

DISPOSITION AND DEVELOPMENT AGREEMENT

BETWEEN

CITY OF HAYWARD
A California Charter City

AND

BMODDRE2, LLC
A California limited liability company

Dated as of September 15, 2020

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DISPOSITION AND DEVELOPMENT AGREEMENT

This Disposition and Development Agreement (the "Agreement") is entered into as of September 15, 2020 (the "Effective Date"), by and between the City of Hayward, a California charter city (the "City"), and BMODDRE2, LLC, a California limited liability company ("Developer"), with reference to the following facts, understandings and intentions of the parties:

RECITALS

A. These Recitals refer to and utilize certain capitalized terms that are defined in Article 1 of this Agreement. The Parties intend to refer to those definitions in connection with the use of capitalized terms in these Recitals.

B. The City holds title to certain real property located in the City of Hayward, California, (the "Property") consisting of the Dealership Development Parcel and the Adjacent Parcel. Under the terms of that certain Purchase and Sale Agreement between the City and Department of Transportation ("Caltrans"), the City must transmit all of the sales proceeds from the sale of the Dealership Development Parcel and the Adjacent Parcel to Caltrans. The City does not currently have any independent ownership interest in the Property that would allow the City to develop the Property independently. The term Property as used in this Agreement will refer to the entire Property, including all subdivisions thereof contemplated in this Agreement.

C. The City currently owns fee title to six parcels of property located at 24744-24874 Mission Boulevard in the City of Hayward, California (collectively, the "Swap Parcel"). The City acquired the Swap Parcel for economic development purposes. The Swap Parcel has been and is currently used for vehicle parking supporting automotive dealerships.

D. Consistent with the Hayward General Plan (the "General Plan") and the current zoning designation for the Dealership Development Parcel, the Parties desire to cause the construction and development of the Dealership Development Parcel for the primary purposes of operating a new automobile sales and full service repair facility thereon. The development of the Dealership Development Parcel shall include the construction of an approximately 57,500 square foot automobile sales and full service auto repair facility and landscaping and other site improvements, in order to establish a first-class automobile sales and full service auto repair facility on the Dealership Development Parcel (the "Improvements"), under the Subaru Brand as more fully described herein.

E. Consistent with the General Plan and the current zoning designation for the Adjacent Parcel, the City desires to restrict the construction and development of the Adjacent Parcel for the primary purposes of providing low and moderate income housing.

F. The City intends to transfer to the Developer: (1) the fee interest in the Dealership Development Parcel and the Swap Parcel subject to the terms and conditions of this Agreement and, as to the Dealership Development Parcel only, the Dealership Operating Covenant; (2) the fee interest in the Adjacent Parcel subject to the terms and conditions of this Agreement and the Adjacent Parcel Restrictive Covenant.

G. Once the City's obligations to Caltrans have been satisfied, the City and the Developer intend to swap ownership of the Adjacent Parcel and the Swap Parcel, such that the Developer would obtain fee ownership of the Swap Parcel in exchange for transferring fee simple title to the Adjacent Parcel to the City. The purpose of the exchange is to allow the City to obtain fee simple ownership of Adjacent Parcel (free and clear of the Caltrans obligations) to enable the City to make the Adjacent Parcel available for subsequent development of affordable housing in accordance with applicable laws.

H. Developer intends to finance the costs of the Development with sources that include but are not limited to Developer's equity investment of not less than ten percent (10%) of the total acquisition and development costs for the Improvements and a construction loan of approximately Twenty Seven Million Four Hundred Thousand Dollars (\$27,400,000) (the "Construction Loan") from Toyota Financial Savings Bank, a Nevada corporation licensed to do business as an FDIC insured Nevada Thrift Company ("TFSB"), which will be reflected in the Financing Plan.

I. The City has determined that Developer has the necessary expertise, skill and ability to carry out the commitments set forth in this Agreement and that this Agreement is in the best interests, and will materially contribute to the City's economic development goals by: (1) creating temporary construction jobs for approximately 400-500 workers in connection with the construction of the Improvements (with approximately 50-75 construction workers working throughout the duration of the construction project); (2) creating approximately 70 full-time equivalent permanent jobs; and (3) establishing and continually operating a first-class automobile sales and full service auto repair facility on the Dealership Development Parcel resulting in the creation of new sale tax revenues.

J. The City finds and determines that the sale of the Property is exempt from California Environmental Quality Act, California Public Resources Code §21000- §21177, as amended ("CEQA") pursuant to Government Code Section 14528.65. Furthermore, pursuant to CEQA and its implementing guidelines, the City (in its capacity as "lead agency"), has prepared and shall cause to be filed with the Alameda County Recorder's Office, a Notice of Exemption (the "Notice of Exemption") for the transactions contemplated by this Agreement.

The transfer and development of the Dealership Development Parcel is exempt from CEQA under 14 California Code of Regulations Section 15332 in that the Development: (1) is consistent with the applicable general plan and zoning designations and regulations; (2) the proposed development will occur within the City limits, and the Dealership Development Parcel is less than five acres; (3) the Dealership Development Parcel has no value as habitat for endangered, rare, or threatened species; (4) the approval of the proposed Development will not result in any significant effects relating to traffic, noise, air quality or water quality; and (5) the Dealership Development Parcel can be served by all required utilities and public services.

The transfer of the Adjacent Parcel is exempt from CEQA under 14 California Code of Regulations Section 15061(b)(3) as it can be seen with certainty that there is no possibility that this transfer will have a significant impact on the environment. The City agrees that additional CEQA review for the development of the Adjacent Parcel by its subsequent owner will be conducted at such time as there is a development proposal brought for City approval for the development of affordable housing on the Adjacent Parcel.

The transfer of the Swap Parcel to the Developer and the continued use of the Swap Parcel is exempt from CEQA under 14 California Code of Regulations Section 15301 as continued operation of an existing facility and use.

THEREFORE, in consideration of the foregoing Recitals, which are incorporated herein by this reference, the mutual covenants contained in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Developer agree as follows:

ARTICLE 1.
DEFINITIONS AND EXHIBITS

Section 1.1 Definitions.

In addition to the terms defined elsewhere in this Agreement, the following definitions shall apply throughout this Agreement.

(a) "Adjacent Parcel" means the approximately 5.2 acre portion of the Property as more particularly described in the attached Exhibit A-2, incorporated herein by this reference.

(b) "Adjacent Parcel Restrictive Covenant" means the Restrictive Use Covenant Agreement that will be recorded against the Adjacent Parcel on the Closing Date and will restrict the use of the Adjacent Parcel for affordable housing purposes, substantially in the form attached hereto as Exhibit E-2.

(c) "Affiliated Company" means any corporation, limited liability company, partnership, trust or other business entity controlling, controlled by or under common control of the Developer. For purposes of the foregoing, "control" means the power, directly or indirectly, by voting rights, contract or otherwise, to direct or cause the direction of the management or policies of a person or entity.

(d) "Agreement" means this Disposition and Development Agreement, including the attached Exhibits and all subsequent operating memoranda and amendments to this Agreement.

(e) "CEQA" has the meaning set forth in Recital J of this Agreement.

(f) "Certificate of Occupancy" means the final certificate of occupancy issued by the City, or comparable City sign-off, on the completion of construction of the Improvements.

(g) "City" means the City of Hayward, a California charter city, and its successors and assigns.

(h) "City Council" means the City Council of the City of Hayward.

(i) "City Documents" shall mean, collectively, this Agreement, the Dealership Operating Covenant, the Adjacent Parcel Restrictive Covenant, and all other

documents required to be executed by Developer in connection with the transaction contemplated by this Agreement.

(j) "City Event of Default" has the meaning set forth in Section 7.3.

(k) "City Indemnitees" includes the City, and its council members, officers, agents, consultants and employees, each an "Indemnified Party".

(l) "Closing Date" means the date of recording of: (1) the Grant Deeds; (2) the Developer Grant Deed; (3) the Dealership Operating Covenant against the Dealership Development Parcel; and (4) the Adjacent Parcel Restrictive Covenant against the Adjacent Parcel.

(m) "Construction Plans" means all construction documentation upon which Developer, and Developer's several contractors, shall rely in building each and every part of the Improvements (including landscaping and parking and any limited improvements, if any, to be installed on the Adjacent Parcel) and shall include, but not necessarily be limited to, final architectural drawings, landscaping plans and specifications, final elevations, building plans and specifications (also known as "working drawings") and a time schedule for construction.

(n) "Dealership Development Parcel" means the approximately 4.9 acre portion of the Property, on which the Development will be constructed, more particularly described in the attached Exhibit A-2, incorporated herein by this reference.

(o) "Dealership Operating Covenant" means the operating covenant that will be recorded against the Dealership Development Parcel on the Closing Date and will restrict the use of the Dealership Development Parcel for the construction and continual operation of the Improvements, substantially in the form attached hereto as Exhibit E-1, for a period of ten (10) years following the Notice of Completion and commencement of operation of the Improvements, after which there shall be no restriction on the Dealership Development Parcel.

(p) "Deposit" means the Initial Deposit of Ten Thousand Dollars (\$10,000), the Reimbursement Deposit of Forty Thousand Dollars (\$40,000), and a Good Faith Deposit of Ten Thousand Dollars, made pursuant to the Exclusive Negotiating Agreement and as further described in Section 3.2(b) below.

(q) "Developer" means BMODDRE2, LLC, a California limited liability company, and its permitted successors and assigns.

(r) "Developer Grant Deed" means the grant deed under which the Developer will transfer fee title to the Adjacent Parcel to the City, substantially in the form attached hereto as Exhibit F-4.

(s) "Developer's Principal" means Brian McCafferty and/or Devin McCafferty.

(t) "Developer's Required Minimum Equity Contribution" means, in accordance with the Summary of Source and Uses attached hereto as Exhibit C, the minimum

equity contribution of not less than ten percent (10%) of the total acquisition and development costs of the Development.

(u) "Development" means the Dealership Development Parcel and the Improvements.

(v) "Effective Date" has the meaning set forth in the first sentence of this Agreement.

(w) "Escrow" means the escrow established with the Title Company for the purpose of transferring the fee interest in the properties from the City to Developer.

(x) "Event of Default" has the meaning set forth in Section 7.4.

(y) "Exclusive Negotiating Agreement" means that certain Exclusive Negotiating Agreement dated as of November 2, 2018 between the City and the Developer.

(z) "Financing Plan" means the Developer's plan for financing the acquisition of the property as contemplated hereunder, and the construction and development of the Improvements (and any limited improvements to be installed on the Swap Parcel that are intended to facilitate the continued use of the Swap Parcel for its existing use), which shall be consistent with the Summary of Sources and Uses approved by the City pursuant to Section 2.3, and as may be amended pursuant to Section 2.6.

(aa) "Grant Deeds" means the grant deeds under which the City will transfer fee title to the properties to the Developer, including (1) the grant deed for the transfer of the Dealership Development Parcel, substantially in the form attached hereto as Exhibit F-1; (2) the grant deed for the transfer of the Adjacent Parcel, substantially in the form attached hereto as Exhibit F-2; (3) the grant deed for the transfer of the Swap Parcel, substantially in the form attached hereto as Exhibit F-3.

(bb) "Hazardous Materials" means any substance, material, or waste which is: (1) defined as a "hazardous waste", "hazardous material", "hazardous substance", "extremely hazardous waste", "restricted hazardous waste", "pollutant" or any other terms comparable to the foregoing terms under any provision of California law or federal law; (2) petroleum; (3) asbestos and asbestos containing materials; (4) polychlorinated biphenyls; (5) radioactive materials; (6) mold; (7) Methyl Tertiary Butyl Ether ("MTBE"); or (8) determined by California, federal or local governmental authority to be capable of posing a risk of injury to health, safety, property or the environment. Without limiting the foregoing, Hazardous Materials means and includes any substance or material defined or designated as hazardous or toxic waste, hazardous or toxic material, a hazardous, toxic or radioactive substance, or other similar term, by any Hazardous Materials Laws including any federal, state or local environmental statute, regulation or ordinance presently in effect that may be promulgated in the future, as such as statutes, regulations and ordinances may be amended from time to time.

(cc) "Hazardous Materials Laws" means all federal, state, and local laws, ordinances, regulations, orders and directives governing hazardous waste, hazardous substances, discharges of pollutants to soil or groundwater, wastewater discharges, drinking water, air

emissions, Hazardous Materials releases or reporting requirements, Hazardous Materials use, storage or disposal, and employee or community right-to-know requirements related to the work being performed under this Agreement.

(dd) "Improvements" has the meaning set forth in Recital C above. In no event shall the Developer be obligated to construct, repair or maintain any improvements that are not located on the Dealership Development Parcel or the Swap Parcel, unless such other improvements are required under the conditions of approval for the Development.

(ee) "Loans" means acquisition or construction loans or permanent loans from private lending institutions, approved by the City in the Financing Plan.

(ff) "Memorandum of Disposition and Development Agreement" means the memorandum of the Disposition and Development Agreement to be recorded against the Dealership Development Parcel and the Swap Parcel on the Closing Date. The form of the Memorandum of Disposition and Development Agreement is attached as Exhibit D.

(gg) "Notice of Completion" has the meaning set forth in Section 4.15 below.

(hh) "Parties" means the City and Developer.

(ii) "Permanent Financing" means the sources of approved permanent financing as listed in the Approved Financing Plan to be submitted for City approval pursuant to the terms of Section 2.6 below.

(jj) "Permitted Transfer" has the meaning set forth in Section 6.4.

(kk) "Property" has the meaning set forth in Recital B.

(ll) "Property Exchange" means the transfer of the Adjacent Parcel from the Developer to the City in exchange for the Swap Parcel from the City to the Developer, pursuant to the terms hereof.

(mm) "Property Exchange Price" has the meaning set forth in Section 3.3, below.

(nn) "Property Preliminary Title Report" means that certain Update/Amendment No. 1 to Preliminary Title Report issued on August 28, 2020 by the Title Company for the Property.

(oo) "Release" for the purposes of Section 5.6, means any spillage, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, migrating, dumping, or disposing into the environment, including but not limited to the abandonment or discharging of barrels, containers, and other closed receptacles containing Hazardous Materials.

(pp) "Schedule of Performance" means the summary schedule of actions to be taken by the Parties pursuant to this Agreement to achieve disposition of the fee interest in the Property to the Developer and the development of the Improvements. The Schedule of

Performance is attached to this Agreement and incorporated herein by this reference as Exhibit C. Any dates specified in the Schedule of Performance may be extended by written agreement of the Parties.

(qq) "Security Financing Interest" has the meaning set forth in Section 8.1.

(rr) "Subaru Brand" means the brand of passenger cars licensed and sold under the Subaru Division of the Subaru of America, Inc.

(ss) "Summary of Sources and Uses" means the summary of sources and uses for the acquisition and construction of the Project on the Dealership Development Parcel. The Summary of Sources and Uses is attached hereto and incorporated herein as Exhibit C.

(tt) "Swap Property Preliminary Title Report" means that certain Preliminary Title Report issued on August 28, 2020 by the Title Company for the Swap Property.

(uu) "T-Mobile Lease" means that certain PCS Communications Site Lease dated May 12, 2000, as amended by that certain First Amendment to PCS Communications Site Lease dated November 14, 2003, as further amended by that certain Second Amendment to PCS Communications Site Lease dated April 12, 2007, as such may be further amended.

(vv) "Term" has the meaning set forth in Section 1.3, below.

(ww) "Title Company" means the Pleasanton office of North American Title Company, located at 6612 Owens Drive, Suite 100, Pleasanton, CA 94588, unless modified pursuant to Section 3.4.

(xx) "Transfer" has the meaning set forth in Section 6.1.

Section 1.2 Exhibits.

The following exhibits are attached to and incorporated in the Agreement:

- Exhibit A-1: Legal Description of Dealership Development Parcel
- Exhibit A-2: Legal Description of Adjacent Parcel
- Exhibit A-3: Legal Description of Swap Parcel
- Exhibit B: Schedule of Performance
- Exhibit C: Summary of Sources and Uses
- Exhibit D: Form of Memorandum of Disposition and Development Agreement
- Exhibit E-1: Form of Dealership Operating Covenant
- Exhibit E-2: Form of Adjacent Parcel Restrictive Covenant
- Exhibit F-1: Form of Dealership Development Parcel Grant Deed
- Exhibit F-2: Form of Adjacent Parcel Grant Deed
- Exhibit F-3: Form of Swap Parcel Grant Deed
- Exhibit F-4: Form of Developer Grant Deed
- Exhibit G: Form of Assignment Agreement
- Exhibit H: Form of Notice of Completion

Section 1.3 Term.

The "Term" of this Agreement, shall commence on the Effective Date and shall continue until the earlier of the following to occur: (1) the recordation of the Notice of Completion for the Improvements and the commencement of operations of an automobile dealership; (2) the termination of the Dealership Operating Covenant, expected to be ten (10) years from the issuance of the Notice of Completion and commencement of operation of the Improvements on the Dealership Development Parcel; or (3) the earlier termination of this Agreement.

ARTICLE 2.
PREDISPOSITION REQUIREMENTS

Section 2.1 Parcelization.

(a) This Agreement addresses the development and use of the Property and the Swap Parcel. The Developer agrees and acknowledges that this Agreement and the Dealership Operating Covenant govern the use and development of the Dealership Development Parcel. The Developer agrees and acknowledges that this Agreement and the Adjacent Parcel Restrictive Covenant govern the use and development of the Adjacent Parcel.

(b) Land Interests as of Effective Date. As of the Effective Date, and prior to the recordation of the Final Map, the City holds the fee interest in the entire Property.

(c) Land Interests Following the Closing Date. Following the Closing Date the Developer will own the fee interest in the Dealership Development Parcel and the Swap Parcel. The City will own fee title to the Adjacent Parcel.

Section 2.2 Conditions Precedent to Conveyance of the Property.

The requirements set forth in this Article are conditions precedent to the City's obligations to convey the Property and Swap Parcel to the Developer, and all such conditions precedent must be satisfied prior to the dates set forth in the Schedule of Performance attached hereto as Exhibit B, as such times may be extended in writing by the City. Performance and achievement of the actions set forth in this Article 2 constitute conditions precedent to conveyance. Satisfaction of these conditions depends on performance by Developer. Only the City can waive satisfaction of the conditions in this Article 2 and any such waiver must be in writing signed by the City Manager and approved as to form by the City Attorney. The Developer agrees and acknowledges that the transfer of the Dealership Development Parcel and the Swap Parcel is conditioned on the Developer accepting title to the Adjacent Parcel and subsequently transferring the Adjacent Parcel to the City subject to the conditions and terms in this Agreement, and the Adjacent Parcel Restrictive Covenant.

Section 2.3 Summary of Sources and Uses.

Within the time set forth in the Schedule of Performance, the Developer shall submit a Summary of Sources and Uses, in a form acceptable to the City, including all assumptions for all debt and equity financing, shall show the timing of the uses of each source of financing and shall break down which expenses each source of financing is funding. The Parties hereby

acknowledge that the Summary of Sources and Uses attached hereto as Exhibit C satisfies the requirements of this Section 2.3.

Section 2.4 Conceptual Site Plan and Elevation.

As of the Effective Date, the Developer has delivered to the City, and the City has approved, a conceptual site plan and elevation drawings for the Improvements to be developed on the Dealership Development Parcel.

Section 2.5 Final Construction Plans.

(a) No later than the date set forth in the Schedule of Performance, Developer shall submit its Construction Plans to the City for the City's review and approval.

(b) The City shall approve or disapprove the Construction Plans in writing within fifteen (15) days following the City's receipt of the complete Construction Plans, which approval shall not be unreasonably denied, conditioned or delayed. If the Construction Plans are disapproved by the City, the City shall deliver a written notice to Developer setting forth, in reasonable detail, the reasons for such disapproval. Developer shall have thirty (30) days following the receipt of such notice to submit revised Construction Plans. The provisions of this Section relating to time periods for approval, disapproval, and resubmission of new Construction Plans shall continue to apply until the final Construction Plans have been approved by the City; provided, however, that if City's reasonable approval of the final Construction Plans has not been obtained by the date set forth in the Schedule of Performance, the City may terminate this Agreement in accordance with terms of Article 7 (including any notice and cure periods set forth therein).

(c) Developer acknowledges that approval of the final Construction Plans by the City does not constitute approval by the City as required for issuance of a building permit.

Section 2.6 Financing Plan.

(a) No later than the date set forth in the Schedule of Performance, Developer shall submit a Financing Plan for the Development to the City for the City's review and approval, evidencing availability of the funds necessary to finance the acquisition of the Dealership Development Parcel and construction and continued operation of the Improvements on the Dealership Development Parcel and Swap Parcel. The Financing Plan shall include:

(1) A detailed development budget (including all direct, indirect, and financing costs) for the construction of the Improvements. The Developer shall update the detailed development budget to reflect any material cost changes to the development budget;

(2) An operating proforma for the Development for ten (10) years, which shall show debt service on all loans and other financial obligations associated with the construction and operation of the Development, as applicable;

(3) An updated Summary of Sources and Uses, including a cost breakdown for costs of constructing and operating the Improvements (including all direct,

indirect, and financing costs). The update to the Summary of Sources and Uses shall include all assumptions for all debt and equity financing, shall show the timing of uses of each source of financing and shall break down which expenses each source of financing is funding and identifying whether it is construction or Permanent Financing;

(4) To the extent applicable, a copy of any updates to the commitment or commitments obtained by Developer for the lines of credits, loans, grants, or other financial assistance from external debt financing sources to assist in financing the construction of the Improvements certified by Developer to be true and correct copies thereof. The City shall cause such commitments to be reviewed solely to determine the validity of the commitments and the proposed amount, terms and timing of the financing to be provided under such commitments, and not for review or approval of any other business or financial terms;

(5) A description of any joint ventures, partnerships or conveyances that the Developer proposes to enter into in order to provide equity funds for acquiring, developing, constructing or operating the Development, including copies of any then executed joint venture, partnership and/or conveyance agreements;

(6) A certified financial statement or other financial statement in such form reasonably satisfactory to the City evidencing other sources of capital sufficient to demonstrate that Developer has adequate funds available and is committing such funds to cover the difference, if any, between costs of acquisition of the property and development and construction of the Improvements and the amount available to Developer from external sources.

(b) Upon receipt by the City of the proposed Financing Plan, the City shall promptly review the Financing Plan and shall approve or disapprove it within fifteen (15) days after submission if it conforms to the provisions of this Agreement. The City's review of the Financing Plan shall be limited to determining if the contemplated financing will be reasonably available, if the financing contemplated in the Financing Plan would provide sufficient funds to undertake and complete the development and construction of the Improvements and determining if it is consistent with the terms of this Agreement.

(c) If the Financing Plan is not approved by the City, the City shall notify Developer in writing of the reasons therefor. Developer shall thereafter resubmit a revised Financing Plan to the City for its approval within fifteen (15) days after the City's notification of disapproval. The City will either approve or disapprove the revised Financing Plan within fifteen (15) days after resubmission by Developer, and if disapproved, this Agreement may be terminated in accordance with the terms of Article 7 (including any notice and cure periods set forth therein) below. Only upon the approval of the Financing Plan shall this pre-disposition condition be met.

(d) The Parties agree that notwithstanding the time requirements set forth in this Section for submission and resubmission to the City by Developer of a proposed Financing Plan and review and approval of the Financing Plan by the City, Developer is responsible for assuring that a Financing Plan in approvable form is submitted to the City in a timely manner such that the City may have the time permitted by this Section to review and approve a Financing Plan no later than the date set forth in the Schedule of Performance.

(e) Prior to the issuance of the Notice of Completion for the Improvements, any material change, modification, revision or alteration of the approved Financing Plan must first be submitted to and approved by the City for conformity to the provisions of this Agreement. If not so approved, the approved Financing Plan shall continue to control. Following the issuance of a Notice of Completion for the Improvements, Developer shall have no obligation to provide City with information or seek City approval with respect to any financing or refinancing related to the Improvements, the Property, or any portion thereof.

(f) Subject to the City's legal obligations, including under the Public Records Act, City agrees to handle all financial information regarding the Developer obtained pursuant to this Agreement with confidentiality. Disclosure of information by the City shall not be prohibited if that disclosure is of information that is or becomes a matter of public record or public knowledge as a result of the closing of the transaction or from sources other than the City or its agents, employees, contractors, consultants or attorneys.

Section 2.7 Equity and Other Approved Financing.

(a) Developer Equity Contribution. Developer shall have invested approximately Eight Million Eight Hundred Thousand Dollars (\$8,800,000) towards the acquisition and construction of the Development. Evidence satisfactory to the City, in its reasonable discretion, of such expenditures and investment shall be a condition precedent to the City's obligation to transfer the properties to the Developer.

(b) To the extent applicable, all other financing necessary to construct the Improvements, as approved by the City in the Financing Plan, shall be closed by or committed to Developer prior to, or simultaneously with, the Closing Date. Developer shall also submit to the City evidence reasonably satisfactory to the City that any conditions to the release or expenditure of funds described in the approved Financing Plan as the sources of funds to pay the costs of constructing the Improvements have been met or will be met upon the Closing Date and subject to Developer's satisfaction of standard disbursement preconditions required to be satisfied on a periodic basis, for constructing the Improvements. Submission by Developer, and approval by the City, of such evidence of funds availability shall be a condition precedent to the City's obligation to transfer the properties to Developer.

Section 2.8 Construction Contract.

(a) No later than the date set forth in the Schedule of Performance, Developer shall submit to the City for its limited approval the proposed construction contract for the Improvements. The City's review and approval shall be limited exclusively to a determination whether: (1) the guaranteed maximum construction cost set forth in the construction contract is consistent with the approved Financing Plan; (2) the construction contract is with a contractor approved by the City (which approval shall not be unreasonably withheld, conditioned or delayed); (3) the construction contract contains provisions consistent with Sections 4.5 through 4.9 of this Agreement; and (4) the construction contract requires a retention of ten percent (10%) of costs until completion of the Improvements or as approved by the City at its sole discretion. The City's approval of the construction contract shall in no way be deemed to constitute approval of or concurrence with any other term or condition of the construction contract.

(b) Upon receipt by the City of the proposed construction contract, the City shall promptly review same and approve it within ten (10) days if it satisfies the limited criteria set forth above. If the construction contract is not approved by the City, the City shall set forth in writing and notify Developer of the City's reasons for withholding such approval. Developer shall thereafter submit a revised construction contract for City approval, which approval shall be granted or denied in ten (10) days in accordance with the criteria and procedures set forth above. Any construction contract executed by Developer for the Improvements shall be in a form approved by the City.

Section 2.9 Construction Bonds.

No later than the date set forth in the Schedule of Performance, Developer shall obtain one (1) labor and material bond and one (1) performance and payment bond for construction of the Improvements, each in an amount equal to one hundred percent (100%) of the scheduled cost of construction of the Improvements. Each bond shall name the City as co-obligee and shall be issued by a reputable insurance company licensed to do business in California with a minimum "Best" Insurance Guide rating of "A-VII" and otherwise reasonably acceptable to the City. The form of the labor and material bond and the performance bond shall be subject to the City's prior review and written approval, which shall not be unreasonably withheld, conditioned or delayed. Only upon final approval shall this condition be met. No work shall be initiated until approval of the bonds or other security has been received.

Section 2.10 Obtain all Applicable Governmental Approvals.

(a) Within the time set forth in the Schedule of Performance, Developer shall use commercially reasonable efforts to obtain all necessary land use and governmental approvals required for the construction and operation of the Improvements ("Applicable Governmental Approvals"), including but not limited to City review and approval of a site plan and building permits. Only upon delivery of evidence of issuance of all applicable Governmental Approvals to the City shall the conditions of this Section 2.10(a) be deemed met. If such evidence is not delivered within the time set forth in the Schedule of Performance, this Agreement may be terminated in accordance with the terms of Article 7 (including any notice and cure periods set forth therein).

(b) Developer acknowledges that execution of this Agreement by the City does not constitute approval by the City of any required or additional permits, applications, or allocations, if any, and in no way limits the discretion of the City in the permit allocation and approval process for the properties.

Section 2.11 Building Permits.

(a) No later than the date set forth in the Schedule of Performance, Developer shall apply for a building permit allowing for the construction of the Improvements called for in the Construction Plans. After submitting the application for a building permit, Developer shall diligently pursue and obtain a building permit for the Improvements, and no later than the date set forth in the Schedule of Performance, Developer shall deliver evidence to the City that Developer is entitled to issuance of a building permit for the Improvements upon payment of permit fees. Only upon delivery to the City of such evidence in form reasonably satisfactory to

the City shall the condition of this Section 2.11 be deemed met. If such evidence is not delivered within the time set forth in the Schedule of Performance, this Agreement may be terminated in accordance with the terms of Article 7 (including any notice and cure periods set forth therein). The City shall render all reasonable assistance (at no cost to the City) to Developer to obtain the building permit.

(b) Developer acknowledges that execution of this Agreement by the City does not constitute approval by the City of any required permits, applications, or allocations, and in no way limits the discretion of the City in the permit allocation and approval process for any the properties.

Section 2.12 Insurance.

Developer shall furnish to the City evidence of the insurance coverage meeting the requirements of Section 5.7 below, no later than the date set forth in the Schedule of Performance.

Section 2.13 Inspection of Properties.

As of execution of this Agreement, Developer has made all such investigations regarding the properties, the suitability of the properties for development (including but not limited to investigation of environmental hazards, geologic conditions, soils conditions, or water conditions on or about the properties) as was required under the Exclusive Negotiating Agreement. The Developer did not submit an Unsuitability Notice and is hereunder accepting title to the properties in an "as-is" condition as set forth in Section 3.7, hereof.

Section 2.14 Demolition of Existing Structures.

Notwithstanding anything to the contrary in Condition of Approval #27, the parties hereby agree that within six (6) months of the Closing Date the Developer shall demolition all vacant building(s) and cap any utilities and return the site to a "pre-development condition" on the Dealership Development Parcel.

