CITY OF PALM DESERT
STAFF REPORT

MEETING DATE: November 17, 2022

PREPARED BY: Eric Ceja, Director of Economic Development
Veronica Chavez, Director of Finance

REQUEST: APPROVE A SECOND AMENDMENT TO THE DISPOSITION AND DEVELOPMENT AGREEMENT (DDA) BETWEEN THE CITY OF PALM DESERT AND DESERT WAVE VENTURES, LLC, AND TAKING CERTAIN OTHER NECESSARY RELATED ACTIONS

RECOMMENDATION:

1. Approve the Second Amendment to the DDA between the City of Palm Desert and Desert Wave Ventures, LLC.
2. Approve a Transient Occupancy Tax (TOT) Agreement (Attachment 8) as-to-form with Desert Wave Ventures, LLC, in an amount not to exceed $20M for the operation of a 137-room upscale hotel on parcel B within the Desert Willow Golf Resort.
3. Approve a Loan Agreement (Attachment 11) as-to-form with Desert Wave Ventures, LLC and appropriate funds to cover certain developer impact fees (DIF) in an amount not to exceed $6M from monies available in the Golf Course Capital Fund.
4. Authorize the City Manager to make non-substantive changes to the DDA, TOT, and Loan Agreement as needed prior to execution by the Mayor.
5. Authorize the City Manager to draft, negotiate, and execute all other supporting agreements that may be required by the DDA, including an Acquisition Agreement (Attachment 7) as to form.
6. Authorize the Mayor to execute said Agreements.

BACKGROUND/ANALYSIS:

On January 27, 2022, the City Council approved modifications to the DSRT Surf Specific Plan, Precise Plan, and DDA, for the development of a 5.5-acre surf lagoon and resort hotel and villa project at Desert Willow Golf Resort. Since the approval in January, the applicant has:

- Received Architectural Review Commission (ARC) approval to modify the hotel design to increase the room-count of the hotel project from 92-room to 137-rooms,
- Determined project phasing, and
- Secured a portion of project financing.

With the ability to obtain some project financing, the applicant approached City staff with a request to modify the DDA to include additional City participation. The request is made based on the developer's discussions with potential hoteliers' operational needs, rising interest rates, and increased construction costs. Below is a summary of the proposed amendment to the DDA that includes additional City participation associated with the project:

City Participation	Adopted DDA (Jan 2022)	Proposed DD (Nov 2022)
Bond Proceeds – Public Improvements	20,000,000	20,000,000

TOT Rebate	16,100,000	20,000,000
City Land Transfer	455,000	455,000
City Loan – DIF's*	0	6,000,000
Total City Participation	**36,555,000**	**46,455,000**

***Note: To be paid back in $1M annual increments plus interest.**

Discussion
Changes to the DDA were initiated by the developer and the City has negotiated the following:

1. Developer to show proof of 100% financing for the project costs prior to permit issuance.

2. Developer agrees to a "Supplemental Surf Lagoon Water Use Assurance" agreement that requires remediation of excessive water use beyond the lagoon's anticipated water use approved by the Water Supply Assessment (WSA). The supplemental agreement requires annual reporting of water use to the City and requires to the developer to cure excessive water use within 90-days by conserving water elsewhere within the project.

3. The Developer also agrees to include a Performance Deed of Trust and Security Agreement (Attachment 10) which includes a reversion clause that requires the developer to quit claim the land back to the City if construction fails to begin by June 1, 2023.

Generally, the developer has requested an additional $10M in City contributions to the project. The new terms of the DDA provide the City new protections to redeem ownership of the land in the event of Developer default, provides greater assurances to limit excessive water use, and anticipates an increased return on investment to the City for additional support through a loan and TOT reimbursement agreement.

FINANCIAL IMPACT:

In addition to the various economic and community benefits related to this project, the anticipated net revenue generated for the General Fund by the City's investment of $26.45M is conservatively expected to be $26.9M over 20 years, plus direct repayment of the $6M loan from the Golf Course Capital Fund in the first 6 years of operation.

REVIEWED BY:

Department Director:	*Eric Ceja*
City Attorney:	*Carlos Campos for Robert Hargreaves*
Finance Director:	*Veronica Chavez*
Assistant City Manager:	*Chris Escobedo*
City Manager:	

ATTACHMENTS:

1. Second Revised and Restated Disposition and Development Agreement and Attachments

SECOND REVISED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT

by and among

CITY OF PALM DESERT
("City")

and

DESERT WAVE VENTURES, LLC
a Delaware limited liability company
("Developer")

DSRT SURF HOTEL, RESIDENTIAL UNITS, SURF CENTER AND LAGOON

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Attachment No. 5	Legal Description of the Project Site
Attachment No. 6	Form of City Cost Reimbursement Agreement
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SECOND REVISED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT

DSRT Surf Hotel, Residential Units, Surf Center, and Lagoon Project

This Revised and Restated Disposition and Development Agreement (this "Agreement") is entered into as of November __, 2022 (the "Execution Date"), by and among the CITY OF PALM DESERT, a chartered municipal corporation (the "City"), and DESERT WAVE VENTURES, LLC, a Delaware limited liability company (the "Developer"). The City and Developer are the sole parties (each, a "Party" and, collectively, the "Parties") to this Agreement. The "Effective Date" shall be November 17, 2022.

RECITALS

This Agreement is based upon the following recitals, facts and understandings of the Parties:

A. The City and Developer entered into that certain Disposition and Development Agreement, dated December 30, 2019 (the "Original DDA"). The City and Developer subsequently entered into that certain Revised and Restated Disposition and Development Agreement, dated April 22, 2022 (the "First Revised DDA"). The Parties now intend to revise and restate the First Revised DDA with this Agreement. The provisions of this Agreement shall completely supersede both the Original DDA and the First Revised DDA, and shall prevail over any inconsistent provisions in the Original DDA and First Revised DDA

B. The City and Developer have entered into that certain Purchase Option Agreement dated August 15, 2018 ("City POA"), for the sale of up to 3.03 acres (APNs 620-400-008 & 620-420-024) (the "City Property") and the Successor Agency to the Redevelopment Agency of the City of Palm Desert ("SARDA") and Developer have entered into that certain Purchase Option Agreement dated August 15, 2018, as amended by the First Amendment to Real Estate Option and Purchase and Sale Agreement dated May 22, 2021, 2021 (collectively, the original and amended agreements are referred to as the ("SARDA POA"), for the sale of up to 14.65 acres (APN 620-420-023) (the "SARDA Property"). The City POA and the SARDA POA provide for the sale of approximately 17.68 acres which make up the Project Site as further discussed in Section 1.2 below (the "Project Site"). Developer agrees that the close of escrow on the SARDA Property shall be concurrent with the Close of Escrow as defined herein for the City Property.

C. The Developer has completed its due diligence investigations of the Project Site and accepts the conditions of the Project Site.

D. On the Project Site, the Developer will construct improvements in two phases as set forth in the "Scope of Development" (Attachment No. 1 attached hereto

and incorporated herein by reference). In the first phase, Developer will construct an approximately 5.5-acre Surf Lagoon; an approximately 7,000 square foot Surf Center; a minimum 137-key 69,000 square foot Hotel (including restaurant, bar, café, meeting and banquet rooms, and outdoor amenities such as pool, spa, and decks) (the "Hotel"); The Hotel will include a parking structure and surface parking stalls with a minimum of 137 parking spaces (one per key) both on and off-site. In total, the Project will include 493 parking spaces with at least 246 of them off-site.) The first phase of the Developer's Improvements may include private Residential Villa Units and stacked flat buildings, HOA leisure pool, club area, and associated amenities. The second phase of Developer's Improvements will include additional private Residential Villa Units and stacked flat units (including additional HOA buildings and amenities) for a total of up to 83 Residential Units. (Together all improvements at the Project Site are referred to as the "Project")

E. The City will contribute an amount not to exceed the Public Investment Amount (the "Public Investment") to be used by the Developer for the development of the Project, as described in the Scope of Development. The payment of the Public Investment is anticipated to be made through up to $20,000,000.00 in bond proceeds, City Property transfer, and up to $20,000,000 in Transient Occupancy Tax ("TOT") revenue sharing, as described below in Section 4.5. The maximum "Public Investment Amount" equals up to FORTY MILLION DOLLARS ($40,000,000)

F. The Public Investment Amount is based on the assumption that the Hotel, Surf Center, and Surf Lagoon portions of the first phase of Developer's Improvements will be constructed and operated in accordance with the Scope of Development, including that the Hotel will have at least 137 Rooms and not more than 350 Rooms (where "Room" shall mean a separately keyed lodging unit of the Hotel) (the "Hotel"). Any Development Costs in excess of the Public Investment Amount shall be "Project Costs" as defined hereinbelow and shall be the sole obligation of Developer.

G. The first phase Project Costs are currently estimated to be $206,000,000 and the Developer expects to fund the Project Costs as set forth in the "Preliminary Plan of Finance" (Attachment No. 2 attached hereto and incorporated herein by reference). Attachment No. 3 is a "Preliminary Project Budget" that includes Project Costs and the Preliminary Plan of Finance. Both the Preliminary Plan of Finance and the Preliminary Project Budget shall be updated by Developer for City review on or prior to the applicable target date set forth in the Schedule of Performance, Attachment No. 9 attached hereto and incorporated herein by this reference.

H. The Parties now desire to set forth the terms and conditions upon which the City may sell the Project Site to the Developer for the development, operation and maintenance of the Project. Developer may finance the Project Costs and the Developer's Improvements Costs. All capitalized terms not defined within this Agreement shall have the meanings described within the Attachments incorporated hereto as part of this Agreement.

AGREEMENTS

For valuable consideration, receipt of which is hereby acknowledged, and the mutual obligations of and benefits to the Parties set forth herein, the City and Developer agree as follows:

1. GENERAL PROVISIONS.

1.1 Purpose of this Agreement. The intent and purpose of this Agreement is to set forth the obligations of the Parties and conditions precedent to the development and construction of the various elements of the Project, as applicable, and the financing commitments by the City and the financing by the Developer of the Project. Accordingly, this Agreement is intended to provide for the completion of all actions necessary to plan and design the Project, and to obtain all approvals necessary for the sale of the Project Site to the Developer and for commencement of development and construction of the Project, including, but not limited to, the preparation of all construction plans, specifications and cost estimates (to the extent required under this Agreement as a condition to the Close of Escrow) and related documents for the Project, the securing of private and public financing for the various elements of the Project and the negotiation and execution of the sale of land for the Project. This Agreement shall expire and be of no further force or effect upon issuance of Certificate of Occupancy for the first phase of the Project except for those provisions that expressly survive the expiration or earlier termination of this Agreement, which are set forth in Article 8.

1.2 Project Site. The Project Site and Map Showing General Location of Elements of the Project ("Site Plan") is shown on Attachment No. 4 and more particularly described in Attachment No. 5 The "Project Site" shall include a Hotel, Residential Units, Surf Center, and Lagoon. The City-owned portion of the Project Site shall be sold to the Developer pursuant to escrow terms with the City, as described in more detail in Section 6.1, and following, for development of the Project.

1.3 Project Existing Approvals; Implementation Actions. The Parties agree that, as of the Execution Date, the following documents have been approved and may be amended from time to time by the City (the "Existing Approvals"):

(a) **Existing Approvals**:

(i) DSRT SURF Specific Plan, as amended (Case Nos. SP 18-0002 Amendment No. 1, PP 21-0002)

(ii) Surf Lagoon, Hotel, Surf Center, and Residential Unit Precise Plan

(iii) Tentative Parcel Map (amended TTM 36379) and related conditions of approval ("Conditions of Approval")

(iv) Architectural Review Commission recommendation of the Project

(v) Environmental Impact Report ("EIR"), Statement of Overriding Considerations, and Mitigation, Monitoring, and Reporting Program ("MMRP") for the DSRT SURF Project (SCH #2019011044)

(vi) EIR Addendum, Specific Plan Amendment, Precise Plan, and Tentative Tract Map for the DSRT Surf Project (SCH #2019011044)

(vii) Acquisition Agreement attached hereto and incorporated herein as Attachment No. 7, subject to execution concurrent with the Close of Escrow

(viii) City Transient Occupancy Tax Reimbursement Agreement attached hereto and incorporated herein as Attachment No. 8, subject to execution concurrent with the Close of Escrow

(b) **Implementing Actions by City, Government Agencies and Other Parties.** The implementation of this Agreement requires certain actions by the City and other governmental agencies with an interest in the Project Site, which actions include, but are not limited to, the following, which have been or shall be completed on or prior to the applicable target date set forth in the Schedule of Performance, Attachment No. 9 attached hereto and incorporated herein by this reference (the "Target Date") for such respective items (the "Implementing Actions") Assuming adequate environmental review, the City Manager, in consultation with the City Attorney, is hereby authorized to execute any Implementing Actions requiring City approval without City Council consideration, unless the City Manager or City Attorney determine that the Implementing Action should be considered by the City Council. Upon execution of any Implementing Action the City Manager shall provide notice to the City Council.

(i) Utility Related Matters:

(1) CVWD Sewer Agreement

(2) CVWD and or Riverside County Agreement for Water Well Site Approval, Permitting, Construction and Operation, if development of a private water well on the Project Site is legally and technically feasible.

(ii) City and Developer Agreements or Approvals:

(1) Master Use and Maintenance Agreement, include water quality discharge plan which would include a 3-day lagoon evacuation agreement with the City and fee schedule for CVWD water use (prior to Water Well site approval and construction) Water Metering schedule (for freshwater intake pass through).

(2) Agreement to evidence the Developer's obligation to fund 12.1% of the cost to install a signal at the intersection of Marketplace and Cook.

(3) City Well Usage Agreement, if the City determines in its sole discretion that adequate excess water supply exists for existing and foreseeable needs.

(4) Supplemental Water Usage Agreement (Indicating Developer's obligation to fund additional turf removal, conservation efforts, or other mitigations should Surf Lagoon water use exceed 23.8 million gallons annually).

(5) City TOT Reimbursement Agreement

(6) Master Construction, Access and Parking Easement Agreement Over Desert Willow Golf Resort

(7) [Intentionally left blank]

(8) Easements required to satisfy the Existing Approvals, e.g. MMRP and other Conditions of Approval

(9) [Intentionally left blank]

(10) Acquisition Agreement

(11) City Cost Recovery Agreement attached hereto and incorporated herein in Attachment No. 6 (to be executed by both Parties on or prior to the applicable Target Date set forth in the Schedule of Performance, Attachment No. 9 attached hereto and incorporated herein by this reference).

(12) Offsite Turf Reduction Program Funding and Scheduling Agreement

(13) Construction easement(s) from City to the Developer for turf reduction immediately adjacent to the Project Site.

(iii) Misc. Required Agreements:

(1) Parties: City, Developer, future owner(s):

a. An easement and maintenance agreement in favor of developer to cross under Mountain

View golf course, and to access 15" underground water line for freshwater supply.

b. An easement and maintenance agreement in favor of the Developer for construction of grading, landscaping, and retaining walls around entire Project Site.

c. The City may, but shall not be required to, enter into an agreement with the Developer whereby the Developer manages, operates and maintains the Parking Facilities (and any other public facilities acquired by the City pursuant to the Acquisition Agreement) so long as such agreement conforms to the requirements of Revenue Procedure 2017-13 and is structured so as not to create "private business use" within the meaning of that term under Section 141(b) of the Internal Revenue Service Code and Section 1.141-3 of the Treasury Regulations.

d. City shall amend or terminate the overflow parking agreement with JW Marriott on Lot E.

e. Residential Unit CC&R's,

(2) Parties: CVWD, City, Desert Willow Condominium Association, Developer, future owner(s):

a. An easement and maintenance agreement in favor of the landowner(s) to provide tie-in access to sewer line at the adjacent Westin Desert Willow Villas property. If not feasible due to design, Developer will tie-in access to the sewer line located along Desert Willow Drive.

b. Emergency Access Agreement

(3) Parties: City, Embarc and Developer:

a. An easement and maintenance agreement under Mountain View golf course, through Embarc property and discharging to City owned circulatory golf irrigation lakes system.

(4) Parties: Developer, Hotel Operator

a. Hotel Management Agreement

b. Hotel Operator Agreement, to include valet parking requirements and identified parking spaces

(5) Parties: Developer and Surf Lagoon and Center Operator

a. Surf Lagoon and Center Operations Agreement

(c) Project Naming Rights.

(i) The Parties agree and acknowledge that all derivatives, logos, trademarks, service marks, and trade names associated with the Project are valuable property of Developer.

(ii) Developer will have the sole discretion to name or re-name the Project and its component parts, subject to approval by the City Council, which approval shall not be unreasonably conditioned, withheld or delayed, prior to the name or re-name designation.

(iii) Developer will refrain from using a name that in any way competes with or infringes on the Palm Desert name and brand. For example, the Developer will not include references to other cities, or regions in the name.

(iv) Where collateral material, including online materials, and marketing/branding include references to the Project, to the extent practicable all references used and imagery associated shall include Palm Desert or Desert Willow.

1.4 CEQA Compliance. The City prepared and certified, pursuant to the California Environmental Quality Act ("CEQA") and CEQA Guidelines (California Code of Regulations, Title 14, Section 15000, *et seq.*), the EIR, Statement of Overriding Considerations, MMRP, and EIR Addendum for the Project, which satisfies CEQA for purposes of this Agreement and the Existing Approvals.

While no new or supplemental environmental approvals are contemplated, the Parties shall cooperate with respect to any supplemental environmental documentation or approvals that may be required for the Project.

The Developer understands and agrees that the City may require subsequent or supplemental environmental review or other environmental analysis to implement the Project as required by CEQA, and/or by changes in applicable local, state, federal laws, including, without limitation, the applicable codes, ordinances, regulations and policies of the City (collectively, the "Laws").

1.5 Definitions. Capitalized terms not otherwise defined in this Agreement shall have the following meanings ascribed to them.

"Commencement Date" shall mean the date of the initial opening of the Hotel for business to the general public.

"Furniture, Fixtures and Equipment" shall mean movable furniture, fixtures or other equipment that have no permanent connection to the structure of a building or utilities within the Hotel, as well as operational supplies. More specifically, furniture, fixtures and/or equipment would include decorative items, wall coverings, flooring treatment, window treatments, casework, furnishings & accessories, furniture, data communications equipment, voice communications equipment, audio visual communications equipment, electronic surveillance equipment, electronic detection and alarm equipment, commercial equipment, foodservice equipment, entertainment equipment, athletic & recreational equipment, collection and disposal equipment. Operational supplies include all supplies needed for the operation of the Hotel, such as stationery, computer equipment and accessories, guestroom TV's and mounts, alarm clocks in rooms, linen, pillows, maids' carts and supplies, trash cans, all items for the hotel restaurant, bar, banquet and conference facilities (including china, utensils, glasses, etc.). For purposes of determining the costs of Furniture, Fixtures and Equipment, taxes, freight, warehouse expense, installation fees and purchasing agent fees shall also be included.

"Project Costs" shall mean all of Developer's actual costs up to the Commencement Date and Developer's anticipated and reasonably estimated costs and expenses to be incurred after the Commencement Date (including, if applicable, any such costs and expenses incurred prior to the Commencement Date that have not been funded and paid in cash or out of Developer's equity as of that date) to plan, design, engineer, finance, and construct the Hotel on the Project Site through the date of the initial opening of the Hotel for business to the general public, including without limitation all such costs and expenses incurred with respect to any of the following: (i) demolition and clearance of existing improvements situated on the Project Site; (ii) land development work, including excavation, grading, compacting and re-compacting of soils, and removal/remediation of any Hazardous Substances; (iii) construction of all improvements comprising the Hotel and any public improvements, utilities, or other improvements in the public rights-of-way on or adjacent to the Project Site; (iv) installation of all fixtures, equipment, furnishings, and personal property in, on, or about the Hotel and Project Site that are needed upon the initial opening of the Hotel and for the full operation thereof; (v) all permit, entitlement, and inspection fees required to be paid to Lessor and other governmental agencies with jurisdiction over the Hotel and the Project Site, as applicable; (vi) premiums for fire, public liability, and property damage insurance during construction and on bonds securing work against liens for labor and materials; (vii) real estate taxes (including possessory interest taxes) and assessments upon the Project Site and improvements during the period of construction; (viii) interest on construction loans prior to the opening of the Hotel; (ix) fees for architects, engineers, accountants, attorneys, and similar professionals; (x) purchasing foes paid to third pa1iies not affiliated with Developer in connection with the purchase of furniture,

fixtures, and equipment; (xi) costs incurred by Developer in connection with construction financing, including, without limitation, commitment fees, mortgage broker fees, standby fees and fees of a like nature, printing and duplicating expenses, documentary transfer tax stamps, mortgage taxes, and recording charges; (xii) customary and reasonable pre-opening expenses for the Hotel; (xiii) costs of any required studies, reports, and inspections; (xiv) reasonable fees for management and construction services through opening of the Hotel; (xv) any other anticipated costs to be incurred by Developer to satisfy its obligations set forth in this Lease; and (xvi) a reasonable contingency for the categories of costs identified above.

2. IDENTITY OF PARTIES.

2.1 Developer.

(a) **The Developer is Desert Wave Ventures, LLC, a Delaware limited liability company**. The Developer's principals are Don Rady, Doug Sheres, and John Luff. It is on the basis of the qualifications and experience of the Developer that the City is entering into this Agreement. Accordingly, the provisions of this Section 2.1 are deemed necessary by the City and are agreed to be reasonable by the Developer to assure the City that the purposes of this Agreement will be achieved.

(b) Subject to Section 2.1(c), during the Term:

(i) Except for any Permitted Transfers, the Developer shall not voluntarily or involuntarily assign a controlling interest in this Agreement or sell, convey or transfer, or permit a controlling majority of its members, to sell, convey or transfer such controlling interest in the Developer (each, a "Transfer") without the prior written consent of the City. The City shall not unreasonably withhold, condition or delay their consent to a Transfer proposed by Developer that requires their consent if all of the following conditions are satisfied:

(1) Developer shall have disclosed to the City in writing, the verification as required in Section 2.1(b)(i)(4) for each Person who will be a member of the Developer and each Person that will hold, directly or indirectly, any membership interests in the Developer as of the effective date of such proposed Transfer.

(2) Developer shall provide evidence of financing reasonably acceptable to the City that following the proposed Transfer, Developer shall have sufficient financial resources for the Developer to perform its obligations under this Agreement and to achieve the Close of Escrow. Evidence of financing shall include, at a minimum, the following: (i) a copy of the loan commitment obtained by Developer from one or more

financial institutions for the mortgage loan or loans for financing to fund the construction, completion, operation and maintenance of the Hotel during the term of the loan, subject to such lenders' reasonable, customary and normal conditions and terms; (ii) other documentation satisfactory to the Agency as evidence of other sources of Hotel Project Equity sufficient to demonstrate that Developer equity funds in the amount necessary to cover the difference between the total cost of the Completion of the Construction of the Hotel and the Hotel Project Construction Loan.

(3) Developer shall provide documentation reasonably acceptable to the City that following the proposed Transfer, the Developer will continue to have the commercial and real estate experience needed to perform the Developer's obligations under this Agreement (including, without limitation, the ability to secure and maintain the required Hotel brand and Operator and extensive (not less than 10 years of senior management) experience financing and developing resort hotel and projects of a similar size and quality to the Hotel, Residential Units, Surf Center and Lagoon).

(4) Developer shall provide the City with an independent third-party verification, subject to the reasonable approval by the City of the independent third-party, that each Unaffiliated Third Party (as defined below) that acquires any membership interests in the Developer is reputable (which shall mean the absence of reputations for dishonesty, criminal conduct or association with criminal elements – "reputable" shall not mean "prestigious", nor shall the determination of whether one is reputable involve considerations of personal taste or preference), and has no history of, or reputation for, either discriminatory employment practices which violate any Laws or non-compliance with applicable Environmental Laws or listing on the Prohibited Person list described below.

(5) Neither the transferee nor any Person with any direct or indirect membership interest in the Developer shall be a Prohibited Person.

(6) Developer shall have provided to the City an outline of any change in the proposed corporate structure of the Developer, in writing, in a detailed narrative and a visual organizational flow chart.

(ii) The Developer shall not permit or suffer to exist any Change of Control (as hereinafter defined) without the prior written consent of the City, which may be given or withheld in the sole and absolute discretion of the City.

(iii) Except for any Permitted Transfers, the Developer shall prohibit each of its members from voluntarily or involuntarily selling, conveying, or transferring any of such member's direct or indirect membership interest in the Developer to any Person without the prior written consent of the City (which consent shall be given or withheld in the sole and absolute discretion of the City unless such Transfer satisfies the criteria of Section 2.1(b)(i) in which case the City's consent shall not be unreasonably withheld, conditioned or delayed), and in no event to any Prohibited Person (as hereinafter defined).

(iv) Any purported Transfer in violation of this Section 2.1(b) shall be null and void, undone by Developer at Developer's sole cost and expense, and not binding on the City.

(c) Upon written request by the Developer to the City for consent to a Transfer as required under Section 2.1(b), the City shall determine, in its reasonable discretion, within thirty (30) days following delivery of the Developer's request and all information reasonably required by the City to review the request, whether the proposed Transfer as of the effective date of the proposed Transfer, meets the qualifications set forth in Section 2.1(b).

(d) The Developer shall deliver to the City all agreements and all certified documents evidencing the formation, existence, and good standing of the Developer (with all information regarding distributions, including any definitions primarily related thereto, redacted), for review by the City for consistency with the provisions of this Agreement. The City may request updates to such documents and/or agreements from time to time during the Term and Developer shall deliver such updates within thirty (30) days of City's notice to Developer.

(e) The Developer represents and warrants to the City that it has disclosed to the City each of its members, each Person that holds, directly or indirectly, at least ten percent (10%) of the membership interests in the Developer, and each Person that Controls the Developer.

(f) For purposes of this Section 2.1, the following definitions shall apply:

(i) "Change of Control" means a merger, consolidation, recapitalization or reorganization of the Developer or other transaction or an amendment to any governing document of the Developer that results in any Unaffiliated Third Party having the ability to Control the Developer.

(ii) "Unaffiliated Third Party" means any Person that is not one of the principals or is not Controlled by one of the principals.

(iii) "Person" means a natural person, whether acting for himself or herself, or in a representative capacity, a partnership, a corporation, a limited liability company, a governmental authority, a trust, an unincorporated organization or any other legal entity of any kind.

(iv) "Control" means with respect to any Person (the "Controlling Person") the power to both (A) direct or cause the direction of the management or policies of another Person (the "Controlled Person"), whether through the ownership of voting equity, by contract or otherwise; and (B) maintain active and direct control and supervision of the operations of Developer, including without limitation, the day to day operations of the Project; provided, however, that a contractual or other requirement that a Controlling Person obtain the consent or approval of one or more other Persons as a condition to undertaking a Major Decision shall not affect whether such Controlling Person Controls such Controlled Person. "Controls", "Controlled" and "Controlling" shall have correlative meanings to "Control".

(v) "Major Decisions" means, with respect to any Person, any decision that is of the type that requires the consent or approval of such Person's non-managing members, limited partners or minority shareholders, which may include by way of example, any decision to (A) enter into any financing or incur, assume or guarantee any indebtedness that has not been previously approved in an approved budget or operating plan; (B) enter into or terminate or amend any material agreement; (C) merge, liquidate, sell, restructure, consolidate, recapitalize, reorganize, wind up, or dissolve the Person; (D) authorize or declare voluntary bankruptcy, assignment for benefit of creditors, acceleration of third-party obligations, confession of judgment, reorganization or any other similar insolvency action involving the Person or make

any filing in connection therewith; (E) make any material changes to the Project; (F) terminate or amend this Agreement; (G) purchase insurance except as required by this Agreement or the Deed of Sale; (H) sell or transfer any asset of the Person; (I) approve any budget or operating plan; (J) amend any of the organizational documents of the Person; (K) issue, redeem, repurchase or cancel equity or other ownership interests in the Person (or any rights, warrants or options to acquire the foregoing); (L) make changes to the governing body of the Person; (M) declare or pay any distributions; (N) engage in new lines of business; (O) make capital expenditures or similar expenditures except as required in an approved capital budget; (P) make or change tax elections or accounting methodologies; or (Q) undertake an initial public offering of securities.

(vi) "Permitted Transfer" means the following Transfers, provided that there is no Change of Control as a result of such transfer: (A) any Transfer of not more than ten percent (10%) of direct or indirect membership interests in the Developer to any Affiliated Transferee (as defined below) that is not a Prohibited Person; (B) if by a natural person, any Transfer upon the death of such person by will or other instrument taking effect upon such death or by applicable laws of descent and distribution to such person's estate and executors and then to such person's heirs; or (C) if by a natural person, any Transfer made in connection with the dissolution of the transferee's marriage or the legal separation of the transferee and his or her spouse on the account of any settlement of any community property or other marital property rights such spouse may have in any membership interests in the Developer.

