for the orderly growth and development of the SUBJECT PROPERTY in furtherance of the policies set forth in the GENERAL PLAN.

G. RIVERVIEW will comply with all applicable laws and conditions of approval to timely develop the PROJECT on the SUBJECT PROPERTY and ensure that development of the PROJECT on the SUBJECT PROPERTY is in accordance with the GENERAL PLAN, the NORTH SAN JOSE POLICY, the DEVELOPMENT APPROVALS and this AGREEMENT.

H. Health and Safety Code Section 33413(b)(2) ("INCLUSIONARY HOUSING ORDINANCE") provides that at least fifteen percent (15%) of all new or rehabilitated dwelling units developed with the Rincon de Los Esteros Redevelopment Project Area shall "be available at affordable housing cost to persons and families of low or moderate

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income” and that at least forty percent (40%) of that fifteen percent (15%) of dwelling units shall be available at affordable housing costs to very low-income households, as such income levels are defined in California Health and Safety Code §§ 50093 and 50105.

1. In order to satisfy the obligations under the INCLUSIONARY HOUSING ORDINANCE, CITY has adopted a policy to implement the INCLUSIONARY HOUSING ORDINANCE (“INCLUSIONARY HOUSING POLICY”) that requires the development of a certain number of affordable units within the PROJECT or provides various alternatives to the PROJECT of such affordable units, including the payment of an in-lieu fee.

2. In an effort to stimulate job growth and revenue, on November 2, 2010, CITY amended the INCLUSIONARY HOUSING POLICY to provide for agreements with developers, which agreements will serve as evidence that the rental requirements of the INCLUSIONARY HOUSING POLICY have been, or will be, satisfied, without developing on-site or off-site affordable units or paying an in-lieu fee or otherwise complying with the INCLUSIONARY HOUSING POLICY (“INCLUSIONARY RENTAL REQUIREMENTS”) with respect to a project or a phase thereof subject to satisfaction of certain conditions contained in such agreement.

3. The terms and provisions of this AGREEMENT shall in no way be deemed to nor shall in any way modify the terms and conditions of that certain Agreement Re: Satisfaction of Inclusionary Housing Requirements entered into under the provisions of the INCLUSIONARY HOUSING POLICY as of May 25, 2011 by the Redevelopment Agency of the City of San Jose, the City of San Jose and WTI, Inc., a California corporation, which agreement was recorded with the Santa Clara County Clerk-Recorder’s Office on June 6, 2011 as Document No. 21198870 (the “SATISFACTION AGREEMENT”).

I. The CITY finds that the PROJECT meets the criteria set forth in Section 18.02.210 of Chapter 18.02 of Title 18, adopted under the DEVELOPMENT AGREEMENT ORDINANCE, in that:

(1) Development of the PROJECT on the SUBJECT PROPERTY as described in the DEVELOPMENT APPROVALS is consistent with the GENERAL PLAN and NORTH SAN JOSE POLICY, as amended as of the EFFECTIVE DATE; and

(2) Development of the PROJECT should be encouraged because it will help meet important economic, social, environmental and planning goals of the CITY, including but not limited to: developing a fine-grain street network in North San Jose, developing a 5+ acre public park, locating housing near jobs to reduce commutes for San Jose residents, and redeveloping underutilized property near transit investment with housing and jobs so as to encourage use of transit; and

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(3) This AGREEMENT will facilitate the development of the PROJECT on the SUBJECT PROPERTY in the manner proposed in this DEVELOPMENT AGREEMENT in that it will allow the PROJECT as a non high-rise mixed use project, while providing for an extraordinary contribution towards high-rise and higher density projects utilizing Type III construction under the California Building Code; and

(4) RIVERVIEW will incur unusually substantial costs in order to provide extraordinary funding for high-rise housing from which the general public will benefit; and

(5) RIVERVIEW has made a commitment to a very high standard of quality for the PROJECT and has agreed to development standards beyond existing City requirements such as enhanced community amenities, high-quality landscaping and residential-supporting uses.

J. RIVERVIEW's strong commitment to high-quality development and the provision of extraordinary public benefits in connection with the PROJECT are material considerations inducing CITY to enter into this AGREEMENT with RIVERVIEW insofar as CITY expects to receive substantial benefits from the development of the PROJECT on the SUBJECT PROPERTY, including the creation of additional housing opportunities for existing and new residents, increased public park amenities, Type III construction for mid-rise living spaces under the California Building Code, retail uses, construction of a fine grain street network in North San Jose and the creation of transit-oriented residential development, all of which will contribute to the overall in-fill development and planning goals and policies of the CITY.

