

# LAST MINUTE AGENDA INFORMATION

## 04/01/15 Regular Meeting

*(Agenda Related Writings/Documents provided to a majority of the City Council after distribution of the Agenda Packet for the April 1, 2015 Regular meeting.)*

ITEM NO.      DESCRIPTION

<b>4.1</b>	<p>CONSIDERATION OF RESOLUTION NO. 2015-7563 AUTHORIZING THE CITY MANAGER TO EXECUTE AN IMPLEMENTATION AGREEMENT OF THE OWNER PARTICIPATION AGREEMENT BETWEEN THE CITY OF IMPERIAL BEACH AND BIKEWAY VILLAGE, LLC FOR THE DEVELOPMENT OF THE BIKEWAY VILLAGE PROJECT LOCATED AT 535 FLORENCE STREET AND 536 13TH STREET. (0600-20 &amp; 0680-20)</p> <p>a. Revised Attachment 2 in Track Changes</p>
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IMPLEMENTATION AGREEMENT  
TO THE OWNER PARTICIPATION AGREEMENT  
BY AND BETWEEN  
THE CITY OF IMPERIAL BEACH  
AND  
BIKEWAY VILLAGE, L.L.C.  
A CALIFORNIA LIMITED LIABILITY COMPANY  
FOR  
MIXED-USE DEVELOPMENT

## INDEX OF EXHIBITS

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IMPLEMENTATION AGREEMENT  
TO THE  
OWNER PARTICIPATION AGREEMENT

(BIKEWAY VILLAGE PROJECT)

THIS IMPLEMENTATION AGREEMENT to the Owner Participation Agreement (“Agreement”) is entered into by and between the CITY OF IMPERIAL BEACH, a municipal corporation, (“City”) and BIKEWAY VILLAGE, L.L.C., a California limited liability company (“Developer”) (City and Developer are also referred to herein individually as a “Party” and collectively as “Parties”) this \_\_\_\_ day of \_\_\_\_\_, 2015, with reference to the following facts:

RECITALS

A. The City and Developer entered into that certain Owner Participation Agreement dated January 31, 2012 pertaining to an adaptive reuse of two structures and improvements to property in the surrounding area of the 13<sup>th</sup> Street access-point to the Bayshore Bikeway (the “Project”). The original Owner Participation Agreement as amended and implemented by this Implementation Agreement and its Exhibits shall collectively be referred to herein as the Owner Participation Agreement (“OPA”). The Exhibits attached to this Agreement shall replace in their entirety the exhibits attached to the original Owner Participation Agreement. The original Owner Participation Agreement, as amended herein, along with any remaining exhibits to the original Owner Participation Agreement not amended or replaced by the terms herein or the Exhibits attached to this Agreement shall remain in full force and effect.

B. The City Council of the City approved the original Owner Participation Agreement on January 26, 2012. Part of that approval included the approval of funding from the City to Developer consisting of bond proceeds from bonds issued by the Imperial Beach Redevelopment Agency (“Agency”) in November 2010 in an amount up to \$1,800,000 to be used for the potential acquisition of certain property for the Project and in an amount up to \$174,700 for the payment of City-approved costs incurred or to be incurred by the Developer for the development of certain public improvements relating to the Project.

C. The Agency was a redevelopment agency in the City, duly created pursuant to the California Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the California Health and Safety Code) (“Redevelopment Law”). On June 28, 2011, Assembly Bill No. X1 26 (2011-2012 1<sup>st</sup> Ex. Sess.) (“AB 26”) was signed by the Governor of California, making certain changes to the Redevelopment Law and to the California Health and Safety Code (“Health and Safety Code”), including adding Part 1.8 (commencing with Section 34161) (“Part 1.8”) and Part 1.85 (commencing with Section 34170) (“Part 1.85”) to Division 24 of the Health and Safety Code. Pursuant to AB 26, as modified by the California Supreme Court on December 29, 2011 by its decision in *California Redevelopment Association v. Matosantos*, all California redevelopment agencies, including the Agency, were dissolved on February 1, 2012, and successor agencies were designated and vested with the responsibility of paying, performing and enforcing the enforceable obligations of the former redevelopment

agencies and expeditiously winding down the business and fiscal affairs of the former redevelopment agencies. On January 5, 2012, the City Council of the City adopted Resolution No. 2012-7136 pursuant to Part 1.85 of AB 26, electing for the City to serve as the successor agency to the Agency upon the dissolution of the Agency under AB 26 (“Successor Agency”). Since enactment, AB 26 has been amended by various Legislation (AB 26 as subsequently amended is referred to herein as the “Dissolution Act”).

D. Pursuant to Health and Safety Code Section 34171(m) of the Dissolution Act, a “Recognized Obligation Payment Schedule” (“ROPS”) means the document setting forth the minimum payment amounts and due dates of payments required by enforceable obligations of the Successor Agency for each six-month fiscal period as provided in Health and Safety Code Section 34177(m) of the Dissolution Act. According to Health and Safety Code Section 34177(l)(1) of the Dissolution Act, the Successor Agency shall prepare a ROPS before each six-month fiscal period providing for all payments on each recognized obligation and the sources of payment during that period. The Successor Agency prepared and included on the ROPS for the period January 1, 2012 through June 30, 2012 (“ROPS 1”) the expenditure of the bond proceeds toward the Project. The California Department of Finance (“DOF”) approved this expenditure by letter dated May 29, 2012. The bond proceeds were transferred to the City for implementation of the Project.

E. Since the City’s approval of the original Owner Participation Agreement, the City has applied for grant funds from the San Diego Association of Governments (“SANDAG”) for payment of costs for some of the improvements which are part of the Project.

E. Since the City’s approval of the original Owner Participation Agreement, and in order to ensure completion of the Project, the Developer has purchased certain real property necessary for the Project. The purpose of this Agreement is to memorialize certain changes to the original Owner Participation Agreement and to the deal points for the Project for the implementation of the Project, to clarify the roles and duties of the Parties, and to specify the timing and method of funding and construction for the Project.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree:

1. Recitals. The above recitals are hereby incorporated into this OPA.
2. Amended Exhibits.

A. Project Description. Exhibit 1 to the original Owner Participation Agreement titled “Project Description” is hereby amended and replaced in its entirety by Exhibit 1 attached hereto and incorporated herein by this reference. Developer represents that it is now the fee owner of the entire site as described on the Site Map set forth in Attachment 2 to the Project Description (Exhibit 1) of the original Owner Participation Agreement. Attachment No. 2 to the Project Description is hereby renamed Exhibit 1-A and is attached hereto and incorporated herein by this reference (the “Site”). Further, attached to this Agreement are the Site Plan attached as Exhibit 1-B and incorporated by this

reference and the Legal Description of the Site attached as Exhibit 1-C and incorporated herein by this reference. Also attached for ease of reference to certain areas of the site is a document entitled Numbered Areas of the Site, Exhibit 1-D and is incorporated herein by this reference.

B. Project Budget. Exhibit 2 to the original Owner Participation Agreement titled “Project Budget” is hereby amended and replaced in its entirety by Exhibit 2 attached hereto and incorporated by this reference. The Project Budget itemizes the total cost of the Project to be paid with Developer equity and the City contribution of funds to the Project from either bond proceeds or grant funds. The City commitment of bond proceeds for the Project shall ~~not exceed~~be Eight Hundred Fifty Five Thousand dollars (\$855,000) (“Bond Proceeds”). The City has applied for grant funds for the Project from SANDAG, and ~~anticipates approval of~~ grant funds from SANDAG have been approved and allocated to this Project in the amount of One Million Three Hundred Eighty Thousand dollars (\$1,380,000) (“Grant Funds”). The City’s funding for the Project shall be paid from both Bond Proceeds set aside for this Project and Grant Funds. Collectively, the funding from the City for the Project (Bond Proceeds and Grant Funds) will be referred to as “Project Funds”. The maximum amount of Project Funds contributed by the City, from both Bond Proceeds and Grant Funds shall ~~not exceed~~be Two Million Two Hundred Thirty Five Thousand dollars (\$2,235,000). Should Grant Funds ~~not be~~ awarded to the Project be withdrawn or rescinded for any reason, no City, Agency or Successor Agency funds shall automatically make up the difference and the Project Funds will be limited to the maximum contribution from the Bond Proceeds in the amount of \$855,000 unless and until the City negotiates an amended agreement for additional funding, which the City may, but is not obligated to do.

C. Schedule of Performance. Exhibit 3 to the original Owner Participation Agreement titled “Schedule of Performance” is hereby amended and replaced in its entirety by Exhibit 3 attached hereto and incorporated herein by this reference. After execution of this Implementation Agreement and receipt of all governmental permits and approvals, Developer shall promptly begin and thereafter diligently prosecute to completion the development of the Project. The construction of the Project shall be completed according to the times set forth in the revised Schedule of Performance; ~~(subject to force majeure delays)~~, which may be amended from time to time with all Parties’ written agreement. The schedule and deadlines set out in the Schedule of Performance, and the terms of the Method of Financing and Disbursement Agreement (Exhibits 5 and 9 hereto) will control the distribution of Bond Proceeds. The grant agreement between the City and SANDAG relating to award of Grant Funds will be controlling as to the timeline for disbursement of Grant Funds for this Project. ~~It is anticipated that the~~The Bond Proceeds and Grant Funds will be paid out concurrently in the appropriate amounts throughout the construction of the Project.

D. Concept Drawings. The document marked as Attachment No. 1 to the Project Description in the original OPA, titled “Concept Drawings” is hereby renumbered as Exhibit 4 and is attached hereto and incorporated herein by this reference. The

construction drawings which more specifically depict the Project and expand on the Concept Drawings will be on file with the City.

### 3. Additional Exhibits.

A. Method of Financing. The timing for the City disbursement of Project Funds to Developer shall occur as set out in the Method of Financing, attached hereto and incorporated by this reference as Exhibit 5. Payments will be delivered by the City to the Developer in stages after certain milestones of the Project are completed according to the timeline in the Schedule of Performance, and the method of payment outlined in the Method of Financing and according to the terms and conditions of the Disbursement Agreement, attached hereto as Exhibit 9 and incorporated herein by this reference.

The Parties to the OPA acknowledge that the Project Funds expended by the City are in consideration for Developer purchasing the property previously owned by the Airport Authority, making off-site improvements to immediately surrounding areas along Florence Street, Cypress Street and ~~Thirteenth~~13th Street, construction of access pathways to Bayshore Bikeway, ramps, bicycle rest areas and bicycle parking, walkways between and around the existing buildings (“West Building” and “East Building”), and construction of a patio area, an overlook structure and public restrooms within the East Building. (The areas of improvement are described in the Project Description, Exhibit 1 and illustrated in the Site Plan, Exhibit 1-B.) The Project Funds will be paid as reimbursement of construction costs for the above-described public improvements as well as in consideration for Developer’s transfer of a perpetual access easement over the bikeway access pathways and ramps, bicycle rest areas and bicycle parking and walkways between and around the West and East Buildings. Developer will also transfer an easement for the useful life, not to be less than ~~fifty~~thirty-five (~~55~~35) years, for the patio area, overlook structure and public restrooms in the East Building. In addition, Developer will execute open space easements for certain areas of the Project (Area 6 on Exhibit 1-D) that will remain undeveloped and in a natural state other than certain planting and/or maintenance of native vegetation.

The Project Funds will not be utilized for any tenant improvement work, and any tenant improvement work will be funded by Developer’s funds and shall not be governed by this Agreement.

The City’s expenditure of Project Funds is in consideration of the following: (i) the construction by Developer and/or its successors and assigns of all improvements to the Site as described in the Project Description, as well as necessary off-site improvements (the Project), in accordance with all the terms and conditions of this OPA, Developer’s obtaining any and all permits and land use approvals for development required by the City or any other public agency, including but not limited to the California Coastal Commission; (ii) Developer conveyance to the City of public easements for the purpose of public access to and use of certain Site improvements constructed by Developer and described above, and Developer’s execution of any and all documents required to convey said easements, as described in the Grants of Public Easement (attached hereto as Exhibit

No. 6A-D hereto and further discussed below); and (iii) Developer's and/or its successor's and assign's maintenance and operation of the Project in accordance with this OPA, the Agreement Affecting Real Property (attached hereto as Exhibit 7 and further discussed below), and the Maintenance Agreement (attached hereto as Exhibit No. 8 and further discussed below). All payments due to be made by the City to the Developer under this OPA shall be made in reliance on Developer performing its obligations hereunder and shall be subject to the conditions set forth in this OPA. As a condition precedent to each payment by the City to the Developer, the Developer shall have duly performed each and every material obligation to be performed by Developer hereunder and Developer's representations, warranties and covenants set forth in this OPA shall be true and correct in all material respects as of the date of such payment.