(vii) "Prohibited Person" means any Person (A) named as a "Specifically Designated National and Blocked Person" ("SDN") on the most current list published by the U.S. Department of the Treasury Office of Foreign Assets Control at its official website or any replacement website or other replacement official publication of such list or (B) that is Controlled by an SDN.

(viii) "Affiliated Transferee" means, with respect to any Transfer, any of the following: (A) each sibling of the transferor, the spouse of the transferor, and each parent, child, grandchild or great-grandchild of the transferor (including relatives by marriage); (B) any trust for the benefit of the transferor or any of the foregoing members of his or her family; (C) where

the transferor is a trust, any beneficiary of the trust or any of the foregoing family members of a beneficiary of the trust, or any other trust established for the benefit of any of the foregoing; and (D) each Person that Controls, is Controlled by, or is under common Control of, the transferor or any of the foregoing Persons.

In addition, for purposes of this Section 2.1, the quantum of a Person's indirect ownership in any other Person is calculated as the percentage of the proportional ownership interest at each level. As an example, if Person A owns a 50% interest in Person B and Person B owns a 50% interest in Person C, then Person A would be deemed to have a 25% indirect ownership interest in Person C.

2.2 City. The City is the City of Palm Desert, a charter city and municipal corporation.

2.3 Notices.

(a) **To Developer.** Notices to the Developer shall be given or served by (a) recognized national overnight delivery service, or (b) facsimile with a confirmed receipt of such transmittal, provided a copy of such facsimile notice is also sent by mail, as provided below, or (c) first-class mail or certified mail, return receipt requested, addressed as follows, or to such other address(es) as the Developer may from time to time designate by notice to the other Parties:

Desert Wave Ventures, LLC
Attn: Don Rady
1555 Camino Del Mar, Suite 315C
Del Mar, CA 92014

With a copy to:

Don Rady
Value Real Estate
1919 Grand Ave
San Diego, CA 92109

With copy to:

Coast Law Group, LLP
1140 S. Coast Hwy 101
Encinitas, CA 92024
Attention: Marco Gonzalez

(b) **To City.** Notices to the City shall be given or served by (a) recognized national overnight delivery service, or (b) facsimile with a confirmed receipt of such transmittal, provided a copy of such facsimile notice is also sent by mail, as provided below, or (c) first-class mail or certified mail, return receipt requested, at the following address, or to such other address(es) as the City may from time to time designate by notice to the other Parties:

City of Palm Desert
Attention: City Manager
73510 Fred Waring Dr.
Palm Desert, California 92260

With a copy to:

City Attorney
City of Palm Desert
73510 Fred Waring Dr.
Palm Desert, California 92260

(c) **Forms of Delivery.** Facsimile notice shall be deemed given on the date set forth in the sender's confirmation notice; overnight delivery notice shall be deemed given the next business day from when sent; and mailed notice shall be deemed to have been given or served, if mailed by first class mail, on the third business day from when mailed, and, if by certified mail, on the date set forth in the return receipt.

3. TERM.

3.1 Term. The term of this Agreement shall commence on the Execution Date and shall expire on the earlier of completion of all improvements for the Surf Lagoon and Surf Center, Hotel, and Parking on or prior to the applicable Target Date set forth in the Schedule of Performance, Attachment No. 9 attached hereto and incorporated herein by this reference (the "Construction Completion") or the Early Expiration Date (the "Term"). The "Early Expiration Date" will occur on the first anniversary of the close of escrow (subject to extensions as provided below). Upon written request from the Developer, City shall administratively extend the Early Expiration Date up to two times (each, an "Extension"), for a period of six (6) months for each such Extension ("Extension Period"), for a total possible Early Expiration Date of two years, in accordance with the obligations of Section 5.1, Section 3.1(d) below, and the following terms:

(a) Developer delivers notice to the City no later than sixty (60) days prior to the Early Expiration Date or no later than forty-five (45) days prior to the expiration of an Extension Period, as applicable, of its request to extend the Early Expiration Date, together with written evidence that the following conditions precedent have been satisfied or requesting that some or all of the conditions precedent be waived or the time for satisfying such condition(s) precedent be extended by the City:

(i) The Developer shall have obtained Grading Permit approval and submitted Construction Documents as required by this Agreement and shall have obtained, or be diligently working to obtain, approvals of Building Permits in accordance with this Agreement; and

(ii) The Developer shall have submitted to the City for their review and approval a current design and construction schedule for the Developer's Improvements as outlined in the Scope of Development.

(b) Administrative staff-level approval of any Extension by the City shall be conditioned upon, and shall be granted if (i) the Parties have completed a Periodic Review, after the Extension request, as provided in Section 5.1, (i) City staff has determined that no Developer Event of Default has occurred and is continuing, (ii) City staff has determined that each of the Parties is diligently proceeding in good faith to complete their respective obligations under this Agreement for development of the Project; and (iii) City staff has determined that any such Extension will allow the Developer to meet its obligations under this Agreement.

(c) Upon receipt of notice of Extension in accordance with Section 3.1(a) which requests the waiver of, or an extension of time to satisfy, any of the conditions precedent set forth in Section 3.1(a) to achieve such Extension, the Parties shall meet and confer in good faith to determine (i) if such waiver or extension would still make it feasible or practicable to proceed with the Project; and (ii) how much additional time is required to satisfy the applicable conditions precedent for such Extension. If it is determined by the Parties that it is feasible and practicable to proceed with the Project and if the conditions precedent set forth in Section 3.1(b) have been satisfied, then the City shall extend the time period to satisfy the applicable condition(s) precedent. If it is determined by any Party that it is not feasible or practicable to proceed with the Project, then any Party may terminate this Agreement in accordance with Section 5.1 and Article 8. Notwithstanding any such waivers or Extensions granted pursuant to this Section 3.1, this Agreement shall terminate upon an Event of Termination as provided in Section 8.1.

(d) The Early Extension Date may be extended by City staff in their sole discretion for one additional 6 (six) month period at the request of the Developer; however the Close of Escrow shall be completed by December 31, 2022.

4. DESIGN AND DEVELOPMENT OF PROJECT.

4.1 Design and Development of the Project.

(a) The Project shall be designed by the Developer in accordance with the Scope of Development, the Project Existing Approvals and this Agreement.

(b) The final designs and plans for the Developer's Improvements shall be attached to the Deed of Sale and provide for build out consistent with the DSRT

SURF Specific Plan approved for the Project and the Existing Approvals and Implementing Approvals.

(c) The Developer shall comply with all Laws applicable to the Project, including, without limitation, the City's Municipal Code.

(d) The Developer shall comply with all Laws applicable to the development and construction of the Developer's Improvements.

(e) Except as provided below, the Developer shall pay when due all fees pertaining to the review and approval of the Developer's Improvements that are lawfully required by any government agency, including, without limitation, the City and by any public utility. The Developer shall endeavor to obtain, prior to the commencement of construction of the Developer's Improvements, any and all governmental approvals and permits that are required for commencement of such construction and any and all discretionary governmental approvals and permits that are required for completion of the Developer's Improvements.

(i) Deferral of Payment of Certain Fees and Costs to City. The Developer shall not be required to pay to the City when due up to a total of six million dollars ($6,000,000) in City development fees, landscape replacement program costs, and any other fees or costs the City deems appropriate to defer (the "Deferred Fees and Costs"). Developer shall repay the Deferred Fees and Costs, amortized over a six (6) year period beginning upon the issuance of a Certificate of Occupancy for the Hotel. The Deferred Fees and Costs shall bear interest at the rate equal to the then current average annual yield on funds invested with the California State Treasurer's Office Local Agency Investment Fund accruing from the date such fees and costs are assessed until fully repaid, capped at a rate of four percent (4%). Amortized payments for the Deferred Fees and Costs (the "Deferral Repayment") in equal installments of 1/6th of the Deferred Fees and Costs plus accrued interest shall be paid by the Developer annually commencing on the 30th day of June first following the issuance of a Certificate of Occupancy for the Hotel and continuing on each June 30 thereafter until paid in full. Upon a failure to pay an installment of the Deferral Repayment plus interest when due, (i) each installment thereafter shall bear interest at ten percent (10%) per annum, and (ii) reimbursement of transient occupancy tax pursuant to Section 4.5(c) shall cease until the Deferral Repayment is brought current and any delinquency has been cured . This Section 4.1(e) shall survive the termination of this Agreement.

4.2 City Infrastructure Improvements. The City shall not be responsible for any infrastructure improvements for the Project.

4.3 Submission and Approval of Construction Documents and Building Permit and Grading Permit Applications.

(a) On or before the Target Date set forth in the Schedule of Performance, the Developer shall submit for approval to the City Construction Documents for the first phase of Developer's Improvements and Building Permit and

Grading Permit Applications in accordance with clauses (i) and (ii) below, respectively, and to the City, Building Permit and Grading Permit Applications for the first phase of Developer's Improvements in accordance with clause (iii) below.

(i) Construction Documents: On or before the Target Date set forth in the Schedule of Performance, Developer shall submit to the City "Construction Documents" for development of the first phase of Developer's Improvements ("Construction Documents Set") demonstrating conformance with the design approvals at 100% Design Development and 100% Construction Documents completion of such construction drawings. Each Construction Documents Set shall be prepared by an architect or an engineer licensed in the State of California. Inspection, review, or comment by the City with respect to any of the Construction Documents shall not in any way affect or reduce the Developer's obligations under this Agreement or be deemed to be a warranty or acceptance by the City with respect to such Construction Documents; it being understood that the City is relying upon the Developer to design and engineer the Developer's Improvements.

(ii) Building Permit and Grading Permit Applications: On or before the Target Date set forth in the Schedule of Performance, Developer shall submit for review by the City "Grading Permit Application" and "Building Permit Application" for development of the first phase Developer's Improvements. Grading Permit and Building Permit Applications shall be prepared by an architect or engineer, as appropriate, licensed to do business in the State of California. Inspection, review, approval or comment by the City with respect to any of the Grading Permit or Building Permit Applications shall not in any way affect or reduce the Developer's obligations under this Agreement or be deemed to be a warranty or acceptance by the City with respect to such Building Permit or Grading Permit Applications; it being understood that the City is relying upon the Developer to design and engineer the Developer's Improvements in accordance with this Agreement.

(iii) Grading Permit and Building Permits: All standard City fees with respect to the issuance of the Grading Permit and Building Permits will apply and shall be paid by the Developer.

(b) With each of the two submission of Construction Documents and the Grading Permit and Building Permits Applications pursuant to this Section 4.3, the

Developer shall submit to the City Development Cost estimates for such portion of the first phase Developer's Improvements, prepared by Developer, Developer's general contractor or a qualified cost estimator in such detail as warranted by the extent of detail and completeness of the Construction Documents and Grading Permit and Building Permits Applications submitted to the City. Such Development Cost estimates shall be prepared in good faith and shall reflect the reasonable judgment of the Developer regarding such estimates. The Parties acknowledge that such estimates are estimates only and that final Development Costs may differ from the previously provided estimates. Whenever this Agreement requires the Developer to submit Development Cost estimates for such portion of Developer's Improvements, a separate Development Cost estimate shall be prepared for each major category of such portion of the Developer's Improvements, including but not limited to: the Surf Lagoon, the Surf Center and grounds, the Surf Center Parking Lot, the Hotel and hotel parking spaces (each, a "Major Component of Developer's Improvements"). The parties understand and agree Development Cost estimates for the Project will comply with the Construction Specialties Institute divisions for cost estimation.

4.4 Agreement on Total Project Costs.

(a) "Hard Construction Costs" shall mean, with respect to any component of the Project, all costs that the Developer is required to pay to the respective construction contractor for the construction of such component of the Project.

(b) Concurrent with the Developer submission of the Building Permit Application for the first phase Developer's Improvements, the Developer shall submit final estimates (non-GMP) of the total first phase Development Costs of the first phase Developer's Improvements, including the items set forth in Section 4.4(d) to review compliance with the Final Plan of Finance and Final Project Budget.

(c) Following receipt of the Developer's final estimates of the first phase Development Costs of the first phase Developer's Improvements pursuant to Section 4.4(b), the City may review such first phase Development Cost estimates. The final estimates (non-GMP) of the first phase Development Costs which are either (i) reviewed by the City as submitted by the Developer in accordance with Section 4.4(b) or (ii) agreed by the City and the Developer, are herein referred to as the "Total First Phase Project Costs".

(d) As to each Major Component of first phase Developer's Improvements such estimates shall include an estimate for all first phase Development Costs in connection with such Major Component of first phase Developer's Improvements. "Development Costs" shall mean, with respect to any component of the Project, (i) the costs of the entire design, architectural work, engineering work, development work and construction work and (ii) contingency which shall be in an amount equal to at least ten percent (10%) of the sum of the costs set forth in clause (i).

(e) The first phase Project Costs are to be funded as set forth in the "Preliminary Plan of Finance" (Attachment No. 2 attached hereto and incorporated

herein by reference). Attachment No. 3 is a "Preliminary Project Budget" that includes Project Costs and the Preliminary Plan of Finance. Both the Preliminary Plan of Finance and the Preliminary Project Budget shall be updated ("Final Plan of Finance" and "Final Project Budget", respectively) by Developer for City review and written approval, on or prior to the applicable target date set forth in the Schedule of Performance, Attachment No. 9 attached hereto and incorporated herein by this reference.

(f) The Developer shall submit executed guaranteed maximum price construction contracts or fixed price construction contracts, as applicable, with respect to the first phase Developer's Improvements, based on signed bids from Developer's contractors and subcontractors (if applicable), other than bids with respect to the Project, for the construction of the first phase Developer's Improvements (all of which shall be provided to the City) on or before the Target Date set forth in the Schedule of Performance. The Developer shall provide drafts of such contracts to the City, as applicable, for the City's review and comment before execution, in which case the City, as applicable, shall promptly provide to the Developer any comments thereto.

4.5 City Financial Contribution. Based on the independent consultant report required to justify the City's Public Investment Amount in the Project as considered as part of the Existing Approvals, the City will financially participate in the Project in the following manner:

(a) City Property Transfer. City shall transfer the City Property at the Close of Escrow for Developer's commitment to build the first phase of Developer's Improvements Project and other consideration as provided in this Agreement and a consideration of $100.00.

(b) Acquisition of Public Improvements. City shall utilize up to $20,000,000 for acquisition of such public improvements or facilities as set forth in the Form of Acquisition Agreement (Attachment No. 7 attached hereto and incorporated herein by reference) by way of progress payments upon project milestones are met as follows:

Draw	Public Parking	Surf Lagoon and Center	Hotel	RESIDENTIAL UNITS
1st- $5M	30% construction cost of podium Parking Structure	100% rough grading complete	Commence foundation upon fully approved and issued building permits for the entire Hotel	

2nd- $5M	60% of construction cost of podium Parking Structure	100% Foundations Complete	Completion of 60% of Hotel Parking	
3rd- up to $5M	100% completion of all Public Parking and compliance with the Acquisition Agreement	100% of Surf Lagoon floor completed and surf equipment on site	Completion of rough framing construction of the Hotel	
4th- up to $3M	100% of all other public infrastructure and compliance with the Acquisition Agreement	100% complete certificate of occupancy for Surf Lagoon and Center approved	100% complete certificate of occupancy for Hotel approved	
5th- up to $2M	4th Payment has been made, and City "look-back" approval of actual Project Costs in Section 4.5(d) and in compliance with the Acquisition Agreement			100% complete Certificate of Occupancy for First Phase Developer's Improvements and initiation of residential construction

The use, management, operation, maintenance, and existence of the public facilities or improvements acquired by the City pursuant to the Acquisition Agreement shall be within the sole and absolute discretion of the City. Unless specifically directed by the City in writing, the Developer shall have no input whatsoever, directly or indirectly, with respect to any decision, action, or inaction relating to the use, management, operation, maintenance, or existence of such public facilities. Any provision of any agreement to the contrary is or shall be null and void.

(c) Transient Occupancy Tax ("TOT") Reimbursement. Developer shall be entitled to receive up to $20,000,000 over a period of twenty (20) years from the Completion Date, in TOT actually generated by the Project based on a minimum 137 key Hotel as set forth in the Form of TOT Reimbursement Agreement (Attachment No. 8 attached hereto and incorporated herein by reference). The City shall rebate 40% of the TOT from Hotel rooms and 60% of the TOT from the Residential Units, subject to

the Minimum Quarterly TOT Guaranty described in Attachment No. 8 and subject to Section 4.1.

(d) Post-Construction Hard Cost Confirmation ("Look Back"). No later than 90 days after issuance of Certificates of Occupancy for the first phase Developer's Improvements and initiation of residential construction, Developer will provide the City with evidence of the Project Costs of the Surf Center, Surf Lagoon, Hotel, Parking, and associated infrastructure and amenities. If these first phase Project Costs total less than $185,000,000, Developer will reimburse to the City an amount equal to the difference between $185,000,000 and the Project Costs (the "Public Improvements Refund") up to a total maximum refund of twenty million dollars ($20,000,000). The Public Improvements Refund, if any, will be paid in equal annual installments, without interest, over the first ten years following issuance of the last Certificate of Occupancy.

(e) Project Financing. As a condition of City's Public Investment Amount, Developer covenants to provide to City, on or before June 1, 2023, evidence of financing sufficient for the Developer to perform its obligations under this Agreement satisfactory to the City in its sole discretion. Evidence of financing shall include, at a minimum, the following: (i) a copy of the loan commitment obtained by Developer from one or more financial institutions for the mortgage loan or loans for financing to fund the construction, completion, operation and maintenance of the Hotel during the term of the loan, subject to such lenders' reasonable, customary and normal conditions and terms; (ii) other documentation satisfactory to the City as evidence of other sources of Hotel Project Equity sufficient to demonstrate that Developer equity funds in the amount necessary to cover the difference between the total cost of the Completion of the Construction of the Hotel and the Hotel Project Construction Loan.

4.6 Insurance. Without limiting Developer's indemnification of the City of Palm Desert, and prior to commencement of construction of the Project, herein defined as "Work" for this Article 4 and this Agreement, Developer shall obtain, provide and maintain, or cause to be obtained, provided, and maintained, at its own expense during the term of this Agreement, policies of insurance of the type and amounts described below and in a form satisfactory to the City.

4.6.1 General Liability Insurance. Developer or its General Contractor shall maintain commercial general liability insurance with coverage at least as broad as Insurance Services Office form CG 00 01, in an amount not less than $2,000,000 per occurrence, $4,000,000 general aggregate, for bodily injury, personal injury, and property damage, and a $4,000,000 completed operations aggregate. The policy must include contractual liability that has not been amended. Any endorsement restricting standard ISO "insured contract" language will not be accepted.

4.6.2 Automobile Liability Insurance. Developer or its General Contractor shall maintain automobile insurance at least as broad as Insurance Services Office form CA 00 01 covering bodily injury and property damage for all activities of the Developer arising out of or in connection with Work to be performed under this

Agreement, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than $1,000,000 combined single limit for each accident.

4.6.3 Umbrella or Excess Liability Insurance. Developer or its General Contractor may opt to utilize umbrella or excess liability insurance in meeting insurance requirements. In such circumstances, Developer or its General Contractor shall obtain and maintain an umbrella or excess liability insurance policy that will provide bodily injury, personal injury and property damage liability coverage at least as broad as the primary coverages set forth above, including commercial general liability, automobile liability, and employer's liability. Such policy or policies shall include the following terms and conditions:

4.6.4 Workers' Compensation Insurance. Developer or its General Contractor shall maintain Workers' Compensation Insurance (Statutory Limits) and Employer's Liability Insurance (with limits of at least $1,000,000) for Developer's employees in accordance with the laws of the State of California, Section 3700 of the Labor Code. In addition, Developer or its General Contractor shall require each subcontractor to similarly maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California, Section 3700 for all of the subcontractor's employees. Developer shall submit to City, along with the certificate of insurance, a Waiver of Subrogation endorsement in favor of the City of Palm Desert, its officers, agents, employees and volunteers.

4.6.5 Pollution Liability Insurance. Developer or its General Contractor shall maintain Environmental Impairment Liability Insurance shall be written on a Contractor's Pollution Liability form or other form acceptable to Agency providing coverage for liability arising out of sudden, accidental and gradual pollution and remediation. The policy limit shall be no less than $1,000,000 dollars per claim and in the aggregate. All activities contemplated in this agreement shall be specifically scheduled on the policy as "covered operations." The policy shall provide coverage for the hauling of waste from the project site to the final disposal location, including non-owned disposal sites.

4.7 Other provisions or requirements:

4.7.1 Proof of Insurance. Developer or its General Contractor shall provide certificates of insurance to City as evidence of the insurance coverage required herein, along with a waiver of subrogation endorsement for workers' compensation. Insurance certificates and endorsements must be approved by City's Risk Manager prior to commencement of performance. Current certification of insurance shall be kept on file with City at all times during the term of this contract. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

4.7.2 Duration of Coverage. Developer or it General Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property, which may arise from or in connection with the performance of the Work hereunder by Developer, its agents, representatives,

employees or subcontractors. Developer or its General Contractor must maintain general liability and umbrella or excess liability insurance for a minimum of three (3) years after project completion. The City of Palm Desert and its officers, officials, employees, and agents shall continue as additional insureds under such policies.

4.7.3 Primary/Noncontributing. Coverage provided by Developer or its General Contractor shall be primary and any insurance or self-insurance procured or maintained by City shall not be required to contribute with it. The limits of insurance required herein may be satisfied by a combination of primary and umbrella or excess insurance. Any umbrella or excess insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary and non-contributory basis for the benefit of City, before the City's own insurance or self-insurance shall be called upon to protect it as a named insured.

4.7.4 Products/Completed Operations Coverage. Products/completed operations coverage shall extend a minimum of three (3) years after project completion. Coverage shall be included on behalf of the insured for covered claims arising out of the actions of independent contractors. If the insured is using subcontractors, the Policy must include work performed "by or on behalf" of the insured. Policy shall contain no language that would invalidate or remove the insurer's duty to defend or indemnify for claims or suits expressly excluded from coverage. Policy shall specifically provide for a duty to defend on the part of the insurer. The City, its officials, officers, agents, and employees, shall be included as additional insureds under the Products and Completed Operations coverage.

4.7.5 City's Rights of Enforcement. In the event any policy of insurance required under this Agreement does not comply with these requirements or is canceled and not replaced, City has the right but not the duty to obtain the insurance it deems necessary. Any premium paid by City will be promptly reimbursed by Developer or City will withhold amounts sufficient to pay premium from Developer payments.

4.7.6 Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance, with an assigned policyholders' and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.

4.7.7 Waiver of Subrogation. All insurance coverage maintained or procured pursuant to this agreement shall be endorsed to waive subrogation against the City of Palm Desert, its elected or appointed officers, agents, officials, employees and volunteers, or shall specifically allow Developer or others providing insurance evidence in compliance with these specifications to waive their right of recovery prior to a loss. Developer hereby waives its own right of recovery against the City of Palm Desert, its elected or appointed officers, agents, officials, employees and volunteers, and shall require similar written express waivers and insurance clauses from each of its subcontractors.

4.7.8 Enforcement of Contract Provisions (non estoppel). Developer acknowledges and agrees that any actual or alleged failure on the part of the City to inform Developer of non-compliance with any requirement imposes no additional obligations on the City nor does it waive any rights hereunder.

4.7.9 Requirements Not Limiting. Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type. If the Developer maintains higher limits than the minimums shown above, the City requires and shall be entitled to coverage for the higher limits maintained by the Developer. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the City.

4.7.10 Notice of Cancellation. Developer agrees to oblige its insurance agent or broker and insurers to provide to City with a thirty (30) day notice of cancellation (except for nonpayment for which a ten (10) day notice is required) or nonrenewal of coverage for each required coverage.

4.7.11 Additional Insured Status. General liability, automobile liability, and if applicable, pollution liability policies shall provide or be endorsed to provide that the City of Palm Desert and its officers, officials, employees, agents, and volunteers shall be additional insureds under such policies. This provision shall also apply to any excess/umbrella liability policies. Coverage shall be at least as broad as coverage provided by ISO's Owners, Lessees, or Developers Additional Insured Endorsement for the ongoing (i.e. ISO Form CG 20 10) and completed operations (i.e. ISO Form CG 20 37) of Developer.

4.7.12 Prohibition of Undisclosed Coverage Limitations. None of the coverages required herein will be in compliance with these requirements if they include any limiting endorsement of any kind that has not been first submitted to City and approved of in writing.

4.7.13 Separation of Insureds. A severability of interests provision must apply for all additional insureds ensuring that Developer's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the insurer's limits of liability. The policy(ies) shall not contain any cross-liability exclusions.

4.7.14 Pass Through Clause. Developer or its General Contractor agrees to ensure that its subconsultants, subcontractors, and any other party involved with the project who is brought onto or involved in the project by Developer, shall maintain commercial general liability insurance with coverage at least as broad as Insurance Services Office form CG 00 01, in an amount not less than $1,000,000 per occurrence, $2,000,000 general aggregate, for bodily injury, personal injury, and property damage,

and a $2,000,000 completed operations aggregate. The policy must include contractual liability that has not been amended. Any endorsement restricting standard ISO "insured contract" language will not be accepted. Developer or its General Contractor agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. Developer agrees that upon request, all agreements with consultants, subcontractors, and others engaged in the project will be submitted to City for review.

4.7.15 City's Right to Revise Requirements. If commercially reasonable, the City or its Risk Manager reserves the right at any time during the term of the contract to change the amounts and types of insurance required by giving the Developer ninety (90) days advance written notice of such change. If such change results in substantial additional cost to the Developer, the City and Developer may renegotiate Developer's compensation. If the City reduces the insurance requirements, the change shall go into effect immediately and require no advanced written notice.

4.7.16 Self-Insured Retentions. Any self-insured retentions must be declared to and approved by City. City reserves the right to require that self-insured retentions be eliminated, lowered, or replaced by a deductible. Self-insurance will not be considered to comply with these specifications unless approved by City.

4.7.17 Timely Notice of Claims. Developer shall give City prompt and timely notice of claims made or suits instituted that arise out of or result from Developer's performance under this Agreement, and that involve or may involve coverage under any of the required liability policies.

4.8 Safety.

DEVELOPER SHALL EXECUTE AND MAINTAIN ITS WORK SO AS TO AVOID INJURY OR DAMAGE TO ANY PERSON OR PROPERTY. IN CARRYING OUT ITS SERVICES, THE DEVELOPER SHALL AT ALL TIMES BE IN COMPLIANCE WITH ALL APPLICABLE LOCAL, STATE AND FEDERAL LAWS, RULES AND REGULATIONS, AND SHALL EXERCISE ALL NECESSARY PRECAUTIONS FOR THE SAFETY OF EMPLOYEES APPROPRIATE TO THE NATURE OF THE WORK AND THE CONDITIONS UNDER WHICH THE WORK IS TO BE PERFORMED. SAFETY PRECAUTIONS, WHERE APPLICABLE, SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO: (A) ADEQUATE LIFE PROTECTION AND LIFESAVING EQUIPMENT AND PROCEDURES; (B) INSTRUCTIONS IN ACCIDENT PREVENTION FOR ALL EMPLOYEES AND SUBCONTRACTORS, SUCH AS SAFE WALKWAYS, SCAFFOLDS, FALL PROTECTION LADDERS, BRIDGES, GANG PLANKS, CONFINED SPACE PROCEDURES, TRENCHING AND SHORING, EQUIPMENT AND OTHER SAFETY DEVICES, EQUIPMENT AND WEARING APPAREL AS ARE NECESSARY OR LAWFULLY REQUIRED TO PREVENT ACCIDENTS OR INJURIES; AND (C) ADEQUATE FACILITIES FOR THE PROPER INSPECTION AND MAINTENANCE OF ALL SAFETY MEASURES.

4.9 Developer's Indemnity Agreement/Hold Harmless. Except for sole negligence or willful misconduct of an Indemnitee, the Developer hereby assumes liability for and agrees to defend, indemnify, protect and hold harmless the City and its officers, agents, and employees, and the City Engineer from and against all claims, charges, damages, demands, actions, proceeding, losses, stop payment notices, costs, expenses (including counsel fees), judgments, civil fines and penalties, liabilities of any kind or nature whatsoever, which may arise out of or encountered in connection with this Agreement or the performance of the Work including, but not limited to death, or bodily or personal injury to persons, or damage to property, including property owned by or under the care and custody of the City, and for civil fines and penalties, that may arise from or be caused, in whole or in part, by any negligent or other act or omission of Developer, its officers, agents, employees, or Subcontractors including, but not limited to, liability arising from:

(a) Any dangerous, hazardous, unsafe or defective condition of, in or on the premises, of any nature whatsoever, which may exist by reason of any act, omission, neglect, or any use or occupation of the premises by the Developer, its officers, agents, employees, or subcontractors;

(b) Any operation conducted upon or any use or occupation of the premises by Developer, its officers, agents, employees, or Subcontractors under or pursuant to the provisions of this contract or otherwise;

(c) Any act, omission or negligence of Developer, its officers, agents, employees or Subcontractors;

(d) Any failure of Developer, its officers, agents or employees to comply with any of the terms or conditions of this Contract or any applicable federal, state, regional, or municipal law, ordinance, rule or regulation, including Prevailing Wage Law as set forth in Section 4.12.