K. Pursuant to the DEVELOPMENT APPROVALS, the CITY has approved and entitled the SUBJECT PROPERTY for the development of the PROJECT.

L. This AGREEMENT will eliminate or significantly diminish uncertainty in development planning and provide for the orderly development of the SUBJECT PROPERTY with the PROJECT in accordance with the timeframes set forth in this AGREEMENT (and the Phasing Plan set forth in the SATISFACTION AGREEMENT facilitate the ability to provide high-rise housing through extraordinary contributions from RIVERVIEW, and otherwise achieve the goals and purposes for which CITY has enacted the DEVELOPMENT AGREEMENT ORDINANCE. In exchange for the benefits provided to the CITY, together with the public benefits served by development of the SUBJECT PROPERTY, RIVERVIEW desires to receive assurance that it may proceed with the PROJECT on the SUBJECT PROPERTY in accordance with the DEVELOPMENT APPROVALS. RIVERVIEW would not proceed to develop the PROJECT at this time were it not assured that the entire PROJECT could be developed on the SUBJECT PROPERTY in accordance with the DEVELOPMENT APPROVALS.

M. CITY and RIVERVIEW have taken all actions mandated by and fulfilled all requirements set forth in the DEVELOPMENT AGREEMENT ORDINANCE of CITY.

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N. The following prior approvals of CITY have been granted with respect to the SUBJECT PROPERTY and RIVERVIEW's development of the PROJECT (collectively, the "DEVELOPMENT APPROVALS"):

- (1) Those certain approvals listed upon EXHIBIT D to this AGREEMENT, entitled "DEVELOPMENT APPROVALS," attached hereto and incorporated herein by this reference; and

O. For the reasons recited herein, the parties each have determined for themselves that the PROJECT is a development for which this AGREEMENT is appropriate.

## AGREEMENTS

### Section 1. General Provisions

#### A. SUBJECT PROPERTY Description

The SUBJECT PROPERTY is that certain real property located in the City of San Jose, County of Santa Clara, State of California and more particularly described in the Subject Property Legal Description, attached hereto as EXHIBIT "A," provided, however, that once the dedication of those certain lands to CITY for street and park purposes as shown upon the map attached to this AGREEMENT as EXHIBIT "C" has been effectuated, those dedicated lands shall thereafter not be included or deemed to be a part of the SUBJECT PROPERTY.

#### B. Term

The term of this AGREEMENT shall commence upon the later of the EFFECTIVE DATE set forth hereinabove or the EFFECTIVE DATE of Ordinance No. \_\_\_\_\_ approving this AGREEMENT (hereinafter, the "ADOPTING ORDINANCE") and shall extend to December 31, 2017 thereafter, unless said term is earlier terminated, modified or extended by circumstances set forth in this AGREEMENT or by mutual consent of the parties hereto, subject to the terms and conditions of this AGREEMENT. Following the expiration or termination of said term, this AGREEMENT shall be deemed terminated and of no further force and effect.

#### C. Notices

Formal written notices, demands, correspondence and communications between CITY and RIVERVIEW shall be deemed sufficiently given if dispatched by postage-prepaid, first class mail, or by personal service to the principal offices of CITY or RIVERVIEW, as appropriate, and as set forth in SECTION 10 herein below. Such written notices, demands, correspondence and communications may be directed in the same manner to

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such other persons and addresses as either party may from time to time designate by notice to the other that meets the noticing provisions hereof.

**D. Amendment or Cancellation of AGREEMENT**

This AGREEMENT may be amended or cancelled, in whole or in part, from time to time by mutual consent of the parties hereto, with CITY costs payable by amendment applicants, in accordance with the provisions of California Government Code Sections 65867 and 65868 and the schedule of fees adopted by resolution of CITY's City Council, subject to the following:

(1) The procedure for an amendment or cancellation of this AGREEMENT shall be as specified in the DEVELOPMENT AGREEMENT ORDINANCE, and this AGREEMENT is subject to termination or modification pursuant to the provisions of the DEVELOPMENT AGREEMENT ORDINANCE.

(2) The issuance of any land use approval or permit that approves an increase in density, intensity of use, maximum height or maximum size of buildings, or a change in the permitted uses, provisions for reservation and dedication of land, conditions, terms, restrictions and requirements relating to subsequent discretionary actions, monetary contributions by RIVERVIEW, or any other VESTED ELEMENT set forth in this AGREEMENT, shall require an amendment to this AGREEMENT for such change to be vested, but RIVERVIEW shall have the right to develop the SUBJECT PROPERTY in accordance with any such amendment changing a VESTED ELEMENT at its election without adversely affecting vesting with respect to other VESTED ELEMENTS not changed by such amendment.

