CAPISTRANO UNIFIED SCHOOL DISTRICT
BOARD REPORT

To: Board of Trustees

From: Clark Hampton, Deputy Superintendent, Business and Support Services

Date: April 17, 2024

Board Item: **RESOLUTION NO. 2324-23, RESOLUTION OF THE BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT APPROVING A FOURTH AMENDMENT TO THE OPTION TO LEASE REAL PROPERTY WITH TOLL BROS., INC., AND APPROVING A DEVELOPMENT AGREEMENT WITH TOLL BROS., INC. AND THE CITY OF DANA POINT**

HISTORY

This is a subsequent action item. The Board previously declared its 5.51 acre property located at 26126 Victoria Blvd, Dana Point ("Property") "surplus," and subsequently approved an Option to Lease Real Property with Toll Bros., Inc. ("Toll Bros."). The Board also approved three amendments to the Original Option to Lease Real Property which, together, constitute the current "Lease Option Agreement" between the District and Toll Bros.

BACKGROUND INFORMATION

The Lease Option Agreement grants Toll Bros. an "Option Term" during which Toll Bros. can review the Property and seek entitlements to determine if it wants to proceed with the proposed 99-year lease ("Ground Lease"). Pursuant to the terms of the Lease Option Agreement, Toll Bros. can extend the Option Term by making specific monetary extension payments and releasing portions of its deposit based on trigger events. Toll Bros. has extended the current Option Term to April 17, 2024, and has the option to further extend the Option Term to October 14, 2024, by making an additional non-refundable $250,000 extension payment (the seventh extension payment).

Toll Bros. has long been working with the City of Dana Point to obtain the entitlements its needs to develop the Property for its intended use, which will determine whether Toll Bros. elects to exercise its option and enter into the Ground Lease. Through this process, Toll Bros.' proposed project has been reduced from the 425 unit project it initially sought to a proposed final 306 unit project.

Additionally, on a separate but parallel track, the City has requested that the District be a party to the Development Agreement between Toll Bros. and the City.

CURRENT CONSIDERATIONS

The Board is asked to consider adoption of Resolution No. 2324-23 to approve a Fourth Amendment to the option to lease real property with Toll Bros. as well as a Development

Agreement with Toll Bros. and the City of Dana Point. The Fourth Amendment to the Lease Option Agreement modifies the timing of the next non-refundable extension payments, changes the length of Toll Bros.' option to enter into the previously negotiated Lease Agreement for the Property, and reduces the minimum annual Base Rent due under the Lease Agreement from $2.5Mil. to $2.1Mil. in light of the project's proposed final 306 unit count. Additionally, the Development Agreement clarifies the District's use of the ground lease rent revenue derived from the Lease Agreement between the District and Toll Bros.

FINANCIAL IMPLICATIONS

Regarding the proposed Fourth Amendment, a reduction of the Annual Rent starting in Year 5 to $2.1Mil. (down from $2.5Mil.). Regarding the final Development Agreement, this formalizes the District's verbal commitment to spend at least the first 30 years of lease proceeds on a COP for a portion of the funds needed to improve Dana Hills High School.

STAFF RECOMMENDATION

It is recommended the Board of Trustees adopt Resolution No. 2324-23, Resolution of the Board of Trustees of the Capistrano Unified School District Approving a Fourth Amendment to the Option to Lease Real Property with Toll Bros., Inc., and Approving a Development Agreement with Toll Bros., Inc. and the City of Dana Point.

APPROVED BY: Clark Hampton, Deputy Superintendent, Business and Support Services

RESOLUTION NO. 2324-23

RESOLUTION OF THE BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT APPROVING A FOURTH AMENDMENT TO THE OPTION TO LEASE REAL PROPERTY WITH TOLL BROS., INC., AND APPROVING A DEVELOPMENT AGREEMENT WITH TOLL BROS., INC. AND THE CITY OF DANA POINT

("SOUTH BUS YARD PROPERTY")

WHEREAS, the Capistrano Unified School District ("District") owns an approximately 5.51 acre property located at 26126 Victoria Blvd, Dana Point, CA 92624 ("Property"); and

WHEREAS, following the request for proposals and waiver process applicable to the Property, the District sought and received various proposals from interested parties to lease the Property, and the District's Board provided authorization and direction for the District to enter into an "Option to Lease Real Property" agreement with Toll Bros., Inc. ("Toll Bros.") dated January 15, 2019; and

WHEREAS, the District and Toll Bros. then agreed to amend the Option to Lease Real Property as follows: 1) a First Amendment to the Original Option Agreement dated July 27, 2019; 2) a Second Amendment to Original Option Agreement dated December 17, 2020; and 3) and a Third Amendment to the Original Option Agreement dated December 14, 2022; and accordingly, the Option to Lease Real Property, together with amendments, constitute the current Option to Lease Real Property; and

WHEREAS, the Option to Lease Real Property grants Toll Bros. an option term during which Toll Bros. can review the Property and seek entitlements from the City of Dana Point ("City") to determine whether or not it will proceed with a proposed 99-year term ground lease in exchange for lease payments to the District (the "Option Term"); and

WHEREAS, the Option to Lease Real Property also grants Toll Bros. the right to extend the Option Term by making specific monetary extension payments, and releasing portions of its deposit based on trigger events; and

WHEREAS, Toll Bros. recently made its "Sixth Option Term Extension Payment," thereby extending the Option Term to April 17, 2024; and

WHEREAS, Toll Bros. has requested modifications to the extension payment structure of the Option to Lease Real Property's Option Term by way of a proposed Fourth Amendment to the Option to Lease Real Property, in order to allow more time for Toll Bros. to review the Property and obtain the necessary entitlements; and

WHEREAS, Toll Bros. has also requested modifications to the Lease Agreement rent amount by way of the same proposed Fourth Amendment to the Option to Lease Real Property, which would reduce the minimum Annual Rent for Year 5 of the Term of the Lease Agreement to no less than Two Million One Hundred Thousand Dollars ($2,100,000); and

WHEREAS, District staff, in consultation with legal counsel, have prepared a Fourth Amendment to the Option to Lease Real Property establishing the terms set forth above, which Fourth Amendment is attached hereto as attached hereto as Exhibit "A" (the "Fourth Amendment"); and

WHEREAS, additionally, the City of Dana Point has requested that the District approve a Development Agreement whereby the District agrees to be a party to the Development Agreement related to Toll Bros.' proposed development of the Property, and which Development Agreement would clarify the District's use of the ground lease revenue derived from the Lease Agreement between the District and Toll Bros; and

WHEREAS, District staff, in consultation with legal counsel, have reviewed and negotiated with the respective parties for a suitable Development Agreement establishing the District's use of such ground lease revenue, which Development Agreement is attached hereto as Exhibit "B" (the "Development Agreement").

NOW, THEREFORE, THE BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT DOES HEREBY FIND, RESOLVE, DETERMINE, AND ORDER AS FOLLOWS:

Section 1. All of the recitals herein contained are true and correct.

Section 2. The Board hereby approves the Fourth Amendment in the form attached hereto as Exhibit "A." The Superintendent, or his designee, is hereby authorized to finalize and execute the Fourth Amendment, subject to any non-substantive changes as deemed appropriate by District staff in consultation with legal counsel, subject to ratification of the Board, as necessary.

Section 3. The Board hereby approves the Development Agreement in the form attached hereto as Exhibit "B." The Superintendent, or his designee, is hereby authorized to finalize and execute the Development Agreement, subject to any non-substantive changes as deemed appropriate by District staff in consultation with legal counsel, subject to ratification of the Board, as necessary.

Section 4. The Superintendent or his designee is hereby authorized and directed, for and in the name of and on behalf of the District, to take any further action necessary to effectuate this Resolution.

Section 5. This Resolution shall take effect upon adoption.

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ADOPTED, SIGNED AND APPROVED this 17th day of April, 2024.

_____

Krista Castellanos
President of the Board of Trustees
of the Capistrano Unified School District

I, Amy Hanacek, Clerk of the Board of Trustees of Capistrano Unified School District, do hereby certify that the foregoing Resolution was adopted by the Board of Trustees of said District at a meeting held on the 17th day of April, 2024, and that it was so adopted by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

_____

Amy Hanacek
Clerk of the Board of Trustees
of the Capistrano Unified School District

Exhibit “A”

FOURTH AMENDMENT TO
OPTION TO LEASE REAL PROPERTY

Exhibit “B”

DEVELOPMENT AGREEMENT

FOURTH AMENDMENT TO
OPTION TO LEASE REAL PROPERTY

This Fourth Amendment to Option to Lease Real Property ("Fourth Amendment") is made this ___ day of April, 2024 (the "Effective Date"), by and between CAPISTRANO UNIFIED SCHOOL DISTRICT, a public school district duly organized and validly existing under the Constitution and laws of the State of California ("Optionor") and TOLL BROS., INC, a Pennsylvania corporation ("Optionee") (collectively, Optionor and Optionee are referred to herein as the "Parties").

R E C I T A L S:

WHEREAS, the Parties entered into that certain Option to Lease Real Property dated January 15, 2019 (the "Original Agreement"), as amended by that certain First Amendment to Option to Lease Real Property dated July 27, 2019 (the "First Amendment"), and as amended by that certain Second Amendment to Option to Lease Real Property dated December 17, 2020 (the "Second Amendment," and as amended by that certain Third Amendment to Option to Lease Real Property dated December 14, 2022 (the "Third Amendment," and together with the Original Agreement, the First Amendment, and the Second Amendment, hereinafter the "Agreement") in which Optionor grants to Optionee an option to lease the Property known as 26126 Victoria Blvd., Dana Point, California and as more fully described in the Agreement (the "Property"); and

WHEREAS, the Parties desire to further amend the Agreement as set forth herein.

NOW THEREFORE, in consideration of the premises, the mutual covenants and agreements set forth herein and for other good and valuable consideration, the receipt, adequacy, and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound hereby, agree to amend the Agreement as follows:

1. Incorporation. The Parties confirm the accuracy of the Recitals set forth above. Each capitalized term used in this Fourth Amendment but not otherwise defined in this Fourth Amendment shall have the meaning ascribed to it in the Agreement.

2. Option Term. The sixth (6^{th}) Option Term is currently set to expire on April 17, 2024 ("Current sixth (6^{th}) Option Expiration).

3. Option Term Extensions. The Parties agree that the sixth (6^{th}) and seventh (7^{th}) Option Terms described in Section 1.2 of the Agreement shall be modified as follows:

a. The sixth (6^{th}) Option Term shall be extended for a period of ninety (90) days from the Current sixth (6^{th}) Option Expiration, and therefore, as of the Effective Date of this Fourth Amendment, the sixth (6^{th}) Option Term shall expire on July 16, 2024.

b. The seventh (7^{th}) Option Term Extension shall be for a period of Three Hundred Sixty (360) days, and therefore, will extend the Option Term until July 11, 2025 upon Optionee's deposit of Two Hundred Fifty Thousand Dollars ($250,000).