B. Grants of Public Easement. The Developer, as owner of the property, shall, upon completion of the improvements, grant to the City public easements on portions of the property through Grants of Public Easement in a form substantially in accordance with the forms of the Grants of Public Easement ("Grants") attached hereto as Exhibits 6A-~~6D~~6C and incorporated herein by this reference. The portions of the Site subject to the public easements are more precisely described in the Grants and attachments thereto. The public easements granted by Developer on the patio and overlook areas (depicted as Area 7 on Exhibit 1-D), may be limited on portions of those areas based on any Alcohol Beverage Control ("ABC") license use limitations pertaining to those areas. The easement on Area 7 will also be subject to Developer's reservation of use on the patio for tables reserved for restaurant and/or café patrons, and may also occasionally be limited for purposes of reserved private special events sponsored by a building tenant. Each public easement is granted in consideration of the City's payment of Project Funds to Developer. There shall be no additional cost to the City for Developer's grant of said easements. Developer shall convey the public easements to the City free and clear of all liens, encumbrances, covenants, restrictions, easements, leases, taxes and other defects, but subject to ~~(a) the covenants, conditions, restrictions and easements arising out of the provisions of this OPA; and (b) the City permitted~~, subject to customary exceptions, such as utility easements, that ~~are listed in the Grants~~ do not interfere with the use of property.

C. Agreement Affecting Real Property. As a covenant running with the land, the Developer and its successors and assigns to the Site or any portion thereof shall be obligated to comply with the provisions set forth in the Agreement Affecting Real Property attached hereto as Exhibit 7 and incorporated herein by this reference. The Agreement Affecting Real Property shall be executed by the Parties and recorded against the Site upon completion of all improvements. The Parties execution and recordation of the Agreement Affecting Real Property is a material inducement for the City to enter into the OPA.

D. Maintenance Agreement. ~~The Developer covenants and agrees for itself and its successors and assigns to the Site or any part thereof, that the Developer and its successors and assigns shall maintain, and repair as necessary, the improvements on the Site in a first class condition and shall keep the entire Site free from any accumulation of debris, trash or waste materials. The Developer shall also maintain the landscaping on~~

~~the Site in a robust and healthy condition, and maintain the bikeway access paths, bicycle parking, bicyclist rest area, patio area, access ramps and overlook structure and the public restrooms in the East Building. The Developer shall also maintain the sidewalks, parking areas and landscaping located in the public right of way directly adjacent to the Site and shall provide irrigation to all off-site landscaping adjacent to the site and to surface parking areas. Irrigation shall be connected to private on-site water service.~~

The Developer agrees to perform all maintenance, repair and replacement work with respect to the improvements on the Site necessary or appropriate to keep the improvements in the condition as originally installed, all consistent with the covenants to be recorded against the Site as set forth in the Maintenance Agreement attached hereto as Exhibit 8 and incorporated herein by this reference. As a covenant running with the land, the Developer and its successors and assigns to the Site or any portion thereof shall be obligated to comply with the provisions set forth in the Maintenance Agreement, to be executed by the Parties and recorded against the Site upon completion of the Project. The Parties execution and the recordation of the Maintenance Agreement is a material inducement for the City to enter into the OPA.

4. Effect and Duration of Covenants. The Covenants established in the OPA, defined in Article III, Section 10 of the original Owner Participation Agreement, and contained in the Grant of Public Easement (Exhibit 6), the Agreement Affecting Real Property (Exhibit 7) and the Maintenance Agreement (Exhibit 8) shall be binding on Developer and its successors and assigns to the Site or any part thereof for the benefit and in favor of the City and its successors and assigns, and shall remain in effect for the periods specified in each such respective recordable document. [A release of construction covenants will be recorded upon completion of the Project to City's reasonable satisfaction.](#)

5. Additional Terms.

A. The following provisions are added as Article V to the original Owner Participation Agreement:

**V. ADDITIONAL PROVISIONS**

1. Right of Access. Representatives of the City shall have the reasonable right of access to the Site without charges or fees, at normal construction hours during the period of construction for the purposes of the OPA, including, but not limited to, the inspection of the work being performed in constructing the improvements. Such representatives of the City shall be those who are so identified in writing by the City Manager (or his or her designee). Such representatives shall comply with reasonable safety rules established by the Developer. The City shall defend, indemnify and hold the Developer harmless from and against all claims, actions, liability, loss, damage, costs or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of any such entry and/or the presence of such parties upon the Site, except for such claims, actions, liability, loss, damage, costs or expenses caused by, that result from, or created by the

negligence or willful misconduct of the Developer and its respective officers, officials, agents, representatives, members, contractors, staff and employees.

2. Notice of Default to Mortgage, Deed of Trust or Other Security Interest Holders; Right to Cure. The Developer shall notify the City in advance of any mortgage, deed of trust, conveyance and lease back, or other form of conveyance for financing as such financing is described in Article III, Section 9(d) of the original OPA, if the Developer proposes to enter into the same before the recordation of ~~the Release~~ a release of Construction Covenants construction covenants. Whenever the City shall deliver any notice or demand to the Developer with respect to any breach or default by the Developer in completion of construction of the improvements, the City shall at the same time deliver to each holder of record of any mortgage, deed of trust or other security interest authorized by this OPA, a copy of such notice or demand. Each such holder shall (insofar as the rights of the City are concerned) have the right at its option within ninety (90) days after the receipt of the notice, to cure or remedy, or commence to cure or remedy, any such default and to add the cost thereof to the security interest debt and the lien of its security interest. If such default shall be a default which can only be remedied or cured by such holder upon obtaining possession, such holder shall seek to obtain possession with diligence and continuity through a receiver or otherwise, and shall remedy or cure such default within ninety (90) days after obtaining possession; provided that in the case of a default which cannot with diligence be remedied or cured, or the remedy or cure of which cannot be commenced within such ninety (90) day period, such holder shall have such additional time as reasonably necessary to remedy or cure such default with diligence; provided, that ~~Developer~~ such holder diligently and continuously pursues such cure to completion ~~but in no event longer than one hundred eighty (180) days after receipt of notice hereunder~~; provided, further, that such holder shall not be required to remedy or cure any non-curable default of Developer (such as an unauthorized attempted assignment).

Nothing contained in this OPA shall be deemed to obligate, permit or authorize such holder to undertake or continue the construction or completion of the improvements (beyond the extent necessary to conserve or protect the improvements or construction already made) without first having expressly assumed the Developer's obligations to the City under this OPA and all Exhibits by written agreement reasonably satisfactory to the City. The holder in that event must agree to complete, in the manner provided in this OPA, the improvements to which the lien or title of such holder related, and submit evidence reasonably satisfactory to the City that it has the qualifications and/or financial responsibility necessary to perform such obligations. Any such holder who has properly completed such improvements shall be entitled, upon written request made to the City, to a ~~Release~~ release of ~~Construction Covenants~~ construction covenants from the City.

3. Failure of Holder to Complete Improvements. In any case where, six (6) months after a default by the Developer in completion of construction of improvements under this OPA has occurred and not been cured as provided by this OPA, the holder of any mortgage, deed of trust or other security interest creating a lien or encumbrance upon the Site (or portion thereof) has not exercised the option to construct, or if it has exercised the

option but has not proceeded diligently with construction, the City shall have the right, but not the obligation, to purchase the mortgage, deed of trust or other security interest by payment to the holder of the amount of the unpaid debt, plus any accrued and unpaid interest and any other amounts secured thereby. If the ownership of the Site (or portion thereof) has vested in the holder, the City, if it so desires, shall be entitled to a conveyance from the holder to the City upon payment to the holder of an amount equal to the sum of the following:

- (a) The unpaid mortgage, deed of trust or other security interest debt at the time title became vested in the holder (less all appropriate credits, including those resulting from collection and application of rentals and other income received during foreclosure proceedings).
- (b) All expenses with respect to foreclosure.
- (c) The net expense, if any (exclusive of general overhead), incurred by the holder as a direct result of the subsequent ownership or management of the Site (or portion thereof), such as insurance premiums and real estate taxes.
- (d) The cost of any improvements made by such holder.
- (e) An amount equivalent to the interest that would have accrued on the aggregate of such amounts had all such amounts become part of the mortgage or deed of trust debt and such debt had continued in existence to the date of payment by the City.

4. Right of City to Cure Mortgage, Deed of Trust or Other Security Interest Default.

In the event of a default or breach by the Developer of a mortgage, deed of trust or other security interest with respect to the Site (or any portion thereof) prior to the issuance of a ~~Release~~release of ~~Construction Covenants~~construction covenants by the City, and the holder has not exercised its option to complete the development, the City shall have the right, but not the obligation, upon ten (10) days notice to Developer, to cure the default prior to completion of any foreclosure and such cure shall be recognized by mortgage holder as if such cure was performed by the developer itself. In such event, the City shall be entitled to reimbursement from the Developer of all costs and expenses incurred by the City in curing the default. ~~The City shall also be entitled to a lien upon the Site (or portion thereof) to the extent of such costs and disbursements.~~

5. Selection of Commercial Tenants. It is the Agency's intent that the financial assistance provided by the Agency to the Project will assist in revitalizing the neighborhood. Therefore, Developer agrees that it will use diligent and good faith efforts to obtain commercial tenants that will revitalize the neighborhood and serve users of the Bayshore Bikeway and 13<sup>th</sup> Street Bike Paths.

Developer shall meet with City staff on a regular basis to discuss the progress of obtaining commercial tenants that meet the City's objectives described above, and to

facilitate the City’s review of proposed commercial tenants. ~~If Developer fails to secure tenant leasing commitments for at least 7,500 square feet of the gross leasable area of the Project satisfactory to the City within 30 days after completion of construction, City retains the right to withhold the last payment of Project Funds to Developer, consistent with the Method of Financing.~~

6. Owner Participation Agreement, Article III, Section 13. The word “gross” in the sixth to the last line of the section is deleted.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

“CITY”  
CITY OF IMPERIAL BEACH

\_\_\_\_\_  
Andy Hall, City Manager

ATTEST:

\_\_\_\_\_  
Jacqueline M. Hald, City Clerk

APPROVED AS TO FORM

\_\_\_\_\_  
Jennifer Lyon, City Attorney

APPROVED AS TO FORM  
Kane, Ballmer & Berkman

---

Carol Leone, Special Counsel

*[Signatures continue on following page.]*

“DEVELOPER”  
BIKEWAY VILLAGE, L.L.C.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

~~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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_, 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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: _____	Signer's Name: _____
<input type="checkbox"/> Corporate Officer – Title(s): _____	<input type="checkbox"/> Corporate Officer – Title(s): _____
<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____

## SCHEDULE OF PERFORMANCE

### I. DEVELOPMENT

1. Submission - Preliminary Construction Drawings, and Preliminary Landscaping and Grading Plans. Developer shall prepare and submit to Agency preliminary construction drawings and preliminary landscaping and grading plans for the Property. Complete.
  
2. Approval – Preliminary Construction Drawings, and Preliminary Landscaping and Grading Plans. City shall approve or disapprove the preliminary construction drawings and preliminary landscaping and grading plans for the Project. Complete.
  
3. Submission - Final Construction Drawings and Landscaping and Finish Grading Plans. Developer shall prepare and submit the final construction drawings and the final landscaping and finish grading plans for the Project. Complete.
  
4. Submission – Final Civil Engineering, Off-Site, Public Improvement Drawings. Developer shall prepare and submit Final Civil Engineering, Off-Site, Public Improvement Drawings for the Project. At least ten (10) days prior to City execution of Implementation Agreement
  
5. Approval - Final Construction Drawings and Landscaping and Finish Grading Plans. City shall approve or disapprove the final construction drawings and the final landscaping and finish grading plans for the Project. Within fifteen (15) business days after receipt by City.

- |  |  |
|--|--|
| 6. <u>Evidence of Developer Equity.</u> Developer shall provide to City submission of evidence of Developer equity for balance of funds as described in Method of Financing.                       | At least thirty (30) days prior to the City's distribution of funds.   |
| 7. <u>Developer's Satisfaction to Conditions Precedent to Distribution of City Public Funds.</u> Developer shall have satisfied all conditions required in accordance with Section III of the OPA. | At least thirty (30) days prior to City's distribution of funds.   |
| 8. <u>Commencement of Construction.</u> Developer shall commence construction of the Improvements, in accordance with the OPA.   | Within 30 days after City's approval of Final Plans; <u>and Developer's receipt of all other governmental permits and approvals.</u> |
| 9. <u>Completion of Construction.</u> Developer shall complete construction of the Improvements in accordance with the OPA.  | On or before fourteen (14) months after commencement of construction, <u>subject to force majeure.</u>                               |
| <del>10. <u>Securing of Tenant Commitments.</u> Developer shall secure tenant leasing commitments for at least 7,500 square feet of leasable area.</del>   | <del>Within 30 days after completion of construction.</del>  |

METHOD OF FINANCING

This is the Method of Financing attached to the Owner Participation Agreement dated January 31, 2012 as implemented by the Implementation Agreement dated \_\_\_\_\_(collectively the “OPA”) between the City of Imperial Beach (“City”) and Bikeway Village L.L.C., a California limited liability company (“Developer”) pertaining to the development of the Project as described in the Project Description attached to the OPA as Exhibit No. 1. (City and Developer are also referred to herein individually as a “Party” or collectively as “Parties”. Any capitalized term not otherwise defined herein shall have the meaning ascribed to such term in the OPA or Project Description, Exhibit 1 to the OPA.