(3) Any change in the design or other elements of the PROJECT that are not specified in this AGREEMENT to be a VESTED ELEMENT shall not require an amendment to this AGREEMENT. The Director of Planning, Building and Code Enforcement ("DIRECTOR") shall be authorized to make a determination as to whether an amendment to this AGREEMENT is necessary.

E. RIVERVIEW shall not sell, assign, or transfer any of its interests or obligations under this AGREEMENT with respect to the SUBJECT PROPERTY, or any portion thereof, without the prior written consent of CITY, which consent shall not be unreasonably withheld.

**Section 2. Development of the SUBJECT PROPERTY**

**A. VESTED ELEMENTS**

The permitted use(s) of the SUBJECT PROPERTY, the maximum density and intensity of use(s), the maximum height and maximum square footage of the proposed buildings

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and maximum residential units, as well as provisions for reservation or dedication of land for public purposes, and provisions for public improvements, and other terms and conditions of development applicable to the SUBJECT PROPERTY are referred to as vested elements of this AGREEMENT ("VESTED ELEMENTS") and are set forth in the following documents and approvals as noted below:

- (1) The DEVELOPMENT APPROVALS;
- (2) The PROJECT ENVIRONMENTAL CLEARANCE;
- (3) This AGREEMENT.

For purposes of this AGREEMENT, VESTED ELEMENTS are vested in order to provide assurance to RIVERVIEW that the PROJECT can be built on the SUBJECT PROPERTY in conformance with the DEVELOPMENT APPROVALS granted by the CITY as described in this AGREEMENT, subject to the limitations and provisions of this AGREEMENT and the SATISFACTION AGREEMENT.

B. Phase Construction

(1) RIVERVIEW shall commence and complete each phase of the PROJECT ("PHASE") in accordance with the phasing plan attached hereto as EXHIBIT "B" and incorporated herein by this reference (the "PHASING PLAN"). For each PHASE, the INCLUSIONARY RENTAL REQUIREMENTS shall be deemed satisfied once RIVERVIEW has obtained any building permit (including, among others, a foundation permit) and commenced construction of such respective PHASE.

(2) Subject to the provisions of SECTION 9 of this AGREEMENT below, if RIVERVIEW fails to commence and complete a PHASE of the PROJECT by the time set forth in the PHASING PLAN, this AGREEMENT shall automatically terminate and be of no further force and effect with respect to any future PHASE for which RIVERVIEW has not yet obtained a building permit and commenced construction. RIVERVIEW acknowledges and agrees that a failure to commence or complete the PROJECT or a PHASE thereof within the time periods required hereunder and in the PHASING PLAN shall constitute a material breach of this AGREEMENT, in which case this AGREEMENT shall terminate and be of no further force and effect with respect to any future PHASE for which RIVERVIEW has not yet obtained a building permit and commenced construction.

(3) If this AGREEMENT terminates and RIVERVIEW has not obtained a building permit for a future PHASE of the PROJECT, then such future PHASE shall be subject to the INCLUSIONARY HOUSING POLICY existing as of the date that RIVERVIEW obtains a building permit for such PHASE.

(4) For purposes of this AGREEMENT, a PROJECT or PHASE thereof shall be deemed completed upon receipt by RIVERVIEW of a Certificate of

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Occupancy from the CITY. A "Certificate of Occupancy" shall mean the permit issued by San Jose Building Division authorizing the initial occupancy of a residential unit, including a temporary certificate of occupancy, for the PROJECT or the particular PHASE.

(5) Notwithstanding any changes in the INCLUSIONARY HOUSING POLICY that apply to rental units, RIVERVIEW shall not be required to comply with any changes in the INCLUSIONARY HOUSING POLICY adopted or approved by CITY after the EFFECTIVE DATE provided that RIVERVIEW is in full compliance with the terms of this AGREEMENT and the SATISFACTION AGREEMENT.

(6) The parties hereby acknowledge and agree that:

(a) RIVERVIEW is relying on the terms of this AGREEMENT, including the satisfaction of INCLUSIONARY RENTAL REQUIREMENTS, as a material inducement to proceed with construction of the PROJECT in accordance with the PHASING PLAN, which includes very significant upfront investment required by RIVERVIEW for the PROJECT.

(b) CITY is relying upon the terms of this AGREEMENT, including the commencement and construction of the PROJECT in accordance with the PHASING PLAN and the SATISFACTION AGREEMENT, as consideration for the CITY'S determination that RIVERVIEW has satisfied the INCLUSIONARY RENTAL REQUIREMENTS.