4. Application of Deposit Amount. In exchange for Optionor granting the additional time for the Option Term as set forth above, Optionee agrees that the Three Hundred Thousand Dollars ($300,000) of Deposit funds originally intended to be "applied to the Base Rent first coming due in Year 2" as set forth in Section 1.5(d) of the Agreement, and similarly intended to be credited "against Annual Rent due in Year 2, which credit shall be applied against the first monthly installments of Annual Rent due during Year 2" as set forth in Section 2.1(a) of the Ground Lease, shall no longer be so applied or credited. Instead, Optionee agrees that said Three Hundred Thousand Dollars ($300,000) of Deposit funds shall, immediately as of the Effective Date of this Fourth Amendment, be rendered non-applicable to Annual Rent as set forth herein, and remain non-refundable to Optionee.

5. Rent pursuant to the Ground Lease. Optionee intends to develop a project on the Property that will remain within the following parameters: A two (2) to five (5) story apartment complex, not to exceed three hundred six (306) total units, consisting of no more than 260 market rate units and no less that forty-six (46) affordable units, with an attached six-story (seven level) parking structure, with no less than one-third (1/3) of the Affordable Units shall be rented as Very Low Income Housing and no less than one-third (1/3) of the Affordable Units shall be rented as Low Income Housing ("Intended Final Project Unit Count"). Provided that Final Approval (as defined by Sections 3.1 and 4.2 of the Agreement) for the project consists of this Intended Final Project Unit Count, the parties agree Section 2.1(c) of the Ground Lease shall hereby be deleted in its entirety and replaced with: "The Annual Rent during Year 5 of the Term shall be TWO MILLION ONE HUNDRED THOUSAND DOLLARS ($2,100,000)." Should Optionee's project's Final Approval include more than the Intended Final Project Unit Count, specifically, more than the three hundred six (306) total units, more than 260 market rate units, more than forty-six (46) affordable units, or less than the one-third (1/3) Very Low Income Housing or Low Income Housing units assumed in the Intended Final Project Unit Count, then Optionee shall have the option to either: 1) Build its project no greater than the Intended Final Project Unit Count; or 2) Propose to build greater than the Intended Final Project Unit Count and negotiate with Optionor a mutually acceptable modified minimum Annual Rent to be established for Year 5 of the Term of the Lease Agreement as described above; provided, however, that in the event the Parties fail to reach a mutually acceptable modified Annual Rent as described herein and Optionee still elects to build its project greater than the Intended Final Project Unit Count, this Fourth Amendment, Section 5 will immediately be rendered moot and the minimum Annual Rent established for Year 5 of the Term of the Lease Agreement as set forth in Section 2.1(c) of the Ground Lease shall revert back to the language which existed prior to this Fourth Amendment.

6. Limitations on Future Unit Count. The Parties agreed that each of the Parties, and their respective successors and assigns, will not (*i*) seek a density bonus or other incentive in connection with the development of the Property beyond the maximum unit counts specified in the Intended Final Project Unit Count, (*ii*) apply for or allow the addition of any accessory dwelling units on the Property, (*iii*) apply for or allow an urban lot split on the Property, or (*iv*) exercise any right to augment the density or intensity of the Project on the Property beyond the maximum unit counts specified in the Intended Final Project Unit Count.

7. New Ground Lease Exhibit. In order to reflect the amended terms set forth in Sections 4, 5, and 6 herein, Exhibit "B" to the Agreement (the Ground Lease) shall be deleted in its entirety and be replaced with the Exhibit "B" attached hereto.

8. Terms, Conflict. Except as otherwise expressly modified in this Fourth Amendment, the terms and conditions of the Agreement are and shall remain in full force and effect. In the event of any conflict or inconsistency between the terms and provisions of the Agreement and the terms and provisions of this Fourth Amendment, the terms and provisions of this Fourth Amendment shall govern and control.

9. Counterparts. This Fourth Amendment may be executed in any number of counterparts, all of which together shall be deemed to constitute one instrument, and each of which shall be deemed an original. The Parties acknowledge that facsimile or electronically transmitted signatures shall be valid for all purposes, and once signed and delivered in such fashion, each such party shall thereafter, upon request of any other party, execute and deliver to the requesting party a signed original counterpart of this Fourth Amendment.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.
SIGNATURES APPEAR ON THE FOLLOWING PAGE.]

IN WITNESS WHEREOF, the Parties have caused this Fourth Amendment to be executed by their respective duly authorized representatives under seal, all as of the day and year first written above.

OPTIONOR:

CAPISTRANO UNIFIED SCHOOL DISTRICT

By: _____
Name: Clark Hampton
Title: Deputy Superintendent

OPTIONEE:

TOLL BROS., INC.,
a Pennsylvania corporation

By: _____
Name: _____
Title: _____

Approved as to form:

_____
Andreas C. Chialtas
Atkinson, Andelson, Loya, Ruud & Roma,
Counsel for Capistrano Unified School District

EXHIBIT “B”

Ground Lease

PLEASE RECORD AND WHEN RECORDED RETURN
TO:

CITY OF DANA POINT
33282 Golden Lantern
Dana Point, CA 92629
Attn: City Attorney

VICTORIA BOULEVARD APARTMENTS

DEVELOPMENT AGREEMENT

This Development Agreement (hereinafter "***Agreement***") is entered into on _____, 2024, by and between (1) the CITY OF DANA POINT (hereinafter "***City***"), a municipal corporation of the State of California, and (2) TOLL BROS., INC., a Pennsylvania corporation ("***Toll Bros.***" or "***Developer***") and CAPISTRANO UNIFIED SCHOOL DISTRICT, a public school district duly organized and validly existing under the Constitution and the laws of the State of California ("***CUSD***").

RECITALS

A. CUSD is the fee owner of all of the real property described on **Exhibit A** and depicted on **Exhibit B,** consisting of approximately 5.51 gross acres of land area located in the City of Dana Point, County of Orange, State of California ("***Property***").

B. Toll Bros., as optionee, and CUSD, as optionor, have entered into an agreement entitled "Option to Lease Real Property, dated January 15, 2019, as amended (hereinafter the "***Option Agreement***"), which provides Toll Bros., as optionee, the right to exercise an option to lease the Property from CUSD, as optionor, pursuant to the terms of a Ground Lease which is Exhibit B to the Option Agreement, and which Ground Lease provides for the development of the Property with a multi-family apartment complex with associated public and private open space and amenities on the Property ("***Property Lease***").

C. The Planning and Zoning approvals for the development of Developer's proposed project on the Property obtained prior to or concurrent with the Effective Date of this Agreement (collectively, the "***Development Approvals***") include, but are not limited to, the following:

i. General Plan Amendment: To ensure that the General Plan land use designations are consistent with the portions of the General Plan that function as the Coastal Element of the Local Coastal Plan, the General Plan has been amended to change the land use designation on the Property from CF and R/OS to "Specific Plan Overlay."

ii. Zone Change: The Zoning Code has been amended to rezone the Property from CF and REC to "Victoria Boulevard Specific Plan" VBSP.

iii. Local Coastal Plan Amendment: An amendment to the Local Coastal Plan is required to make the Victoria Boulevard Specific Plan consistent with the Local Coastal Plan (**"*Local Coastal Plan Amendment*"**). After approval by the City, the Local Coastal Plan Amendment must be approved and certified by the California Coastal Commission in order for the approval to be deemed final, and any modification thereto approved by the City.

iv. Victoria Boulevard Specific Plan: The Victoria Boulevard Specific Plan has been adopted in accordance with Chapter 9.33 of the Zoning Code. It serves both planning and regulatory functions including without limitation land use regulations, circulation pattern, public facilities/infrastructure, and development standards. All future development within the Specific Plan area, which includes the Property, shall be subject to compliance with the Specific Plan regulations.

v. Environmental Clearance Document: Victoria Boulevard Apartments Environmental Impact Report, State Clearinghouse Number 2021070304, together with its associated findings of fact and mitigation monitoring and reporting program has been certified by the City Council.

D. Subject to the Development Approvals, Developer intends to develop a project on the Property that shall remain within the following parameters (collectively, "***Core Project Characteristics***"):

i. Unit and Height Limit: Two (2) to five (5) story apartment complex, not to exceed three hundred six (306) total units, consisting of no more than 260 market rate units and no less that forty-six (46) affordable units ("***Affordable Units***"), with an attached six-story (seven level) parking structure. Project height shall be limited to fifty (50) feet high within forty (40) feet of the Victoria Boulevard right of way. In all other areas, Project height shall be limited to sixty five (65) feet; provided, however, that roof mounted equipment and rooftop recreation amenities may extend to a height of seventy five (75) feet and recreational structures to eighty five (85) feet provided they are located in the middle or rear of the property.

ii. Affordable Unit Mix: No less than one-third (1/3) of the Affordable Units shall be rented as Very Low Income Housing. No less than one-third (1/3) of the Affordable Units shall be rented as Low Income Housing. The remaining Affordable Units shall be rented as Moderate Income Housing. Developer shall agree to record a deed restriction and covenant acceptable to City to maintain the continued affordability of all Affordable Units for a minimum of fifty-five (55) years.

iii. Victoria Shore Park: A total of 17,666 square feet (0.406 acres) of public open space shall include Victoria Shore Park (at the southeastern corner of Sepulveda Avenue and Victoria Boulevard), which shall include exercise equipment, a shaded surf pavilion with seating and an art wall, and shall be maintained by Developer in perpetuity and in accordance with all applicable City park standards, shall not be gated, and shall include public access easements for pedestrians, bicyclists and emergency access, which shall be in a

form acceptable to the City and shall be recorded upon completion of the physical construction of the park and its improvements. The physical construction of the park shall be in accordance with Dana Point Public Works standards, and the owner retained licensed landscape architect's recommendations, subject to City review and approval, inspected by the City at the owner's expense.

iv. Additional Public Open Space: 63,452 square feet (1.457 acres) of public street and frontage open space, as well as a dog park and public paseos along the former La Playa Avenue right-of-way (the public paseo shall be no less than 26,289 square feet at the rear of the building (improved with six (6) feet of sidewalk with landscaping) and shall also include children's play elements, boulders, and other amenities acceptable to the City. The public paseos and other hardscape areas of La Playa Avenue shall be enhanced pavement in accordance with Orange County Fire Authority standards and shall not be asphalt All of the foregoing shall be maintained by Developer in perpetuity and in accordance with all applicable City public works and parks standards, shall not be gated, and shall include public access easements for pedestrians, bicyclists and emergency access, which shall be in a form acceptable to the City and shall be recorded upon completion of the physical construction of the open space and its improvements.

v. Private Open Space: 44,644 square feet (1.025 acres) of private active open space, and an additional 15,778 square feet (0.36 acre) of private passive open space, all of which shall be maintained by Developer in perpetuity.

vi. Enhanced Landscape and Streetscape Amenities: All improvements as specified in the Development approvals, including without limitation (i) Establishment of no less than 27 on-street parking spaces along the southside of Victoria Boulevard and 13 on-street parking spaces along the eastside of Sepulveda Avenue, reflecting a 38 percent increase (11 stalls) from existing conditions, parking along Victoria shall be angled parking and shall be landscape enhanced; (ii) Street amenities to include ample landscaping and other amenities acceptable to the City; (iii) New curb, gutter, and ten (10) foot sidewalk along Victoria Blvd (increasing sidewalk width from four (4) feet existing to ten (10) feet to allow for bicycles and pedestrians; (iv) New ten (10) foot sidewalk along Sepulveda Blvd (increasing sidewalk from four (4) feet to ten (10) feet to allow for bicycles and pedestrians; (v) new curb and gutter to replace existing driveways on Sepulveda; (vi) Relocation of catch basin at the corner of Victoria and other storm drain modifications to accommodate street improvements; (vii) Caltrans drainage culvert to be modified/replaced with junction structure; required upgrades to SCWD system; (viii) a cul-de-sac and sidewalk at Sepulveda dead-end, and (ix) other amenities acceptable to the City along sidewalk on Victoria.