ARTICLE 3.
DISPOSITION OF PROPERTY

Section 3.1 Conditions for Property Exchange.

Provided the pre-disposition requirements set forth in Article 2 have all been satisfied and the additional closing conditions set forth in Section 3.7 have been satisfied, the City shall transfer the Dealership Development Parcel pursuant to the terms, covenants, and conditions of this Agreement and the Dealership Operating Covenant, the Adjacent Parcel pursuant to the terms, covenants, and conditions of this Agreement and the Adjacent Parcel Restrictive Covenant, and the Swap Parcel pursuant to the terms, covenants, and conditions of this Agreement.

Section 3.2 Consideration for Transfers.

(a) Subject to the terms of Section 3.2(b) below, the purchase price for the Dealership Development Parcel and the Adjacent Parcel shall be Five Million Four Hundred Twenty-One Thousand Dollars (\$5,421,000) (the "Purchase Price") to be paid to the City by the Developer prior to or concurrently with the Closing Date. The City has prepared a Government Code Section 52201 Summary Report supporting the sale of the Dealership Development Parcel and the Adjacent Parcel for the Purchase Price. The Developer agrees and acknowledges that the Purchase Price is for the Dealership Development Parcel and the Adjacent Parcel and that the City has no obligation to transfer the Dealership Development Parcel or the Adjacent Parcel separately. City and Developer agree that the Purchase Price for the Dealership Development Parcel and the Adjacent Parcel represent the fair market value of such properties at their highest and best use, taking into account the development restrictions contemplated herein and under the Dealership Operating Covenant and the Adjacent Parcel Restrictive Covenant. City and Developer further agree that the Adjacent Parcel and the Swap Parcel have equivalent fair market value and that the exchange of such properties is equitable. City agrees and acknowledges that Developer is not obligated to acquire the Dealership Development Parcel individually and that the Developer's acquisition of the Adjacent Parcel is expressly conditioned upon the occurrence of the Property Exchange and the Developer's acquisition of the Swap Parcel as contemplated under this Agreement.

(b) The Developer has as of the Effective Date of this Agreement made a deposit into Escrow an amount of Twenty Thousand Dollars (\$20,000) as deposits under the Exclusive Negotiating Agreement (the "ENRA Deposit"). The ENRA Deposit shall not be refundable to the Developer but shall be credited toward the Purchase Price on the Closing Date.

Section 3.3 Consideration for Property Exchange.

(a) The consideration for the Swap Parcel shall be One Dollar (\$1.00) and the Developer's conveyance of the Adjacent Parcel, together with all rights, privileges and appurtenances pertaining to the Adjacent Parcel, to the City on the Closing Date (the "Property Exchange Price").

Section 3.4 Opening Escrow.

The Parties shall establish the Escrow with the Title Company. The Parties shall execute and deliver all written instructions to the Title Company to accomplish the terms hereof, which instructions shall be consistent with this Agreement. The Parties may submit their own escrow instructions to Title Company provided such instructions are consistent with the terms of this Agreement. Upon request by Developer, the Title Company may be changed to a company requested by Developer, provided: (a) Developer makes the request prior to the opening of escrow; and (b) the company is approved by the City.

Section 3.5 Closing.

(a) The Closing Date shall occur within thirty (30) days following the date on which all conditions precedent to conveyance set forth in Article 2 have been satisfied, but in no event later than the date set forth in the Schedule of Performance, and only in the event that all

conditions precedent to conveyance set forth in Article 2 have been satisfied by the party required to perform or waived in writing by the other party as set forth herein.

(b) City Conditions to Closing. In addition to the conditions precedent to the Closing Date set forth in Article 2 (including but not limited to the closing of the financing set forth in the approved Financing Plan), the obligation of the City to transfer the Dealership Development Parcel and the Adjacent Parcel pursuant to this Agreement is subject to the satisfaction on or before the Closing Date (or such earlier date as is specifically set forth in this Agreement) of all of the following conditions precedent which conditions are for the benefit of the City only and the satisfaction of which may be waived only in writing by the City:

(1) Developer shall have provided the City with certified copies of a corporate authorizing resolution, approving this Agreement, the Dealership Operating Covenant, and the Adjacent Parcel Restrictive Covenant, and the conditions and covenants set forth in this Agreement, the Operating Covenant, and the Adjacent Parcel Restrictive Covenant.

(2) Developer shall have furnished the City with evidence of the insurance coverage meeting the general insurance requirements set forth in Section 5.7.

(3) Developer shall have executed and delivered to the City, the Memorandum of Disposition and Development Agreement, the Dealership Operating Covenant, the Adjacent Parcel Restrictive Covenant, and any other documents and instruments required to be executed and delivered, all in a form and substance satisfactory to the City.

(4) The Memorandum of Disposition and Development Agreement and the Dealership Operating Covenant shall have been recorded against Developer's interest in the Dealership Development Parcel as a lien subject only to the exceptions authorized by the City.

(5) Developer has obtained Governmental Approvals necessary for the construction allowing for the construction of the Improvements called for in the Construction Plans as required under Section 2.10 and Section 2.11 above; provided however the Developer may satisfy this requirement with regards to the building permit, if the Developer provides the City with a permit ready letter from the City Building Division;

(6) The Adjacent Parcel Restrictive Covenant shall have been recorded against the Developer's interest in the Adjacent Parcel as a lien subject only to the exceptions authorized by the City.

(7) The Developer shall have deposited into Escrow, the Developer's Minimum Equity Contribution which shall be used exclusively for the payment of the acquisition of the Dealership Development Parcel and the Adjacent Parcel and related closing costs. On or before the Closing Date, the Developer shall also establish a deposit account held by TFSB, segregated from the Developer's other funds (the "Segregated Construction Fund"), which shall be used exclusively for the payment of acquisition related closing costs or other approved development costs which are needed for the completion of the Improvements as shown in the approved Financing Plan. After the Closing Date and until such time as a Certificate of Occupancy is issued for the Improvements, the Developer shall at all times, maintain a minimum

total cash balance in the Segregated Construction Fund or have a committed construction loan amount that is disbursed from time to time into the Segregated Construction Fund, equal to the estimated cost to complete the remainder of the Improvements at such time, or as otherwise required by TFSB. For purposes of this paragraph, the term "cash balance" includes cash on hand in the Segregated Construction Fund. At the Closing Date and once monthly thereafter until a Certificate of Occupancy is issued for the Improvements, the Developer shall submit a certified statement detailing: (1) the then available cash balance in or committed funds available to the Segregated Construction Fund, along with monthly bank statements evidencing the then available cash; and (2) the estimated cost to complete the remainder of the Improvements, which as of the Closing Date is estimated to be approximately Eighteen Million Dollars (\$18,000,000). In the event that the available cash balance in or committed funds available to the Segregated Construction Fund falls below the estimated cost to complete the remainder of the Improvements, the Developer shall within five (5) business days deposit funds into or secure committed funds available to the Segregated Construction Fund in an amount necessary to maintain the total cash balance and/or funding commitment equal to or greater than the estimated cost to complete the remainder of the Improvements at such time.

(8) There shall exist no condition, event or act which would constitute a breach or default under this Agreement.

(9) All representations and warranties of Developer contained in any part of this Agreement shall be true and correct in all material respects.

(c) The obligation of Developer to acquire the Dealership Development Parcel and the Adjacent Parcel pursuant to this Agreement is subject to the satisfaction on or before the Closing Date (or such earlier date as is specifically set forth in this Agreement) of all of the following conditions precedent which conditions are for the benefit of Developer only and the satisfaction of which may be waived only in writing by Developer:

(1) Delivery and execution by the City of all instruments and other items required to be delivered by City pursuant to this Agreement;

(2) City's warranties and representations set forth herein shall be true and correct as of the Closing Date;

(3) City shall have performed each and every obligation to be performed by the City pursuant to this Agreement; and

(4) As of the Closing Date, the Title Company shall have issued or shall have committed to issue, upon the sole condition of the payment of its regularly scheduled premium, the Buyer's Title Policy (and as applicable its lender's title policy) as set forth in Section 3.6.

(d) The following constitute the conditions precedent for the City to complete the Property Exchange:

(1) Title to the Adjacent Parcel shall be in the condition specified in Section 3.6(b) below and the Escrow Holder shall be prepared to issue to the City on the Closing

Date the policy of title insurance with such endorsements as may be reasonably requested by the City;

(2) The Developer has executed and the Escrow Holder is prepared and fully authorized to record a grant deed from the Developer, in a form attached hereto as Exhibit F-4, to the City on the Closing Date;

(3) There shall exist no condition, event, or act which would constitute a breach or default by the Developer under this Agreement; and

(4) The T-Mobile Lease shall have been assigned to Developer by the City, and the City and T-Mobile shall certify in writing that, to the knowledge of the certifying party: (i) the T-Mobile Lease is in full force and effect and binding obligation of the parties, listing the current term and payments due under the T-Mobile Lease, (ii) the T-Mobile Lease has not been amended or modified either orally or in writing, or if so amended, identifying the amendments, and (iii) there exists no default in the performance of the parties obligations under the T-Mobile Lease, or if in default, such notice shall describe the nature and amount of any such default.

(e) The following constitute the conditions precedent for the Developer to complete the Property Exchange:

(5) Title to the Swap Parcel shall be in the condition specified in Section 3.6(c) below and the Escrow Holder shall be prepared to issue to the Developer on the Closing Date the policy of title insurance with such endorsements as may be reasonably requested by the Developer;

(6) The City has executed and the Escrow Holder is prepared and fully authorized to record a grant deed from the City, in a form attached hereto as Exhibit F-3, to the Developer on the Closing Date;

(7) The Developer and T-Mobile have negotiated and agreed on the relocation of the T-Mobile cell tower to a location that that does not interfere with the development of the project improvements or have negotiated the early termination of the T-Mobile Lease.

(8) There shall exist no condition, event, or act which would constitute a breach or default by the City under this Agreement;

(9) The Developer has approved of the physical condition of the Swap Parcel and no adverse condition has been discovered and no adverse material change has occurred between the time that the Developer approved the physical condition of the Swap Parcel and the Closing Date.

Section 3.6 Condition of Title.

(a) On the Closing Date, Developer shall have insurable fee simple interest to the Dealership Development Parcel which shall be free and clear of all liens, encumbrances, clouds and conditions, rights of occupancy or possession, except:

- (1) Applicable building and zoning laws and regulations;
- (2) The provisions of the Redevelopment Plan;
- (3) The provisions of this Agreement;
- (4) The provisions of the Dealership Operating Covenant;
- (5) Any lien for current taxes and assessments or taxes and assessments accruing subsequent to recordation of the Deed;
- (6) The provisions of the T-Mobile Lease, subject to any amendments required for the relocation of the T-Mobile facilities or unless sooner terminated by the Developer;
- (7) The provisions of the Mission Boulevard Corridor Specific Plan, as outlined in the conditions of approval;
- (8) Exceptions __ - __ as listed in the Property Preliminary Title Report, and Title Company shall be irrevocably committed to issue to the Developer an ALTA extended coverage owner's policy of title insurance conditioned only upon the payment of the insurance premium.

(b) On the Closing Date and prior to the Property Exchange, Developer shall have insurable fee simple interest to the Adjacent Parcel which shall be free and clear of all liens, encumbrances, clouds and conditions, rights of occupancy or possession, except:

- (1) Applicable building and zoning laws and regulations;
- (2) The provisions of the Redevelopment Plan;
- (3) The provisions of this Agreement;
- (4) The provisions of the Adjacent Parcel Covenant;
- (5) The provisions of the Mission Boulevard Corridor Specific Plans outlined in the conditions of approval;
- (6) Any lien for current taxes and assessments or taxes and assessments accruing subsequent to recordation of the Deed;
- (7) Exceptions ___ - ___ as listed in the Property Preliminary Title Report, and Title Company shall be irrevocably committed to issue to the Developer an ALTA extended coverage owner's policy of title insurance conditioned only upon the payment of the insurance premium.

(c) On the Closing Date, following the Property Exchange, Developer shall have insurable fee simple interest to the Swap Parcel which shall be free and clear of all liens, encumbrances, clouds and conditions, rights of occupancy or possession, except:

- (1) Applicable building and zoning laws and regulations;
- (2) The provisions of the Redevelopment Plan;
- (3) The provisions of this Agreement;
- (4) Any lien for current taxes and assessments or taxes and assessments accruing subsequent to recordation of the Deed;
- (5) Exceptions ___ - ___ as listed in the Swap Property Preliminary Title Report, and Title Company shall be irrevocably committed to issue to the Developer an ALTA extended coverage owner's policy of title insurance conditioned only upon the payment of the insurance premium.

Section 3.7 Condition of Property and Swap Property.

(a) **"AS IS" CONVEYANCE. DEVELOPER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT THE CITY IS CONVEYING AND DEVELOPER IS OBTAINING THE FEE SIMPLE INTEREST IN THE ENTIRE PROPERTY (WHICH FOR THE PURPOSES OF THIS SECTION 3.7 SHALL BE READ TO INCLUDE THE SWAP PROPERTY) ON AN "AS IS WITH ALL FAULTS" BASIS AND THAT DEVELOPER IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, FROM THE CITY AS TO ANY MATTERS CONCERNING THE PROPERTY, INCLUDING WITHOUT LIMITATION: (A) THE QUALITY, NATURE, ADEQUACY AND PHYSICAL CONDITION OF THE PROPERTY (INCLUDING, WITHOUT LIMITATION, TOPOGRAPHY, CLIMATE, AIR, WATER RIGHTS, WATER, GAS, ELECTRICITY, UTILITY SERVICES, GRADING, DRAINAGE, SEWERS, ACCESS TO PUBLIC ROADS AND RELATED CONDITIONS); (B) THE QUALITY, NATURE, ADEQUACY, AND PHYSICAL CONDITION OF SOILS, GEOLOGY AND GROUNDWATER; (C) THE EXISTENCE, QUALITY, NATURE, ADEQUACY AND PHYSICAL CONDITION OF UTILITIES SERVING THE PROPERTY; (D) THE DEVELOPMENT POTENTIAL OF THE PROPERTY, AND THE PROPERTY'S USE, HABITABILITY, MERCHANTABILITY, OR FITNESS, SUITABILITY, VALUE OR ADEQUACY OF THE PROPERTY FOR ANY PARTICULAR PURPOSE; (E) THE ZONING OR OTHER LEGAL STATUS OF THE PROPERTY OR ANY OTHER PUBLIC OR PRIVATE RESTRICTIONS ON THE USE OF THE PROPERTY; (F) THE COMPLIANCE OF THE PROPERTY OR ITS OPERATION WITH ANY APPLICABLE CODES, LAWS, REGULATIONS, STATUTES, ORDINANCES, COVENANTS, CONDITIONS AND RESTRICTIONS OF ANY GOVERNMENTAL OR QUASI-GOVERNMENTAL ENTITY OR OF ANY OTHER PERSON OR ENTITY; (G) THE PRESENCE OR ABSENCE OF HAZARDOUS MATERIALS ON, UNDER OR ABOUT THE PROPERTY OR THE ADJOINING OR NEIGHBORING PROPERTY; AND (H) THE CONDITION OF TITLE TO THE PROPERTY. DEVELOPER AFFIRMS THAT**

DEVELOPER HAS NOT RELIED ON THE SKILL OR JUDGMENT OF THE CITY OR ANY OF ITS RESPECTIVE AGENTS, EMPLOYEES OR CONTRACTORS TO SELECT OR FURNISH THE PROPERTY FOR ANY PARTICULAR PURPOSE, AND THAT THE CITY MAKES NO WARRANTY THAT THE PROPERTY IS FIT FOR ANY PARTICULAR PURPOSE. DEVELOPER ACKNOWLEDGES THAT IT SHALL USE ITS INDEPENDENT JUDGMENT AND MAKE ITS OWN DETERMINATION AS TO THE SCOPE AND BREADTH OF ITS DUE DILIGENCE INVESTIGATION WHICH IT SHALL MAKE RELATIVE TO THE PROPERTY AND SHALL RELY UPON ITS OWN INVESTIGATION OF THE PHYSICAL, ENVIRONMENTAL, ECONOMIC AND LEGAL CONDITION OF THE PROPERTY (INCLUDING, WITHOUT LIMITATION, WHETHER THE PROPERTY IS LOCATED IN ANY AREA WHICH IS DESIGNATED AS A SPECIAL FLOOD HAZARD AREA, DAM FAILURE INUNDATION AREA, EARTHQUAKE FAULT ZONE, SEISMIC HAZARD ZONE, HIGH FIRE SEVERITY AREA OR WILDLAND FIRE AREA, BY ANY FEDERAL, STATE OR LOCAL AGENCY). DEVELOPER UNDERTAKES AND ASSUMES ALL RISKS ASSOCIATED WITH ALL MATTERS PERTAINING TO THE PROPERTY'S LOCATION IN ANY AREA DESIGNATED AS A SPECIAL FLOOD HAZARD AREA, DAM FAILURE INUNDATION AREA, EARTHQUAKE FAULT ZONE, SEISMIC HAZARD ZONE, HIGH FIRE SEVERITY AREA OR WILDLAND FIRE AREA, BY ANY FEDERAL, STATE OR LOCAL AGENCY.

(b) Survival. The terms and conditions of this Section shall expressly survive the Closing Date. The City is not liable or bound in any manner by any oral or written statements, representations or information pertaining to the Dealership Development Parcel, the Swap Parcel, and the Adjacent Parcel, or any portion thereof, furnished by any contractor, agent, employee, servant or other person. Developer acknowledges that the Purchase Price reflects the "as is" nature of this conveyance and any faults, liabilities, defects or other adverse matters that may be associated with the Dealership Development Parcel, the Swap Parcel, and the Adjacent Parcel. Developer has fully reviewed the disclaimers and waivers set forth in this Agreement with Developer's counsel and understands the significance and effect thereof.

(c) Acknowledgment. Developer acknowledges and agrees that: (1) to the extent required to be operative, the disclaimers of warranties contained in this Section are "conspicuous" disclaimers for purposes of all applicable laws and other legal requirements; and (2) the disclaimers and other agreements set forth herein are an integral part of this Agreement, that the Purchase Price has been adjusted to reflect the same and that the City would not have agreed to convey the Dealership Development Parcel, the Swap Parcel, and the Adjacent Parcel, or any portion thereof, to Developer pursuant to this Agreement without the disclaimers and other agreements set forth in this Section.

(d) Developer's Release of the City. Developer, on behalf of itself and anyone claiming by, through or under Developer hereby waives its right to recover from and fully and irrevocably releases the City, its council members, board members, employees, officers, directors, representatives, and agents (the "Released Parties") from any and all claims, responsibility and/or liability that Developer may have or hereafter acquire against any of the Released Parties for any costs, loss, liability, damage, expenses, demand, action or cause of action arising from or related to: (1) the condition (including any construction defects, errors,

omissions or other conditions, latent or otherwise), valuation, salability or utility of the Dealership Development Parcel, the Swap Parcel, and the Adjacent Parcel, or its suitability for any purpose whatsoever; (2) any presence of Hazardous Materials; and (3) any information furnished by the Released Parties under or in connection with this Agreement.

(e) Scope of Release. The release set forth in this Section includes claims of which Developer is presently unaware or which Developer does not presently suspect to exist which, if known by Developer, would materially affect Developer's release of the Released Parties. Developer specifically waives the provision of any statute or principle of law that provides otherwise. In this connection and to the extent permitted by law, Developer agrees, represents and warrants that Developer realizes and acknowledges that factual matters now unknown to Developer may have given or may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses which are presently unknown, unanticipated and unsuspected, and Developer further agrees, represents and warrants that the waivers and releases herein have been negotiated and agreed upon in light of that realization and that Developer nevertheless hereby intends to release, discharge and acquit the City from any such unknown causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses. Accordingly, Developer, on behalf of itself and anyone claiming by, through or under Developer, hereby assumes the above-mentioned risks and hereby expressly waives any right Developer and anyone claiming by, through or under Developer, may have under Section 1542 of the California Civil Code, which reads as follows:

"A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

Developer's Initials: _____

Section 3.8 Condition of Adjacent Parcel.

(a) **"AS IS" CONVEYANCE. CITY SPECIFICALLY ACKNOWLEDGES AND AGREES THAT THE DEVELOPER IS CONVEYING AND CITY IS OBTAINING THE FEE SIMPLE INTEREST IN THE ADJACENT PARCEL ON AN "AS IS WITH ALL FAULTS" BASIS AND THAT CITY IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, FROM THE DEVELOPER AS TO ANY MATTERS CONCERNING THE ADJACENT PARCEL, INCLUDING WITHOUT LIMITATION: (A) THE QUALITY, NATURE, ADEQUACY AND PHYSICAL CONDITION OF THE ADJACENT PARCEL (INCLUDING, WITHOUT LIMITATION, TOPOGRAPHY, CLIMATE, AIR, WATER RIGHTS, WATER, GAS, ELECTRICITY, UTILITY SERVICES, GRADING, DRAINAGE, SEWERS, ACCESS TO PUBLIC ROADS AND RELATED CONDITIONS); (B) THE QUALITY, NATURE, ADEQUACY, AND PHYSICAL CONDITION OF SOILS, GEOLOGY AND GROUNDWATER; (C) THE EXISTENCE, QUALITY, NATURE, ADEQUACY AND PHYSICAL CONDITION OF UTILITIES SERVING THE ADJACENT PARCEL; (D) THE DEVELOPMENT**

POTENTIAL OF THE ADJACENT PARCEL, AND THE ADJACENT PARCEL'S USE, HABITABILITY, MERCHANTABILITY, OR FITNESS, SUITABILITY, VALUE OR ADEQUACY OF THE ADJACENT PARCEL FOR ANY PARTICULAR PURPOSE; (E) THE ZONING OR OTHER LEGAL STATUS OF THE ADJACENT PARCEL OR ANY OTHER PUBLIC OR PRIVATE RESTRICTIONS ON THE USE OF THE ADJACENT PARCEL; (F) THE COMPLIANCE OF THE ADJACENT PARCEL OR ITS OPERATION WITH ANY APPLICABLE CODES, LAWS, REGULATIONS, STATUTES, ORDINANCES, COVENANTS, CONDITIONS AND RESTRICTIONS OF ANY GOVERNMENTAL OR QUASI-GOVERNMENTAL ENTITY OR OF ANY OTHER PERSON OR ENTITY; (G) THE PRESENCE OR ABSENCE OF HAZARDOUS MATERIALS ON, UNDER OR ABOUT THE ADJACENT PARCEL OR THE ADJOINING OR NEIGHBORING PROPERTY; AND (H) THE CONDITION OF TITLE TO THE ADJACENT PARCEL. CITY AFFIRMS THAT CITY HAS NOT RELIED ON THE SKILL OR JUDGMENT OF THE DEVELOPER OR ANY OF ITS RESPECTIVE AGENTS, EMPLOYEES OR CONTRACTORS TO SELECT OR FURNISH THE ADJACENT PARCEL FOR ANY PARTICULAR PURPOSE, AND THAT THE DEVELOPER MAKES NO WARRANTY THAT THE ADJACENT PARCEL IS FIT FOR ANY PARTICULAR PURPOSE. CITY ACKNOWLEDGES THAT IT SHALL USE ITS INDEPENDENT JUDGMENT AND MAKE ITS OWN DETERMINATION AS TO THE SCOPE AND BREADTH OF ITS DUE DILIGENCE INVESTIGATION WHICH IT SHALL MAKE RELATIVE TO THE ADJACENT PARCEL AND SHALL RELY UPON ITS OWN INVESTIGATION OF THE PHYSICAL, ENVIRONMENTAL, ECONOMIC AND LEGAL CONDITION OF THE ADJACENT PARCEL (INCLUDING, WITHOUT LIMITATION, WHETHER THE ADJACENT PARCEL IS LOCATED IN ANY AREA WHICH IS DESIGNATED AS A SPECIAL FLOOD HAZARD AREA, DAM FAILURE INUNDATION AREA, EARTHQUAKE FAULT ZONE, SEISMIC HAZARD ZONE, HIGH FIRE SEVERITY AREA OR WILDLAND FIRE AREA, BY ANY FEDERAL, STATE OR LOCAL AGENCY). CITY UNDERTAKES AND ASSUMES ALL RISKS ASSOCIATED WITH ALL MATTERS PERTAINING TO THE ADJACENT PARCEL'S LOCATION IN ANY AREA DESIGNATED AS A SPECIAL FLOOD HAZARD AREA, DAM FAILURE INUNDATION AREA, EARTHQUAKE FAULT ZONE, SEISMIC HAZARD ZONE, HIGH FIRE SEVERITY AREA OR WILDLAND FIRE AREA, BY ANY FEDERAL, STATE OR LOCAL AGENCY.

(b) Survival. The terms and conditions of this Section shall expressly survive the Closing Date. The Developer is not liable or bound in any manner by any oral or written statements, representations or information pertaining to the Adjacent Parcel, or any portion thereof, furnished by any contractor, agent, employee, servant or other person. City acknowledges that the Property Exchange Price reflects the "as is" nature of this conveyance and any faults, liabilities, defects or other adverse matters that may be associated with the Adjacent Parcel. City has fully reviewed the disclaimers and waivers set forth in this Agreement with City's counsel and understands the significance and effect thereof.

(c) Acknowledgment. City acknowledges and agrees that: (1) to the extent required to be operative, the disclaimers of warranties contained in this Section are "conspicuous" disclaimers for purposes of all applicable laws and other legal requirements; and (2) the disclaimers and other agreements set forth herein are an integral part of this Agreement,

that the Property Exchange Price has been adjusted to reflect the same and that the Developer would not have agreed to convey the Adjacent Parcel, or any portion thereof, to the City pursuant to this Agreement without the disclaimers and other agreements set forth in this Section.

(d) City's Release of the Developer. City, on behalf of itself and anyone claiming by, through or under City hereby waives its right to recover from and fully and irrevocably releases the Developer, its members, managers, board members, employees, officers, directors, representatives, and agents (the "Developer Released Parties") from any and all claims, responsibility and/or liability that City may have or hereafter acquire against any of the Developer Released Parties for any costs, loss, liability, damage, expenses, demand, action or cause of action arising from or related to: (1) the condition (including any construction defects, errors, omissions or other conditions, latent or otherwise), valuation, salability or utility of the Adjacent Parcel, or its suitability for any purpose whatsoever; (2) any presence of Hazardous Materials; and (3) any information furnished by the Developer Released Parties under or in connection with this Agreement.

(e) Scope of Release. The release set forth in this Section includes claims of which City is presently unaware or which City does not presently suspect to exist which, if known by City, would materially affect City's release of the Developer Released Parties. City specifically waives the provision of any statute or principle of law that provides otherwise. In this connection and to the extent permitted by law, City agrees, represents and warrants that City realizes and acknowledges that factual matters now unknown to City may have given or may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses which are presently unknown, unanticipated and unsuspected, and City further agrees, represents and warrants that the waivers and releases herein have been negotiated and agreed upon in light of that realization and that City nevertheless hereby intends to release, discharge and acquit the Developer from any such unknown causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses. Accordingly, City, on behalf of itself and anyone claiming by, through or under City, hereby assumes the above-mentioned risks and hereby expressly waives any right City and anyone claiming by, through or under City, may have under Section 1542 of the California Civil Code, which reads as follows:

"A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

City's Initials: _____

Section 3.9 Costs of Escrow and Closing.

Ad valorem taxes, if any, shall be prorated as of the Closing Date. Developer shall pay the cost of title insurance, transfer tax, Title Company document preparation, recordation fees and the escrow fees of the Title Company, if any, and any additional costs to close the Escrow; which the parties expect to be approximately Forty-Six Thousand Dollars (\$46,000). The parties further agree and acknowledge that the transfer of the Adjacent Parcel is exempt from City imposed transfer taxes pursuant to Section 8-6.50 of the Hayward Municipal Code which

exempts the payment of transfer taxes where the purchaser agrees to immediately reconvey the realty to the exempt agency. The Developer shall have the sole obligation to make any applicable County transfer taxes, subject to any exemptions that may apply. The City makes no representations about the amounts of and applicability of exemptions for any transfer taxes that may be due as a result of the land swap as contemplated hereunder.

Section 3.10 Deliveries into Escrow.

(a) Deliveries by City. At least two (2) business days before the Closing Date, City shall deliver or cause to be delivered into Escrow (with a copy delivered concurrently to Developer) the following documents duly executed and acknowledged where appropriate:

(1) A Relinquishment of Power of Termination from Caltrans duly executed and acknowledged by Caltrans;

(2) A grant deed conveying the Dealership Development Parcel to Developer as provided in this Agreement in the form attached hereto as Exhibit F-1 duly executed and acknowledged by City;

(3) A grant deed conveying the Adjacent Parcel to Developer as provided in this Agreement in the form attached hereto as Exhibit F-2 duly executed and acknowledged by City;

(4) A grant deed conveying the Swap Parcel to the Developer as provided in this Agreement in the form attached hereto as Exhibit F-3 duly executed and acknowledged by the Developer;

(5) The Dealership Operating Covenant in the form attached hereto duly executed and acknowledged by City;

(6) The Adjacent Parcel Restrictive Covenant in the form attached hereto duly executed and acknowledged by the City;

(7) Such proof of City's authority and authorization to enter into this Agreement and consummate the transaction contemplated hereby and such proof of the power and authority of the individual(s) executing and/or delivering any instruments, documents or certificates on behalf of City to act for and bind City as may be reasonably required by Title Company or Developer;

(8) Such other documents as may be reasonably necessary and appropriate to issue Developer's title policy and as applicable, its lender's title policy, and complete the closing of the transaction contemplated herein.