1. Total Development Cost. The parties estimate that the cost of the development of the Site by Developer will be approximately \$4,973,818 to be provided as follows in Section 2 of this Method of Financing.

2. Sources of Financing. The parties anticipate that the costs of the development of the Site and the construction of the improvements thereon (the “Development Costs”) shall be financed with a combination of Developer’s equity and City project funds (collectively, the “Construction Funding”) as set forth in the following chart and as described below:

Source of Funds

Construction

Developer Equity (this will increase or decrease depending upon the actual cost of the Project) \$ 2,738,818

City Project Funds (~~up to a maximum of~~) \$ 2,235,000

(to be derived from Bond Proceeds in the amount of \$855,000 and Grant Funds in the amount of \$1,380,000)

TOTAL FUNDING \$ 4,973,818

- a. Equity from the Developer not secured by any deed of trust against the project in the amount of \$2,738,818.

- b. Developer shall be responsible for providing all funds which may be needed to pay for cost overruns and contingencies not otherwise funded by the above-listed funding.
- c. Notwithstanding any other provision of the OPA, including without limitation this Method of Financing, in no event shall the City, Agency or Successor Agency be obligated to make any expenditure under or arising from the OPA and this Method of Financing in excess of the amount of the Project Funds (as defined herein) set forth above. If, for any reason, Grant Funds ~~are not~~ awarded to this Project are withdrawn or rescinded, it is agreed and understood by the Parties that no City, Agency or Successor Agency funds shall automatically make up the difference of any shortfall. In such a case, Developer is responsible for the costs exceeding the maximum Bond Proceeds of \$855,000 unless and until an amended agreement is negotiated with the City, which the City may, but is not obligated to negotiate.

3. City Project Funds.

- a. Pursuant to the OPA, upon Completion and satisfaction of certain conditions set forth in the OPA, herein, and within the grant agreement provided by the grantor, the San Diego Association of Governments (“SANDAG”), there shall be a City payment of project funds to the Developer in an amount ~~not to exceed~~ of \$2,235,000, with such disbursements to be in accord with the conditions and requirements of the OPA, the timing of the Schedule of Performance, this Method of Financing and the terms of the Disbursement Agreement (Exhibit 9 to the OPA). Disbursement of the Grant Funds shall also be in accord with the timing and requirements of the grant agreement with SANDAG. The source of the project funds will be the 2010 Bond Proceeds and Grant Funds, ~~if such grants are awarded to the Project, and are available to the Developer for the Project,~~ but the total amount from Bond Proceeds and Grant Funds together will not exceed \$2,235,000. Funding contributions from the City for the Project, derived from Bond Proceeds and Grant Funds together shall be referred to as “Project Funds”. The City has determined that the important public purposes of the OPA cannot be achieved unless the City provides Developer with the Project Funds as defined in the OPA and provided for in this Method of Financing.

(i) The City Project Funds disbursements shall be made from the City’s 2010 Bond Proceeds and from Grant Funds awarded to the Project, both as defined in Section 2.B. of the Implementation Agreement to the Owner Participation Agreement.

- b. The City’s obligation to pay Developer shall only occur upon the Developer’s satisfaction of all conditions precedent to City disbursement of Project Funds and in particular, ~~Developers~~Developer’s completion of

work to City's reasonable satisfaction and Developer presenting invoices and other evidence of actual costs expended for such work. The Project Funds will be paid as reimbursement to Developer for actual costs expended on certain public improvements, in a manner consistent with the Disbursement Agreement. Disbursement of Grant Funds will also be consistent with the terms of the grant agreement with SANDAG. Besides reimbursement for the cost of construction of certain public improvements, the Project Funds also serve as consideration for Developer's transfer to City of public easements on certain portions of the Site as described in the Grants of Public Easement, Exhibits 6A-6D to the OPA, incorporated herein by this reference.

- c. Project Funds will be used to pay for: (i) improvements to portions of the Site on which public easements will be granted, including the access areas next to and between the buildings (identified as Areas 1A, 2A, 4 and 8A on the Numbered Areas of Site, Exhibit 1-D to the OPA); (ii) ~~Developer~~Developer's transfer of easements to the City allowing public access to and onto bicycle ramps, patio area, overlook structure, public restrooms and preservation of open space (identified as Areas 5, 7, ~~9~~ and ~~69~~, respectively, on the Numbered Areas of Site) and (iii) improvements to off-site public improvements on Florence Street, Cypress Street, 13th Street and in the alley between the buildings (identified as Areas 1B, 2, 2B, 3 and 8B on the Numbered Areas of Site.) These improvements will consist of additional on-street public parking, new curbs, gutters, and sidewalks, street trees, street lighting, landscaping, an enhanced intersection and crosswalks at 13<sup>th</sup> Street and Cypress Avenue, Class II Bike Lanes in 13<sup>th</sup> Street and a Class I Bike Lane "Boardwalk" in 13<sup>th</sup> Street north of Cypress Avenue accessing the Bayshore Bikeway.
- d. From the Project Funds, the City shall ~~pay to~~reimburse Developer ~~up to 38% of the Project Funds in partial reimbursement of~~ the cost of on-site and off-site public improvements described in Section 3.c.(i) and (iii) above, ~~after such improvements are complete.~~
- ~~e. The City shall pay to Developer up to 42% of the remaining Project Funds for reimbursement of construction costs after completion of the the cost of Bikeway Parcel Improvements ~~(as those improvements are, the cost of eligible Eastern Parcel Improvements (as~~ defined in the Project Description, Exhibit 1 to the OPA).~~
- ~~f. The City shall pay to Developer an amount up to the maximum of the Project Funds, after completion of the entire Project, including the Eastern ) in monthly construction draws from Bond Proceeds and Western Parcel Improvements; a final building permit is acquired by Developer for both Eastern and Western Buildings; and Developer has secured, to the City's satisfaction, leasing commitments for at least 7,500 square feet of the~~

~~gross leasable area of the Project within 30 days after completion of construction of the Project.~~ quarterly construction draws from Grant Funds or as Grant Funds are available from SANDAG, as such improvements are complete.

~~g. If~~

e. The City, at its discretion, may withhold up to ten percent (10%) of Bond Proceeds until the project improvements are completed to the City's reasonable satisfaction. Upon completion of the project improvements, any remaining Bond Proceeds and Grant Funds will be disbursed to Developer notwithstanding anything herein to the contrary and subject to the requirements of the Grant Agreement between the City and SANDAG.

f. If, for reasons other than force majeure, Developer fails to complete the Project (as described in the Project Description) within the timelines set within Schedule of Performance or the grant agreement with SANDAG, the City shall retain any and all remaining Project Funds. In any event, City shall at all times retain any accrued interest on the Project Funds.

5. Project Budget. The parties anticipate that all Development Costs shall be as set forth in the Project Budget attached to the OPA as Exhibit No. 2 (the "Project Budget"), incorporated herein by this reference. The Project Budget shall be subject to change from time-to-time, subject to the prior written approval of material changes by the City Manager or designee (which approval shall not be unreasonably withheld), upon which approval the Project Budget shall be replaced by the approved revised Project Budget.

6. Evidence of Financing. The sum of the sources of funds described in Section 2 of this Method of Financing shall be sufficient at all times to pay all Development Costs as set forth in the most recently approved Project Budget. Within the time provided therefore in the Schedule of Performance (Exhibit No. 3 to the OPA), Developer shall submit for City review and approval, evidence of such financing or equity, including all statements reflecting Developer's Equity or access to Construction Funding, if any. The City shall not unreasonably withhold its approval. Developer shall provide written certification to the City that such financing documents are true and correct copies of the actual documents provided to Developer by finance institutions on or before the closing date for the Project.

7. Subordination. The Agreement Affecting Real Property and covenants described in the Maintenance Agreement and Grant(s) of Public Easement shall be senior and first priority to any lien or deed of trust securing any other financing for the Project. Upon request, the Developer shall secure execution of such reasonable instruments as may be necessary to subordinate any deed of trust securing a loan, and any regulatory agreements to be recorded in connection therewith.

8. Method of Financing Part of Agreement. This Exhibit No. 5 is part of the OPA and is subject to all of the terms and conditions thereof.

RECORDING REQUESTED BY AND  
WHEN RECORDED, MAIL TO:

CITY OF IMPERIAL BEACH  
825 Imperial Beach Boulevard  
Imperial Beach, California 91932

FREE RECORDING REQUESTED  
BY CITY OF IMPERIAL BEACH  
(SEE GOVERNMENT CODE 6103)  
NO DOCUMENTARY TAX DUE

---

GRANT OF PUBLIC EASEMENT

A. WHEREAS, the City of Imperial Beach, a municipal corporation (the "City"), is engaged in activities necessary and appropriate to carry out the Redevelopment Plan for the Palm Avenue/Commercial Redevelopment Project Area (the "Project Area"); and

B. WHEREAS, in furtherance of said redevelopment activities, the City and Bikeway Village, L.L.C., a California limited liability company, (the "Grantor"), entered into an Owner Participation Agreement dated January 31, 2012 as implemented by the Implementation Agreement between those parties dated \_\_\_\_\_ (collectively referred to as the "OPA") for redevelopment of the Site, as defined below. The OPA is a public document and on file as Document No. \_\_\_\_\_ with the Clerk for the City of Imperial Beach. Any capitalized terms not defined herein shall take on those meanings ascribed in the OPA; and

C. WHEREAS, as a material inducement to the City for entering into the OPA with Grantor, the Grantor agreed to grant to the City public easements on land owned by Grantor situated in the City of Imperial Beach and County of San Diego, State of California, more particularly illustrated on Exhibit A and described on Exhibit B (the "Public Easement"). Said Public Easement lies within Grantor's development site (the "Site", illustrated in Exhibit C and described in Exhibit D). Grantor proposes to construct an adaptive reuse of two existing warehouse structures ("West Building" and "East Building") with a variety of retail, commercial, recreational and personal service uses, as well as a public overlook area, bicycle parking, public restrooms, bicyclist rest areas, improved bike paths and bikeway access ramps on the Site pursuant to the OPA (the "Project"); and

~~D. WHEREAS, Grantor and City have entered into a Maintenance Agreement (the "Maintenance Agreement") concerning the perpetual maintenance of the Public Easement to the~~

~~bikeway access paths and surrounding landscaping and other improvements for the benefit of the City and public and maintenance for the useful life of the bikeway ramps, patio and overlook structures and public restroom in the East Building, which useful life is not to be less than fifty-five (55) years.~~

NOW THEREFORE, for valuable consideration, the sufficiency of which being hereby acknowledged, Grantor does hereby grant to the City a perpetual (except as otherwise provided herein) public easement over, along, across, and about the surface of the Public Easement for exclusive use as public bikeway and pedestrian access ~~as well as the portions of Grantor's property used as access to the overlook structure from between and around the sides of the West and East Buildings,~~ for operation in accordance with City practices and in a manner that is compatible with the Bayshore Bikeway use and comparable to other public access uses in the Project Area. Grantor and City further agree:

1. Use of the Public Easement as access to the bikeway, patio and overlook structure according to the City's custom and practice for public areas within the Project Area, subject to any specific use permit(s) and limitations held by Grantor with respect to any portion of the Public Easement, such as the City's right to provide for hours of curfew within a portion or all of the Public Easement similar to hours of curfew placed from time to time by City on other public areas within the Project Area.

2. Grantor shall have the right at all times to eject or cause the ejection from the Public Easement of any person causing any public or private nuisance. Grantor, however, makes no representations or warranties, express or implied, regarding security in, for or around the Public Easement and shall have no obligation to provide or maintain security therefor.

3. Any improvements which Grantor or GranteeCity may construct within or immediately adjacent to the Public Easement shall meet the requirements and reservations of the Grant of Easement and shall be constructed in strict compliance with plans and specifications approved by the City.