The Developer also agrees to indemnify City and pay for all damage or loss suffered by City including, but not limited to damage or loss of City Property, loss of City revenue from any source, caused by or arising out of the conditions, operations, uses, occupations, acts, omissions or negligence referred to in Sections 4.9 (a), (b), (c), and (d) above.

Developer's obligations under this Section apply regardless of whether or not such claim, charge, damage, demand, action, proceeding, loss, stop payment notice, cost, expense, judgment, civil fine or penalty, or liability was caused in part or contributed to by an Indemnitee. However, without affecting the rights of the City under and provision of this agreement, Developer shall not be required to indemnify and hold harmless City for liability attributable to the active negligence of City, provided such active negligence is determined by agreement between the parties or by the findings of a court of competent jurisdiction. In instances where City is shown to have been actively negligent and where City's active negligence accounts for only a percentage of

the liability involved, the obligation of the Developer will be for that entire portion or percentage of liability not attributable to the active negligence of City.

Developer agrees to obtain executed indemnity agreements with provisions similar to those set forth here in this section from each and every subcontractor or any other person or entity involved by, for, with, or on behalf of Developer in the performance of this agreement. In the event that Developer fails to obtain such indemnity obligations from others as required here, Developer agrees to be fully responsible according to the terms of this section.

Failure of City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend City as set forth here is binding on the successors, assigns or heirs of Developer and shall survive the termination of this agreement or this section.

This Indemnity shall survive termination of the Agreement hereunder. This Indemnity is in addition to any other rights or remedies that the Indemnitees may have under the law or under any other Contract Documents or Agreements. In the event of any claim or demand made against any party which is entitled to be indemnified hereunder, City may, in its sole discretion, reserve, retain or apply any monies to the Developer under this Agreement for the purpose of resolving such claims; provided, however, City may release such funds if the Developer provides City with reasonable assurance of protection of the Indemnitees' interests. City shall, in its sole discretion, determine whether such assurances are reasonable.

4.10 Payment Bonds and Performance Bonds.

(a) Prior to the Close of Escrow the Developer shall furnish the City with the following separate corporate surety bonds from each contractor that is responsible for the construction of a Major Component of first phase Developer's Improvements, or, in each case, a portion thereof:

(i) A performance bond ("Performance Bond") issued by a surety company licensed and admitted to transact business as such in the State of California, in an amount not less than one hundred percent (100%) of the estimated Hard Construction Costs of the applicable Major Component of the first phase Developer's Improvements, or a portion thereof, as applicable. The Performance Bond shall name Developer as principal obligee, the City, each of the Private Construction Lenders and each of the public lenders as co-obligees. The Performance Bond shall assure full completion of the construction by such contractor of such Major Component of the first phase Developer's Improvement, or such portion thereof, as applicable; and

(ii) A payment bond ("Payment Bond") issued by a surety company licensed and admitted to transact business as such in the State of California, in an amount equal to one hundred percent (100%) of the estimated Hard Construction Costs of the applicable Major Component of the first phase Developer's Improvements, or a portion thereof, as applicable, guaranteeing payment for all materials, provisions, supplies and equipment used in, upon, for or about the performance of the construction by such contractor of such Major Component of the first phase Developer's Improvements, or such portion thereof and for labor done thereon and protecting the City from any and all liability, loss or damages arising out of or in connection with any failure to make any such payments. The Payment Bond shall name Developer as principal obligee, the City, each of the Private Construction Lenders and each of the public lenders as co-obligees.

(b) The Payment Bonds and Performance Bonds shall be in form and content reasonably satisfactory to the City.

4.11 Completion Guaranty. Developer shall cause the Guarantor under any completion guaranty given to City guaranteeing the lien-free completion of construction of the public improvements outlined in the Acquisition Agreement to execute a completion guaranty in favor of City and in substantially the same form and substance as the completion guaranty provided to Developer's lender. "Completion Guaranty" shall mean a guaranty, or guaranties, from a Person or multiple Persons (collectively, the "Guarantor"), each of which is not a Prohibited Person, and which, in the aggregate, have a net worth, which shall mean total assets less the amount of total liabilities, determined in accordance with generally accepted accounting principles of at least TWENTY MILLION DOLLARS ($20,000,000) and which are approved by the City, in its reasonable discretion, guaranteeing to the City the completion of the improvements outlined in the Acquisition Agreement. The Parties shall negotiate the form of the Completion Guaranty and any inter-creditor agreements(s) on or before the Target Date set forth in the Schedule of Performance. The Parties shall execute and deliver the Completion Guaranty at the Close of Escrow.

4.12 Prevailing Wages. The Developer acknowledges and agrees that:

(a) Any construction, alteration, demolition, installation or repair work that the Developer performs, or causes to be performed to complete the first phase of the Project, or that the Developer is required to perform, under this Agreement ("Developer Construction Work"), constitutes "public work" under California Prevailing Wage Law, including Labor Code Sections 1720 through 1861, *et seq.* (as such statutes may be amended from time to time, "PWL"), and PWL obligates the Developer to cause such Developer Construction Work to be performed as "public work", including, but not limited to, the payment of applicable prevailing wages to all Persons subject to the PWL.

(b) The Developer shall cause all Persons performing Developer Construction Work to comply with all applicable provisions of the PWL and other applicable wage Laws.

(c) The City hereby notifies the Developer and the Developer hereby acknowledges that the PWL includes, without limitation, Labor Code Section 1771.1(b) that provides that the following requirements described in Labor Code Section 1771.1(a) shall be included in all bid invitations and "public work" contracts: A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any contract for "public work", unless it is currently registered and qualified to perform "public work" pursuant to Section 1725.5. It is not a violation of Section 1771.1 for an unregistered contractor to submit a bid that is authorized by Section 7029.1 of the Business and Professions Code or by Section 10164 or 20103.5 of the Public Contract Code if the contractor is registered to perform "public work" pursuant to Section 1725.5 at the time the contract is awarded.

(d) The Developer acknowledges that its obligations under the PWL include, without limitation, ensuring that:

(i) pursuant to Labor Code Section 1771.1(b), a bid shall not be accepted nor any contract or subcontract entered into without proof of the contractor or subcontractor's current registration to perform "public work" pursuant to Section 1725.5;

(ii) pursuant to Labor Code Section 1771.4(a)(1), the call for bids and contract documents shall specify that the project is subject to compliance monitoring and enforcement by the California Department of Industrial Relations ("DIR");

(iii) pursuant to Labor Code Section 1771.4(a)(2), it posts or requires the prime contractor to post job site notices, as prescribed by regulation; and

(iv) pursuant to Labor Code Section 1773.3(a)(1), it provides notice to the DIR of any "public works" contract subject to the requirements of the PWL, within thirty (30) days of the award, but in no event later than the first day in which a contractor has workers employed upon the public work. Pursuant to Labor Code Section 1773.3(a)(2), the notice shall be transmitted electronically in a format specified by the DIR and shall include the name and registration number issued by the DIR pursuant to Section 1725.5 of the contractor, the name and registration number issued by the DIR pursuant to Section 1725.5 of any subcontractor listed on the successful bid, the bid and contract award dates, the

contract amount, the estimated start and completion dates, job site location, and any additional information that the DIR specifies that aids in the administration and enforcement of the PWL. PWC-100 is the name of the form currently used by the DIR for providing the notice, but the Developer shall determine and use whatever form the DIR requires.

(e) The City shall not be responsible for the Developer's failure to comply with any applicable provisions of the PWL.

(f) The Developer's violations of the PWL shall constitute a breach of this Agreement.

4.13 Liens and Claims.

(a) The Developer agrees that, if any Professional or materialman performing the Work, or furnishing materials in connection therewith, or if anyone claiming directly or indirectly under or through the Developer or any affiliate, professional or materialman shall file or cause to be filed any mechanics lien or other lien or security interest against the Project Site, the Developer's Improvements, or any portion thereof, or against any assets of or funds appropriated to or by the City or the City, then, within thirty (30) days after the Developer receives notice of filing thereof, the Developer shall cause such lien or security interest to be discharged of record by payment, deposit, bond, order of court of competent jurisdiction or otherwise. If the Developer shall fail to cause such lien or security interest to be discharged of record within the period aforesaid, then, in addition to any other right or remedy, the City or the City may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due from retentions or any progress payment next due to the Developer or by procuring the discharge of record of such lien or security interest. Any amount so paid by the City or the City, including all reasonable costs and expenses incurred by the City or the City in connection therewith, shall be payable by the Developer to the City or the City, as applicable, on demand. Each of the City will endeavor to notify Developer of any lien notices that it receives; provided, however, that the failure by City to so notify the Developer shall not affect Developer's obligations hereunder.

(b) Notwithstanding Section 4.13(a), the Developer shall not be required to discharge of record any such lien or security interest if the Developer is in good faith, and consistent with applicable Law, at its own expense, currently and diligently contesting the same; provided that the Developer first records a surety bond sufficient to release such lien or such security interest, as applicable.

4.14 Compliance with Law; Enforceability by City. The City shall provide to the Developer copies of its findings, policies and resolutions which authorize (a) the City to enter into each and every of the Closing Documents to which it is a party and (b) the Person or Persons executing each of such Closing Documents on behalf of the City to do so (collectively, "Compliance Documents"), when they are made available to the public. The Developer shall provide its written comments to the Compliance Documents

within a commercially reasonable period of time of the receipt thereof. If the City disagrees with any of the comments provided by the Developer, then the Parties shall meet and confer in accordance with Section 5.1. If disagreements between the Developer and the City are not resolved pursuant to Section 5.1, then the Developer may terminate this Agreement in accordance with Article 8.

5. REQUIREMENTS OF PARTIES; CONDITIONS PRECEDENT TO CLOSE OF ESCROW.

5.1 Periodic Review; Meet and Confer.

(a) The City shall have the option, not more frequently than every three (3) months during the Term, to conduct a review (the "Periodic Review") to evaluate, among other things, the extent to which the Developer is complying with its obligations under this Agreement or the Schedule of Performance, and the Parties' determinations of whether it is feasible to continue with the development of the Project pursuant to this Agreement (collectively, "Periodic Review Matters").

(b) Meet and Confer. (i) Within thirty (30) days following submittal by the Developer of the information and materials concerning Developer obligations and/ or the Schedule of Performance as reasonably requested by the City and/or the City in accordance with Section 5.1(a) or (ii) within five (5) days following notice of any Event of Default, City staff and the Developer shall meet and confer to seek mutual resolution of areas of concern covered in the Periodic Review or such Event of Default, as applicable, and to come to a mutual agreement whether to take one of the following actions:

(i) Pause. To the extent feasible, pause any actions and activities of the Parties pursuant to this Agreement (except, to the extent applicable, insurance, maintenance and indemnification obligations) for a period up to thirty (30) days to enable the Parties to schedule one or more additional meet and confer events to gather additional information and continue discussions of the Periodic Review Matters or such Event of Default, as applicable; or

(ii) Delay. To the extent feasible, delay for a period up to thirty (30) days any further actions or activities of the Parties under this Agreement to enable the Parties to further investigate their respective positions and whether it is feasible to proceed with the development of the Project as provided for hereunder. If disagreements between the Parties are not resolved pursuant to Section 5.1(b)(i) or (ii), then the Parties shall attempt to resolve such disagreements through mediation in accordance with Section 7.5. If such disagreements are not resolved through mediation within one hundred twenty (120) days after the commencement of

mediation, then either Party may terminate this Agreement pursuant to Article 8.

(c) If disagreements between the Parties are resolved pursuant to Section 5.1(b), then, if applicable, the Parties shall revise the Schedule of Performance to incorporate the changes agreed to by the Parties pursuant to Section 5.1(b) and such revisions to the Schedule of Performance shall be made without the need for an amendment to this Agreement in accordance with Section 9.9.

(d) Notwithstanding any other provision in this Agreement, in the event Schedule of Performance extensions pursuant to Sections 5.1(b)(i) and 5.1(b)(ii) above exceed one hundred and eighty (180) days cumulatively, any Party may elect to terminate this Agreement in accordance with Article 8.

5.2 Conditions Precedent to Close of Escrow Benefiting the City. The City's obligations in connection with the Close of Escrow are expressly conditioned upon the satisfaction by the City (or waiver by the City in writing) of each of the following conditions of the Project on or prior to the Target Date set forth in the Schedule of Performance:

(a) The City shall have received from the Developer in accordance with this Agreement final Development Cost estimates for the first phase of the Developer's Improvements as required under Section 4.4(d) on or prior to the applicable Target Date set forth in the Schedule of Performance;

(b) The City shall have approved in accordance with this Agreement, on or prior to the applicable Target Date set forth in the Schedule of Performance, the Developer provided independent third-party verification that each Unaffiliated Third Party that acquires any membership interests in the Developer is reputable (which shall mean the absence of reputations for dishonesty, criminal conduct or association with criminal elements – "reputable" shall not mean "prestigious", nor shall the determination of whether one is reputable involve considerations of personal taste or preference), and has no history of, or reputation for, either discriminatory employment practices which violate any Laws or non-compliance with applicable Environmental Laws or listing on the Prohibited Person list (each, an "Equity Investor" and, collectively, "the Equity Investors");

(c) The City shall have received from the Developer and reasonably accepted the terms of (i) the executable versions of the agreements with the Equity Investor(s) evidencing the commitments of such Equity Investors to make contributions for the first phase Developer's Improvements Costs (the "Equity Investor Contribution") on or prior to the applicable Target Date set forth in the Schedule of Performance;

(d) The City shall have received from the Developer and shall have reviewed on or prior to the applicable Target Date set forth in the Schedule of Performance, the binding final first phase loan documents ("Loan Documents") to

confirm conformance with the Final Plan of Finance and are in an amount not in excess of the Developer's Debt Contribution where:

(i) "Developer's Debt Contribution" shall mean the Developer's Contribution (as hereinafter defined) *less* the amount of the Equity Investor Contribution; and

(ii) "Developer's Contribution" shall mean the budgeted amount for the first phase Developer's Improvements Costs (currently estimated to be $197,000,000, including all furnishings, fixtures and equipment);

(e) The City shall be prepared to issue upon payment of required fees the required grading permits, Building Permits and all other permits that are required for the commencement and completion of construction of the first phase Developer's Improvements;

(f) The City shall have reviewed and provided comments, on or prior to the applicable Target Date set forth in the Schedule of Performance, regarding the terms of the Developer construction contracts with any contractor for the first phase Developer's Improvements, including guaranteed maximum price construction contracts or fixed price construction contracts for all Major Components of the first phase Developer's Improvements;

(g) The City shall have reviewed and approved the form of Completion Guaranty under Section 4.11;

(h) The City shall have received from the Developer evidence reasonably satisfactory to the City that all discretionary permits and other approvals that are required to complete construction of the first phase Developer's Improvements have been obtained from any and all governmental agencies having jurisdiction over the Project Site and other parties as set forth in Section 1.3;

(i) The City shall have received from the Developer certificates of insurance for each of the policies of insurance required under this Agreement evidencing that such policies meet the respective insurance requirements and will be effective as of the Close of Escrow;

(j) The City shall have received from the Developer for City review the completed Payment Bond and Performance Bond application in accordance with Section 4.10;

(k) No Developer Event of Default shall have occurred and be continuing;

(l) The Developer shall have executed the Deed of Sale to which it is a party, with the effectiveness thereof subject only to the consummation of the Close of Escrow;

(m) City shall have considered and approved items set forth in Section 1.3;

(n) Developer shall have obtained commitments for all financing that is necessary to satisfy its respective obligations for the first phase Developer's Improvements under the Final Plan of Finance and Final Project Budget, with such financing to close concurrently with the Close of Escrow or any extensions provided pursuant to section 5.4(e) below;

(o) The City shall have prepared the City TOT Reimbursement Agreement for execution by Developer;

(p) The City shall have received and reviewed the final, executed versions of the first phase Loan Documents that evidence the commitments for the Developer's Debt Contribution and the disbursement conditions therefor;

(q) The City shall confirm with Developer that the closing under the SARDA POA is ready to take place concurrently with the Close of Escrow and includes a Right of Termination by the City as described in Section 5.4(e) ;

(r) Developer shall provide documentation reasonably acceptable to the City that the required Hotel Operator and Hotel Management Agreement, including dedicated parking requirements, as set forth in the Scope of Development has been agreed to by all parties;

(s) City shall have amended or terminated the overflow parking agreement with JW Marriott on Lot E;

(t) Developer shall have terminated the CITY POA, on or prior to the applicable Target Date set forth in the Schedule of Performance, Attachment No. 9 attached hereto and incorporated herein by this reference; and

(u) City shall have approved the City Well Usage Agreement.

5.3 Conditions Precedent to Close of Escrow Benefiting Developer. The Developer's obligations in connection with the Close of Escrow are expressly conditioned upon the City, satisfying, or causing the satisfaction, of each of the following conditions (or waiver by the Developer in writing of any of the following conditions):

(a) The Title Company shall be irrevocably committed to issue to the Developer, simultaneously with the Close of Escrow, a policy or policies of title insurance in such form and amounts and with such special endorsements as may be reasonably required by the Developer and the Private Construction Lender, subject only to the Approved Title Exceptions;

(b) The Developer shall have received notice from the City approved or disapproved, the Developer's submittals required under this Agreement;

(c) The Developer shall have approved each of the Compliance Documents in accordance with Section 4.14 or the Developer, the City shall have reached an agreement regarding each of the Compliance Documents pursuant to Section 4.14;

(d) The Developer shall have received its Grading Permit and Building Permits;

(e) The Hotel Management Agreement shall have been agreed to and executed by all of the parties thereto, with the effectiveness thereof subject only to the consummation of the Close of Escrow or any extensions provided pursuant to section 5.4(e) below;

(f) The Developer shall have received all discretionary permits and approvals that are required to complete the construction of the first phase Developer's Improvements from any and all non-City governmental agencies having jurisdiction over the Project Site and all such discretionary permits and approvals shall be final beyond any applicable appealable periods;

(g) The first phase Loan Documents shall have been executed, with the effectiveness thereof subject only to the consummation of the Close of Escrow or any extensions provided pursuant to section 5.4(e), below, in an amount sufficient to pay the Developer's Debt Contribution;

(h) Developer shall have considered and approved items set forth in Section 1.3;

(i) The Developer shall have received evidence that the City has received required approvals from any and all third parties;

(j) The City shall have amended or terminated the overflow parking agreement with JW Marriott on Lot E; and

(k) Developer shall have approved the City Well Usage Agreement.

5.4 Existing Approvals; Cooperation Between Parties.

(a) All approvals required by the City and Developer under this Agreement shall not be unreasonably withheld or denied (except where such actions are specifically said to be in the sole and absolute discretion of a Party) and, where specifically referenced in this Agreement or in the Schedule of Performance, shall be given within the times set forth in this Agreement or in the Schedule of Performance.

(b) The City and Developer shall, to the extent reasonably necessary, cooperate with each other to enable each Party to perform its obligations under this Agreement; provided, however, that in the event that any Party is asked to provide cooperation, assurance, assistance, documentation, or investigation and such Party determines that complying with such request will be unlawful, unreasonably

burdensome, unreasonably expensive, or unreasonably time consuming, such Party may refuse to cooperate, without liability to that Party, by providing notice to the Party requesting the cooperation. Notwithstanding this provision, this Section 5.4(b) does not limit City's discretionary actions and City reserve the right to exercise discretionary actions, each in in its sole authority and in its sole and absolute discretion.

(c) From and after the Execution Date, the City shall not use the Project Site for any uses other than legally permitted uses that would not reasonably be expected to materially and adversely affect the development or use of the Project.

(d) Any Party, at its sole election, may in writing waive satisfaction of any of the conditions by another Party set forth in Section 5.2 or Section 5.3 that is to the benefit of such waiving Party only, or if it is to the benefit of two of the Parties, then upon the agreement between such Parties. Any such condition waived by a Party or two Parties, as applicable, shall be deemed to be "satisfied" for purposes of Section 5.2 or Section 5.3, as applicable. Any such waiver shall be set out in an Operating Memorandum in accordance with Section 9.9.

(e) The Parties may agree in writing to waive satisfaction of any of the conditions set forth in Section 5.2 and Section 5.3. The written waiver may classify any or all such waived conditions as post-closing obligations rather than deem them "satisfied." The conditions set forth in Section 5.2 and Section 5.3 that are classified as post-closing obligations together with the obligation set forth in Section 4.5(e) and Items 1 through 25 set forth in the Schedule of Performance attached as Attachment No. 9 shall be referred to herein as the "Post-Closing Obligations." As security for Developer's completion of any "Post-Closing Obligations," the conveyance of the Project Site (including both the City Property and the SARDA Property) to Developer shall be subject to a "Power of Termination" as defined in California Civil Code Section 885.010 as set forth below.

(i) If the Developer fails to satisfy the Post-Closing Obligations by the dates detailed in the Schedule of Performance (subject to delay for events of force majeure)(the "Post-Closing Obligations Deadlines"), the City may exercise its Power of Termination by delivering written notice to Developer. Developer shall not be entitled to any cure period for a failure to satisfy one or more of the Post-Closing Obligations by the applicable Post-Closing Obligations Deadline. Upon receipt from City of written notice of City's exercise of its Power of Termination, Developer agrees to, and shall, within five (5) calendar days, execute and deliver to City a quit claim deed relinquishing any and all of Developer's right, title, and interest in and to the Project Site.

(iii) Developer shall not allow or permit any charge, pledge, mortgage, lien, hypothecation, usufruct, deed of trust, security interest, adverse claim or interest, restriction or easement of any kind (each, an "Encumbrance") to encumber the Project Site or any portion thereof unless and until it has fully satisfied the conditions set forth in Section

5.2(b), (c), (d), and (p) (the "Financing Plan Conditions"), whether as a condition precedent to Close of Escrow or as a Post-Closing Obligation, including obtaining City's written approval of the Financing Plan Conditions being fully satisfied (the "Encumbrance Prohibition"), and any violation of the Encumbrance Prohibition shall constitute a material breach of this Agreement, provided, however, that the Encumbrance Prohibition shall not apply to a Performance Deed of Trust and Security Agreement made for the benefit of the City. Notwithstanding anything to the contrary set forth herein, upon such breach by Developer, City shall be entitled to exercise its Power of Termination by delivering written notice to Developer. Developer shall not be entitled to any cure period for a breach of the Encumbrance Prohibition. Upon receipt from City of written notice of City's exercise of its Power of Termination, Developer agrees to, and shall, within five (5) business days execute and deliver to City a quit claim deed relinquishing any and all of Developer's right, title, and interest in and to the Project Site.

(iv) Except to resolve Developer's claims of delay for events of force majeure, Developer waives its right to judicially contest City's exercise of its Power of Termination under this Section 5.4(e).

(v) If the Developer is in default of Post-Closing Obligations under this Section 5.4(e) following the Close of Escrow and prior to the issuance by the City of a Certificate of Occupancy for the Hotel the City may, in its sole discretion, as a remedy in addition to any and all other remedies set forth herein or available at law or equity, re-enter and take possession of the Project Site with all then-existing improvements, and vest in the City the estate previously conveyed to the Developer. The City's rights under this Section shall terminate and be of no further force and effect upon the earlier of satisfaction of the Post-Closing Obligations or the issuance by the City of a Certificate of Occupancy for the Hotel.

(vi) The City's Power of Termination shall be subordinate and subject to and be limited by and shall not defeat, render invalid, or limit:

(i) Any financing instrument secured by the Property (including any loans or ground lease); or

(ii) Any rights or interests provided in this Agreement for the protection of the holder of a secured financing right with respect to the Property; or

(iii) Any leases affecting the Property as of the date of such termination.

The rights established in this Section 5.4(e) are to be interpreted in light of the fact that the City and SARDA will convey the Project Site to the Developer for development and not for speculation.

This subsection 5.4(e)(vi) shall not apply to City's exercise of its Power of Termination pursuant to subsection 5.4(e)(iii) above.

(vii) Upon vesting in the City of title to the Project Site as provided in this Section 5.4(e), the City shall have the sole discretion to determine the terms and conditions upon which it shall subsequently dispose of or utilize the Project Site and the parties shall have no further obligations to one another. Obligations under any guaranties and ancillary documents in connection with this Agreement shall also terminate and be of no further force and effect.

(viii) Upon the earlier of satisfaction of the Post-Closing Obligations or issuance of a certificate of occupancy for the Hotel Developer shall be entitled to record a memorandum of release of reversionary rights in the form attached hereto as Exhibit [__].

(f) As additional security to secure the performance of Developer's Post Closing Obligations, Developer shall execute and deposit with the Escrow Agent prior to the Close of Escrow, a Performance Deed of Trust and Security Agreement in the form attached hereto as Attachment No. 10.

5.5 Physical Condition of the Project Site. The Developer agrees to unconditionally accept the Project Site SUBJECT TO ALL FAULTS AND CONDITION, "AS-IS", "WHERE IS", WITHOUT ANY WARRANTY AS TO QUALITY, CHARACTER, PERFORMANCE OR CONDITION and with full knowledge of the physical condition of the Project Site, all Laws applicable to the Project Site, the Approved Title Exceptions and of any and all conditions, restrictions, encumbrances and all matters of record relating to the Project Site. The Developer's acceptance of the Project Site shall constitute the Developer's representation and warranty to the City that the Developer is relying solely on its own investigation of the Project Site and has received assurances acceptable to the Developer by means independent of the City or any employee, official, consultant or agent of the City of the truth of all facts material to the Developer's purchase of the Project Site pursuant to this Agreement, the Deed of Sale , and that the Project Site are being purchased by the Developer as a result of its own knowledge, inspection and investigation of the Project Site and not as a result of any representation(s) made by the City or City, or any employee, official, consultant or agent of the City or City relating to the condition of the Project Site. The City hereby expressly and specifically disclaim any express or implied warranties regarding the Project Site, except as expressly set forth in this Agreement.

5.6 Early Entry by Developer

(a) The City shall provide Developer right of entry agreements, as required, by and between the Developer (collectively, the "Right of Entry Agreement").

6. SALE OF CITY PROPERTY; CLOSE OF ESCROW.

6.1 Sale of City Property. City and Developer entered into the City POA, but agreed to transfer the deposit and terminate the City POA and replace it with a prior version of this Agreement. The City POA terms shall upon the execution of this Agreement inure to this Agreement and thereby shall provide for the sale of the City Property. The City Property shall be sold to the Developer pursuant to the Deed of Sale. On or before the Target Date set forth in the Schedule of Performance, the City and the Developer shall negotiate and agree on the form of Deed of Sale which shall include a right of repurchase by the City in the event that the Project has not obtained required building permits within fifteen (15) months of the Close of Escrow or not commenced construction within eighteen (18) months from the Close of Escrow.

(a) Opening of Escrow; Updated Preliminary Title Reports. The Parties shall open an escrow with Foresite Escrow, or such other escrow company as the Parties may mutually select (the "Escrow Agent") to consummate the Close of Escrow as herein provided. Within sixty (60) days of the Execution Date ("Delivery Date"), the Developer shall deliver to the City a preliminary title report ("Preliminary Title Report") for the City Property prepared by Lawyers Title Insurance Company (the "Title Company").

(b) Developer has reviewed the Preliminary Title Report and has no objections to the items of record.

6.2 Execution and Delivery of Documents. The applicable Parties shall complete, execute and deliver the Closing Documents as set forth in Section 6.3(a).

6.3 Close of Escrow; Title Policies. Provided that each of the conditions in Sections 5.2 and 5.3 has been satisfied, or waived in writing by the Party or the Parties, as applicable, to whose benefit such condition exists, the Parties shall close the transaction contemplated by this Agreement ("Close of Escrow") on or before the Target Date set forth in the Schedule of Performance (the "Closing Date"), but in no event earlier than the following conditions have been satisfied:

(a) Escrow Agent and Title Company shall have received fully executed originals of all of the following documents (the "Closing Documents"), all of which Closing Documents shall be delivered not later than one (1) business day prior to the Closing Date:

(i) Two (2) originals of the Deed of Sale, executed by the City and Developer;

(ii) One (1) notarized original of the Performance Deed of Trust and Security Agreement, executed by Developer;

(iii) One (1) notarized original of the Memorandum of Deed of Sale, executed by the City and Developer, in recordable form;

(iv) One (1) original Closing Statement, executed by the City;

(v) One (1) original Closing Statement, executed by the Developer;

(vi) As to each of the lenders involved in the Close of Escrow, one (1) original executed Closing Statement; and

(vii) Such other customary and reasonable title and escrow documents reasonably required by the Title Company and Escrow Company for the Close of Escrow in a form and with terms reasonably acceptable to the Parties executing such documents and supplemental escrow instructions as may be reasonably required for the Close of Escrow.