(b) Deliveries by Developer. The Developer shall deliver into Escrow the following amounts in cash and shall, at least two (2) business days before the Closing Date, deliver or cause to be delivered the following documents (with a copy delivered concurrently to City) duly executed and acknowledged where appropriate:

(1) The Developer's Minimum Equity Contribution and the balance of the Purchase Price and such additional sums as are necessary to pay the Developer's share of closing costs, prorations and any fees as more particularly set forth in Section 3.9 below;

(2) The Dealership Operating Covenant in the form attached hereto duly executed and acknowledged by Developer;

(3) The Adjacent Parcel Restrictive Covenant in the form attached hereto duly executed and acknowledged by Developer;

(4) A copy of any corporate and personal guarantees provided to TFSB associated with the Construction Loan for the Improvements;

(5) The Developer Grant Deed conveying the Adjacent Parcel to the City as provided in this Agreement in the form attached hereto as Exhibit F-4 duly executed and acknowledged by the Developer;

(6) Such proof of Developer's authority and authorization to enter into this Agreement and consummate the transaction contemplated by this Agreement, and such proof of the power and authority of the individual(s) executing and/or delivering any instruments, documents or certificates on behalf of Developer to act for and bind Developer as may be reasonably required by Title Company or City; and

(7) Such other documents as may be reasonably necessary and appropriate to complete the closing of the transaction contemplated herein.

(c) Delivery upon Closing Date. The City shall deliver possession of the Dealership Development Parcel, the Swap Parcel, and the Adjacent Parcel to Developer upon the Closing Date free and clear of all tenants and other occupants. The Developer shall deliver possession of the Adjacent Parcel to the City upon the Closing Date free and clear of all tenants and other occupants.

Section 3.11 Real Estate Commissions.

The City represents and warrants that it has not entered into any agreement, and has no obligation, to pay any real estate commission in connection with the transaction contemplated by this Agreement. Developer represents, warrants, and agrees that Developer is not obligated to pay any real estate commission in connection with the transactions contemplated by this Agreement. If a real estate commission is claimed due to the actions of any party hereto, then the Developer shall indemnify, defend, and hold the City Indemnitees harmless from any liability related to such commission. The provisions of this Section 3.11 shall survive termination of this Agreement.

ARTICLE 4. CONSTRUCTION REQUIREMENTS AFTER CLOSING

Section 4.1 Construction Pursuant to Plans.

Unless modified by operation of Section 4.2, the Improvements shall be constructed

substantially in accordance with the Construction Plans and the terms and conditions of the land use permits and approvals and building permits, including any variances granted.

Section 4.2 Change in Construction of Improvements.

(a) If Developer desires to make any material change in the Improvements which are not substantially consistent with the Construction Plans, Developer shall submit the proposed change to the City for its approval. No change which is required for compliance with building codes or other government health and safety regulations shall be deemed material. If the Improvements, as modified by any such proposed change, will conform to the requirements of this Agreement, and the Construction Plans, the City shall approve the change by notifying Developer in writing. For purposes of this Section 4.2, a material change shall mean any change which is expected to substantially alter the appearance of the Development or which is expected to result in an individual change of Two Hundred Thousand Dollars (\$200,000) or a cumulative change of Four Hundred Thousand Dollars (\$400,000), or more, in the cost of construction of the Improvements.

(b) Unless a proposed change is rejected by the City within ten (10) working days (excluding City and other legal holidays), it shall be deemed approved. If rejected within such time period, the previously approved Construction Plans shall continue to remain in full force and effect. If the City rejects a proposed change, it shall provide Developer with the specific reasons therefor and the Developer shall have the right to revise and resubmit its proposal to City.

(c) The approval of changes in the Construction Plans by the City pursuant to this Section shall be in addition to any approvals required to be obtained from the City pursuant to building permit requirements or the conditions of approval. Approval of changes in the Construction Plans by the City shall not constitute approval of building permit requirements or conditions of approval by the City and shall in no way limit the City's discretion in approving changes to the building permits or conditions of approval.

Section 4.3 Commencement of Construction of Improvements.

Developer shall commence construction of the Improvements on the Dealership Development Parcel no later than the date set forth in the Schedule of Performance. Simultaneously with the construction of the Improvements, the Developer shall also install all limited improvements to be constructed on the Swap Parcel approved by the City. The City agrees and acknowledges that Developer shall have no obligation of any kind to improve, repair, maintain, or remediate the Adjacent Parcel or any portion thereof.

Section 4.4 Completion of Construction of Improvements.

Developer shall diligently prosecute to completion the construction of the Improvements on the Dealership Development Parcel no later than the date set forth in the Schedule of Performance.

Section 4.5 Equal Opportunity.

During the construction and operation of the Development discrimination on the basis of race, color, creed, religion, age, sex, gender, gender identity, gender expression, sexual orientation, marital status, pregnancy, national origin, ancestry, military and veteran status, or disability in the hiring, firing, promoting, or demoting of any person engaged in the construction or other work at the properties is not allowed.

Section 4.6 Compliance with Applicable Law; Prevailing Wage Requirement.

(a) Developer shall cause all construction to be performed in compliance with:

(1) All applicable laws, ordinances, rules and regulations of federal, state, county or municipal governments or agencies in effect as of the Effective Date or that may be enacted hereafter, and

(2) All directions, rules and regulations of any fire marshal, health officer, building inspector, or other officer of every governmental agency now having or hereafter acquiring jurisdiction. The work shall proceed only after the payment of all applicable fees, procurement of each permit, license, or other authorization that may be required by any governmental agency having jurisdiction, and Developer shall be responsible to the City for the procurement and maintenance thereof, as may be required of Developer and all entities engaged in work on the properties, or any portion thereof.

(b) The construction required under this Agreement does not constitute a "public work" as defined in Labor Code Section 1720, as none of the project will be paid for in whole or in part out of public funds and the City has not made any direct or indirect financial contributions to the project, the requirements of Labor Code Section 1720 have not been triggered. If and only to the extent the work performed under this Agreement is deemed a public work shall the provisions of this subsection (b) apply. To the extent required by law, the Developer shall, and shall cause the contractor and subcontractors, to pay prevailing wages in the construction of the Improvements as those wages are determined pursuant to Labor Code Sections 1720 et seq., to employ apprentices as required by Labor Code Sections 1777.5 et seq. and the implementing regulations of the Department of Industrial Relations (the "DIR"). In addition, as applicable, the Developer shall and shall cause the contractor and subcontractors to do all of the following:

(1) To the extent applicable, all calls for bids, bidding materials and the construction contract documents for the development of the properties must specify that: (A) no contractor or subcontractor may be listed on a bid proposal nor be awarded a contract for the development of the properties unless registered with the DIR pursuant to Labor Code Section 1725.5; and (B) the development of the properties is subject to compliance monitoring and enforcement by the DIR;

(2) To the extent applicable, the Developer is required to provide the City all information required by Labor Code Section 1773.3 as set forth in the DIR's online form PWC-100 within two (2) days of the award of the contract (<https://www.dir.ca.gov/pwc100ext/>);

(3) To the extent applicable, the Developer shall cause its respective contractors to post job site notices, as prescribed by regulation by the DIR;

(4) To the extent applicable, the Developer shall cause its respective contractors to furnish payroll records required by Labor Code Section 1776 directly to the Labor Commissioner, at least monthly in the electronic format prescribed by the Labor Commissioner;

(5) To the extent applicable, the Developer shall and shall cause the contractor and subcontractors to keep and retain such records as are necessary to determine if such prevailing wages have been paid as required pursuant to Labor Code Sections 1720 et seq. and that apprentices have been employed as required by Labor Code Sections 1777.5 et seq. Copies of the currently applicable current per diem prevailing wages are available from the City's Public Works Department, 777 B Street, Hayward, California. To the extent applicable, during the construction of the Improvements or any work on the properties, Developer shall or shall cause the contractor to post at the properties the applicable prevailing rates of per diem wages.

(c) Developer shall indemnify, hold harmless and defend (with counsel reasonably selected by the City) the City Indemnitees against any claim for damages, compensation, fines, penalties or other amounts arising out of the failure or alleged failure of any person or entity (including Developer, its contractor and subcontractors) to pay prevailing wages as determined pursuant to Labor Code Sections 1720 et seq., to employ apprentices pursuant to Labor Code Sections 1777.5 et seq., and implementing regulations of the DIR or to comply with the other applicable provisions of Labor Code Sections 1720 et seq., 1777.5 et seq., and the implementing regulations of the DIR in connection with the construction of the Improvements or any other work undertaken under this Agreement and shall indemnify and hold the City harmless against any damages, compensation, fines, penalties or other amounts resulting from the successful prosecution of such claim; except as directly caused by the City Indemnitee's willful misconduct or gross negligence. The provisions of this Section shall survive expiration of the Term or other termination of this Agreement and shall remain in full force and effect.

Section 4.7 Progress Report.

Until such time as Developer has completed construction as required under Section 4.4, as evidenced by issuance of final Certificates of Occupancy by the City for all buildings located on the Dealership Development Parcel, Developer shall provide the City with quarterly progress reports, or more frequent updates if City reasonably requires, regarding the status of the construction of the Improvements, including, upon City request, a certification that the actual construction costs to date conform to the Financing Plan.

Section 4.8 Construction Responsibilities.

(a) It shall be the responsibility of Developer to coordinate and schedule the work to be performed so that commencement and completion of construction will take place in accordance with this Agreement.

(b) Developer shall be solely responsible for all aspects of Developer's conduct in connection with the Development, including (but not limited to) the quality and suitability of the plans and specifications, the supervision of construction work, and the

qualifications, financial condition, and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants, and managers. Any review or inspection undertaken by the City with reference to the Development is solely for the purpose of determining whether Developer is properly discharging its obligations to the City and should not be relied upon by Developer or by any third parties as a warranty or representation by the City as to the quality of the design or construction of the Development.

Section 4.9 Mechanic's Liens, Stop Notices, and Notices of Completion.

(a) If any claim of lien is filed against the Dealership Development Parcel or Swap Parcel, or any portion thereof, or the Improvements or a stop notice is issued affecting any portion of the Dealership Development Parcel or Swap Parcel, the City or any other lender or other third party in connection with the Development, then Developer shall, within twenty (20) days after such filing or service, either pay and fully discharge the lien or stop notice, effect the release of such lien or stop notice by delivering to the City a surety bond from a surety acceptable to the City in sufficient form and amount, or provide the City with other assurance reasonably satisfactory to the City that the claim of lien or stop notice will be paid or discharged ; provided, however, that Developer shall have the right to contest in good faith any such liens or stop notice.

(b) If Developer fails to discharge any lien, encumbrance, charge, or claim in the manner required in this Section or obtain a surety bond, then in addition to any other right or remedy, upon prior notice to Developer, the City may (but shall be under no obligation to) discharge such lien, encumbrance, charge, or claim at Developer's expense. Alternatively, the City may require Developer to immediately deposit with the City the amount necessary to satisfy such lien or claim and any costs, pending resolution thereof. The City may use such deposit to satisfy any claim or lien that is adversely determined against Developer.

(c) Developer shall file a valid notice of cessation or notice of completion upon cessation of construction of the Development for a continuous period of thirty (30) days or more (that is not excused hereunder or otherwise approved by the City) and take all other reasonable steps to forestall the assertion of claims of lien against any portion of the Dealership Development Parcel or Swap Parcel and/or Improvements. Developer authorizes the City, but without any obligation, to record any notices of completion or cessation of labor, or any other notice that the City deems necessary or desirable to protect its interest in the Development and any portion of the Dealership Development Parcel or Swap Parcel.

Section 4.10 Inspections.

Developer shall permit and facilitate, and shall require its contractors to permit and facilitate, observation and inspection at the Dealership Development Parcel or Swap Parcel and the Development by the City and by public authorities during reasonable business hours upon forty-eight (48) hours' prior written notice for the purposes of determining compliance with this Agreement.

Section 4.11 Information.

Developer shall provide any information reasonably requested by the City in connection with the Development and the Dealership Development Parcel or Swap Parcel.

Section 4.12 Records.

(a) Developer shall maintain complete, accurate, and current records pertaining to the Development and the Dealership Development Parcel or Swap Parcel for a period of five (5) years after the creation of such records and shall permit any duly authorized representative of the City to inspect and copy records upon reasonable prior notice to Developer. Such records shall include all invoices, receipts, and other documents related to expenditures associated with the implementation of this Agreement. Records must be kept accurate and current.

(b) The City shall notify Developer of any records it deems insufficient. Developer shall have thirty (30) calendar days after the receipt of such a notice to correct any deficiency in the records specified by the City in such notice, or if a period longer than thirty (30) days is reasonably necessary to correct the deficiency, then Developer shall begin to correct the deficiency within thirty (30) days and complete the correction of the deficiency as soon as reasonably possible.

Section 4.13 Relocation.

(a) On the Closing Date, the City shall deliver possession of the Dealership Development Parcel and Swap Parcel to Developer free and clear of all tenants and other occupants. The parties do not expect any relocation as a result of this Agreement. Nonetheless, if and to the extent that the acquisition of the Dealership Development Parcel or Swap Parcel or the construction of the Development by Developer result in the permanent or temporary displacement of residential tenants, homeowners, or businesses, then Developer shall comply with all applicable local, state, and federal statutes and regulations, (including without limitation California Government Code Section 7260 et seq., and accompanying regulations) with respect to relocation planning, advisory assistance, and payment of monetary benefits. Developer shall be solely responsible for payment of any relocation benefits to any displaced persons and any other obligations associated with complying with such relocation laws.

(b) Developer shall defend (with counsel reasonably acceptable to the City), the City and City Indemnitees against any claim for damages, compensation, fines, penalties, relocation payments or other amounts arising out of the failure or alleged failure of any person or entity (including Developer, the City or the City) to satisfy relocation obligations related to the acquisition of the Dealership Development Parcel or Swap Parcel and the construction of the Development. The provisions of this Section shall survive expiration of the Term or other termination of this Agreement and shall remain in full force and effect.

Section 4.14 Financing; Revisions to Plan.

As of the Effective Date, the City has approved the Summary of Sources and Uses set forth in Exhibit C. As required under Section 2.6, Developer shall submit a Financing Plan and any required amendments to the Financing Plan including but not limited to any amendments or modifications to the development budget, or the commitment letter from any other lender, to the

City for approval within fifteen (15) days of the date Developer receives information indicating that actual costs of the Development materially vary or will materially vary from the line item costs shown on the Financing Plan. Written consent of the City shall be required to materially amend the Financing Plan.

Section 4.15 Notice of Completion.

(a) Promptly after completion of all of the Improvements on the Dealership Development Parcel in accordance with those provisions of this Agreement relating solely to the obligations of Developer to construct the Improvements on the Dealership Development Parcel the City shall provide an instrument so certifying the completion of the Improvements on the Dealership Development Parcel (the "Notice of Completion"), substantially in the form attached hereto as Exhibit J.

(b) The Notice of Completion shall be conclusive determination that all covenants in this Agreement with respect to the obligations of Developer to construct the Improvements on the Dealership Development Parcel have been met. Issuance of a Notice of Completion by the City, however, shall not constitute evidence of compliance with Developers' obligation to comply with the requirements of Section 4.6 or 4.9 and shall not terminate the obligations of Developer that survive the termination of this Agreement. The Notice of Completion shall not constitute evidence of compliance with or satisfaction of any obligation of Developer to any holder of a deed of trust securing money loaned to finance the Improvements and shall not be deemed a notice of completion under the California Civil Code.

ARTICLE 5.
ONGOING DEVELOPER OBLIGATIONS

Section 5.1 Applicability.

The conditions and obligations set forth in this Article 5 shall apply throughout the Term, unless a different period of applicability is specified for a particular condition or obligation.

Section 5.2 Use.

(a) Developer hereby agrees that, for the entire Term of this Agreement and the term of the Dealership Operating Covenant, the Development will be used only for operation of a new automobile dealership and full service auto repair facilities (which may include auto body repair pending City approval) operating under the Subaru Brand and in accordance with all the terms, conditions and requirements imposed under any applicable franchise sales and service agreement. The Developer may use portions of the Development for the sale of used automobiles so long as the primary use of the Development is for the sale of new automobiles consistent with the customary practices of similar new automobile dealerships in the San Francisco Bay Area and so long as the Developer or its Affiliated Company remains a franchisee of Subaru (or any subsequent manufacturer or brand approved by the City under this Agreement).

(b) The Developer may at any time during the Term of this Agreement and the term of the Dealership Operating Covenant propose a change to the use requirement that the

Developer operate under the Subaru Brand and so long as such other replacement brand name is commercially acceptable to the City. To the extent the Developer is proposing to operate the Development under a second brand (in addition to Subaru), no additional City approval shall be required. If and to the extent the Developer is proposing to no longer operate the Development under the Subaru Brand, subject to the conditions set forth in and consistent with the Dealership Operating Covenant the Developer shall propose a replacement brand for the City's commercially reasonable approval, taking into consideration all relevant factors, including without limitation the time remaining in the Term of the Dealership Operating Covenant, it being understood by the parties that it shall be reasonable for the City to withhold consent for any of the following reasons: (1) the proposed replacement brand name would be expected to achieve substantially less sales revenue; (2) if at the time of the brand name change request, the proposed replacement brand is operating a new automobile dealership within the City limits or has operated a new automobile dealership in the City within the previous twelve (12) months (which requirement may be waived by the City Manager at the City Manager's sole and absolute discretion); or (3) the replacement brand does not require the Developer to utilize the property primarily for the sale of new automobiles. The City shall reasonably approve or disapprove the Developer's requested replacement brand in writing as soon as practicable, but in no event later than thirty (30) days of the receipt of the Developer's complete written request. If the City disapproves the Developer's proposed replacement brand, the City shall specify in writing the reasons for the disapproval. If the Developer's determination is disapproved by the City, the Developer shall have the right to re-submit documentation to the City until the City approval is obtained. If and to the extent the City does not respond within thirty (30) days of the receipt of the Developer's complete written request under this Section 5.2, the proposed replacement brand shall be deemed approved.

(c) During the Term, the Developer shall not use any portion of the Dealership Development Parcel for any other purpose without the prior written consent of the City, which consent shall be granted or denied at the City's sole and absolute discretion.

Section 5.3 Compliance with Covenants.

(a) Developer agrees, for the entire Term of this Agreement, to maintain all interior and exterior improvements, including landscaping, of the Development in first-class condition, repair and sanitary condition (and, as to landscaping, in a healthy condition) and in accordance with the Dealership Operating Covenant (for as long as the Dealership Operating Covenant is in effect), as the same may be amended from time to time, and all applicable laws, rules, ordinances, orders, and regulations of all federal, state, municipal, and other governmental agencies and bodies having or claiming jurisdiction and all their respective departments, bureaus, and officials. Following the Closing Date, Developer shall comply with all standards and requirements for use, operation, maintenance, management and encumbrances of the Dealership Development Parcel and the Improvements and with the Dealership Operating Covenant for so long as the Operating Covenant is in effect. Subject to any applicable notice and cure periods, any default under the Dealership Operating Covenant shall also be a default under this Agreement.

Section 5.4 Taxes and Assessments.

Developer shall pay all real and personal property taxes, assessments and charges and all franchise, income, employment, old age benefit, withholding, sales, and other taxes assessed against it, or payable by it, at such times and in such manner as to prevent any penalty from accruing, or any lien or charge from attaching to any portion of the properties or Developer's fee interest in any portion of the properties; provided, however, that Developer shall have the right to contest in good faith any such taxes, assessments, or charges. In the event Developer exercises its right to contest any tax, assessment, or charge against it, Developer, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered against it, together with all costs, charges and interest.

Section 5.5 Nondiscrimination.

Developer covenants by and for itself, its successors and assigns that there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease transfer, use, occupancy, tenure or enjoyment of the Development nor shall Developer or any person claiming under or through Developer establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the Development. The foregoing covenant shall run with the land.

Section 5.6 Hazardous Materials.

(a) Covenants.

(1) No Hazardous Materials Activities. Developer hereby represents and warrants to the City that, at all times from and after the Closing Date, Developer shall not cause or permit any portion of the properties or the Improvements thereon to be used as a site for the use, generation, manufacture, storage, treatment, release, discharge, disposal, transportation or presence of any Hazardous Materials with the exception for the use and storage of minimal quantities as required for the operation of the Improvements as an automobile sales and full service auto repair facility (which may include auto body repair pending City approval).

(2) Hazardous Materials Laws. Developer hereby represents and warrants to the City that, at all times from and after the Closing Date, Developer shall comply and cause the properties and the Improvements thereon, and the operations of all actives conducted at the properties and Improvements, to comply with all applicable Hazardous Materials Laws, including without limitation, those relating to the training, use and storage of Hazardous Materials and soil and groundwater conditions. Developer further represents and warrants to the City that, at all times from and after the Closing Date, Developer shall obtain and maintain in good standing all permits and licenses required for the use of any Hazardous Materials required for the operation of the Improvements as an automobile sales and full service auto repair facility (which may include auto body repair pending City approval).

(3) Notices. Developer hereby represents and warrants to the City that, at all times from and after the Closing Date, Developer shall immediately notify the City in

writing of: (A) the discovery of any Hazardous Materials on or under the properties, particularly associated with the discovery or any new release of Hazardous Materials on or under the properties; (B) the discovery of any Hazardous Materials under the properties, particularly associated with the discovery or any new release of Hazardous Materials on or under the properties, including those used and stored in accordance with Section 5.6(a)(1) above; (C) any knowledge by Developer that the properties do not comply with any Hazardous Materials Laws; (D) any directives, corrective action orders, requests, claims or actions pending or threatened against Developer, the properties, the Improvements thereon, or the City by any Governmental Authorities or any third-party or entity relating to Hazardous Materials or pursuant to any Hazardous Materials Laws, or arising from claims of nuisance, or damage to property or personal injury relating to Hazardous Materials associated with the properties or the Improvements thereon (collectively "Hazardous Materials Claims"); and (E) the discovery of any occurrence or condition on any real property adjoining or in the vicinity of the properties that could cause the properties or any part thereof to be designated as "border zone property" under the provisions of California Health and Safety Code sections 25220, et seq., or any regulation adopted in accordance therewith.

(4) Remedial Action. In response to the presence of any Hazardous Materials on, under or about the properties, or migrating from the properties, Developer shall immediately take, at Developer's sole expense, all action to assess, investigate, remedy or remove the Hazardous Material, or take any action required by any Hazardous Materials Laws or to comply with any directives, or corrective action orders, requests, from any Governmental Authority, or to comply with any judgment, consent decree, settlement or compromise with respect to any Hazardous Materials Claims.

(b) Indemnity. At all times from and after the Closing Date, Developer shall indemnify, defend, and hold the City Indemnitees, harmless from and against any and all losses, costs, claims, damages, liability, and judgments, including reasonable attorney's fees, with the counsel of City's choice, and costs incurred to hire environmental consultants incurred by or asserted against any Indemnified Party in connection with, arising out of, in response to, or in any manner relating to the violation of any Hazardous Materials Law, any Release, or threatened Release of Hazardous Materials, any condition of pollution, contamination or Hazardous Materials-related nuisance on, under or from the Dealership Development Parcel or the Swap Parcel, or arising out of or in response to any Hazardous Materials Claims except as directly caused by the City's willful misconduct or gross negligence. This obligation to indemnify and defend the City Indemnitees contained in this shall survive termination of this DDA.

At all times from and after the Closing Date, the City shall indemnify, defend, and hold the Developer, harmless from and against any and all losses, costs, claims, damages, liability, and judgments, including reasonable attorney's fees, with the counsel of Developer's choice, and costs incurred to hire environmental consultants incurred by or asserted against the Developer in connection with, arising out of, in response to, or in any manner relating to the violation of any Hazardous Materials Law, any Release, or threatened Release of Hazardous Materials, any condition of pollution, contamination or Hazardous Materials-related nuisance on, under or from the Adjacent Parcel, or arising out of or in response to any Hazardous Materials Claims. This obligation to indemnify and defend the Developer contained in this shall survive termination of this DDA.

(c) No Limitation. Developer hereby acknowledges and agrees that Developer's duties, obligations and liabilities under this Agreement, including, without limitation, under subsection (b) above, are in no way limited or otherwise affected by any information the City may have concerning the Development and/or the presence within the Development of any Hazardous Materials, whether the City obtained such information from Developer or from its own investigations.

Section 5.7 Insurance Requirements.

(a) Required Coverage. At all times from and after the Closing Date and through the completion of the Development and issuance of a Notice of Completion, Developer shall maintain and keep in force, at Developer's sole cost and expense, the following insurance applicable to the Development:

(1) To the extent required by law, Worker's Compensation insurance, including Employer's Liability coverage, with limits not less than required by applicable law.

(2) Comprehensive or Commercial General Liability insurance with limits not less than Two Million Dollars (\$2,000,000) each occurrence combined single limit for Bodily Injury and Property Damage, including coverages for Contractual Liability, Personal Injury, Broadform Property Damage, Products and Completed Operations.

(3) Comprehensive Automobile Liability insurance with limits not less than Two Million Dollars (\$2,000,000) each occurrence combined single limit for Bodily Injury and Property Damage, including coverages for owned, non-owned and hired vehicles, as applicable; provided, however, that if Developer does not own or lease vehicles for purposes of this Agreement, then no automobile insurance shall be required and both Parties to this Agreement shall initial this provision signifying same.

(4) Property insurance covering the Development covering all risks of loss, naming the City as a Loss Payee, as its interest may appear as commercially reasonably determined by Developer and consistent with similar new automobile dealerships in the San Francisco Bay Area.

(b) Contractor's Insurance. Developer shall cause any general contractor or agent working on the Development under direct contract with Developer to maintain insurance of the types and in at least the minimum amounts described in subsections (a)(1), (a)(2), and (a)(3) above, and shall require that such insurance shall meet all of the general requirements of subsection (c) below. Subcontractors working on the Development under indirect contract with Developer shall be required to maintain the insurance described in subsections (a)(1), (a)(2) and (a)(3) above; provided that the amount of Commercial General Liability insurance for each subcontractor shall have a limit of not less than One Million Dollars (\$1,000,000). Liability and Comprehensive Automobile Liability insurance to be maintained by such contractors and agents pursuant to this subsection shall name as additional insureds TFSB and the City, and its council members, officers, agents, and employees.

(c) General Requirements. The required insurance shall be provided under an occurrence form, and Developer shall maintain such coverage continuously throughout the Term. Should any of the required insurance be provided under a form of coverage that provides that claims investigation or legal defense costs be included in such annual aggregate limit, such annual aggregate limit shall be three times the occurrence limits specified above.

Comprehensive General Liability, Comprehensive Automobile Liability and property insurance policies shall be endorsed to name as additional insureds TFSB and the City and the City's board and council members, officers, agents, and employees.

All policies and bonds shall be endorsed to provide thirty (30) days prior written notice of cancellation, reduction in coverage, or intent not to renew to the address established for notices to the City pursuant to Section 9.1.

(d) Post Completion Insurance Requirements. From and after the issuance of the Notice of Completion, the Developer shall carry such liability and property damage insurance as is consistent with lender and manufacturer requirements and the customary practices of similar new automobile dealerships in the San Francisco Bay Area.

(e) Certificates of Insurance. Upon the City's reasonable request at any time from and after the Closing Date and through the completion of the Development and issuance of a Notice of Completion, Developer shall provide certificates of insurance, in form and with insurers reasonable acceptable to the City, evidencing compliance with the requirements of this Section. Through the completion of the Development and up to the issuance of the Notice of Completion, all required insurance policies shall include a separate endorsement naming the City of Hayward and TFSB as an additional insured, which rights shall be subject to the rights of senior lienholders.

(f) Insurance Proceeds. Any right of the City and Developer to any and all insurance proceeds, including casualty insurance proceeds or condemnation proceeds, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

(1) Any approved Security Financing Interest permitted by this Agreement and under the Financing Plan; or

(2) Any rights or interest provided in this Agreement or any applicable security instrument for the protection of the holder of such Security Financing Interests.

Section 5.8 Audits.

Upon forty-eight (48) hours' prior written notice from the City, the Developer shall make available for examination at reasonable intervals and during normal business hours to the City all books, accounts, reports, files, and other papers or property with respect to all matters covered by this Agreement, and shall permit the City to audit, examine, and make excerpts or transcripts from such records. The City may make audits of any conditions relating to this Agreement. The City agrees to treat information obtained from the Developer during any audit with confidentiality, subject to the City's legal obligations including under the Public Records Act. Disclosure of information by the City shall not be prohibited if that disclosure is of information

that is or becomes a matter of public record or public knowledge as a result of the closing of the transaction or from sources other than the City or its agents, employees, contractors, consultants or attorneys.

Section 5.9 Subdivision of Property.

(a) Prohibition on further Subdivision of Dealership Development Parcel. As consideration for the transfer of the Dealership Development Parcel, the Developer agrees that it shall not further subdivide, file or process a lot line adjustment, or take any action to create any separate transferable legal parcels for the entire term of the Dealership Operating Covenant, without the City's prior written approval.

ARTICLE 6.
ASSIGNMENT AND TRANSFERS

Section 6.1 Definitions.

As used in this Article, the term "Transfer" means:

(a) Any total or partial (more than fifty percent (50%)) sale, assignment or conveyance, or any trust or power, or any transfer in any other mode or form, of or with respect to this Agreement or of the fee interest in any portion the Dealership Development Parcel or the Improvements or any part thereof or any interest therein, of the Improvements constructed thereon; or

(b) Any total or partial (more than fifty percent (50%)), sale, assignment or conveyance, any trust or power, or any transfer in any other mode or form, of or with respect to the membership interests in Developer or any member of Developer or any contract to any of the same, including without limitation, any transfer or sale of any interest in Developer for financing purposes unless (i) approved by the City as part of the approved Financing Plan or (ii) in connection with a financing occurring after the Notice of Completion is recorded; or

(c) Any merger, consolidation, sale, lease (other than as expressly allowed under Section 6.4, below), assignment or conveyance of all or substantially all of the assets of Developer; or

(d) Any action that results in the change, removal, replacement or otherwise of more than fifty percent (50%) of the membership interests of an Affiliated Company operating at the Development or a change, removal, replacement of the Subaru Brand; or

(e) The subletting of any part or all of the Dealership Development Parcel except to an Affiliated Company for uses in conformance with the Dealership Operating Covenant.