~~a. Grantor shall, according to the terms of the OPA, construct an overlook structure adjacent to the Bayshore Bikeway. When constructed, such overlook structure shall be constructed and maintained by Grantor to provide sufficient structural support for, and to accommodate, the anticipated public use of such improvements.~~

~~b. Grantor shall be responsible for determining and representing to the City, prior to the City's approval of plans and specifications for installation of the overlook structure, whether such plans are prepared by Grantor or others, that installation and use of the overlook structure is in accordance with such plans and specifications. The City shall not be liable or~~

~~responsible for the structural integrity of the overlook structure and/or the utility thereof as a public overlook structure for public use; it shall be Grantor's sole obligation to provide sufficient structural support for, and to accommodate, the overlook structure constructed within the Public Easement as provided by this paragraph 3.~~

~~e. Grantor further agrees, at its sole cost and expense to repair and maintain any improvements under the Public Easement to provide sufficient structural support for, and to accommodate the overlook structure constructed within the Public Easement and further, Grantor agrees to promptly reconstruct and restore any improvements to the overlook structure upon the occurrence of any damage or destruction thereto from any cause, with sufficient structural integrity to support and accommodate the public use thereof.~~

4. Grantor agrees to and shall defend, indemnify and hold City and its officers, employees, contractors and agents harmless from and against all claims, liability, loss, damage, costs or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or to the property of any person (including, without limitation, the City) which shall occur on or adjacent to the Public Easement in connection with the activities of Grantor under this Grant of Public Easement, and which shall be ~~directly or indirectly~~ caused by ~~any acts done or any errors or omissions~~ negligence or willful misconduct of, ~~or neglect by,~~ Grantor or its officers, employees, contractors, agents, and tenants, ~~guests, or permittees.~~

5. Grantor shall at all times maintain bodily injury and property damage liability insurance covering the matters referred to in the preceding paragraph, with coverage of at least \$3,000,000 combined single limit. Such insurance shall name the City and its respective officers, employees, contractors and agents as additional insureds. Grantor shall furnish, or cause to be furnished, to City duplicate originals or appropriate certificates of such insurance to demonstrate that such insurance is continuously in effect.

6. In amplification and not in restriction of the provisions set forth hereinabove, it is intended and agreed that City shall be deemed a beneficiary of the covenants provided for in this Grant of Public Easement both for and in its own right and also for the purposes of protecting the interests of the community. All covenants without regard to technical classification or designation shall be binding for the benefit of City and such covenants shall run in favor of City for the entire period during which such covenant shall be in force and effect, without regard to whether City is or remains an owner of any land or interest therein to which such covenants relate. City shall have the right, in the event of any breach of any such covenant, agreement or condition, to exercise all the rights and remedies, and to maintain any actions at law or suit in equity or other proper proceedings to enforce the curing of such breach of covenant, agreement or condition.

7. City shall not make any alterations to the improvements in the Public Easement unless (i) such alterations reasonably accommodate the use of the Public Easement in accordance with this Grant of Public Easement, the Maintenance Agreement, and any specific use permit(s) held by Grantor with respect to the Public Easement and (ii) City has obtained Grantor's consent.

8. This Grant of Public Easement shall bind and inure to the benefit of the respective heirs, representatives, successors and assigns of the parties hereto.

9. This Grant of Public Easement shall terminate should the adjacent Bayshore Bikeway no longer be used as a bikeway.

IN WITNESS WHEREOF, this instrument is executed as of this \_\_\_\_ day of \_\_\_\_\_, 2015.

BIKEWAY VILLAGE, L.L.C.,  
a California limited liability company  
(Grantor)

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

CITY ACCEPTANCE OF GRANT OF PUBLIC EASEMENT  
APPEARS ON THE FOLLOWING PAGE

CERTIFICATE OF ACCEPTANCE  
(Government Code Section 27281)

This is to certify that the interest in real property conveyed by this instrument to the City of Imperial Beach, a municipal corporation, is hereby accepted by the undersigned officer on behalf of the City of Imperial Beach, and City consents to recordation thereof by its duly authorized officer.

Dated \_\_\_\_\_

By \_\_\_\_\_  
Assistant City Manager

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_, 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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: \_\_\_\_\_  
 Corporate Officer – Title(s): \_\_\_\_\_  
 Partner -  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  
Signer is Representing: \_\_\_\_\_  
\_\_\_\_\_

Signer's Name: \_\_\_\_\_  
 Corporate Officer – Title(s): \_\_\_\_\_  
 Partner -  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  
Signer is Representing: \_\_\_\_\_  
\_\_\_\_\_

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_, 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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: \_\_\_\_\_  
 Corporate Officer – Title(s): \_\_\_\_\_  
 Partner -  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  
Signer is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_  
 Corporate Officer – Title(s): \_\_\_\_\_  
 Partner -  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  
Signer is Representing: \_\_\_\_\_

Exhibit A

MAP OF PUBLIC EASEMENT

[To be added.]

Exhibit B

DESCRIPTION OF PUBLIC EASEMENT

[To be added.]

Exhibit C

MAP OF SITE

[To be added.]

Exhibit D

DESCRIPTION OF SITE

[To be added.]

RECORDING REQUESTED BY AND  
WHEN RECORDED, MAIL TO:

CITY OF IMPERIAL BEACH  
825 Imperial Beach Boulevard  
Imperial Beach, California 91932

FREE RECORDING REQUESTED  
BY CITY OF IMPERIAL BEACH  
(SEE GOVERNMENT CODE 6103)  
NO DOCUMENTARY TAX DUE

---

GRANT OF PUBLIC EASEMENT

A. WHEREAS, the City of Imperial Beach, a municipal corporation (the "City"), is engaged in activities necessary and appropriate to carry out the Redevelopment Plan for the Palm Avenue/Commercial Redevelopment Project Area (the "Project Area"); and

B. WHEREAS, in furtherance of said redevelopment activities, the City and Bikeway Village, L.L.C., a California limited liability company, (the "Grantor"), entered into an Owner Participation Agreement dated January 26, 2012 as implemented by the Implementation Agreement between those parties dated \_\_\_\_\_ (collectively referred to as the "OPA") for redevelopment of the Site, as defined below. The OPA is a public document and on file as Document No. \_\_\_\_\_ with the Clerk for the City of Imperial Beach. Any capitalized terms not defined herein shall take on those meanings ascribed in the OPA; and

C. WHEREAS, as a material inducement to the City for entering into the OPA with Grantor, the Grantor agreed to grant to the City public easements on land owned by Grantor situated in the City of Imperial Beach and County of San Diego, State of California, more particularly illustrated on Exhibit A and described on Exhibit B (the "Public Easement"). Said Public Easement lies within Grantor's development site (the "Site", illustrated in Exhibit C and described in Exhibit D). Grantor proposes to construct an adaptive reuse of two existing warehouse structures ("West Building" and "East Building") with a variety of retail, commercial, recreational and personal service uses, as well as a public overlook area, bicycle parking, public restrooms, bicyclist rest areas, improved bike paths and bikeway access ramps on the Site pursuant to the OPA (the "Project"); and

~~D. WHEREAS, Grantor and City have entered into a Maintenance Agreement (the~~

Exhibit No. ~~6-6B~~  
Grant of Public Easement  
Page 1 of 5

~~“Maintenance Agreement”) concerning the perpetual maintenance of the Public Easement to the bikeway access paths and surrounding landscaping and other improvements for the benefit of the City and public and maintenance for the useful life of the bikeway ramps, patio and overlook structures and public restroom in the East Building, which useful life is not to be less than fifty-five (55) years.~~

NOW THEREFORE, for valuable consideration, the sufficiency of which being hereby acknowledged, Grantor does hereby grant an access easement to the City for a public easement for the useful life of the patio area and overlook structure located to the north of the West and East Buildings and to and in the public restroom in the East Building which useful life of such structures and restroom is not to be less than ~~fifty-five (55) years~~ thirty-five (35) years. Any time after commencement of the 36<sup>th</sup> year of the life of the structures or restroom, at the request of Grantor, City shall consider a mutual agreement with Grantor to eliminate the easement based upon Grantor and City agreement that the useful life of the structures or restroom has ended.

Grantor and City further agree:

1. Use of the Public Easement is for access to the bikeway, patio and overlook structure, use of the patio and overlook structure and access to and use of the public restroom according to the City’s custom and practice for public areas within the Project Area, subject to any specific use permit(s) and limitations held by Grantor with respect to any portion of the Public Easement, such as the City’s right to provide for hours of curfew within a portion or all of the Public Easement similar to hours of curfew placed from time to time by City on other public areas within the Project Area. The Public Easement to the patio and overlook areas (depicted as Area 7 on the Numbered Areas of Site, Exhibit A; hereto~~;~~), may be limited on portions of ~~those areas~~ Area 7 by the Alcohol Beverage Control license use limitations pertaining to ~~those areas~~ that area. The Public Easement over Area 7 will also be subject to Grantor’s reservation of use for tables on the patio reserved by building tenants for their customer use, but the Public Easement will apply to a minimum of 25% of the total square footage of Area 7. The Public Easement may be further limited by Grantor’s occasional special uses such as previously reserved space for private events sponsored by a building tenant. Notwithstanding the foregoing, Grantor shall be obligated to provide access to the public restroom only during those times that any occupant of the East Building is open for business.

2. Grantor shall have the right at all times to eject or cause the ejection from the Public Easement of any person causing any public or private nuisance. Grantor, however, makes no representations or warranties, express or implied, regarding security in, for or around the Public Easement and shall have no obligation to provide or maintain security therefor.

3. Any improvements which Grantor or ~~Grantee~~ City may construct within or immediately adjacent to the Public Easement shall meet the requirements and reservations of the Grant of Easement and shall be constructed in strict compliance with plans and specifications approved by the City.

~~a. Grantor shall, according to the terms of the OPA, construct an overlook structure adjacent to the Bayshore Bikeway. When constructed, such overlook structure shall be constructed and maintained by Grantor to provide sufficient structural support for, and to accommodate, the anticipated public use of such improvements.~~

~~b. Grantor shall be responsible for determining and representing to the City, prior to the City's approval of plans and specifications for installation of the overlook structure, whether such plans are prepared by Grantor or others, that installation and use of the overlook structure is in accordance with such plans and specifications. The City shall not be liable or responsible for the structural integrity of the overlook structure and/or the utility thereof as a public overlook structure for public use; it shall be Grantor's sole obligation to provide sufficient structural support for, and to accommodate, the overlook structure constructed within the Public Easement as provided by this paragraph 3.~~

~~e. Grantor further agrees, at its sole cost and expense to repair and maintain any improvements under the Public Easement to provide sufficient structural support for, and to accommodate the overlook structure constructed within the Public Easement and further, Grantor agrees to promptly reconstruct and restore any improvements to the overlook structure upon the occurrence of any damage or destruction thereto from any cause, with sufficient structural integrity to support and accommodate the public use thereof.~~

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4. Grantor agrees to and shall defend, indemnify and hold City and its officers, employees, contractors and agents harmless from and against all claims, liability, loss, damage, costs or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or to the property of any person (including, without limitation, the City) which shall occur on or adjacent to the Public Easement in connection with the activities of Grantor under this Grant of Public Easement, and which shall be ~~directly or indirectly~~ caused by any ~~acts done or any errors or omissions of, or neglect~~negligence or willful misconduct by; Grantor or its officers, employees, contractors, agents, and tenants, ~~guests, or permittees.~~

Formatted: Indent: Left: 1"

5. Grantor shall at all times maintain bodily injury and property damage liability insurance covering the matters referred to in the preceding paragraph, with coverage of at least \$3,000,000 combined single limit. Such insurance shall name the City and its respective officers, employees, contractors and agents as additional insureds. Grantor shall furnish, or cause to be furnished, to City duplicate originals or appropriate certificates of such insurance to demonstrate that such insurance is continuously in effect.

6. In amplification and not in restriction of the provisions set forth hereinabove, it is intended and agreed that City shall be deemed a beneficiary of the covenants provided for in this Grant of Public Easement both for and in its own right and also for the purposes of protecting the interests of the community. All covenants without regard to technical classification or designation shall be binding for the benefit of City and such covenants shall run in favor of City for the entire period during which such covenant shall be in force and effect, without regard to whether City is or remains an owner of any land or interest therein to which such covenants relate. City shall have the right, in the event of any breach of any such covenant, agreement or condition, to exercise all the rights and remedies, and to maintain any actions at law or suit in equity or other proper proceedings to enforce the curing of such breach of covenant, agreement or condition.

7. City shall not make any alterations to the improvements in the Public Easement unless (i) such alterations reasonably accommodate the use of the Public Easement in accordance with this Grant of Public Easement, the Maintenance Agreement, and any specific use permit(s) held by Grantor with respect to the Public Easement, and (ii) City has obtained Grantor's consent.

8. This Grant of Public Easement shall bind and inure to the benefit of the respective heirs, representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, this instrument is executed as of this \_\_\_\_ day of \_\_\_\_\_, 2015.

BIKEWAY VILLAGE, L.L.C.,  
a California limited liability company  
(Grantor)

By:

Its

CITY ACCEPTANCE OF GRANT OF PUBLIC EASEMENT  
APPEARS ON THE FOLLOWING PAGE

Exhibit No. ~~6~~6B  
Grant of Public Easement  
Page 4 of 5

CERTIFICATE OF ACCEPTANCE  
(Government Code Section 27281)

This is to certify that the interest in real property conveyed by this instrument to the City of Imperial Beach, a municipal corporation, is hereby accepted by the undersigned officer on behalf of the City of Imperial Beach, and City consents to recordation thereof by its duly authorized officer.

Dated \_\_\_\_\_

By \_\_\_\_\_  
Assistant City Manager

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_,  
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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: _____	Signer's Name: _____
<input type="checkbox"/> Corporate Officer – Title(s): _____	<input type="checkbox"/> Corporate Officer – Title(s): _____
<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_,  
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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: _____	Signer's Name: _____
<input type="checkbox"/> Corporate Officer – Title(s): _____	<input type="checkbox"/> Corporate Officer – Title(s): _____
<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____

Exhibit A

MAP OF PUBLIC EASEMENT

[To be added.]

Exhibit B

DESCRIPTION OF PUBLIC EASEMENT

[To be added.]

Exhibit C

MAP OF SITE

[To be added.]

Exhibit D

DESCRIPTION OF SITE

[To be added.]

RECORDING REQUESTED BY AND  
WHEN RECORDED, MAIL TO:

CITY OF IMPERIAL BEACH  
825 Imperial Beach Boulevard  
Imperial Beach, California 91932

FREE RECORDING REQUESTED  
BY CITY OF IMPERIAL BEACH  
(SEE GOVERNMENT CODE 6103)  
NO DOCUMENTARY TAX DUE

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GRANT OF PUBLIC EASEMENT  
(Open Space)

A. WHEREAS, the City of Imperial Beach, a municipal corporation (the “City”), is engaged in activities necessary and appropriate to carry out the Redevelopment Plan for the Palm Avenue/Commercial Redevelopment Project Area (the “Project Area”); and

B. WHEREAS, in furtherance of said redevelopment activities, the City and Bikeway Village, L.L.C., a California limited liability company, (the “Grantor”), entered into an Owner Participation Agreement dated January 31, 2012 as implemented by the Implementation Agreement between those parties dated \_\_\_\_\_ (collectively referred to as the “OPA”) for redevelopment of the Site, as defined below. The OPA is a public document and on file as Document No. \_\_\_\_ with the Clerk for the City of Imperial Beach. Any capitalized terms not defined herein shall take on those meanings ascribed in the OPA; and

C. WHEREAS, as a material inducement to the City for entering into the OPA with Grantor, and in compliance with the Coastal Commission Special Condition number 1 for the Coastal Commission permit approval, the Grantor agrees to grant to the City a public easement on land owned by Grantor situated in the City of Imperial Beach and County of San Diego, State of California, more particularly illustrated on Exhibit A and described on Exhibit B (the "Public Easement"). Said Public Easement lies within Grantor’s development site (the “Site”, illustrated in Exhibit C and described in Exhibit D). Grantor proposes to construct an adaptive reuse of two existing warehouse structures (“West Building” and “East Building”) with a variety of retail, commercial, recreational and personal service uses, as well as a public overlook area, bicycle parking, public restrooms, bicyclist rest areas, improved bike paths and bikeway access ramps on the Site pursuant to the OPA (the “Project”) and dedicate preservation of certain area of the Site as open space; and

~~D. WHEREAS, Grantor and City have entered into a Maintenance Agreement (the "Maintenance Agreement") concerning the perpetual maintenance of this Public Easement and on the bikeway access paths and surrounding landscaping for the benefit of the City and public, and maintenance for the useful life of the bikeway ramps, patio and overlook structures and public restroom in the East Building, which useful life is not to be less than fifty-five (55) years.~~

NOW THEREFORE, for valuable consideration, the sufficiency of which being hereby acknowledged, Grantor does hereby grant to the City a perpetual public easement over, along, across, and about the surface of the Public Easement for exclusive use as open space, to be left in its natural state, undisturbed and protected, and maintained in accordance with City practices for land designated as open space and comparable to other areas designated as open space in the Project Area.

Grantor and City further agree:

1. Grantor shall have the right at all times to eject or cause the ejection from the Public Easement of any person causing any public or private nuisance. Grantor, however, makes no representations or warranties, express or implied, regarding security in, for or around the Public Easement and shall have no obligation to provide or maintain security therefor.

2. No development, as defined in Section 30106 of the Coastal Act shall occur in the area generally described as the northeast corner of the parcel APN 616-021-10 from the parcel line west to the area shown as the "Area to be Designated Open Space" in Exhibit A hereto, except for optional planting and/or maintenance of native coastal sage scrub vegetation. The purpose of this easement is to ensure the area is retained predominately in its natural, scenic, historical, and open-space condition.

3. Any improvements which Grantor or Grantee may construct immediately adjacent to this Public Easement shall meet the requirements and reservations of the Grant of Easement and shall be constructed in strict compliance with plans and specifications approved by the City.

4. Grantor agrees to and shall defend, indemnify and hold City and its officers, employees, contractors and agents harmless from and against all claims, liability, loss, damage, costs or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or to the property of any person (including, without limitation, the City) which shall occur on or adjacent to the Public Easement in connection with the activities of Grantor under this Grant of Public Easement, and which shall be ~~directly or indirectly~~ caused by any ~~acts done or any errors or omissions of, or neglect~~negligence or willful misconduct by, Grantor or its officers, employees, contractors, agents, and tenants, ~~guests, or permittees.~~

5. Grantor shall at all times maintain bodily injury and property damage liability insurance covering the matters referred to in the preceding paragraph, with coverage of at least \$3,000,000 combined single limit. Such insurance shall name the City and its respective officers, employees, contractors and agents as additional insureds. Grantor shall furnish, or cause to be furnished, to City duplicate originals or appropriate certificates of such insurance to demonstrate that such insurance is continuously in effect.

6. In amplification and not in restriction of the provisions set forth hereinabove, it is intended and agreed that City shall be deemed a beneficiary of the covenants provided for in this Grant of Easement both for and in its own right and also for the purposes of protecting the interests of the community. All covenants without regard to technical classification or designation shall be binding for the benefit of City and such covenants shall run in favor of City for the entire period during which such covenant shall be in force and effect, without regard to whether City is or remains an owner of any land or interest therein to which such covenants relate. City shall have the right, in the event of any breach of any such covenant, agreement or condition, to exercise all the rights and remedies, and to maintain any actions at law or suit in equity or other proper proceedings to enforce the curing of such breach of covenant, agreement or condition.

7. This Grant of Public Easement shall run with the land, and be binding and inure to the City, the Grantor, and their respective heirs, representatives, successors and assigns.

IN WITNESS WHEREOF, this instrument is executed as of this \_\_\_\_ day of \_\_\_\_\_, 2015.

BIKEWAY VILLAGE, L.L.C.,  
a California limited liability company  
(Grantor)

By:

Its

CITY ACCEPTANCE OF GRANT OF PUBLIC EASEMENT  
APPEARS ON THE FOLLOWING PAGE



STATE OF CALIFORNIA            )  
  ) ss.  
COUNTY OF SAN DIEGO        )

On \_\_\_\_\_, before me, \_\_\_\_\_, a Notary Public, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

Exhibit A

MAP OF PUBLIC EASEMENT

[To be added.]

Exhibit B

DESCRIPTION OF PUBLIC EASEMENT

The northeast corner of the parcel APN 616-021-10 from the parcel line west to the area shown as the limit of work as depicted on the Map of Site, Exhibit C, below.

Exhibit C

MAP OF SITE

[To be added.]

Exhibit D

DESCRIPTION OF SITE

**LEGAL DESCRIPTION OF PROPERTY**

Real property in the City of Imperial Beach, County of San Diego, State of California, described as follows:

That portion of the Northwest Quarter of the Southeast Quarter of Section 20, Township 18, South, Range 2 West, in the City of San Diego, County of San Diego State of California being described as follows:

BEGINNING at the Southeast corner of said Northwest Quarter of the Southeast Quarter of said Section 20; thence along the Southerly line thereof North  $89^{\circ}21'08''$  West, 420.06 feet; thence leaving said Southerly line North  $00^{\circ}37'24''$  East, 87.74 feet to the Southerly line of said San Diego and Arizona Eastern Railway right-of-way, said point being a point on a curve concave to the North having a radius of 997.95 feet, to which said beginning a radial bears South  $00^{\circ}20'53''$  West; thence Easterly 434.13 feet along said curve through a central angle of  $24^{\circ}55'29''$  to the Easterly line of said Northwest Quarter of the Southeast Quarter; thence along said Easterly line South  $00^{\circ}38'17''$  West 182.87 feet to the POINT OF BEGINNING.

Recording Requested by,  
and When Recorded, return to:  
THE CITY OF IMPERIAL BEACH  
Attn: City Manager  
825 Imperial Beach Boulevard  
Imperial Beach, California 91932

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SPACE ABOVE THIS LINE FOR RECORDER'S USE

BIKEWAY VILLAGE PROJECT

AGREEMENT TO BE RECORDED AFFECTING REAL PROPERTY

THIS AGREEMENT TO BE RECORDED AFFECTING REAL PROPERTY (the "Agreement") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2015, by and between the CITY OF IMPERIAL BEACH, a municipal corporation (hereinafter referred to as the "City") and BIKEWAY VILLAGE, L.L.C. (hereinafter referred to as the "Developer") with reference to the following:

A. The Developer is the present owner of the real property (the "Property") located in the City of Imperial Beach, County of San Diego, State of California legally described in the attached Exhibit A.

B. The Property is within the Palm Avenue/Commercial Redevelopment Project Area in the City of Imperial Beach and is subject to the provisions of the Redevelopment Plan for the Project adopted by Ordinance No. 96-901 on February 6, 1996 by the City Council of the City of Imperial Beach, as amended.

C. This Agreement acknowledges ~~and provides~~ that the Developer ~~shall develop~~ has developed the Property in accordance with the Redevelopment Plan and pursuant to the terms and provisions of that certain "Owner Participation Agreement" entered into between the City and the Developer on January 26, 2012 as implemented by the Implementation Agreement and entered into between those parties on \_\_\_\_\_.

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

1. The Developer hereby covenants and agrees for itself, its successors, its assigns and every successor in interest that the Property shall be developed and used in accordance with

Exhibit No.7  
Agreement to be Recorded Affecting Real Property  
Page 1 of 8

the Redevelopment Plan, and pursuant to the terms and provisions of the Owner Participation Agreement and Implementation Agreement.

2. The Developer hereby covenants and agrees for itself, its successors, its assigns, and every successor in interest to the Property that the Developer, such successors and such assigns, shall develop, maintain and use the Property only as follows:

- a. During the time the Redevelopment Plan is in effect, the Property shall be devoted only to the development permitted and the uses specified in the applicable provisions of the Redevelopment Plan ~~and this Agreement, whichever document is more restrictive.~~
- b. The Developer ~~proposes to construct~~has constructed the renovation and refurbishment of ~~two~~ existing warehouse structures for ~~ultimate~~ reuse of those buildings with a variety of retail, commercial, recreational and personal service uses on this Property. The Developer ~~will~~has also ~~construct~~constructed a patio area adjacent to the bikeway, bicycle parking, public restrooms, bicyclist rest areas, improved bike paths, bikeway access ramps and additional public parking.
- ~~e. The Developer shall maintain the improvements on the Property and in the public rights of way and easements and shall keep the Property and such public rights of way and easements free from any accumulation of debris or waste materials. The Developer shall also maintain the required landscaping on the Property and in such public rights of way and easements in a safe and healthy condition.~~

3. The Developer covenants and agrees for itself, its successors, its assigns and all persons claiming under or through them that there shall be no discrimination against or segregation of any person or group of persons on account of sex, sexual orientation, marital status, race, color, creed, religion, national origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall the Developer itself or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the Property. The foregoing covenants shall run with the land.

4. Developer covenants and agrees for itself, its successors, its assigns and every successor in interest to the Property or any part thereof or interest therein, there shall be no discrimination against or segregation of any person, or group of persons, on account of sex, sexual orientation, marital status, race, color, creed, religion, ancestry or national origin in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property nor shall Developer, itself or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees of the Property.

All deeds, leases or contracts shall contain or be subject to substantially the following nondiscrimination or nonsegregation clauses:

- a. In deeds: “The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land.”

Notwithstanding the preceding paragraph, the provisions relating to discrimination on the basis of familial status shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code nor be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5 of the Civil Code, relating to housing for senior citizens. Subdivision (d) of Section 51 and Section 1360 of the Civil Code and subdivisions (n), (o), and (p) of Section 12955 of the Government Code shall also apply to the preceding paragraph.

- b. In leases: “The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions:  
That there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased.”

Notwithstanding the preceding paragraph, the provisions relating to discrimination on the basis of familial status shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code nor be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5 of the

Civil Code, relating to housing for senior citizens. Subdivision (d) of Section 51 and Section 1360 of the Civil Code and subdivisions (n), (o), and (p) of Section 12955 of the Government Code shall also apply to the preceding paragraph.

- c. In contracts: There shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the land, nor shall the transferee itself or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees of the land.”

5. All conditions, covenants and restrictions contained in this Agreement shall be covenants running with the land, and shall, in any event, and without regard to technical classification or designation, legal or otherwise, be, to the fullest extent permitted by law and equity, binding for the benefit and in favor of, and enforceable by the City, its successors and assigns, against the Developer, its successors and assigns, to or of the Property or any portion thereof or any interest therein, and any party in possession or occupancy of said Property or portion thereof.