Development consistent with and subject to all of the Development Approvals, the Core Project Characteristics, the Development Plan, the proposed site plan attached as **Exhibit C**, the Mitigation Measures specified in **Exhibit D**, and the Land Use Regulations is hereinafter referred to as the "***Project***."

E. Government Code Sections 65864 *et seq.* ("***Development Agreement Law***") authorize City to enter into binding development agreements with persons having a legal or equitable interest in real property for the development of such property, all for the purpose of strengthening the public planning process, encouraging private participation and comprehensive planning, and reducing

the economic costs of such development. Toll Bros., CUSD and City have agreed to enter into this Development Agreement in order to memorialize and secure the respective expectations of the City and Toll Bros. that Toll Bros. may proceed with the Project in accordance with the existing policies, rules, and regulations as set forth in this Development Agreement.

F. The City Council has found that this Agreement is in the best public interest of the City and its residents. Adopting this Agreement constitutes a present exercise of the City's police power, and reflects the findings by the City that the Project is consistent with the goals and policies of the City's General Plan, zoning and Victoria Boulevard Specific Plan, and imposes appropriate standards and requirements with respect to the Development of the Property in order to maintain the overall quality of life and of the environment within the City. Prior to its approval of this Agreement, City considered the environmental impacts of the Project and completed its environmental review of the Project.

G. On _____, the Planning Commission of City held a public hearing on the Developer's application for approval of this Agreement, made certain findings and determinations with respect thereto, and adopted Planning Commission Resolution No. recommended to the City Council that this Agreement be approved. On _____, the City Council held a public hearing on the Developer's application for approval of this Agreement, considered the recommendations of the Planning Commission, and found that this Agreement is consistent with City's General Plan. On _____, the City Council introduced Ordinance No. _____, approving this Development Agreement for first reading. On _____, the City Council approved Ordinance No. ___, which takes effect as of _____.

COVENANTS

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS AND EXHIBITS.

1.1 **Definitions**. This Agreement uses a number of terms having specific meanings, as defined below. These specially defined terms are distinguished by having the initial letter capitalized, or all letters capitalized, when used in the Agreement. The defined terms include the following:

1.1.1 "***Adjusted for household size appropriate to the unit***" means a household of one person in the case of a studio unit, a household of two persons in the case of a one-bedroom unit, a household of three persons in the case of a two-bedroom unit, a household of four persons in the case of a three-bedroom unit, and a household of five persons in the case of a four-bedroom unit.

1.1.2 "***Agreement***" means this Development Agreement.

1.1.3 "***Affiliate***" means a person or entity that, directly or indirectly controls the Developer, is controlled by the Developer, or is, with the Developer, under common control of another person or entity. Indicia of control include, without limitation, interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and use of substantially the same management, ownership or principals as the Developer.

1.1.4 "***Affordable Housing***" means housing which is rented for an amount that is limited by the requirements imposed by Health and Safety Code Section 50053.

1.1.5 "***Affordable Housing Agreement***" means an agreement between City and Developer substantially and substantively in the form attached hereto as **Exhibit E**.

1.1.6 "***Affordable Rent***" means for a Very Low Income Household the maximum monthly rent that does not exceed the amount of rent (including a reasonable utility allowance) for a Very Low Income Household authorized pursuant to Health and Safety Code Section 50053 as such statute exists on the date hereof, which is the product of thirty percent (30%) times fifty percent (50%) of Median Income, adjusted for household size appropriate to the unit. "**Affordable Rent**" means for a Low Income Household the maximum monthly rent that does not exceed the amount of rent (including a reasonable utility allowance) for a Lower Income Household authorized pursuant to Health and Safety Code Section 50053 as such statute exists on the date hereof, which is the product of thirty percent (30%) times sixty percent (60%) of Median Income, adjusted for household size appropriate to the unit. "**Affordable Rent**" means for a Moderate Income Household the maximum monthly rent that does not exceed the amount of rent (including a reasonable utility allowance) for a Moderate Income Household authorized pursuant to Health and Safety Code Section 50053 as such statute exists on the date hereof, which is the product of thirty percent (30%) times one hundred ten percent (110%) of Median Income, adjusted for household size appropriate to the unit.

1.1.7 "***Affordable Units***" means the no less than 46 apartment units to be developed as part of the Project on the Property as Affordable Housing, consisting of a mix of sizes and bedroom numbers that is substantially equal to the size and bedroom number of market rate units in the Project, and to be distributed throughout the Project.

1.1.8 *"**Applicable Law**"* means all federal, state, and local laws and regulations applicable to the Project as of the Effective Date.

1.1.9 *"**Certificate**"* means the "Certificate of Agreement Compliance" referred to in Section 4.4 of this Agreement.

1.1.10 "***City Council***" means the City Council of the City.

1.1.11 "***City Parties***" means the City, City Council, City officers, employees, attorneys and agents.

1.1.12 "***Claim***" means any claim, loss, cost, damage, expense, liability, lien, action, cause of action (whether in tort, contract, under statute, at law, in equity or otherwise), charge, award, assessment, fine or penalty of any kind (including consultant and expert fees, Legal Costs, and expenses and investigation costs of whatever kind or nature), and any judgment caused or initiated by a third party. Without limiting the foregoing, "Claims" include any matter that results or arises in any way from any of the following: (1) the noncompliance by Developer or its contractor with any applicable local, state and/or federal law or regulation, including, without limitation, any applicable federal and/or state labor laws or regulations (including, without limitation, if applicable, the requirement to pay state and/or federal prevailing wages and hire apprentices); (2) the implementation of Labor Code Section 1781

and/or any other similar law or regulation; and/or (3) failure by Developer to provide any required disclosure or identification as required by Labor Code Section 1781, as the same may be amended from time to time, or any other similar law or regulation.

1.1.13 "***Costs***" means quantifiable expenses of any kind, including without limitation the allocated value of staff time, amounts expended for consultant and/or legal services, acquisition expenses, and allocated overhead.

1.1.14 "***Core Project Characteristics***" means those core characteristics of the Project described in Recital D.

1.1.15 "***CUSD***" means Capistrano Unified School District, a public school district duly organized and validly existing under the Constitution and the laws of the State of California.

1.1.16 ***"CUSD Parties***" means CUSD, and its Board of Trustees, administration, employees, attorneys, and agents.

1.1.17 "***Dana Hills High School***" means the high school site and all associated buildings, structures, facilities and amenities, located at 33333 Golden Lantern, Dana Point, CA 92629, and which is one of the schools within the jurisdiction, control, and responsibility of CUSD.

1.1.18 "***Dana Hills High School Improvements***" means the improvement/rebuild of Dana Hills High School and which may include the modernizing and/or replacement of school buildings to improve infrastructure and instructional capacity and opportunities, and to comply with seismic building requirements.

1.1.19 "***Default***" means the failure to perform any material duty or obligation set forth in this Agreement or to comply in good faith with the terms of this Agreement.

1.1.20 "***Developer***" means Toll Bros., Inc., and its respective successors in interest to all or any part of the Property.

1.1.21 "***Development***" means the improvement of the Property for the purposes of completing the structures, improvements and facilities comprising the Project including, but not limited to: Grading; the construction of infrastructure and public facilities related to the Project whether located within or outside the Property; the construction of buildings and structures; and the installation of landscaping and park facilities and improvements. "***Development***" also includes the maintenance, repair, reconstruction or redevelopment of any building, structure, improvement, landscaping or facility after the construction and completion thereof.

1.1.22 "***Development Approvals***" means all permits, licenses, consents, rights and privileges, and other actions subject to approval or issuance by City in connection with Development of the Project on the Property issued by City on or before the Effective Date, including but not limited to the Development Approvals. The Development Approvals shall include the certification of the City's Local Coastal Plan Amendment and any modifications made by the California Coastal Commission and incorporated into the certified Local Coastal

Plan Amendment and the Victoria Boulevard Specific Plan, and the City's approval of said Coastal Commission modifications.

1.1.23 "***Development Fees***" means the monetary consideration charged by City in connection with a development project for the purpose of defraying all or a portion of the cost of mitigating the impacts of the Project and development of the public facilities related to Development of the Project. Development Fees shall not include: (*i*) City's normal fees for processing, environmental assessment/review, tentative tracts/parcel map review, plan checking, site review, site approval, administrative review, building permit (plumbing, mechanical, electrical, building), inspection, and similar fees imposed to recover City's Costs associated with processing, review, and inspection of applications, plans, specifications, etc.; and/or (*ii*) fees and charges levied by any other public agency, utility, district, or joint powers authority, whether or not such fees are collected by City.

1.1.24 "***Development Plan***" means the plan for Development of the Project on the Property which shall be subject to the Development Approvals, the Core Project Characteristics, the proposed site plan attached as **Exhibit C**, the Mitigation Measures attached as **Exhibit D**, and the Land Use Regulations.

1.1.25 "***Development Requirement***" means any requirement of City in connection with or pursuant to any Development Approval for the dedication of land, the construction or improvement of public facilities, the payment of fees (including Development Fees) or assessments in order to lessen, offset, mitigate or compensate for the impacts of Development on the environment, or the advancement of the public interest.

1.1.26 "***Effective Date***" means the later of (*i*) the date that the ordinance approving this Agreement becomes effective; or (*ii*) the date that this Agreement is executed by the City; provided, however, that Toll Bros. and CUSD shall have delivered three fully executed and notarized copies of this Agreement to the City on or before the second reading/adoption of the ordinance approving this Agreement.

1.1.27 "***Force Majeure Delay***" means, pursuant to Section 11.12, a delay in performance of this Agreement caused by strikes; acts of God; a declaration of emergency as a result of a public health issue, including the occurrence of any pandemic; enemy action; civil disturbances; wars; terrorist acts; fire; unavoidable casualties; referenda; or mediation, arbitration, litigation, or other administrative or judicial proceeding commenced by a third party and involving the Development Approvals or Subsequent Development Approvals or this Agreement.

1.1.28 "***Funding Certification***" means a certification prepared and provided by CUSD confirming that, unless all capital improvements needs for CUSD schools in the City are fully satisfied and provided CUSD successfully obtains funding from a future voter-approved district-wide general obligation bond or a future voter-approved school facilities improvement district associated with any smaller CUSD geographical area which includes any areas within the City (in either instance, or both, "Future Bond Funds"), the proportion of available Future Bond Funds provided toward capital improvements of Dana Hills High School and/or projects identified in the School Facilities Assessment plus all CUSD funds attributed towards such improvements beginning from the Effective Date of the Option

Agreement equals or exceeds the proportion of the total square footage of all CUSD school space (including charter schools) and administrative buildings in the City as compared to the total square footage of all CUSD school space (including charter schools) and administrative buildings district-wide (the "**Non-Lease Revenue Proportionate Funding Obligation**"). The Funding Certification by CUSD shall also summarize CUSD's efforts regarding any possible future Dana Hills High School Improvements in excess of funding related to the School Financing Mechanism.