(c) Subject to the provisions of this AGREEMENT, CITY retains and reserves the power to amend the INCLUSIONARY HOUSING POLICY and to enact, enforce or amend other land use ordinances or policies (including, without limitation, the INCLUSIONARY HOUSING ORDINANCE), the effect of which could be to require satisfaction of INCLUSIONARY RENTAL REQUIREMENTS for the PROJECT ("RESERVED POWER").

(d) Notwithstanding anything to the contrary in this AGREEMENT, including without limitation, Section 2.b.(5)(c) above, if RIVERVIEW has obtained all discretionary and building permits for and commenced construction of a PHASE and is proceeding with construction of the PROJECT in accordance with the PHASING PLAN, the SATISFACTION AGREEMENT and this AGREEMENT, RIVERVIEW shall be deemed to have a right to proceed with any remaining PHASES of the PROJECT in accordance with the PHASING PLAN, the SATISFACTION AGREEMENT, and this AGREEMENT. If for any reason notwithstanding the rights described in the foregoing sentence, the effect of CITY'S exercise of RESERVED POWER is to impose inclusionary housing requirements on the PROJECT despite this AGREEMENT, CITY shall use other means or resources to satisfy those inclusionary housing requirements for the PROJECT.

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C. Reserved Discretionary Approvals

Planned Development Permit PD07-090 has been approved and adopted for the development of the PROJECT on the SUBJECT PROPERTY and is a VESTED ELEMENT under this AGREEMENT. RIVERVIEW will need to obtain further discretionary approvals to complete construction and development of the PROJECT on the SUBJECT PROPERTY as described in the VESTED ELEMENTS, including without limitation the DEVELOPMENT APPROVALS (such necessary future approvals are collectively referred to herein as "RESERVED DISCRETIONARY APPROVALS"). CITY agrees to cooperate with RIVERVIEW to facilitate the processing of all future applications for such RESERVED DISCRETIONARY APPROVALS, and CITY shall exercise its discretion in a manner consistent with and in recognition of this AGREEMENT and the other VESTED ELEMENTS. CITY and RIVERVIEW shall meet to identify all necessary RESERVED DISCRETIONARY APPROVALS and to develop a schedule for timely processing of such RESERVED DISCRETIONARY APPROVALS. CITY and RIVERVIEW agree to cooperatively work together to ensure timely review and processing of the RESERVED DISCRETIONARY APPROVALS.

D. Rules, Regulations and Official Policies

(1) Development of the SUBJECT PROPERTY shall be subject to all standards in the GENERAL PLAN, NORTH SAN JOSE POLICY, the zoning code, and other rules, regulations, ordinances and official policies of CITY applicable to the ability to develop the PROJECT on the SUBJECT PROPERTY as amended and except as otherwise provided herein.

(2) This SECTION shall not preclude the application to development of the PROJECT or the SUBJECT PROPERTY of changes in CITY laws, regulations, plans or policies, the terms of which are specifically mandated and required by changes in State or Federal laws or regulations. In the event State or Federal laws or regulations enacted after the EFFECTIVE DATE of this AGREEMENT or action by any governmental jurisdiction other than the CITY prevent or preclude compliance with one or more provisions of this AGREEMENT or require changes in plans, maps or permits approved by the CITY, this AGREEMENT shall be modified, extended or suspended as may be necessary to comply with such State or Federal law or regulation or the regulation of such other governmental jurisdiction.

(3) This SECTION shall not be construed to limit the authority or obligation of CITY to hold necessary public hearings or to limit the discretion of CITY or any of its officers or officials with regard to rules, regulations, ordinances, laws and entitlements of use which require the exercise of discretion by CITY or any of its officers or officials, provided that subsequent discretionary actions shall not be in conflict with the VESTED ELEMENTS.

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(4) Notwithstanding anything herein to the contrary, all applications for approvals, permits and entitlements shall be subject to the development and processing fees and taxes which are in force and effect at the time the application therefor is filed.

E. Nothing herein shall be construed to limit the authority of the CITY to adopt and apply codes, ordinances, regulations and policies which have the legal effect of protecting persons or property from dangerous or hazardous conditions which create a substantial physical risk. This subsection is not intended to be used for purposes of general welfare or to limit intensity of development or use, but to protect and recognize the authority of the CITY to deal with endangerment's not adequately addressed at the time of the adoption of this AGREEMENT.

F. Codes, ordinances and regulations relating to construction standards or permits, for example, building and fire codes, shall apply as of the time of grant of each applicable construction permit. DEVELOPER shall have the opportunity to file for Building Permits in reliance on Building Codes in place at the time of submittal of plans for a Plan Check, including approved Alternative Means and Methods of Construction, for a given building to be used for the Plan Check and construction if such Plan Check and construction commencement occurs in a manner consistent with the adopted Building Codes.