6. Every covenant and condition and restriction contained in this Agreement shall remain in effect in perpetuity.

7. In amplification and not in restriction of the provisions set forth hereinabove, it is intended and agreed that the City shall be deemed a beneficiary of the agreements and covenants provided hereinabove both for and in its own right and also for the purposes of protecting the interests of the community. All covenants without regard to technical classification or designation shall be binding for the benefit of the City, and such covenants shall run in favor of the City for the entire period during which such covenants shall be in force and effect, without regard to whether the City is or remains an owner of any land or interest therein to which such covenants relate. The City shall have the right, in the event of any breach of any such agreement or covenant, to exercise all the rights and remedies, and to maintain any actions at law or suit in equity or other proper proceedings to enforce the curing of such breach of agreement or covenant.

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IN WITNESS WHEREOF, the City and the Developer have caused this instrument to be executed on their behalf by their respective officers hereunto duly authorized this \_\_\_\_ day of \_\_\_\_\_, 2015.

CITY OF IMPERIAL BEACH

Date: \_\_\_\_\_

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

Andy Hall  
City Manager

Formatted: Level 1

APPROVED AS TO FORM AND LEGALITY

City Attorney

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

Jennifer Lyon

Kane, Ballmer & Berkman  
City Special Counsel

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

Carol A. Leone

DEVELOPER

BIKEWAY VILLAGE L.L.C.  
A California Limited Liability Company

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

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

Exhibit No.7  
Agreement to be Recorded Affecting Real Property  
Page 6 of 8

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_,  
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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: _____	Signer's Name: _____
<input type="checkbox"/> Corporate Officer – Title(s): _____	<input type="checkbox"/> Corporate Officer – Title(s): _____
<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____

Exhibit "A"

LEGAL DESCRIPTION OF PROPERTY

[TO BE ADDED]

Exhibit No.7  
Agreement to be Recorded Affecting Real Property  
Page 8 of 8

Recording Requested By and  
When Recorded, Mail To:

City of Imperial Beach  
c/o City Manager's Office  
825 Imperial Beach Boulevard  
Imperial Beach, California 91932

Free Recording Requested  
Per Government Code § 6103

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BIKEWAY VILLAGE PROJECT  
MAINTENANCE AGREEMENT

THIS MAINTENANCE AGREEMENT (the "Agreement") is entered into this day of \_\_\_\_\_, 2015, by and between the CITY OF IMPERIAL BEACH, a municipal corporation (the "City"), and BIKEWAY VILLAGE L.L.C., a California limited liability company, (the "Developer") with reference to the following:

A. The City is engaged in activities necessary and appropriate to carry out the Redevelopment Plan for the Palm Avenue/Commercial Redevelopment Project Area.

B. As part of such activities the City and the Developer entered into that certain Owner Participation Agreement dated January 26, 2012, which is a public document on file in the offices of the City as Document No. \_\_\_\_\_ and the Implementation Agreement between the same parties dated \_\_\_\_\_, (collectively, the "OPA").

C. Pursuant to the OPA, the Developer has ~~agreed to improve~~ improved that certain real property designated herein as the "Site" (as illustrated on the Site Map attached hereto and incorporated herein as Exhibit A, and as described in the Description of the Site attached hereto and incorporated herein as Exhibit B). All capitalized terms herein not defined in this agreement shall have the definition assigned to them in the OPA or its other exhibits, including the Project Description.

D. Also pursuant to the OPA, the Developer has ~~agreed to improve~~ improved the Site, as described and depicted on the attached Concept Drawings ("Concept Drawings") attached hereto and incorporated herein as Exhibit C.

E. Also pursuant to the OPA, the Developer and its successors in interest to the Site shall maintain, repair and replace the improvements installed on the Site, and the City and the Developer now desire to enter into and record this Agreement to provide for the terms and conditions of such obligation.

NOW, THEREFORE, in consideration of the premises hereof, and the covenants of the parties set forth in the OPA and this Agreement, the City and the Developer hereby agree as follows:

1. The Developer shall, at its own cost and expense, maintain, repair and replace all the improvements covered by this Agreement to the reasonable satisfaction of the City. The term "Improvements" means (without limitation): the following: (1) the bikeway access ramps, bicycle parking and rest area, (2) the patio and overlook structures, (3) the public restrooms in the East Building on the Eastern Parcel, (4) all plant materials, including trees, shrubs, vines, groundcovers, turf and other plantings; (5) all irrigation components, including water lines, valves, back flow valves, vacuum breakers, beads, electrical wires, controllers, clocks and other elements; (6) all paved surfaces, including paths and platforms; (7) all walls and fences and objects constructed above the ground; (8) all furniture such as benches, trash receptacles, kiosks, fountains, lighting standards and fixtures, and other furnishings; (9) all utility service lines and facilities directly serving public improvements (excluding distribution lines and facilities serving other properties as well), such as French drains, electrical connections, and similar local elements; (10) all other components of the improvements as initially installed by the Developer in accordance with the final working drawings for the improvements described in the OPA and the Concept Drawings; and (11) all ~~public right-of-way~~ sidewalks, curbs, gutters and landscaping improvements immediately adjacent to the West and East Buildings ~~including~~; and (12) the ~~improvements~~ Class I Bikeway "Boardwalk" on 13<sup>th</sup> Street north of Cypress Avenue, ~~including paving, landscaping, irrigation, limited to the bollards and~~ lighting and litter and debris removal. The Improvements do not include the two buildings on the Site, other improvements located than the public restroom in the ~~above-described area~~ Eastern Building.

2. This Agreement does not include and the Developer shall not be responsible for maintenance of the off-site public improvements on 13<sup>th</sup> Street between Cypress Avenue and Calla Avenue; or those public improvements on 13<sup>th</sup> Street north of Cypress not described in clause 12 of Section 2 above. These public improvements will be maintained by the City upon City acceptance of Developer's construction of those improvements.

3. The Developer agrees to perform all maintenance, repair and replacement work with respect to the Improvements on the Site necessary or appropriate to keep the Improvements in the condition as originally installed; reasonable wear and tear excepted. Any plant replacement shall be equal in quality to the then existing vegetation and equal in growth to at least the original installation. The Developer shall furnish and pay for all

utilities (water, electricity, etc.), materials, tools and equipment and other labor and supplies needed to perform such work and operate the Improvements. Maintenance work shall include pick up and hauling away of trash on a regular basis.

4. The Developer shall be obligated to restore and/or replace, at its own cost and expense, any Improvements within the Site damaged or destroyed from any cause whatsoever; provided, however, if the East Building is damaged and Developer does not elect to restore the East Building, then Developer shall have an obligation to restore or replace the public restrooms. The Developer shall notify the City as soon as possible and in any event within ten (10) days after the occurrence of any such damage or destruction which will cost more than \$5,000 to restore and/or replace. The Developer shall commence to restore and/or replace the applicable improvements, in accordance with plans and specifications approved by the City (as to any restoration and/or replacement which will cost more than \$5,000), which approval shall not be unreasonably withheld, conditioned or delayed, ~~within thirty (30) days~~ as soon as reasonably practicable after the occurrence of the damage or destruction, and shall thereafter diligently prosecute to completion the work of restoration and/or replacement. During any period prior to and during the work of restoration and/or replacement, the Developer shall remove, clean up or otherwise protect the damaged or destroyed Improvements as necessary or appropriate to protect the public health and safety. During construction or reconstruction work, the Developer shall control pedestrian and bicyclist access and shall conduct its operation in a safe and orderly manner. The City shall permit the Developer to reasonably control pedestrian and bicyclist access as necessary to meet its obligations hereunder.

5. All work of ordinary maintenance, repair and replacement as referred to in Paragraph ~~23~~ above, and all work of restoration and/or replacement as referred to in Paragraph ~~34~~ above, shall be performed in a manner so as to keep the Improvements at all times with the type and at least the quality of Improvements initially installed; reasonable wear and tear excepted. In addition to the requirements set forth in this Agreement, all work shall be performed in compliance with any maintenance specifications if and as approved by the City comparable to the standards for City parks generally.

6. If the Developer fails at any time, and/or from time to time, to maintain, repair and/or replace any Improvements (or to restore and/or replace such Improvements if damaged or destroyed) as required by this Agreement, then the City may deliver written notice of such failure to the Developer. Such notice shall specify with particularity the condition constituting the failure, the work the City contends is necessary to cure the failure, and the estimated cost of such work. If the failure is not commenced to be cured within thirty (30) days after receipt of the notice, or the cure is not pursued in a continuous and diligent manner and completed within a reasonable period of time after commencement, the City at its option following additional notice to Developer may correct or cause to be corrected said failure. The reasonable cost of any such work shall be borne by the Developer; (not to exceed the estimate). The Developer

shall reimburse the City for any reasonable costs (not to exceed the estimate) originally borne by the City within fifteen (15) days after receipt of a written statement from the City specifying the actual cost of such work and the amount of the reimbursement demanded, and if not paid within said fifteen- (15) day period such amount shall bear interest at the Bank of America reference rate on the date of the demand for payment, plus two percent (2%), from the due date until paid to the City.

7. The obligations of the Developer under this Agreement shall commence upon the ~~receipt by the Developer of written notice or notices from the City to proceed~~recording of this Agreement. The obligations of the Developer under this Agreement shall remain, in perpetuity, as to the bikeway access paths and the landscaping (as those improvements are described above).~~The~~; provided, however, that if the adjoining Bayshore Bikeway ceases to be used as such, then such obligations shall cease. The remaining obligations of the Developer under this Agreement shall remain for the useful life of the improvements described as the bicycle ramps, patio and overlook structures and the public restroom in the East Building, which useful life shall not be less than ~~fifty-five (55) years~~thirty-five (35) years. Any time after commencement of the 36<sup>th</sup> year of the life of the bicycle ramps, structures and restroom, at the request of Grantor, City shall consider a mutual agreement with Grantor to eliminate the remaining maintenance obligations based upon Grantor and City agreement that the useful life of such improvements has ended.

8. In performing the services hereunder, the Developer shall comply with all applicable federal, state and local statutes, ordinances and regulations. The Developer shall, at its own cost and expense, secure or cause to be secured, any and all permits which may be required by any governmental agency.

9. During the entire term of this Agreement, the Developer agrees to and shall defend, indemnify and hold the City and its officers, employees, contractors and agents harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or to the property of any person which shall occur on or adjacent to the Site and which shall be ~~directly or indirectly~~ caused by any ~~acts done thereon by or any~~ negligence, ~~errors or omissions~~willful misconduct of the Developer or its officers, employees, contractors, or agents.

10. During the entire term of this Agreement, the Developer shall furnish or cause to be furnished to the City, duplicate originals or appropriate certificates of bodily injury and property damage insurance policies in the amount of at least Three Million Dollars (\$3,000,000) combined single limit naming the City and its officers, employees, contractors and agents as additional insureds.

11. The Developer agrees to comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment Practices Act, and any other applicable federal and state laws and regulations hereinafter enacted, as well as those requirements addressed by the City of Imperial Beach's Equal Opportunity Program, recorded with the City Clerk.

12. All covenants, conditions and restrictions contained in this Agreement shall be covenants running with the land, and shall, in any event, and without regard to technical classification or designation, legal or otherwise, be, to the fullest extent permitted by law and equity, binding for the benefit and in favor of, and enforceable by the City and its successors and assigns, against the Developer, its successors and assigns, to or of the Site or any portion thereof or any interest therein. Whenever used herein, the term "Developer" includes, jointly and severally, the original Developer and any successors and assigns to or of the Site or any portion thereof or any interest therein, and any party in possession or occupancy of the Site or portion thereof.

13. In amplification and not in restriction of the provisions set forth in Paragraph ~~11~~12, it is intended and agreed that the City shall be deemed beneficiary of the agreements and covenants provided hereinabove both for and in its own right and also for the purposes of protecting the interests of the community. All covenants without regard to technical classification or designation shall be binding for the benefit of the City, and such covenants shall run in favor of the City for the entire period during which such covenants shall be in force and effect, without regard to whether the City is or remains an owner of any land or interest therein to which such covenants relate. The City shall have the right, in the event of any breach of any such agreement or covenant, to exercise all the rights and remedies, and to maintain any actions at law or suit in equity or other proper proceedings to enforce the curing of such breach of agreement or covenant.

14. In addition to any other rights or remedies, either party may institute legal action to cure, correct or remedy any default, to recover damages for any default, or to obtain any other remedy consistent with the purpose of this Agreement. Such legal actions must be instituted in the Superior Court of the County of San Diego, State of California, in any other appropriate court in that county, or in the Federal District Court in the Southern District of California.

15. In the event that either the City or the Developer shall bring or commence an action or legal proceeding to interpret this Agreement, enforce the terms and conditions of this Agreement, or to obtain damages against the other party arising from any default under or violation of this Agreement, then the prevailing party shall be entitled to and shall be paid reasonable attorneys' fees and court costs as may be fixed by the court or jury.