1.1.29 "***Initial Lease Revenues"*** means the Property Lease Revenues to be received by CUSD over the first 30 years of the Property Lease.

1.1.30 "***Joinder Agreement***" means an agreement evidencing, *inter alia,* CUSD's consent to the Affordable Housing Agreement and its agreement that the Affordable Housing Agreement bind the fee simple interest in the Property and the leasehold interest created by the Ground Lease, substantially and substantively in the form attached hereto as **Exhibit F**.

1.1.31 "***Land Use Regulations***" means all ordinances, resolutions, codes, rules, regulations, City adopted plans (including, but not limited to, trail plans and park master plans) and official policies of City adopted and effective on or before the Effective Date governing Development and use of land, including, without limitation, the permitted use of land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement, grading, and construction standards and specifications applicable to the Development of the Property.

1.1.32 "***Land Use Regulations***" does not include any City ordinance, resolution, code, rule, regulation or official policy, governing:

(a) the conduct of businesses, professions, and occupations;

(b) taxes and assessments;

(c) the control and abatement of nuisances;

(d) the granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property;

(e) the exercise of the power of eminent domain; and

(f) the amount of processing fees.

1.1.33 "***Legal Costs***" means for any Person, all actual and reasonable costs and expenses such Person incurs in any legal proceeding (or other matter for which such Person is entitled to be reimbursed for its Legal Costs), including reasonable attorneys' fees, court costs and expenses, including in or as a result of any: (a) bankruptcy proceeding; (b) litigation between the Parties; (c) negotiating or documenting any agreement with a third party requested by the other Party; (d) requirement or request that such Person or its employees act as a witness in any proceeding regarding this Agreement or the other Party; and (e) review or approval that the other Party requests of such Person. All references to Legal Costs shall

include the salaries, benefits and costs of in-house or contract general counsel to City or Developer, respectively, and the lawyers employed in the office of such general counsel who provide legal services regarding a particular matter, adjusted to or billed at an hourly rate and multiplied by the time spent on such matter rounded to increments of one-tenth (1/10) of an hour, in addition to Legal Costs of outside counsel retained by City or Developer, respectively, for such matter.

1.1.34 "***Low Income Household***" shall have the meaning ascribed to "lower income household" in Health and Safety Code Section 50079.5.

1.1.35 "***Low Income Housing***" means housing which is restricted for rental to and occupancy by Low Income Households at an Affordable Rent.

1.1.36 "***Median Income***" means the Orange County area median income, as established by the United States Department of Housing and Urban Development, and as published periodically by the California Department of Housing and Community Development in Section 6932 of Title 25 of the California Code of Regulations, or successor regulation(s).

1.1.37 "***Mitigation Measures***" means those requirements imposed on the Project contained in the Mitigation Monitoring and Reporting Plan for the Project, which is attached hereto as **Exhibit D**.

1.1.38 "***Moderate Income Household***" shall have the meaning ascribed to "persons and families of moderate income" in Health and Safety Code Section 50093

1.1.39 "***Moderate Income Housing***" means housing which is restricted for rental to and occupancy by Moderate Income Households at an Affordable Rent.

1.1.40 "***Mortgagee***" means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device, a lender or each of their respective successors and assigns.

1.1.41 "***Municipal Code***" means the Dana Point Municipal Code as it existed on the Effective Date.

1.1.42 "***Party***" and "***Parties***" mean and refer to City, CUSD and/or Developer, as context dictates, and their respective successors, assigns, and Affiliates.

1.1.43 "***Person***" means any association, corporation, government, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization or other entity of any kind.

1.1.44 "***Project***" means the Development of the Property consistent with and subject to the Development Approvals, the Core Project Characteristics as described and defined in Recital D., above, the Development Plan, the proposed site plan attached as **Exhibit C**, the Mitigation Measures attached as **Exhibit D**, and the Land Use Regulations.

1.1.45 "***Property***" means the real property described in **Exhibit A** and shown on **Exhibit B** to this Agreement.

1.1.46 "***Property Lease***" means the Ground Lease described in Recital B above, and substantially and substantively in the form attached hereto as **Exhibit G,** which provides, *inter alia,* for the development of the Property with a multi-family apartment complex with associated public and private open space and amenities on the Property.

1.1.47 "***Property Lease Revenue***" means all payments, funding, revenues and other consideration provided to CUSD, or any Affiliate or designee of CUSD, under and/or pursuant to the Property Lease.

1.1.48 "***Property Lease Revenue Fund***" means a separate fund created and maintained by CUSD, into which all Property Lease Revenue will be deposited and from which expenditures shall made only as otherwise authorized by this Agreement.

1.1.49 "***Property Lease Revenue Expenditure Plan***" means a plan that has been developed by CUSD within two (2) years after CUSD's first receipt of Property Lease Revenues, and which will be updated every twelve (12) months thereafter (unless and until one or more School Financing Mechanisms are established that, in combination with Property Lease Revenues expended under a Property Lease Revenue Expenditure Plan, provide for the utilization of all of the Initial Lease Revenues), for the expenditure of all funds then in the Property Lease Revenue Fund on the Dana Hills High School Improvements and/or facilities identified in the School Facilities Assessment within the time period described in such adopted or updated, as the case may be, plan.

1.1.50 "***Reservation of Authority***" means the rights and authority excepted from the assurances and rights provided to Developer under this Agreement and reserved to the City.

1.1.51 "***School Facilities Assessment"*** means the school facilities review described in Section 5.4.

1.1.52 "***School Financing Mechanism***" means a financing strategy that utilizes Property Lease Revenue, in whole or in substantial part, as a stream of revenue to secure bonds, certificates of participation, or another source of funds, in the maximum commercially feasible amount (estimated to be between Thirty Five Million Dollars ($35,000,000) and Forty Five Million Dollars ($45,000,000)). Funds received through the School Financing Mechanism shall be used entirely to fund the Dana Hills High School Improvements and/or facilities identified in the School Facilities Assessment.

1.1.53 "***Specific Plan***" means the Victoria Boulevard Specific Plan, as approved by the City Council by Ordinance No. _____,on _____, and effective as of _____.

1.1.54 "***Subsequent Development Approvals***" means all permits, licenses, consents, rights and privileges, and other actions subject to approval or issuance by City in connection with Development of the Project on the Property issued by City after the Effective Date.

1.1.55 "***Subsequent Land Use Regulations***" means all ordinances, codes, rules, regulations, City adopted plans and official policies of City adopted and effective after the Effective Date of this Agreement governing Development and use of the Property, including, without limitation, the permitted use of the Property, the density or intensity of use,

subdivision requirements, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement, and construction standards and specifications applicable to the Development of the Property; provided, however, that "Subsequent Land Use Regulations" do not include any City ordinance, resolution, code, rule, regulation or official policy, governing:

(a) the conduct of business, professions, and occupations;

(b) taxes and assessments;

(c) the control and abatement of nuisances;

(d) the granting of encroachment permits and the conveyance of rights and interests which provide for the use of or entry upon public property;

(e) the exercise of the power of eminent domain; and

(f) the amount of processing fees.

1.1.56 "***Term***" means the period of time from the Effective Date until the expiration of this Agreement as provided in Section 2.3, or earlier termination as provided in Section 8.3.

1.1.57 "***Toll Bros.***" means Toll Bros., Inc., a Pennsylvania corporation.

1.1.58 "***Transfer***" means sell, assign, or transfer.

1.1.59 *"**Unaffiliated**"* means and refers to a person or entity that is not an Affiliate.

1.1.60 "***Very Low Income Household***" shall have the meaning ascribed thereto in Health and Safety Code Section 50105.

1.1.61 "***Very Low Income Housing***" means housing which is restricted for rental to and occupancy by Low Income Households at an Affordable Rent.

1.1.62 "***Zoning Code***" means the Title 9, Zoning of the Municipal Code.

1.2 **Exhibits**. The following documents are attached to, and by this reference made a part of, this Agreement:

Exhibit A Legal Description of the Property.

Exhibit B Map showing Property and its location.

Exhibit C Site Plan

Exhibit D Mitigation Monitoring and Reporting Program

Exhibit E Affordable Housing Agreement

Exhibit F Joinder Agreement

Exhibit G Property Lease

2. GENERAL PROVISIONS.

2.1 **Binding Effect of Agreement**. From and following the Effective Date, Development of the Project and City actions on applications for Subsequent Development Approvals respecting the Development of the Project shall be subject to the terms and provisions of this Agreement.

2.2 **Assignment**.

2.2.1 *Release of Transferring Developer*. Upon the Transfer in whole or in part, of Developer's right and interest to all or any portion of the Property, Developer may, at least thirty (30) days prior to completion of the Transfer, apply to City for a release from its obligations hereunder with respect to the portion of the Property so Transferred. City shall approve the partial or full release if: (*i*) Developer is not in Default of this Agreement at the time of the request for release, or provides adequate assurances to City that it will cure any Default prior to the Transfer; (*ii*) with respect to the Transfer of any lot that has not been fully improved, the transferee executes and delivers to City a written assumption agreement in substance and form which is approved by City's Attorney, which approval shall not be unreasonably denied, and in which: (A) the name and address of the transferee is set forth; (B) the transferee expressly assumes the obligations of Developer under this Agreement as to the portion of the Property transferred; (C) the transferee provides commercially reasonable assurances of its performance of the obligations of the Developer that transferee proposes to assume; and (D) the assumption agreement adequately allocates to the transferee (or justifies the non-allocation) credits, reimbursements, or other benefits provided to Developer under this Agreement that relate to the portion of the Property transferred. Failure to obtain City approval of a written assumption agreement hereunder shall not negate, modify or otherwise affect the liability under this Agreement of any transferee or future owner of any portion of the Property. Developer shall remain responsible for all obligations set forth in the Agreement that are not subject to an assignment approved by the City in accordance with this paragraph. Notwithstanding the foregoing, the Parties acknowledge and agree that CUSD's obligations as set forth in Section 5, below, regarding the funding of Dana Point schools may not be assigned to, assumed by, or apportioned to any other party unless the City, in its sole and absolute discretion, consents to such assignment, assumption, or apportionment in writing.

2.3 **Term**.

2.3.1 The term of this Agreement ("***Term***") shall commence on the later of the Effective Date or the date upon which the City's Local Coastal Plan Amendment for the Project is deemed effective and certified pursuant to Section 13544(b)-(c) of Title 14 of the California Code of Regulations, and shall continue thereafter for a period of fifteen (15) years (*"**Original Term***"), unless this Agreement is terminated, modified, or extended by circumstances set forth in this Agreement or by mutual written consent of the Parties; provided, however, that Parties respective rights and obligations under Sections 5 and Section 6 shall survive the expiration of this Agreement and continue until fully discharged and satisfied.

2.3.2 Where a shorter term is not mandated by Applicable Law, the term of any and all discretionary Development Approvals and discretionary Subsequent Development

Approvals shall automatically be extended for the longer of the Term of this Agreement or the term otherwise applicable to such discretionary Development Approvals or discretionary Subsequent Development Approvals. For the avoidance of doubt, the following categories of Development Approvals and Subsequent Development Approvals shall be deemed "not discretionary" for purposes of this Section: grading permits, building permits, improvement permits, landscape permits, wall and fence plans, and signage permits and programs.

2.3.3 Notwithstanding Sections 2.3.1 and 2.3.2, this Agreement shall automatically terminate if any of the following occur: (*i*) vertical development of the Project on the Property has not commenced within five (5) years following the later of the Effective Date or the date upon which the Coastal Commission's certification of the City's Local Coastal Plan Amendment for the Project is deemed effective as described in Section 2.3.1, above, (*ii*) certificates of occupancy and/or completion have not been issued for the entirety of the Project on the Property within ten (10) years following the later of the Effective Date or the date upon which the Coastal Commission's certification of the City's Local Coastal Plan Amendment for the Project is deemed effective as described in Section 2.3.1, above, and (*iii*) certificates of acceptance have been issued within ten (10) years following the later of the Effective Date or the date upon which the Coastal Commission's certification of the City's Local Coastal Plan Amendment for the Project is deemed effective as described in Section 2.3.1, above, for all public improvements required in connection with the development of the Project on the Property. For purposes of this Section 2.3.3 "vertical development" means commencement of construction of core project buildings on site; construction of ancillary buildings and/or parking garages, and grading and underground infrastructure work shall not, by themselves, constitute "vertical development."

3. DEVELOPMENT OF THE PROPERTY.

3.1 **Rights to Develop**. Subject to the terms of this Agreement, Developer shall upon entering into the Property Lease have a vested right to develop the Project on the Property in accordance with, subject to, and to the extent of, the Development Plan. If at any time during the Term, Toll Bros. determines that it will not develop the Project on the Property or will not seek to entitle a modification to the Project and terminates its option to enter into the Property Lease or the Property Lease itself with CUSD, Toll Bros. and the City acknowledge and agree that CUSD may substitute another developer party in Toll Bros.' place for all purposes related to this Agreement, which substitution shall be subject to approval by the City (and which shall not be unreasonably withheld) so long as such substitution is, prior to becoming effective, (*i*) approved by City in writing in accordance with Section 2.2, and (*ii*) consistent with the Development Plan and the Land Use Regulations. Should Toll Bros. determine that it will not develop the Project on the Property or will not seek to entitle a modification to the Project and terminates its option to enter into the Property Lease or the Property Lease itself with CUSD, the City and CUSD agree that any and all rights and obligations of Toll Bros. under this Agreement shall be terminated if a new party is substituted in pursuant to this Section 3.1 and assumes all rights and obligations of Toll Bros. under this Agreement. City and Toll Bros. agree that, for purposes of this Agreement generally, and Section 2.2.1 specifically, "Developer's right and interest to all or any portion of the Property" shall include Toll Bros.' option to enter into the Property Lease and not merely the Property Lease itself. Notwithstanding the foregoing, the Parties acknowledge and agree that CUSD's obligations as set forth in Section 5, below, regarding the funding of Dana Hills High School may not be assigned to

or assumed by or apportioned to any other party unless the City, in its sole and absolute discretion, consents to such assignment, assumption, or apportionment in writing.

3.2 **Effect of Agreement on Land Use Regulations**. Except as otherwise provided under the terms of this Agreement, the rules, regulations and official policies governing permitted uses of the Property, the density and intensity of use of the Property, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications applicable to Development of the Property, shall be those contained in the Development Plan and the Land Use Regulations.

3.3 **[RESERVED]**

3.4 **Timing of Development**. The Parties acknowledge that Developer cannot at this time predict when or the rate at which phases of the Property will be developed. Such decisions depend upon numerous factors which are not within the control of Developer, such as market orientation and demand, interest rates, absorption, completion and other similar factors. Since the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, that the failure of the parties therein to provide for the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the Parties' intent to cure that deficiency by acknowledging and providing that Developer shall have the right to develop the Property in such order and at such rate and at such times as Developer deems appropriate within the exercise of its subjective business judgment. Nothing in this Section is intended to alter the standard durational limits of any applicable permits issued to Developer.

3.4.1 **Entitlement Expiration Date**: Notwithstanding any other provision of this Agreement, the Parties agree that Developer shall commence vertical development of the apartment buildings on the Property within five (5) years following the later of the Effective Date or the date upon which the Coastal Commission certifies the City's Local Coastal Plan Amendment for the Project; provided, however that the City may extend such five (5) year deadline in writing in its sole and absolute discretion. Developer acknowledges and agrees that upon the expiration of such five (5) year deadline (or such longer period as may be authorized by the City in writing in its reasonable direction) City shall have the option to terminate this Development Agreement.

3.5 **Changes and Amendments**. The Parties acknowledge that Development of the Project will likely require Subsequent Development Approvals, and that in connection therewith Developer may determine that changes are desirable in the existing Development Approvals or Development Plan. If Developer finds that such a change is desirable, Developer may apply, in writing, for an amendment to prior Development Approvals or the Development Plan to effectuate such change, and City shall process and act on such application in the normal manner for processing such matters. City shall have no obligation to grant any such application for a Subsequent Development Approval by Developer (including, without limitation, General Plan amendments, zone changes, or variances) that increases the overall intensity or density of Development or, in the sole and absolute discretion of the City's City Manager, otherwise causes a substantial modification of the Development Plan. Except as provided in the preceding sentence, if approved in a form to which Developer and City have both, in their respective sole and absolute discretion, consented in writing, any application effectuating a change in the Development Approvals or Development Plan shall be incorporated herein and any resulting modifications to the Exhibits to this Agreement, shall

be administratively appended to this Agreement for tracking purposes, and a notice thereof shall be recorded in the Official Records of the County of Orange.

3.6 **Reservation of Authority**.

3.6.1 *Limitations, Reservations and Exceptions*. Notwithstanding any other provision of this Agreement, the following Subsequent Land Use Regulations shall apply to the Development of the Project on the Property:

(a) Processing fees and charges of every kind and nature imposed by City to cover the estimated actual Costs to City of processing applications for Development Approvals, or Subsequent Development Approvals, or for monitoring compliance with any Development Approvals or Subsequent Development Approvals granted or issued. Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearing, reports, recommendations, appeals and any other matter of procedure.

(b) Changes adopted by the California Building Standards Commission to the California Building Code, from time to time, as well as local modifications to the California Building Code adopted by City as Subsequent Land Use Regulations.

(c) Regulations imposed by the City which may be in conflict with the Development Plan but which are reasonably necessary to protect the public health or safety. To the extent reasonable and feasible, any such regulations shall be applied and construed consistent with Section 3.6.2 below so as to provide Developer with the rights and assurances provided under this Agreement.

(d) Regulations imposed by the City which are not in conflict with the Development Plan and this Agreement.

(e) Regulations which are in conflict with the Development Plan provided Developer and City have given written consent to the application of such regulations to Development of Property.

(f) Laws and regulations imposed by Federal, State, regional, or other governmental authorities, or imposed directly by the City as necessary to comply with Federal, State, regional or other governmental authorities' regulations, which City is required to enforce against the Property or the Development of the Property.

For purposes of this Section 3.6 the word "conflict" means any City-imposed modification that: (a) changes the permitted uses of the Property, the density and intensity of use (including, but not limited to, floor area ratios of buildings and the maximum number of units), or the maximum height and size of proposed buildings in a manner that is not consistent with the Development Plan; (b) imposes new or additional requirements, or changes existing requirements, for reservation or dedication of land for public purposes or requirements for infrastructure, public improvements, or public utilities that are not otherwise provided for pursuant Development Plan (subject to the reservation of authority in this Section 3.6.1); (c) changes conditions upon Development of the Project on the Property other than as permitted by this Section 3.6.1; (d) expressly limits the timing, phasing, or rate of Development of the

Property in a manner that is not consistent with the Development Plan; (e) limits the location of building sites, grading, or other improvements on the Property in a manner that is not consistent with the Development Plan; (f) unreasonably limits the processing or procuring of applications and approvals of Subsequent Development Approvals; or (g) changes, as against the Project, any obligations regarding affordable housing not specifically required by the Development Plan (except to the extent otherwise necessary to comply with a mandate or law imposed by another governmental authority).

3.6.2 *Future Discretion of City*. This Agreement shall not prevent City, in acting on Subsequent Development Approvals, from applying Subsequent Land Use Regulations which do not conflict with the Development Plan, nor shall this Agreement prevent City from denying or conditionally approving any Subsequent Development Approval on the basis of the Land Use Regulations or any Subsequent Land Use Regulation not in conflict with the Development Plan.

3.6.3 *Modification or Suspension by State or Federal Law*. In the event that State or Federal laws or regulations, enacted after the Effective Date of this Agreement, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations, and this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

3.6.4 *Taxes and Assessments; Reservation of Rights*. This Agreement shall not prevent the City from enacting, levying or imposing any new or increased taxes or assessments that are imposed City-wide and from applying those City-wide taxes or assessments to the Project and/or the Property. Developer shall timely pay all applicable City-wide assessments, and special and general taxes validly imposed in accordance with the Constitution and laws of the State of California. Notwithstanding the foregoing, nothing set forth herein is intended or shall be construed to limit or restrict whatever right the Developer might otherwise have to challenge any fee, charge, assessment, or tax either adopted and imposed by City after the Effective Date.

3.7 **Regulation by Other Public Agencies**. It is acknowledged by the Parties that other public agencies not subject to control by City possess authority to regulate aspects of the Development of the Project on the Property, and this Agreement does not limit the authority of such other public agencies.

3.8 **Compliance with Government Code Section 66473.7**. As mandated by Government Code Section 65867.5, any tentative map prepared for the subdivision(s) included within the Project will comply with Government Code Section 66473.7.

3.9 **Vesting Tentative Maps**. If any tentative or final subdivision map, or tentative or final parcel map, heretofore or hereafter approved in connection with Development of the Project on the Property, is a vesting map under the Subdivision Map Act (Government Code Section 66410, *et seq.*), and if this Agreement is determined by a final judgment to be invalid or unenforceable insofar as it grants a vested right to develop to Developer, then and to that extent the rights and protection afforded Developer under the laws and ordinances applicable to vesting maps shall

supersede the provisions of this Agreement. Except as set forth immediately above, Development of the Property shall occur only as provided in this Agreement, and the provisions in this Agreement shall be controlling over any conflicting provision of law or ordinance concerning vesting maps.

3.9.1 *Term of Vesting Tentative Map*. If any tentative subdivision map or tentative parcel map, whether vesting or non-vesting, is hereafter approved in connection with Development of the Project on the Property, the term of said tentative vesting or non-vesting subdivision or parcel map shall be extended to the same as the Term of this Development Agreement.

4. REVIEW FOR COMPLIANCE.

4.1 **Periodic Review**. During the Term, the City Council or, at City's election City's City Manager, shall review this Agreement annually during May of each year following the Effective Date of this Agreement, in order to ascertain the good faith compliance by Developer with the terms of the Agreement. As part of that review, Developer shall submit an annual monitoring review statement describing its actions in compliance with this Agreement, in a form acceptable to the City's City Manager, by April 10 of that year. The statement shall be accompanied by an annual review and administration fee sufficient to defray the estimated costs of review and administration of the Agreement during the succeeding year. The amount of the annual review and administration fee shall be set by resolution of the City Council. City shall not hold an annual review pursuant to this Section unless it provides Developer at least thirty (30) days written notice of such annual review.