(b) The Title Company is irrevocably committed to issue to the Developer a policy or policies of title insurance related to the City Property in such form and amounts and with such special endorsements as may be reasonably required by the Developer and the Private Construction Lender, subject only to the Approved Title Exceptions;

(c) The Title Company is irrevocably committed to issue to the City policies of title insurance related to the City Property in such form and amounts and with such special endorsements as may be reasonably required by the City, as applicable, subject only to the Approved Title Exceptions;

(d) Escrow Agent shall have received from the Developer evidence that the Title Company is irrevocably committed to issue to the Private Construction Lender a lender's policy of title insurance in the amount of the first lien mortgage, subject only to the Approved Title Exceptions, and with special endorsements as may be required by the Private Construction Lender;

(e) Escrow Agent shall have received from the City and/or City evidence that the Title Company is irrevocably committed to issue to any public lender a lender's policy of title insurance in the amount of the financing, subject only to the Approved Title Exceptions, and with special endorsements as may be required by the public lenders;

(f) The Developer and the Escrow Agent shall have received from the City certification in writing that all conditions to Close of Escrow set forth in Section 5.2 have either been satisfied or waived; and

(g) The City and the Escrow Agent shall have received from the Developer certification in writing that all conditions to Close of Escrow set forth in Section 5.3 have either been satisfied, waived, or deemed Post-Closing Obligations.

(h) Developer shall have deposited in escrow the amount of One Hundred Seventy-Five Thousand and 00/100 Dollars ($175,000.00) to compensate City for the costs of the Turf Reduction Design at Desert Willow, said amount to be credited to City at Close of Escrow.

6.4 Commencement of Construction. Developer shall commence grading and construction of the Project only after the Close of Escrow. Construction shall be completed as in the Schedule of Performance.

6.5 Costs of Escrow; Title Insurance.

(a) The Developer shall pay in escrow to the Escrow Agent the following fees, charges and costs promptly after the Escrow Agent has notified the Developer of the amount of such fees, charges and costs, but not earlier than ten (10) days prior to the Closing Date:

(i) The escrow fee;

(ii) All premiums for title insurance policies and special endorsements issued by the Title Company to the Developer and the Private Construction Lenders pursuant to Sections 6.3(b) and 6.3(d);

(iii) Ad valorem taxes and assessments, including possessory interest taxes, upon the City Property accruing on and after the Closing Date;

(iv) Any transfer taxes required to be paid at the Close of Escrow;

(v) Any fees payable for the recordation of any of the Closing Documents in the Official Records of the County of Riverside; and

(vi) One-half (1/2) of all other fees, charges and costs of escrow.

(b) The City shall pay in escrow to the Escrow Agent the following fees, charges and costs promptly after the Escrow Agent has notified the City of the amount of such fees, charges and costs, and City has approved the same, but not earlier than ten (10) days prior to the Closing Date:

(i) All premiums for title insurance policies and special endorsements issued by the Title Company to the City and the any public lender pursuant to Sections 6.3(c) and 6.3(e);

(ii) The cost of any endorsements that are required to remove any Title Exception that the City has agreed to remove; and

(iii) One-half (1/2) of all other fees, charges and costs of escrow.

Except as otherwise set forth in this Agreement, each of the Parties shall be responsible for the costs of its own due diligence investigations or activities, including, without limitation, the costs of its own consultants and legal counsel.

7. DEFAULTS; REMEDIES.

7.1 General Developer Default. If, prior to the Close of Escrow and delivery of the City Property to Developer, the Developer shall fail to perform or fulfill any obligation required of it under this Agreement and/or under the Right of Entry Agreement and shall not have cured or commenced to cure such failure within thirty (30) days following written notice thereof from the City and/or the City (or has commenced to cure such failure, but is not diligently proceeding to cure such failure), then the Developer shall be in default under this Agreement (each such event or occurrence, a "Developer Event of Default").

In the event of a Developer Event of Default, the City may, each in its sole discretion, (a) extend the time for the Developer to perform the applicable obligation(s) hereunder for a period of time acceptable to the City beyond the cure period set forth in this Section 7.1, or (b) terminate this Agreement by giving written notice (as required under Section 2.4) of such termination to the other Parties. Upon termination, the rights and obligations of the Parties shall be as set forth in Section 8.3 and Article 8.

7.2 Default by City. If, prior to the Close of Escrow, the City shall fail to perform or fulfill any obligation required of such Party under this Agreement and/or under the Right of Entry Agreement and shall not have cured or commenced to cure such failure within thirty (30) days following written notice thereof from the Developer (or has commenced to cure such failure, but is not diligently proceeding to cure such failure), then the City or the City, as applicable, shall be in default under this Agreement (each such event or occurrence, a "Public Entities Event of Default" and, together with a Developer Event of Default, any "Event of Default").

In the event of a Public Entities Event of Default, the Developer may, in its sole discretion, (a) extend the time for the City or the Developer, as applicable, to perform the applicable obligation(s) hereunder for a period of time acceptable to the Developer beyond the cure period set forth in this Section 7.2, or (b) terminate this Agreement by giving written notice (as required under Section 2.3) of such termination to the other Parties. Upon termination, the rights and obligations of the Parties shall be as set forth in Section 7.4 and Article 8.

7.3 Force Majeure. Notwithstanding anything to contrary contained herein, neither Party shall be held liable or responsible to the other Party nor be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any term of this Agreement to the extent, and for so long as, such failure or

delay is caused by or results from causes beyond the reasonable control of the affected Party limited to the following events that actually directly impact and cause delay the Project: fire, floods, seismic events, embargoes, war, acts of war (whether war be declared or not), acts of terrorism, insurrections, riots, civil commotions, strikes, lockouts or other labor disturbances, pandemics, or other acts of God.

7.4 Remedies Exclusive.

(a) Because of the nature of this Agreement, the Parties agree that remedies expressly set forth in this Agreement are the only remedies available to the Parties.

(b) The Developer shall not have any remedy for money damages against the City except for return of the Deposit in accordance with Article 8.

(c) The City shall not have any remedy for money damages against the Developer, except for retention of the Deposit in accordance with Article 8.

(d) The City, and the Developer, as applicable, shall be entitled to compel specific performance of the other Party's(ies') obligation to meet and confer in accordance with Section 5.1.

(e) Except as set forth in Section 7.4(d), the Parties shall not have any remedy for specific performance against any other Party.

7.5 Dispute Resolution. The Parties shall, before the commencement of any lawsuit or court action against any other Party relating to this Agreement or the Project, attempt in good faith to settle their dispute by third-party mediation.

8. EVENTS OF TERMINATION; RIGHTS AND OBLIGATIONS OF PARTIES.

8.1 Events of Termination. This Agreement shall automatically terminate if any of the following events (an "Event of Termination") occur prior to Close of Escrow:

(a) The Early Expiration Date or expiration of any Extension Period without an approved Extension or expiration of the final Extension Period;

(b) Termination of this Agreement by any Party pursuant to Section 3.1(c);

(c) Termination of this Agreement by the Developer pursuant to Section 4.14;

(d) Termination of this Agreement by any Party pursuant to Section 5.1(b);

(e) Termination of this Agreement by any Party pursuant to Section 5.1(d);

(f) Termination of this Agreement by the Developer by reason of a Public Entities Event of Default or by the City or the City by reason of a Developer Event of Default, in each case, pursuant to Article 7; and

(g) The failure to otherwise satisfy, by the Closing Date, the conditions set forth in Sections 5.2, 5.3 and 6.5, unless said failure is waived by the Party or Parties which the condition benefits.

8.1.1 Notwithstanding any of the foregoing, this Agreement will terminate upon the issuance of the final certificate of completion of the first phase Developer's Improvements, if not earlier terminated.

8.2 Disposition of Deposit.

(a) IF THIS AGREEMENT IS TERMINATED BY THE CITY PURSUANT TO SECTION 8.1(g), THE DEVELOPER ACKNOWLEDGES AND AGREES THAT THE DEPOSIT MAY BE RETAINED BY THE CITY AND CITY AS LIQUIDATED DAMAGES AND AS THEIR PROPERTY WITHOUT ANY DEDUCTION, OFFSET OR RECOUPMENT WHATSOEVER BY THE DEVELOPER. IF THE DEVELOPER SHOULD DEFAULT UPON ITS OBLIGATIONS HEREUNDER, ANY SUCH TERMINATION OF THIS AGREEMENT WOULD RESULT IN IMMEASURABLE DAMAGE AND LOSS TO THE CITY. IT IS IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE AMOUNT OF SUCH DAMAGES TO THE CITY, BUT THE PARTIES ARE OF THE OPINION, UPON THE BASIS OF ALL INFORMATION AVAILABLE TO THEM, THAT SUCH DAMAGES WOULD APPROXIMATELY EQUAL THE AMOUNT OF THE DEPOSIT, AND THE AMOUNT OF SUCH DEPOSIT SHALL BE PAID TO THE CITY UPON ANY SUCH OCCURRENCE AS THE TOTAL OF ALL LIQUIDATED DAMAGES FOR ANY AND ALL SUCH DEVELOPER EVENTS OF DEFAULT AND NOT AS A PENALTY.

THE DEVELOPER AND THE CITY SPECIFICALLY ACKNOWLEDGE THIS LIQUIDATED DAMAGES PROVISION BY THEIR SIGNATURES HERE:

CITY:

By:_____

DEVELOPER:

By:_____

(b) If this Agreement is terminated by reason of a Developer Event of Default, then the City shall promptly return or release the Deposit then held by the City to the Developer as the Developer's sole remedy hereunder.

8.3 Effect of Termination.

(a) Following the Close of Escrow, the provisions of this Agreement shall be governed by Section 5.4(e), if applicable, and Article 8, and the rights and obligations of the parties under the Deed of Sale and shall be governed by those documents.

(b) If this Agreement is terminated or expires, then the City shall have the absolute right to enter into agreements relating to the Project, Project Site, Developer's Improvements and the City Property with any developer or operator and brand of its choosing. The City shall not have the right to discuss any aspect of the Project with any prospective or subsequent developer, operator, or brand absent full and final termination of this Agreement.

(c) Except as otherwise expressly provided in Section 5.4(e), if applicable, and this Article 8 and in subsection (d) below, upon an Event of Termination none of the Parties shall have any further rights, obligations or remedies to or against any other Party pursuant to this Agreement.

(d) Notwithstanding termination of this Agreement, the Parties agree that the following provisions shall survive such termination to the extent and for such period as necessary to give them full force and effect under the circumstances giving rise to termination of this Agreement:

(i) Section 1.3(c);

(ii) Section 4.6;

(iii) Section 4.7;

(iv) Section 4.9;

(v) Section 4.10;

(vi) Section 8.2; and

(vii) this Section 8.3.

9. MISCELLANEOUS PROVISIONS.

9.1 Real Estate Commissions. Neither Party shall be liable for any real estate commission or brokerage fees which may arise from this Agreement. Each Party represents that it has engaged no broker, agent or finder in connection with this Agreement, and each Party agrees to hold the other Party or Parties harmless from any claim by any broker, agent or finder retained by such Party.

9.2 Time of Essence. Time is of the essence in the performance of the respective obligations of the Parties under this Agreement.

9.3 Consent. The City shall reasonably cooperate with the Developer in the preparation and submittal of any governmental applications the Developer must submit in the furtherance of this Agreement. The City further agree to reasonably cooperate with the Developer in the timely processing of any such applications.

9.4 Entire Agreement. This Agreement consists of forty-six (46) pages together with Attachment Nos. 1 through 9, inclusive, which are attached hereto and incorporated herein by this reference, which constitute the entire agreement between the Parties.

9.5 Interpretation. This Agreement has been negotiated at arm's length and between Persons sophisticated and knowledgeable in the matters dealt with herein. In addition, each Party has been represented by experienced and knowledgeable legal counsel. Accordingly, any rule of law (including California Civil Code Section 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the Party that has drafted it, is not applicable and is waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purposes of this Agreement.

9.6 Governing Law. This Agreement shall be governed by the laws of the State of California.

9.7 Captions. The captions used herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or the intent of any Section hereof.

9.8 No Third Party Rights. Nothing in this Agreement shall create or shall give to third parties any claim or right of action against the City, the City or the Developer beyond such as may legally exist, irrespective of this Agreement.

9.9 Modification or Amendment of Agreement; Operating Memoranda.

(a) No change in, modification to, termination or discharge of this Agreement in any form whatsoever shall be valid or enforceable unless it is in writing and signed by the Party to be charged therewith or its duly authorized representative.

(b) The Parties acknowledge that the provisions of this Agreement require a close degree of cooperation, and that new information and future events may make appropriate changes with respect to the details of performance of the Parties under this Agreement. If, as a result of a Periodic Review provided for in Section 5.1, or otherwise from time to time prior to the Early Expiration Date or during any Extension Period, the Parties find that non-substantive refinements or adjustments that do not require any public review or approval and that concern details of performance of the Parties hereunder, are necessary or appropriate, they may effectuate such refinements or adjustments through a memorandum (individually, "Operating Memorandum", and collectively, "Operating Memoranda") approved by the Parties which, after execution, shall be attached to this Agreement as addenda and become a part hereof. Operating Memoranda must be executed on behalf of the City by its City Manager or designee,

and on behalf of the Developer by its authorized representative. Operating Memoranda shall not require prior notice or approval by the City Council and shall not constitute an amendment to this Agreement.

(c) Any substantive or significant modifications to the terms and conditions set forth in this Agreement, such as an increase of the Public Investment Amount, reduction in insurance or indemnity requirements, or waiver of any discretionary approval requirement, shall be processed as an amendment of this Agreement, and must be approved by the Developer, and City Council.

9.10 Waiver. No waiver or any breach of any of the terms, covenants, agreements, restrictions or conditions of this Agreement shall be construed to be a waiver of any succeeding breach of the same or other terms, covenants, agreements, restrictions and conditions hereof.

9.11 Severability. If any term, covenant or condition of this Agreement or the application thereof to any Person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by Law.

9.12 Integrated Agreement. This Agreement, including the attached exhibits, contains the entire agreement of the parties and supersedes all prior and contemporaneous agreements and understandings, oral or otherwise, among the parties with respect to the matters contained in this Agreement and may not be modified or amended except as set forth in this Agreement.

9.13 Certificates.

(a) On or before the Target Date set forth in the Schedule of Performance, the Developer shall provide to the City an incumbency certificate, in form and substance reasonably satisfactory to the City and signed by a duly authorized officer of the Developer, certifying that Doug Sheres, John Luff and Don Rady are duly authorized to execute this Agreement on behalf of the Developer, and attaching a copy of the Limited Liability Company Agreement of Desert Wave Ventures, LLC and any applicable resolutions.

(b) On or before the Target Date set forth in the Schedule of Performance, the City shall provide to the Developer a copy of the resolution duly adopted by the City Council, evidencing that the City Manager is authorized to execute this Agreement on behalf of the City.

(c) On or before the Target Date set forth in the Schedule of Performance, the City shall provide to the Developer a copy of the ordinance duly passed and adopted by the City Council, evidencing that the Mayor of the City is duly authorized to execute this Agreement on behalf of the City.

9.14 Counterparts. This Agreement may be executed in counterparts which taken together shall constitute one agreement.

9.15 Public Records.

(a) The City is subject to the provisions of the California Public Records Act (Cal. Gov. Code § 6250, *et seq.*), (the "Act"). The City's use and disclosure of public records are governed by the Act.

(b) In the event that any lawsuit, action, or other legal proceeding is brought against City by any person(s) or entity(ies) seeking the disclosure of the information Developer has provided to City under any theory (collectively the "Actions"), Developer hereby agrees to release City from any such liability and to defend, indemnify and hold harmless City from any such Actions. Developer agrees and acknowledges that City has the sole and exclusive right to choose its legal counsel in its defense of the Actions, and Developer agrees to fully and promptly reimburse all legal fees and costs incurred by City in the defense of the Actions no later than thirty (30) days after Developer's receipt of a reimbursement invoice with supporting documentation. Developer further agrees that any award of monetary damages, fees and costs, or otherwise that may be legally imposed upon City in the Actions, relating to the information Developer has articulated as being exempt from disclosure under the Act or any other relevant laws, shall be fully and promptly paid by Developer to the Court, plaintiff(s) in the Actions, or any other third party as may be required by any such award no later than thirty (30) days after Developer's receipt of City's written demand for such payment unless earlier ordered by the Court.

9.16 Incorporation by Reference of Recitals. The Recitals are hereby incorporated into this Agreement by reference as if set forth herein in full.

[Signatures on Following Pages]

CITY:

CITY OF PALM DESERT, a charter city and municipal corporation

Date: _____, 2022

By:_____
JAN HARNIK, Mayor

APPROVED AS TO FORM:

By:_____
ROBERT HARGREAVES
City Attorney

DEVELOPER:

Date: _____2022

DESERT WAVE VENTURES, LLC, a Delaware limited liability company

By: FS VENTURES, LLC, a Delaware corporation, Its Manager

By: _____
Don Rady
Its: Managing Member

APPROVED AS TO FORM:

By:_____
Marco A. Gonzalez, Counsel

CALIFORNIA ALL PURPOSE ACKNOWLEDGMENT

	ing this certificate verifies only the identity of the individual who signed the document. to ot the truthfulness. accuracy or validity of that document.

State of California)
) SS.
County of _____)

On _____, 20___, before me,_____, a Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature _____

ATTACHMENT NO. 1

SCOPE OF DEVELOPMENT

I. GENERAL

The Project and all related public improvements shall be designed and constructed substantially in accordance with the provisions of this Agreement, including without limitation the Laws, and all specifications, drawings, plans, data, reports, maps, permit applications, land use applications, zoning applications, environmental review and disclosure documents and design review documents (collectively, "Plans and Specifications") and related documents to be approved by the City pursuant hereto. The City staff, the City's engineers, the Developer and the Developer's architects, engineers, General Contractor and subcontractors shall coordinate with respect to the overall design, architecture and nature of the improvements on the Project Site.

In the event of any conflict between the contents of this Scope of Development and the Agreement, the provisions of the Agreement shall prevail.

II. DEVELOPER'S IMPROVEMENTS

Subject to the terms and conditions of this Agreement, including all attachments hereto, the Developer shall be responsible for the design and construction of the following improvements in two phases (collectively, the "Developer's Improvements"):

A. Phase one Developer's Improvements will include an approximately 17.68 acre Surf Lagoon Resort and Amenities comprised of:

1. Minimum 5.0 acre Surf Lagoon with wave generating equipment.

2. Minimum 6,000 sq. ft. and maximum 15,000 sq. ft. Surf Center Building, to include surf welcome area, ticketing, wetsuit rental/drying, board rental, office space, training area, flex space, and retail facility.

3. Developer to construct a hotel pursuant to the amended Specific Plan and Precise Plan that allows up to 350 hotel rooms in one hotel and complies with the following requirements:

    a. Phase one of Developer's Improvements shall include a minimum of 137 keys, all of which may be provided in the Hotel.

    b. Hotel and related facilities shall include multiple restaurants, spa facilities, pool facilities and group meeting space commensurate with hotel/villa upper upscale brand, size and needs.

c. Hotel shall be designed to meet the standards equivalent to an AAA 4-Diamond rating in accordance with the latest version of the Approval Requirements & Diamond Rating Guidelines Lodging published by AAA.

d. Hotel shall be an independent boutique or shall carry the flag of a major hotel brand (Marriott, Hilton, Hyatt). AAA 4-Diamond rating equivalency requirements shall dictate investment requirements for the hotel amenity and room packages (such investment not to be less than $75,000 per key for Furniture, Fixtures and Equipment, and operating supplies and systems), including the desired mix of rooms, suites and Residential Units. However, any "extended stay" or "time share" hotel shall not be permitted without prior written approval by the City.

e. Evidence and consent of a market based commercially reasonable Hotel Developer/Operator agreement with a partner that has a minimum of 10 years' experience operating Upper Upscale or Luxury hotels or resorts.

f. Developer may but is not required to include a portion of the Project's Residential Units in phase one of Developer's Improvements.

4. Proprietary wave producing machinery and accompanying surf lagoon control building.

5. All ancillary Support Facilities to support wave operations in accordance with Specific Plan including maintenance, guest service, F&B, parking and common area.

6. Private Water Well approval, permitting, construction and operation on Project Site, if development of a private water well on the Project Site is legally and technically feasible.

7. Circular roadway around project perimeter, as necessary, for fire and residential ownership access.

8. Landscape, Open Space, and Swimming Pools equating to a minimum of 20% of the Project Site.

9. Parking – Not less than:

a. Parking structure with 151 parking stalls for Surf Center parking and Desert Willow overflow parking;

b. 96 on-site surface parking stalls for Surf Center and Desert Willow overflow parking;

c. Hotel parking as required by the Existing Approvals to include 30 on-site parking stalls and up to 107 off-site parking stalls; and

d. 246 surface stalls of off-site parking which include the107 from item "C" above

B. Misc. Items included in phase one Developer's Improvements:

1. Construct freshwater intake line from City owned 15" extant water line to west boundary line of SARDA Parcel B consistent with Existing Approvals or in substantial conformance with the Improvement objective.

2. Construct on-site and accompanying off-site storm-water discharge system draining to dry wells and waste areas on the Mountain View golf course or in substantial conformance with the Improvement objective.

3. Construct evacuation line to dry wells and golf course irrigation lake system (through Embarc property) consistent with Existing Approvals or in substantial conformance with the Improvement objective.

4. Construct tie-in sewer line to CVWD owned extant line west of the site adjacent to Westin Desert Willow Villas consistent with Existing Approvals or in substantial conformance with the Improvement objective.

5. Provide emergency gate access point for emergency vehicles at northerly and westerly corner of site adjacent to Westin Desert Willow Villas consistent with Existing Approvals, as required by Palm Desert Fire Department.

6. Provide funding consistent with the Turf Reduction Program Funding Agreement.

7. Construct improvements for overflow parking needs of the Desert Willow Golf Resort.

8. Construction of all utility connections to support the Project.

C. All Conditions of Approval identified in the Existing Approvals.

D. All Mitigation Measures identified in the Existing Approvals.

E. Phase two of Developer's Improvements shall include construction of Residential Units and associated amenities, up to a total of 83 units within the Project.

III. ARCHITECTURE AND DESIGN

The Developer's Improvements shall be of high architectural quality and be sufficiently landscaped, as approved by the Architectural Review Committee. The Construction Documents and the Building Permit Application shall describe the architectural character intended for the Developer's Improvements.

ATTACHMENT NO. 2

PRELIMINARY PLAN OF FINANCE

[TO BE INSERTED]

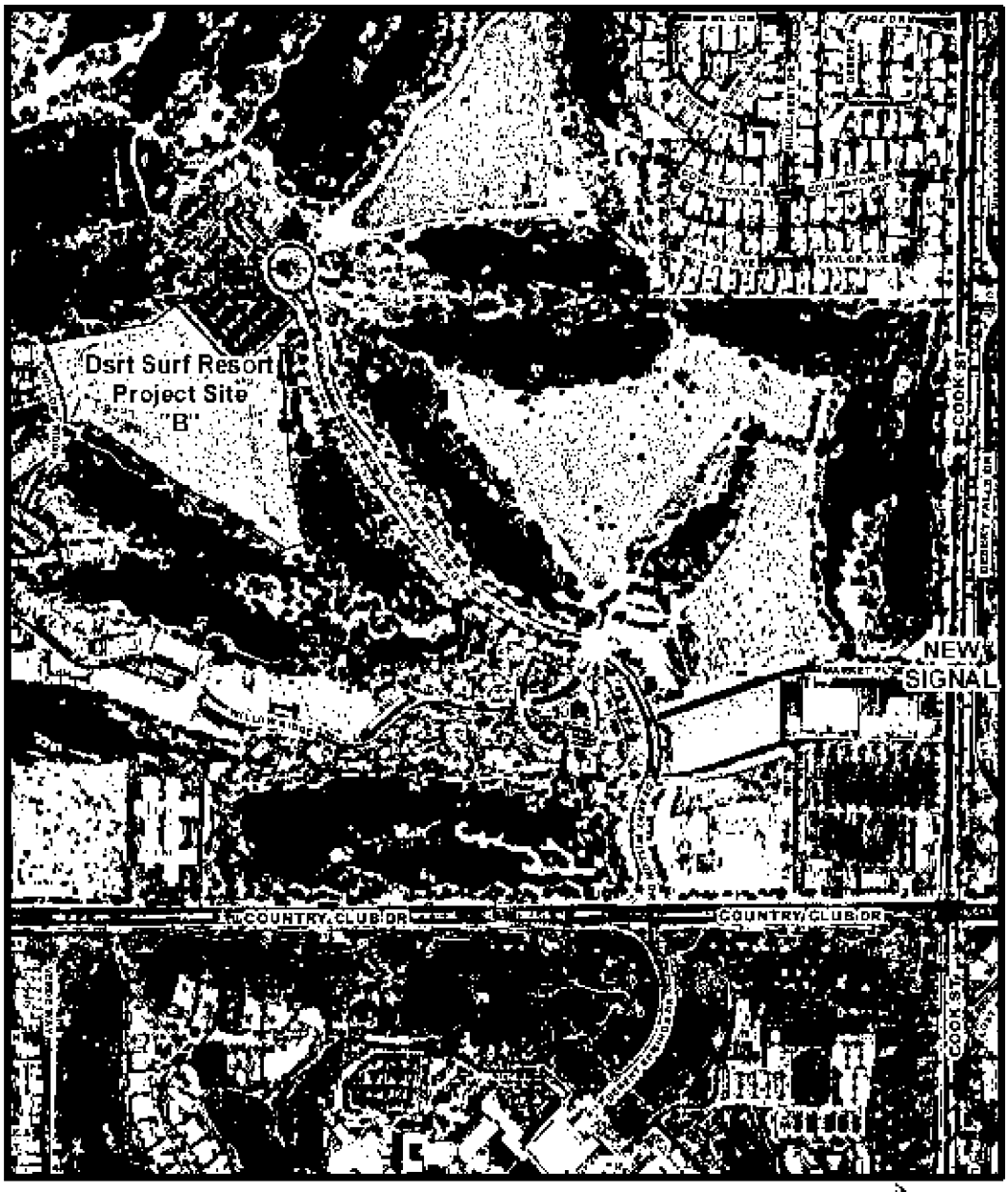
ATTACHMENT NO. 3

FORM OF PROJECT BUDGET

[TO BE INSERTED]

ATTACHMENT NO. 4

MAP OF PROJECT SITE;
MAP SHOWING GENERAL LOCATION OF ELEMENTS OF THE PROJECT



Dsrt Surf Resort Project Site

ATTACHMENT NO. 5

LEGAL DESCRIPTION OF PROJECT SITE

For SARDA Property

All that certain real property situated in the County of Riverside, State of California, described as follows:

Lot 8 of Tract No. 28450, in the City of Palm Desert, County of Riverside, State of California, as shown by map on file in Book 264, Pages 4 through 15 of Maps, Records of Riverside County.

Excepting therefrom all oil, gas and other mineral deposits, together with the right to prospect for, mine, and remove the same, according to the provisions of the Act of Congress approved June 1, 1938 (52 Stat. 609) as reserved in the Patent recorded February 4, 1960 as Instrument No. 9510, of Official Records of Riverside County, California;

Also excepting therefrom one half of all crude oil, petroleum, gas brea, asphaltum, and all kindred substances and other minerals, as reserved in deed from Henry A. Dustin and Pearl M. Dustin, husband and wife recorded January 11, 1956 as Instrument No. 1901 of Official Records of Riverside County, California;

Also excepting therefrom one half of all crude oil, petroleum, gas brea, asphaltum, and all kindred substances and other minerals, as reserved in deed from Henry A. Dustin and Pearl M. Dustin, husband and wife recorded January 11, 1956 as Instrument No. 1895 in Book 1845, Page 474 of Official Records of Riverside County, California;

Also excepting one half of all crude oil, petroleum, gas, brea, asphaltum and all kindred substances and other minerals under and in said land, without right of surface entry and with the obligation of grantor herein and any transfers thereof to repair any damage to said land and/or any improvements now or hereafter constructed thereon resulting from the extraction of said minerals by deed recorded February 8, 1985 as Instrument No. 27280 of Official Records of Riverside County, California;

Also excepting therefrom one half of all crude oil, petroleum, gas, brea, asphaltum and all kindred substances and other minerals under and in said land without the right of surface entry and with the obligation of grantor herein and any transferee thereof to repair any damage to said land and/r any improvements now or hereafter constructed thereon resulting from the extraction of said minerals, as reserved by deed recorded January 31, 1991 as Instrument No. 36436 of Official Records of Riverside County, California; said mineral rights interests now purportedly vest in Lois A. Taylor, Jacqueline Y. Schaper, Jeanelle N. Stehly, Chadwick J. Mc Donald, Kevin O. Mc

Donald, as to an undivided 1/5 interest each as evidenced by Quitclaim Mineral Deed recorded June 1, 1993 as Instrument No. 204127 of Official Records of Riverside County, California;

Also excepting therefrom all oil, gas and other hydrocarbon substances and minerals in and under said land, as set forth in the deed from John J. Kovacevich and Beverly Ellen Kovacevich, husband and wife recorded January 20, 1959 as Instrument No. 5010 of Official Records of Riverside County, California, without right of surface entry to a depth of 500 feet;

Except one half of all oil and mineral rights as reserved by Lucille Sleeper in Document recorded March 20, 1956 in Book 1883, Page 571 of Official Records of Riverside County, California;

Also excepting therefrom one half of all oil and minerals, as reserved by Lucille Sleeper by deed recorded December 14, 1961 as Instrument No. 107309 of Official Records of Riverside County, California.