16. This Agreement shall be governed by the laws of the State of California. It constitutes the entire agreement between the parties regarding its subject matter. If any

provision in this Agreement is held by any court to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force and effect.

17. Formal notices, demands and communications between the City and the Developer shall be in writing and shall be deemed sufficiently given if dispatched by registered or certified mail, postage prepaid, return receipt requested, to the addresses of the City or of the Developer as designated below in this Paragraph, and shall be deemed delivered on the third business day after deposit into the United States mail. Such written notices, demands and communications may be sent in the same manner to other addresses as either party may from time to time designate by mail as provided in this Paragraph.

If to the City:

Office of the City Manager  
City of Imperial Beach  
825 Imperial Beach Boulevard  
Imperial Beach, California 91932

If to the Developer:

Rex Butler, President  
Bikeway Village L.L.C.  
2 Sandpiper Strand  
Coronado, California 92118

18. No change in or addition to this Agreement or any part thereof shall be valid unless in writing and properly executed by the City Manager (or his designee) and an authorized representative of the Developer.

19. It is expressly understood and agreed that this Agreement constitutes the entire maintenance agreement between the Developer and the City.

IN WITNESS WHEREOF, the City and the Developer have caused this Agreement to be executed on their behalf by their respective officers hereunto duly authorized as of the dates set forth opposite their signatures.

BIKEWAY VILLAGE, L.L.C.,  
a California limited liability company  
(Developer)

Dated:

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

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

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

CITY OF IMPERIAL BEACH,  
a municipal corporation

Dated:

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

Assistant City Manager

APPROVED AS TO FORM AND LEGALITY:  
City Attorney

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

Jennifer Lyon

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_\_ before me, \_\_\_\_\_, 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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_

Document Date: \_\_\_\_\_

Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

Corporate Officer – Title(s): \_\_\_\_\_

Corporate Officer – Title(s): \_\_\_\_\_

Partner -  Limited  General

Partner -  Limited  General

Individual  Attorney in Fact

Individual  Attorney in Fact

Trustee  Guardian or Conservator

Trustee  Guardian or Conservator

Other: \_\_\_\_\_

Other: \_\_\_\_\_

Signer is Representing: \_\_\_\_\_

Signer is Representing: \_\_\_\_\_

EXHIBIT A

SITE MAP

[To be added.]

EXHIBIT B

LEGAL DESCRIPTION OF THE SITE

[To be added.]

EXHIBIT C

CONCEPT DRAWINGS

[To be added.]

## DISBURSEMENT AGREEMENT

(Progress Payments)

THIS DISBURSEMENT AGREEMENT (“Agreement”) is made as of \_\_\_\_\_, 2015 by and between CITY OF IMPERIAL BEACH, a municipal corporation (“City”) and BIKEWAY VILLAGE, LLC, a California limited liability company (“Developer”). In this Agreement, each of the Developer and City are sometimes individually referred to as a “Party” and collectively as the “Parties”. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

### RECITALS

- A. City and Developer have entered into that certain Owner Participation Agreement dated January 26, 2012 and the Implementation Agreement for implementation of the project dated \_\_\_\_\_, and Exhibits to those documents, all collectively referred to herein as the Owner Participation Agreement (“OPA”). Any capitalized term not otherwise defined in this Agreement shall have the meaning ascribed to such term in the OPA.
- B. As a condition to the OPA, Developer has agreed to design, permit, construct and install certain improvements for the Project (as defined in the OPA) and which are described in Recital C, below. The City shall distribute funds (“Project Funds”) to pay or reimburse Developer for the cost of designing, permitting, constructing and installing certain public improvements for the Project.
- C. The Project consists of an adaptive reuse of two existing warehouse structures (referred to herein as the East Building and West Building) with a variety of retail, commercial, recreational and personal service uses at the 13<sup>th</sup> street access point to Bayshore Bikeway, as reflected in the Concept Drawings for the Project and shall consist of the installation of the work described in the Concept Drawings, including without limitation, the following, all of which shall meet all applicable City standards (the “Project Improvements”):
  1. Completion of certain off-site public improvements as described in the Project Description, Exhibit 1 to the OPA (“Off-Site Public Improvements”);
  2. Refurbishing the East Building, including exterior renovation and refurbishment and some interior renovation and refurbishment, including limited to the construction of public restrooms, and installation of landscaping, and improvement of on-site utilities, parking and driveways (“Eastern Parcel Improvements”);

3. Refurbishing the West Building, including exterior ~~and some interior~~ renovation and refurbishment, installation of landscaping, and improvement of on-site utilities, parking and driveways (“Western Parcel Improvements”);
4. Landscaping the vacant land on the Bikeway Parcel, installation of bicycle ramps and pathways, and installation of a patio and an overlook structure affixed to the north side of the East and West Buildings (“Bikeway Parcel Improvements”);

D. In order to facilitate the construction of the Project, the Parties have agreed that the City will incrementally provide the Project Funds throughout the course of the Project, in accordance with the Method of Financing, the Schedule of Performance and the Project Budget of the OPA.

NOW, THEREFORE, City and Developer agree as follows:

I. Deposit into Separate City Construction Account.

City shall create a Bikeway Village Construction Account (“Construction Account”) and shall deposit into the Construction Account not less than the sum of \$100,000 (the “Initial Deposit”). Nothing contained herein shall preclude the City from depositing more than the Initial Deposit into the Construction Account.

II. Conditions Precedent.

A. City shall have no obligation to approve disbursement of any funds from the Construction Account to or for Developer for the design, permitting, construction and installation of the Project, unless and until the conditions precedent set forth in this section have been satisfied in full. The Parties acknowledge that execution of this Agreement by City and Developer is a condition precedent to the disbursement from the Construction Account of any funds and that this Agreement provides for disbursement of funds by the City for costs incurred and payments expended by Developer in the design, permitting, construction and installation of the Project.

B. Not later than five (5) Business Days after the satisfaction of the following conditions, City shall deposit the Initial Deposit into the Construction Account:

1. Project Budget. Developer shall have prepared and submitted to the City Manager or his designee (herein referred to as “City Manager”), and the City Manager shall have approved, a line item budget (the “Project Budget”) setting forth all eligible costs and expenses for the planning, construction and installation of the Project. The Project Budget shall not include any amounts to be paid to Developer or any Affiliate of Developer as a management fee, contractor’s fee or for overhead or general conditions, regardless of how characterized. The City Manager shall approve or disapprove the Project Budget within twenty (20) days of a complete submittal. The City Manager shall not unreasonably withhold, condition or delay approval of the Project Budget. The Project Budget may be amended from time-to-time upon the

written approval of the Parties, provided that City's total distribution of Bond Proceeds and Grant Funds (as defined in the OPA) for the Project for public improvements shall not exceed \$2,235,000.00 (the Project Funds), made up of Bond Proceeds in the amount of \$855,000 and Grant Funds in the amount of \$1,380,000. ~~Notwithstanding the description of disbursements discussed below, disbursements shall not exceed the percentage amounts at certain construction milestones as set out in the Method of Financing, Exhibit 5 to the OPA, or the Grant Agreement between the San Diego Association of Governments ("SANDAG") and the City under which the Grant Funds will be provided, and incorporated herein by this reference.~~

2. No default. City shall determine that Developer is not in default (beyond the applicable notice and cure period) of any material obligation under the OPA or any related instrument or agreement.

C. Promptly after the City deposits into the Construction Account the Initial Deposit, Developer shall process the first application for payment to pay for the cost of, among other things, the following:

- ~~1. Bond. Developer shall obtain and pay the premium for a contractor's bond (the "Bond") covering labor, materials and faithful performance for construction of the Project in an amount equal to one hundred percent (100%) of the construction price set forth in the Method of Financing. Prior to the commencement of construction of the Project, the Bond shall have been approved in writing by the City Manager as to content, form and amount. Developer shall, prior to the commencement of construction of the Project deliver to City a certificate or certificates from the bonding company issuing the Bond, naming the City as an additional obligee under the Bond. Notwithstanding the foregoing, the requirement of this paragraph 2.c.1, shall be deemed satisfied in full by any Bond meeting the requirements of the City of Imperial Beach for public improvements.~~
- ~~2.~~1. Insurance. Developer shall obtain and pay the premium for the insurance policies required by Section 9(i) of the OPA, the City for bodily injury, property damage and liability coverage in the amount of three million dollars (\$3,000,000), with respect to the construction of the Project by Developer. Developer shall, prior to the commencement of construction of the Project deliver to City a certificate or certificates from the insurance company issuing the insurance policies, naming the City as an additional insured.
- ~~3.~~2. Other Costs. The City Manager may, in his sole discretion, approve as part of the first application for payment other Project costs, provided such costs are of a minor nature, such as permit costs.

### III Disbursements.

A. City shall make disbursements of the remaining Project Funds in accordance with this Agreement.

B. Subject to the conditions precedent set forth in Section II, above, City shall pay to or for the benefit of or reimburse Developer for the cost of designing, permitting, constructing and installing ~~some of the~~ eligible public improvements part of the Project Improvements described in Recital C, above (the "Public Improvement Costs"), eligible for funding with available Project Funds not to exceed the amount described in this Section III.B. City has committed the sum of \$2,235,000 (the Project Funds) for payment against certain of the Project Improvements described in Recital C, above. For purposes of this Agreement, the amount of the Project Funds remaining after disbursement of the Initial Deposit shall be referred to as the "Remaining Project Funds". After disbursement of the Initial Deposit described in Section 1, above, the City shall deposit into the Construction Account, the Remaining Project Funds for disbursement as follows:

1. ~~City's obligation shall be to first deposit up to 38% of the Remaining~~ Project Funds. ~~Payment from the Grant Funds and Bond Proceeds for payment~~ of those funds to Developer ~~will be~~ based on actual costs expended on ~~Off-Site~~ eligible Public Improvements ~~after such improvements,~~ pursuant to monthly construction draws for payment from Bond Proceeds and pursuant to quarterly construction draws for payment from Grant Funds, or as Grant Funds are completed to the City's satisfaction made available from SANDAG, as provided in paragraph C below. Developer shall provide copies of paid invoices for construction costs paid, or other appropriate documentation to evidence, document, justify and support a payment request, which shall be an amount within the amount of the applicable line item in the Project Budget, (subject to overages covered by the contingency), including invoices and documentation showing costs paid by the Initial Deposit.
2. ~~Upon City, at its discretion, may withhold up to ten percent (10%) of Bond Proceeds until the completion of construction of the Bikeway Parcel Project Improvements to the City Manager's~~ City's reasonable satisfaction, ~~deposit.~~ All undisbursed Bond Proceeds and disbursement by any remaining Grant Funds shall, notwithstanding anything herein to the contrary, and subject to the requirement of the Grant Agreement between the City of 42% of the Remaining Project Funds may be made.
3. ~~2. Deposit and payment may be made of the remaining balance of Project Funds, provided that Developer's actual costs expended equal or exceed the remaining balance of Project Funds and there are remaining Project Funds available~~ SANDAG, be paid to Developer after the prior pay outs. Conditions precedent for the payment of the remaining Project Funds also include: all of the following have occurred:
  - i. all Eastern, Western and Bikeway Parcel Improvements, as well as all Off-Site Public Improvements are complete;

~~ii. final building permits are acquired by Developer for the East and West Building;~~

~~iii.ii.~~ Developer provides to the City a written certification and verification that all costs actually expended by Developer for the completion of all Project Improvements have been paid in full; and

~~iv.iii.~~ the Project Improvements are completed to the City's reasonable satisfaction; ~~and.~~

~~v. Developer has secured, to the City's satisfaction, tenant leasing commitments for at least 7,500 of the gross leasable area within 30 days of construction completion.~~

C. City mayshall disburse funds from the Construction Account to pay eligible Public Improvement ~~Costs~~costs, not to exceed the Remaining Project Funds, as follows:

1. Payment Process. Upon satisfaction of all Conditions Precedent set forth in Section II.B., above and application for payment by Developer approved in writing by City in accordance with the terms of this Agreement, City shall disburse to Developer any portion of the Remaining Project Funds intended to reimburse Developer for any eligible Public Improvement ~~Costs~~costs actually incurred and paid by Developer, not to exceed the amounts set forth for such costs in the Project Budget, (subject to overages covered by the contingency), as such Project Budget has been revised from time-to-time with the reasonable approval of both Developer and City Manager.
2. Disbursements for Public Improvement Costs. Developer shall not request disbursement of funds until the funds are needed to reimburse Developer for eligible Public Improvement ~~Costs~~costs. The amount of each disbursement request shall be consistent with the approved Project Budget and limited to the amount needed for actual reimbursement of costs expended. The City shall have the right to disapprove any request if the City determines the request is not consistent with the Project Budget, or is for an ineligible item or is otherwise not in compliance with or inconsistent with the OPA or this Agreement. Disbursements shall be made by the City upon receipt of applications for payment signed by the representative of Developer and approved by the City Manager or his designee, such approval not to be unreasonably withheld or delayed. Project Funds shall be used exclusively for the ~~payment of or~~ reimbursement for eligible Public Improvement ~~Costs~~costs

as shown in the Project Budget, as the same may be amended from time to time with the written approval of Developer and the City Manager or his designee, such payment of, or reimbursement to be made only after the same have been incurred by the Developer.

3. Draw Requests. Disbursements shall be made upon submission by Developer to City of a written itemized statement or draw request in a form that is reasonably acceptable to the City Manager or his or her designee (the "Application for Payment" or "Draw Request"), subject to the conditions set forth in this Agreement. An Application for Payment shall be submitted not more frequently than once monthly. City shall determine in its sole, but reasonable, discretion whether or not the conditions precedent to its obligation to disburse funds have been satisfied or whether or not, in its sole, but reasonable, discretion, to waive any condition precedent to its obligation to disburse funds which City determines has not been satisfied.
4. Description of Work. Each Application for Payment shall set forth the following: (i) a description of the work performed, material supplied and/or Public Improvement ~~Costs~~costs incurred ~~or due~~ for which disbursement is requested with respect to any such costs shown as a Line Item in the Project Budget; and (ii) the total amount incurred, and expended ~~and/or due~~ for each requested Line Item, less prior disbursements.
5. Invoices. Developer shall attach to the Application for Payment invoices, bills or such other appropriate documentation to evidence, document, justify and support the request, and proof of payment thereof, which shall be an amount within the amount of the applicable Line Item in the Project Budget.
6. Satisfaction of Requirements. Approval of each Draw Request shall be subject to satisfaction of the requirements of this Agreement and the OPA.
7. Approval of Draw Request. City shall, within fifteen (15) Business Days after receipt of an Application for Payment containing all of the items described above, determine the amount of the Application for Payment to be approved, notify Developer, and disburse the approved amount, by check, to Developer.
8. Disapprovals. Any item in an Application for Payment which is not specifically approved in writing within fifteen (15) Business Days shall not be deemed approved. City may disapprove all or part of a requested draw request. In the event City disapproves any portion of the amount requested by Developer in an Application for Payment (the "disapproved amount"), City shall promptly notify the Developer in writing of the disapproved amount and the reason for such disapproval and shall timely process an approval for the balance of the amount of such Application for Payment.

9. Disputes. In the event of any dispute concerning whether any item listed in an Application for Payment should be approved for payment, City shall disburse the amount not in dispute, and fund any disputed amounts promptly upon resolution of the dispute. In the event City and the Developer are unable to resolve any dispute concerning the appropriateness of any item for payment in an Application for Payment, City shall not deduct the disapproved amount from the Public Improvement Reimbursement. City and the Developer shall seek to resolve any disputes promptly and in good faith.
10. Conditional Payments. City shall have the right to condition any disbursement upon receipt and approval of such documentation, evidence or information that City may reasonably request, including, but not limited to, vouchers, invoices and similar documentation.
11. Qualifications of Contractors. All construction and other work on the Project shall be performed by persons or entities licensed or otherwise authorized to perform the applicable work or service in the State of California and the City of Imperial Beach. Developer and all contractors and subcontractors working on the Project shall have a current City of Imperial Beach Business License.
12. Other costs. Except as expressly provided otherwise in this Agreement and the OPA, all costs incurred in predevelopment, development and operation of the Project shall be the responsibility and obligation of Developer without cost or expense to City.
13. Source of Reimbursement Funds. Developer acknowledges that the obligation of the City to provide the Project Funds to Developer is a special limited obligation, payable exclusively from Bond Proceeds or Grant Funds described in Section 2.B. of the Implementation Agreement to the Owner Participation Agreement and that nothing in this Agreement or the OPA shall be deemed to obligate or commit the expenditure of any funds from the Imperial Beach City general fund or any other Successor Agency or Agency funds for any purpose. If for any reason, Grant Funds awarded to the Project are withdrawn or ~~unavailable~~rescinded, no City, Successor Agency or Agency funding will automatically make up the difference or the lack of Grant Funds and the Project Funds will be limited to the maximum contribution from the Bond Proceeds in the amount of \$855,000 unless and until the City negotiates an amended agreement for additional funding, which the City may, but is not obligated to do.

IV. Conduct of Project Improvement Work. Subject to the obligation of the City to provide the Project Funds in accordance with this Agreement, Developer shall commence and prosecute to completion, with diligence that is reasonable under all the circumstances (including the occurrence of ~~Force Majeur Delays~~force majeure delays), the preparation of the plans for and

the permitting, construction and installation of the Project Improvements in accordance with the OPA and all of the requirements of the City relating to such improvements.

V. Inspection of the Project. City shall have the right to inspect the Project Improvements and the Site during construction and agrees to deliver to the Developer copies of any inspection reports. Inspection of the Project Improvements and the Site shall be for the sole purpose of ensuring compliance with the OPA and this Agreement and is not to be construed as a representation by City that there has been compliance with plans or that any work of improvement or the Site will be free of faulty materials or workmanship. The Developer may make or cause to be made such other independent inspections as the Developer may desire for its own protection.

VI. Supervision of Construction. City shall be under no obligation to perform any of the construction or installation or complete the construction or installation of the Project Improvements or any work of improvement on the Site, or to supervise any construction or installation of the Project Improvements or any work of improvement on the Site, and shall not be responsible for inadequate or deficient contractors, subcontractors, materials, equipment or supplies. City is not the agent for Developer, neither are City and Developer partners or joint venturers with each other.

VII. Compliance with Laws. Developer shall comply and cause its contractor(s) to comply with all applicable laws in the construction of the Public Improvements and any work of improvement on the Site, including but not limited to laws relating to the payment of prevailing wages set forth in the California Labor Code [and any amendments thereto, including recent legislation from implementation of Senate Bill 854.](#)

VIII. Insurance and Indemnification.

A. Before commencing any of the Project Improvements, Developer shall deliver to City and shall maintain in force until completion the insurance policies required by the OPA.

B. Developer shall defend, indemnify and hold harmless the City and its respective elected officials, members, officers, representatives, agents, employees, contractors and attorneys (the "Indemnified Parties") from and against any and all actions, third party claims, liabilities, damages, injuries and/or challenges arising from the design, construction and installation of the Project Improvements or arising from this Agreement, except that the foregoing defense, indemnification and hold harmless obligations shall not apply to the proportional extent that the matter giving rise to such claims, liability, damages or injuries is due to the negligence or willful misconduct of City (or any of the Indemnified Parties). Developer further agrees that, if City, in good faith, determines that its interests are not adequately protected by being provided a defense by Developer, such indemnification obligation shall include all fees and costs reasonably incurred in the defense of the Indemnified Parties by counsel selected by the City in its sole discretion. The foregoing defense and indemnification obligations shall survive the termination of this Agreement and shall continue to remain in effect after any or all of the following events: completion and recordation of any Release of Construction Covenants.

IX. Maintenance of Records. Developer shall retain in the County of San Diego, all books and records relating to the Public Improvements and this Agreement for a minimum of ten (10) years after the recordation of any Maintenance Agreement or Notice of Completion applicable to the construction of Project Improvements (whichever is recorded first), including but not limited to all contractors' and subcontractors' invoices, payroll and other documentation of work performed, supplies purchased and other expenditures for which reimbursement has been requested from City. The City, and any of its representatives, shall have the right of access at all reasonable times, upon reasonable notice, to any pertinent books, documents, papers or other records of the Developer relative to the Project Improvements and the Project Improvement Costs in order to make audits, examinations, excerpts and transcripts.

X. Inspection and Audit Rights. City and its designated representatives, including any independent auditors engaged by City to audit the Project or any part thereof, shall have the right at all reasonable times to inspect and audit the books and records of Developer relating in any way to the Public Improvements. Developer shall cooperate in all respects with any such inspections and audits. City shall give Developer notice of any audit findings. Developer shall immediately remit to City, with interest at the rate of ten percent (10%) per annum from the date of disbursement any amounts for which all or any part of any disbursement was found by the auditor to have been overpaid, ineligible for reimbursement or without adequate documentation. In the event of any such overpayment or other improper disbursement, Developer shall also remit to City an amount equal to the independent auditor's fees and expenses.

XI. Integrated Agreement. This Agreement is made for the sole benefit and protection of the Parties hereto and no other person or persons shall have any right of action or right to rely hereon. As this Agreement contains all the terms and conditions agreed upon between the parties, no other agreement regarding the subject matter thereof shall be deemed to exist or bind any Party unless in writing and signed by the party to be charged. Notwithstanding the foregoing sentence or any other provision of this Agreement, this Agreement does not supersede and shall not be deemed to amend any of the OPA and nothing in this Agreement, and no actions by any party hereunder, shall be deemed as a modification or waiver of either Party's rights under the OPA.

XII. Termination of this Agreement. Except for provisions of this Agreement that are intended to survive the termination of this Agreement, this Agreement shall terminate when the City has executed a Maintenance Agreement, as provided in Section 3.D. of the Implementation Agreement.

XIII. Counterparts. This Agreement may be signed by each Party on a separate signature page, and when the executed signature pages are combined, shall constitute one single instrument with the same effect as if all signatories had executed the same instrument.

XIV. Binding Effect. This Agreement shall be binding on and inure to the benefit of the Parties to this Agreement and their heirs, personal representatives, successors, and assigns, whether such succession or assignment is voluntary, involuntary, by force of law or otherwise, except as otherwise provided in this Agreement.

XV. Governing Law. This Agreement has been negotiated and entered in the State of California, and shall be governed by, construed and enforced in accordance with the internal laws of the State of California, applied to contracts made in California by California domiciliaries to be wholly performed in California.

XVI. Titles and Captions. Titles or captions contained herein are inserted as a matter of conveniences and for reference, and in no way define, limit, extend or describe the scope of this Agreement or any provision hereof.

XVII. Interpretation. No provision in this Agreement is to be interpreted for or against either Party because that party or his legal representatives drafted such provision.

XVIII. Waiver; Amendments. No breach of any provision hereof may be waived unless in writing. Waiver of any one breach of any provision hereof shall not be deemed to be a waiver of any other breach of the same or any other provision hereof. This Agreement may be amended only by a written agreement executed by the parties in interest at the time of the modification.

XIX. Further Assurances. The Parties hereto hereby agree to execute such other documents and to take such other action as may be reasonably necessary to further the purposes of this Agreement.

XX. Severance. If any provision of this Agreement is determined by a court of competent jurisdiction to be illegal, invalid or enforceable, then such provision will be deemed to be severed and deleted from the agreement as a whole and neither such provision, nor its severance and deletion shall in any way affect the validity of the remaining provisions of this Agreement.

XXI. Independent Advice of Counsel. The Parties hereto and each of them, represent and declare that in executing this Agreement they rely solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently selected counsel, concerning the nature, extent and duration of their rights and claims, and that they have not been influenced to any extent whatsoever in executing the same by any of the parties hereto or by any person representing them, or any of them.

XXII. Voluntary Agreement. The Parties hereto, and each of them, further represent and declare that they carefully read this Agreement and know the contents thereof, and that they sign the same freely and voluntarily.

XXIII. Attorneys' Fees. In the event of any dispute between the parties regarding this Agreement, the prevailing Party shall be entitled to recover costs and expenses, including but not limited to reasonable attorneys' fees.

XXIV. Relation to OPA. The Parties agree that this Agreement is a material part of the OPA and that a default under this Agreement shall be deemed to be a default under the OPA.

Subject to the notice and cure provisions of the OPA, a Party in default of this Agreement shall be deemed to be in default of the OPA.

XXV. Reasonableness Standard. Except as otherwise expressly provided in this Agreement, approvals (which includes both approvals and consents and words of similar meaning contained herein) required of City or Developer in this Agreement shall not be unreasonably withheld, conditioned or delayed. All approvals shall be in writing.

IN WITNESS WHEREOF, the City and Developer have executed this Agreement as of the date set forth above.

BIKEWAY VILLAGE LLC,  
a California limited liability company

Dated: \_\_\_\_\_

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

[SIGNATURES CONTINUE ON NEXT PAGE]

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 )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, \_\_\_\_ before me, \_\_\_\_\_, 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 \_\_\_\_\_ (Seal)

-----OPTIONAL-----

**Description of Attached Document**

Title or Type of Documents: \_\_\_\_\_ Document Date: \_\_\_\_\_  
Number of Pages: \_\_\_\_\_ Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed By Signer(s)**

Signer's Name: _____	Signer's Name: _____
<input type="checkbox"/> Corporate Officer – Title(s): _____	<input type="checkbox"/> Corporate Officer – Title(s): _____
<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____

CITY OF IMPERIAL BEACH

Dated: \_\_\_\_\_

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

Andy Hall  
City Manager

APPROVED AS TO FORM  
City Attorney

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

Jennifer Lyon

KANE, BALLMER & BERKMAN  
Agency Special Counsel

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

Carol Leone

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<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____