Section 6.2 Purpose of Restrictions on Transfer.

This Agreement is granted to Developer solely for the purpose of development and operation of the Improvements, and its subsequent use in accordance with the terms of this

Agreement, and not for speculation in landholding. Developer recognizes that, in view of the following factors, the qualifications and identity of Developer are of particular concern to the community and City:

(a) The importance of the development of the Improvements to the general welfare of the community; and

(b) The fact that a Transfer as defined in Section 6.1 above is for practical purposes a transfer or disposition of the fee interest in the properties then owned by Developer; and

(c) The fact that the Dealership Development Parcel and the Improvements are not to be acquired, developed or used for speculation, but only for development and operation by Developer in accordance with this Agreement and the Dealership Operating Covenant;

(d) The reliance by the City upon the unique qualifications and ability of Developer to serve as the catalyst for development of the properties and upon the continuing interest which Developer will have in the properties to assure the quality of the use, operation and maintenance deemed critical by the City in the development of the properties; and

(e) The fact that a change in ownership or control of the owner of any portion the properties, or of a substantial part thereof, or any other act or transaction involving or resulting in a significant change in ownership or with respect to the identity of the parties in control of Developer or the degree thereof is for practical purposes a transfer or disposition of the properties.

Section 6.3 Prohibited Transfers.

(a) Except as expressly permitted in this Agreement (including in Section 6.4 below), for the entire Term of the Operating Covenant, the Developer represents and agrees that Developer has not made or created, and will not make or create or suffer to be made or created, any Transfer, either voluntarily or by operation of law without the prior written approval of the City, including the following:

(1) For the term of the Dealership Operating Covenant, any transfer of any portion of the Dealership Development Parcel for a use other than as allowed under the Dealership Operating Covenant;

(2) Any transfer resulting from the subdivision of the Dealership Development Parcel other than those consistent with the terms of Section 5.9 above.

(b) Any Transfer made in contravention of this Section 6.3 shall be void and shall be deemed to be a default under this Agreement whether or not Developer knew of or participated in such Transfer.

Section 6.4 Permitted Transfers.

Notwithstanding the provisions of Section 6.3, the following Transfers shall be permitted and are hereby approved by the City, subject to the conditions set forth under Section 6.6, below:

(a) Any Transfer of the Dealership Development Parcel creating a Security Financing Interest permitted pursuant to the approved Financing Plan and any post-completion Security Financing Interest or any financing obtained by the Developer post-completion; or

(b) Any Transfer of the Dealership Development Parcel directly resulting from the foreclosure of a Security Financing Interest or the granting of a deed in lieu of foreclosure of a Security Financing Interest or as otherwise permitted under Article 7; or

(c) Any Transfer of the Dealership Development Parcel that would allow the operation of the Dealership Development Parcel to maintain the Subaru Brand so long as: (1) The proposed transferee has continuously been in the business of owning or operating similar Improvements for at least five (5) years prior to the proposed Transfer; (2) as of the date of the proposed Transfer, the proposed transferee has a net worth equal to or greater than Three Million Dollars (\$3,000,000); and (3) the proposed transferee has been pre-qualified as meeting all of the dealer candidate standards of the Subaru Brand as set forth by Subaru of America, Inc., with evidence of such approval from Subaru of America, Inc., being provided to the City to its reasonable satisfaction. Notwithstanding anything to the contrary, if a proposed transferee has been approved by Subaru of America, Inc. or any subsequent manufacturer or brand approved by the City under this Agreement, but does not otherwise meet the requirements of this subsection 6.4(c), the proposed transferee shall nonetheless be deemed to satisfy the requirements of this subsection 6.4(c); or

(d) Any Transfer of the Dealership Development Parcel resulting from the foreclosure of a Security Financing Interest or the granting of a deed in lieu of foreclosure of a Security Financing Interest and the subsequent transfer of the Dealership Development Parcel to a new owner that would allow the operation of the Dealership Development Parcel to continue to operate as a new automobile dealership, so long as: (1) the replacement brand is a nationally recognized automobile brand; (2) the proposed transferee has been pre-qualified by the replacement brand as meeting all of the dealer candidate standards required by the replacement brand, with evidence of such pre-qualification from the proposed transferee being provided to the City; (3) at the time of the proposed transfer, the proposed replacement brand may not be operating a new automobile dealership within the City limits or may not have operated a new automobile dealership in the City within the previous twelve (12) months (which requirement may be waived by the City Manager at the City Manager's sole and absolute discretion); and (4) TFSB has approved the proposed transferee; or

(e) Any Transfer solely and directly resulting from the death or incapacity of an individual; or

(f) Any Transfer of the Dealership Development Parcel creating a lease or sublease between Developer and an Affiliated Company; or

(g) The Transfer by the Developer of the Adjacent Parcel to the City.

Section 6.5 Permitted Transfer Subject to Further Approval.

(a) Notwithstanding any other provision of this Agreement, the following Transfers shall also constitute Permitted Transfers, subject to satisfaction of the conditions to such Transfer described in Section 6.5(b):

(1) Transfer in the ownership percentages of the Developer may be adjusted between the owners of the Developer, provided such adjustment does not cause a material change in the rights of Developer's Principal to manage and control Developer and does not diminish the capacity and expertise with respect to operation and management of similar Improvements;

(2) Admission of new or additional equity partners or creation of joint ventures, partnerships (including limited partnerships), or other entities, provided that such admission or creation of new entities does not cause a material change in the rights of Developer's Principal to manage and control Developer and does not diminish the capacity and expertise with respect to operation and management of similar Improvements;

(3) Any Transfer for estate and or tax planning purposes provided that such admission or creation of new entities does not cause a material change in the rights of Developer's Principal to manage and control Developer and does not diminish the capacity and expertise with respect to operation and management of similar Improvements; and

(4) The leasing of any portion of the Improvements to a prospective tenant or user other than an Affiliated Company for uses consistent with the Dealership Operating Covenant. City hereby approves the lease of the Dealership Development Parcel and Swap Parcel to OSOH, LLC, an Arizona limited liability company [dba One Subaru of Hayward], an Affiliated Company of the Developer.

(b) Effectuation of Certain Permitted Transfers. For a transfer specified in Section 6.5(a) to constitute a Permitted Transfer, the following conditions must be satisfied:

(1) Not less than thirty (30) days prior to the intended effectiveness of a Permitted Transfer, the Developer shall deliver to the City a notice of the intended Permitted Transfer, a description of the intended Transfer, and such information about the intended Permitted Transfer and the transferee as is necessary to enable the City to determine that the intended Transfer meets the requirements of a Permitted Transfer pursuant to this Section 6.5.

(2) For Transfers under Section 6.5(a) above, the City may withhold its approval of a Permitted Transfer if the City determines in its discretion, reasonably exercised, taking into consideration all relevant factors, including without limitation the time remaining in the Term of the Dealership Development Operating Covenant, that: (1) the proposed Transfer will in any material respect diminish the City's rights under this Agreement and the Dealership Operating Covenant; (2) the proposed Transfer will in any material respect diminish the Developer's Principal's ability to manage or control Developer or result in a change in Developer's Principal; or (3) the proposed Transfer will diminish the Developer's ability to perform under this Agreement or the Dealership Operating Covenant. If the City withholds its

approval of a Permitted Transfer, it shall provide a written statement to the Developer within thirty (30) days of receipt of the notice specifying the City's grounds for withholding approval.

(3) If City determines there is no basis to withhold, condition or delay its approval of a Permitted Transfer, City shall approve said proposed Transfer. If City fails to approve or disapprove of a Permitted Transfer under subsection 6.5(b) within thirty (30) days following receipt of a complete notice of proposed transfer, the Transfer shall be deemed approved and the Developer shall deliver to City a fully executed counterpart of the assignment and assumption agreement as required under Section 6.6(a), below.

Section 6.6 Effectuation of Certain Permitted Transfers.

(a) All Transfers of this Agreement permitted pursuant to Section 6.4 and Section 6.5 shall be effective if at the time of the Transfer, the person or entity to which such Transfer is made, by an instrument in writing prepared by the City and in form recordable among the land records, expressly assumes the obligations of Developer under this Agreement and the Dealership Operating Covenant and agrees to be subject to the conditions and restrictions to which Developer is subject arising during this Agreement, to the fullest extent that such obligations are applicable to the particular portion of or interest in the Development conveyed in such Transfer. Anything to the contrary notwithstanding, the holder of a Security Financing Interest whose interest shall have been acquired by, through or under a Security Financing Interest or shall have been derived immediately from any holder thereof shall not be required to give to City such written assumption until such holder or other person is in possession of the Dealership Development Parcel or the Swap Parcel or entitled to possession thereof pursuant to enforcement of the Security Financing Interest.

(b) In the absence of specific written agreement by the City, no such Transfer, assignment or approval by the City shall be deemed to relieve Developer or any other party from any obligations under this Agreement.

Section 6.7 Additional Transfers.

(a) Any Transfers not permitted under Section 6.4, Section 6.5, or other provisions of this Agreement shall require the prior written consent of the City, which approval shall not be unreasonably withheld, conditioned, or delayed if the proposed Transfer provides for the use of the Dealership Development Parcel as a new automobile dealership. At least forty-five (45) days prior to the proposed effective date of the Transfer, the Developer shall deliver to the City a notice of the intended Transfer (the "Transfer Notice"). The Transfer Notice must clearly detail, consistent with this Agreement and the Operating Covenant, which obligations therein are being transferred and shall include financial and other reasonable documentary evidence to enable the City to evaluate the proposed transaction and the proposed transferee's experience, reputation and qualifications necessary to comply with the following requirements:

(1) Developer shall first submit to City information regarding such proposed Transfer including the proposed documents to effectuate the Permitted Transfer, a description of the terms of the Transfer, and information regarding the proposed transferee's financial strength and the proposed transferee's capacities and expertise with respect to operation and management of similar Improvements;

(2) The transferee shall assume by a written, recorded assignment and assumption agreement, all or a portion of the Developer's obligations under this Agreement and the Operating Covenant, commensurate with the interest, rights or powers being transferred;

(3) The Transfer must be consistent with the City's goal of achieving development and operation of the Improvements in a quality equal to or superior to that being proposed or conducted by the Developer;

(4) The transferee must have the financial capacity, business reputation, and demonstrable experience of successfully acquiring and developing projects similar to the obligation it will be assuming under the assignment and assumption agreement

(5) The proposed transferee will be of sound reputation and will have sufficient financial strength and management and operation expertise in the ownership and operation of the Improvements, to fully perform and comply with all terms of this Agreement and the Dealership Operating Covenant;

(6) As of the date of the proposed Transfer, the proposed transferee has a net worth equal to or greater than Three Million Dollars (\$3,000,000);

(7) The transferee must have been prequalified as meeting all of the dealer candidate standards of a new automobile manufacturer with evidence of such approval from the manufacturer being provided to the City to its satisfaction;

(b) The City shall, at its commercially reasonable discretion, approve the Transfer by written notice to Developer if, based upon the information submitted by Developer and any other information available to the City, it appears that following the Transfer, the conditions set forth in this Section have been satisfied or waived. The City shall notify Developer and the proposed transferee of its decision within forty-five (45) days of receipt of notice of the proposed Transfer, which notice shall state with reasonable specificity the basis for disapproval. The Developer shall pay the City's reasonable staff and third-party costs in making such decisions.

(c) The provisions of Section (a)(1) through (a)(6) above shall only apply to Transfers of the Dealership Development Parcel and Improvements.

Section 6.8 Transfer of Swap Parcel. The Swap Parcel is not subject to the restrictions and conditions on transfer set forth in this Article 6; provided however, if Developer desires to transfer the Swap Parcel for any purpose, Developer must ensure that the parking requirements for the Dealership Development Parcel can otherwise be satisfied.

ARTICLE 7. DEFAULT AND REMEDIES

Section 7.1 General Applicability.

The provisions of this Article shall govern the Parties' remedies for breach or failure of this Agreement.

Section 7.2 No Fault of Parties Prior to Closing.

(a) Developer, despite good faith and diligent efforts, is unable to satisfy all of the conditions precedent to the City's obligation to transfer the properties set forth in Article 2 by the dates set forth in the Schedule of Performance; or

(b) The City, despite good faith and diligent efforts, is unable to transfer the properties to Developer and Developer is otherwise entitled to purchase the properties.

(c) Upon the happening of any of the above-described events, and at the election of either party, this Agreement may be terminated by written notice to the other party. After termination, neither party shall have any rights against or liability to the other under this Agreement, except that the waiver and indemnification provisions of this Agreement that recite that they survive termination of the Term or of this Agreement shall survive such termination and remain in full force and effect.

Section 7.3 Fault of City.

(a) Except as to events constituting a basis for termination under Section 7.2, the following events each constitute a City Event of Default (subject to any applicable notice and cure period) and a basis for Developer to take action against the City:

(1) The City, without good cause, fails to transfer the Dealership Development Parcel, the Adjacent Parcel or Swap Parcel to Developer within the time and in the manner set forth in Article 3 and Developer is otherwise entitled by this Agreement to such conveyance; or

(2) The City breaches any other material provision of this Agreement.

(b) Upon the happening of any of the above-described events, Developer shall first notify the City in writing of its purported breach or failure, giving the City forty-five (45) days from receipt of such notice to cure or, if cure cannot be accomplished within forty-five (45) days, to commence to cure such breach, failure, or act. In the event the City does not then so cure within said forty-five (45) days, or if the breach or failure is of such a nature that it cannot be cured within forty-five (45) days, the City fails to commence to cure within such forty-five (45) days and thereafter diligently complete such cure within a reasonable time thereafter but in no event later than one hundred twenty (120) days, then Developer shall be afforded the following exclusive remedies:

(1) Terminating in writing this Agreement and receiving a refund of the Deposit provided, however, that the waiver and indemnification provisions of this Agreement that recite that they survive termination of the Term or of this Agreement shall survive such termination and remain in full force and effect; or

(2) Prosecuting an action for specific performance but shall not be entitled to seek any other monetary damages against the City.

Section 7.4 Fault of Developer.

(a) Except as to events constituting a basis for termination under Section 7.2, the following events each constitute an Event of Default (subject to any applicable notice and cure period) and a basis for the City to take action against Developer:

(1) Developer fails to exercise good faith and diligent efforts to satisfy, within the time set forth in the Schedule of Performance and in the manner set forth in Article 2, one or more of the conditions precedent to the City's obligation to convey the fee interest in the properties to Developer pursuant to this Agreement; or

(2) Developer refuses to acquire the Dealership Development Parcel, the Adjacent Parcel or the Swap Parcel within the time periods and under the terms set forth in Article 3; or

(3) Developer constructs or attempts to construct the Improvements in violation of Article 4; or

(4) Developer has not satisfied all preconditions set forth in this Agreement to commencement of construction of the Improvements by the Closing Date, or fails to commence or complete construction of the Improvements within the times set forth in Article 4, or abandons or suspends construction of the Improvements prior to completion of all construction for a period of sixty (60) days after written notice by the City of such abandonment or suspension; or

(5) Developer fails to comply with any obligation or requirement set forth in Article 6; or

(6) Developer subdivides the Dealership Development Parcel (or any portion thereof) in manner other than as allowed under Section 5.9; or

(7) A Transfer occurs, either voluntarily or involuntarily, in violation of Article 6; or

(8) Developer fails to transfer the Adjacent Parcel to the City on the Closing Date; or

(9) Any representation or warranty contained in this Agreement (including those listed in Section 9.18) or in any application, financial statement, certificate or report submitted to the City in connection with this Agreement proves to have been incorrect in any material and adverse respect when made; or

(10) An Event of Default occurs under the Dealership Operating Covenant, including but not limited to a failure by Developer (or its transferee) to continuously operate the Improvements pursuant to the terms and conditions of the Dealership Operating Covenant for the minimum ten (10) year term thereof;

(11) A court having jurisdiction shall have made or entered any decree or order: (i) adjudging Developer to be bankrupt or insolvent; (ii) approving as properly filed a

petition seeking its reorganization of Developer or seeking any arrangement for Developer under the bankruptcy law or any other applicable debtor's relief law or statute of the United States or any state or other jurisdiction; (iii) appointing a receiver, trustee, liquidator, or assignee of Developer in bankruptcy or insolvency or for any of their properties; or (iv) directing the winding up or liquidation of Developer, if any such decree or order described in clauses (i) to (iv), inclusive, shall have continued unstayed or undischarged for a period of ninety (90) days unless a lesser time period is permitted for cure under any other mortgage on the Dealership Development Parcel or Swap Parcel, in which event such lesser time period will apply under this subsection (9) as well; or Developer has admitted in writing its inability to pay its debts as they fall due or shall have voluntarily submitted to or filed a petition seeking any decree or order of the nature described in clauses (i) to (iv), inclusive; or

(12) Developer shall have assigned its assets for the benefit of its creditors or suffered a sequestration or attachment of or execution on any substantial part of its property, unless the property so assigned, sequestered, attached or executed upon shall have been returned or released within ninety (90) days after such event (unless a lesser time period is permitted for cure under any other mortgage on the Dealership Development Parcel or Swap Parcel, in which event such lesser time period shall apply under this subsection as well) or prior to sooner sale pursuant to such sequestration, attachment, or execution; or

(13) Developer shall have been dissolved or shall have voluntarily suspended its business; or

(14) There shall occur any default declared by any lender under any loan document related to any loans secured by a deed of trust on the Development after the expiration of all applicable cure periods; or

(15) Developer breaches any other material provision of this Agreement and any applicable cure period for such breach shall have expired.

(b) Upon the happening of any of the above-described events, the City shall first notify Developer in writing of its purported breach, failure or act above described, giving Developer in writing forty-five (45) days from receipt of such notice to cure, or, if cure cannot be accomplished within said forty-five (45) days, to commence to cure such breach, failure, or act. In the event Developer fails to cure within said forty-five (45) days, or if such breach is of a nature that it cannot be cured within forty-five (45) days, Developer fails to commence to cure within said forty-five (45) days and diligently complete such cure within a reasonable time thereafter but in no event later than ninety (90) days, then the City shall be afforded all of its rights at law or in equity and the right to exercise any or all of the following remedies:

(1) Termination of this Agreement by written notice to Developer; provided, however, that the City's remedies pursuant to this Article 7 or any other City Document and the waiver and indemnification provisions of this Agreement that recite that they survive termination of the Term or of this Agreement shall survive such termination and remain in full force and effect;

(2) Prosecuting an action for damages or specific performance; and

(3) If the uncured default occurs prior to the issuance of a Certificate of Occupancy for the Improvements, exercising the City's rights under Section 7.5 and Section 7.6; it being understood that the remedies in Section 7.5 and 7.6 will automatically terminate after the issuance of a Certificate of Occupancy for the Improvements.

Section 7.5 Reversion to City.

(a) The Developer shall diligently and in good faith pursue completion of the Improvements in accordance with this Agreement. Following the close of escrow, if this Agreement is terminated pursuant to Section 7.4 and such termination occurs prior to issuance of a Certificate of Occupancy for the Improvements, the City shall have the right to reenter and take possession of the Dealership Development Parcel or Swap Parcel and all Improvements thereon, and to revest in the City the estate of the Developer for such Dealership Development Parcel or Swap Parcel. From and after the issuance of a Certificate of Occupancy for the Improvements and the recordation of the Notice of Completion, the remedies set forth in this Section 7.5 shall no longer be available to the City under any circumstances.

(b) Upon revesting in the City, the City shall promptly use its best efforts to resell the Dealership Development Parcel or Swap Parcel consistent with its obligations under state law. Upon sale, the proceeds shall be applied as follows:

(1) First, to reimburse the City for any reasonable costs it incurs in managing or selling the Dealership Development Parcel or Swap Parcel, including but not limited to amounts to discharge or prevent liens or encumbrances arising from any acts or omissions of the Developer or its contractors;

(2) Second, to the Developer up to the sum of the Purchase Price Developer paid for the Dealership Development Parcel or Swap Parcel and the reasonable costs actually expended by the Developer in undertaking the entitlement and construction of the portion of the Improvements; and

(3) Any balance to the City.

(c) The right of reverter contained in this Section shall be set forth in the Grant Deed.

(d) Such right to revest the property to the City, to the extent provided in this Agreement, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

(1) Any approved Security Financing Interest permitted by this Agreement and under the Financing Plan; or

(2) Any rights or interest provided in this Agreement for the protection of the holder of such Security Financing Interests.

Section 7.6 Option to Repurchase, Reenter and Repossess.

(a) Following the close of escrow, if this Agreement is terminated pursuant to Section 7.4 and such termination occurs prior to issuance of a Certificate of Occupancy for the Improvements, the City shall have the additional right at its option to repurchase, reenter and take possession of any portion of the Dealership Development Parcel or Swap Parcel then owned by the Developer with all Improvements thereon. From and after the issuance of a Certificate of Occupancy for the Improvements and the recordation of the Notice of Completion, the remedies set forth in this Section 7.6 shall no longer be available to the City under any circumstances. The recordation of the Notice of Completion shall be conclusive evidence that the rights under this Section 7.6 have been terminated.

(b) Such right to repurchase, reenter and repossess, to the extent provided in this Agreement, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

(1) Any approved Security Financing Interest permitted by this Agreement and under the Financing Plan; or

(2) Any rights or interest provided in this Agreement for the protection of the holder of such Security Financing Interests.

(c) To exercise its right to repurchase, reenter and take possession with respect to the Dealership Development Parcel or Swap Parcel owned by the Developer, the City shall pay to the Developer in cash an amount equal to:

(1) The Purchase Price paid to the City for the Property; plus

(2) The reasonable costs actually expended by the Developer in undertaking the entitlement of the Dealership Development Parcel or Swap Parcel to construct the Improvements, construction of the portion of the Improvements existing on the Dealership Development Parcel or Swap Parcel at the time of the repurchase, reentry and repossession; less

(3) Any gains or income withdrawn or made by the Developer from the Dealership Development Parcel or Swap Parcel or the Improvements thereon; less

(4) The value of any unpaid liens or encumbrances on the Dealership Development Parcel or Swap Parcel which the City assumes or takes subject to said encumbrances.

Section 7.7 Right to Cure at Developer's Expense.

The City shall have the right to cure any monetary default by Developer under a loan secured by the Dealership Development Parcel or the Improvements in connection with the Development. However, if Developer is in good faith contesting a claim of default under a loan and the City's interest under this Agreement is not imminently threatened by such default, in the City's sole judgment, the City shall not have the right to cure such default. Developer agrees to reimburse the City for any funds advanced by the City to cure a monetary default by Developer upon demand therefore, together with interest thereon at the lesser of the rate of ten percent

(10%) per annum or the maximum rate permitted by law from the date of expenditure until the date of reimbursement.

Section 7.8 Rights of Mortgagees.

Any rights of the City under this Agreement shall be subordinate to and not defeat, limit or render invalid any Security Financing Interest permitted by this Agreement or any rights provided for in this Agreement or any applicable security instrument for the protection of holders of Security Financing Interests. Nothing in this section shall limit the City's rights under the Operating Covenant.

Section 7.9 Remedies Cumulative.

No right, power, or remedy given by the terms of this Agreement is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given by the terms of any such instrument, or by any statute or otherwise. Neither the failure nor any delay to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

Section 7.10 Waiver of Terms and Conditions.

No waiver of any default or breach by Developer hereunder shall be implied from any omission by the City to take action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the waiver, and such waiver shall be operative only for the time and to the extent therein stated. Waivers of any covenant, term, or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term, or condition. The consent or approval by the City to or of any act by Developer requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar act. The exercise of any right, power, or remedy shall in no event constitute a cure or a waiver of any default under this Agreement or the Dealership Operating Covenant or Adjacent Parcel Restrictive Covenant, as applicable, nor shall it invalidate any act done pursuant to notice of default, or prejudice the City in the exercise of any right, power, or remedy hereunder or under this Agreement, unless in the exercise of any such right, power, or remedy all obligations of Developer to City are paid and discharged in full.

Section 7.11 Assignment of Plans.

If this Agreement is terminated pursuant to Section 7.2 or Section 7.4, then Developer shall promptly deliver to the City, within ten (10) days of such termination, copies of all plans and specifications for the Development, all permits and approvals obtained in connection with the Development, and all applications for permits and approvals not yet obtained but needed in connection with the Development (collectively, the "Section 7.11 Documents"). To the maximum extent permitted under such documents or any applicable security instrument, the delivery of the Section 7.11 Documents shall be accompanied by an assignment, in substantially the form attached hereto as Exhibit G (form "Assignment Agreement"), of Developer's right, title

and interest in the Section 7.11 Documents; provided however, that any use of the Section 7.11 Documents by the City or any other person shall be without liability of any kind to Developer and without any representation or warranty of Developer or its employees as to the quality, validity, or usability of the Section 7.11 Documents.

Section 7.12 No Consequential Damages.

Notwithstanding anything to the contrary elsewhere in this agreement or provided for under any applicable law, neither City or Developer shall, in any event, be liable to the other party, either in contract, tort or otherwise, for any consequential, incidental, indirect, special or punitive damages from such other person, including loss of future revenue, income or profits, diminution of value or loss of business reputation or opportunity relating to the default or alleged breach hereof, whether or not the possibility of such damages has been disclosed to the other party in advance or could have been reasonably foreseen by such other party.

ARTICLE 8.
SECURITY FINANCING AND RIGHTS OF HOLDERS

Section 8.1 No Encumbrances Except for Development Purposes.

Mortgages and deeds of trust, or any other reasonable method of security are permitted to be placed upon Developer's fee interest in the Dealership Development Parcel and Swap Parcel but only for the purpose of securing loans approved by the City pursuant to the approved Financing Plan or as otherwise provided in this Agreement. Mortgages, deeds of trust, or other reasonable security instruments securing loans approved by the City pursuant to the approved Financing Plan are each referred to as a "Security Financing Interest." The words "mortgage" and "deed of trust" as used in this Agreement include all other appropriate modes of financing real estate construction, and land development.

Section 8.2 Holder Not Obligated to Construct.

The holder of any Security Financing Interest authorized by this Agreement is not obligated to construct or complete any improvements or to guarantee such construction or completion, nor shall any covenant or any other provision in the City Documents be construed so to obligate such holder. However, nothing in this Agreement shall be deemed to permit or authorize any such holder to devote the Dealership Development Parcel or Swap Parcel or any portion thereof to any uses, or to construct any improvements thereon, other than those uses or improvements provided for or authorized by this Agreement.

Section 8.3 Notice of Default and Right to Cure.

Whenever the City pursuant to its rights set forth in Article 7 of this Agreement delivers any notice or demand to Developer with respect to the commencement, completion, or cessation of the construction of the Improvements, the City shall at the same time deliver to each holder of record of any Security Financing Interest creating a lien upon Developer's interest in the Dealership Development Parcel or Swap Parcel or any portion thereof, a copy of such notice or demand. Each such holder shall (insofar as the rights of the City are concerned) have the right, but not the obligation, at its option, within ninety (90) days after the receipt of the notice, to cure

or remedy or commence to cure or remedy any such default or breach affecting the Dealership Development Parcel or Swap Parcel which is subject to the lien of the Security Financing Interest held by such holder and to add the cost thereof to the security interest debt and the lien on its security interest. Nothing contained in this Agreement shall be deemed to permit or authorize such holder to undertake or continue the construction or completion of the Improvements (beyond the extent necessary to conserve or protect such improvements or construction already made) without first having expressly assumed in writing Developer's obligations to the City relating to such Improvements under this Agreement. The holder or its assignee in that event must agree to complete, in the manner provided in this Agreement, the Improvements to which the lien or title of such holder relates. Any such holder or its assignee properly completing such Improvements pursuant to this paragraph shall assume all rights and obligations of Developer under this Agreement and shall be entitled, upon completion and written request made to the City, to a Notice of Completion from the City, in substantially the form attached hereto as Exhibit J, incorporated herein by this reference.

Section 8.4 Failure of Holder to Complete Improvements.

In any case where six (6) months after default by Developer in completion of construction of the Improvements under this Agreement, the holder of record of any Security Financing Interest, having first exercised its option to construct, or the assignment of its option to construct, has not proceeded diligently with construction, the City shall be afforded those rights against such holder it would otherwise have against Developer under this Agreement.

Section 8.5 Right of City to Cure.

In the event of a default or breach by Developer of a Security Financing Interest prior to the completion of Development, and the holder has not exercised or assigned its option to complete the Development called for on the Dealership Development Parcel or Swap Parcel, the City may cure the default (inclusive of any acceleration of principal, accrued interest, or other fees under the terms of the Security Financing Interest loan documents), prior to the completion of any foreclosure. In such event the City shall be entitled to reimbursement from Developer of all costs and expenses incurred by the City in curing the default. The City shall also be entitled to a lien upon the Dealership Development Parcel or Swap Parcel or any portion thereof to the extent of such costs and disbursements. The City agrees that such lien shall be subordinate to any Security Financing Interest, and the City shall execute from time to time any and all documentation reasonably requested by Developer to effect such subordination.

Section 8.6 Right of City to Satisfy Other Liens.

After the conveyance of title to the Dealership Development Parcel or Swap Parcel or any portion thereof, and for the term of the Operating Covenant or prior to the issuance of a Certificate of Occupancy for the Improvements, and after Developer has had a reasonable time to challenge, cure or satisfy any liens or encumbrances on the Dealership Development Parcel or Swap Parcel or any portion thereof, the City shall have the right to satisfy any such lien or encumbrances; provided, however, that nothing in this Agreement shall require Developer to pay or make provision for the payment of any tax, assessment, lien or charge so long as Developer in good faith shall contest the validity or amount therein and so long as such delay in payment shall

not subject the Dealership Development Parcel or Swap Parcel or any portion thereof to forfeiture or sale.

Section 8.7 Holder to be Notified.