4.2 **Special Review**. The City Council may order a special review of compliance with this Agreement at any time. Developer shall cooperate with the City in the conduct of such special reviews.

4.3 **Procedure**. In connection with any periodic or special review, each Party shall have a reasonable opportunity to assert matters which it believes have not been undertaken in accordance with the Agreement, to explain the basis for such assertion, and to receive from the other Party a justification of its position on such matters. If on the basis of the Parties' review of any terms of the Agreement, any Party concludes that the other Party has not complied in good faith with the terms of the Agreement, then such Party may issue a written "***Notice of Non- Compliance***" specifying the grounds therefor and all facts demonstrating such non-compliance. The Party receiving a Notice of Non-Compliance shall have thirty (30) days to respond in writing to said Notice. If a Notice of Non-Compliance is contested, the Parties shall have up to sixty (60) days to arrive at a mutually acceptable resolution of the matters occasioning the Notice. In the event that the Parties are not able to arrive at a mutually acceptable resolution of the matter(s) by the end of the sixty (60) day period, the Party alleging the non-compliance may thereupon pursue the remedies provided in Section 8.

4.4 **Certificate of Agreement Compliance**. If, at the conclusion of a periodic review pursuant to Section 4.1 or special review pursuant to Section 4.2, Developer is found to be in compliance with this Agreement, City shall, upon request by Developer, issue a "Certificate of Agreement Compliance" ("***Certificate***") to Developer stating that after the most recent periodic or special review and based upon the information known or made known to the City's City Manager and City Council that (1) this Agreement remains in effect and (2) Developer is in compliance. The Certificate shall be in recordable form, shall contain information necessary to communicate constructive record notice of the finding of compliance, shall state whether the Certificate is issued

after a Periodic or Special Review and shall state the anticipated date of commencement of the next Periodic Review. Developer may record the Certificate with the County Recorder. Additionally, Developer may at any time request from the City a Certificate stating, in addition to the foregoing, which obligations under this Agreement have been fully satisfied with respect to the Property, or any lot or parcel within the Property.

5. MINIMUM FUNDING FOR DANA POINT SCHOOLS.

5.1 **Property Lease Revenue Fund Expenditures – First Thirty (30) Years.** For the first thirty (30) years following the receipt of the first Property Lease Revenues CUSD shall use all Initial Lease Revenues toward capital improvements at Dana Hills High School and/or facilities identified in the School Facilities Assessment.

5.1.1 *School Financing Mechanism*: From and after the Effective Date, CUSD shall diligently and expeditiously seek to enter into one or more School Financing Mechanisms.

5.1.2 *Property Lease Revenues Received Prior to Forming a School Financing Mechanism*: Until such time as CUSD has entered into a School Financing Mechanism, it shall hold the Property Lease Revenue in the Property Lease Revenue Fund. Funds in the Property Lease Revenue Fund may be expended from time to time on Dana Hills High School Improvements and/or facilities identified in the School Facilities Assessment; provided, however, that, if CUSD has not entered into a School Financing Mechanism within two (2) years after the later of the Effective Date or the date on which the first Property Lease Revenues are received by CUSD, CUSD shall develop a Property Lease Revenue Expenditure Plan, and shall at all times diligently pursue implementation of the Property Lease Revenue Expenditure Plan.

5.1.3 *Property Lease Revenues Received After the Repayment of Debt Associated with the School Financing Mechanism(s)*. If the School Financing Mechanism(s) do(es) not, in combination with Property Lease Revenues obtained prior to the establishment of the School Financing Mechanism(s), result in the expenditure of all of the Initial Lease Revenues on Dana Hills High School Improvements and/or facilities identified in the School Facilities Assessment, then within one (1) year following the expiration of the School Financing Mechanism(s), CUSD shall develop a Property Lease Revenue Expenditure Plan, and shall at all times diligently pursue implementation of the Property Lease Revenue Expenditure Plan.

5.2 **Property Lease Revenue Fund Expenditures – After First Thirty (30) Years**. Following receipt of all Initial Lease Revenues, CUSD may continue to use future Property Lease Revenues for the Dana Hills High School Improvements and/or facilities identified in the School Facilities Assessment, and/or for any other CUSD capital outlay and facilities needs CUSD-wide; provided, however, CUSD agrees that, unless all capital improvements needs for CUSD schools in the City are fully satisfied, the proportion of such future Property Lease Revenue expenditures for CUSD schools and administrative buildings in the City shall equal or exceed, in total, the proportion of the total square footage of all CUSD school space (including charter schools) and administrative buildings in the City as compared to the total square footage of all CUSD school space (including charter schools) and administrative buildings district-wide.

5.3 **Reporting**. CUSD shall, upon written request by City, (*i)* promptly provide a Funding Certification, and/or (*ii*) an annual update regarding the balance of any debt secured by the Property Lease Revenue, the balance in the Property Lease Revenue Fund, the expenditures from the Property Lease Revenue Fund, and anticipated future amounts to be deposited into the Property Lease Revenue Fund.

5.4 **CUSD Facilities Review.** Within two (2) years following the Effective Date CUSD shall complete and certify its review and assessment of the specific capital outlay needs of school sites located in the City. First priority projects shall only include needs in CUSD's School Facilities Assessment and projects identified through site stakeholder engagement (including without limitation parent teacher associations) for schools located in the City.

6. AFFORDABLE HOUSING COMMITMENTS

6.1 **Affordable Housing Agreement**. Concurrent with the execution of this Agreement, the City and Toll Bros. shall enter into an Affordable Housing Agreement in the form attached hereto as **Exhibit E**, which contains the following non-exhaustive list of essential terms:

6.1.1 No less than one-third (1/3) of the Affordable Units shall be rented as Very Low Income Housing.

6.1.2 No less than one-third (1/3) of the Affordable Units shall be rented as Low Income Housing.

6.1.3 The remaining Affordable Units shall be rented as Moderate Income Housing.

6.1.4 The Affordable Housing Agreement shall be recorded as a covenant against the Property and shall remain in place for and ensure continued affordability for a minimum period of fifty-five (55) years.

6.1.5 The quality, and range of sizes and types of Affordable Units (expressed in square footage and number of bedrooms) shall be substantially equal to the quality and range of sizes and types of market rate units in the Project.

6.1.6 The Affordable Units shall be distributed throughout the Project, such that the Affordable Units are blended in with market rate units.

6.2 **Waiver of Bonuses and Incentives**. The Parties acknowledge and agree that development of the Project on the Property shall not be augmented or modified with additional density bonus units or the exercise of incentive and/or concession rights under any current or future law, including without limitation the State Density Bonus Law (Government Code Section 65915 *et seq.*), and/or the Municipal Code provisions implementing the State Density Bonus Law (Municipal Code Section 4.40.10 *et seq.*). For the avoidance of doubt, CUSD and Toll Bros. each specifically waive and relinquish any rights they may have under the State Density Bonus Law, Municipal Code Section 4.40.10 *et seq.,* and any other current or future law providing bonuses, incentives, and/or concessions in connection with the development of housing (including affordable housing).

6.3 **Property Lease**. Within seven (7) days of execution of the Property Lease, CUSD and Toll Bros. shall deliver to City a fully executed copy of the Property Lease. The Property Lease may be modified upon written agreement of CUSD and Toll Bros.; however, any future amendment(s) shall be provided to the City to confirm that such amendment(s) do not adversely impact the material economic and/or affordable housing terms of this Agreement.

6.4 **Joinder Agreement**. Concurrent with the execution of this Agreement, CUSD shall execute and deliver to City and Toll Bros the Joinder Agreement, which thereafter shall be recorded in the Official Records of the County of Orange

7. ADDITIONAL PUBLIC BENEFITS.

7.1 **Community Benefit**. Within ten (10) days following the City's issuance of the first building permit for the construction of the Project's main structure, Toll Bros. shall deliver to City a single lump sum payment in the amount of Six Million Three Hundred Thousand Dollars ($6,300,000) which, in addition to providing considerable community benefit opportunities to the City, satisfies any all City park and recreation fees and public art fees.

7.2 **Park In Lieu Obligations**. Provision of the community benefit payment specified in Section 7.1, coupled with the timely provision of park and open space amenities as specified in the Development Plan shall be deemed to fully satisfy the requirements of Municipal Code Section 7.36.010 *et. seq.*

8. DEFAULT AND REMEDIES.

8.1 **Specific Performance Available**. The Parties acknowledge that money damages and remedies at law generally are inadequate and specific performance is a particularly appropriate remedy for the enforcement of this Agreement and should be available to Developer and City because the size, nature and scope of the Project, make it impractical or impossible to restore the Property to its natural condition once implementation of this Agreement has begun. After such implementation, Developer and/or City may be foreclosed from other choices they may have had to utilize or condition the uses of the Property or portions thereof. Developer and City have invested significant time and resources in performing extensive planning and processing for the Project and in negotiating and agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement, such that it would be extremely difficult to determine the sum of money which would adequately compensate Developer and/or City for such efforts. The Parties therefore agree that specific performance shall be the sole remedy available for a breach of this Agreement.

8.2 **Money Damages Unavailable**. Neither Developer nor City shall not be entitled to any monetary compensation, whether characterized as money damages or injunctive or other relief compelling the payment of money, including attorney fees, from the other Party by reason of, arising out of, based upon, or relating to (a) the interpretation, enforcement, performance, or breach of any provision of this Agreement, or (b) the respective rights or duties of any of the Parties under the Development Approvals, the Subsequent Development Approvals, any Development Requirement, the Land Use Regulations, or the Subsequent Land Use Regulations. Notwithstanding the foregoing, City may recover from Developer any fees owed under or pursuant to this Agreement; and Developer

may recover from City the right to exercise any credits and the right to receive any reimbursements under or pursuant to this Agreement.

8.3 **Termination of Agreement**.

8.3.1 *Termination of Agreement for Default of Developer*. City in its discretion may terminate this Agreement for any failure of Default by Developer; provided, however, City may terminate this Agreement pursuant to this Section only after following the procedure set forth in Section 4.3 and thereafter providing written notice to Developer of the Default setting forth the nature of the Default and the actions, if any, required by Developer to cure such Default and, where the Default can be cured, Developer has failed to take such actions and cure such Default within thirty (30) days after the effective date of such notice or, in the event that such Default cannot be cured within such thirty (30) day period but can be cured within a longer time, as reasonably determined by the City in its sole discretion, Developer has failed to commence the actions necessary to cure such Default within such thirty (30) day period and to diligently proceed to complete such actions and cure such Default.

8.3.2 *Termination of Agreement for Default of City*. Developer in its discretion may terminate this Agreement for any Default by City; provided, however, Developer may terminate this Agreement pursuant to this Section only after providing written notice by Developer to the City of the Default setting forth the nature of the Default and the actions, if any, required by City to cure such Default and, where the Default can be cured, the failure of City to cure such Default within thirty (30) days after the effective date of such notice or, in the event that such Default cannot be cured within such thirty (30) day period, the failure of City to commence to cure such Default within such thirty (30) day period and to diligently proceed to complete such actions and to cure such Default.