### **Section 3. Obligations of the Parties**

#### **A. RIVERVIEW's Obligations**

(1) Development. If RIVERVIEW elects to develop the PROJECT on the SUBJECT PROPERTY, RIVERVIEW shall carry out its obligations to develop the SUBJECT PROPERTY and PROJECT as required by the DEVELOPMENT APPROVALS, consistent with the VESTED ELEMENTS, and shall fully and timely comply with all of the terms and conditions of this AGREEMENT, including without limitation the PHASING PLAN.

#### **(2) High Rise Incentive Contribution.**

(a) The parties acknowledge and agree that development of the SUBJECT PROPERTY is subject to the NORTH SAN JOSE POLICY, including without limitation the phasing requirements and limitations for residential development in the NORTH SAN JOSE POLICY area, as amended as of the EFFECTIVE DATE.

(b) The parties further acknowledge their mutual understanding that as of December 5, 2012: (i) the SUBJECT PROPERTY does not contain an important, vital or driving industrial use, as only one of the structures located on the SUBJECT PROPERTY is occupied; (ii) the SUBJECT PROPERTY is not adjacent to an industrial use that would be adversely affected by a residential development, and (iii) the SUBJECT PROPERTY is not located in close proximity to a use that would create a hazardous condition for proposed residential development.

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(c) RIVERVIEW agrees to pay to CITY, by wire transfer to an account selected by CITY and in the manner set forth in this AGREEMENT, a contribution in the total amount of Three Million Dollars (\$3,000,000) (the "HIGH RISE INCENTIVE CONTRIBUTION"), due at the time that the first building permit is issued for Parcel 1 of the PROJECT on the SUBJECT PROPERTY or by \_\_\_\_\_ 201\_\_\_\_, whichever date first occurs.

**B. CITY's Obligations.**

(1) Residential Construction. Upon the EFFECTIVE DATE of this AGREEMENT, CITY agrees to allow RIVERVIEW to construct Type V construction under the California Building Code for Parcels 2 and 3 of the PROJECT on the SUBJECT PROPERTY, but the parties hereto agree that only Type III or Type I construction under the California Building Code may occur on Parcel 1 of the PROJECT on the SUBJECT PROPERTY. CITY agrees not to place design or construction conditions or requirements on the PROJECT that require the highest occupiable floor to be of such height that federal, state or local high-rise requirements are triggered (current California Building Code triggers high-rise requirements where the highest occupied floor is 75 feet above finished grade elevation). The Alternative Means and Methods of Construction granted by the Building Official for Parcel 1 of the PROJECT on the SUBJECT PROPERTY is consideration to RIVERVIEW for the proposed Type III building.

(2) Commercial Component. Upon the EFFECTIVE DATE of this AGREEMENT, CITY agrees to consider as adequate development of the PROJECT on the SUBJECT PROPERTY by RIVERVIEW the quantity of commercial space proposed for the PROJECT if such plans contain not less than 10,000 and not more than 25,000 square feet of net commercial space (actual floor area of commercial space excluding, without limitation, any support area or commercial corridors).

(3) CITY's Processing of Applications. CITY agrees that it will accept, process and review all complete applications for development permits necessary to construct and develop the PROJECT on the SUBJECT PROPERTY in accordance with the terms and conditions of the VESTED ELEMENTS, including the terms of this AGREEMENT, and all other applicable laws, regulations and policies.

**Section 4. Default, Remedies, Termination.**

A. General Provisions. The provisions relating to defaults, remedies, termination and annual review of this AGREEMENT shall be those provisions set forth in Sections 13 and 15 of the DEVELOPMENT AGREEMENT ORDINANCE, which are incorporated herein by this reference. The goal of this AGREEMENT is to fully implement the PROJECT on the SUBJECT PROEPRTY as described in this AGREEMENT. Reasonable notice and a reasonable opportunity to cure a default under this

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AGREEMENT shall be provided by each party to the other in order to allow the intended implementation of this AGREEMENT according to its terms and provisions.

B. Developer Default; Enforcement. No building permit shall be issued or building permit application accepted for the building shell of any structure on the SUBJECT PROPERTY unless it is a high rise development that comports with the DEVELOPMENT APPROVALS if RIVERVIEW is in default under the terms and conditions of this AGREEMENT.