Also excepting therefrom one half of all crude oil, petroleum, gas brea, asphaltum, and all kindred substances and other minerals, as reserved in deed from Henry A. Dustin and Pearl M. Dustin, husband and wife recorded January 11, 1956 as Instrument No. 1897 of Official Records of Riverside County, California.

Also except therefrom that portion of said land conveyed to the City of Palm Desert, a Municipal Corporation, as set forth and described in that certain document recorded November 6, 2014 as Instrument No. 2014-0428272 of Official Records.

APN: 620-420-023

For City Property:

All that certain real property situated in the County of Riverside, State of California, described as follows:

That portion of Lot 8 of Tract No. 28450, in the City of Palm Desert, County of Riverside, State of California, as per map filed in Book 264, Pages 4 through 15, inclusive, of Maps, in the Office of the County Recorder of said County, described as follows:

Beginning at the Westerly terminus of that certain course in the Northerly line of said Lot 8 shown as "N 89°46'41" W 293.56'" on said map;

Thence along said Northerly line S 89°46'41" E 293.56 feet to the West line of Desert Willow Drive, and to the beginning of a non-tangent curve concave to the East having a radius of 137.00 feet and to which beginning a radial line bears S 88°57'01" W;

Thence along said Wet line Southeasterly 170.74 feet along said curve through a central angle of 71°24'21" to the beginning of a reverse curve concave to the Southwest having a radius of 65.00 feet, a radial line through said beginning of reverse curve bears N 17°32'40" E;
Thence continuing along said West line Southeasterly 51.87 feet along said curve through a central angle of 45°43'21" to the beginning of a compound curve concave to the Southwest having a radius of 526.00 feet;

Thence continuing along said West line Southeasterly 36.97 feet along said curve through a central angle of 4°01'37";

Thence leaving said West line S 46°18'47" W 347.14 feet;

Thence N 43°41'13" W 394.66 feet to the Northerly line of said Lot 8;

Thence along said Northerly line N 54°05'23" E 97.66 feet;

Thence continuing along said Northerly line N 0°50'56" E 92.68 feet to the point of beginning.

APN: 620-400-008; 620-420-024

ATTACHMENT NO. 6

FORM OF CITY COST REIMBURSEMENT AGREEMENT

REIMBURSEMENT AGREEMENT

Between

CITY OF PALM DESERT
a California municipal corporation

and

DESERT WAVE VENTURES, LLC,
a Delaware limited liability company

REIMBURSEMENT AGREEMENT

This Reimbursement Agreement ("Agreement") is made this ___ day of _____, 20__, by and between the City of Palm Desert, a California municipal corporation (the "City"), and Desert Wave Ventures, LLC, a Delaware limited liability company registered to do business in the State of California (the "Applicant").

RECITALS

This Agreement is made with respect to the following facts.

A. The Applicant is in contract to purchase of that certain real property ("Property") located within the City of Palm Desert, County of Riverside, California. The Property is more particularly described in attached **Exhibit A.**

B. The Applicant is contemplating a development described as the 17.68 acre DSRT Surf project described in Environmental Impact Report Project SCH #2019011044 and its Addendum, consisting of a 5.5 acre surf lagoon and surf center facility to include restaurant, bar, retail and similar facilities, a minimum of 137 and a maximum of 350 hotel rooms and up to 83 for-sale residential units which is referred to as the "Project."

C. To provide the City with the planning, environmental and legal services, and other expertise and information necessary to the City's review process concerning the development of the Property, it is necessary for the City to access the services of various consultants for the Project beyond those whose fees are paid through traditional permit and application fees ("Consultants").

D. As a condition to the City's completion of the review process, the Applicant has agreed to reimburse the City for the Consultants' costs and expenses related to the City's review process in the manner and amounts set forth in this Agreement. The Applicant's reimbursement of City under this Agreement will ensure that the City has the necessary resources to diligently and efficiently process the Applicant's Project.

AGREEMENT

NOW, THEREFORE, in consideration of the following mutual promises and agreements, City and Applicant agree as follows:

1 Incorporation of Recitals. The parties agree that the Recitals constitute the factual basis upon which the City and the Applicant have entered into this Agreement. The City and the Applicant each acknowledge the accuracy of the Recitals and agree that the Recitals are incorporated into this Agreement as though fully set forth at length.

2. City to Retain Consultants. As a necessary and indispensable part of its fact-finding process relating to the review and processing of the Applicant's proposed uses of the Property and Project, the City shall retain the services of Consultants as the City may deem necessary in its reasonable and sole discretion.

The Applicant agrees that, notwithstanding the Applicant's reimbursement obligations under this Agreement, Consultants shall be the contractors exclusively of the City and not of the Applicant. Except for those disclosures required by law including, without limitation, the California Public Records Act, all conversations, notes, memoranda, correspondence and other forms of communication by and between the City and its Consultants shall be, to the extent permissible by law, privileged and confidential and not subject to disclosure to the Applicant. The Applicant agrees that it shall have no claim to, nor shall it assert any right in any reports, correspondence, plans, maps, drawings, news releases or any and all other documents or work product produced by the Consultants.

3. Applicant to Cooperate with Consultants. The Applicant agrees to cooperate in good faith with the Consultants and City. The Applicant agrees that it will instruct its agents, employees, consultants, contractors and attorneys to reasonably cooperate with the Consultants and to provide all necessary documents or information reasonably requested of them by the City and/or the Consultants; provided, however, that the foregoing shall not require the disclosure of any documents or information of the Applicant which by law is privileged, proprietary, confidential, and exempt from disclosure under the Public Records Act.

4. Applicant's Reimbursement of Costs and Expenditures. The Applicant shall reimburse the City for one hundred percent (100%) only of the actual costs and expenditures incurred after November 14, 2019 by the City relative to the Consultant costs ("Costs".) The City has preliminarily reviewed the scope of work required and has estimated the Costs to be approximately Fifty Thousand Dollars ($50,000) ("Estimated Costs"). Within ten (10) calendar days of the execution of this Agreement, the Applicant shall submit the initial deposit in the amount of $50,000 to cover 100% of the consultant costs The City shall provide copies of monthly invoices prepared by consultants, with confidential information removed, and the applicant shall make additional deposits to adequately cover the anticipated consultant costs.

5. Applicant's Approval of Excess Costs and Expenditures. City shall not exceed the Estimated Consultants Costs without the Applicants prior written approval. The City may incur aggregate Costs up to the Estimated Costs, subject to the reasonable approval of the Applicant. The City shall use reasonable good faith efforts to consult with the Applicant incurring Costs that exceed the Estimated Costs ("Excess Costs"). The Applicant's obligation to reimburse the City for Excess Costs which exceed the Estimated Costs shall be contingent upon, the City's providing the Applicant with written notice of the amendment of the "Estimated Costs" to be performed by Consultants and the estimated Excess Costs prior to the commencement of work. The City shall not incur Excess Costs without the prior written approval of the Applicant;

however in the event that Applicant does not approve of Excess Costs, City shall not be required to continue processing of the Project.

For purposes of this Section, the City shall be deemed to have consulted with the Applicant when the City has provided written notice to the Applicant that the City reasonably anticipates that it will incur, or has incurred, Excess Costs. If, after consultation, the Applicant disagrees with the City's incurring of Excess Costs, then the Applicant's may terminate this Agreement pursuant to Section 9 of this Agreement, subject to the Applicant's obligation to reimburse the City for all Costs incurred by the City prior to the date of termination, whether or not yet paid by the City to the Consultants.

6. Evidence of Payment of Consultant Costs Immediately following the City's disbursement of funds to Consultant pursuant to an approved Professional Services Agreement or similar retainer agreement with the Consultant(s), the City shall provide the Applicant with such reasonable documentation as the Applicant may request to substantiate any demands for payment by Consultant(s).

7. Applicant understands and agrees that City reserves complete discretion and authority regarding the (a) outcome of the Project, (b) contents, scope, analysis and conclusions of the Consultant(s) and Consultant documents, including plans, staff reports, ordinances, resolutions, maps, conditions, mitigation measures, and environmental review documents and findings, (c) and City determinations and decisions on the Project. Nothing in this Agreement shall in any way commit or obligate City to approve any particular development project application or to support the development of any part of it.

8. Term. The term of this Agreement shall commence on the date that this Agreement is approved by the City and fully executed by the parties and shall terminate when all work required been completed to the City's reasonable satisfaction and the Applicant has satisfied all of its obligations under this Agreement including, without limitation, the obligation to reimburse the City for Estimated Costs and Excess Costs, whether or not paid by the City to Consultant(s) prior to the date of termination. The Applicant's obligation to reimburse the City as provided in this Agreement shall survive the termination of this Agreement pursuant to Section 9.

9. Early Termination. The City may terminate this Agreement prior to the term set forth in Section 8 above, without cost or liability to the City, upon thirty (30) days prior written notice to the Applicant. The Applicant may in its reasonable and sole discretion terminate this Agreement prior to the end of the term set forth in Section 8 above upon thirty (30) days' prior written notice to the City; provided, however, that the Applicant has satisfied all of its obligations under this Agreement to the date of termination regarding reimbursement to the City of both Estimated Costs and Excess Costs and, furthermore, that the Applicant has given City written notice withdrawing its application(s) for the Project.

Within two (2) City working days following either the City's decision to terminate this Agreement or the City's receipt of written notice indicating the Applicant's decision to terminate this Agreement, the City shall notify the Consultant(s) and instruct them to cease work. Consultant(s) shall be instructed to bill the City for any work completed prior to the date of termination.

10. Assignability. This Agreement may not be assigned by either party without the prior and express written consent of the other party, which consent shall not be unreasonably withheld. In determining whether to approve a request by the Applicant to assign this Agreement, the City may consider, among other things, the proposed assignee's financial status and commitment to the Project. Any attempted assignment of this Agreement not in compliance with the terms of this Agreement shall be null and void and shall confer no rights or benefits upon the assignee.

11. No Oral Modifications. This Agreement represents the entire understanding of the City and the Applicant and supersedes all other prior or contemporaneous written or oral agreements pertaining to the subject matter of this Agreement. This Agreement may be modified, only by a writing signed by both the authorized representatives of both the City and the Applicant.

12. Binding Upon Successors. This Agreement and each of its terms shall be binding upon the City, the Applicant and their respective officers, elected officials, employees, agents, contractors, and permitted successors and assigns.

13. Legal Challenges. Nothing herein shall be construed to require City to defend any third party claims and suits challenging any action taken by the City with regard to any procedural or substantive aspect of the City's approval of development of the Property, the environmental process, or the proposed uses of the Property. The Applicant may, however, in its sole and absolute discretion appear as real party in interest in any such third party action or proceeding, and in such event, it and the City shall defend such action or proceeding and the Applicant shall be responsible and reimburse the City for whatever legal fees and costs, in their entirety, including actual attorneys' fees, which may be incurred by the City in defense of such action or proceeding. This City shall have the absolute right to retain such legal counsel as the City deems necessary and appropriate and the Applicant shall reimburse the City for any and all attorneys' fees and costs incurred by the City as a result of such third party action or proceeding; provided, however, Applicant may, at any time, notify City in writing of its decision to terminate such reimbursement obligation and, thereafter, in the event that the City decides to continue the defense of such third party action or proceeding, Applicant shall have no further obligation to reimburse City for its attorney fees and costs.

14. Attorneys' Fees. In the event that any action or proceeding, including arbitration, is commenced by either the City or the Applicant against the other to establish the validity of this Agreement or to enforce any one or more of its terms, the prevailing party in any such action or proceeding shall be entitled to recover from the other, in addition to all other legal and equitable remedies available to it, its actual

attorneys' fees and costs of litigation, including, without limitation, filing fees, service fees, deposition costs, arbitration costs and expert witness fees, including actual costs and attorneys' fees on appeal.

15. Jurisdiction and Venue. This Agreement is executed and is to be performed in the City of Palm Desert, Riverside County, California, and any action or proceeding brought relative to this Agreement shall be heard in the appropriate court in the County of Riverside, California. The City and the Applicant each consent to the jurisdiction of the Court in any such action or proceeding.

16. Severability. If any term or provision of this Agreement is found to be invalid or unenforceable, the City and the Applicant both agree that they would have executed this Agreement notwithstanding the invalidity of such term or provision. The invalid term or provision may be severed from the Agreement and the remainder of the Agreement may be enforced in its entirety.

17. Headings. The headings of each Section of this Agreement are for the purposes of convenience only and shall not be construed to either expand or limit the express terms and language of each Section.

18. Representations of Authority. Each party signing this Agreement on behalf of a party which is not a natural person hereby represents and warrants to the other party that all necessary legal prerequisites to that party's execution of this Agreement have been satisfied and that he or she has been authorized to sign this Agreement and bind the party on whose behalf he or she signs.

19. Notices. Notices required under this Agreement shall be sent to the following:

If to the City:	City Manager City of Palm Desert 73510 Fred Waring Drive Palm Desert, CA 92260
If to the Applicant:	Desert Wave Ventures, LLC Attn: Don Rady 1555 Camino Del Mar Del Mar, CA 92014

Notices given pursuant to this Agreement shall be deemed received as follows:

(1) If sent by United States Mail - five (5) calendar days after deposit into the United States Mail, first class postage prepaid.

(2) If by facsimile - upon transmission and actual receipt by the receiving party.

(3) If by express courier service or hand delivery - on the date of receipt by the receiving party.

The addresses for notices set forth in this Section 19 may be changed upon written notice of such change to either the City or the Applicant, as appropriate.

Dated: _____

CITY OF PALM DESERT
a California municipal corporation

By: _____
_____, Mayor

ATTEST:

By: _____
Anthony Mejia, City Clerk

APPROVED AS TO FORM:

By: _____
Robert W. Hargreaves, City Attorney

Dated: _____

APPLICANT:

_____
By:

_____
Name/Title

Dated: _____

APPROVED AS TO FORM:

By: _____
Applicant's Counsel

Dated: _____

CALIFORNIA ALL PURPOSE ACKNOWLEDGMENT

	ing this certificate verifies only the identity of the individual who signed the document. to ot the truthfulness. accuracy or validity of that document.

State of California)
) SS.
County of _____)

On _____, 20___, before me,_____, a Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature _____

Exhibit "A"

Description of the Property

Approximately 17.68 acres known as APN 620400008, 620420024 and 620420023 in the City of Palm Desert, County of Riverside, California.

ATTACHMENT NO. 7

FORM OF ACQUISITION AGREEMENT

THIS ACQUISITION AGREEMENT (the "Acquisition Agreement"), dated as of _____, 202_, is by and between the City of Palm Desert, a charter city existing under the laws and Constitution of the State of California (the "City"), and Desert Wave Ventures, LLC, a Delaware limited liability company registered to do business in the State of California (the "Developer").

ARTICLE I
DEFINITIONS

Section 1.1. Definitions. The following terms shall have the meanings ascribed to them in this Section 1.1 for purposes of this Acquisition Agreement.

"Acceptable Title" means title to a Facility or land, in form acceptable to the City Manager, free and clear of all liens, taxes, assessments, leases, easements and encumbrances, whether or not recorded, and, with respect to land, as evidenced by such title guaranty or title insurance as the City Manager may require, but subject to any exceptions determined by the City Manager as not interfering with the actual or intended use of the land.

"Acceptance Date" means the date the City Council takes final action to accept dedication of or transfer of title to a Facility.

"Acquisition Agreement" means this Acquisition Agreement, together with any Supplement hereto.

"Actual Cost" means the substantiated cost of a Facility, which costs may include: (i) the costs incurred by the Developer for the construction of such Facility (evidenced by payments to parties unrelated to the Developer), (ii) the documented costs incurred by the Developer in preparing the Plans for such Facility, (iii) the fees paid to governmental agencies for obtaining permits, licenses or other governmental approvals for such Facility, (iv) documented professional costs incurred by the Developer associated with such Facility, such as engineering, legal, accounting, inspection, construction staking, materials testing and similar professional services; and (v) costs directly related to the construction and/or acquisition of a Facility, such as costs of payment, performance and/or maintenance bonds, and insurance costs (including costs of any title insurance required hereunder). Actual Cost may include (a) an amount not in excess of 7.0% of the cost described in clause (i) of the preceding sentence in respect of any construction management or project management or other similar fee payable to the Developer or any party related thereto, and (b) any financing fees, costs or charges, or any interest, cost of carry or other similar charges.

"Affiliate" means any entity with respect to which 50 percent or more of the ownership or voting power is held individually or collectively by any of the Developer and any other entity owned, controlled or under common ownership or control by or with, the Developer or its managing member(s), general partner(s), or majority shareholder, as applicable, and includes all general partners of any entity which is a

partnership. Control shall mean ownership of 50 percent or more of the voting power of or ownership interest in the respective entity.

"City" means the City of Palm Desert, California.

"City Manager" means the City Manager of the City or or the written designee of such officer acting as such under this Acquisition Agreement.

"Civil Code" means the Civil Code of the State of California.

"County" means the County of Riverside, California.

"Development Agreement" means the Second Revised Disposition and Development Agreement, dated as of _____, 2022 by and between the City and the Developer relating to the development of the Project, as it may be amended from time to time.

"Developer" means Desert Wave Ventures, LLC, and its successors and assigns to the extent permitted under Section 9.7 hereof.

"Facilities" means the public facilities which are described in Exhibit A hereto.

"Finance Director" means the Finance Director of the City, or the written designee of such officer acting as such under this Acquisition Agreement.

"Government Code" means the Government Code of the State of California.

"Hotel" means the primary and accessory structures associated with a minimum of 92 and a maximum of 350 overnight accommodation rooms, grounds and parking facilities associated therewith, described in the Environmental Impact Report for DSRT Surf, Project SCH #2019011044 and its Addendum.

"Labor Code" means the Labor Code of the State of California.

"Payment Request" means a document, substantially in the form of Exhibit C hereto, to be used by the Developer in requesting payment of a Purchase Price.

"Plans" means the plans, specifications, schedules and related construction contracts for the design and construction of any Facility approved by the City or other entity that will own, operate or maintain such Facility when completed and acquired.

"Progress Payment" means the amount paid by the City upon the attainment of certain Project Milestones, each as set forth on Exhibit B hereto.

"Project" means the first phase of that 17.68 acre DSRT Surf project described in Environmental Impact Report Project SCH #2019011044 and its Addendum, located on Lot B of Desert Willow Golf Course consisting of a 5.5 acre surf lagoon and surf center

facility to include restaurant, bar, retail and similar facilities, a minimum of 137 and a maximum of 350 hotel rooms.

"Project Milestone" means the applicable conditions required to be completed or attained prior to each Progress Payment, as set forth on Exhibit B hereto.

"Public Contract Code" means the Public Contract Code of the State of California.

"Purchase Price" means the amount paid by the City for a Facility determined in accordance with Article IV hereof, being an amount equal to the Actual Cost of such Facility, but subject to any applicable limitations and reductions provided for in Article IV.

"Risk Manager" shall mean the person acting in the capacity of Risk Manager for the City.

"RDA Bond Proceeds" shall mean the proceeds of bonds previously issued (specifically, the Palm Desert Financing Authority Tax Allocation Revenue Bonds (Project Area No. 2), 2006 Series A, B, C, and D, and the Palm Desert Financing Authority Tax Allocation Revenue Bonds (Project Area No. 3), 2006 Series A, B, and C) and transferred to the City pursuant to bond proceeds funding agreements previously approved by the California Department of Finance.

"State" means the State of California.

"Surf Center and Surf Lagoon" means that portion of the Project that includes a structure to be used for administration of surfing and recreational activities constructed at no less than 6,000 sq. ft. and no more than 15,000 sq. ft, and including restaurant, bar, cafe, and retail uses; a 5.5 acre surf lagoon with wave generating equipment; and, the grounds surrounding the Surf Center and Surf Lagoon providing pools, additional restaurants, surf schools, lockers, and other amenities available to patrons of the Surf Center and Surf Lagoon.

"Supplement" means a written document amending, supplementing or otherwise modifying this Acquisition Agreement or any exhibit hereto.

ARTICLE II
RECITALS

Section 2.1. The Development. The Developer is developing the Project within the City.

Section 2.2. The Facilities. The Facilities are required as a condition of regulatory approval by the City, and the City and the Developer will benefit from a coordinated plan of design, engineering, and construction of the Facilities and the

development of the Project. The Facilities, which pursuant to the Development Agreement are the subject of acquisition by the City from the Developer under this Acquisition Agreement or with respect to Facilities to be owned by a governmental entity other than the City, contribution by the City toward the Actual Costs thereof from RDA Bond Proceeds, are only the Facilities listed in Exhibit A hereto.

Section 2.3. No Advantage to City Construction. The City, by its approval of this Acquisition Agreement, has determined that it will obtain no advantage from undertaking the construction by the City directly of the Facilities. The Developer agrees to undertake construction of the Facilities in accordance with the requirements of, and subject to the terms and conditions of, this Acquisition Agreement. The Developer hereby represents that it has experience in the supervision of the construction of public facilities of the character of the Facilities.

Section 2.4. Agreements. In consideration of the mutual promises and covenants set forth herein, and for other valuable consideration the receipt and sufficiency of which are hereby acknowledged, the City and the Developer agree that the foregoing recitals, as applicable to each, are true and correct and further make the agreements set forth herein.

ARTICLE III
CONSTRUCTION OF FACILITIES

Section 3.1. Plans. The Developer shall cause Plans to be prepared for the Facilities and shall obtain the written approval of the Plans in accordance with applicable ordinances and regulations of the City or the governmental entity or utility that will own and operate the Facilities. Copies of all Plans shall be provided by the Developer to the City Manager upon request therefor, and, in any event, as built drawings and a written assignment of the Plans for any Facility shall be provided to the City prior to its acceptance of the Facility.

Section 3.2. Duty of Developer to Construct. All Facilities to be acquired hereunder shall be constructed by or at the direction of the Developer in accordance with the approved Plans. The Developer hereby represents it has performed, and shall continue to perform, all of its obligations hereunder and has conducted, and shall continue to conduct, all operations with respect to the construction of the Facilities in a good, workmanlike and commercially reasonable manner, with the standard of diligence and care normally employed by duly qualified persons utilizing their best efforts in the performance of comparable work and in accordance with generally accepted practices appropriate to the activities undertaken. The Developer has employed, and shall continue to employ, at all times adequate staff or consultants with the requisite experience necessary to administer and coordinate all work related to the design, engineering, acquisition, construction and installation of the Facilities to be acquired by the City from the Developer hereunder.

The Developer shall be obligated: (i) to construct and cause to be conveyed to the City, or other applicable governmental entity or utility, all Facilities as a condition of

and pursuant to the terms of any applicable development agreement, improvement agreement, subdivision map, or regulatory approval, and (ii) to use its own funds to pay all costs thereof in excess of the Purchase Prices thereof to be paid therefor hereunder.

The Developer shall not be relieved of its obligation to construct each Facility and convey each such Facility to the City in accordance with the terms hereof, even if because of the limitations imposed by Section 4.6 hereof, the Purchase Price for such Facility is less than the Actual Cost, or cost to the Developer, of such Facility.

Section 3.3. Labor Code Provisions. Pursuant to Section 1781 of the Labor Code, the City hereby states, and the Developer hereby acknowledges, that the construction of the Facilities, the Project, and any portion thereof by the Developer, which will be paid in part out of public funds, is "public work" (as defined in Section 1720 of the Labor Code) to which Section 1771 of the Labor Code applies, and the Developer hereby agrees that it shall cause the construction of the Facilities, the Project, and any portion thereof, to be performed as "public work" as required by Section 1781 of the Labor Code. Without limiting the foregoing, the Developer agrees to comply with the provisions of Sections 1720 et seq. of the Labor Code with respect to prevailing wages with respect to the construction of the Facilities, the Project, and any portion thereof, and to provide to the City payment bonds meeting the requirements of Section 3.6 herein with respect to all such construction.

Section 3.4. Relationship to Public Works; Qualified Contractors; Project Scheduling. The following shall apply to all contracts applicable to the Facilities and any portion thereof which will be the subject of a Payment Request hereunder:

A. General. This Acquisition Agreement is for the acquisition by the City of the Facilities and is not intended to be a public works contract. The City and the Developer agree that the Facilities are of local, and not state-wide concern, and that the provisions of the Public Contract Code shall not apply to the construction of the Facilities. The City and the Developer agree that (i) the Developer shall award, or has awarded, all contracts for the construction of the Facilities and the portions thereof, (ii) this Acquisition Agreement is necessary to assure the timely and satisfactory completion of the Facilities, and (iii) compliance with the Public Contract Code with respect to the Facilities or portions thereof would work an incongruity and would not produce an advantage to the City.

B. Selection of Qualified Contractors. The Developer represents and warrants it shall evaluate, or has evaluated, criteria such as experience, ability to perform on schedule, and financial ability, and such other criteria as recommended by the City Manager to determine qualified contractors for any contract for construction of a Facility or any portion thereof. Such contractors shall comply with any applicable City laws, rules, and regulations.

C. Scheduling. At the request of the City Manager, the Developer shall develop, or cause to be developed, and shall maintain a project schedule, providing for all major project elements included in the construction of the Facilities to be acquired

hereunder, so that the whole project is scheduled in an efficient manner. If a schedule is requested, the Developer shall provide the City Manager with complete copies of the schedule and each update to the schedule for the Director's review.

D. Periodic Meetings. From time to time at the request of the City Manager, representatives of the Developer shall meet and confer with City staff, consultants and contractors regarding matters arising hereunder with respect to the Facilities, and the progress in constructing and acquiring the same, and as to any other matter related to the Facilities or this Acquisition Agreement. The Developer shall advise the City Manager in advance of any coordination and scheduling meetings to be held with contractors relating to the Facilities in the ordinary course of performance of an individual contract. The City Manager shall have the right to be present at such meetings, and to meet and confer with individual contractors if deemed advisable by the City Manager to resolve disputes or ensure the proper completion of the Facilities and any portions thereof.

Section 3.5. Independent Contractor. In performing its obligations under this Acquisition Agreement, the Developer is an independent contractor and not the agent or employee of the City. The City shall not be responsible for making any payments directly or otherwise to any contractor, subcontractor, agent, consultant, employee or supplier of the Developer.

Section 3.6. Performance and Payment Bonds. The Developer shall comply with all performance and payment bonding requirements of the City and other applicable public entities and public utilities with respect to the construction of the Facilities. As to the City, the Developer shall provide to the City payment bonds and performance bonds, which bonds shall meet the following requirements:

A. Payment Bonds. Prior to commencement of construction under each construction contract relating to the construction of any Facility, the Project, or the Hotel, or any portion thereof, the Developer shall provide to the City a payment bond that (I) shall be in conformity with the requirements of the State Civil Code, Sections 9550 and 9554; (II) shall secure with respect to such contract the payment of claims of laborers (including but not limited to the payment of prevailing wages as required by Section 3.3 of this Acquisition Agreement), mechanics, material suppliers, and other persons as provided by law; and (III) otherwise shall be substantially in the form as set forth in Exhibit D. Provided that (a) 15 days have passed after the later of (i) the expiration of the applicable statutory period in which any person may bring suit against the surety(ies) on a payment bond as set forth in Sections 8609 or 9558 of the Civil Code or (ii) the expiration of the applicable statutory period in which any person may record a lien pursuant to Sections 8412 or 8414 of the Civil Code and (b) no such suit or lien has been filed at such time, at the applicable Developer's written request submitted to the Risk Manager, the City shall provide such Developer with a letter confirming that the City no longer requires the applicable payment bond to be maintained in full force and effect.

In the event a contractor to whom a Developer awards a contract for the construction of a Facility provides a payment bond meeting the requirements hereof, such contractor's payment bond shall be deemed as the provision by such Developer of a payment bond hereunder.

B. Performance Bonds. Prior to the commencement of construction on a Facility, the Developer shall require any contractor to whom a contract is awarded for the construction of such Facility to provide a performance bond for the benefit of the City, in substantially the form attached hereto as Exhibit E, securing such contractor's obligations under such contract. Any performance bond provided hereunder shall be in form and substance satisfactory to the City Manager and, if applicable, meet the requirements of Government Code Sections 66499 through 66499.10 of the Subdivision Map Act.