8.3.3 *Rights and Duties Following Termination*. Upon the termination of this Agreement, no Party shall have any further right or obligation hereunder except with respect to (*i*) any obligations to have been performed prior to said termination, or (*ii*) any Default in the performance of the provisions of this Agreement which has occurred prior to said termination.

9. INDEMNIFICATION AND THIRD PARTY LITIGATION.

9.1 **Indemnities by Developer**.

9.1.1 *General Indemnity*. Developer agrees to indemnify, protect, defend, and hold harmless the City Parties and CUSD Parties from and against any and all Claims which may arise directly from the acts, omissions, or operations of Developer or Developer's agents, contractors, subcontractors, agents, or employees pursuant to this Agreement, but excluding any loss resulting solely from the intentional or active negligence of the City Parties or CUSD Parties Notwithstanding the foregoing, (*i*) City or CUSD, as applicable, shall have the right to select and retain counsel to defend any such action or actions and Developer shall pay the cost thereof; provided, however, that the Parties agree to attempt in good faith to coordinate and/or consolidate their defense of any Claim that is subject to the indemnification provisions of this Section; and (*ii*) this indemnity obligation shall not apply to any Claim for which

Developer has provided a separate indemnity to the City or CUSD, as applicable, by way of a separate instrument mutually accepted by the Parties.

9.1.2 *Prevailing Wage Indemnity and Notice to Developer of Labor Code Section 1781*. In connection with, but without limiting, the indemnification obligations set forth in Section 9.1.1, Developer hereby expressly acknowledges and agrees that the City or CUSD is not by this Agreement affirmatively representing, and has not previously affirmatively represented, to the Developer or any contractor(s) of Developer for any construction on or Development on or adjacent to the Property, in writing or otherwise, in a call for bids or any agreement or otherwise, that any work to be undertaken on the Property, as may be referred to in this Agreement or construed under this Agreement, is *not* a "public work," as defined in Labor Code Section 1720, or under any similar existing or hereinafter enacted law or regulation. The Parties agree that, in connection with the Development and construction (as defined by Applicable Law) of the Project, including, without limitation, any and all public works (as defined by Applicable Law), Developer shall bear all risks of payment or non-payment of prevailing wages under California law and/or federal law and/or the implementation of Labor Code Section 1781, as the same may be amended from time to time, and/or any other similar law. With respect to the foregoing, Developer shall be solely responsible, expressly or impliedly and legally and financially, for determining and effectuating compliance with all applicable federal, state and local public works requirements, prevailing wage laws, and labor laws and standards, and City or CUSD makes no representation, either legally and/or financially, as to the applicability or non-applicability of any federal, state and local laws to the construction of the Project as it may be amended pursuant hereto or otherwise.

Without limiting the foregoing, Developer shall indemnify, protect, defend and hold harmless the City Parties and CUSD Parties, with counsel reasonably acceptable to City or CUSD, as applicable, from and against "increased costs" as defined in Labor Code Section 1781 (including City's and CUSD's, as applicable, reasonable attorneys' fees, court and litigation costs, and fees of expert witnesses) in connection with the Development or construction (as defined by Applicable Law) of or on the Property, that results or arises in any way from (1) non-compliance by Developer of the requirement, if and to the extent applicable, to pay federal or state prevailing wages and hire apprentices, or (2) failure by Developer to provide any required disclosure or identification as required by Labor Code Section 1720 *et seq.* including without limitation specifically Labor Code Section 1781, as the same may be amended from time to time. The foregoing indemnity shall survive the expiration or earlier termination of this Agreement.

9.2 **Indemnification Procedures**. Wherever this Agreement requires Developer to indemnify any City Party or CUSD Party, as applicable:

9.2.1 *Prompt Notice*. City and/or CUSD, as applicable, shall promptly notify Developer in writing of any Claim.

9.2.2 *Cooperation*. City and/or CUSD, as applicable, shall reasonably cooperate with Developer's defense, provided Developer reimburses City's and/or CUSD's, as applicable, actual reasonable out of pocket expenses (including Legal Costs) of such cooperation.

9.2.3 *Settlement*. Any settlement shall require the prior written consent of both City and/or CUSD, as applicable, and Developer, which consent shall not be unreasonably withheld if the settlement is objectively financially reasonable. If City and/or CUSD, as applicable, refuses to authorize a settlement that is objectively financially reasonable, it shall be responsible for costs and damages of the Claim that are in excess of those incurred through the date of the City's and/or CUSD, as applicable, rejection of the proposal, plus the amount of the proposal.

9.2.4 *City and/or CUSD Cooperation*. City and/or CUSD, as applicable, shall reasonably cooperate with Developer's defense, provided Developer reimburses City and/or CUSD, as applicable, for its actual reasonable out of pocket expenses (including Legal Costs) of such cooperation.

9.2.5 *Insurance Proceeds*. Developer's obligations shall be reduced by net insurance proceeds City and/or CUSD, as applicable, actually receives for the matter giving rise to indemnification.

9.3 **Third Party Litigation**. City and/or CUSD, as applicable, shall promptly notify Developer of any Claim against City and/or any City Party, and/or CUSD and/or any CUSD Party, as applicable, and/or any other administrative or judicial action to challenge, set aside, void, annul, limit or restrict the approval and continued implementation and enforcement of this Agreement. Developer agrees to reimburse the City and/or CUSD, as applicable, for its reasonable Legal Costs incurred in connection with the defense of the Claim and to fully defend and indemnify City and/or CUSD, as applicable, for all costs of defense and/or judgment obtained in any such action or proceeding. City and/or CUSD, as applicable, and Developer agree to cooperate in the defense of such action(s).

9.4 **Challenge to Enforceability of Specific Obligations**. The Parties have determined in good faith that each of the provisions of this Agreement are valid and enforceable. Notwithstanding, if a court of competent jurisdiction finds invalid or unenforceable any provision of this Agreement purporting to supersede or otherwise render ineffectual any federal, state, or local law or regulation in existence as of the Effective Date, Developer shall perform its obligations under such law or regulation as it existed on the Effective Date, or as otherwise specifically directed by a court of competent jurisdiction.

10. MORTGAGEE PROTECTION.

10.1 **Encumbrances**. The Parties hereto agree that this Agreement shall not prevent or limit Developer from encumbering the Property or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Property, unless otherwise determined by the Property Lease which shall control. City acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with Developer and representatives of such lenders to negotiate in good faith any such request for interpretation or modification. Subject to compliance with Applicable Laws, City will not unreasonably withhold its consent to any such requested interpretation or modification provided City determines such interpretation or modification is consistent with the intent and purposes of this Agreement. Any Mortgagee of the Property shall be entitled to the following rights and privileges:

(a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Property made in good faith and for value, unless otherwise required by law.

(b) The Mortgagee of any mortgage or deed of trust encumbering the Property, or any part thereof, which Mortgagee has submitted a request in writing to the City in the manner specified herein for giving notices, shall be entitled to receive written notification from City of any Default by Developer in the performance of Developer's obligations under this Agreement.

(c) If City timely receives a request from a Mortgagee requesting a copy of any notice of Default given to Developer under the terms of this Agreement, City shall make a good faith effort to provide a copy of that notice to the Mortgagee within ten (10) days of sending the notice of Default to Developer. The Mortgagee shall have the right, but not the obligation, to cure the Default during the remaining cure period allowed such Party under this Agreement.

(d) Any Mortgagee who comes into possession of the Property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Property, or part thereof, subject to the terms of this Agreement. However, no Mortgagee (including one who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, lease termination, eviction or otherwise) shall have any obligation to construct or complete construction of improvements, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to develop the Property or receive any benefit provided under this Agreement unless it first agrees in writing to fully comply with this Agreement and the Development Plan.

11. MISCELLANEOUS PROVISIONS.

11.1 **Option to Terminate Due to Litigation or Referendum**. If (1) a lawsuit is filed challenging the Development Approvals or the ordinance approving this Agreement within the time periods for the filing of such lawsuits under the California Environmental Quality Act (Public Resources Code Section 21000 *et seq*.) or the State Planning and Zoning Law (Government Code Section 65000 *et seq*.), or (2) if a referendum seeking recission of some or all of the Development Approvals is circulated, qualifies for voter consideration at a City-wide election and is either approved by the voters or the Development Approvals rescinded by the City Council, the Parties shall meet and confer concerning the potential impact of the lawsuit on this Agreement and the Development of the Project. Within thirty (30) days of such meeting, if Developer determines that such litigation may have an unacceptable adverse impact on the Project or its rights under this Agreement, Developer may in its discretion terminate this Agreement by sending City a written notice of such termination, and the Parties shall be relieved of any further obligations to this Agreement, to the extent that such obligations have not been performed or have been incurred prior to such termination. Developer acknowledges and agrees that if this Agreement is terminated, other than by court order, City shall have the option to restore the General Plan, the Specific Plan, and zoning to the condition that existed prior to the adoption of the Development Approvals or ordinance approving this Agreement. In no event, however, shall Developer bring or cause to bring a lawsuit in any court against City to invalidate any

provision in this Agreement that would result in the ability of Developer to keep the Development Approvals without having to comply with the terms and conditions of this Agreement.

11.2 **Recordation of Agreement**. This Agreement shall be recorded with the County Recorder by the City Clerk within the period required by Section 65868.5 of the Government Code. Amendments approved by the Parties, and any termination, shall be similarly recorded.

11.3 **Entire Agreement**. This Agreement sets forth and contains the entire understanding and agreement of the Parties, and there are no oral or written representations, understandings or ancillary covenants, undertakings or agreements which are not contained or expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.

11.4 **Estoppel Certificate**. Any Party hereunder may, at any time, deliver written notice to any other Party requesting such Party to certify in writing that, to the best knowledge of the certifying Party, (*i*) this Agreement is in full force and effect and a binding obligation of the Party; (*ii*) this Agreement has not been amended or modified either orally or in writing, or if so amended, identifying the amendments; and (*iii*) the requesting Party is not in Default in the performance of its obligations set forth in this Agreement or, if in Default, to describe therein the nature and amount of any such Defaults. A Party receiving a request hereunder shall execute and return such Certificate within sixty (60) days following the receipt thereof. Any third party including a Mortgagee shall be entitled to rely on the Certificate.

11.5 **Severability**. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect, unless and to the extent the rights and obligations of any Party has been materially altered or abridged by such holding.

11.6 **Interpretation and Governing Law**. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. Any dispute between City, CUSD and/or Developer over this Agreement shall be filed, and tried, in the Superior Court of the County of Orange, and the Parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting Party or in favor of City shall not be employed in interpreting this Agreement, each of the Parties having been represented by counsel in the negotiation and preparation hereof.

11.7 **Section Headings**. All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

11.8 **Singular and Plural**. As used herein, the singular of any word includes the plural.

11.9 **Time of Essence**. Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.

11.10 **Waiver**. Failure of a Party to insist upon the strict performance of any of the provisions of this Agreement by the other Party, or the failure by a Party to exercise its rights upon the Default of the other Party, shall not constitute a waiver of such Party's right to insist and demand strict compliance by the other Party with the terms of this Agreement thereafter.