C. Default by City. In the event CITY is in default under the terms of this AGREEMENT, CITY agrees that RIVERVIEW shall not be obligated to develop Parcel 1, 2 or 3 of the PROJECT in the manner described under this AGREEMENT, until CITY cures such default, and any resulting delays in RIVERVIEW's performance directly caused by CITY's default shall not constitute grounds for termination or cancellation of this AGREEMENT by CITY due to and to the extent of such resulting performance delays by RIVERVIEW.

D. Legal Actions. In addition to any other rights or remedies, a party may institute legal proceedings for mandamus, specific performance or other injunctive or declaratory relief to enforce this AGREEMENT. In no event shall the CITY be liable in damages for any breach or violation of this AGREEMENT.

In the event this AGREEMENT shall be found void for any reason whatsoever, neither party shall be limited to any remedy in law or equity available at the time the AGREEMENT is found void.

E. Applicable Law and Attorney's Fees. This AGREEMENT shall be construed and enforced in accordance with the laws of the State of California. Should any legal action be brought by a party for breach of this AGREEMENT or to enforce any provision herein, the prevailing party of such action shall be entitled to reasonable attorney's fees, court costs and such other costs as may be fixed by the court. Reasonable attorney's fees of the City Attorney's Office shall be based on comparable fees of private attorneys practicing in Santa Clara County.

#### **Section 5. Hold Harmless Agreement.**

RIVERVIEW hereby agrees to and shall hold CITY, its elective and appointive boards, commissions, officers, agents and employees harmless from any liability for damage or claims for damage for personal injury, including death, as well as from claims for property damage which may arise from RIVERVIEW's or RIVERVIEW's contractors', subcontractors', agents' or employees' operations under this AGREEMENT, whether such operations be by RIVERVIEW, or by any of RIVERVIEW's contractors, subcontractors, or by any one or more persons directly or indirectly employed by, or acting as agent for RIVERVIEW or any of RIVERVIEW's contractors or subcontractors,

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excepting suits and actions brought by the RIVERVIEW for default of this AGREEMENT or arising from the sole active negligence or willful misconduct of the CITY. RIVERVIEW agrees to and shall pay CITY's costs of defense (or, at the sole option of CITY, RIVERVIEW shall defend with counsel approved by the City Attorney) and indemnify CITY and its elective and appointive boards, commissions, officers, agents and employees from any suits or actions at law or in equity arising out of the execution, adoption or implementation of this AGREEMENT (exclusive of any such actions brought by RIVERVIEW), such indemnification to include all costs of defense, judgments and any awards of attorneys' fees.

**Section 6. PROJECT as a Private Undertaking.**

It is specifically understood and agreed by and between the parties hereto that the development of the SUBJECT PROPERTY is a separately undertaken private development. No partnership, joint venture or other association of any kind between RIVERVIEW and CITY is formed by this AGREEMENT.

**Section 7. General/No Third Party Beneficiary.**

A. The CITY agrees that unless this AGREEMENT is amended or canceled pursuant to the provisions of this AGREEMENT and the DEVELOPMENT AGREEMENT ORDINANCE, this AGREEMENT shall be enforceable according to its terms, subject to the RESERVED DISCRETIONARY APPROVALS and other matters set forth herein, by RIVERVIEW notwithstanding any change hereafter in any applicable general plan, zoning ordinance, subdivision ordinance or building regulation adopted by CITY which changes, alters or amends the rules, regulations and policies applicable to the development of the PROJECT on the SUBJECT PROPERTY at the time of approval of this AGREEMENT, as provided by Government Code Section 65866. Nothing herein shall be construed to limit the authority of CITY to fix the amount of fees or charges which may otherwise lawfully be imposed by CITY, as set forth in Section 2 of this AGREEMENT.

B. CITY hereby finds and determines that execution of this AGREEMENT is in the best interest of the public health, safety and general welfare and is consistent with the GENERAL PLAN and DEVELOPMENT AGREEMENT ORDINANCE.

C. Nothing in this AGREEMENT is intended to create duties or obligations to or rights in third parties not parties to this AGREEMENT.