Section 3.7. Contracts and Change Orders. The Developer shall be responsible for entering into all contracts and any supplemental agreements, including change orders, required for the construction of the Facilities, the Project, or any portion thereof. All such contracts and supplemental agreements relating to construction of any Facility shall be submitted to the City Manager or, as to any such contracts and supplemental agreements entered into prior to the date of this Acquisition Agreement, the Developer represents and warrants they have been submitted to the City Manager. Prior approval of supplemental agreements by the City Manager shall only be required for such change orders which in any way materially alter the quality or character of the subject Facilities, provided, as to any such change orders meeting the thresholds set forth in the foregoing and entered into prior to the date of this Acquisition Agreement, the Developer represents and warrants it has obtained the prior approval of the City Manager. The City expects that such contracts and supplemental agreements needing prior approval by the City Manager will be approved or denied (any such denial to be in writing, stating the reasons for denial and the actions, if any, that can be taken to obtain later approval) within five (5) business days of receipt thereof by the City Manager.

ARTICLE IV
ACQUISITION AND PAYMENT

Section 4.1. Inspection. Inspection relating to the applicable Project Milestones shall have been made in connection with each requested Progress Payment, as further set forth in Section 4.3 below. Progress Payments Nos. 3, 4 and 5 shall not be made by the City to the Developer until any and all Facilities required to be completed by the applicable Project Milestones for each such Progress Payment, as set forth on Exhibit B, have been inspected and found to be completed in accordance with the approved Plans by the City or other applicable governmental entity or utility. The City may make periodic site inspections of the Facilities to be acquired by the City hereunder; provided that in no event shall the City incur any liability for any delay in the inspection of any Facilities. For Facilities to be acquired by other public entities or utilities, the Developer shall be responsible for obtaining such inspections and providing written evidence thereof to the City Manager. The Developer agrees to pay all inspection, permit and

other similar fees of the City applicable to construction of the Facilities, subject to reimbursement therefor as an Actual Cost of the related Facility.

Section 4.2. Agreement to Sell and Purchase Facilities.

A. The Developer hereby agrees to sell the Facilities to the City or other applicable governmental entity or utility that will own a Facility, and the City hereby agrees to pay the Purchase Price thereof to the Developer, subject to the terms and conditions hereof. Except for payment of Progress Payments as provided in paragraph B. below, the City shall not be obligated to pay for the purchase of any Facility until the Facility is completed and the Acceptance Date for such Facility has occurred.

B. The City has identified the Project Milestones to be completed or attained for any Progress Payment which may be the subject of a Payment Request prior to completion of the Facilities relating thereto, and paid pursuant to the terms of this Acquisition Agreement prior to completion of such entire Facility or Facilities, and such Project Milestones are set forth on Exhibit B.

The parties hereto acknowledge a Facility does not have to be accepted by the City, or other applicable governmental entity or utility that will own a Facility, as a condition precedent to the payment of any Progress Payment relating thereto, but in no event shall any such payment be made until the requirements of the first paragraph of this Section 4.2.B. have been met. The Developer acknowledges that the Progress Payments, and the Project Milestones relating thereto, have been identified for payment purposes only, and that the City is not obligated to accept a Facility until the entire Facility has been completed, although at the sole discretion of the City Manager, the City may accept a portion of a Facility prior to completion of the entire Facility.

C. In any event, the City shall not be obligated to pay any Progress Payment or the Purchase Price for any Facility except from RDA Bond Proceeds. The City hereby represents and warrants to the Developer that it has reserved and allocated RDA Bond Proceeds in the amount of up to $20,000,000.00 for the purpose of paying the Purchase Prices of the Facilities hereunder, and the Progress Payments toward such Purchase Prices, pursuant to the terms of this Acquisition Agreement.

Section 4.3. Payment Requests. In order to receive a Progress Payment, inspection relating to the applicable Project Milestones shall have been made, and the Developer shall deliver to the City Manager: (a) a Payment Request in the form of Exhibit C hereto for such Progress Payment, together with all attachments and exhibits required by Exhibit C and this Section 4.3 to be included therewith (including, but not limited to, Attachment 1 to Exhibit C), and (b) if payment is requested for a Progress Payment for which one or more completed Facilities is required as a Project Milestone, (i) if the property on which the Facility is located is not owned by the City (or other applicable governmental entity or utility that will own the Facility) at the time of the request, a copy of the recorded documents conveying to the City (or other applicable governmental entity or utility that will own the Facility) Acceptable Title to the real property on, in or over which such Facility is located, as described in Section 5.1 hereof,

(ii) a copy of the recorded notice of completion of such Facility (meeting the requirements specified in Section 4.6), (iii) an assignment to the City of any reimbursements that may be payable with respect to the Facility, such as public or private utility reimbursements, and (iv) an assignment of the warranties and guaranties for such Facility, as described in Section 5.5 hereof, in a form acceptable to the City.

In connection with each Progress Payment, the Developer shall submit such evidence satisfactory to the City Manager and the Finance Director that the Developer has completed or attained the applicable Project Milestones for such Progress Payment.

Section 4.4. Processing Payment Requests. Upon receipt of a Payment Request for any Progress Payment and all accompanying documentation, the City Manager shall conduct a review in order to confirm that such request is complete, that the construction work relating to any Facility required to be completed by a Project Milestone for the applicable Progress Payment has been accomplished in accordance with the Plans therefor, and as to Progress Payments to verify and approve the Actual Cost of all Facilities for purposes of adjustment of the aggregate Purchase Prices therefor pursuant to Section 4.6 herein. The City Manager, and a construction estimator retained by the City, shall also conduct such review as is required in the City Manager' discretion to confirm the matters certified in the Payment Request. The Developer agrees to cooperate with the City Manager, and City's construction estimator, in conducting each such review and to provide the City Manager with such additional information and documentation as is reasonably necessary for the City Manager to conclude each such review. Within ten business days of receipt of any Payment Request, the City Manager will begin to review the request for completeness and notify the Developer whether such Payment Request is complete, and, if not, what additional documentation must be provided. If such Payment Request is complete, the City Manager will provide a written approval, or denial specifying the reason for any denial, of the request within 60 days of its submittal. Each Payment is subject to review and approval by the City Manager as to the amount and allocation, if any, of other project costs allocated to the costs of the Facilities.

Section 4.5. Payment. Upon approval of the Payment Request by the City Manager, the City Manager shall sign the Payment Request and forward the same to the City's Finance Director. Upon receipt of the reviewed and fully signed Payment Request, the City's Finance Director shall, within the then current City financial accounting payment cycle but in any event within 60 business days of receipt of the approved Payment Request, cause the same to be paid but solely from RDA Bond Proceeds.

The Purchase Price paid hereunder for any Facility shall constitute payment in full for such Facility, including, without limitation, payment for all labor, materials, equipment, tools and services used or incorporated in the work, supervision, administration, overhead, expenses and any and all other things required, furnished or incurred for completion of such Facility, as specified in the Plans.

Section 4.6. Restrictions on Payments. Notwithstanding any other provisions of this Acquisition Agreement, the following restrictions shall apply to any payments made to the Developer under Sections 4.2 and 4.5 hereof:

A. Amounts of Payments. Subject to the following paragraphs of this Section 4.6, Progress Payments shall be applied toward the Purchase Prices of the Facilities listed on Exhibit A. If the Actual Cost of all Facilities, in the aggregate, is less than $20,000,000.00, then Progress Payment No. 4 and 5 shall be reduced accordingly such that the total of all Progress Payments paid hereunder does not exceed the aggregate Actual Cost of all Facilities acquired, or paid from RDA Bond Proceeds, by the City hereunder; provided, further, if the aggregate Actual Cost of all Facilities exceeds $20,000,000.00, the aggregate Purchase Price paid under this Acquisition Agreement for all Facilities shall be reduced and limited up to $20,000,000.00.

Nothing herein shall require the City in any event to pay more than the Actual Cost of a Facility. The parties hereto acknowledge and agree that all payments to the Developer for the Purchase Prices of Facilities are intended to be reimbursements to the Developer for monies already expended or, if made pursuant to Section 4.6.B. or 4.6.C. hereof, for immediate payment by the Developer (or directly by the City) to third parties in respect of such Facilities.

B. Joint or Third-Party Payments. The City may make any payment jointly to the Developer and any mortgagee or trust deed beneficiary, contractor or supplier of materials, as their interests may appear, or solely to any such third party, if the Developer so requests the same in writing or as the City otherwise determines such joint or third party payment is necessary to obtain lien releases.

C. Withholding Payments. The City shall withhold payment for Progress Payment Nos. 4 & 5 until Acceptable Title to land on which any Facility required by the applicable Project Milestones to be completed in connection with such Progress Payment is conveyed to the City, as described in Article V hereof.

The City shall withhold any payment hereunder for Progress Payment Nos. 4 & 5 until the City is satisfied that any and all claims for labor and materials have been paid by the Developer for any Facility required by the applicable Project Milestones to be completed in connection with such Progress Payment, or conditional lien releases in accordance with Section 8122 et seq. of the Civil Code have been provided by the Developer for such Facility. The City may waive this limitation upon the provision by the Developer of sureties, undertakings, securities and/or bonds of the Developer or appropriate contractors or subcontractors and deemed satisfactory by the Director of Public Works to assure payment of such claims.

The City shall withhold Progress Payment Nos. 4 & 5 until: (i) the City Manager determines that the Facilities are ready for their intended use, (ii) the Acceptance Date for the Facilities has occurred and the requirements of Section 5.1, if applicable to any Facility, has been satisfied, (iii) a notice of completion executed by the Developer as an owner pursuant to Section 8182 of the Civil Code, reciting the name and address of the

City as an owner of an interest as a vendee under a contract of purchase pursuant to Section 8182 of the Civil Code, and in a form acceptable to the Director or Public Works, has been recorded for the Facility, and (iv) general lien releases in accordance with Section 8122 et seq. of the Civil Code, conditioned solely upon payment to be used to acquire such Facility, has been submitted to the City Manager. The City shall withhold Progress Payment Nos. 4 & 5 until the Developer provides the City Manager with evidence that for any Facility to be owned by other governmental entities the governmental entity or utility has accepted dedication of, or title to, the Facility. If the City Manager determines that a Facility is not ready for intended use under (i) above, the City Manager shall so notify the Developer as soon as reasonably practicable in writing specifying the reason(s) therefor.

Pending transfer of title of any Facility to the City, Developer will not use or permit the use of any such Facility. The Developer shall transfer title to the City of each Facility prior to any use of such Facility.

D. Retention. With respect to Progress Payment No. 5, the City shall withhold an amount up to $2,000,000. Such retention will be released to the Developer upon (i) final completion and acceptance of the related Facilities required by the applicable phase one Project Milestones to be completed in connection with such Progress Payment, (ii) the expiration thereafter of a maintenance/warranty period (or in lieu thereof, posting of a maintenance or warranty bond to remain in effect for such warranty period) consistent with applicable City policy and Section 5.5 hereof, and (iii) after review and approval by the City of the total aggregate Actual phase one Costs of the Facilities and the allocation of other related project costs to the phase one Facilities.

No retention shall apply if the Developer proves to the City Manager' satisfaction that the Developer's contracts for the phase one Facilities provide for the same retention as herein provided, so that the Purchase Price paid for the Facility or portion thereof is at all times net of the required retention.

E. Frequency. No more than one Payment Request shall be submitted by the Developer in any calendar month.

Section 4.7. Defective or Nonconforming Work. If any of the work done or materials furnished for a Facility are found by the City Manager to be defective or not in accordance with the applicable Plans: (i) and such finding is made prior to payment of the Progress Payment for which a percentage or all of the construction of such Facility is required pursuant to the Project Milestones relating to such Progress Payment, the City may withhold payment therefor until such defect or nonconformance is corrected to the satisfaction of the City Manager, or (ii) and such finding is made after payment of the Purchase Price of such Facility or portion thereof, but prior to the expiration of the applicable warranty period, the City and the Developer shall act in accordance with Section 5.5 hereof.

ARTICLE V
OWNERSHIP AND TRANSFER OF FACILITIES

Section 5.1. Facilities to be Owned by the City – Conveyance of Land and Easements to City. Acceptable Title to all property on, in or over which each Facility to be acquired by the City will be located, shall be deeded over to the City by way of grant deed, quitclaim, or dedication of such property. The Developer shall assist the City in obtaining such documents as are required to obtain Acceptable Title with respect to such property on, in, or over which each Facility will be located. Completion of the transfer of title to land shall be accomplished prior to the payment of the Purchase Price for a Facility and shall be evidenced by recordation of the acceptance thereof by the City Council or the designee thereof.

Section 5.2. Facilities to be Owned by the City – Title Evidence. Upon the request of the City Manager, the Developer shall furnish to the City a preliminary title report for land with respect to Facilities to be acquired by the City and not previously dedicated or otherwise conveyed to the City, for review and approval at least 15 calendar days prior to the transfer of Acceptable Title to a Facility to the City. In the event the City Manager does not approve the preliminary title report, the City shall not be obligated to accept title to such Facility, and the City shall not be obligated to pay the Purchase Price for such Facility until the Developer has cured all objections to title to the satisfaction of the City.

Section 5.3. Facilities Constructed on Private Lands. If any Facilities to be acquired are located on privately-owned land, the owner thereof shall retain title to the land and the completed Facilities until acquisition of the Facilities under Article IV hereof. Pending the completion of such transfer of title to land, the Developer shall not be entitled to receive the Progress Payment for the final Purchase Price of any such Facility (e.g., Progress Payment No. 3 with respect to Facilities Nos. 1 and 2, or Progress Payment No. 4 with respect to Facilities Nos. 3, 4, 5 or 6).

Section 5.4. Facilities Constructed on City Land. If the Facilities to be acquired are on land owned by the City, the City shall grant to the Developer a license to enter upon such land for purposes related to the construction, and maintenance pending acquisition, of the Facilities. The provisions for inspection and acceptance of such Facilities otherwise provided herein shall apply.

Section 5.5. Maintenance and Warranties. The Developer shall maintain each Facility in good and safe condition until the Acceptance Date of the Facility. Prior to the Acceptance Date, the Developer shall be responsible for performing any required maintenance on any completed Facility. On or before the Acceptance Date of the Facility, the Developer shall assign to the City all of the Developer's rights in any warranties, guarantees, maintenance obligations or other evidence of contingent obligations of third persons with respect to such Facility. The Developer shall maintain or cause to be maintained each Facility to be owned by the City, including the repair or replacement thereof, for a period of one year from the Acceptance Date thereof, or, alternatively, shall provide a bond reasonably acceptable in form and substance to the

City Manager for such period and for such purpose, to insure that defects, which appear within said period will be repaired, replaced, or corrected by the Developer, at its own cost and expense, to the satisfaction of the City Manager. The Developer shall commence to repair, replace or correct any such defects within 30 days after written notice thereof by the City to the Developer, and shall complete such repairs, replacement or correction as soon as practicable. After such one-year period, the City shall be responsible for maintaining such Facility. Any warranties, guarantees or other evidences of contingent obligations of third persons with respect to the Facilities to be acquired by the City shall be delivered to the City Manager as part of the transfer of title.

ARTICLE VI
INSURANCE; RESPONSIBILITY FOR DAMAGE

Section 6.1. Liability Insurance Requirements. The Developer shall procure and maintain insurance policies and provide to the City Manager evidence of insurance and endorsements thereto on forms acceptable to the Risk Manager as provided below.

A. Time for Compliance. The Developer shall not commence any physical work on the Facilities until it has provided evidence satisfactory to the Risk Manager that it has secured all insurance required under this Section 6.1. In addition, the Developer shall not allow any contractor or subcontractor to commence work on any contract or subcontract until it has provided evidence satisfactory to the City that the subcontractor has secured all insurance required under this Section 6.1.

B. Minimum Requirements. At its expense (but subject to reimbursement to the extent permitted as an Actual Cost), the Developer or its General Contractor shall procure and maintain, until acceptance pursuant to the terms of this Acquisition Agreement of all Facilities, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work covered by this Acquisition Agreement, its agents, representatives, employees or subcontractors. The Developer shall also require all of its contractors and subcontractors to procure and maintain the same insurance until acceptance (pursuant to the terms of this Acquisition Agreement) of all Facilities. Such insurance shall meet at least the following minimum levels of coverage:

1. Minimum Scope of Insurance. Coverage shall be at least as broad as the latest version of the following:

(a) *General Liability:* Insurance Services Office Commercial General Liability coverage (occurrence form CG 0001);

(b) *Automobile Liability:* Insurance Services Office Business Auto Coverage form number CA 0001, code 1 (any auto);

(c) *Workers' Compensation and Employers' Liability:* Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance; and

(d) *Builders'/All Risk:* Builders'/All Risk insurance covering for all risks of loss, including explosion, collapse, underground excavation and removal of lateral support (and including earthquakes and floods if requested by the City).

2. Minimum Limits of Insurance. Developer or its General Contractor shall maintain limits no less than:

(a) *General Liability:* $2,000,000 per occurrence for bodily injury, personal injury and property damage. The general aggregate limit shall apply separately to each construction contract for a Facility thereof that is separately bid and shall be $4,000,000. If multiple Facilities are aggregated under one construction contract, the Risk Manager may in its sole discretion require a higher general aggregate limit;

(b) *Automobile Liability:* $1,000,000 per accident for bodily injury and property damage;

(c) *Workers' Compensation and Employer's Liability:* Workers' compensation limits as required by the Labor Code of the State of California. Employers Liability limits of $1,000,000 per accident for bodily injury or disease;

(d) *Builders'/All Risk:* Completed value of the project;

(e) *Umbrella or Excess Liability Insurance* per Section 4.6.3 of Development Agreement;

(f) *Pollution Liability Insurance:* per Section 4.6.5 of Development Agreement; and

3. Requirements Not Limiting per Section 4.7.9 of Development Agreement.

C. Insurance Endorsements. The insurance policies shall contain the following provisions, or each Developer or its General Contractor shall provide endorsements on forms supplied or approved by the Risk Manager to add the following provisions to its insurance policies:

1. General Liability. (a) The City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers shall be covered as additional insureds with respect to the construction of the Facilities or operations performed by or on behalf of the Developer, including materials, parts or equipment furnished in connection with such work; (b) the insurance coverage shall be primary and non-contributing insurance as respects the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers, or if excess, shall stand in an unbroken chain of coverage excess of the Developer's or its General Contractor's scheduled underlying coverage; and (c) any failure to comply with reporting provisions of the policy shall not affect coverage provided to the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers. Any insurance or

self-insurance maintained by the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers shall be excess of the Developer's or its General Contractor's insurance and shall not be called upon to contribute with it.

2. Automobile Liability. (a) The City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers shall be covered as additional insureds with respect to the ownership, operation, maintenance, use, loading or unloading of any auto owned, leased, hired or borrowed by the Developer or for which the Developer is responsible; (b) the insurance coverage shall be primary insurance as respects the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers, or if excess, shall stand in an unbroken chain of coverage excess of the Developer's or its General Contractor's scheduled underlying coverage; and (c) any failure to comply with reporting provisions of the policy shall not affect coverage provided to the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers. Any insurance or self-insurance maintained by the City, its officers, employees, consultants, agents' attorneys, and volunteers shall be excess of the Developer's insurance and shall not be called upon to contribute with it in any way.

3. Waiver of Subrogation for All Coverage. The insurer shall agree to waive all rights of subrogation against the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers for losses paid under the terms of all insurance policies which arise from work performed by the Developer.

4. All Coverages. Each insurance policy required by this Acquisition Agreement shall be endorsed to state that: (a) coverage shall not be suspended, voided, reduced (in coverage or in limits) or canceled except after 30 days prior written notice by certified mail, return receipt requested, has been given to the Risk Manager; and (b) any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers.

Liability coverage shall not be limited to the vicarious liability or supervising role of any additional insured nor shall there be any limitation with the severability clause. Coverage shall contain no limitation endorsements and there shall be no endorsement or modification limiting the scope of coverage for liability arising from pollution, explosion, collapse, underground property damage or employment related practices. All liability insurance shall be on an occurrence basis. Insurance on a claims made basis will be rejected. There shall be no cross policy exclusion.

E. Separation of Insureds; No Special Limitations. All insurance required by this Section 6.1 shall contain standard separation of insureds provisions. In addition, such insurance shall not contain any special limitations on the scope of protection afforded to the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers.

F. Professional Liability Insurance. All architects, engineers, consultants or design professionals retained by the Developer shall also procure and maintain, for a period of five years following acceptance (pursuant to the terms of this Acquisition Agreement) of all Facilities for which such Developer is responsible, errors and omissions liability insurance with a limit of not less than $1,000,000 per occurrence.

G. Deductibles and Self-Insurance Retentions. Any deductibles or self-insured retentions must be declared to and approved by the Risk Manager. The Developer shall guarantee that, at the option of the City, either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers; or (2) the Developer shall procure a bond guaranteeing payment of losses and related investigation costs, claims and administrative and defense expenses.

H. Acceptability of Insurers. **All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance with an assigned policyholders' and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.**

I. Verification of Coverage. The Developer shall furnish the City with certificates of insurance and endorsements, duly authenticated, evidencing coverage required by this Acquisition Agreement on forms satisfactory to the Risk Manager and with other evidence of coverage as may be reasonably required by the Risk Manager. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf, and shall be on forms supplied or approved by the Risk Manager. All certificates and endorsements must be received and approved by the Risk Manager before work commences. The Risk Manager reserves the right to require complete, certified copies of all required insurance policies, at any time.

J. Reduction, Cancellation, Void or Suspended Policy. In the event that any required insurance is reduced in coverage, canceled for any reason, voided or suspended, the Developer or its General Contractor agrees that the City may arrange for insurance coverage as specified, and the Developer or its General Contractor further agrees that administrative and premium costs may be deducted from any deposits or bonds the City may have. A reduction or cancellation will be grounds for termination of this Acquisition Agreement and will cause a halt to payment for any Facilities, or Progress Payments toward the Purchase Prices thereof, until the insurance is reestablished.

K. Subcontractors. All subcontractors shall meet the requirements of subsections (a) though (d) of this Section 6.1 before commencing any physical work on the Facilities; provided, that minimum general liability coverage shall be $1,000,000 per occurrence for bodily injury, personal injury and property damage, and the general aggregate limit shall apply separately to each construction contract for a Facility that is separately bid and shall be $2,000,000. In addition, the Developer or its General

Contractor shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor, in form and substance acceptable to the Risk Manager, prior to the subcontractor entering the job site. All coverages for subcontractors shall be subject to all of the requirements stated herein. The Developer or its General Contractor may furnish insurance that meets all the specifications of this Section 6.1 to all of its subcontractors though use of an "Owner Controlled Insurance Program", "Contractor Controlled Insurance Program" or "Wrap-up" program, subject to approval by the Risk Manager.

Section 6.2. Responsibility for Damage and Claims. The Developer or its General Contractor shall take and assume all responsibility for the work performed as part of the Facilities constructed pursuant to this Acquisition Agreement. The Developer shall bear all losses and damages directly or indirectly resulting to it, to the City, and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers, or to others on account of the performance or character of the work, unforeseen difficulties, accidents or any other causes whatsoever.

The Developer and its successors and assigns shall assume the defense of, indemnify, protect and save harmless the City and its Councilmembers, officers, employees, consultants, agents, attorneys, and volunteers (each an "Indemnified Party"), and each and every one of them (including independent contractors who serve as the City's officers or officials), from and against all actions, demands, damages, injuries, claims, losses, causes of action, liabilities or expenses of every type and description to which they may be subjected or put, whether known or unknown, existing or potential, anticipated or unanticipated, in law or equity, to property or persons, including wrongful death, by reason of, or resulting or in any manner arising from or incident to, the performance by the Developer (or any of its officers, agents, servants, employees, subcontractors, materialmen, or suppliers) of its obligations under this Acquisition Agreement, the construction of the Facilities (including, but not limited to, failure of such Developer to pay any amount due to any contractor hired by the Developer for the construction of any Facility and any fines or penalties arising therefrom, and all damages to property or personal injury received by reason of, or in the course of, performing work, which may be caused by any willful or negligent act or omission by the Developer or any of the Developer's employees, or any subcontractor), the nature or physical condition of the Facilities, the presence of any hazardous materials on or in any land conveyed to the City hereunder (but excluding hazardous materials which are introduced in or on such land by an Indemnified Party or after the expiration of the period for which the Developer is responsible for maintenance of the related Facility pursuant to Section 5.5. hereof), including without limitation the payment of all consequential damages and attorneys' fees and other related costs and expenses. No provision of this Acquisition Agreement shall in any way limit the extent of the Developer's responsibility for payment of damages resulting from the operations of the Developer and its contractors.

The Developer shall defend, at the Developer's own cost, expense and risk, any and all such aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against the City or its Councilmembers, officers, employees,

consultants, agents attorneys, or volunteers. The Developer shall pay and satisfy any judgment, award or decree that may be rendered against the City or its Councilmembers, officers, employees, consultants, agents, attorneys, or volunteers, in any such suit, action or other legal proceeding. The Developer shall reimburse City and its Councilmembers, officers, employees, consultants, agent's attorneys, and volunteers, for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided.

The City does not, and shall not, waive any rights against the Developer which either may have by reason of the aforesaid hold harmless agreements because of the acceptance by the City, or deposit with the City by the Developer of any insurance policies described in Section 6.1. The aforesaid hold harmless agreement by the Developer shall apply to all damages and claims for damages of every kind suffered, or alleged to have been suffered by reasons of any of the aforesaid operations of the Developer, or any subcontractor, regardless of whether or not such insurance policies are determined to be applicable to any of such damages or claims for damages.

No act by the City or its representatives in processing or accepting any plans, in releasing any bond, in inspecting or accepting any work, or of any other nature, shall in any respect relieve the Developer or anyone else from any legal responsibility, obligation or liability it might otherwise have.

The indemnification and hold harmless provisions of this Section 6.2 shall survive the termination of this Acquisition Agreement, the completion of construction of the Facilities, and the conveyance of title thereto to the City.

ARTICLE VII
REPRESENTATIONS, WARRANTIES AND COVENANTS

Section 7.1. Representations, Covenants and Warranties of the Developer. The Developer represents and warrants for the benefit of the City as follows:

A. Organization. The Developer is a Limited Liability Company duly organized and validly existing under the laws of the State of Delaware, is qualified to do business in and is in compliance with all applicable laws of the State of California, and has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated.

B. Authority. The Developer has the power and authority to enter into this Acquisition Agreement, and has taken all action necessary to cause this Acquisition Agreement to be executed and delivered, and this Acquisition Agreement has been duly and validly executed and delivered by the Developer.

C. Binding Obligation. This Acquisition Agreement is a legal, valid and binding obligation of the Developer, enforceable against the Developer in accordance with its terms, subject to bankruptcy and other equitable principles.

D. Compliance with Laws. The Developer shall not commit, suffer or permit any act to be done in, upon or to the lands of the Developer, the City or the Facilities in violation of any law, ordinance, rule, regulation or order of any governmental authority or any covenant, condition or restriction now or hereafter affecting the lands in the City or the Facilities.

E. Requests for Payment. The Developer represents and warrants that (i) it will not request payment from the City for the acquisition of any improvements that are not part of the Facilities, and (ii) it will diligently follow all procedures set forth in this Acquisition Agreement with respect to the Payment Requests.

F. Financial Records. Until the date which is one year following the final acceptance of the Facilities, the Developer covenants to maintain proper books of record and account for the construction of the Facilities and all costs related thereto. Such accounting books shall be maintained in accordance with generally accepted accounting principles, and shall be available for inspection by the City or its officers, employees, consultants, or agents at any reasonable time during regular business hours.

G. Prevailing Wages. The Developer covenants that, with respect to any contracts or subcontracts for the construction of the Facilities to be acquired from the Developer hereunder, it will assure complete compliance with any applicable law or regulation for the payment of prevailing wages. Without limiting the foregoing, the Developer further covenants that it will assure compliance with Section 3.3 hereof regarding the payment of prevailing wages with respect to the construction of the Facilities and the Project.

H. Plans. The Developer represents that it has obtained or will obtain approval of the Plans for the Facilities to be acquired from the Developer hereunder from all appropriate departments of the City and from any other governmental entity or utility from which such approval must be obtained. The Developer further agrees that the Facilities to be acquired from the Developer hereunder have been or will be constructed in full compliance with such approved plans and specifications and any supplemental agreements and change orders thereto, as approved in the same manner.

ARTICLE VIII
TERMINATION

Section 8.1. Mutual Consent. This Acquisition Agreement may be terminated by the mutual, written consent of the City and the Developer, in which event the City may let contracts for any remaining work related to the Facilities not theretofore acquired from the Developer hereunder, and the Developer shall have no claim or right to any further payments for the Purchase Price of Facilities or Progress Payments toward the Purchase Prices thereof, except as otherwise may be provided in such written consent.

Section 8.2. City Election for Cause. The following events shall constitute grounds for the City to terminate this Acquisition Agreement, without the consent of the Developer:

A. The Developer voluntarily files for reorganization or other relief under any Federal or state bankruptcy or insolvency law.

B. The Developer has any involuntary bankruptcy or insolvency action filed against it, or shall suffer a trustee in bankruptcy or insolvency or receiver to take possession of the assets of the Developer, or has suffered an attachment or levy of execution to be made against the property it owns within the City unless, in any of such cases, such circumstance shall have been terminated or released within 30 days thereafter.