The provisions of this Article shall be incorporated into the relevant deed of trust or mortgage evidencing each Security Financing Interest to the extent deemed necessary by, and in form and substance reasonably satisfactorily to the City, or shall be acknowledged by the holder of a Security Financing Interest prior to its coming into any security right or interest in the Dealership Development Parcel or Swap Parcel. As of the date of this Agreement, the City has determined that the City shall not require the provisions of this Article to be incorporated into the TFSB mortgage or deed of trust. Prior to or concurrently with the closing, the City and TFSB will execute an estoppel certificate in which TFSB will acknowledge acceptance of the terms of Article 8.

ARTICLE 9.
GENERAL PROVISIONS

Section 9.1 Notices, Demands and Communications.

Formal notices, demands, and communications between the City and Developer shall be sufficiently given if and shall not be deemed given unless dispatched by registered or certified mail/return receipt, or delivered personally, to the principal offices of the City and Developer as follows:

City: City of Hayward
777 B Street, Fourth Floor
Hayward, CA 94541
Attn: City Manager

With copy to: City of Hayward
777 "B" Street
Hayward, CA 94541-5007
Attn: City Attorney
Facsimile: (510) 583-3660
Email: Michael.Lawson@hayward-ca.gov

Goldfarb & Lipman
1300 Clay Street, 11th Floor
Oakland, CA 94612
Attn: Heather Gould
Facsimile: (510) 836-1035
Email: hgould@goldfarblipman.com

Developer: BMODDRE2 LLC
10005 W Papago Fwy
Avondale, AZ 85323
Attn: TJ Hess, CFO

With copy to: Arent Fox, LLP
55 Second Street, 21st Floor
San Francisco, CA 94105-3490
Attn: Bruce Bercovich, Esq.
Facsimile: (415) 757-5501
Email: Bruce.Bercovich@arentfox.com

Such written notices, demands and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate by mail as provided in this Section 9.1. No party shall evade or refuse delivery of any notice.

Section 9.2 Non-Liability of City Officials, Employees and Agents.

No member, official, employee or agent of the City shall be personally liable to Developer, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to Developer or successor or on any obligation under the terms of this Agreement.

Section 9.3 Conflict of Interest.

No member, official, employee or agent of the City shall make any decision relating to this Agreement which affects their personal interests or the interest of any corporation, partnership, association in which they are directly or indirectly interested in.

Section 9.4 Enforced Delay.

In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default where delays or defaults are due to war; insurrection; protests, strikes; lock-outs; riots; floods; earthquakes; fires; casualties; acts of god; acts of the public enemy; epidemics or pandemics; quarantine restrictions; freight embargoes; governmental restrictions or priority; litigation (including suits filed by third parties concerning or arising out of this Agreement); weather or soils conditions which, in the opinion of Developer's contractor, will necessitate delays; inability to secure necessary labor, materials or tools; acts of the other party; acts or failure to act of any public or governmental agency or entity (other than the acts or failure to act of the City); or any other causes (other than Developer's inability to obtain financing for the Improvements) beyond the control or without the fault of the party claiming an extension of time to perform. An extension of time for any cause will be deemed granted if notice by the party claiming such extension is sent to the other within fifteen (15) days from the date the party seeking the extension first discovered the cause and such extension of time is not rejected in writing by the other party within fifteen (15) days of receipt of the notice. Times of performance under this Agreement may also be extended in writing by the City and Developer. In no event shall the cumulative delays exceed one hundred eighty (180) days, unless otherwise agreed to by the Parties in writing.

Section 9.5 Inspection of Books and Records.

Upon request, Developer shall permit the City to inspect at reasonable times and on a confidential basis those books, records and all other documents of Developer necessary to determine Developer's compliance with the terms of this Agreement. Developer also has the right at all reasonable times to inspect the public books, records and all other documentation of the City pertaining to its obligations under this Agreement.

Section 9.6 Title of Parts and Sections.

Any titles of the articles, sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any part of its provision.

Section 9.7 General Indemnification.

Developer agrees to indemnify, protect, hold harmless and defend (by counsel reasonably satisfactory to the City) the City Indemnitees, from all suits, actions, claims, causes of action, administrative proceedings, arbitrations, enforcement actions, costs, demands, judgments and liens arising out of Developer's performance or non-performance under this Agreement, or any other agreement executed pursuant to this Agreement, or arising out of acts or omissions of any of Developer's contractors, subcontractors, or persons claiming under any of the aforesaid, except as directly caused by the City's willful misconduct or gross negligence. The provisions of this Section shall survive expiration of the Term or other termination of this Agreement and shall remain in full force and effect.

Section 9.8 Applicable Law.

This Agreement shall be interpreted under and pursuant to the laws of the State of California.

Section 9.9 No Brokers.

The City represents that it has not had any contact or dealings regarding the properties, or any communication in connection with the subject matter of this transaction, through any real estate broker or other person who can claim a right to a commission or finder's fee except as agreed to in writing by the City and Developer. Developer represents, warrants, and agrees that it has a real estate broker that Developer is obligated to pay any real estate commission in connection with the transactions contemplated by this Agreement. If any broker or finder makes a claim for a commission or finder's fee based upon a contact, dealings, or communications, Developer shall indemnify, defend with counsel of the City's choice, and hold the City harmless from all expense, loss, damage and claims, including the City's attorneys' fees, if necessary, arising out of the broker's or finder's claim, except as directly cause by the City's willful misconduct or gross negligence. The provisions of this Section shall survive expiration of the Term or other termination of this Agreement and shall remain in full force and effect.

Section 9.10 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 remainder of the provisions shall continue in full force and effect unless the rights and obligations of the parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

Section 9.11 Venue.

In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the venue for such action shall be the Superior Court of the County of Alameda, or where otherwise appropriate, exclusively in the United States District Court, Northern District, Oakland, California.

Section 9.12 Binding Upon Successors.

(a) This Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors in interest and assigns of each of the parties hereto except that there shall be no Transfer of any interest by any of the parties hereto except pursuant to the terms of this Agreement. Any reference in this Agreement to a specifically named party shall be deemed to apply to any successor, heir, administrator, executor or assign of such party who has acquired an interest in compliance with the terms of this Agreement, or under law.

(b) The covenants and restrictions set forth in this Agreement shall run with the land and shall bind all successors in title to the Dealership Development Parcel, Swap Parcel, and the Adjacent Parcel, as applicable. However, on the termination of this Agreement, such covenants and restrictions shall expire. Each and every contract, deed, or other instrument hereafter executed covering or conveying any portion of the properties shall be held conclusively to have been executed, delivered, and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed, or other instrument, unless the City expressly releases any portion of the properties from the requirements of this Agreement.

Section 9.13 Parties Not Co-Venturers.

Nothing in this Agreement is intended to or does establish the parties as partners, co-venturers, or principal and agent with one another.

Section 9.14 No Third-Party Beneficiaries.

No person or entity other than the City, Developer, and their permitted successors and assigns shall have any right of action under this Agreement

Section 9.15 Time of the Essence.

In all matters under this Agreement, the parties agree that time is of the essence.

Section 9.16 Action by the City.

Except as may be otherwise specifically provided in this Agreement or any another City Documents, whenever any approval, notice, direction, finding, consent, request, waiver, or other

action by the City is required or permitted under this Agreement or any other City Documents, such action may be given, made, or taken by the City Manager, or by any person who shall have been designated in writing to Developer by the City Manager, without further approval by the City Council. Any such action shall be in writing in a form approved by the City Attorney.

Section 9.17 Discretion Retained by City.

The City's execution of this Agreement does not constitute approval by the City and in no way limits the discretion of the City in the permit and approval process in connection with development of the Improvements.

Section 9.18 Representations and Warranties.

(a) Developer Representations and Warranties. Developer hereby represents and warrants to the City as follows as of the Effective Date and throughout the Term, unless otherwise specified below:

(1) Organization. Developer is a duly organized, validly existing limited liability company, or such other entity approved by the City, and is in good standing under the laws of the State of California and has the power and authority to own its property and carry on its business as now being conducted.

(2) Authority of Developer. Developer has full power and authority to execute and deliver this Agreement, and all other documents and instruments to be executed and delivered, pursuant to this Agreement, and to perform and observe the terms and provisions of all of the above.

(3) Authority of Persons Executing Documents. This Agreement and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement have been executed and delivered by persons who are duly authorized to execute and deliver the same for and on behalf of Developer, and all actions required under Developer's organizational documents and applicable governing law for the authorization, execution, delivery and performance of this Agreement and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement, have been duly taken.

(4) Valid Binding Agreements. This Agreement and all other documents or instruments which have been executed and delivered pursuant to or in connection with this Agreement constitute or, if not yet executed or delivered, will when so executed and delivered constitute, legal, valid and binding obligations of Developer enforceable against it in accordance with their respective terms.

(5) No Breach of Law or Agreement. Neither the execution nor delivery of this Agreement or of any other documents or instruments executed and delivered, or to be executed or delivered, pursuant to this Agreement, nor the performance of any provision, condition, covenant or other term hereof or thereof, will conflict with or result in a breach of any statute, rule or regulation, or any judgment, decree or order of any court, board, commission or agency whatsoever binding on Developer, or any provision of the organizational documents of

Developer, or will conflict with or constitute a breach of or a default under any agreement to which Developer is a party, or will result in the creation or imposition of any lien upon any assets or property of Developer, other than liens permitted or established pursuant hereto.

(6) Compliance with Laws; Consents and Approvals. The construction of the Improvements will comply with all applicable laws, ordinances, rules and regulations of federal, state and local governments and agencies and with all applicable directions, rules and regulations of the fire marshal, health officer, building inspector and other officers of any such government or agency.

(7) Pending Proceedings. Developer is not in default under any law or regulation or under any order of any court, board, commission or agency whatsoever, and there are no claims, actions, suits or proceedings pending or, to the knowledge of Developer, threatened against or affecting Developer, at law or in equity, before or by any court, board, commission or agency whatsoever which might, if determined adversely to Developer, materially affect Developer's ability to develop and operate the Improvements as required under this Agreement and the Dealership Operating Covenant.

(8) Title to Property. Upon the Closing Date, Developer will have good and marketable fee title to the Dealership Development Parcel, the Swap Parcel, and the City will have title to the Adjacent Parcel and there will exist thereon or with respect thereto no mortgage, lien, pledge or other encumbrance of any character whatsoever other than those liens approved by the City, liens for current real property taxes and assessments not yet due and payable, and liens in favor of the City or approved in writing by the City.

(9) Financial Statements. The financial statements of Developer and other financial data and information furnished by Developer to the City fairly present the information contained therein. As of the date of this Agreement, there has not been any adverse, material change in the financial condition of Developer from that shown by such financial statements and other data and information.

(10) Sufficient Funds. As of the Closing Date, the Developer holds sufficient funds or binding commitments for sufficient funds to obtain the fee interest in the properties and complete the construction of the Improvements on the Dealership Development Parcel in accordance with this Agreement.

(b) City's Representations and Warranties. City represents and warrants to Developer as follows:

(1) That this Agreement constitutes the valid and binding obligation of City and is enforceable against City in accordance with its terms, subject to bankruptcy, insolvency and similar laws affecting the enforcement of creditors' rights generally and general equitable principles.

(2) City is a California charter city, validly formed, duly organized and in good standing under the laws of the State of California.

(3) City has full power and authority to enter into and perform this Agreement.

(4) The execution and delivery of this Agreement, delivery of money and all required documents, City's performance of this Agreement and the transaction contemplated hereby have been duly authorized by the requisite action on the part of City.

(5) Neither the execution nor delivery of this Agreement, nor the transaction contemplated by this Agreement will, to City's knowledge, conflict in any material respect or constitute a breach under any agreement or instrument by which City or the properties are bound.

(6) Except as disclosed in writing to Developer, there are no pending or threatened actions, suits, arbitrations, claims or proceedings, at law or in equity, including without limitation, any action or proceeding for condemnation, affecting the properties or in which City is, or, to the best of City's knowledge, will be, a party by reason of City's ownership of the properties.

(7) The due diligence materials provided to Developer by City represent all material information regarding the properties, or their condition, known to City.

Section 9.19 Complete Understanding of the Parties.

This Agreement and the attached exhibits constitute the entire understanding and agreement of the parties with respect to the matters set forth in this Agreement.

Section 9.20 Entry by the City.

Developer shall permit the City, through its officers, agents, or employees, at all reasonable times, and upon reasonable prior written notice to Developer, to enter into the Development: (a) to inspect the work of construction to determine that the same is in conformity with the requirements of this Agreement; and (b) following completion of construction, to inspect the ongoing operation and management of the Development to determine that the same is in conformance with the requirements of this Agreement. Developer reserves the right to have a representative of Developer accompany City during any inspection by City. Developer acknowledges that the City is under no obligation to supervise, inspect, or inform Developer of the progress of construction, or operations and Developer shall not rely upon the City therefore. Any inspection by the City during the construction is entirely for its purposes in determining whether Developer is in compliance with this Agreement and is not for the purpose of determining or informing Developer of the quality or suitability of construction. Developer shall rely entirely upon its own supervision and inspection in determining the quality and suitability of the materials and work, and the performance of architects, subcontractors, and material suppliers.

Section 9.21 Amendments.

The Parties can amend this Agreement only by means of a writing executed by all Parties.

Section 9.22 Implementation Agreements.

The Parties acknowledge that the provisions of this Agreement require a close degree of cooperation and that new information and future events may demonstrate that changes are appropriate with respect to the details of performance of the Parties under this Agreement. The Parties desire, therefore, to retain a certain degree of flexibility with respect to the details of performance for those items covered in general terms under this Agreement. If and when, from time to time, the Parties find that mutually acceptable refinements or adjustments are desirable, such refinements or adjustments shall be accomplished through operating memoranda or implementation agreements approved by the Parties which, after execution shall be attached to this Agreement as addenda and become a part hereof. Operating memoranda or implementation agreements may be executed on the City's behalf by the City Manager, or the City Manager's designee. In the event a particular subject requires notice or hearing, such notice or hearing shall be appropriately given. Notwithstanding the foregoing, nothing in this Section shall be deemed to require the City to consider any request by Developer for a waiver of any particular obligation as set forth herein.

Section 9.23 Multiple Originals; Counterparts.

This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

[Signatures on following page]

IN WITNESS WHEREOF, the City and Developer have executed this Agreement in triplicate on or as of the date first above written.

DEVELOPER:

BMODDRE2, LLC, a California limited liability company

By: _____
Brian McCafferty, Member Manager

NOTE: Section 3.7 requires the initials of Developer

CITY:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

APPROVED AS TO FORM:

Michael S. Lawson
City Attorney

By: _____
Joseph Brick, Assistant City Attorney

ATTEST:

By: _____
Miriam Lens, City Clerk

NOTE: Section 3.8 requires the initials of the City

EXHIBIT A-1

LEGAL DESCRIPTION OF THE DEALERSHIP DEVELOPMENT PARCEL

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 2

A PORTION OF THE PROPERTY SITUATED IN THE CITY OF HAYWARD, COUNTY OF ALAMEDA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE SOUTHEASTERN LINE OF CARLOS BEE BOULEVARD WITH A LINE PARALLEL TO AND 200 FEET AT RIGHT ANGLES NORTHWESTERLY FROM THE SOUTHEASTERN LINE OF THE "MAP OF MEEK HILL TRACT, EDEN TOWNSHIP, ALAMEDA CO." FILED OCTOBER 18, 1905, IN BOOK 20 OF MAPS, PAGE 86, ALAMEDA COUNTY RECORDS; THENCE FROM SAID POINT OF COMMENCEMENT ALONG A LINE PARALLEL TO SAID SOUTH LINE, SOUTH 56°45'22" WEST A DISTANCE OF 692.14 FEET TO THE **POINT OF BEGINNING**; THENCE NORTH 31°00'00" WEST A DISTANCE OF 342.75 FEET; THENCE NORTH 59°00'00" EAST A DISTANCE OF 24.00 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 126.96 FEET TO A POINT ON THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID LINE, ALONG THE ARC OF A NON TANGENT CURVE CONCAVE TO THE SOUTH, THE INITIAL RADIAL BEARING OF WHICH BEARS NORTH 17°51'14" WEST, HAVING A RADIUS OF 745 FEET, A DISTANCE OF 71.19 FEET, THROUGH A DELTA ANGLE OF 5°28'30"; THENCE LEAVING SAID RIGHT OF WAY SOUTH 30°57'49" EAST A DISTANCE OF 112.02 FEET; THENCE SOUTH 56°45'22" WEST A DISTANCE OF 58.86 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 119.88 FEET TO THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID SOUTHERLY LINE, ALONG THE ARC OF A NON TANGENT CURVE CONCAVE TO THE SOUTH, THE INITIAL RADIAL BEARING OF WHICH BEARS NORTH 27°52'23" WEST, HAVING A RADIUS OF 745 FEET, A DISTANCE OF 40.26 FEET, THROUGH A DELTA ANGLE OF 3°05'47"; THENCE SOUTH 59°01'50" WEST A DISTANCE OF 99.71 FEET; THENCE LEAVING SAID SOUTHERLY LINE SOUTH 30°58'10" EAST A DISTANCE OF 150.00 FEET; THENCE SOUTH 59°01'50" WEST A DISTANCE OF 100.00 FEET; THENCE NORTH 30°58'10" WEST A DISTANCE OF 150.00 FEET TO THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID SOUTHERLY LINE SOUTH 59°01'50" WEST 83.85 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE EAST HAVING A RADIUS OF 20 FEET, A DISTANCE OF 30.97 FEET, THROUGH A DELTA ANGLE OF 88°43'56" TO A POINT ON THE NORTHEASTERLY LINE OF MISSION BOULEVARD; THENCE ALONG SAID NORTHEASTERLY LINE SOUTH 29°42'05" EAST A DISTANCE OF 342.03 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE WEST, HAVING A RADIUS OF 192 FEET, A DISTANCE OF 63.80 FEET, THROUGH A DELTA ANGLE OF 19°02'24" TO A POINT OF REVERSE CURVATURE; THENCE ALONG SAID REVERSE CURVE CONCAVE TO THE EAST, HAVING A RADIUS OF 168 FEET, A DISTANCE OF 45.15 FEET, THROUGH A DELTA ANGLE OF 15°23'56"; THENCE SOUTH 25°04'26" EAST A DISTANCE OF 55.84 FEET; THENCE LEAVING SAID NORTHEASTERLY LINE NORTH 59°02'11" EAST A DISTANCE OF

313.82 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 27.49 FEET TO A POINT ON A LINE PARALLEL TO AND 200 FEET AT RIGHT ANGLES NORTHWESTERLY FROM THE SOUTHEASTERN LINE OF SAID "MAP OF MEEK HILL TRACT, EDEN TOWNSHIP, ALAMEDA CO."; THENCE ALONG SAID LINE NORTH 56°45'22" EAST A DISTANCE OF 170.11 FEET TO THE POINT OF BEGINNING.

CONTAINING 4.936 ACRES MORE OR LESS

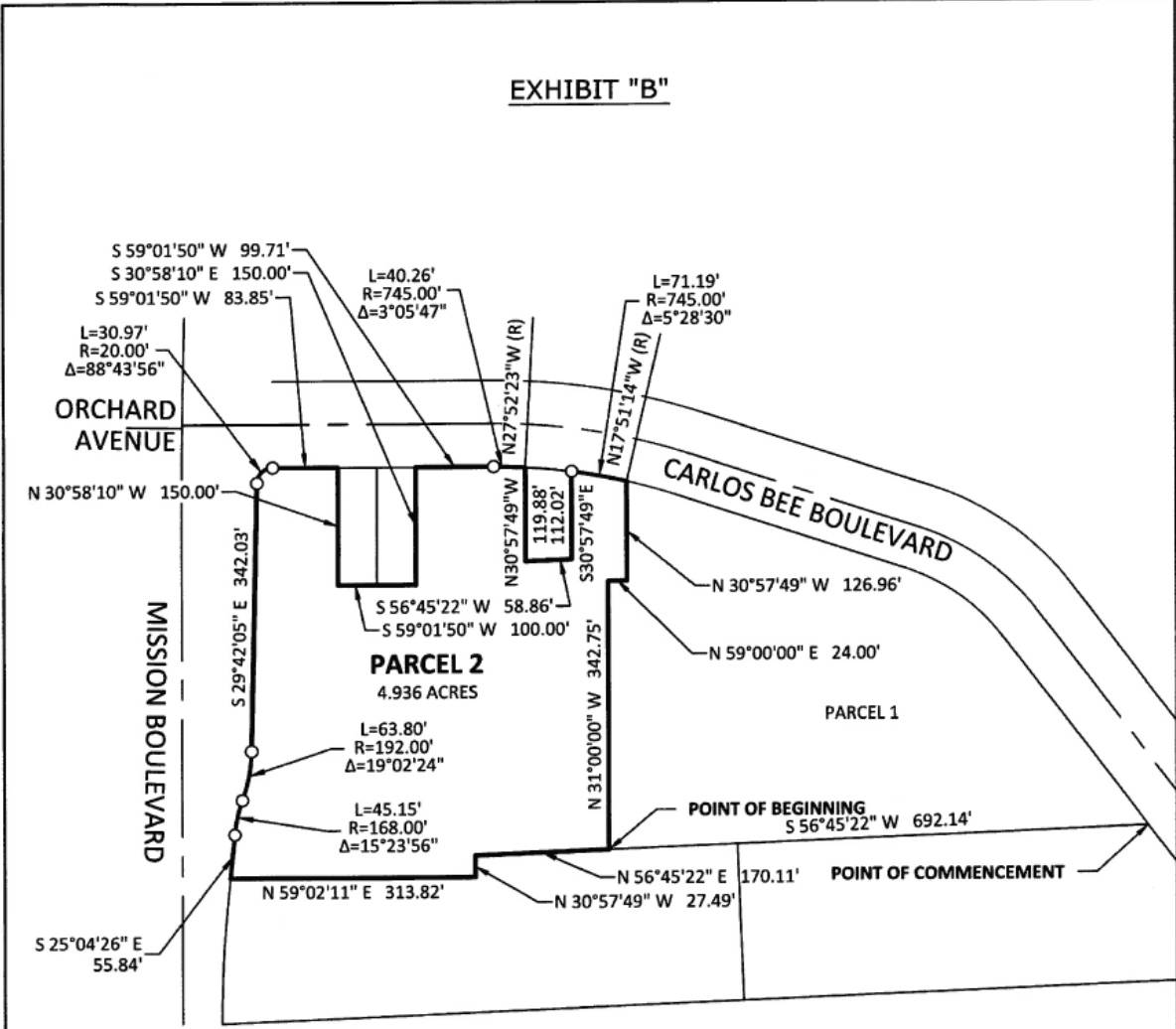
THE HEREIN DESCRIBED IS SHOWN ON EXHIBIT "B" ATTACHED HERETO AND MADE A PART HEREOF.



DAVID M. GARRETT, P.L.S. 10/11/19
DATE



EXHIBIT "B"



LEGEND:

○ DIMENSION POINT



kpff

2250 Douglas Blvd., Suite 200
 Roseville, CA 95661
 O: 916.772.7688
 F: 916.772.7699
www.kpff.com

PARCEL 2 LOT LINE ADJUSTMENT HAYWARD / ALAMEDA COUNTY / CALIFORNIA	DATE: 10/11/2019
	SCALE: 1" = 200'
	SHEET: 1 OF 1

EXHIBIT A-2

LEGAL DESCRIPTION OF THE ADJACENT PARCEL

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 1

A PORTION OF THE PROPERTY SITUATED IN THE CITY OF HAYWARD, COUNTY OF ALAMEDA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE SOUTHEASTERN LINE OF CARLOS BEE BOULEVARD WITH A LINE DRAWN PARALLEL TO AND 200 FEET AT RIGHT ANGLES NORTHWESTERLY FROM THE SOUTHEASTERN LINE OF THE "MAP OF MEEK HILL TRACT, EDEN TOWNSHIP, ALAMEDA CO." FILED OCTOBER 18, 1905, IN BOOK 20 OF MAPS, PAGE 86, ALAMEDA COUNTY RECORDS; THENCE FROM SAID **POINT OF BEGINNING** ALONG A LINE PARALLEL TO SAID SOUTH LINE, SOUTH 56°45'22" WEST A DISTANCE OF 692.14 FEET; THENCE NORTH 31°00'00" WEST A DISTANCE OF 342.75 FEET; THENCE NORTH 59°00'00" EAST A DISTANCE OF 24.00 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 126.96 FEET TO A POINT ON THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID LINE, ALONG THE ARC OF A NON TANGENT CURVE CONCAVE TO THE SOUTH, THE INITIAL RADIAL BEARING OF WHICH BEARS NORTH 17°51'14" WEST HAVING A RADIUS OF 745 FEET, A DISTANCE OF 63.00 FEET, THROUGH A DELTA ANGLE OF 4°50'44"; THENCE NORTH 76°59'30" EAST A DISTANCE OF 312.49 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE SOUTH, HAVING A RADIUS OF 253 FEET, A DISTANCE OF 151.76 FEET, THROUGH A DELTA ANGLE OF 34°22'10"; THENCE SOUTH 68°38'20" EAST A DISTANCE OF 306.94 FEET TO THE **POINT OF BEGINNING**.

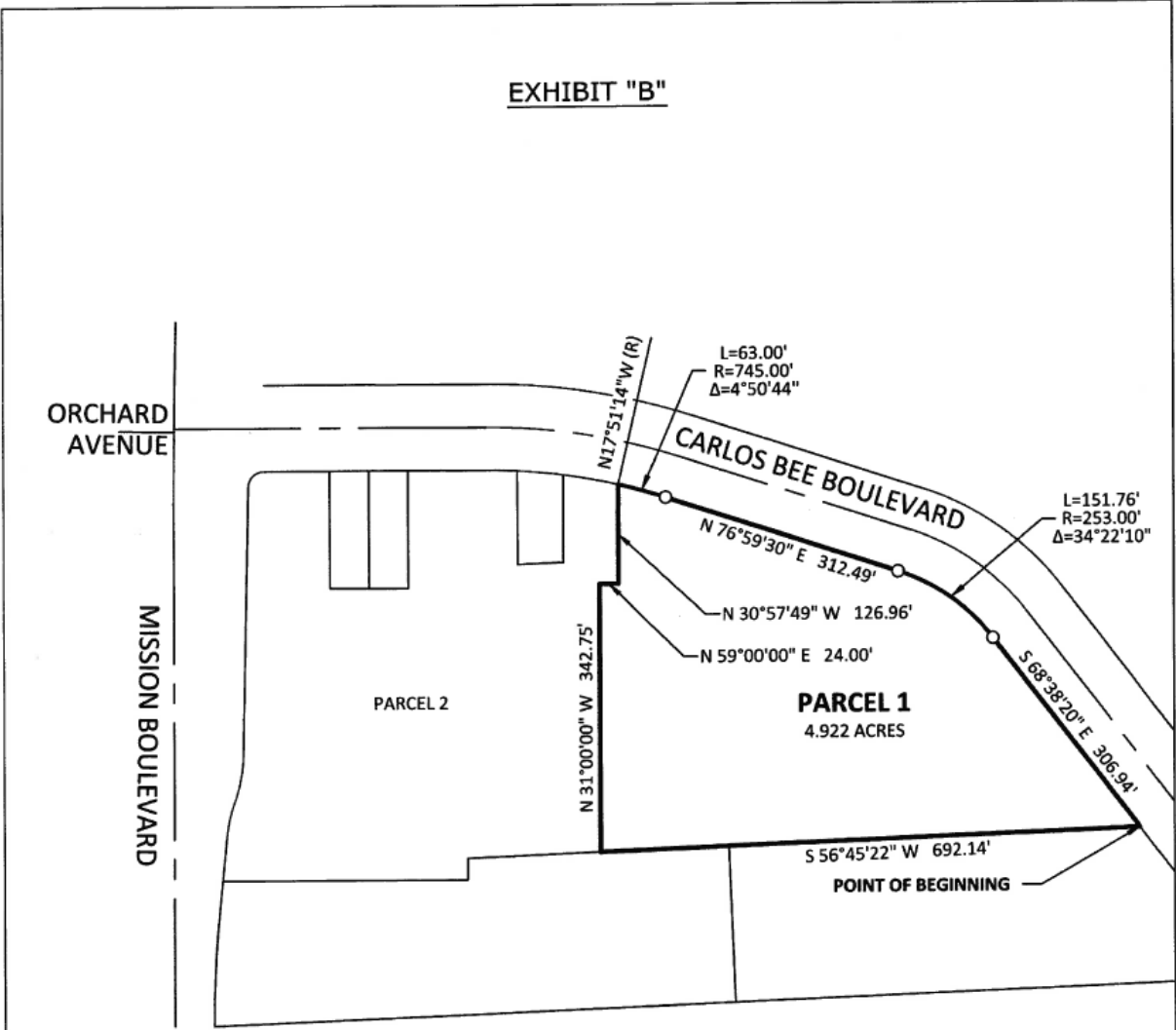
CONTAINING 4.922 ACRES MORE OR LESS

THE HEREIN DESCRIBED IS SHOWN ON EXHIBIT "B" ATTACHED HERETO AND MADE A PART HEREOF.