**Section 8. Duplicate Originals.**

This AGREEMENT is executed in \_\_\_\_\_ ( ) duplicate originals, each of which is deemed to be an original. This AGREEMENT consists of \_\_\_\_\_ pages and \_\_\_\_\_ ( ) exhibits which together constitute the entire understanding and agreement of the parties

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with respect to the matters covered hereunder. This AGREEMENT may be executed in counterparts which, in the aggregate, shall constitute a whole and complete document. Said exhibits are identified as follows:

Exhibit "A"	Legal Description of SUBJECT PROPERTY
Exhibit B	PHASING PLAN
Exhibit C	MAP of SUBJECT PROPERTY
Exhibit D	DEVELOPMENT APPROVALS

**Section 9. Enforced Delay**

In addition to specific provisions of this AGREEMENT, no party shall be deemed to be in default under this AGREEMENT where delays in performance or failure to perform are due to war, insurrection, strikes, or other labor disturbances, walkouts, riots, floods, earthquakes, fires, inclement weather, casualties, acts of God, governmental restrictions imposed or mandated by other governmental entities in connection with Other Laws, enactment of conflicting Other Laws, judicial decisions, administrative appeals, litigation, the general unavailability of construction or permanent financing for projects similar to the PROJECT or similar basis for excused performance when such event or occurrence is not within the reasonable control of the party to be excused. Upon the request of any party hereto, extension of time for such cause will be granted for the period of the enforced delay, or longer, as may be and when mutually agreed upon.

**Section 10. Notice Addresses**

City: City of San Jose  
 Attn: Director of Planning, Building and Code Enforcement  
 200 East Santa Clara Street, 12<sup>th</sup> Floor Tower  
 San Jose, California 95113

Riverview: Riverview Apartment Development LLC  
 c/o The Irvine Company LLC  
 Attn: Legal Affairs  
 550 Newport Center Drive  
 Newport Beach, California 92660

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**Section 11. Recordation**

Within ten (10) days after the EFFECTIVE DATE, the CITY's City Clerk shall have this AGREEMENT recorded with the County Recorder. If the parties to this AGREEMENT or their successors in interest amend, cancel, or if either party terminates this AGREEMENT as hereinabove provided, CITY's City Clerk shall have notice of such action recorded with the County Recorder. RIVERVIEW shall be responsible for any recording charges incurred by CITY pursuant to this AGREEMENT.

**Section 12. Number of Days**

Provisions in this AGREEMENT relating to number of days shall be calendar days, unless otherwise specified, provided that if the last day of any period to give notice, reply to a notice or to undertake any other action occurs on a Saturday, Sunday or a bank or CITY holiday, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding CITY working day.

**Section 13. No Party Drafter: Captions**

The parties hereto each participated in the drafting of this AGREEMENT. Accordingly, the provisions of this AGREEMENT shall be construed as a whole according to their common meaning and not strictly for or against any party in order to achieve the objectives and purposes of the parties. Any caption preceding the text of any section, paragraph or subsection is included only for convenience of reference and shall be disregarded in the construction and interpretation of this AGREEMENT.

**Section 14. Conduct**

In all situations arising out of this AGREEMENT, the parties shall each attempt to avoid and minimize the damages resulting from the conduct of the other and shall take all reasonably necessary measures to achieve the provisions of this AGREEMENT.

**Section 15. Further Assurances**

RIVERVIEW and CITY each covenant, on behalf of itself and its successors, heirs and assigns, to take all actions and to do all things required by law, and to execute, with acknowledgement or affidavit if required, any and all documents and writings that may be necessary or proper to achieve the purposes and objectives of this AGREEMENT.

**Section 16. Cooperation and Non-Interference**

RIVERVIEW and CITY, each, shall refrain from doing anything that would render its performance under this AGREEMENT impossible and each shall do everything which this AGREEMENT contemplated that the party shall do to accomplish the objectives and purposes of this AGREEMENT.

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IN WITNESS WHEREOF, this AGREEMENT is entered into by the parties hereto and made effective as of the EFFECTIVE DATE set forth hereinabove.

"CITY"

CITY of San Jose, a municipal corporation

Approved as to form:

\_\_\_\_\_  
Senior Deputy City Attorney

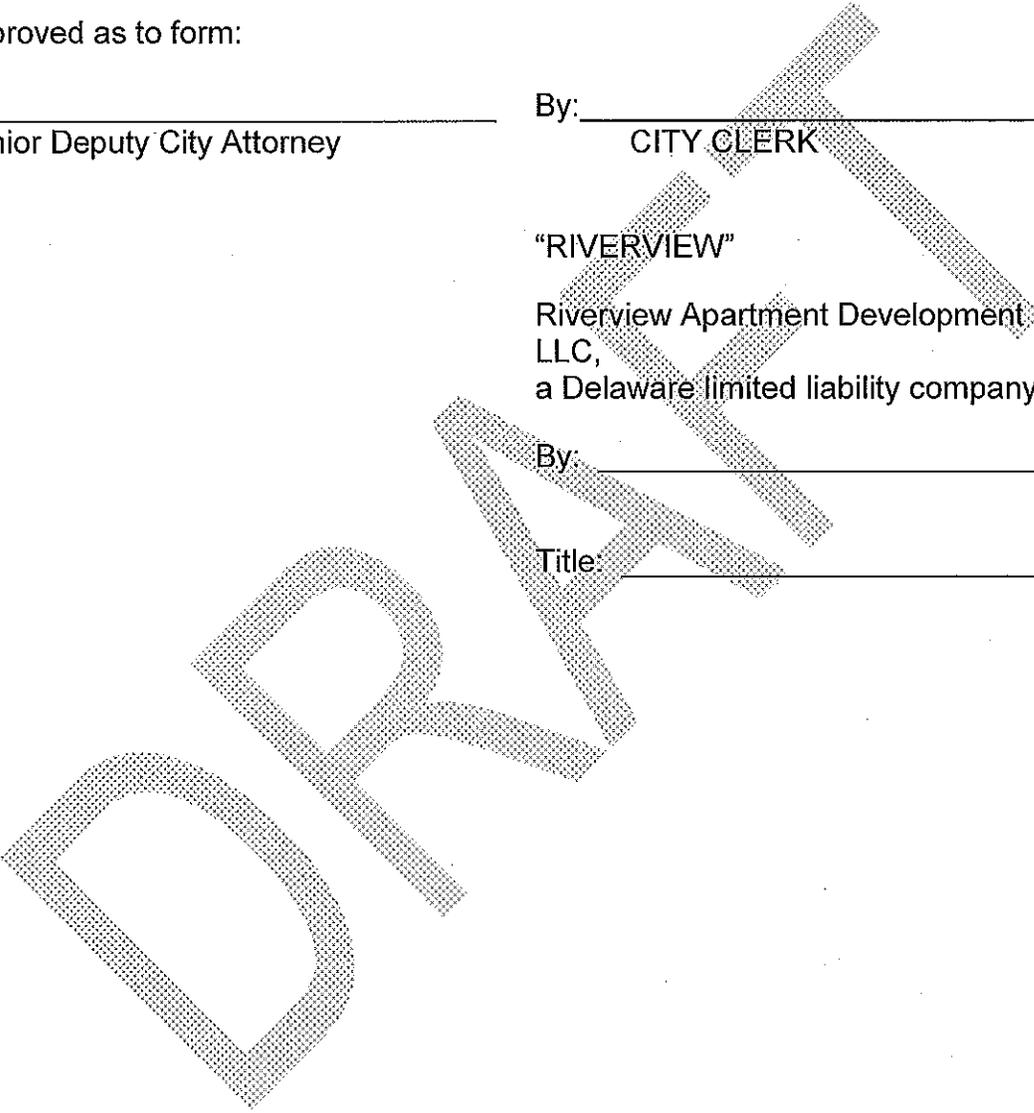
By: \_\_\_\_\_  
CITY CLERK

"RIVERVIEW"

Riverview Apartment Development LLC,  
a Delaware limited liability company

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

Title: \_\_\_\_\_



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**EXHIBIT "A"**

**SUBJECT PROPERTY LEGAL DESCRIPTION**

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**EXHIBIT "B"**  
**PHASING PLAN**

- Second and Third Phases – Commence construction by September 30, 2013  
Complete construction by March 30, 2016  
Second Phase – 115 units (Parcel 6) – where are Parcel numbers shown?  
Third Phase – 200 units (Parcel 5)
- Fourth or Greater Phases – Commence construction by September 30, 2014  
Complete construction by March 30, 2017  
Fourth Phase and subsequent phases – 1014 units (Parcel 1, 2 and 3) – where are parcels listed?  
Parcel 1 will be delivered first

Where are Phases described/labeled?]

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**EXHIBIT "C"**

**Map of Parcels 1-6**

[Where is this defined or referred to in  
AGREEMENT?]

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**EXHIBIT "D"**  
**DEVELOPMENT APPROVALS**

General Plan Amendment: GP05-04-08  
Planned Development Zoning: PDC07-057  
Planned Development Permit: PD07-090  
Tentative Map: PT07-101  
Planned Development Permit Amendment: PDA07-090-01 (Revise Phasing)  
Planned Development Permit Amendment: PDA07-090-02 (Architecture, reduce units)  
Planned Development Permit Amendment: PDA07-090-03 (Tree Removal)  
Planned Development Permit Amendment: PDA07-090-04 (Phase 1) - pending  
Permit Adjustment: AD10-077 (Permit Extension)  
Permit Adjustment: AD12-216 (Street light fixtures)  
Permit Adjustment: AD12-539 (Phase 5)  
Permit Adjustment: AD12-540 (Phase 6)  
Permit Adjustment: AD12-755 (Temporary Chilling unit)

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