11.11 **No Third Party Beneficiaries**. This Agreement is made and entered into for the sole protection and benefit for the Parties and their successors and assigns. No other Person shall have any right of action based upon any provision of this Agreement.

11.12 **Force Majeure**. Subject to the limitations set forth below, the Term of this Agreement and the time within which any Party shall be required to perform any act under this Agreement shall be extended by a period of time equal to the number of days during which performance of such act is delayed unavoidably and beyond the reasonable control of the Party seeking the delay by: strikes; acts of God; a declaration of emergency as a result of a public health issue, including the occurrence of any pandemic; enemy action; civil disturbances; wars; terrorist acts; fire; unavoidable casualties; referenda; or mediation, arbitration, litigation, or other administrative or judicial proceeding commenced by a third party and involving the Development Approvals or Subsequent Development Approvals or this Agreement (each a "***Force Majeure Delay***"). An extension of time shall be for the period of the Force Majeure Delay and shall commence to run from the time of the commencement of the cause, if written notice by the Party claiming such extension is sent to the other Parties within ten (10) days of the commencement of the cause. If written notice is sent after such ten (10) day period, then the extension shall commence to run no sooner than ten (10) days prior to the giving of such notice. The cumulative extensions of time for Force Majeure Delays for individual performance obligations hereunder shall not exceed six (6) months, and the cumulative extensions of the expiration of this Agreement as a result of Force Majeure Delays shall not exceed one (1) year, unless otherwise agreed to in writing in accordance with Section 11.13.

11.13 **Extension of Time Limits**. The time limits set forth in this Agreement may be extended by mutual consent in writing of the Parties without amendment to this Agreement. Except as otherwise specified in this Agreement, each Party may agree or refuse to agree to any extension of time in its sole and absolute discretion.

11.14 **Mutual Covenants**. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the Party benefited thereby of the covenants to be performed hereunder by such benefited Party.

11.15 **Successors in Interest**. As provided in Government Code Section 65868.5, and except as otherwise provided in this Agreement, all of the terms, provisions, covenants and obligations contained in this Agreement shall be binding upon, and inure to the benefit of, City and Developer, and their respective successors and assigns. In no event shall this Agreement impose obligations on individual unit owners or residents of the Project who are not otherwise affiliated with Developer. From and after the date that certificates of occupancy have been issued (or a final inspection is completed when no certificate of occupancy is required) for all buildings and improvements to be constructed on a parcel within the Project (or with respect to a single- family dwelling unit on a single-family residential lot), such parcel shall not be burdened with the obligations of Developer under this Agreement.

11.16 **Counterparts**. This Agreement may be executed by the Parties in counterparts, which counterparts shall be construed together and have the same effect as if each of the Parties had executed the same instrument.

11.17 **Project as a Private Undertaking**. It is specifically understood and agreed by and between the Parties hereto that the Development of the Project is a private Development, that no Party is acting as the agent of the other in any respect hereunder, and that each Party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement. The only relationship between City and Developer is that of a government entity regulating the Development of private property and the owner of such property.

11.18 **Further Actions and Instruments**. Each of the Parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. Upon the request of any Party at any time, the other Parties shall promptly execute, with acknowledgment or affidavit if reasonably required, and file or record such required instruments and writings and take any actions as may be reasonably necessary under the terms of this Agreement to carry out the intent and to fulfill the provisions of this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

11.19 **Eminent Domain**. No provision of this Agreement shall be construed to limit or restrict the exercise by City of its power of eminent domain.

11.20 **Amendments in Writing/Cooperation**. This Agreement may be amended only by written consent of both Parties specifically approving the amendment and in accordance with the Government Code provisions for the amendment of Development Agreements. The Parties shall cooperate in good faith with respect to any amendment proposed in order to clarify the intent and application of this Agreement, and shall treat any such proposal on its own merits, and not as a basis for the introduction of unrelated matters.

11.21 **Authority to Execute**. The Person or Persons executing this Agreement on behalf of Developer warrants and represents that he/they have the authority to execute this Agreement on behalf of his/their corporation, partnership or business entity and warrants and represents that he/they has/have the authority to bind Developer to the performance of its obligations hereunder.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the day and year first set forth above.

[Signatures Attached]

City: City OF DANA POINT

By _____
Mayor

ATTEST:

By _____
City Clerk

APPROVED AS TO FORM:

By _____
City Attorney

(SEAL)

Developer: TOLL BROS., INC., a corporation

By _____

Title _____

By _____

Title _____

By _____

Title _____

CUSD: CAPISTRANO UNIFIED SCHOOL DISTRICT

By _____
Clark Hampton

Title Deputy Superintendent

By _____

Title _____

By _____

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 _____, 2024 before me,

Notary Public (insert name and title of the officer),

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]

EXHIBIT A

Legal Description of the Property

EXHIBIT B

Map Showing Property and Its Location

EXHIBIT C

Site Plan

EXHIBIT D

Mitigation Measures

EXHIBIT E

Affordable Housing Agreement

EXHIBIT F

Joinder Agreement

[SEE FOLLOWING PAGES]

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

CITY OF DANA POINT
33282 Golden Lantern
Dana Point, CA 92629
Attn: City Attorney

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

[This Joinder Agreement is recorded at the request and for the benefit of the City of Dana Point and is exempt from the payment of a recording fee pursuant to Government Code Sections 6103 and 27383]

JOINDER AGREEMENT

THIS JOINDER AGREEMENT ("**Joinder Agreement**") is executed as of _____, 20__, by CAPISTRANO UNIFIED SCHOOL DISTRICT, a public school district duly organized and validly existing under the Constitution and the laws of the State of California ("**Joining Party**" or "**Ground Lessor**"), and delivered to CITY OF DANA POINT, a California municipal corporation ("**City**"), as Ground Lessor of that certain ground lease agreement (the "**Ground Lease**") between the Ground Lessor and TOLL BROS., INC., a Pennsylvania corporation (the "**Developer**").

RECITALS

A. Ground Lessor owns that certain real property located within the City of Dana Point, County of Orange, State of California, and more particularly described in Exhibit "**A**" attached hereto and incorporated herein (the "**Property**") and has agreed to lease the Property to the Developer for the purposes of the Project, as defined below.

B. Developer intends to develop and operate on the Property a multi-family apartment complex containing not more than three hundred six (306) residential dwelling units, with not less than forty-six (46) of such units restricted to occupancy by very low income, low income, and moderate income households, and with associated public and private open space and amenities (collectively, the "**Project**").

C. On or about the same date hereof, City, Developer, and CUSD have entered into that certain Development Agreement which sets forth the respective expectations of City, Developer and CUSD with respect to the Project, including, without limitation, the required approvals, the development limitations, and the required private and public open space and recreational amenities (the

"**Development Agreement**").

D. Pursuant to and as a condition of City entering into the Development Agreement, on or about the same date hereof City and Developer have entered into that certain Regulatory Agreement and Declaration of Covenants and Restrictions, which imposes the foregoing affordability requirements (the "**Regulatory Agreement**").

E. Under the terms of the Ground Lease, the Developer has the right to encumber the Property.

F. Joining Party expects to realize direct and indirect benefits as a result of the Regulatory Agreement.

G. Terms used but not defined in this Joinder Agreement shall have the meanings defined for those terms in the Regulatory Agreement.

NOW, THEREFORE, Joining Party agrees as follows:

AGREEMENT

1. Joinder–Regulatory Agreement. Joining Party hereby agrees to evidence its consent to the Regulatory Agreement and its agreement that the Regulatory Agreement bind the fee simple interest in the Property and the leasehold interest created by the Ground Lease, and further agrees that the Regulatory Agreement run with the land; provided that, by recording the Regulatory Agreement, the City, on behalf of itself and its successors, and assigns and on behalf of all other parties who, pursuant to the terms of the Regulatory Agreement, shall be entitled to the benefit thereof, shall be deemed to have agreed that: (i) Ground Lessor's execution of this joinder to the Regulatory Agreement shall not give rise to any personal liability or obligation under the Regulatory Agreement on the part of the Ground Lessor, its successors and assigns or any present or future officer, director, employee, trustee, member, agent or advisor of any of the foregoing, and (ii) all notices of default hereunder and under the Regulatory Agreement to the Developer shall also be given to the Ground Lessor, and the Ground Lessor shall have the right to cure any such default on the terms and conditions set forth in the Regulatory Agreement and City shall accept or reject such cure on the same basis as if made by the Developer.

2. Further Assurances. Joining Party agrees to execute and deliver such other instruments and documents and take such other action, as the City may reasonably request, in connection with the transaction contemplated by this Joinder Agreement.

3. Governing Law and Venue. This Joinder Agreement and the Regulatory Agreement and other instruments given pursuant hereto shall be construed in accordance with and be governed by the laws of the State of

California. In the event of any legal action to enforce or interpret this Joinder Agreement or the Regulatory Agreement, the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California, and the parties hereto agree to and do hereby submit to the jurisdiction of such court, notwithstanding Code of Civil Procedure Section 394.

4. Notices. If at any time after the execution of this Joinder Agreement it shall become necessary or convenient for one of the parties hereto to serve any notice, demand or communication upon the other party, such notice, demand or communication shall be in writing and shall be served personally or by depositing the same in the registered United States mail, return receipt requested, postage prepaid and:

To the City:

City of Dana Point
33282 Golden Lantern
Dana Point, CA 92629
Attn: City Attorney

With a copy to:

Rutan & Tucker, LLP
18575 Jamboree Road, 9th Floor
Irvine, CA 92612
Attn: A. Patrick Muñoz

To the Joining Party/Ground Lessor:

_____
_____
_____

5. Effective Date. The effective date (the "**Effective Date**") of this Joinder Agreement concurs with the earlier of the date the Memorandum of the Ground Lease or the Development Agreement is recorded in the office of the County Recorder of Orange County, California.

IN WITNESS WHEREOF, Joining Party has executed this Joinder Agreement under seal as of the day and year first above written.

Signature Follows

JOINING PARTY/GROUND LESSOR:

CAPISTRANO UNIFIED SCHOOL DISTRICT, a public school district duly organized and validly existing under the Constitution and the laws of the State of California

By: _____
Name:
Its:
Dated: _____, 20__

APPROVED AS TO FORM:
RUTAN & TUCKER, LLP

By:_____ Dated:_____
A. Patrick Muñoz, City Attorney

Exhibit A
LEGAL DESCRIPTION

EXHIBIT G

Property Lease

[NOTE: Form of Lease to be as approved by CUSD Board of Directors, consistent with Exhibit B to Option Agreement dated January 15, 2019, as amended. To include the following additional provision as provided by the Fourth Amendment to Option to Lease Real Property between CUSD and Toll Bros. (and wherein "Intended Final Project Unit Count" means the unit count in the "*Core Project Characteristics" defined by the Development Agreement between the parties)*: Toll Bros. and CUSD, and their respective successors and assigns, will not (i) seek a density bonus or other incentive in connection with the development of the Property beyond the maximum unit counts specified in the Intended Final Project Unit Count, (ii) apply for or allow the addition of any accessory dwelling units on the Property, (iii) apply for or allow an urban lot split on the Property, or (iv) exercise any right to augment the density or intensity of the Project on the Property beyond the maximum unit counts specified in the Intended Final Project Unit Count.