 10/11/19
DAVID M. GARRETT, P.L.S. DATE



EXHIBIT "B"



LEGEND:

○ DIMENSION POINT



kpff

2250 Douglas Blvd., Suite 200
 Roseville, CA 95661
 O: 916.772.7688
 F: 916.772.7699
www.kpff.com

PARCEL 1 LOT LINE ADJUSTMENT HAYWARD / ALAMEDA COUNTY / CALIFORNIA	DATE:	10/11/2019
	SCALE:	1" = 200'
	SHEET:	1 OF 1

EXHIBIT A-3

LEGAL DESCRIPTION OF THE SWAP PARCEL

EXHIBIT "A"
LEGAL DESCRIPTION
LOT MERGER

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF HAYWARD, IN THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

BEING ALL OF THAT PARCEL OF LAND DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED ON JANUARY 20TH 2009, AS INSTRUMENT NO. 2009019053, ALAMEDA COUNTY RECORDS, TOGETHER WITH ALL OF PARCELS 1 AND 2 DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED ON MAY 27TH 2009, AS INSTRUMENT NO. 2009165523, ALAMEDA COUNTY RECORDS, TOGETHER WITH ALL OF THAT PARCEL OF LAND DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED ON JANUARY 7TH 2010, AS INSTRUMENT NO. 2010003503, ALAMEDA COUNTY RECORDS, TOGETHER WITH ALL OF THAT PARCEL OF LAND DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED ON JANUARY 22ND 2009, AS INSTRUMENT NO. 2009021490, ALAMEDA COUNTY RECORDS, TOGETHER WITH ALL OF THAT PARCEL OF LAND DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED ON MARCH 12TH 2009, AS INSTRUMENT NO. 2009072438, ALAMEDA COUNTY RECORDS, TOGETHER WITH PARCELS 1 AND 2 DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED ON JUNE 9TH 2010, AS INSTRUMENT NO. 201016122, ALAMEDA COUNTY RECORDS, MORE PARTICULARLY DESCRIBES AS FOLLOWS:

BEGINNING A POINT ON THE NORTHWESTERLY LINE OF CARLOS BEE BOULEVARD AS SHOWN ON THAT RECORD OF SURVEY RS2604 FILED IN BOOK 40 OF RECORD OF SURVEYS, PAGE 8, ALAMEDA COUNTY RECORDS FROM WHICH POINT THE INTERSECTION OF CARLOS BEE BOULEVARD AND MISSION BOULEVARD BEARS SOUTH 30°58'10" EAST A DISTANCE OF 55.00 FEET; THENCE SOUTH 59°01'50" WEST A DISTANCE OF 226.27 FEET; THENCE FROM SAID **POINT OF BEGINNING** ALONG SAID NORTHWESTERLY LINE SOUTH 59°01'50" WEST A DISTANCE OF 116.68 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE NORTH HAVING A RADIUS OF 23.00 FEET, A DISTANCE OF 36.64 FEET THROUGH A DELTA ANGLE OF 91°16'04" TO A POINT ON THE NORTHEASTERLY LINE OF MISSION BOULEVARD; THENCE ALONG SAID NORTHEASTERLY LINE, NORTH 29°42'05" WEST A DISTANCE OF 176.75 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE WEST HAVING A RADIUS OF 2012.00 FEET, A DISTANCE OF 222.05 FEET THROUGH A DELTA ANGLE OF 06°19'24"; THENCE NORTH 36°01'29" WEST A DISTANCE OF 85.05 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE EAST HAVING A RADIUS OF 1488.00 FEET, A DISTANCE OF 47.52 FEET THROUGH A DELTA ANGLE OF 01°49'07" TO A POINT ON THE SOUTHWESTERLY LINE OF PARCEL 2 AS SHOWN ON THAT CERTAIN PARCEL MAP NO. 3040 FILED IN BOOK 116 OF PARCEL MAPS, PAGE 3 ALAMEDA COUNTY RECORDS; THENCE LEAVING SAID NORTHEASTERLY LINE OF MISSION BOULEVARD, ALONG SAID SOUTHWESTERLY LINE NORTH 60°36'09" EAST A DISTANCE OF 119.17 FEET; THENCE SOUTH 29°23'51" EAST A DISTANCE OF 40.00 FEET; THENCE NORTH 60°36'09" EAST A DISTANCE OF 50.00 FEET; THENCE SOUTH 29°23'51" EAST A DISTANCE OF 509.72 FEET TO SAID NORTHWESTERLY LINE OF CARLOS BEE BOULEVARD AND THE **POINT OF BEGINNING.**

CONTAINING 79,469 SQUARE FEET (1.824 AC), MORE OR LESS.

David Garrett 08/18/2020
DAVID M. GARRETT, P.L.S. DATE



SHEET 1 OF 1

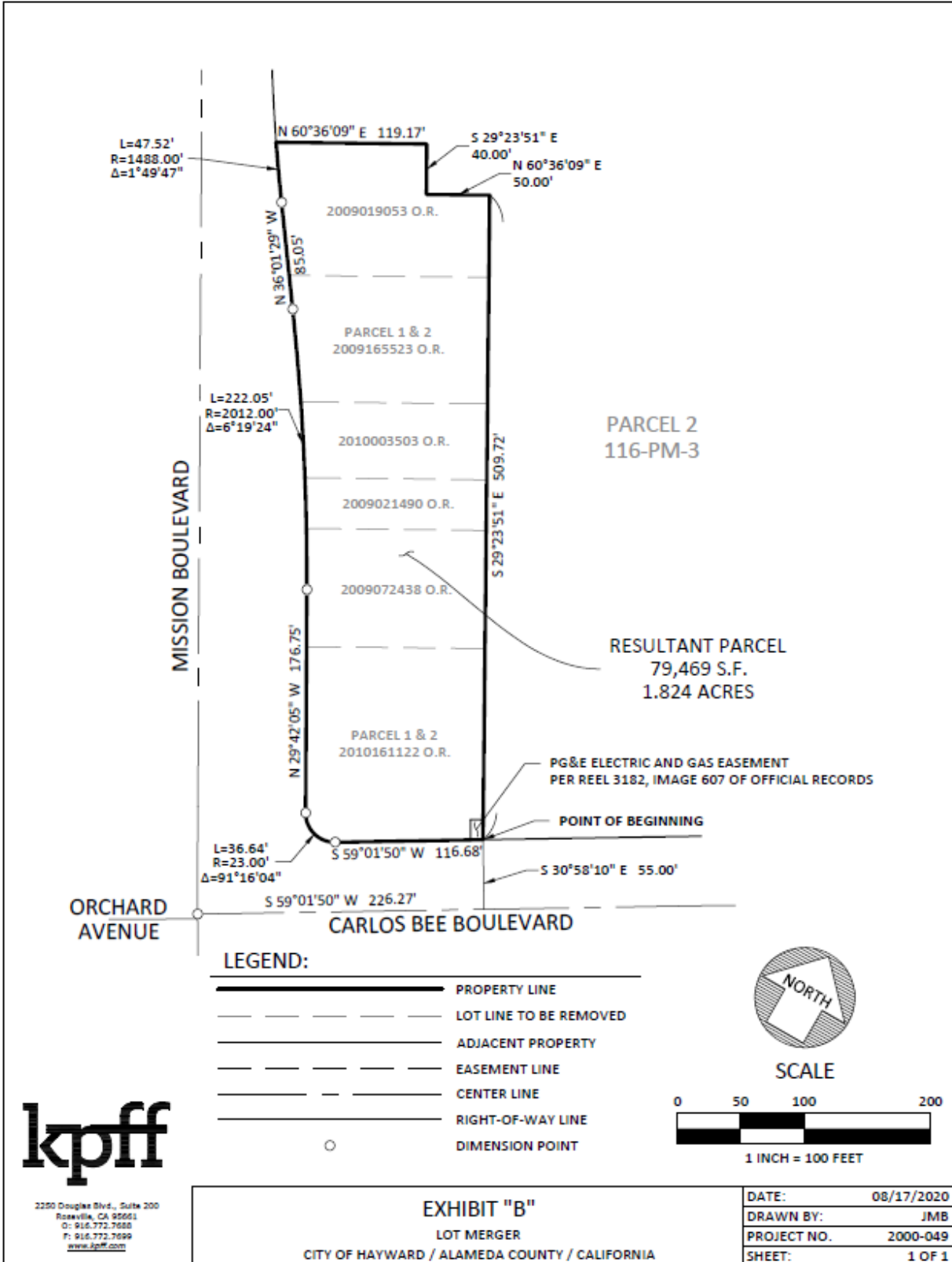


EXHIBIT B

SCHEDULE OF PERFORMANCE

This Schedule of Performance summarizes the schedule for various activities under the Disposition and Development Agreement to which this exhibit is attached. The description of items in this Schedule of Performance is meant to be descriptive only and shall not be deemed to modify in any way the provisions of the Agreement to which such items relate. Section references herein to the Agreement are intended merely as an aid in relating this Schedule of Performance to other provisions of the Agreement and shall not be deemed to have any substantive effect. Times for performance are subject to Forced Delay, as further provided in Section 9.4 of the Agreement.

Whenever this Schedule of Performance requires the submission of plans or other documents at a specific time, such plans or other documents, as submitted, shall be complete and adequate for review by the City or other applicable governmental entity within the time set forth herein. Prior to the time set forth for each particular submission, Developer shall consult with City staff informally as necessary concerning such submission in order to assure that such submission will be complete and in a proper form within the time for submission set forth herein.

Item	Obligation/Duty	Date of Completion
1.	<u>Submission of Sources and Use.</u> Developer shall submit a Summary of Sources and Uses Table for the Development. To include Financing Plan narrative, Summary of Sources and Uses Table, and readjusted interest rate. [§2.3]	Deemed completed.
2.	<u>Conceptual Site Plan and Elevations.</u> Design site plan and elevations for the Site. [§2.4]	Deemed completed
3.	<u>Application for All Applicable Governmental Approvals.</u> Developer shall apply for all applicable Governmental Approvals [§2.4(a)].	Deemed completed
4.	<u>Submission of Final Construction Plans.</u> Developer shall submit to the City for City approval the Final Construction Plans. [§2.5]	Within 30 days after closing date.
5.	<u>Approval of Final Construction Plans.</u> City shall review and approve or disapprove of the Final Construction Plans submitted by Developer pursuant to §2.5. [§2.5]	Within 25 days of Developer's submittal of a Final Construction Plans.
6.	<u>Submission of Financing Plan.</u> Developer shall submit for City Review a final Financing Plan for the development of the Project.	Deemed completed, but subject to any necessary updates.

	<u>[\$2.6]</u>	
7.	<u>City Review of Financing Plan.</u> City shall approve or disapprove the Financing Plan for the Development [§2.6(b)].	Within 5 days of Developers submission of a complete Financing Plan.
8.	<u>Submission of Loan Financing.</u> Developer must obtain a financial commitment for financing the Development. [§2.7]	On or before closing date.
9.	<u>Submission of Additional Financing.</u> Developer must obtain and submit evidence of fund availability to finance the Development. [§2.7(a) and (b)]	On or before closing date.
10.	<u>Submission of Construction Contract.</u> Developer shall submit proposed Construction Contract for the Improvements. [§2.8]	On or before closing date.
11.	<u>City Review of Construction Contract.</u> The City shall approve or reject the Construction Contract. [§2.8(a)]. NOTE: §2.8(b) contains provisions for resubmission.	Within 5 days from receipt of the proposed Construction Contract.
12.	<u>Submission of Construction Bonds.</u> Developer shall obtain and submit proof of labor and material bond and performance and payment bond. [§2.9]	Deemed Completed
13.	<u>Obtain All Applicable Governmental Approvals.</u> Developer shall obtain all necessary land use and governmental approvals. [§2.10]	Completed
14.	<u>Building Plan Submittal.</u> Developer shall submit building plans to the Building Division for review. [§2.11]	Within 30 days after closing date
15.	<u>Building Permits.</u> Developer shall have obtained building permits for the construction of the Improvements. [2.11]	On or before 1/1/2021, but in no event later than 7 days prior to the Commencement of Construction.
16.	<u>Submission of Proof of Insurance.</u> Developer must furnish to City proof of insurance required under §5.7. [§2.12]	No later than 10 days prior to the Commencement of Construction.
17.	<u>Completion of Closing Conditions.</u> Developer shall have completed all the requirements of Article II including but not limited to submission	Prior to or concurrently with the Closing.

	of the payment and performance guarantees, corporate authorizing resolutions, proof of insurance, and executed conveyance documents. [§3.4]	
18.	<u>Execution & Closing.</u> Developer and the City shall execute and close on the transfer of the Property. [§Article 3]	Upon completion of Pre-Disposition Requirements in Article 3, but in no event later than 10/1/2020.
19.	<u>Property Exchange.</u> Parties shall exchange the Adjacent Parcel and the Swap Parcel.	Concurrently with Closing.
20.	<u>Demolition of Existing Structure.</u> Developer shall demolition all vacant building(s) and cap any utilities and return the site to a "pre-development condition" on the Dealership Development Parcel. [§2.14]	Within six (6) months of the Closing Date.
21.	<u>Commence Construction.</u> Developer shall commence construction of the Improvements in accordance with approved Final Construction Plans. [§4.3]	On or before 1/1/2021.
22.	<u>Completion of Improvements.</u> Developer shall diligently complete construction of the Improvements. [§4.4]	On or before 6/1/2022.
23.	<u>Construction Progress reports.</u> Developer shall provide the City with reports regarding status of construction, and conformance with financing plan. [§4.7]	Quarterly upon commencement of construction.
24.	<u>Certificate of Occupancy.</u> Upon conformance of all City codes and regulations, the City shall issue a Certificate of Occupancy or an equivalent document. [§4.7]	Within 30 days after final inspection.
25.	<u>Recordation of Notice of Completion.</u> City shall record the Notice of Completion [§4.15]	Promptly after completion of all of the Improvements on the Dealership Development Parcel in accordance with those provisions of this Agreement

EXHIBIT C

SUMMARY SOURCES AND USES

Sources: Construction

Source	Currently Available
Cash (Owner)	+/- \$ 8,800,000
TFSB Financing (80% LTV or 90% LTC)	+/- \$ 27,400,000
Government Subsidies	n/a
Total	+/- \$ 36,300,000

Uses: Construction

Uses	Currently Available
Land Acquisition	+/- \$ 5,421,000
Design/Engineer Fees	+/- \$ 400,000
Permits	+/- \$400,000
Construction Costs	+/- \$26,000,000
Internal Admin	+/- \$4,079,000
Total	+/- \$ 36,300,000

EXHIBIT D

FORM MEMORANDUM OF
DISPOSITION AND DEVELOPMENT AGREEMENT

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Hayward
777 B Street
Hayward, CA 94541
Attn: Joseph Brick

No fee for recording pursuant to
Government Code Section 27383

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

MEMORANDUM OF DISPOSITION AND DEVELOPMENT AGREEMENT

THIS MEMORANDUM OF DISPOSITION AND DEVELOPMENT AGREEMENT (the "Memorandum") is made as of September __, 2020, by and between the City of Hayward, a California charter city, and BMODDRE2, LLC, a California limited liability company. The parties entered into that certain Disposition and Development Agreement, dated as of September 15, 2020, as such may be amended from time to time (the "Agreement").

The Agreement imposes certain conditions (including but not limited to, construction requirements, operating and use restrictions and covenants, and transfer restrictions) on the real property described in Exhibit A attached hereto and incorporated herein (the "Property"). The Disposition Agreement is a public document and may be reviewed at the office of the City Clerk.

This Memorandum shall incorporate herein all of the terms and provisions of the Agreement as though fully set forth herein. This Memorandum is solely for recording purposes, and shall not be construed to alter, modify, amend or supplement the Agreement, of which this is a memorandum.

This Memorandum may be executed in counterparts, each of which shall be deemed an original.

Remainder of Page Intentionally Left Blank

IN WITNESS WHEREOF, the parties have caused this Memorandum to be duly executed as of the date first above written.

DEVELOPER:

BMODDRE2, LLC, a California limited liability company

By:

Brian McCafferty, Member Manager

CITY:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

APPROVED AS TO FORM:

Michael S. Lawson
City Attorney

By: _____
Joseph Brick, Assistant City Attorney

ATTEST:

By: _____
Miriam Lens, City Clerk

[SIGNATURES MUST BE NOTARIZED]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

The land is situated in the City of Hayward, County of Alameda, State of California, and is described as follows:

EXHIBIT E-1

FORM OF DEALERSHIP OPERATING COVENANT

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Hayward
777 "B" Street
Hayward, CA 94541
Attn: City Manager

NO FEE DOCUMENT PURSUANT TO
GOVERNMENT CODE SECTION 27383

OPERATING COVENANT AGREEMENT
(Subaru Dealership Operating Covenant)

This Operating Covenant Agreement (this "Agreement") is made and entered into as of October __, 2020, by and between the City of Hayward, a California charter City (the "City"), and BMODDRE2, LLC, a California limited liability company (the "Developer") and OSOH, LLC, an Arizona limited liability company [dba One Subaru of Hayward] ("One Subaru") (collectively, the "Hayward Subaru"), with reference to the following facts, purposes, and understandings.

RECITALS

- A. Capitalized terms used herein are defined in Article 1 of this Agreement.
- B. The City conveyed to the Developer that certain real property located in the City of Hayward, California (the "Property" also referred to as the "Dealership Development Parcel"). The legal description of the Property is contained in Exhibit A attached hereto and incorporated herein by this reference.
- C. The City and Developer entered into that certain Disposition and Development Agreement, dated as of September 15, 2020, as such may be amended from time to time (the "Disposition and Development Agreement" or "DDA"). Pursuant to the DDA, the Developer is required to develop an approximately 57,500 square foot automobile sales and full service auto repair facility and landscaping and other site improvements, in order to establish a first-class automobile sales and full service auto repair facility on the Dealership Development Parcel (collectively the "Improvements"). In the event of a conflict between the terms and conditions of this Agreement and the terms and conditions of the Disposition and Development Agreement, the terms and conditions of this Agreement will control.
- D. Developer intends to finance the costs of the Development with sources that include but are not limited to Developer's equity investment of not less than ten percent (10%) of the total acquisition and development costs for the Improvements and an acquisition and a construction loan of approximately Twenty Seven Million Four Hundred Thousand Dollars (\$27,400,000) (the "TFSB Loan") from Toyota Financial Savings Bank, a Nevada corporation licensed to do business as an FDIC insured Nevada Thrift Company ("TFSB"), which is secured

by Developer's fee interest in the Property. The City acknowledges that TFSB is an approved Security Financing Interest permitted pursuant to the approved Financing Plan under the Disposition and Development Agreement.

E. In order to ensure that the Improvements will operate on the Property in accordance with these conditions and restrictions, the City and Hayward Subaru desire to enter into this Agreement.

THEREFORE, the City, the Developer and One Subaru hereby agree as follows.

ARTICLE 1. DEFINITIONS

Section 1.1 Definitions. When used in this Agreement, the following terms shall have the respective meanings assigned to them in this Article 1. All terms not defined herein shall have the meaning set forth in the Disposition and Development Agreement.

(a) "Affiliated Company" means any corporation, limited liability company, partnership, trust or other business entity controlling, controlled by or under common control of the Developer. For purposes of the foregoing, "control" means the power, directly or indirectly, by voting rights, contract or otherwise, to direct or cause the direction of the management or policies of a person or entity.

(b) "Agreement" means this Operating Covenant Agreement, as may be amended as set forth herein.

(c) "Approved Security Interests" means any and all mortgages, deeds of trust, and other real property security instruments placed upon the Property by Developer, approved by the City pursuant to the Disposition and Development Agreement and this Agreement. Approved Security Interest shall mean any one of the Approved Security Interests.

(d) "Certificate of Completion" means the certificate to be issued by the City following completion of certain obligations in accordance with the DDA.

(e) "City" has the meaning set forth in the first paragraph of this Agreement.

(f) "City Indemnitees" includes the City, and its council members, officers, agents, consultants and employees, each an "Indemnified Party".

(g) "Dealership Development Parcel" also referred to as the Property, as more particularly described in the legal description attached as Exhibit A, on which the Improvements are to be constructed.

(h) "Developer" means BMODDRE2, LLC, a California limited liability company and its permitted successors and assigns.

- (i) "Developer's Principal" means Brian McCafferty and/or Devin McCafferty.
- (j) "Disposition and Development Agreement" or "DDA" has the meaning set forth in Recital C.
- (k) "Effective Date" means the earlier of: (i) June 1, 2022; (ii) or the date on which the Certificate of Completion for the Improvements has been issued by the City and Hayward Subaru has commenced operation of the Improvements.
- (l) "Event of Default" has the meaning set forth in Section 4.1, below.
- (m) "Improvements" has the meaning set forth in Recital C.
- (n) "Parties" means, collectively, the City and Developer and One Subaru.
- (o) "Property" has the meaning set forth in Recital D.
- (p) "Security Financing Interest" means mortgages, deeds of trust, or any other security instruments securing loans
- (q) "Security Interest Holder" means the holder, or beneficiary, of any Security Financing Interest.
- (r) "Subaru Brand" means the brand of passenger cars licensed and sold under the Subaru Division of the Toyota Motor Sales, U.S.A., Inc., a California corporation.
- (s) "Transfer" means: (1) Any total or partial (more than fifty percent (50%)) sale, assignment or conveyance, or any trust or power, or any transfer in any other mode or form, of or with respect to this Agreement or of the fee interest in any portion the Dealership Development Parcel or the Improvements or any part thereof or any interest therein, of the Improvements constructed thereon; (2) Any total or partial sale (more than fifty percent (50%)), sale, assignment or conveyance, any trust or power, or any transfer in any other mode or form, of or with respect to the membership interests in Developer or any member of Developer or any contract to any of the same, including without limitation, any transfer or sale of any interest in Developer for financing purposes unless (i) approved by the City as part of the approved Financing Plan or (ii) in connection with a financing occurring after the Notice of Completion is recorded; (3) any merger, consolidation, sale, lease (other than as expressly allowed under Sections 3.5 or 3.6, below), assignment or conveyance of all or substantially all of the assets of Developer; (4) any action that results in the change, removal, replacement or otherwise of more than fifty percent (50%) of the membership interests of an Affiliated Company operating at the Development or a change, removal, replacement of the Subaru Brand; or (5) the subletting of any part or all of the Dealership Development Parcel except to an Affiliated Company for uses in conformance with this Agreement.

Section 1.2 Term of Agreement. The Term of this agreement shall be ten (10) years, commencing on the Effective Date and ending on the tenth (10th) year anniversary thereof, expected to be from June 1, 2022 to May 30, 2032.

ARTICLE 2.
COVENANTS AFFECTING CONSTRUCTION AND USE

Section 2.1 Covenant for Continuous Operation.

(a) For the duration of the Term, Hayward Subaru hereby covenants and agrees to operate (cause its successors or assigns to operate) the Improvements on the Property on a continuous basis, a new automobile dealership and full service auto repair facilities (which may include auto body repair pending City approval) operating under the Subaru Brand and in accordance with all the terms, conditions and requirements imposed under any applicable franchise sales and service agreement. Hayward Subaru may use portions of the Development for the sale of used automobiles so long as the primary use of the Development is for the sale of new automobiles consistent with the customary practices of similar new automobile dealerships in the San Francisco Bay Area and so long as Hayward Subaru or its Affiliated Company remains a franchisee of Subaru (or any subsequent manufacturer or brand approved by the City under this Agreement) or the addition of a second brand (in addition to Subaru) which shall not require City approval. Subject to Section 2.4 below, no other uses may be made on the Property during the Term without prior City Approval. The requirements of this Section 2.1 shall run with the land.

(b) The Developer may at any time during the Term of this Agreement propose a change to the use requirement that the Developer operate under the Subaru Brand and so long as such other replacement brand name is commercially acceptable to the City. To the extent the Developer is proposing to operate the Development under a second brand (in addition to Subaru), no additional City approval shall be required. If and to the extent the Developer is proposing to no longer operate the Development under the Subaru Brand, the Developer shall propose a replacement brand for the City's commercially reasonable approval, taking into consideration all relevant factors, including without limitation the time remaining in the Term of this Agreement, it being understood by the parties that it shall be reasonable for the City to withhold consent for any of the following reasons: (1) the proposed replacement brand name would be expected to achieve substantially less sales revenue; (2) if at the time of the brand name change request, the proposed replacement brand is operating a new automobile dealership within the City limits or has operated a new automobile dealership in the City within the previous twelve (12) months (which requirement may be waived by the City Manager at the City Manager's sole and absolute discretion); or (3) the replacement brand does not require the Developer to utilize the property primarily for the sale of new automobiles. The City shall reasonably approve or disapprove the Developer's requested replacement brand in writing as soon as practicable, but in no event later than thirty (30) days of the receipt of the Developer's complete written request. If the City disapproves the Developer's proposed replacement brand, the City shall specify in writing the reasons for the disapproval. If the Developer's determination is disapproved by the City, the Developer shall have the right to re-submit documentation to the City until the City approval is obtained. If and to the extent the City does not respond within thirty (30) days of the receipt of the Developer's complete written request under this Section 2.1(b), the proposed replacement brand shall be deemed approved.

(c) For the duration of the Term, the Improvements shall be open for business to the general public, and Hayward Subaru shall operate the Improvements on a continuous basis three hundred and sixty-five (365) days a year, excluding holidays recognized as industry standard holidays. Notwithstanding the foregoing, Hayward Subaru shall have no obligation to operate the Improvements in the event of war; insurrection; protests, strikes; lock-outs; riots; floods; earthquakes; fires; casualties; acts of god; acts of the public enemy; epidemics or pandemics; quarantine restrictions; freight embargoes; governmental restrictions or priority; litigation (including suits filed by third parties concerning or arising out of this Agreement or the DDA); weather or soils conditions which, in the opinion of Hayward Subaru's contractor, will necessitate delays in construction or repairs; inability to secure necessary labor, materials, inventory or tools; acts of the City; acts or failure to act of any public or governmental agency or entity (other than the acts or failure to act of the City); or any other causes beyond the control and without the fault of Hayward Subaru (each a "Closure Event") provided that such Closure Event has a material adverse impact on Hayward Subaru's ability to operate the Improvements using commercially reasonable efforts. The Parties agree and acknowledge that in no event shall Hayward Subaru's lack of funds to operate the Improvements in accordance with this Agreement constitute a Closure Event. Within three (3) business days following a Closure Event or as soon as reasonably feasible under the circumstances, Hayward Subaru shall deliver to the City a written notice of such Closure Event and Hayward Subaru's anticipated schedule for returning the Improvements to operation in accordance with this Agreement.

Section 2.2 Hours of Operation. Hayward Subaru shall operate the Improvements during the normal business hours for auto dealerships as determined by industry standards for auto dealerships of similar size and quality operating under the Subaru Brand.

Section 2.3 Permitted Uses.

(a) During the Term of this Agreement, Hayward Subaru shall use and operate the Property and the Improvements consistent with:

(1) The Disposition and Development Agreement (to the extent any obligations survive its termination);

(2) Applicable building and zoning laws and regulations,

(3) The provisions of the Redevelopment Plan;

(4) The provisions of this Agreement;

(5) Any lien for taxes and assessments accruing subsequent to recordation of the Deed;

(6) The provisions of the T-Mobile Lease, subject to any amendments required for the relocation of the T-Mobile facilities or unless sooner terminated by the Developer;

(7) The provisions of the Mission Boulevard Corridor Specific Plan, as outlined in the conditions of approval;

(8) The following record title items for the Dealership Development Parcel:

(A) An easement for right of way for road and incidental purposes, recorded November 17, 1922 as/in Book 331, Page 38, Official Records In Favor of: H.W. Meeks Estates Inc. Affects: Portions of the land as described therein;

(B) A waiver of any claims for damages by reason of the location, construction, landscaping or maintenance of a contiguous freeway, highway or roadway, as contained in the document recorded September 21, 1937 as Book 3523, Page 274 of Official Records;

(C) An easement for right of way for public street, highway and/or sidewalk and for public or municipal utilities and incidental purposes, recorded November 23, 1962 as/in Instrument No. AT160461 in Reel 730, Page 711, Official Records In Favor of: City of Hayward, a municipal corporation Affects: A portion of said land;

(D) The fact that the land lies within the boundaries of the Downtown Hayward Mission Foothill Redevelopment Project Area, as disclosed by various documents of record.

(b) Provided, however, all uses of the Property shall not limit, impair, or otherwise have a material adverse effect on the operation of the Improvements in accordance with Section 2.1 and Section 2.2 above.

Section 2.4 Prohibition on Subdivision of the Property. The purchase price for the Property was determined taking into account and based on the use restrictions set forth in Section 5.9 of the DDA and this Agreement. As consideration for the City's conveyance of the Property to the Developer, the Developer agrees that it shall not subdivide, file or process a lot line adjustment or take any action to create a separate transferable legal parcel for the entire Term without the City's prior written consent. The Parties agree and acknowledge that the restriction on subdividing the Property contained in this Section 2.4(a) shall automatically terminate at the end of the Term.

ARTICLE 3. ON-GOING OBLIGATIONS

Section 3.1 Management Responsibilities; Operating Costs. Hayward Subaru shall be solely responsible for all management functions with respect to the Property and the Improvements constructed thereon, including, without limitation, the day-to-day operation of the Improvements, security, maintenance, landscaping, and routine and extraordinary repairs to the Improvements and the Property. The City shall have no rights or responsibility with respect to the management of the Improvements or the Property; and, Hayward Subaru shall be solely responsible for the payment of all operating expenses and costs relating to the operation of the Improvements and the Property in accordance with this Agreement, and the Disposition and Development Agreement, including, but not limited to, all maintenance and repair costs.

Section 3.2 Maintenance.

(a) Hayward Subaru hereby agrees that the Property shall be maintained in a neat and orderly condition to the extent practicable and in accordance with existing industry health and safety standards (as such standards may evolve, or otherwise be adjusted, during the Term), and that the Improvements shall be well maintained in good repair and working order, and in a neat, clean and orderly condition. In accordance with the Disposition and Development Agreement, from time to time, Hayward Subaru shall make all necessary and proper repairs to the Improvements and the Property. To the extent commercially reasonable, maintenance and repairs to the Improvements and/or the Property shall be performed during times when Hayward Subaru is not obligated to operate the Improvements as set forth in Article 2 above. To the extent any repair or maintenance will require the Improvements to be out of operation, and unavailable during the hours set forth in Section 2.2, above for more than two (2) business days, Hayward Subaru shall first obtain the prior written consent of the City, which shall not be unreasonably, withheld, delayed, or conditioned; provided, however, Hayward Subaru shall not be required to obtain the City's prior written consent in the event of an emergency or any repair necessary to prevent a threat to health and safety of the general public. In such event, Hayward Subaru shall deliver a written notice to the City within three (3) business days of such closure, setting forth, in reasonable detail, the reason(s) the Improvements, or any portion thereof, are not in operation, and the schedule for repair.