C. The Developer abandons construction of the Facilities. Failure for a period of 60 consecutive days to undertake substantial work related to the construction of the Facilities, other than for a reason specified in Section 8.3 hereof, shall constitute such abandonment.

D. The Developer breaches any material covenant or default in the performance of any material obligation hereunder.

E. The Developer transfers any of its rights or obligations under this Acquisition Agreement in violation of the terms and conditions of this Acquisition Agreement.

If any such event occurs, the City shall give written notice of its knowledge thereof to the Developer, and the Developer shall meet and confer with the City Manager and other appropriate City staff and consultants within five days of receipt of

such notice as to options available to assure timely completion of the Facilities. Such options may include, but not be limited to the termination of this Acquisition Agreement by the City. If the City elects to terminate this Acquisition Agreement, the City shall first notify the Developer of the grounds for such termination and allow the Developer 60 days to eliminate or mitigate to the satisfaction of the City Manager the grounds for such termination. Such period may be extended, at the sole discretion of the City, if the Developer to the satisfaction of the City is proceeding with diligence to eliminate or mitigate such grounds for termination. If at the end of such period (and any extension thereof), as determined solely by the City, the Developer has not eliminated or completely mitigated such grounds to the satisfaction of the City, the City may then terminate this Acquisition Agreement.

Notwithstanding the foregoing, so long as any event listed in any of clauses A. through and including E. above has occurred, notice of which has been given by the City to the Developer, and such event has not been cured or otherwise eliminated by the Developer, the City may in its discretion cease making payments for the Purchase Price of Facilities or Progress Payments toward the Purchase Prices thereof under Article III or Article IV hereof.

Section 8.3. Force Majeure. Whenever performance is required of a party hereunder, that party shall use all due diligence and take all necessary measures in good faith to perform, but if completion of performance is actually delayed by reasons of floods, earthquakes or other acts of God, war, civil commotion, riots, strikes, picketing, or other labor disputes, pandemics, damage to work in progress by casualty, or by other cause beyond the reasonable control of the party (financial inability excepted), then the specified time for performance shall be extended by the amount of the delay actually so caused.

ARTICLE IX
MISCELLANEOUS

Section 9.1. Limited Liability of City. No member of the City Council or City official, employee, consultant, agent, attorney, or volunteer shall incur any liability hereunder to the Developer or any other party in their individual capacities by reason of their actions hereunder or execution hereof.

Section 9.2. Excess Costs. The Developer shall pay all costs of the Facilities that it is obligated to construct (pursuant to Section 3.2 or otherwise) in excess of the aggregate Purchase Price to be paid by the City therefor pursuant to the terms and conditions of this Acquisition Agreement (including but not limited to Section 4.6).

Section 9.3. Audit. The City Manager and the City's Finance Director may, with 72 hours advanced notice, review all books and records of the Developer pertaining to costs and expenses incurred by the Developer into any of the Facilities, and any bids taken or received for the construction thereof or materials therefor.

Section 9.4. Attorney's Fees. In the event that any action or suit is instituted by either party against the other arising out of this Acquisition Agreement, the party in whose favor final judgment shall be entered shall be entitled to recover from the other party all costs and expenses of suit, including reasonable attorneys' fees.

Section 9.5. Notices. Any notice, payment or instrument required or permitted by this Acquisition Agreement to be given or delivered to either party shall be deemed to have been received when personally delivered, or transmitted by telecopy or facsimile transmission (which shall be immediately confirmed by telephone and shall be followed by mailing an original of the same within 24 hours after such transmission), or 72 hours following deposit of the same in any United States Post Office, registered or certified mail, postage prepaid, addressed as follows:

City: City of Palm Desert
73-510 Fred Waring Drive
Palm Desert, CA 92260
Attention: City Manager

Developer: Desert Wave Ventures, LLC
1555 Camino Del Mar, Suite 315C
Del Mar, CA 92014
Attn: Don Rady

Each party may change its address or addresses for delivery of notice by delivering ten calendar days' prior written notice of such change of address to the other party.

Section 9.6. Severability. If any part of this Acquisition Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Acquisition Agreement shall be given effect to the fullest extent possible.

Section 9.7. Successors and Assigns. This Acquisition Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. This Acquisition Agreement shall not be assigned by the Developer without the prior written consent of the City shall release the Developer from its obligations and liabilities under this Acquisition Agreement.

Section 9.8. Other Agreements. Nothing herein shall be construed as affecting the Developer's duties to perform its respective obligations, under other agreements, use regulations or requirements relating to the development. This Acquisition Agreement shall not confer any additional rights to, or waive any duties of, the Developer under the Development Agreement or other agreement to which the Developer is a party.

Section 9.9. Waiver. Failure by a party to insist upon the strict performance of any of the provisions of this Acquisition Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a

waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Acquisition Agreement thereafter.

Section 9.10. Merger; Entire Agreement. No other agreement, statement or promise made by any party or any employee, officer or agent of any party with respect to any matters covered hereby that is not in writing and signed by all the parties to this Acquisition Agreement shall be binding.

Section 9.11. Parties in Interest. Nothing in this Acquisition Agreement, expressed or implied, is intended to or shall be construed to confer upon or to give to any person or entity other than the City and the Developer any rights, remedies or claims under or by reason of this Acquisition Agreement or any covenants, conditions or stipulations hereof; and all covenants, conditions, promises, and agreements in this Acquisition Agreement contained by or on behalf of the City or the Developer shall be for the sole and exclusive benefit of the City and the Developer.

Section 9.12. Amendment. This Acquisition Amendment may be amended, from time to time, by written Supplement hereto and executed by the City and the Developer.

Section 9.13. Counterparts. This Acquisition Agreement may be executed in counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties have executed this Acquisition Agreement as of the day and year first-above written.

CITY OF PALM DESERT

By:_____
_____ Mayor

[DEVELOPER]

DESERT WAVE VENTURES, LLC
a Delaware limited liability company

By: FS Ventures, LLC
a Delaware corporation, Its Manager

By:_____

Name:_____

Its:_____

ACQUISITION AGREEMENT

EXHIBIT A

Facilities

a. Parking structure with 151 parking stalls for Surf Center parking and Desert Willow overflow parking;

b. 96 on-site surface parking stalls for Surf Center and Desert Willow overflow parking; and

c. 246 surface stalls of off-site parking

d. 493 is the total number of parking spots to be built

e. Of the 493 spots,

--107 of them will be hotel off site

--30 of them will be hotel on site

f. 356 of the stalls as outlined above are the Facilities

e. 137 of the stalls as outlined above are Hotel Parking Spaces (30 surface onsite and 107 surface offsite) and are not a part of the Facilities

[ADDITIONAL PAGES TO BE INSERTED]

ACQUISITION AGREEMENT
EXHIBIT B

SCHEDULE OF PROGRESS PAYMENTS

Draw	Public Parking	Surf Lagoon and Center	Hotel	RESIDENTIAL UNITS
1st- $5M	30% construction cost of podium Parking Structure	100% rough grading complete	Commence foundation upon fully approved and issued building permits for the entire Hotel	
2nd- $5M	60% of construction cost of podium Parking Structure	100% Foundations Complete	Completion of 60% of Hotel Parking	
3rd- up to $5M	100% completion of all Public Parking and compliance with the Acquisition Agreement	100% of Surf Lagoon floor completed and surf equipment on site	Completion of rough framing construction of the Hotel	
4th- up to $3M	100% of all other public infrastructure and compliance with the Acquisition Agreement	100% complete certificate of occupancy for Surf Lagoon and Center approved	100% complete certificate of occupancy for Hotel approved	
5th- up to $2M	4th Payment has been made, and City "look-back" approval of actual Project Costs in Section 4.5(d) of the Development Agreement and in compliance with			100% complete Certificate of Occupancy for First Phase Developer's Improvements and initiation of residential

	the Acquisition Agreement			construction

ACQUISITION AGREEMENT
EXHIBIT C

FORM OF PAYMENT REQUEST

PAYMENT REQUEST NO. _____

The undersigned (the "Developer") hereby requests payment in the total amount of $_____ for Progress Payment No. ____, as more fully described in Attachment 1 hereto. Capitalized terms used but not defined herein shall have the respective meanings ascribed thereto in the Acquisition Agreement, dated as of _____, 20___, between the City of Palm Desert (the "City"), and the Developer. In connection with this Payment Request, the undersigned hereby represents and warrants to the City as follows:

1. The Undersigned is a duly authorized officer of the Developer, qualified to execute this Payment Request for payment on behalf of the Developer and is knowledgeable as to the matters set forth herein.

2. To the extent that this payment request is with respect to a Progress Payment for which the applicable Project Milestones require one or more completed Facilities, the Developer has submitted or submits herewith to the City as-built drawings or similar plans and specifications for the items to be paid for as listed in Attachment 1 hereto with respect to any such completed Facility, and such drawings or plans and specifications, as applicable, are true, correct and complete. To the extent that this payment request is for a Progress Payment for which the applicable Project Milestones require a percentage (less than completion) of one or more Facilities, the Developer has in the Developer's construction office a marked set of drawings or similar plans and specifications for the subject Facility(ies) as listed in Attachment 1 hereto, which drawings or plans and specifications, as applicable, are current and show all changes or modifications which have been made to date.

3. All costs of the Facilities or portions thereof for which payment is requested hereby are Actual Costs (as defined in the Acquisition Agreement) and have not been inflated in any respect. The items for which payment is requested have not been the subject of any prior payment request submitted to the City.

4. Supporting documentation (such as third party invoices) is attached with respect to each cost for which payment is requested.

5. There has been compliance with applicable laws relating to prevailing wages for the work to construct the Facilities or portions thereof for which payment is requested.

6. The Facilities or portions thereof for which payment is requested were constructed in accordance with all applicable City or other governmental standards, and

in accordance with the as-built drawings or plans and specifications, as applicable, referenced in paragraph 2 above.

7. The Developer is in compliance with the terms and provisions of the Acquisition Agreement, and no portion of the amount being requested to be paid was previously paid.

8. The Purchase Price for each Facility or portion thereof for which a Progress Payment is requested hereby (a detailed calculation of which is shown in an Attachment 1 hereto for each such Facility or portion thereof), has been calculated in conformance with the terms of Section 4.6 of the Acquisition Agreement.

I hereby declare and certify that the above representations and warranties are true and correct.

DEVELOPER:	**CITY:**
By:_____	Payment Request Approved for Submission to the Finance Director of the City of Palm Desert
Name:_____	
Its: _____	By:_____ City Manager
Date:_____	Date:_____

EXHIBIT C

ATTACHMENT 1

CALCULATION OF PURCHASE PRICE.

[Use a separate sheet for each Facility for which a Progress Payment is being requested]

1. Description (by reference to Exhibit A to the Acquisition Agreement) of the Facility

2. Actual Cost (list here total of supporting invoices and/or other documentation supporting determination of Actual Cost): $_____

3. Subtractions from Purchase Price:

   A. Holdback for Lien releases (see Section 4.6.C. of the Acquisition Agreement) $_____

   B. Retention (see Section 4.6.D. of the Acquisition Agreement) $_____

4. Total disbursement requested (amount listed in 2, less amounts, if any, listed in 3) $_____

ACQUISITION AGREEMENT
EXHIBIT D

FORM OF PAYMENT BOND

Bond No. _____

PAYMENT BOND
(LABOR AND MATERIALS)

CITY OF PALM DESERT

KNOW ALL PERSONS BY THESE PRESENTS that:

WHEREAS [name of developer] ("Developer") has awarded to _____

_____

_____

_____

(Name, address, and telephone number of Contractor)

("Principal"), a contract (the "Contract") for the work described as follows:

_____

_____

_____

WHEREAS, Principal is required under the terms of the Contract and the California Civil Code to secure the payment of claims of laborers, mechanics, materialmen, and other persons as provided by law.

NOW, THEREFORE, we, the undersigned Principal, and _____

_____

_____,

(Name, address, and telephone number of Surety)

("Surety") a duly admitted surety insurer under the laws of the State of California, as Surety, are held and firmly bound unto Developer and the City of Palm Desert in the penal sum of _____

_____

Dollars ($_____), this amount being not less than 100 percent of the total contract price, in lawful money of the United States of America, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if the hereby bounded Principal, his, her or its heirs, executors, administrators, successors or assigns, or subcontractors shall fail to pay any of the persons named in Section 9100 of the California Civil Code, or any amounts due under the Unemployment Insurance Code with respect to work or labor performed under the

Contract, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Principal and subcontractors pursuant to Section 13020 of the Unemployment Insurance Code, with respect to work or labor performed under the Contract, the Surety will pay for the same in an amount not exceeding the penal sum specified in this bond; otherwise, this obligation shall become null and void.

This bond shall inure to the benefit of any of the persons named in Section 9100 of the California Civil Code so as to give a right of action to such persons or their assigns in any suit brought upon the bond. In case suit is brought upon this bond, Surety further agrees to pay all court costs and reasonable attorneys' fees in an amount fixed by the court.

FURTHER, the Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, addition or modification to the terms of the Contract, or of the work to be performed thereunder, or the specifications for the same, shall in any way affect its obligations under this bond, and it does hereby waive notice of any such change, extension of time, alteration, addition, or modification to the terms of the Contract or to the work or to the specifications thereunder. Surety hereby waives the provisions of California Civil Code Sections 2845 and 2849.

IN WITNESS WHEREOF, two identical counterparts of this instrument, each of which shall for all purposes be deemed an original hereof, have been duly executed by Principal and Surety, on the date set forth below, the name of each corporate party being hereto affixed and these presents duly signed by its undersigned representative(s) pursuant to authority of its governing body.

Dated: _____

"Principal"	"Surety"
_____	_____
_____	_____
By:_____ Its	By:_____ Its
By:_____ Its	By:_____ Its
(Seal)	*(Seal)*

Note: This bond must be executed in duplicate and dated, all signatures must be notarized, and evidence of the authority of any person signing as attorney-in-fact must be attached.

ACQUISITION AGREEMENT
EXHIBIT E

FORM OF CONTRACTOR PERFORMANCE BOND

Bond No. _____

CONTRACTOR PERFORMANCE BOND
CITY OF PALM DESERT

KNOW ALL PERSONS BY THESE PRESENTS that:

WHEREAS [name of developer] ("Developer") has awarded to _____

_____

_____

_____

(Name, address, and telephone number of Contractor)

("Principal"), a contract (the "Contract") for the work described as follows:

_____

_____

_____

WHEREAS, Principal is required under the terms of the Contract to furnish a bond for the faithful performance of the Contract.

NOW, THEREFORE, we, the undersigned Principal, and _____

_____

_____,

(Name, address, and telephone number of Surety)

("Surety") a duly admitted surety insurer under the laws of the State of California, as Surety, are held and firmly bound unto Developer and the City of Palm Desert (the "City") in the penal sum of _____

_____

Dollars ($_____), this amount being not less than the total contract price, in lawful money of the United States of America, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if the hereby bounded Principal, his, her or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform all the undertakings, terms, covenants, conditions and agreements in the Contract and any alteration thereof made as therein provided, on the Principal's part to be kept and performed, all within the time and in the manner therein specified,

and in all respects according to their true intent and meaning, and shall indemnify and hold harmless the City and their respective Councilmembers, officers, employees, agents, attorneys, and volunteers, and others as therein provided, then this obligation shall become null and void; otherwise, it shall be and remain in full force and effect.

In case suit is brought upon this bond, Surety further agrees to pay all court costs and reasonable attorneys' fees in an amount fixed by the court.

FURTHER, the Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, addition or modification to the terms of the Contract, or of the work to be performed thereunder, or the specifications for the same, shall in any way affect its obligations under this bond, and it does hereby waive notice of any such change, extension of time, alteration, addition, or modification to the terms of the Contract or to the work or to the specifications thereunder. Surety hereby waives the provisions of California Civil Code §§ 2845 and 2849. The City is a principal beneficiary of this bond and has all rights of a party thereto.

IN WITNESS WHEREOF, two identical counterparts of this instrument, each of which shall for all purposes be deemed an original hereof, have been duly executed by Principal and Surety, on the date set forth below, the name of each corporate party being hereto affixed and these presents duly signed by its undersigned representative(s) pursuant to authority of its governing body.

Dated: _____

"Principal"	"Surety"
_____	_____
_____	_____
By:_____	By:_____
Its	Its
By:_____	By:_____
Its	Its
(Seal)	*(Seal)*

Note: This bond must be executed in duplicate and dated, all signatures must be notarized, and evidence of the authority of any person signing as attorney-in-fact must be attached.

ATTACHMENT NO. 8

FORM OF TRANSIENT OCCUPANCY TAX REIMBURSEMENT AGREEMENT

[NOTE: The Parties shall execute this Agreement concurrent with the Close of Escrow as such term is defined in the DDA. The Form is subject to minor confirming and clarifying changes to implement the provisions of the DDA]

FORM OF CITY OF PALM DESERT/DESERT WAVE VENTURES TOT REIMBURSEMENT AGREEMENT

THIS AGREEMENT ("Agreement") is entered into as of _____, 20___, by and between THE CITY OF PALM DESERT, a California municipal corporation, (the "City"), and Desert Wave Ventures, LLC, a Delaware limited liability company registered to do business in the State of California ("Owner").

RECITALS

A. Owner intends to purchase certain real property in the City of Palm Desert, as more fully described in Exhibit "A" (the "Property"), on which Owner intends to develop and operate at least a 137-room hotel and up to 83 for-sale residential units (the "Project"). Owner anticipates that the Project, once occupied, will generate transient occupancy taxes ("TOT") to the City in an amount estimated by Owner to exceed _____ dollars ($_____) during the first twenty (20) years of the Project's operation, in addition to increased sales taxes generated by the anticipated increased visitation to the City.

B. The City wishes to provide Owner an incentive to operate the Project in order that increased visitation will generate additional TOT and sales tax to the City, and to provide certain emergency services to City residents.

C. City and Owner have entered into that certain Revised and Restated Disposition and Development Agreement, dated _____ (the "DDA")

AGREEMENT

NOW, THEREFORE, THE CITY AND OWNER AGREE AS FOLLOWS:

Section 1. Reimbursement Commitment.

A. In consideration for Owner's operation of the Project on the Property and the other conditions and covenants provided for herein, if and when the Project is built and operated on the Property, the City shall reimburse to Owner based off the City's current (11%) TOT, as defined in Section 3.28.030 of the Palm Desert Municipal Code as of the date of this Agreement, collected from the Project an amount not to exceed $20,000,000 ("Reimbursement TOT").

B. The City will reimburse to Owner of the Project up to a maximum of $20,000,000 in the following manner:

1. Forty Percent (40%) of the TOT generated by the hotel component of the Project; and

2. Sixty percent (60%) of the TOT generated by the for-sale residential component of the Project.

C. Payment of Reimbursement TOT by City to Owner shall commence for the first full quarter during which commercial operation of the Project commenced and shall continue until the earlier of (1) $20,000,000 has been reimbursed by the City; or (2) twenty years from the date of commencement of commercial operation as defined in Section 2(A) below ("Reimbursement Termination Date"). TOT collected prior to the Reimbursement Termination Date is subject to reimbursement pursuant to this Agreement; TOT collected after the Reimbursement Termination Date is not subject to reimbursement.

D. Owner shall at all times remit to City full payment of TOT as required by the City's Municipal Code. Distributions of Reimbursement TOT by City to Owner shall be made within thirty (30) days of the receipt by the City of the full amount of TOT from the Property for each quarter.

Section 2. Conditions to Reimbursement.

As a condition precedent to payment of any Reimbursement TOT, Owner shall:

A. Commence commercial operation of the Project by _____. If Owner fails to commence commercial operation prior to that date, then the City, in its sole discretion, may terminate this Agreement by delivering written notice of such termination to Owner. Following such termination, neither party shall have any further rights, duties or obligations hereunder, and the City shall have no obligation to pay Reimbursement TOT, provided however that if this Agreement is not so terminated and Owner subsequently commences operation, the terms of this Agreement shall apply and the City's right to terminate shall be void; and

B. Be at all times operated equivalent to an AAA 4-Diamond property as required by the DDA and the Grant Deed dated_____ between the City of Palm Desert and _____, recorded in the Official Records of the County of Riverside, California as Document No._____.

C. Owner shall quarterly certify to the City that the Hotel continues to operate on par with the AAA 4-Diamond rating.

D. Minimum Quarterly TOT Guaranty: Payment of Reimbursement TOT by City to Owner shall occur only in quarters when the Project generates quarterly TOT payments to the City in the amounts set forth below in Table 1 (the "Minimum Quarterly TOT Guaranty").

Table 1

YEAR	QUARTERLY MINIMUM TOT GUARANTY
1	$119,875
2	$138,300
3	$155,425
4	$159,750
5	$164,050
6	$168,175
7	$172,300
8	$176,625
9	$181,050
10	$185,550

In any quarter where Owner does not meet the Minimum Quarterly TOT Guaranty amount through TOT generation, Owner may, in its sole discretion, make payment to the City in an amount equal to the difference between the gross TOT generated and the Minimum Quarterly TOT Guaranty (the difference deemed a "Supplemental Payment"). Payment of the entire Supplemental Payment shall qualify the Owner for the Reimbursement TOT. The method by which Owner generates funds for the Supplemental Payment shall be determined within the sole discretion of Owner, but may include a Lagoon Use Fee, amenity fee(s), surf session fee(s), residential sales/rental fees, or other fees. Subject to Section 2.E, below, the Owner may elect not to make the Supplemental Payment in a quarter where the Minimum Quarterly TOT Guaranty is not generated, in which case the Owner shall not be entitled to the Reimbursement TOT for that quarter. The Reimbursement Termination Date shall be extended one quarter for each quarter the Owner does not make the Minimum Quarterly TOT Guaranty and Supplemental Payment, if applicable.

The Minimum Quarterly TOT Guaranty shall no longer apply: (a) if Certificates of Occupancy are issued for at least 83 residential units on the Property; or (b) the Minimum quarterly TOT Guaranty has been in place for 10 years.

E. At the conclusion of each fiscal year, City shall calculate the total amount of TOT paid to the City by Owner during the preceding four quarters segregated by Project component. In the event the total amount of TOT paid, including any Supplemental Payment, is less than four times the Minimum Quarterly TOT Guaranty for the applicable year set forth above in Table 1, Owner shall pay to the City an amount equal to the difference between the gross TOT generated and the Minimum Quarterly TOT Guaranty for the applicable year. Owner shall pay the City such amount within thirty (30) days of receipt of an invoice for same from the City. In the event the total amount of TOT paid is greater than four times the Minimum Quarterly TOT Guaranty for the applicable year set forth above in Table 1, City shall apply the percentages described in Section 1.B above to the difference between the TOT paid and the Minimum Quarterly TOT Guaranty for the applicable year, segregated by Project component from which the excess TOT was generated. City shall pay Owner such amount within thirty days of the determination.

F. Payment of Reimbursement TOT under this Agreement shall be subject to Owner's payment as and when due of the Deferral Repayment as defined in the DDA. In the event of any delinquency or default in such Deferral Repayment obligation, the payment of Reimbursement TOT shall be suspended until the Deferral Repayment is brought current and any delinquency has been cured.

Section 3. No Obligation to Build or Operate.

Both parties acknowledge that the Project is currently in the proposal stages, and Owner shall have no liability to City for failure to build or operate the Project as intended by the parties herein.

Section 4. Indemnification.

Owner shall defend, assume all responsibility for and hold the City, its council members, officers and employees, harmless from all demands, claims, actions and damages, of whatever type or nature, including all costs of defense and attorneys' fees, to any person or property arising out of or caused by any of Owner's activities under this Agreement, whether such activities or performance thereof be by Owner or anyone directly or indirectly employed or contracted with by Owner and whether such damage shall accrue or be discovered before or after commencement of operation of the Project.

Section 5. Default.

A. Any one or all of the following events shall constitute a default by Owner:

1. Any misleading statement, misrepresentation or warranty of Owner herein or in any other writing at any time furnished by Owner to City that materially harms the City or materially diminishes the benefit of the Agreement to the City;

2. Nonperformance when due of any of the obligations described herein, or failure to perform any obligation or covenant contained herein;

3. The filing by or against Owner of a petition for relief under the Bankruptcy Reform Act of 1978 or any bankruptcy or debtor relief law;

4. A general assignment by Owner for the benefit of creditors or the appointment of any receiver or trustee of all or any portion of the assets of Owner; and

5. The transfer or assignment of this Agreement without approval by the City as set forth in the DDA.

B. Remedies. Upon the occurrence of a default, consistent with the provisions of the DDA, the City will notify the Owner and, may at its option, declare this Agreement to be in default and, in such event, the City shall have all of the rights and remedies prescribed at law or in equity. Following an uncured event of default, the City shall have no further obligation to disburse all or any portion of Reimbursement TOT.

C. No Liability of City Member. No city council member, official or employee of the City shall be personally liable to Owner, or any successor in interest, in the event of any default or breach by City under this Agreement or for any amount which may become due to Owner or any successor or on any obligations under the terms of this Agreement.

Section 6. Compliance With Governmental Regulations.

Owner shall, at its sole cost and expense, comply with all applicable municipal, county, state and federal laws, rules, regulations and ordinances now in force, or which may hereafter be in force, pertaining to its activities contemplated under this Agreement, including, but not limited to: issuance of building and use permits and compliance with all federal and state labor laws (collectively, "Laws"). Supplementing the indemnity set forth in Section 4 above, Owner shall defend, indemnify and hold the City, its elected officials, officers, members, employees and agents free and harmless from any claims, liabilities, costs, penalties or interest arising out of any failure or alleged failure of Owner to comply with such Laws relating to this Agreement

Specifically, by its execution of this Agreement, Owner certifies that it is aware of the requirements of California Labor Code Sections 1720 et seq. and 1770 et seq., as well as California Code of Regulations, Title 8, Section 16000 et seq. ("Prevailing Wage Laws"), which require the payment of prevailing wage rates and the performance of other requirements on certain "public works" and "maintenance" projects. If the project being performed is an applicable "public works" or "maintenance" project, as defined by the Prevailing Wage Laws, Owner agrees to fully comply with such Prevailing Wage Laws. If required, Owner shall make copies of the prevailing rates of per diem wages for each craft, classification or type of worker needed to execute the work on the project available to interested parties upon request, and shall post copies at the Owner's principal place of business and the project site.

Section 7. Miscellaneous Provisions.

A. Transfer or Assignment. Owner shall not transfer or assign this Agreement without prior written approval by the City. Approval of any such transfer or assignment shall be at the sole discretion of the City, provided that, as the parties acknowledge that Owner will likely monetize this Agreement as part of its project financing, City shall not unreasonably withhold, condition or delay its consent to a pledge or assignment of this Agreement (or rights under this Agreement) as part of the capital financing for the Project. Such financing approval may be granted by the City Manager without further action of the City Council.

B. Interest of Members of City. No member of the City Council of City and no other officer, employee or agent of the City who exercises any functions or responsibilities in connection with the carrying out of the City's work shall have any personal interest, direct or indirect, in this Agreement.

C. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, to the jurisdiction of which the parties hereto submit.

D. Time of the Essence. Time is of the essence of each and every provision of this agreement.

E. Notices. Notices or other communications given under this Agreement shall be in writing and shall be served personally or transmitted by first class mail, postage prepaid. Notices shall be deemed received either at the time of actual receipt or, if mailed in accordance herewith, on the third (3rd) business day after mailing, whichever occurs first. Notices shall be directed to the parties at the following addresses or at such other addresses as the parties may indicate by notice:

City: The City of Palm Desert
Palm Desert Civic Center
73-510 Fred Waring Drive
Palm Desert, CA 92260
Attention: City Manager

Owner: Desert Wave Ventures, LLC
Attn: Don Rady
1555 Camino Del Mar, Suite 315C
Del Mar, CA 92014

F. Headings. The titles and headings of the various sections of this Agreement are intended solely for reference and are not intended to explain, modify or place any interpretation upon any provision of this Agreement.

G. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such or the remaining provisions of this Agreement.

H. Waiver. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executing in writing by the party making the waiver.

I. Number and Gender. As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number, shall each include the others whenever the context so indicates or requires.

J. Further Assurances. The parties shall execute, acknowledge, file or record such other instruments and statements and shall take such additional action as may be necessary to carry out the purpose and intent of this Agreement.

K. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties' respective heirs, legal representatives, successors and assigns.

L. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all prior or contemporaneous agreements, representations, warranties and understandings of the parties concerning the

subject matter contained herein, written or oral. No change, modification, addendum or amendment to any provision of this Agreement shall be valid unless executed in writing by each party hereto.

M. Attorneys' Fees. In the event of any litigation arising out of this Agreement, the prevailing party in such action, or the non-dismissing party where the dismissal occurs other than by reason of a settlement, shall be entitled to recover its reasonable costs and expenses, including, without limitation, reasonable attorneys' fees and costs paid or incurred in good faith. The "prevailing party," for purposes of this Agreement, shall be deemed to be that party who obtains substantially the result sought, whether by settlement, dismissal or judgment.

N. Amendment. This Agreement may be amended only by a written instrument signed by both City and Owner.

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

CITY:

CITY OF PALM DESERT,
a California municipal corporation

By: _____
_____ Mayor

ATTEST:

_____
Anthony Mejia, City Clerk

APPROVED AS TO LEGAL FORM:

BEST BEST & KRIEGER LLP

_____
Robert W. Hargreaves, City Attorney

OWNER:

DESERT WAVE VENTURES, LLC

a Delaware limited liability company

By: _____

Its: _____

EXHIBIT A

Approximately 17.68 acres known as APN 620400008, 620420024 and 620420023 in the City of Palm Desert, County of Riverside, California.

ATTACHMENT NO. 9

SCHEDULE OF PERFORMANCE

In the event of any conflict between the contents of the Schedule of Performance and the Agreement, the provisions of the Agreement shall prevail.

	ACTION	TARGET DATE
1.	Execution of Agreement and City Cost Reimbursement Agreement by Developer. Developer shall execute and deliver Agreement and City Cost Reimbursement Agreement to City.	Completed.
2.	Execution of Agreement and City Cost Reimbursement Agreement by City. City shall hold public hearings to consider and approve or disapprove Agreement and City Cost Reimbursement Agreement. If approved, City shall execute Agreement.	Completed.
3.	Submission of all Implementing Actions. Developer shall submit all agreements pertaining to the Implementing Actions to City for final review and approval. (§1.3(b), §5.2(a))	June 1, 2023.
4.	Submission of 100% Design Development Drawings and Preliminary Cost Estimate. Developer shall prepare and submit to the City 100% Design Development Drawings and documents for the Surf Lagoon, Surf Center and Hotel; and preliminary costs associated.	Completed.
5.	Submission of 100% Rough Grading Plans. The Developer shall submit to the City 100% Rough Grading Plans, Rough Grading Permit Application and associated fees.	June 1, 2023.
6.	Approval – 100% Rough Grading Plans. The City shall approve or disapprove the 100% Rough Grading Plans for the entire site.	June 1, 2023.
7.	Submission of 100% Construction Drawings. Developer shall prepare and submit to the City 100% Construction Drawings and documents for the	Completed.

	ACTION	TARGET DATE
	Surf Lagoon, Surf Center and Hotel.	
8.	Submit Building Permit Application. Developer shall submit to City Building Permit Application for the Surf Lagoon, Surf Center and Hotel with 100% construction documents. (§4.3(a)(ii))	Completed.
9.	City acceptance of complete Construction Documents and Building Permits. (§4.3)	June 1, 2023.
10.	Submission -- Equity Investors. Developer shall submit to City identity of Equity Investors and written binding agreements with the Equity Investors. (§5.2(b) and (c))	June 1, 2023.
11.	Submission of Final Detailed Cost Estimates (Non-GMP)- Surf Lagoon and Center and Hotel. Developer shall prepare and submit to the City final detailed cost estimates for the design and construction of the Surf Lagoon and Center and Hotel. (§4.4(b))	June 1, 2023.
12.	Review -- Final Cost Estimates - Surf Lagoon and Center and Hotel. The City shall review final detailed cost estimates for the Surf Lagoon and Center and Hotel. (§4.4(b))	June 1, 2023.
13.	Submittal of Final Project Budget and Final Project Plan of Finance. (§4.4(e))	June 1, 2023.
14.	Submission of Loan Documents. Developer shall submit to City binding Loan Documents from Private Construction Lender for construction financing. (§5.2(d) and (p))	June 1, 2023.
15.	Submission of Operating Agreement for the Hotel Developer shall submit to City for review of the Operating Agreement. (§5.2(r), Scope of Development at II.A.3(e))	June 1, 2023.
16.	Submission of Construction Contracts. Developer shall submit to the City construction contracts and	June 1, 2023.

	ACTION	TARGET DATE
	executed guaranteed maximum price construction contracts or fixed price construction contracts, as applicable, with respect to the Developer's Improvements, based on signed bids from Developer's contractors (§4.4(f) for the construction of the Surf Lagoon and Center and Hotel. (§5.2(f))	
17.	City Review of Items 13-16 above.	Within 45 days of submission of each item.
18.	Submission of Completion Guarantee if required, Certificates of Insurance, Payment Bonds and Performance Bonds. (§4.7.1, §4.11)	Within 45 days after completion of City Review of Items 13-16.
19.	City Review Completion Guarantee , Certificates, Insurance, Payment Bonds and Performance Bonds	At City's discretion.
20.	Open Escrow Account. The City and Developer shall open an escrow with the Escrow Agent. (§6.1)	Completed.
21.	Execution and Delivery of SARDA Property, Property Title, etc. The City and Developer shall complete, execute and deliver into escrow the SARDA Property Title (including memorandum relating thereto), together with all documents and supplemental escrow instructions required to close escrow for conveyance of SARDA Property Title from the SARDA to Developer. (§6.5)	Prior to close of escrow.
22.	Escrow Fees, Charges. The City and Developer shall pay their respective fees, charges and other costs into escrow. (§6.4)	Prior to close of escrow.
23.	Close of Escrow. The City shall convey to the Developer title to the City Property and SARDA Property. (§6.3)	December 31, 2022.
24.	Work with City to identify temporary parking to accommodate at least seventy (70) spaces that will be unavailable for the Desert Willow golf courses during Project construction.	June 1, 2023.

	ACTION	TARGET DATE
25.	Commencement of Construction Mobilization of Surf Lagoon and Center and Hotel. The Developer shall commence construction of the Surf Lagoon and Center and Hotel improvements. (§6.3.2)	Within 45 days after completion of City Review of Items 13-16.
26.	Completion of Construction of Project. The Developer shall complete construction of the first phase Developer's Improvements. (§6.4)	Within 24 months following commencement of construction.
27.	Termination of Agreement. This Agreement shall automatically terminate if any of the events listed occur. (§8.1; §8.1.1)	Upon completion and issuance of certificate of occupancy and/or certificate of completion of all improvements for the Surf Lagoon and Center, Hotel, and Parking.

ATTACHMENT NO. 10

FORM OF PERFORMANCE DEED OF TRUST AND SECURITY AGREEMENT

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Palm Desert
City Clerk's Office
2870 Clark Avenue
Palm Desert, CA 92860

EXEMPT FROM RECORDING FEES PER
GOVERNMENT CODE §27383

Space above this line for Recorder's use.

Escrow No: _____
Property Address: _____, Palm Desert
APNS: _____

PERFORMANCE DEED OF TRUST AND SECURITY AGREEMENT

(Desert Surf Project)

THIS PERFORMANCE DEED OF TRUST AND SECURITY AGREEMENT ("**Deed of Trust**") is made as of _____, 20__, by _____ ("**Trustor**") as Trustor, to [_____ Title Company] [the City of Palm Desert, a charter city and municipal corporation] ("**Trustee**") as Trustee, for the benefit of the City of Palm Desert, a charter city and municipal corporation (the "**City**") as Beneficiary.

The Trustor, in consideration of the promises herein recited and the trust herein created, irrevocably and unconditionally grants, transfers, conveys and assigns to Trustee, in trust for the benefit of City, with power of sale and right of entry and possession, all of Trustor's right, title and interest now held or hereafter acquired in and to the property located in the City of Palm Desert, Riverside County, State of California, described in the attached Exhibit A and more commonly known as: _____, Palm Desert, California (the "**Property**");

TOGETHER with all the improvements now or hereafter erected on the Property, and all easements, rights of way, and appurtenances thereto, and all fixtures now or hereafter attached to the Property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the Property covered by this Deed of Trust;

All of the foregoing, together with the Property, is herein collectively referred to as the "**Security**."

TO HAVE AND TO HOLD the Security, together with acquittances, to the Trustee, its successors and assigns forever;

TO SECURE to the City the performance of the Post-Closing Obligations of the Trustor (the "**Post-Closing Obligations**"), as defined in and evidenced by, that certain Second Revised and Restated Disposition and Development Agreement (the "**DDA**") executed by and between Trustor and City, dated as of _____, 2022 and recorded substantially concurrently herewith, and all extensions, modifications, or renewals of the DDA. The DDA is incorporated herein by this reference; and

TO SECURE the performance of the covenants and agreements of Trustor herein contained.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

1. **Trustor's Estate.** Trustor represents and warrants that Trustor is lawfully seized of the estate hereby conveyed, has the right to grant and convey the Security, and that other than this Deed of Trust, the Security is encumbered only by the DDA. Trustor agrees to warrant and defend generally the title to the Security against all claims and demands, subject to any declarations, easements or restrictions listed in a schedule of exceptions to coverage in any title insurance policy insuring the City's interest in the Security, and Trustor shall pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which City or Trustee may appear, and in any suit brought by City to foreclose this Deed of Trust.

2. **DDA.** Trustor shall promptly perform all of Trustor's Post-Closing Obligations in accordance with the Post-Closing Obligations Deadlines under the DDA and this Deed of Trust.

3. **Charges and Liens.** Trustor will promptly pay when due, the interest, principal, and all other charges accruing under any deed of trust, mortgage, or other instrument encumbering the Property, and will pay when due directly to the payee thereof all taxes, assessments and other charges, fines and impositions affecting the Property. Upon request by the City, Trustor will promptly furnish to the City copies of all notices of amounts due described in this Section and evidence of payment of such amounts. Trustor shall pay when due each obligation secured by or reducible to a lien, charge or encumbrance which now does or later may encumber or appear to encumber all or part of the Property or any interest therein, whether or not such lien, charge or encumbrance is or would be senior or subordinate to this Deed of Trust; provided however, Trustor will not be required to pay any tax, charge, lien or assessment described in this Section so long as Trustor is actively contesting its validity in good faith and by appropriate legal proceedings that will operate to prevent the enforcement of the lien or forfeiture of the Property or any part thereof. Trustor shall post security for the payment of such contested claims as may be requested by the City.

4. **Protection of Security.** If Trustor fails to perform any of the covenants and agreements set forth in this Deed of Trust, or if any action or proceeding is commenced that materially affects City's interest in the Property, including, but not limited to, default under any senior lienholder document, eminent domain, insolvency, code enforcement, arrangements or proceedings involving a bankrupt or decedent, foreclosure of any mortgage secured by the

Property or sale of the Property under a power of sale of any instrument secured by the Property, City, at its option, without releasing Trustor from any obligation hereunder, may upon notice to Trustor, make such appearance, disburse such sums and take such action as is necessary to protect City's interest, including, but not limited to, the purchase of insurance, disbursement of reasonable attorneys' fees and entry upon the Property to make repairs. Any amounts disbursed by City pursuant to this Section, with interest thereon, shall become additional indebtedness of Trustor secured by this Deed of Trust. Unless Trustor and City agree to other terms of payment, such amounts shall be payable upon notice from City to Trustor requesting payment thereof, and shall bear interest from the date of disbursement at the highest rate permissible under applicable law. Nothing contained in this Section shall require City to incur any expense or take any action hereunder.

5. **Inspection.** The City may make, or cause to be made, reasonable entries upon the Property and inspections of the Security; provided that the City will give Trustor reasonable notice of inspection.

6. **Title Insurance.** At Trustor's expense, Trustor shall purchase a CLTA lender's policy of title insurance for the benefit of City, insuring this Deed of Trust as a secondary lien on the Property, with no delinquent taxes or assessment liens appearing as exceptions to title.

7. **Hazard Insurance.** Trustor shall keep the Property insured by a standard all-risk property insurance policy with endorsements for vandalism, malicious mischief, and special extended perils, in the full replacement value of the improvements, and with endorsements for increases in costs due to changes in code and inflation, with loss payable to City and any superior trust deed holder, as their interests may appear, and any other insurance required by the City.

The insurance carrier providing such insurance shall be licensed to do business in the State of California and may be chosen by Trustor, subject to approval by City. All insurance policies and renewals thereof shall be in a form acceptable to the City, and shall include a standard mortgagee clause with standard lender's endorsement in favor of the holder of any senior lien and the City as their interests may appear and in a form acceptable to the City. Trustor shall provide City with copies of all policies and renewals thereof, certificates of insurance, all renewal notices and all receipts of paid premiums. In the event of loss, Trustor shall give prompt notice to the insurance carrier and the City or its designated agent. The City, or its designated agent, may make proof of loss if not made promptly by Trustor. The policies shall include an endorsement providing that City shall receive thirty (30) days' advance written notice of the cancellation, expiration or termination or any material change in the coverage afforded by any of the insurance policies required under this Section.

If the Property is acquired by the City, all right, title and interest of Trustor in and to any insurance policy and in and to the proceeds thereof resulting from damage to the Property prior to the sale or acquisition will pass to the City to the extent of the sums secured by this Deed of Trust immediately prior to such sale or acquisition, subject to the rights of the holder of any senior lien.

Renewal policies and any replacement policies, together with premium receipts satisfactory to the City, shall be delivered to the City at least thirty (30) days prior to the expiration of existing policies. Neither Trustee nor the City shall by reason of accepting, rejecting, approving or obtaining insurance incur any liability for the existence, nonexistence, form or legal sufficiency of such insurance, or solvency of any insurer for payment of losses. The application of proceeds pursuant to this Section shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

8. **Awards and Damages.** Subject to the rights of senior lienholders, all judgments, awards of damages, settlements and compensation made in connection with or in lieu of (a) taking of all or any part of or any interest in the Property by or under assertion of the power of eminent domain, (b) any damage to or destruction of the Property or any part thereof by insured casualty, and (c) any other injury or damage to all or any part of the Property, are hereby assigned to and shall be applied to the restoration or repair of the Property (if applicable) or paid to the City. The City is authorized and empowered (but not required) to collect and receive any such sums and is authorized to apply them in whole or in part upon any indebtedness or obligation secured hereby, in such order and manner as the City shall determine at its option. The City shall be entitled to settle and adjust all claims under insurance policies provided under this Deed of Trust and may deduct and retain from the proceeds of such insurance the amount of all expenses incurred by it in connection with any such settlement or adjustment. All or any part of the amounts so collected and recovered by the City may be released to Trustor upon such conditions as the City may impose for its disposition. Application of all or any part of the amounts collected and received by the City or the release thereof shall not cure or waive any default under this Deed of Trust. If the Property is abandoned by Trustor, or if, after notice by City or its designated agent to Trustor that the condemnor or insurer offers to make an award or settle a claim for damages, Trustor fails to respond to City within thirty (30) days after the date such notice is mailed, City or its designated agent is authorized to collect and apply the proceeds, at City's option, either to restoration or repair of the Property or to the sums secured by this Deed of Trust

9. **Maintenance.** Trustor shall maintain the Property and all structures and landscaping thereon in good condition and repair. Trustor agrees to complete installation of landscaping as approved by the City, and to diligently maintain and care for installed landscaping, using generally accepted methods of cultivation and watering. Trustor shall not remove or demolish any building located on the Property, and agrees to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon, and to pay when due all claims for labor performed and materials furnished therefor, and to comply with all laws affecting the Property or requiring any alterations or improvements to be made thereon. Trustor shall not commit or permit waste thereof, and shall not commit or permit any act upon the Property in violation of applicable laws. Trustor will comply with all applicable laws, ordinances and governmental regulations affecting the Property or requiring any alteration or improvement thereof, and will not suffer or permit any violations of any such law, ordinance or governmental regulation, nor of any covenant, condition or restriction affecting the Property. If there arises a condition in contravention of this Section, and if the Trustor has not cured such condition within thirty (30) days after receiving a notice from City of such a condition, then in addition to any other rights available to City, City shall have the right

(but not the obligation) to perform all acts necessary to cure such condition, and to establish or enforce a lien or other encumbrance against the Property to recover its cost of cure.

10. **Reserved.**

11. **Transfer.** Trustor shall not Encumber or Transfer (as such terms are defined in the DDA) any interest in the Property without complying with all requirements of the DDA.

12. **Reserved.**

13. **Default.** An event of default **("Default")** shall arise hereunder upon the occurrence of any one or more of the following and the expiration of any applicable cure period:

(a) The sale, conveyance, encumbrance, refinance, assignment, or other transfer of the Property including without limitation, the lease or rental of the Property in violation of the DDA or this Deed of Trust;

(b) An event of default arises under the DDA in connection with the performance of the Post-Closing Obligations, and such default remains uncured following the expiration of any applicable cure period;

(c) Trustor fails to maintain insurance on the Property as required by the DDA and this Deed of Trust;

(d) Subject to Trustor's right to contest the following charges, Trustor fails to pay prior to delinquency taxes or assessments due on the Property or fails to pay when due any other charge that may result in a lien on the Property, and Trustor fails to cure such default within twenty (20) days of date of delinquency, but in all events prior to the time that the holder of such lien has the right to pursue foreclosure thereon;

(e) Trustor declares bankruptcy or makes an assignment of assets for the benefit of creditors, or an order for relief is entered under federal bankruptcy laws as to Trustor, or Trustor is adjudicated as insolvent or bankrupt pursuant to the provisions of any state or federal insolvency or bankruptcy, or Trustor consents to, acquiesces in, or attempts to secure the appointment of, any receiver for all or any substantial part of the Property;

(f) The occurrence of an event of default under any loan secured by the Property and the continuance of such default beyond the expiration of all applicable cure periods such that the holder of such loan has the right to accelerate such loan.

(g) Trustor fails to observe or perform any other covenant, condition, or agreement to be observed or performed by Trustor pursuant to this Deed of Trust.

14. **Remedies.** Upon the occurrence of a Default, the giving of notice thereof and the expiration of any applicable cure period, City may, at its option, exercise any one or more of the following remedies:

a. Pursue the exercise of the power of sale provided under this Deed of Trust.

b. Either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed by a court, enter upon, take possession thereof (or any part thereof) and of any of the Security, in its own name or in the name of Trustee, and do any acts which it deems necessary or desirable to preserve the value or marketability of the Property, or part thereof or interest therein, increase the income therefrom, or protect the security thereof. The entering upon and taking possession of the Security shall not cure or waive any breach hereunder or invalidate any act done in response to such breach and, notwithstanding the continuance in possession of the Security, the City shall be entitled to exercise every right and remedy provided under this Deed of Trust, or the DDA, or by law upon occurrence of any uncured breach.

c. Commence an action to foreclose this Deed of Trust as a mortgage, appoint a receiver, or specifically enforce any of the covenants hereof.

d. Exercise its Right of Termination to retake the Property pursuant to the DDA.

e. Exercise all other rights and remedies provided herein, in the instruments by which the Trustor acquires title to any Security, or in any other document or agreement now or hereafter evidencing, creating or securing all or any portion of the obligations secured hereby.

f. Exercise any other remedy provided by law or in equity.

15. Sale.

(a) **Notice of Default**. Upon Trustor's breach of any covenant or agreement of Trustor under the DDA or this Deed of Trust, City shall mail notice to Trustor as provided in Section 24 hereof specifying: (i) the nature of the breach; (ii) the action required to cure such breach; (iii) a date no less than thirty (30) days from the date the notice is mailed to Trustor by which such breach must be cured or such shorter cure period as may be provided in the DDA or this Deed of Trust; and (iv) that failure to cure such breach on or before the date specified in the notice may result in the sale of the Property. The notice shall further inform Trustor of Trustor's right to reinstate after breach and the right to bring a court action to assert the nonexistence of a default or any other defense of Trustor to sale. If the breach is not cured on or before the date specified in the notice, City at City's option may invoke the power of sale and/or pursue any other remedy provided herein or available under law. City shall be entitled to collect from the Trustor, or from the proceeds of the sale of the Property, all reasonable costs and expenses incurred in pursuing the remedies provided hereunder, including, but not limited to, reasonable attorneys' fees.

If a non-monetary default is not reasonably capable of being cured within thirty (30) days, the City, in its sole and absolute discretion, may grant the Trustor such additional time as is reasonably necessary to cure the default provided that the Trustor (i) initiates corrective action within said period, and (ii) diligently, continually, and in good faith works to effect a cure as soon as possible.

Notwithstanding the cure periods established in this Section, in no event shall the City be precluded from sooner exercising any remedies if its security becomes or is about to become materially jeopardized by any failure to cure a default or the default is not cured within ninety (90) days after the first notice of default or delinquency is given.

(b) **Trustor's Right to Reinstate**. Notwithstanding City's invocation of the power of sale, Trustor will have the right to have any proceedings begun by City to enforce this Deed of Trust discontinued at any time prior to five (5) days before sale of the Property pursuant to the power of sale contained in this Deed of Trust or at any time prior to entry of the judgment enforcing this Deed of Trust if: (a) Trustor pays all reasonable expenses incurred by City and Trustee in enforcing the covenants and agreements of Trustor contained in this Deed of Trust, including, but not limited to, reasonable attorneys' fees; (b) Trustor cures all breaches of any covenants or agreements of Trustor set forth in the DDA and this Deed of Trust; and (c) Trustor takes such action as City may reasonably require to assure that the lien of this Deed of Trust, City's interest in the Property and Trustor's obligation to perform the obligations secured by this Deed of Trust shall continue unimpaired. Upon such payment and cure by Trustor, this Deed of Trust and the obligations secured hereby will remain in full force and effect as if no invocation of the power of sale had occurred.

(c) **Sale**. After delivery to Trustee of a Notice of Default and Demand for Sale and after the expiration of such time and the giving of such notice of default and sale as may then be required by law, and without demand on Trustor, Trustee shall sell the Property at the time and place of sale fixed by it in said notice of sale, at public auction to the highest bidder for cash in lawful money of the United States of America, payable at time of sale. Trustee may postpone sale of all or any portion of the Property by public announcement at such time and place of sale and from time to time thereafter may postpone such sale by public announcement at the time and place fixed by the preceding postponement. Any person, including Trustor, Trustee or the City, may purchase at such sale. Upon such sale by Trustee it shall deliver to such purchaser its deed conveying the Property so sold, but without any covenant or warranty expressed or implied. The recitals in such deed of any matters or facts shall be conclusive proof of their truthfulness. Upon sale by Trustee and after deducting all costs, expenses and fees of Trustee, Trustee shall apply the proceeds of sale to the payment of the indebtedness hereby secured, including without limitation, any advances made or costs or expenses paid or incurred by City under this Deed of Trust, any indebtedness evidenced by any other instrument hereby secured, and all other sums then secured hereby, including without limitation, interest, if any, as provided in the DDA, in such order as the City shall direct; and then the remainder, if any, shall be paid to the person or persons legally entitled thereto.

16. **Remedies Cumulative; No Waiver**. No exercise of any right or remedy by the City or Trustee hereunder shall constitute a waiver of any other right or remedy herein contained

or provided by law, and no delay or forbearance by the City or Trustee in exercising any such right or remedy hereunder shall operate as a waiver thereof or preclude the exercise thereof in any continued or subsequent default hereunder. All remedies provided in this Deed of Trust are distinct and cumulative to any other right or remedy under this Deed of Trust or any other document, or afforded by law or equity, and may be exercised concurrently, independently or successively. No sale of the Property, forbearance on the part of City, or extension of the time for payment of the indebtedness hereby secured shall operate to release, discharge, waive, modify, change or affect the liability of Trustor either in whole or in part.

17. **Indemnity.** Trustor agrees to defend, indemnify, and hold the City of Palm Desert, and its elected and appointed officers, officials, employees, and agents harmless from all losses, damages, liabilities, claims, actions, judgments, costs, and reasonable attorneys' fees that they may incur as a direct or indirect consequence of: (i) Trustor's failure to perform any obligations as and when required by the DDA, or this Deed of Trust; or (ii) the failure at any time of any of Trustor's representations or warranties herein or in the DDA to be true and correct.

18. **Reserved.**

19. **Reconveyance.** Upon satisfaction of all obligations secured by this Deed of Trust, including without limitation, and upon the expiration or termination of the DDA, the City will provide a written request to the Trustee to reconvey the Security and will surrender this Deed of Trust to Trustee. The Trustee shall reconvey the Security without warranty and without charge to the person or persons legally entitled thereto. Such person or persons shall pay all costs of recordation, if any. The recitals in the reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof.

20. **Trustee Substitution.** The City, at its option and without prior notice, may from time to time, by written instrument, remove the Trustee and appoint a successor trustee pursuant to a written instrument executed by City and duly acknowledged and recorded in the Official Records of Riverside County. Such instrument shall be conclusive proof of proper substitution of such successor Trustee or Trustees, who shall, without conveyance from the predecessor Trustee, succeed to all the title, estate, power and duties conferred upon the Trustee herein and by applicable law. Such instrument shall set forth the name of the Trustor, the original Trustee and the Beneficiary hereunder, the book and page where this Deed of Trust is recorded, and the name and address of the new Trustee.

21. **City's Rights to Release.** Without affecting the liability of any person for performance of the Secured Obligations hereby secured, and without affecting the lien hereof upon any of the Property not released pursuant hereto, at any time and from time to time without notice: (a) City may in its sole discretion subordinate the lien hereof; and (b) Trustee, acting pursuant to the written request of the City, may reconvey all or any part of the Property, consent to the making of any map or plot of the Land, join in granting any easement thereon, or join in any extension agreement of any agreement subordinating the lien hereof.

22. **Reserved.**

23. **Request for Notice.** City requests that copies of any notice of default and notice of sale affecting the Property be sent to City at its address set forth herein. City shall record a Request for Notice of Default and Sale.

24. **Notices.** All notices, requests, demands, reports or other communications regarding this Deed of Trust shall be in writing and delivered: (i) personally; or (ii) by independent, reputable, overnight commercial courier; or (iii) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, and addressed as follows, or to such other address as specified in written notice delivered to the parties pursuant to this Section:

To Trustor: Desert Wave Ventures, LLC
Attn: Don Rady
1555 Camino Del Mar, Suite 315C
Del Mar, CA 92014

To City: The City of Palm Desert
Palm Desert Civic Center
73-510 Fred Waring Drive
Palm Desert, CA 92260
Attention: City Manager

Any notice that is personally delivered (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service), shall be deemed received on the documented date of delivery thereof.

25. **Successors Bound.** The terms of this Deed of Trust shall be binding upon the Trustor and the Trustor's heirs, legatees, devisees, administrators, executors, successors and assigns.

26. **Attorneys' Fees and Costs.** If any legal action is filed to enforce or interpret this Deed of Trust, or the interpretation or enforcement thereof, the prevailing party shall be entitled to an award of its reasonable attorneys' fees, costs and expenses incurred therein.

27. **No Waiver.** Any waiver of any term or provision of this Deed of Trust must be in writing. No waiver shall be implied from any delay or failure by City to take action on any breach or default hereunder or to pursue any remedy allowed under this Deed of Trust or applicable law. No failure or delay by City at any time to require strict performance of any provision of this Deed of Trust or to exercise any election contained herein or any right, power or remedy hereunder shall be construed as a waiver of any other provision or any succeeding breach of the same or any other provision hereof or a relinquishment for the future of such election.

28. **No Third-Party Beneficiaries.** This Deed of Trust shall not benefit or be enforceable by any person or entity except the City, the Trustee, and the Trustor and their respective successors and assigns.

29. **Entire Agreement.** This Deed of Trust, together with the DDA, sets forth the entire understanding between Trustor and the City with respect to the subject matter hereof. Any previous representations, warranties, agreements, and understandings among the parties regarding the subject matter of the DDA, this Deed of Trust whether written or oral, are superseded by the terms of the DDA and this Deed of Trust.

30. **Amendments.** This Deed of Trust shall not be amended except by a written instrument duly executed by Trustor and Beneficiary and recorded in the Official Records of Riverside County.

31. **Severability.** If any provision of this Deed of Trust shall be held by a court of competent jurisdiction to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Deed of Trust shall not be affected or impaired thereby.

32. **Controlling Law and Venue.** The terms of this Deed of Trust shall be interpreted under the laws of the State of California without regard to principles of conflicts of law. This Deed of Trust was entered into and is to be performed in the County of Riverside, which is the exclusive venue for any action or dispute arising out of this Deed of Trust.

33. **Captions and Gender.** All captions and headings in this Deed of Trust are for the purposes of reference and convenience and shall be disregarded for all other purposes, including the construction or enforcement of any of provisions thereof. Whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

34. **Joint and Several.** The obligations of each signatory to this Deed of Trust shall be joint and several.

35. **Time of the Essence.** Time is of the essence with regard to all matters contained in this Deed of Trust.

SIGNATURES ON FOLLOWING PAGE.

IN WITNESS WHEREOF, Trustor has executed this Deed of Trust as of the date first written above.

TRUSTOR:

By: _____

Print Name: _____

By: _____

Print Name: _____

ACKNOWLEDGMENT

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

State of California)
County of Riverside)

On _____, 20__, before me, _____,
(Name of Notary Public)

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

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

WITNESS my hand and official seal

_____
Signature of Notary Public

(ABOVE AREA FOR OFFICIAL NOTARIAL SEAL)

Exhibit A

PROPERTY DESCRIPTION

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF PALM DESERT, COUNTY OF RIVERSIDE, STATE OF CALIFORNIA AND IS DESCRIBED AS FOLLOWS:

[Insert legal description.]

APN: _____