(b) Hayward Subaru shall maintain the Improvements and the Property in accordance with the following standards ("Maintenance Standards") for the duration of the Term:

(1) Landscape maintenance shall include, but not be limited to: drought resistant watering/irrigation; fertilization; mowing; edging; trimming of grass; tree and shrub pruning; trimming and shaping of trees and shrubs to maintain a healthy, natural appearance and safe road conditions and visibility, and irrigation coverage; replacement, as needed, of all plant materials; control of weeds in all planters, shrubs, lawns, ground covers, or other planted areas; and staking for support of trees; and to the extent possible free of all pesticides.

(2) Clean-up maintenance shall include, but not be limited to: maintenance of all sidewalks, paths and other paved areas in clean and weed-free condition; maintenance of all such areas clear of dirt, mud, trash, debris or other matter which is unsafe or unsightly; removal of all trash, litter and other debris from improvements and landscaping prior to mowing; clearance and cleaning of all areas maintained prior to the end of the day on which the maintenance operations are performed to ensure that all cuttings, weeds, leaves and other debris are properly disposed of by maintenance workers.

(3) All maintenance work shall conform to all applicable federal and state Occupational Safety and Health Act standards and regulations for the performance of maintenance.

(4) Any and all chemicals, unhealthful substances, and pesticides to the extent allowed under section (b)(2) above, used in and during maintenance shall be applied in strict accordance with all governing regulations. Precautionary measures shall be employed recognizing that all areas are open to public access.

(5) The Improvements and the Property shall be maintained in conformance and in compliance with the approved construction and architectural plans and design scheme, as the same may be amended from time to time with the approval of the City, and reasonable commercial development maintenance standards for similar projects, including but not limited to: painting and cleaning of all exterior surfaces and other exterior facades comprising all private improvements and public improvements to the curblin.

(6) The Improvements and the Property shall be maintained as required by this Section 3.2 in good condition and in accordance with the custom and practice generally applicable to comparable automobile dealership facilities located in the San Francisco Bay Area.

Section 3.3 Taxes. Hayward Subaru shall pay, when due, all real and personal property taxes and any and all other assessments assessed and levied on the Property, and shall remove any levy or attachment made on the Property and the Improvements following the Effective Date. Hayward Subaru may, however, contest the validity or amount of any tax, assessment, or lien on the Property or the Improvements. In the event Hayward Subaru exercises its right to contest any tax, assessment, or charge against it, Hayward Subaru, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered against it, together with all costs, charges and interest.

Section 3.4 Prohibited Transfers.

(a) Except as expressly permitted in this Agreement (including in Section 3.5 below), for the entire Term of the Operating Covenant, the Developer represents and agrees that neither the Developer nor Hayward Subaru have made or created, and will not make or create or suffer to be made or created, any Transfer, either voluntarily or by operation of law without the prior written approval of the City, including the following:

(1) For the term of this Agreement, any transfer of any portion of the Dealership Development Parcel for a use other than as allowed under this Agreement;

(2) Any transfer resulting from the subdivision of the Dealership Development Parcel other than approved by the City in writing.

(b) Any Transfer made in contravention of this Section 3.4 shall be void and shall be deemed to be a default under this Agreement whether or not the Developer or Hayward Subaru knew of or participated in such Transfer.

Section 3.5 Permitted Transfers.

Notwithstanding the provisions of Section 3.4, the following Transfers shall be permitted and are hereby approved by the City, subject to the conditions set forth under Section 3.6, below:

(a) Any Transfer of the Dealership Development Parcel creating a Security Financing Interest permitted pursuant to the approved Financing Plan and any post-completion Security Financing Interest or any financing obtained by the Developer post-completion; or

(b) Any Transfer of the Dealership Development Parcel directly resulting from the foreclosure of a Security Financing Interest or the granting of a deed in lieu of foreclosure of a Security Financing Interest or as otherwise permitted under Article 6 or Article 7 of the DDA; or

(c) Any Transfer of the Dealership Development Parcel that would allow the operation of the of the Dealership Development Parcel to maintain the Subaru Brand so long as: (1) The proposed transferee has continuously been in the business of owning or operating similar Improvements for at least five (5) years prior to the proposed Transfer; (2) as of the date of the proposed Transfer, the proposed transferee has a net worth equal to or greater than Three Million Dollars (\$3,000,000); and (3) the proposed transferee has been pre-qualified as meeting all of the dealer candidate standards of the Subaru Brand as set forth by Subaru of America, Inc., with evidence of such approval from Subaru of America, Inc., being provided to the City to its reasonable satisfaction. Notwithstanding anything to the contrary, if a proposed transferee has been approved by Subaru of America, Inc. or any subsequent manufacturer or brand approved by the City under this Agreement, but does not otherwise meet the requirements of this subsection 3.5(c), the proposed transferee shall nonetheless be deemed to satisfy the requirements of this subsection 3.5(c);

(d) Any Transfer of the Dealership Development Parcel, resulting from the foreclosure of a Security Financing Interest or the granting of a deed in lieu of foreclosure of a Security Financing Interest and the subsequent transfer of the Dealership Development Parcel to a new owner that would allow the operation of the Dealership Development Parcel to continue to operate as a new automobile dealership, so long as: (1) the replacement brand is a nationally recognized automobile brand; (2) the proposed transferee has been pre-qualified by the replacement brand as meeting all of the dealer candidate standards required by the replacement brand, with evidence of such pre-qualification from the proposed transferee being provided to the City; (3) at the time of the proposed transfer, the proposed replacement brand may not be operating a new automobile dealership within the City limits or may not have operated a new automobile dealership in the City within the previous twelve (12) months (which requirement may be waived by the City Manager at the City Manager's sole and absolute discretion); and (4) TFSB has approved the proposed transferee; or

(e) Any Transfer solely and directly resulting from the death or incapacity of an individual; or

(f) Any Transfer of the Dealership Development Parcel creating a lease or sublease between Developer and an Affiliated Company.

Section 3.6 Permitted Transfer Subject to Further Approval.

(a) Notwithstanding any other provision of this Agreement, the following Transfers shall also constitute Permitted Transfers, subject to satisfaction of the conditions to such Transfer described in Section 3.6(b):

(1) Transfer in the ownership percentages of the Developer may be adjusted between the owners of the Developer, provided such adjustment does not cause a material change in the rights of Developer's Principal to manage and control Developer and does

not diminish the capacity and expertise with respect to operation and management of similar Improvements;

(2) Admission of new or additional equity partners or creation of joint ventures, partnerships (including limited partnerships), or other entities, provided that such admission or creation of new entities does not cause a material change in the rights of Developer's Principal to manage and control Developer and does not diminish the capacity and expertise with respect to operation and management of similar Improvements;

(3) Any Transfer for estate and or tax planning purposes provided that such admission or creation of new entities does not cause a material change in the rights of Developer's Principal to manage and control Developer and does not diminish the capacity and expertise with respect to operation and management of similar Improvements; and

(4) The leasing of any portion of the Improvements to a prospective tenant or user other than an Affiliated Company for uses consistent with the Dealership Operating Covenant. City hereby approves the lease of the Dealership Development Parcel to OSOH, LLC, an Arizona limited liability company [dba One Subaru of Hayward], an Affiliated Company of the Developer.

(b) Effectuation of Certain Permitted Transfers. For a transfer specified in Section 3.6(a) to constitute a Permitted Transfer, the following conditions must be satisfied:

(1) Not less than thirty (30) days prior to the intended effectiveness of a Permitted Transfer, the Developer shall deliver to the City a notice of the intended Permitted Transfer, a description of the intended Transfer, and such information about the intended Permitted Transfer and the transferee as is necessary to enable the City to determine that the intended Transfer meets the requirements of a Permitted Transfer pursuant to this Section 3.6.

(2) For Transfers under Section 3.6(a) above, the City may withhold its approval of a Permitted Transfer if the City determines in its discretion, reasonably exercised, taking into consideration all relevant factors, including without limitation the time remaining in the Term of this Agreement, that: (1) the proposed Transfer will in any material respect diminish the City's rights under this Agreement and the DDA; (2) the proposed Transfer will in any material respect diminish the Developer's Principal's ability to manage or control Developer or result in a change in Developer's Principal; or (3) the proposed Transfer will diminish the Developer's ability to perform under this Agreement. If the City withholds its approval of a Permitted Transfer, it shall provide a written statement to the Developer within thirty (30) days of receipt of the notice specifying the City's grounds for withholding approval.

(3) If City determines there is no basis to withhold, condition or delay its approval of a Permitted Transfer, City shall approve said proposed Transfer. If City fails to approve or disapprove of a Permitted Transfer under subsection 3.6(b) within thirty (30) days following receipt of a complete notice of proposed transfer, the Transfer shall be deemed approved and the Developer shall deliver to City a fully executed counterpart of the assignment and assumption agreement as required under Section 3.7(a), below.

Section 3.7 Effectuation of Certain Permitted Transfers.

(a) All Transfers under this Agreement permitted pursuant to Sections 2.1, 3.5 and Section 3.6 shall be effective if at the time of the Transfer, the person or entity to which such Transfer is made, by an instrument in writing prepared by the City and in form recordable among the land records, expressly assumes the obligations of Developer under this Agreement and agrees to be subject to the conditions and restrictions to which Developer is subject arising during this Agreement, to the fullest extent that such obligations are applicable to the particular portion of or interest in the Development conveyed in such Transfer. Anything to the contrary notwithstanding, the holder of a Security Financing Interest whose interest shall have been acquired by, through or under a Security Financing Interest or shall have been derived immediately from any holder thereof shall not be required to give to City such written assumption until such holder or other person is in possession of the Dealership Development Parcel or entitled to possession thereof pursuant to enforcement of the Security Financing Interest.

(b) In the absence of specific written agreement by the City, no such Transfer, assignment or approval by the City shall be deemed to relieve Developer or any other party from any obligations under this Agreement.

Section 3.8 Additional Transfers.

(a) Any Transfers not permitted under Section 2.1(b), Section 3.5, Section 3.6, or other provisions of this Agreement shall require the prior written consent of the City, which approval shall not be unreasonably withheld, conditioned, or delayed if the proposed Transfer provides for the use of the Dealership Development Parcel as a new automobile dealership. At least forty-five (45) days prior to the proposed effective date of the Transfer, the Developer shall deliver to the City a notice of the intended Transfer (the "Transfer Notice"). The Transfer Notice must clearly detail, consistent with this Agreement, which obligations therein are being transferred and shall include financial and other reasonable documentary evidence to enable the City to evaluate the proposed transaction and the proposed transferee's experience, reputation and qualifications necessary to comply with the following requirements:

(1) Developer shall first submit to City information regarding such proposed Transfer including the proposed documents to effectuate the Permitted Transfer, a description of the terms of the Transfer, and information regarding the proposed transferee's financial strength and the proposed transferee's capacities and expertise with respect to operation and management of similar Improvements;

(2) The transferee shall assume by a written, recorded assignment and assumption agreement, all or a portion of the Developer's obligations under this Agreement and the Operating Covenant, commensurate with the interest, rights or powers being transferred;

(3) The Transfer must be consistent with the City's goal of achieving development and operation of the Improvements in a quality equal to or superior to that being proposed or conducted by the Developer;

(4) The transferee must have the financial capacity, business reputation, and demonstrable experience of successfully acquiring and developing projects similar to the obligation it will be assuming under the assignment and assumption agreement

(5) The proposed transferee will be of sound reputation and will have sufficient financial strength and management and operation expertise in the ownership and operation of the Improvements, to fully perform and comply with all terms of this Agreement and the DDA;

(6) As of the date of the proposed Transfer, the proposed transferee has a net worth equal to or greater than Three Million Dollars (\$3,000,000);

(7) The transferee must have been prequalified by the automobile manufacturer as meeting all of the dealer candidate standards of a new automobile manufacturer with evidence of such approval from the manufacturer being provided to the City to its satisfaction;

(b) The City shall, at its commercially reasonable discretion, approve the Transfer by written notice to Developer if, based upon the information submitted by Developer and any other information available to the City, it appears that following the Transfer, the conditions set forth in this Section have been satisfied or waived. The City shall notify Developer and the proposed transferee of its decision within forty-five (45) days of receipt of the proposed Transfer Notice, which notice shall state with reasonable specificity the basis for disapproval. The Developer shall pay the City's reasonable staff and third-party costs in making such decisions.

Section 3.9 Existence of Subaru Brand. To the extent that the Subaru Brand no longer is in existence, the Parties hereby agree that any Transfers resulting therefrom must comply with the terms of Section 2.1(b) hereof, and Section 5.2(b) and Article 6 of the Disposition and Development Agreement.

Section 3.10 Approved Security Interest. Any Transfer of the Dealership Development Parcel creating a Security Financing Interest permitted pursuant to the approved Financing Plan and any post-completion Security Financing Interest or any financing obtained by the Developer post-completion shall have the following rights: (1) any lien evidencing the Security Interest must be subordinate to this Agreement; and (2) the Security Interest Holder agrees, in writing, that in the event of default by Hayward Subaru, the City may, but shall have no obligation to, cure such default according to the same rights, duties, and obligations and within the applicable cure period provided to Hayward Subaru under the documents evidencing the Security Financing Interest.

Section 3.11 Rights of Security Interest Holders. The rights and remedies of Security Financing Interests holders contained in Article 8 of the Disposition and Development Agreement are incorporated herein by this reference and shall be applicable for the duration of the Disposition and Development Agreement. The rights and remedies of Security Interest Holders, including those rights contained in any Security Financing Interest loan documents, after recordation of such Security Financing Interest loan documents, shall be superior in priority to any lien, charge, or encumbrance subsequently placed upon the Dealership Development

Parcel by the City under this Agreement. This Section in no way limits the City's rights pursuant to any applicable federal, state, or local law, statute, ordinance, or regulation.

Section 3.12 Non-Discrimination. Hayward Subaru covenants by and for itself and its successors and assigns that there shall be no discrimination against or segregation of a person or of a group of persons on account of race, color, religion, creed, sex, sexual orientation, gender identity, pregnancy, age, marital status, ancestry or national origin in the construction, sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall Hayward Subaru or any person claiming under or through Hayward Subaru establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, vendees or employees in the Property. The foregoing covenant shall run with the Property and shall remain in effect in perpetuity.

Section 3.13 Post Completion Insurance Requirements. During the Term, Hayward Subaru shall carry such liability and property damage insurance as is consistent with any Security Financing Interest and manufacturer requirements and the customary practices of similar new automobile dealerships in the San Francisco Bay Area.

ARTICLE 4. DEFAULT

Section 4.1 Events of Default. Any of the following events, subject to the applicable notice and cure period (if any), shall constitute an "Event of Default" by Hayward Subaru:

(a) Failure to Operate Improvements. Hayward Subaru fails to operate the Improvements in accordance with the use and operating standards set forth in Article 2 and Article 3, above;

(b) Other Breach of Agreement. Hayward Subaru breaches any other material provision of this Agreement, or the Disposition and Development Agreement; or

(c) Unauthorized Transfer. Any Transfer occurs in violation of Article 6 of the Disposition and Development Agreement or that is not authorized under Sections 2.1(b), 3.5 and 3.6 of this Agreement.

Section 4.2 Notice and Cure; Remedies Upon Default. Upon any of the above-described events, the City shall give Hayward Subaru the opportunity to cure the default by delivering a written notice of default to Hayward Subaru, which notice shall provide forty-five (45) days, from the date thereof, to cure the default; provided, however, if the default cannot be cured within forty-five (45) days, Hayward Subaru shall not be deemed to be in default if Hayward Subaru shall within such period commence to cure and thereafter diligently prosecute the same to completion within ninety (90) days from the date of the City's initial written notice to Hayward Subaru. Upon an Event of Default, the City shall have the right to enforce this Agreement by any or all remedies provided by law or equity, including, but not limited to, specific performance, seeking an action for damages, or any other right or remedy set forth in

this Agreement, subject to the rights of the Security Financing Interest holders.

Section 4.3 No Consequential Damages. Notwithstanding anything to the contrary elsewhere in this agreement or provided for under any applicable law, neither City or Developer shall, in any event, be liable to the other party, either in contract, tort or otherwise, for any consequential, incidental, indirect, special or punitive damages from such other person, including loss of future revenue, income or profits, diminution of value or loss of business reputation or opportunity relating to the default or alleged breach hereof, whether or not the possibility of such damages has been disclosed to the other party in advance or could have been reasonably foreseen by such other party.

Section 4.4 Remedies Cumulative. No right, power, or remedy given by the terms of this Agreement or, to the extent applicable, any Approved Security Interest, is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given by the terms of any such instrument, or by any statute or otherwise.

ARTICLE 5. MISCELLANEOUS

Section 5.1 Term. The provisions of this Agreement shall apply to the Property for the entire Term as defined in Section 1.2 above; provided, however, that the nondiscrimination provisions of Section 3.12 of this Agreement shall run with the Property and shall remain in effect in perpetuity. The issuance of the Certificate of Completion, or the termination of the Disposition and Development Agreement, shall in no way limit the Term of this Agreement, except as expressly agreed to in writing by the City. Notwithstanding any provision herein to the contrary (if any), this Agreement shall bind any successor, heir or assign of Hayward Subaru, whether a change in interest occurs voluntarily or involuntarily, by operation of law or otherwise, except as expressly released by the City.

Section 5.2 Covenants to Run With the Land. The City and Hayward Subaru hereby declare their express intent that the covenants and restrictions set forth in this Agreement shall run with the land, and shall bind all successors in title to the Property, provided, however, that on the expiration of the Term of this Agreement said covenants and restrictions shall expire (excluding those provisions that expressly survive the termination of this Agreement). Each and every contract, deed or other instrument hereafter executed covering or conveying the Improvements or the Property or any portion thereof shall be held conclusively to have been executed, delivered and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed or other instrument, unless the City expressly releases such conveyed portion of the Property from the requirements of this Agreement.

Section 5.3 Hayward Subaru to Indemnify Agency and City. Developer and Hayward Subaru agree to indemnify, protect, hold harmless and defend (by counsel reasonably satisfactory to the City) the City Indemnitees, from all suits, actions, claims, causes of action, administrative proceedings, arbitrations, enforcement actions, costs, demands, judgments and liens arising out

of Developer's performance or non-performance under this Agreement, or any other agreement executed pursuant to this Agreement, or arising out of acts or omissions of any of Developer's contractors, subcontractors, or persons claiming under any of the aforesaid, except as directly caused by the City's willful misconduct or gross negligence. The provisions of this Section shall survive expiration of the Term or other termination of this Agreement and shall remain in full force and effect.

Section 5.4 Recording and Filing. The City and Hayward Subaru shall cause this Agreement, and all amendments and supplements to it, to be recorded against the Property in the Official Records of the County of Alameda. As applicable from time to time, Hayward Subaru shall execute such documents necessary for this Agreement to remain in effect.

Section 5.5 Execution of Other Agreements. Hayward Subaru agrees that it has not and will not execute any other agreement with provisions contradictory of, or in opposition to, the provisions of this Agreement, including, but not limited to, any Approved Security Interest documents, and that in any event, the provisions of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict herewith.

Section 5.6 Amendments, Modifications, and Waivers. This Agreement may not be amended, modified or changed, nor shall any waiver of any provision hereof be effective, except by an instrument in writing and signed by Hayward Subaru and the City, and if applicable approved by the City Council.

Section 5.7 Waiver. The City's waiver of any term, covenant, or condition shall not be deemed to be a waiver of such term, covenant or condition of any subsequent breach of the same or any other term, covenant or condition. The City's failure to exercise any right, option or privilege hereunder shall not be deemed a waiver of such right, option or privilege nor shall it relieve Hayward Subaru from (1) its obligation to perform each and every covenant and condition on its part to be performed, or (2) from any damages or other remedy for failure to perform the obligations of this Agreement.

Section 5.8 Entire Understanding of the Parties. This Agreement (together with the Disposition and Development Agreement) constitutes the entire understanding and agreement of the Parties with respect to the operation of the Improvements and the Property. The Parties and their counsel have read and reviewed this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party (including, but not limited to Civil Code Section 1654, as may be amended from time to time) shall not apply to the interpretation of this Agreement.

Section 5.9 Severability. If any term, provision, covenant or condition of this Agreement is held in a final disposition by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue in full force and effect.

Section 5.10 Governing Law. This Agreement shall be governed by the laws of the State of California.

Section 5.11 Time. In all matters under this Agreement, the Parties agree that time is of the essence.

Section 5.12 Notice. Formal notices, demands, and communications between the City and Hayward Subaru shall be in writing and shall be sufficiently given if and shall not be deemed given unless dispatched by registered or certified mail/return receipt, or delivered personally, to the principal offices of the City, Developer and One Subaru, as follows:

Developer: BMODDRE2 LLC
10005 W Papago Fwy
Avondale, AZ 85323
Attn: TJ Hess, CFO

With copy to: Arent Fox, LLP
55 Second Street, 21st Floor
San Francisco, CA 94105-3490
Attn: Bruce Bercovich, Esq.
Facsimile: (415) 757-5501
Email: Bruce.Bercovich@arentfox.com

One Subaru: OSEB LLC
10005 W Papago Fwy
Avondale, AZ 85323
Attn: TJ Hess, CFO

With copy to: Arent Fox, LLP
55 Second Street, 21st Floor
San Francisco, CA 94105-3490
Attn: Bruce Bercovich, Esq.
Facsimile: (415) 757-5501
Email: Bruce.Bercovich@arentfox.com

City: City of Hayward
777 B Street, Fourth Floor
Hayward, CA 94541
Attn: City Manager

With copy to: City of Hayward
777 "B" Street
Hayward, CA 94541-5007
Attn: City Attorney
Facsimile: (510) 583-3660
Email: Michael.Lawson@hayward-ca.gov

Goldfarb & Lipman
1300 Clay Street, 11th Floor
Oakland, CA 94612
Attn: Heather Gould
Facsimile: (510) 836-1035

Email: hgould@goldfarbblipman.com

Such written notices, demands and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate by mail as provided in this Section 5.12. No party shall evade or refuse delivery of any notice.

Section 5.13 Discretion Retained by City. The City's execution of this Agreement does not constitute approval by the City in any manner and in no way limits the discretion of the City in the permit and approval process in connection with the development or operation of the Property.

Section 5.14 No Third Party Beneficiaries. This Agreement is not intended to create, nor shall it be in any way interpreted or construed to create, any third party beneficiary rights in any person not a party hereto.

Section 5.15 No Partnership. This Agreement shall not be construed to constitute any form of partnership or joint venture between the Parties.

Section 5.16 Article Headings. Article headings are for convenience only and are not to be used to interpret this Agreement.

Section 5.17 Multiple Originals; Counterparts. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

[Remainder of Page Left Intentionally Blank]

IN WITNESS WHEREOF, this Agreement has been executed, in triplicate, by the Parties on the date first above written.

DEVELOPER:

BMODDRE2, LLC, a California limited liability company

By: _____
Brian McCafferty, Member Manager

ONE SUBARU:

OSEB LLC, an Arizona limited liability company

By: _____

Name: _____

Its: _____

CITY:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

APPROVED AS TO FORM:

MICHAEL S. LAWSON,
City Attorney

By: _____
Joseph Brick, Assistant City Attorney

ATTEST:

By: _____
Miriam Lens, City Clerk

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Name: Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Name: Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Name: Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF SITE

The land is situated in the State of California, County of Alameda, City of Hayward, and is described as follows:

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 2


A PORTION OF THE PROPERTY SITUATED IN THE CITY OF HAYWARD, COUNTY OF ALAMEDA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE SOUTHEASTERN LINE OF CARLOS BEE BOULEVARD WITH A LINE PARALLEL TO AND 200 FEET AT RIGHT ANGLES NORTHWESTERLY FROM THE SOUTHEASTERN LINE OF THE "MAP OF MEEK HILL TRACT, EDEN TOWNSHIP, ALAMEDA CO." FILED OCTOBER 18, 1905, IN BOOK 20 OF MAPS, PAGE 86, ALAMEDA COUNTY RECORDS; THENCE FROM SAID POINT OF COMMENCEMENT ALONG A LINE PARALLEL TO SAID SOUTH LINE, SOUTH 56°45'22" WEST A DISTANCE OF 692.14 FEET TO THE **POINT OF BEGINNING**; THENCE NORTH 31°00'00" WEST A DISTANCE OF 342.75 FEET; THENCE NORTH 59°00'00" EAST A DISTANCE OF 24.00 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 126.96 FEET TO A POINT ON THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID LINE, ALONG THE ARC OF A NON TANGENT CURVE CONCAVE TO THE SOUTH, THE INITIAL RADIAL BEARING OF WHICH BEARS NORTH 17°51'14" WEST, HAVING A RADIUS OF 745 FEET, A DISTANCE OF 71.19 FEET, THROUGH A DELTA ANGLE OF 5°28'30"; THENCE LEAVING SAID RIGHT OF WAY SOUTH 30°57'49" EAST A DISTANCE OF 112.02 FEET; THENCE SOUTH 56°45'22" WEST A DISTANCE OF 58.86 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 119.88 FEET TO THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID SOUTHERLY LINE, ALONG THE ARC OF A NON TANGENT CURVE CONCAVE TO THE SOUTH, THE INITIAL RADIAL BEARING OF WHICH BEARS NORTH 27°52'23" WEST, HAVING A RADIUS OF 745 FEET, A DISTANCE OF 40.26 FEET, THROUGH A DELTA ANGLE OF 3°05'47"; THENCE SOUTH 59°01'50" WEST A DISTANCE OF 99.71 FEET; THENCE LEAVING SAID SOUTHERLY LINE SOUTH 30°58'10" EAST A DISTANCE OF 150.00 FEET; THENCE SOUTH 59°01'50" WEST A DISTANCE OF 100.00 FEET; THENCE NORTH 30°58'10" WEST A DISTANCE OF 150.00 FEET TO THE SOUTHERLY LINE OF CARLOS BEE BOULEVARD; THENCE ALONG SAID SOUTHERLY LINE SOUTH 59°01'50" WEST 83.85 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE EAST HAVING A RADIUS OF 20 FEET, A DISTANCE OF 30.97 FEET, THROUGH A DELTA ANGLE OF 88°43'56" TO A POINT ON THE NORTHEASTERLY LINE OF MISSION BOULEVARD; THENCE ALONG SAID NORTHEASTERLY LINE SOUTH 29°42'05" EAST A DISTANCE OF 342.03 FEET; THENCE ALONG THE ARC OF A CURVE CONCAVE TO THE WEST, HAVING A RADIUS OF 192 FEET, A DISTANCE OF 63.80 FEET, THROUGH A DELTA ANGLE OF 19°02'24" TO A POINT OF REVERSE CURVATURE; THENCE ALONG SAID REVERSE CURVE CONCAVE TO THE EAST, HAVING A RADIUS OF 168 FEET, A DISTANCE OF 45.15 FEET, THROUGH A DELTA ANGLE OF 15°23'56"; THENCE SOUTH 25°04'26" EAST A DISTANCE OF 55.84 FEET; THENCE LEAVING SAID NORTHEASTERLY LINE NORTH 59°02'11" EAST A DISTANCE OF

313.82 FEET; THENCE NORTH 30°57'49" WEST A DISTANCE OF 27.49 FEET TO A POINT ON A LINE PARALLEL TO AND 200 FEET AT RIGHT ANGLES NORTHWESTERLY FROM THE SOUTHEASTERN LINE OF SAID "MAP OF MEEK HILL TRACT, EDEN TOWNSHIP, ALAMEDA CO."; THENCE ALONG SAID LINE NORTH 56°45'22" EAST A DISTANCE OF 170.11 FEET TO THE POINT OF BEGINNING.

CONTAINING 4.936 ACRES MORE OR LESS

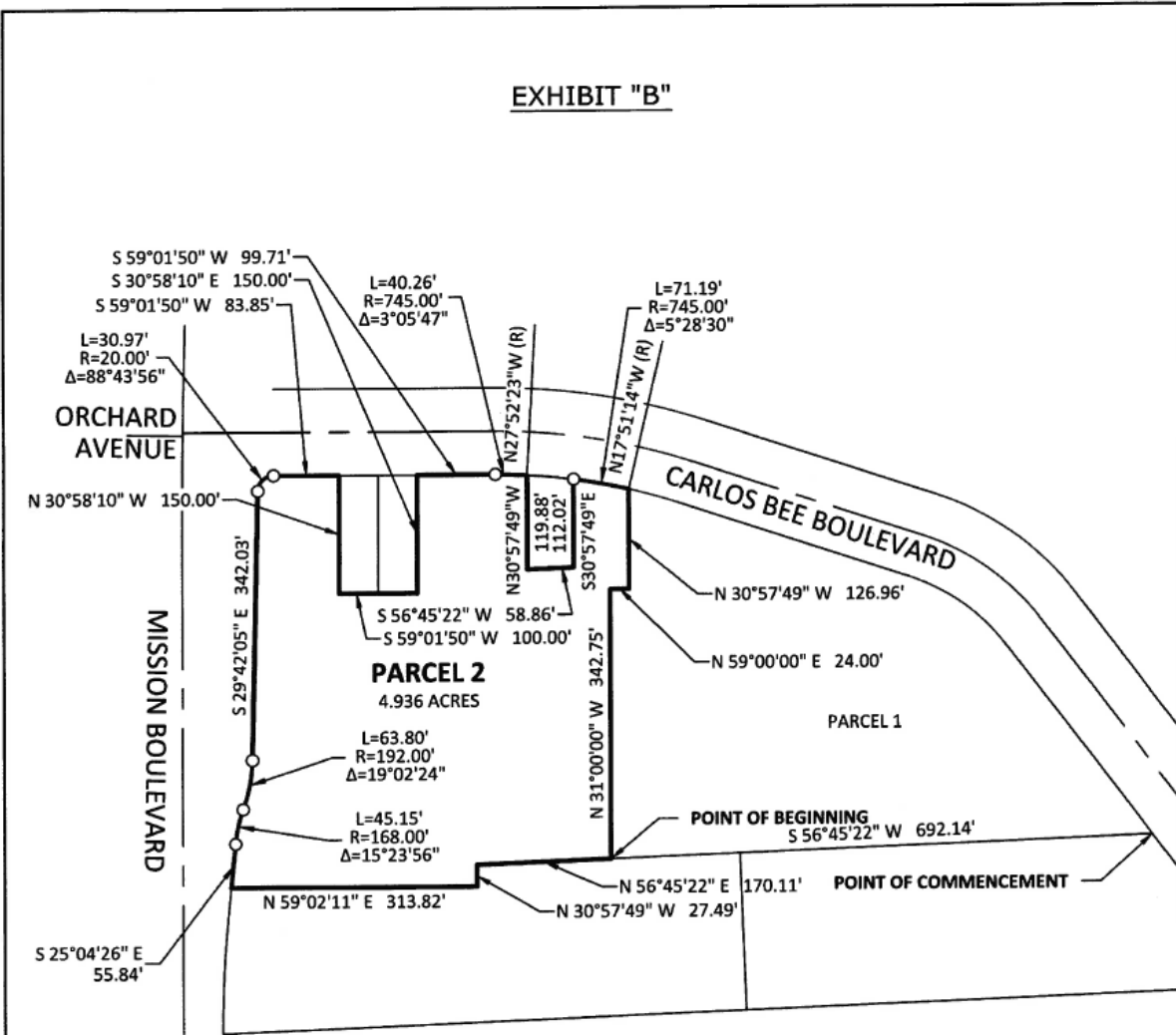
THE HEREIN DESCRIBED IS SHOWN ON EXHIBIT "B" ATTACHED HERETO AND MADE A PART HEREOF.



DAVID M. GARRETT, P.L.S. 10/11/19
DATE



EXHIBIT "B"



LEGEND:

○ DIMENSION POINT



kpff

2250 Douglas Blvd., Suite 200
 Roseville, CA 95661
 O: 916.772.7688
 F: 916.772.7699
www.kpff.com

PARCEL 2		DATE:	10/11/2019
LOT LINE ADJUSTMENT		SCALE:	1" = 200'
HAYWARD / ALAMEDA COUNTY / CALIFORNIA		SHEET:	1 OF 1

EXHIBIT E-1

FORM OF ADJACENT PARCEL RESTRICTIVE COVENANT

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Hayward
777 "B" Street
Hayward, CA 94541
Attn: City Manager

NO FEE DOCUMENT PURSUANT TO
GOVERNMENT CODE SECTION 27383

RESTRICTIVE USE COVENANT AGREEMENT
(Adjacent Parcel)

This Restrictive Use Covenant Agreement (this "Agreement") is made and entered into as of September 15, 2020, by and between the City of Hayward, a California charter City (the "City"), and BMODDRE2, LLC, a California limited liability company, and its successors and assigns (the "Developer"), with reference to the following facts, purposes, and understandings.

RECITALS

A. Capitalized terms used herein are defined in Article 1 of this Agreement. The Parties intend to refer to those definitions in connection with the use of capitalized terms in these Recitals.

B. The City and Developer entered into that certain Disposition and Development Agreement, dated as of September 15, 2020, as such may be amended from time to time (the "Disposition and Development Agreement") pursuant to which the City is transferring to the Developer certain real property located in the City of Hayward, California, which is more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property" also referred to as the "Adjacent Parcel").

C. Under the Disposition and Development Agreement, this Agreement is required to be recorded as an encumbrance on the Adjacent Parcel, limiting the use of Adjacent Parcel for the development of affordable housing in accordance with applicable laws.

D. In order to ensure that the Property is used in accordance with the conditions and restrictions in the Disposition and Development Agreement, the City and Developer desire to enter into this Agreement.

THEREFORE, the City and the Developer hereby agree as follows.

ARTICLE 1.
DEFINITIONS

Section 1.1 Definitions. When used in this Agreement, the following terms shall have the respective meanings assigned to them in this Article 1. All terms not defined herein shall have the meaning set forth in the Disposition and Development Agreement.

- (a) "Adjacent Parcel" has the meaning set forth in Recital B.
- (b) "Agreement" means this Restrictive Use Covenant Agreement, as may be amended as set forth herein.
- (c) "City" has the meaning set forth in the first paragraph of this Agreement.
- (d) "Developer" has the meaning set forth in the opening paragraph of this Agreement, and shall also be read to refer to the Developer's successor and assigns, who will have the full authority of the Developer from and after such successor or assign acquires the Developer's interest in the Property.
- (e) "Disposition and Development Agreement" or "DDA" has the meaning set forth in Recital B.
- (f) "Effective Date" means the date this Agreement is recorded against the fee interest in the Property.
- (g) "Event of Default" has the meaning set forth in Section 3.1, below.
- (h) "Property" has the meaning set forth in Recital C.
- (i) "Term" has the meaning set forth in Section 4.1.

ARTICLE 2.
COVENANTS AFFECTING CONSTRUCTION AND USE

Section 2.1 Use of Property.

(a) Dedicated Use. The Property is hereby designated and set aside for future development and use for low, very low, or moderate income housing (or any combination thereof), and shall only be developed by the City or a City-designated public or nonprofit agency specializing in the development of affordable housing.

(b) Allowable Use. For the entire Term the Property will be restricted for use as affordable rental or ownership housing to be made available to and occupied by extremely-low, very-low, low, and moderate income households at affordable housing cost (and other related uses) in conformity with this Agreement. Notwithstanding anything to the contrary, any affordable housing developed at the site may include without limitation any ancillary civic or public infrastructure that provides benefit to the residents of the affordable housing development.

(c) The restrictions and covenant shall burden all portions of the Property and shall run with the land so as to be binding upon every person having any fee, leasehold, or other estate in the Property. The restriction in Section 2.1(c) shall survive termination of this Agreement.

Section 2.2 Nondiscrimination.

(a) There shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased.

(b) Notwithstanding the preceding paragraph, with respect to familial status, the preceding paragraph shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in the preceding paragraph shall be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5 of the Civil Code, relating to housing for senior citizens. Subdivision (d) of Section 51 and Section 1360 of the Civil Code and subdivisions (n), (o), and (p) of Section 12955 of the Government Code shall apply to the preceding paragraph.

(c) The provisions of this Section shall run with the land and survive termination of this Agreement.

ARTICLE 3.
DEFAULT

Section 3.1 Events of Default. Subject to the applicable notice and cure period (if any), if the Developer breaches any other material provision of this Agreement, such breach shall constitute an "Event of Default" by Developer.

Section 3.2 Notice and Cure; Remedies Upon Default. Upon any of the above-described events, the City shall give Developer the opportunity to cure the default by delivering a written notice of default to Developer, which notice shall provide thirty (30) days, from the date thereof, to cure the default; provided, however, if the default cannot be cured within thirty (30) days, Developer shall not be deemed to be in default if Developer shall within such period commence to cure and thereafter diligently prosecute the same to completion within ninety (90) days from the date of the City's initial written notice to Developer. Upon an Event of Default, the City shall have the right to enforce this Agreement by any or all remedies provided by law or equity, including, but not limited to, specific performance, seeking an action for damages.

Section 3.3 Remedies Cumulative. No right, power, or remedy given by the terms of this Agreement is intended to be exclusive of any other right, power, or remedy; and each and

every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given by the terms of any such instrument, or by any statute or otherwise.

ARTICLE 4. MISCELLANEOUS

Section 4.1 Term. The provisions of this Agreement shall apply to the Property for the term of this Agreement, which commences as of the date of this Agreement and, unless terminated earlier pursuant to this Agreement, continues in perpetuity.

Section 4.2 Covenants to Run With the Land. The parties declare their express intent that the covenants and restrictions set forth in this Agreement shall run with the land, and shall bind all successors in title to the Property, provided. Each and every contract, deed or other instrument hereafter executed covering or conveying the improvements or the Property or any portion thereof shall be held conclusively to have been executed, delivered and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed or other instrument, unless the City expressly releases such conveyed portion of the Property from the requirements of this Agreement.

Section 4.3 Recording and Filing. The parties shall cause this Agreement, and all amendments and supplements to it, to be recorded against the Property in the Official Records of the County of Alameda. As applicable from time to time, the Developer shall execute such documents necessary for the Operating Covenant to remain in effect.

Section 4.4 Amendments, Modifications, and Waivers. This Agreement may not be amended, modified or changed, nor shall any waiver of any provision hereof be effective, except by an instrument in writing and signed by the parties or their successors in interest, and if applicable approved by the City Council.

Section 4.5 Waiver. The City's waiver of any term, covenant, or condition shall not be deemed to be a waiver of such term, covenant or condition of any subsequent breach of the same or any other term, covenant or condition. The City's failure to exercise any right, option or privilege hereunder shall not be deemed a waiver of such right, option or privilege nor shall it relieve Developer from (1) its obligation to perform each and every covenant and condition on its part to be performed, or (2) from any damages or other remedy for failure to perform the obligations of this Agreement.

Section 4.6 Entire Understanding of the Parties. This Agreement constitutes the entire understanding and agreement of the Parties with respect to the operation of the improvements and the Property. The Parties and their counsel have read and reviewed this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party (including, but not limited to Civil Code Section 1654, as may be amended from time to time) shall not apply to the interpretation of this Agreement.

Section 4.7 Severability. If any term, provision, covenant or condition of this Agreement is held in a final disposition by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue in full force and effect.

Section 4.8 Governing Law. This Agreement shall be governed by the laws of the State of California.

Section 4.9 Time. In all matters under this Agreement, the Parties agree that time is of the essence.

Section 4.10 Notice. Formal notices, demands, and communications between the City and Developer shall be in writing and shall be sufficiently given if and shall not be deemed given unless dispatched by registered or certified mail/return receipt, or delivered personally, to the principal offices of the City, as follows:

If to the City: City of Hayward
777 B Street, Fourth Floor
Hayward, CA 94541
Attn: City Manager

With copy to: City of Hayward
777 "B" Street
Hayward, CA 94541-5007
Attn: City Attorney
Facsimile: (510) 583-3660
Email: Michael.Lawson@hayward-ca.gov

Goldfarb & Lipman
1300 Clay Street, 11th Floor
Oakland, CA 94612
Attn: Heather Gould
Facsimile: (510) 836-1035
Email: hgould@goldfarbblipman.com

If to the Developer: At the address to be provided by the Developer in writing.

Such written notices, demands and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate by mail as provided in this Section. No party shall evade or refuse delivery of any notice.

Section 4.11 Discretion Retained by City. The City's execution of this Agreement does not constitute approval by the City in any manner and in no way limits the discretion of the City in the permit and approval process in connection with the development or operation of the Property.

Section 4.12 No Third Party Beneficiaries. This Agreement is not intended to create, nor shall it be in any way interpreted or construed to create, any third party beneficiary rights in any person not a party hereto.

Section 4.13 No Partnership. This Agreement shall not be construed to constitute any form of partnership or joint venture between the Parties.

Section 4.14 Article Headings. Article headings are for convenience only and are not to be used to interpret this Agreement.

Section 4.15 Multiple Originals; Counterparts. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

[Remainder of Page Left Intentionally Blank]

IN WITNESS WHEREOF, this Agreement has been executed, in triplicate, by the Parties on the date first above written.

DEVELOPER:

BMODDRE2, LLC, a California limited liability company

By: _____
Brian McCafferty, Member Manager

CITY:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

APPROVED AS TO FORM:

MICHAEL S. LAWSON,
City Attorney

By: _____
Joseph Brick, Assistant City Attorney

ATTEST:

By: _____
Miriam Lens, City Clerk

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Name: Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Name: Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF SITE

The land is situated in the State of California, County of Alameda, City of Hayward, and is described as follows:

EXHIBIT F-1
FORM OF DEALERSHIP DEVELOPMENT PARCEL
GRANT DEED

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

City of Hayward
777 B Street
Hayward, CA 94541
Attn: Joseph Brick

(Space Above For Recorder's Use)

APN NOs: _____

GRANT DEED
(Dealership Development Parcel)

Documentary County Transfer Tax is \$ _____; City Transfer Tax is \$ _____

- computed on full value of property conveyed, or
- computed on full value less value of liens and/or encumbrances remaining at time of sale
- Unincorporated Area of: City of: Hayward

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the City of Hayward, a California charter city ("**Grantor**"), hereby **GRANTS** to BMODDRE2, LLC, a California limited liability company ("**Grantee**"), that certain real property located in the City of Hayward, County of Alameda, State of California and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "**Property**"), together with (i) all improvements located thereon, and (ii) all rights, privileges, easements and appurtenances pertaining to the Property.

[Signature Page Follows]

IN WITNESS WHEREOF, Grantor has caused its duly authorized representatives to execute this instrument as of September ___, 2020.

GRANTOR:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

Date: _____, 20__

APPROVED AS TO FORM:
Michael Lawson, City Attorney

By: _____
Joseph Brick, Assistant City Attorney

Date: _____, 20__

ATTEST:

By: _____
Miriam Lens, City Clerk

Date: _____, 20__

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Notary Public

EXHIBIT A

LEGAL DESCRIPTION

Real property in the City of Hayward, County of Alameda, State of California, described as follows:

EXHIBIT F-2
FORM OF ADJACENT PARCEL
GRANT DEED

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

City of Hayward
777 B Street
Hayward, CA 94541
Attn: Joseph Brick

(Space Above For Recorder's Use)

APN NOs: _____

**GRANT DEED
(Adjacent Parcel)**

Documentary County Transfer Tax is \$ _____; City Transfer Tax is \$ _____

- computed on full value of property conveyed, or
- computed on full value less value of liens and/or encumbrances remaining at time of sale
- Unincorporated Area of: City of: Hayward

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the City of Hayward, a California charter city ("**Grantor**"), hereby **GRANTS** to BMODDRE2, LLC, a California limited liability company ("**Grantee**"), that certain real property located in the City of Hayward, County of Alameda, State of California and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "**Property**"), together with (i) all improvements located thereon, and (ii) all rights, privileges, easements and appurtenances pertaining to the Property.

[Signature Page Follows]

IN WITNESS WHEREOF, Grantor has caused its duly authorized representatives to execute this instrument as of September __, 2020.

GRANTOR:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

Date: _____, 20__

APPROVED AS TO FORM:
Michael Lawson, City Attorney

By: _____
Joseph Brick, Assistant City Attorney

Date: _____, 20__

ATTEST:

By: _____
Miriam Lens, City Clerk

Date: _____, 20__

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Real property in the City of Hayward, County of Alameda, State of California, described as follows:

EXHIBIT F-3
FORM OF SWAP PARCEL
GRANT DEED

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

City of Hayward
777 B Street
Hayward, CA 94541
Attn: Joseph Brick

(Space Above For Recorder's Use)

APN NOs: _____

GRANT DEED
(Swap Parcel)

Documentary County Transfer Tax is \$ _____; City Transfer Tax is \$ _____

- computed on full value of property conveyed, or
- computed on full value less value of liens and/or encumbrances remaining at time of sale
- Unincorporated Area of: City of: Hayward

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the City of Hayward, a California charter city ("**Grantor**"), hereby **GRANTS** to BMODDRE2, LLC, a California limited liability company ("**Grantee**"), that certain real property located in the City of Hayward, County of Alameda, State of California and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "**Property**"), together with (i) all improvements located thereon, and (ii) all rights, privileges, easements and appurtenances pertaining to the Property.

[Signature Page Follows]

IN WITNESS WHEREOF, Grantor has caused its duly authorized representatives to execute this instrument as of September __, 2020.

GRANTOR:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

Date: _____, 20__

APPROVED AS TO FORM:
Michael Lawson, City Attorney

By: _____
Joseph Brick, Assistant City Attorney

Date: _____, 20__

ATTEST:

By: _____
Miriam Lens, City Clerk

Date: _____, 20__

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Real property in the City of Hayward, County of Alameda, State of California, described as follows:

EXHIBIT F-4
FORM OF DEVELOPER
GRANT DEED

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

City of Hayward
777 B Street
Hayward, CA 94541
Attn: Joseph Brick

(Space Above For Recorder's Use)

APN NOs: _____

GRANT DEED
(Adjacent Parcel to City)

Documentary County Transfer Tax is \$ _____; City Transfer Tax is \$ 0 _____

- computed on full value of property conveyed, or
- computed on full value less value of liens and/or encumbrances remaining at time of sale
- Unincorporated Area of: City of: Hayward

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, BMODDRE2, LLC, a California limited liability company ("**Grantor**"), hereby **GRANTS** to the City of Hayward, a California charter city ("**Grantee**"), that certain real property located in the City of Hayward, County of Alameda, State of California and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "**Property**"), together with (i) all improvements located thereon, and (ii) all rights, privileges, easements and appurtenances pertaining to the Property.

[Signature Page Follows]

IN WITNESS WHEREOF, Grantor has caused its duly authorized representatives to execute this instrument as of September __, 2020.

GRANTOR:

BMODDRE2, LLC, a California limited liability company

By: _____
Brian McCafferty, Member Manager

Date: _____, 20__

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Real property in the City of Hayward, County of Alameda, State of California, described as follows:

**CERTIFICATE OF ACCEPTANCE
(Pursuant to Government Code 27281)**

This is to certify that the interest in real property, conveyed by that certain Grant Deed dated as of September ___, 2020, from BMODDRE2, LLC, a California limited liability company (the "**Grantor**"), to the CITY OF HAYWARD, a California charter city (the "**Grantee**"), located in the City Hayward, County of Alameda, State of California, is hereby accepted by, and consent to recordation of the Grant Deed in the Office of the Recorder of Alameda County, State of California, is hereby given by, the undersigned, its duly authorized officer, on behalf of the City pursuant to City Resolutions No. 20-_____, adopted on September 15, 2020.

CITY OF HAYWARD,
a California charter city

By: _____
Kelly McAdoo, City Manager

Date: _____

APPROVED AS TO FORM:

By: _____
Michael S. Lawson, City Attorney
Joseph Brick, Assistant City Attorney

Date: _____

ATTEST:

By: _____
Miriam Lens, City Clerk

Date: _____

EXHIBIT G
FORM OF ASSIGNMENT AGREEMENT

ASSIGNMENT OF COLLATERAL DOCUMENTS

This Assignment of Collateral Documents (the "Assignment") is entered into as of this _____ day of _____, 20__, by and between BMODDRE2, LLC, a California limited liability company ("Assignor"), and the City of Hayward, a California charter city, (the "Assignee"), with reference to the following facts:

RECITALS

A. Pursuant to the terms of that certain Disposition and Development Agreement dated as of September 15, 2020, as amended from time to time, by and between Assignor and Assignee (the "Disposition Agreement"), Assignor desires to assign to Assignee, and Assignee desires to accept from Assignor, the assignment of Assignor's right, title, and interest in and under those agreements, contracts and other work product described below and incurred by Assignor in connection with the Development, as listed in Schedule I attached hereto, as the same may be amended from time to time.

NOW, THEREFORE, in consideration of the foregoing, of the mutual promises of the parties hereto, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties mutually agree as follows:

TERMS

Section 1. Assignment by Assignor. Pursuant to Section 7.4 of the Disposition Agreement, subject to the rights of senior lenders, Assignor hereby assigns and delegates to Assignee, and Assignee hereby accepts from Assignor, in any and all of Assignor's right, title, and interest in and obligations under the following:

(a) all architectural designs, construction, engineering and consulting contracts (including Construction Contracts as defined in the Disposition Agreement), and any and all amendments, modifications, supplements, addenda and general conditions thereto (collectively, the "Project Agreements") heretofore or hereafter entered into by Assignor and any Contractor (as defined below and listed in Exhibit A, incorporated herein by this reference);

(b) all plans and specifications, shop drawings, working drawings, reports, studies, amendments, modifications, changes, supplements, general conditions, addenda and work product thereto (collectively, the "Reports, Plans and Specifications") heretofore or hereafter prepared by Assignor or any Contractor;

(c) all land use approvals, conditional use permits, building permits and other governmental entitlements and approvals of any nature obtained for the Development (collectively, the "Government Approvals"); and

(d) all financing or other applications and all other tangible documents, except those of a proprietary or confidential nature ("General Documents").

For purposes of this Agreement, the term "Contractor" means any architect, contractor, engineer, consultant or other person or entity entering into Project Agreements with Assignor (other than attorney agreements for the provision of legal services) and/or preparing Reports, Plans and Specifications for Assignor with respect to the Development. Such Project Agreements, Reports, Plans and Specifications, Government Approvals, and General Documents, are hereinafter to be collectively referred to as the "Collateral Documents". It is intended that all Collateral Documents, whenever produced, be assigned through this Assignment to Assignee, and Assignor agrees to make commercially reasonable efforts to obtain the consent to such assignments by various third parties in the form of consent attached hereto as Schedule II (the "Consent"). Notwithstanding anything to the contrary herein, the Assignor acknowledges and agrees that subject to the terms of Section 7.4 of the Disposition Agreement, the City, as the Assignee, shall have the right to assign all of its right, title, and interest in and to the Collateral Documents to any other public agency, a nonprofit corporation, or similar party, utilizing a form of assignment and assumption agreement to be provided by the City. Assignee acknowledges that this Assignment excludes any document that, pursuant to applicable law, the Assignor does not have the right to pledge or assign.

Section 2. Purpose. This Assignment is made to secure performance by Assignor of all its obligations under the Disposition Agreement.

Section 3. No Assumption of Obligations. Assignee does not assume any of Assignor's obligations or duties under any Collateral Documents, including, but not limited to, the obligation to pay for the preparation of any Collateral Documents, until and unless Assignee exercises its rights under this Assignment.

Section 4. As-Is; No Liability of Assignor. Assignee agrees and acknowledges that following the assignment, any use of the Collateral Documents by the City or any other person shall be without liability of any kind to Assignor and without any representation or warranty of Assignor or its employees as to the quality, validity, or usability of the Collateral Documents. Notwithstanding anything to the contrary no assignment here under shall relieve the Assignor of any liability of the Assignor under the Collateral Documents incurred or occurring prior to the assignment under this Agreement.

Section 5. Attorney-In-Fact. Assignor hereby irrevocably appoints Assignee as its attorney-in-fact which appointment shall be effective only upon the occurrence of an Event of Default by the Assignor that remains uncured after notice and opportunity to cure as prescribed in Section 7.4 of the Disposition Agreement, which power is coupled with an interest, so that Assignee shall have the right to demand, receive, and enforce any and all of Assignor's rights with respect to the Collateral Documents, and to perform any and all acts in the name of Assignor or in the name of Assignee with the same force and effect as if performed by Assignor in the absence of this Assignment, upon an assignment pursuant to Section 7.4 of the Disposition Agreement. Until such occurrences, Assignor will be entitled to exercise all rights pertaining to the Collateral Documents.

Section 6. Assignment Effective Upon Uncured Event of Default. The Assignment and assumption described herein shall be effective only upon the occurrence of: (a) an Event of

Default by Assignor (after notice and opportunity to cure) or an event which, with notice or the passage of time or both, would constitute an Event of Default under Section 7.4 of the Disposition Agreement; or (b) any termination of the Disposition Agreement pursuant to clauses other than Sections 7.2 and 7.3 of the Disposition Agreement. Until such occurrences, Assignor will be entitled to exercise all rights pertaining to the Collateral Documents.

Section 7. No Previous Assignment. Except as authorized under the Disposition Agreement (i.e. assignments to lenders of Approved Financing), Assignor represents and warrants to Assignee that no previous assignment(s) of its right or interest in or to the Collateral Documents has or have been made, and Assignor agrees not to assign, sell, pledge, transfer, mortgage, or hypothecate its right or interest therein so long as Assignee holds or retains any interest under the Disposition Agreement without the prior consent of Assignee.

Section 8. Governing Law. This Assignment is to be governed by the laws of the State of California, except to the extent that federal law preempts the laws of the State of California. Assignor consents to the jurisdiction of any federal or state court within the State of California having proper venue for the filing and maintenance of any action arising hereunder and agrees that the prevailing party in any such action will be entitled, in addition to any other recovery, to reasonable attorneys' fees and costs.

Section 9. Binding Upon Successors and Assigns. This Assignment is binding upon and will inure to the benefit of the heirs, legal representatives, successors-in-interest, and assigns of Assignor and Assignee; provided, however, this Section 7 may not be construed and is not intended to waive the restrictions on assignment, sale, transfer, mortgage, pledge, hypothecation, or encumbrance by Assignor contained in the Disposition Agreement.

Section 10. Capitalized Terms. Capitalized terms used but not defined in this Assignment have the meanings set forth in the Disposition Agreement.

Section 11. Headings. Section headings contained in this Assignment are inserted as a matter of convenience and for ease of reference only and will be disregarded for all other purposes, including the construction or enforcement of this Assignment or any of its provisions.

Section 12. Termination. This Assignment will terminate, and the lien of the Assignee under this Assignment will be released upon the earlier of Assignor's repayment in full of the Loan or termination of the Disposition Agreement.

Section 13. Counterparts. This Assignment may be executed in counterparts by the Parties hereto, each of which shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the Effective Date.

ASSIGNOR:

BMODDRE2, LLC, a California limited liability company

By: _____
Brian McCafferty, Member Manager

ASSIGNEE:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAdoo, City Manager

APPROVED AS TO FORM:

Michael S. Lawson
City Attorney

By: _____
Joseph Brick, Assistant City Attorney

ATTEST:

By: _____
Miriam Lens, City Clerk

SCHEDULE I

LIST OF PROJECT AGREEMENTS

TITLE OF AGREEMENT

NAME OF CONTRACTOR

DATE OF AGREEMENT

SCHEDULE II

FORM OF CONSENT

_____, a _____ (the "Contractor") hereby consents to the foregoing Assignment, of which this Consent is a part.

The undersigned agrees that if, at any time, Assignee, pursuant to its rights under the Disposition Agreement, elects to undertake or cause the completion of any work, and gives the undersigned written notice of such election; then, so long as the undersigned has received, receives, or continues to receive the compensation called for under the applicable Project Agreement, Assignee may, at its option, use and rely on the Collateral Documents for the purposes for which the documents were prepared, and the undersigned will continue to perform its obligations under the applicable Project Agreement for the benefit and account of Assignee in the same manner as if performed for the benefit or account of Assignor in the absence of this Assignment.

Contractor acknowledges and agrees that the City, as the Assignee, shall have the right to assign all of its right, title, and interest in and to the Collateral Documents to any other public agency, a nonprofit corporation, or similar party, utilizing a form of assignment and assumption agreement to be provided by the City.

The undersigned further agrees that, in the event of a breach by Assignor of the applicable Project Agreement, or any agreement entered into with the undersigned in connection with the Collateral Documents, so long as Assignor's interest in the applicable Project Agreement and Collateral Documents is assigned to Assignee, the undersigned will give written notice to Assignee. Assignee shall have thirty (30) days from the receipt of such written notice of default to remedy or cure said default; provided, however, nothing herein shall require Assignee to cure said default or to undertake completion of the work.

The undersigned warrants and represents that Contractor consents to the assignment(s) of the applicable Project Agreement or the Collateral Documents. Except as otherwise defined herein, the terms used herein shall have the meanings given them in the foregoing Assignment or the Disposition Agreement, as applicable.

Execution date: _____, 20__

Title of Contract:

By: _____

Name: _____

Its: _____

Date of Contract: _____

EXHIBIT H
FORM OF NOTICE OF COMPLETION

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

City of Hayward
777 B Street
Hayward, CA 94541
Attn: Joseph Brick

(Space Above For Recorder's Use)

APN NOs: _____

NOTICE OF COMPLETION
(Subaru)

Pursuant to Section 4.15 of that certain Disposition and Development Agreement dated as of September 15, 2020, a memorandum of which is recorded in the official records of the County of Alameda (the "Official Records") on _____, 20__ as Document No. 20__ - _____, as such may be amended (the "Disposition Agreement"), entered into by and between the City of Hayward, a California charter city (the "City"), and BMODDRE2, LLC, a California limited liability company (the "Developer"), the City certifies that the Developer of the real property more particularly described in Exhibit A (the "Property") has met its obligations under Article 4 of the Disposition Agreement regarding the construction of certain improvements on the Property, and has met its various obligations specified in Article 2, Article 3, and Article 4.

This Notice of Completion shall serve as conclusive evidence that the Developer has completed construction and development of all the improvements on the Property, including on-site and off-site improvements, required under Article 4 of the Disposition Agreement and has met its various obligations specified in Article 2, Article 3, and Article 4. From and after the issuance of a Certificate of Occupancy for the Improvements and the recordation of this Notice of Completion, the remedies set forth in this Section 7.5 and 7.6 of the Disposition Agreement shall no longer be available to the City under any circumstances.

All other rights, remedies and controls of the City with respect to the requirements of the Disposition Agreement not listed above, shall continue for the Term of the Disposition Agreement or as otherwise specified therein.

This Notice of Completion shall not constitute evidence of compliance with, or satisfaction of, any obligation of the Developer to any holder of a Security Financing Interest, including, but not limited to, the holder of a deed of trust securing money loaned to finance the Property, or any part thereof, and shall not be deemed to be either a notice of completion under

the California Civil Code or a certificate of occupancy. This Notice of Completion shall not constitute evidence of compliance with the prevailing wage requirements of California Labor Code Sections 1720 et seq, or the requirements set forth in Section 4.6 of the Disposition Agreement.

Capitalized terms used in this Notice of Completion which are not defined herein shall have the meanings given such terms in the Disposition Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, The City has caused its duly authorized representatives to execute this instrument as of _____, 20__.

CITY:

CITY OF HAYWARD, a California charter city

By: _____
Kelly McAadoo, City Manager

Date: _____, 20__

APPROVED AS TO FORM:
Michael Lawson, City Attorney

By: _____
Joseph Brick, Assistant City Attorney

Date: _____, 20__

ATTEST:

By: _____
Miriam Lens, City Clerk

Date: _____, 20__

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Name: _____
Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Real property in the City of Hayward, County of Alameda, State of California, described as follows: