

September 2, 2008

Via Cal Express

Chairman Barry Schultz and
Members of the Planning Commission
City of San Diego
1222 First Avenue, 4th Floor
San Diego, California 92101

Re: Commission Docket of September 11, 2008
Casa Mira View

Dear Chairman Schultz and Members of the Planning Commission:

We represent Scripps Mesa Developers, LLC ("SMD"), whose proposed Casa Mira View project will be before you on September 11, 2008. We are seeking your support for this valuable project. I am writing primarily to emphasize that the project is covered by a development agreement guaranteeing the number of units.

Casa Mira View proposes 1,848 residential units on about 41 acres near Westview Parkway and Capricorn Way in Mira Mesa. The density is consistent with the community plan designation for the site. The project consists of three 5-story residential buildings, each of which will wrap around an above-ground parking structure. The project will include swimming pools and other amenities. A privately-funded shuttle will allow residents to reach local businesses and recreational facilities without burdening the local road or transit systems. SMD has committed to providing its road improvements up front, even though much of the development necessitating those improvements as mitigation will not be built for years. SMD will provide not fees, but *one hundred eighty-five* affordable housing units either on-site or nearby. The Mira Mesa Community Planning Group endorsed the project by a 12-0 vote.

Chairman Barry Schultz
and Members of the Planning Commission
September 2, 2008
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SMD will provide more detailed information regarding the project and various planning issues separately. As noted above, I am writing separately to address a topic that mixes planning and legal considerations. In short, the right to develop the project has vested because it is the last subject of a development agreement that is still in effect.

VESTED RIGHTS

The development agreement in question was entered into between the City and Pardee Construction Company in late 1988. I have enclosed a copy for your reference. According to Section 4.2 (page 7), the development agreement is in effect for twenty years after the effective date of the ordinance that approved it (O-17178). According to Section 1.6 (page 4), the ordinance approving the agreement took effect on December 14, 1988, so the agreement will be in effect until late this year. Pardee assigned the development agreement for the Casa Mira View property to SMD in 2007.

The development agreement provided the City many benefits, mostly by requiring that Pardee (or its successors) provide a great deal of public infrastructure over and above what the City could legally have demanded. This included portions of Black Mountain Road and Westview Parkway, which have been built; most of Hage neighborhood park, which has been improved; what was then a third community park, which has been completed; a library and community swimming pool, which have also been built; and so on. There was also a contribution for the Penasquitos Canyon Preserve, which has been paid. In fact, the City has separately acknowledged that SMD has no further liability for the extraordinary benefits of the development agreement because they have all been provided.

Conversely, the development agreement provided Pardee (and now provides SMD) one major benefit: Section 5 (on page 11) vested a right to develop the "density and intensity of use" of "1,848 multi-family units in the subdivision commonly known as 'Casa Mira View.'" That is exactly the project now before you. The agreement is still in effect, so it assures the number of units being proposed. Even if the agreement had expired, SMD's rights would have vested because the City has received its benefits from the agreement and because SMD's application was deemed complete months ago. In any event, the agreement is still in effect.

CLARIFICATION OF CONDITIONS

We ask that the Commission correct two of the conditions staff has proposed for the project. Condition No. 5 of the vesting tentative subdivision map and condition No. 10 of the planned development/site development permit are defense and indemnity provisions requiring SMD to pay the City Attorney's fees and giving the City (i.e., the City Attorney) control over any litigation challenging the project. This violates the Subdivision Map Act (GOVERNMENT CODE §66474.9), which requires that cities bear their own attorney's fees and not impose a settlement on the developer. (Both conditions say, consistent with the Map Act, that the developer need not perform a settlement to which it did not agree, but that protection has no value given the preceding sentence giving the City sole authority to dispose of the matter, presumably including invalidation of the permits.) In the past, developers have been willing to accept the City's version of this provision in a spirit of cooperation. Unfortunately, though, the position of the current City Attorney, that his office can dictate the City's legal policy even in conflict with the Council, necessitates conforming these conditions to the law. We thus request that Condition No. 5 of the subdivision be replaced with the following:

Subdivider shall defend, indemnify, and hold the City (including its agents, officers, and employees [together, "Indemnified Parties"]) harmless from any claim, action, or proceeding against any Indemnified Party to attack, set aside, void, or annul City's approval of this project, which action is brought within the time period provided for in Government Code §66499.37. City shall promptly notify the subdivider of any claim, action, or proceeding and shall cooperate fully in the defense. If City fails to promptly notify the subdivider of any claim, action, or proceeding, or if City fails to cooperate fully in the defense, the subdivider shall not thereafter be responsible to defend, indemnify, or hold City harmless. City may participate in the defense of any claim, action, or proceeding if City both bears its own attorney's fees and costs, and defends the action in good faith. The subdivider shall not be

Chairman Barry Schultz
and Members of the Planning Commission
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required to pay or perform any settlement unless the settlement is approved by the subdivider.

This tracks the language of state law. To avoid conflicts between the two entitlements, Condition 10 of the use permit could then either be deleted or replaced with identical language.

CONCLUSION

Casa Mira View would provide many benefits to the City. It will provide needed housing in a location consistent with the community plan. The community planning group endorsed the project *unanimously*. Even though the property is protected by a development agreement, SMD will provide not fees, but *one hundred eighty-five* affordable housing units either on-site or nearby. A private shuttle will ensure that residents do not burden the local road or transit systems. The density of Casa Mira View has vested. We urge that you recommend approval of this valuable project.

Sincerely,



Paul E. Robinson

HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP

PER/RAS:cas
Enclosure (development agreement)

cc (w/enclosure):
Mayor Jerry Sanders
William Anderson
John Fisher
Stuart Posnock
Carol Matson
John Leppert

From: jai_birdie@hotmail.com
Sent: Tuesday, October 14, 2008 11:00 PM
To: CLK Hearings1
Subject: project no: 91647

this is a concern with respect to the proposed development of 1848 condominium at 11195 westview parkway. This site is close to the school and playground where people gathers most of time and traffic and congestions will be a problem since westview parkway is just four lane street both ways. the only access for parents dropping their kids in the morning and residents who uses the ball park and the picnic park that residents uses mostly on weekend. With 1848 proposed condominium. lets say average number of residents per condo is 3, you are talking about 5544 people in that neighborhood and with average number of cars per resident is 2, you are talking about 3696 cars in that neighborhood alone with only access out is westview parkway .. could you imagine how congested the road is early in the morning where people are going to work and parents dropping their kids at school. and with the ballpark just across the street , west view parkway will be totally in shambles with people looking for parking to use the ball park.

is there any study as how many cars uses westview parkway in the morning and during that time that ball parks are being used by neighborhood residents?

thanks,

concern resident,

jay sumilang

From: Lopez, Dante P. CIV FISCSD Code 4315 [dante.lopez@navy.mil]
Sent: Thursday, October 16, 2008 9:18 AM
To: CLK Hearings1
Subject: Rezone, Easement Vacation for Casa Mira View

My name is Dante P. Lopez. I am a retired U.S. Navy servicemen but still work for the Navy as a civilian employee. I live in 11267 Spitfire Road, San Diego, Ca. My property is one of the rows of houses that will parallel to this future development. I am one of the pioneer owners of this property since 1985 which among us at Spitfire Road still are. I will not be here during the hearing on Tuesday, October 28, 2008 because I will be overseas working for a Navy project.

Me and my neighbors saw the developers plan when they had their open house presentation at Hage Elementary School last spring and we have some concerns of what will be the implications since it will be adjacent to our properties.

According to the plan of the developers, structures will be built at about 80 ft. from their property line. Structures are five storey buildings. Their property is elevated about more than 15 feet from our property.

Building a five storey structure plus elevation will just dwarf the location of our properties, thereby overlooking us downhill all the time. Although the developers told us that they will plant trees to camouflage their buildings, these trees will take years before they grow to their attained heights which I will not envision anymore. Our concern here is our privacy and for us, looking those tall buildings will be an eye sore and that is given, God forbid. These just break our hearts after 23 years living peacefully. Additionally, with the height of the building and added elevation, this will deprive us of the sunlight we always have during the peak of winter because the sun rises from a easterly south direction. What we will have are shades of this building and lesser heat radiating into our houses.

In comparison to the units built by Home Depot by Hillery Road and those at La Jolla Village Drive and I-805, these condominiums to be built at Casa Mira View will be the highest in this corridor. The advantage of those two developments, there are no adjacent detached houses nearby. Casa Mira View will be build just right near our backyards.

Me and my neighbors know that we cannot stop the developers and it is hard to fight city hall. We are dwarves fighting a giant. What me and my neighbors recommend to the council if the developers erect these building more than 80 ft. from their property line thus minimizing the view of these tall buildings from us and giving us more the privacy we currently enjoy. We do not know if this will put a dent in the developers and city hall's agenda, we just hope somebody could take a look on this putting their situation as if they are living in this area.

We love the area and we hope the city council will hear our dilemma and help us come up with a more viable solution. From the beginning that this was planned, we are just in the state of depressive move of what will happen to our properties we worked for all those years. Thank you for reading my concern in behalf of myself and my neighbors.

Very respectfully yours,

Dante P. Lopez
Disbursing Examiner
FEG, FISC, San Diego
937 N. Harbor Drive

10/16/2008

San Diego, CA 92132-0058
(619) 532-1570 DSN: 522

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10/16/2008

HECHT
SOLBERG
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GOLDBERG
BAGLEY
LLP

PAUL E. ROBINSON
E-Mail:
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October 24, 2008

Via Cal Express

Council President Scott Peters
and Members of the City Council
City of San Diego
202 "C" Street, 10th Floor
San Diego, California 92101

RECEIVED
CITY CLERK'S OFFICE
08 OCT 24 PM 11:20
SAN DIEGO, CALIF.

Re: Council Docket of October 28, 2008, Item 336
Casa Mira View

Dear President Peters and Members of the City Council:

We represent Scripps Mesa Developers, LLC ("SMD"), whose proposed Casa Mira View project will be before you on October 28, 2008. We are seeking your support for this valuable project. I am writing primarily to emphasize that the project is covered by a development agreement guaranteeing the number of units.

Casa Mira View proposes 1,848 residential units on about 41 acres near Westview Parkway and Capricorn Way in Mira Mesa. The density is consistent with the community plan designation for the site. The project consists of three 5-story residential buildings, each of which will wrap around an above-ground parking structure. The project will include swimming pools and other amenities. A privately-funded shuttle will allow residents to reach local businesses and recreational facilities without burdening the local road or transit systems. SMD has committed to providing its road improvements up front, even though much of the development necessitating those improvements as mitigation will not be built for years. SMD will provide not fees, but *one hundred eighty-five* affordable housing units either on-site or nearby. The Mira Mesa Community Planning Group endorsed the project by a 12-0 vote. Finally, the Planning Commission approved the project by a 4-0 vote.

SMD will provide more detailed information regarding the project and various planning issues separately. As noted above, I am writing separately to address two topics that arise from legal considerations. In short, the right to develop the project has vested because it is the last subject of a development agreement that is still in effect, and the Council should use the alternative defense/indemnity language it has already used on other projects.

President Scott Peters
and Members of the City Council
October 24, 2008
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Conversely, the development agreement provided Pardee (and now provides SMD) one major benefit: Section 5 (on page 11) vested a right to develop the "density and intensity of use" of "1,848 multi-family units in the subdivision commonly known as 'Casa Mira View.'" That is exactly the project now before you. The agreement is still in effect, so it assures the number of units being proposed. Even if the agreement had expired, SMD's rights would have vested because the City has received its benefits from the agreement and because SMD's application was deemed complete months ago. In any event, the agreement is still in effect.

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President Scott Peters
and Members of the City Council
October 24, 2008
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can dictate the City's legal policy even in conflict with the Council, necessitates conforming these conditions to the law. We thus request that both conditions be replaced with the following:

Subdivider/Owner/Permittee shall defend, indemnify, and hold the City (including its agents, officers, and employees [together, "Indemnified Parties"]) harmless from any claim, action, or proceeding against any Indemnified Party to attack, set aside, void, or annul City's approval of this project, which action is brought within the time period provided for in Government Code §66499.37. City shall promptly notify Subdivider/Owner/Permittee of any claim, action, or proceeding and shall cooperate fully in the defense. If City fails to promptly notify Subdivider/Owner/Permittee of any claim, action, or proceeding, or if City fails to cooperate fully in the defense, Subdivider/Owner/Permittee shall not thereafter be responsible to defend, indemnify, or hold City harmless. City may participate in the defense of any claim, action, or proceeding if City both bears its own attorney's fees and costs, and defends the action in good faith. Subdivider/Owner/Permittee shall not be required to pay or perform any settlement unless the settlement is approved by the Subdivider/Owner/Permittee.

This tracks the language of state law and avoids a conflict between the two entitlements.

At a recent Council hearing on another project, the City Attorney advised the Council that the City's standard defense/indemnity language was not barred by the Map Act. We advised the Council otherwise, but did not have a copy of the Map Act handy. For the Council's reference, I have thus also attached a copy of the Map Act section (GOVERNMENT CODE §66474.9) in question. As the Council can see, it explicitly bars any other form of a defense/indemnity provision ("Except as provided in subdivision (b), a local agency may not require . . ."), including the language that the City Attorney had advised the Council to use.

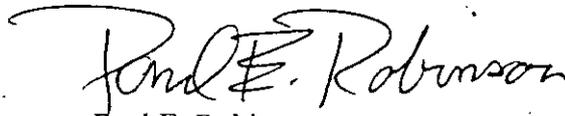
CONCLUSION

Casa Mira View would provide many benefits to the City. It will provide needed housing in a location consistent with the community plan. Both the community planning group and the City's Planning Commission endorsed the project *unanimously*. Even though the property is protected by a

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Sincerely,



Paul E. Robinson
HECHT SOLBERG ROBINSON GOLDBERG & BAGLEY LLP

PER/RAS:cas

Enclosures: Development Agreement
GOVERNMENT CODE §66474.9

cc (w/enclosures):

Mayor Jerry Sanders
William Anderson
John Fisher
Stuart Posnock
Carol Matson
John Leppert

353242_1

66474.9. (a) Except as provided in subdivision (b), a local agency may not require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider or an agent of the subdivider, defend, indemnify, or hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency as a result of the action or inaction of the local agency, advisory agency, appeal board, or legislative body in reviewing, approving, or denying the map.

(b) (1) A local agency may require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider defend, indemnify, and hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency or its agents, officers, or employees to attack, set aside, void, or annul, an approval of the local agency, advisory agency, appeal board, or legislative body concerning a subdivision, which action is brought within the time period provided for in Section 66499.37.

(2) Any condition imposed pursuant to this subdivision shall include the requirement that the local agency promptly notify the subdivider of any claim, action, or proceeding and that the local agency cooperate fully in the defense. If the local agency fails to promptly notify the subdivider of any claim, action, or proceeding, or if the local agency fails to cooperate fully in the defense, the subdivider shall not thereafter be responsible to defend, indemnify, or hold harmless the local agency.

(c) Nothing contained in this section prohibits the local agency from participating in the defense of any claim, action, or proceeding, if both of the following occur:

- (1) The agency bears its own attorney's fees and costs.
- (2) The agency defends the action in good faith.

(d) The subdivider shall not be required to pay or perform any settlement unless the settlement is approved by the subdivider.

w/c

DEVELOPMENT AGREEMENT BETWEEN
THE CITY OF SAN DIEGO AND
PARDEE CONSTRUCTION COMPANY
NEGOTIATED AND ENTERED INTO PURSUANT TO
CITY COUNCIL POLICY 600-37 ADOPTED BY THE
CITY COUNCIL ON AUGUST 9, 1988 AND AS
AMENDED ON SEPTEMBER 13, 1988

DOCUMENT NO. 00-17178
FILED NOV 14 1988
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

Submitted by:

Pardee Construction Company
110 West "C" Street
San Diego, California 92101

Applicant's Attorneys:

John D. Butler, Esq.
John E. Ponder, Esq.
Sparber, Ferguson, Naumann,
Ponder, & Ryan
701 "B" Street, Suite 800
San Diego, California 92101

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DEVELOPMENT AGREEMENT BETWEEN
THE CITY OF SAN DIEGO AND
PARDEE CONSTRUCTION COMPANY
NEGOTIATED AND ENTERED INTO PURSUANT TO
CITY COUNCIL POLICY 600-37 ADOPTED BY THE
CITY COUNCIL ON AUGUST 9, 1988 AND AS
AMENDED ON SEPTEMBER 13, 1988

THIS DEVELOPMENT AGREEMENT ("Agreement") is entered into between THE CITY OF SAN DIEGO, a municipal corporation ("City"), and PARDEE CONSTRUCTION COMPANY, a California corporation ("Owner" or "Property Owner").

1. RECITALS. The Agreement is entered into with reference to the following facts:

1.1 Code Authorization. City, a charter city, is authorized pursuant to Government Code Sections 65864 through 65869.5 to enter into development agreements with persons having legal or equitable interests in real property for the purpose of establishing certainty for both City and Owner in the development process. City enters into the Agreement pursuant to the provisions of the Government Code, the City charter and its home-rule powers, City Municipal Code sections 105.0101 et seq., Council Policy 600-37, and applicable City policies. The parties acknowledge:

(1) This Agreement is intended to assure adequate public facilities at the time of development.

(2) This Agreement is intended to assure development in accordance with City's Capital Improvement Plans.

(3) This Agreement is intended to provide certainty in the development approval process by only vesting the permitted use(s), density and intensity of use with respect to the subject property.

(4) This Agreement will permit achievement of growth management goals and objectives as reflected in the Progress Guide and Council Policy No. 600-37.

(5) Owner is required by the Mira Mesa Community Plan, the Mira Mesa Public Facilities Financing Plan and Facilities Benefit Assessment, Planned Residential Permit No. 86-0969, Vesting Tentative Map No. 86-0969, and Final Map No. 9257 to provide public facilities or public improvements as conditions of approvals through the regulatory process.

(6) This Agreement will allow City to realize extraordinary and significant transit, transportation, educational, recreational, cultural and regional benefits and facilities and other supplemental benefits in addition to those available through the existing regulatory process.

(7) Many of the extraordinary and significant benefits identified as consideration to City for entering into this Agreement are of regional significance; relate to existing deficiencies in public facilities; require Property Owner to contribute a greater percentage of benefits than would otherwise be required; and represent benefits which would not otherwise be required as part of the development process.

1.2 Owner. Owner has a legal or equitable interest in the real property located in City and County of San Diego, California, described on Exhibit "A" attached hereto ("Property"). The Property includes the subdivisions known as Westview (216.6± acres) and Casa Mira View (43.4± acres) within the Mira Mesa community planning area. The Property is located on the north side of Mira Mesa Boulevard between Interstate 15 and Black Mountain Road.

1.3 Interest of Owner. Owner hereby represents that it has a legal or equitable interest in the Property and is authorized to enter into this Agreement.

1.4 Planning Commission - Council Hearings. On September 19, 1988, the Planning Commission of the City ("Planning Commission"), after giving notice pursuant to Government Code sections 65090 and 65091, held a public hearing to consider the Owner's application for this Agreement. The Planning Commission recommended that the City Council deny approval of the Development Agreement. On September 20, 1988, the Council of The City of San Diego ("Council"), after providing notice as required by law, held a public hearing to consider the Owner's application for the Agreement.

1.5 Council Findings. The Council finds that this Agreement is consistent with the Progress Guide and General Plan, Specific Plan or the Community Plan, Council Policy 600-37, as well as all other applicable ordinances, plans, policies and regulations of City.

1.6 City Ordinance. On November 14, 1988, the Council adopted Ordinance No. 0-17178 approving this Agreement. The ordinance becomes effective on December 14, 1988.

2. DEFINITIONS. In the Agreement, unless the context otherwise requires:

2.1 "Community Plan" is the Mira Mesa Community Plan, adopted by the City Council on August 25, 1983, by Resolution No. R-254903, as amended on January 5, 1988, by City Council Resolution No. R-270080.

2.2 "EIR" is the Environmental Impact Report EQD Nos. 86-0969/87-0177, certified on January 5, 1988, by City Council Resolution No. R-270080.

2.3 "FM" is Final Map No. 9257, approved by City Council on June 18, 1979, pursuant to Resolution No. R-223727, and any duly approved amendment to the FM.

2.4 "Financing Plan" means the Mira Mesa Public Facilities Financing Plan, adopted by the City Council on February 23, 1988, by Resolution No. R-270414, or subsequent approved amendments. The parties recognize that the Financing Plan sets forth the public facilities which will be required for the ultimate build-out of the Community Plan. The general description, process and allocation of costs contained in the Financing Plan are further explained and identified in the Financing Plan which is incorporated herein by reference.

2.5 "Negative Declaration" is the Negative Declaration for Hage Park, EQD No. 87-0456 issued July 23, 1987, and Addendum thereto.

2.6 "PRD" is Planned Residential Permit No. 86-0969, approved by Planning Commission on October 22, 1987, pursuant to Resolution No. 0086-PC, and any duly approved amendment to the PRD.

2.7 "Project" is the development of the Property as set forth in the Community Plan, PRD, VTM, and FM. The Project includes 38 single family detached units and 1,826 attached multi-family units in the subdivision commonly known as "Westview" and 1,848 multi-family units in the subdivision commonly known as "Casa Mira View."

2.8 "Property" is the real property referred to in Exhibit A.

2.9 "Property Owner" or "Owner" means the person, persons, or entity having a legal or equitable interest in the Property and includes the Property Owner's successors in interest.

2.10 "Shapell" is Shapell Industries, Inc., and its successor in interest, S & S Construction Company, who have a legal or equitable interest in that subdivision commonly known as Mesa Del Sol which is subject to Planned Residential Permit No. 86-0613, Tentative Map No. 86-0613 and Final Map No. 9407.

2.11 "VTM" is Vesting Tentative Map No. 86-0969, approved by Planning Commission on October 22, 1987, pursuant to Resolution No. R-0078-PC, and any duly approved amendment to the VTM.

2.12 "Zoning" is Ordinance No. C-17009 adopted by City Council on January 19, 1988, rezoning the real property to R1-5000 and R-3000 zones.

2.13 "404 Permit" is Army Corps of Engineers 404 Permit issued December of 1987.

2.14 "1603 Permit" is California Department of Fish and Game Section 1603 permit dated December 22, 1987.

3. EXHIBITS. The following documents referred to in the Agreement are attached to this Agreement, are on file with the City of San Diego, and are identified as follows:

<u>Exhibit Designation</u>	<u>Description</u>	<u>Referred to in Section</u>
A	The Property	1.2, 2.9
B	Planned Residential Permit No. 86-0969	1.1(5), 2.7
C	(deleted)	
D	Vesting Tentative Map No. 86-0969	1.1(5), 2.12
E	Army Corps of Engineers 404 permit	2.14
F	California Department of Fish and Game Section 1603 permit	2.15
G	Certificate EIR 86-0969	2.2
H	Notice of Determination for Westview PRD	3
I	Negative Declaration for Hage Park	2.6
J	Notice of Determination for Hage Park	3
K	Final Map No. 9257	1.1(5)
L	Black Mountain/Westview Parkway Improvement Plans	6.1(a)(1)
M	Hage Neighborhood Park General Development Plans	6.1(a)(2)
N	Third Community Park General Development Plans	6.1(a)(3)

4. GENERAL PROVISIONS.

4.1 Property Subject to the Agreement. Until released pursuant to the provisions of Section 9.3 below, no property

shall be released from this Agreement until Property Owner has fully performed its obligations arising out of the Agreement.

4.2 Duration of Agreement. The term of the Agreement shall commence on, and the effective date of the Agreement shall be, the effective date of City Ordinance No. 0- 17178 as set forth in Section 1.6 above and the term shall extend for a period twenty (20) years following the effective date unless the Agreement is earlier terminated, or its term modified.

4.3 Assignment. Property Owner shall have the right to transfer or assign the Property, in whole or in part, to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement; provided, however, the rights of the Property Owner under this Agreement may not be transferred or assigned unless the written consent of the City Manager of City is first obtained and any transfer or assignment of the rights under this Agreement shall include in writing the assumption of the duties, obligations, and liabilities arising from this Agreement if the City Manager grants written consent to transfer the rights. Such transfer or assignment shall not relieve the Property Owner of any duty, obligation or liability to City without the consent of the City Manager. The City Manager's consent to transfer, assignment and release of liability shall not unreasonably be withheld.

During the term of this Agreement, any approved assignee or transferee of the rights under this Agreement shall observe and perform all of the duties and obligations of Property Owner contained in this Agreement as such duties and obligations pertain to the portion of the Property transferred or assigned.

Any and all approved successors and assignees of Property Owner shall have all of the same rights, benefits, duties, obligations, and liabilities of Property Owner under this Agreement. If the Property is subdivided, any subdivided parcel may be sold, mortgaged, hypothecated, assigned or transferred to persons for development by them in accordance with the provisions of this Agreement. Upon assignment or transfer of the rights of Property Owner under this Agreement, the obligations of Property Owner and the transferee or assignee shall be joint and several.

4.4 Amendment or Cancellation of Agreement. This Agreement may be amended from time to time or cancelled by the mutual consent of the parties but only in the same manner as its adoption by an ordinance as set forth in Government Code section 65868 and San Diego Municipal Code section 105.0109. The term "Agreement" or "Development Agreement" shall include any amendment properly approved and executed.

4.5 Enforcement. Notwithstanding Government Code section 65865.4 and San Diego Municipal Code section 105.0110, this Agreement is enforceable by any party to the Agreement in any manner provided by law. The remedies provided in Section 8.4 of this Agreement shall not include and City shall not be liable for any action in damages or any costs or attorney's fees resulting from any dispute, controversy, action or inaction, or any legal proceeding arising out of this Agreement.

4.6 Hold Harmless. Property Owner agrees to and shall hold City, its officers, agents, employees, consultants, special counsel and representatives harmless from liability: (1) for damages, just compensation, restitution, judicial or equitable

relief arising out of claims for personal injury, including health, and claims for property damage which may arise from the direct or indirect operations of the Property Owner or their contractors, subcontractors, agents, employees or other persons acting on their behalf which relates to the Project; and (2) from any claim that damages, just compensation, restitution, judicial or equitable relief is due by reason of the terms of or effects arising from this Agreement. Property Owner agrees to pay all costs for the defense of the City and its officers, agents, employees, consultants, special counsel and representatives regarding any action for damages, just compensation, restitution, judicial or equitable relief caused or alleged to have been caused by reason of Property Owner's actions in connection with the Project or any claims arising out of this Agreement. This hold harmless Agreement applies to all claims for damages, just compensation, restitution, judicial or equitable relief suffered or alleged to have been suffered by reason of the events referred to in this paragraph or due by reason of the terms of, or effects, arising from this Agreement regardless of whether or not the City prepared, supplied or approved this Agreement, plans or specifications, or both, for the Project. The Property Owner further agrees to indemnify, hold harmless, and pay all costs for the defense of the City, including fees and costs for special counsel regarding any action by a third party challenging the validity of this Agreement or asserting that damages, just compensation, restitution, judicial or equitable relief is due to personal or property rights by reason of the terms of, or effects arising from this Agreement. Property Owner shall select legal

counsel to represent City in any such proceeding subject to City Attorney's approval. Such approval shall not be unreasonably withheld. City may make all reasonable decisions with respect to its representation in any legal proceeding.

4.7 Binding Effect of Agreement. To the extent not otherwise provided in Section 4.3 of this Agreement, the burdens of the Agreement bind and the benefits of the Agreement inure to the parties' successors in interest.

4.8 Relationship of the Parties. The contractual relationship between City and Owner arising out of the Agreement is one of independent contractor and not agency. This Agreement does not create any third party beneficiary rights.

4.9 Notices. All notices, demands and correspondence required or permitted by the Agreement shall be in writing and delivered in person or mailed by first class or certified mail, postage prepaid, addressed as follows:

If to City, to:

The City of San Diego
City Administration Building
202 "C" Street, 9th Floor
San Diego, CA 92101
Attention: City Manager

If to Owner, to:

Pardee Construction Company
110 West "C" Street
San Diego, California 92101
Attention: Michael D. Madigan
Phone: (619) 231-9744

A party may change its address by giving notice in writing to the other party. Thereafter, notices, demands and correspondence shall be addressed and transmitted to the new address. Notice shall be deemed given upon personal delivery or,

if mailed, two (2) business days following deposit in the United States mail.

5. DEVELOPMENT OF THE PROPERTY.

5.1 Rules, Regulations and Policies. The rules, regulations and official policies governing the permitted use(s) of the Property, with respect to and only with respect to the density and intensity of use of the Property, shall be those rules, regulations and policies applicable to the Property as of the effective date of this Agreement.

5.2 Permitted Use, Density and Intensity of Use; Rate and Amount of Growth. ~~This development agreement shall vest with respect to the subject Property only the permitted use(s) of~~ land, density and intensity of use. The permitted use(s) of land, density and intensity of use shall be for the project which includes 38 single family detached units and 1,826 attached multi-family units in the subdivision commonly known as "Westview" and 1,848 multi-family units in the subdivision commonly known as "Casa Mira View."

The right to regulate the rate and amount of growth is not abrogated by the City. The City hereby retains the police power to provide for change in regulations, ordinances, policies and plans relating to moratoria, building permit allocations, timing and sequencing of development and the financing and provision of adequate public facilities at the time of development. No vested rights as to any requirements in this subparagraph either as to existing or future regulations, ordinances, policies and plans is hereby conferred.

5.3 Design and Construction Standards and Specifications. The design and construction standards and specifications for buildings and structures in the Project shall be subject to applicable design standards and guidelines in effect at the time that any development approval shall be sought for the Project or any unit or structure contained within the Project.

5.4 Maximum Height and Size of Structures. The maximum height and size for all structures shall be as provided in the applicable zoning classifications.

5.5 Reservations and Dedications of Lands for Public Purposes. Minimum reservations and dedications of land for public purposes shall be as set forth in all approvals for this Project, including the VTM, FM, PRD and as set forth in this Agreement.

5.6 Future Discretionary Approvals. Except as provided in section 5.2 and 5.9, this Agreement shall not prevent the City, when considering requests for discretionary approvals subsequent to the effective date of this Agreement, from applying new rules, regulations, and policies which are applicable to the Property, including but not limited to, changes in the general plans, specific plan, community plan, subdivision and/or building regulations, nor shall this Agreement prevent the City from denying or conditionally approving any subsequent applications for land use entitlements based on such existing or new rules, regulations and/or policies; provided, however, that such new rules, regulations, and official policies are of general application to all development within the City of San Diego and are not imposed solely with respect to the subject property. In

addition, this Agreement shall not prevent the City from exercising its police power to protect the health, safety and welfare of the public. This Police Power, exercised in accordance with section 5.14 of this Agreement, is paramount to any rights or obligations created or existing between the parties.

5.6.1 Future Discretionary Approvals Required for Black Mountain Road Construction. Should Property Owner be required to obtain any discretionary approvals or amendments to existing approvals for the construction of Black Mountain Road on Owner's Property subsequent to the effective date of this Agreement as a result of being directed by City to construct that portion of Black Mountain Road which is shown on the Mesa Del Sol Final Map No. 9407, and Property Owner is unable to obtain such approvals because of the application of rules, regulations or policies which became effective after the effective date of this Agreement, then and in that event, Property Owner shall be relieved of its obligation to construct that portion of Black Mountain Road which is on the Mesa Del Sol Subdivison.

5.7 Processing Fees. All fees and charges intended to cover City costs associated with processing development of the Property, including but not limited to fees and charges for applications, processing, inspections, plan review, plan processing, and/or environmental review, which are existing or may be revised or adopted during the term of this Agreement, shall apply to the development of the Property.

5.8 Amendments or Additions to Facility Financing Programs. This Agreement shall not preclude the inclusion of and

changes to Facility Benefit Assessments, Facility Financing Plans, Development Impact Fees or other related fees adopted on a community or City-wide basis where such inclusion or change is caused by inflation, later more accurate cost estimation, later commonly accepted higher standards of construction, an allocation to the Mira Mesa Community of a fair share of the cost of any regional public improvements which demonstrably benefit said community and one or other communities of City or to address community facility deficiencies arising from and attributing to unforeseen circumstances in the development of the Property.

5.9 Development, Construction and Completion of Project. In consideration for the extraordinary and significant benefits set forth in Section 6.1, the Owner has been legally vested under paragraph 5.2 with regard to the permitted use(s) of land, density and intensity of use. To the extent that such benefits have been provided, the City also confers under this section the right to develop, construct and complete the Project in accordance with limited phasing and timing. The Owner shall be issued the following number of building permits in the following years provided.

<u>Year</u>	<u>Number of Building Permits</u>
1990	200
1991	350
1992	350
1993	350
1994	450
1995	450

1996	450
1997	450
1998	450
1999	212

In the event Owner elects to obtain fewer building permits during any calendar year than is specified, the difference in number shall be added to the number specified for the following year and may be carried forward from year to year thereafter. All building permits are subject to the allocation process pursuant to Section 4A3b of the growth management element amendment adopted by the City Council on August 9, 1988, subject to voter approval.

5.9.1 Certificate of Occupancy. No certificate of occupancy (or equivalent document) for any dwelling unit on the Property shall be issued other than for model units by City until construction of Black Mountain/Westview Parkway, Hage Neighborhood Park, the 25 acre athletic complex in the Third Community Park, and the traffic signal at Hillery Drive and Black Mountain Road have been completed. "Completed" means, for the purposes of this subsection, a status of construction such that members of the public can physically use the improvements shown on the Black Mountain/Westview Parkway, Hage Neighborhood Park and Third Community Park Improvement Plans. Nothing contained in this subsection shall be construed to limit City's right to require, after said improvements are so completed, correction of construction defects prior to City's acceptance of said improvements.

5.10 Moratoriums. Moratoriums enacted by the City for the public health, safety and welfare which are imposed on the Property or Project shall toll the time periods set forth in this Agreement.

5.11 Progress Reports Until Construction of Project is Complete. Owner shall make reports of the progress of construction of public facilities described in the Agreement in such detail and at such time as the City Manager or City Engineer reasonably requests.

5.12 City to Receive Construction Contract Documents. Owner shall furnish City, upon written request, copies of any public facilities construction contracts and supporting documents relating to the Property.

5.13 Conditions of Discretionary Approvals. The requirements imposed as conditions of any discretionary approval received through the City's existing regulatory process shall be governed by the terms of those approvals except to the extent this Agreement modifies such conditions, but in no event shall such conditions be affected by the termination, cancellation, rescission, revocation, default or expiration of this Agreement.

5.14 Police Power. In the exercise of its Police Power, the City Council shall recognize and consider the circumstances existing at the time this Agreement was authorized. In addition, such exercise of the Police Power shall be consistent with the purpose and intent of the Development Agreement statute, Government Code § 65864 et seq.

6. DEVELOPMENT PROGRAM.

6.1 (a) Extraordinary and Significant Benefits.

Notwithstanding any provision in this Agreement, or of law, to the contrary and as partial consideration for the parties entering into this Agreement, the parties agree that Owner is obligated to provide to the City the following enumerated extraordinary and significant benefits even if the Owner: cancels, rescinds, repudiates, refuses, revokes or in any manner terminates or attempts to terminate this Agreement:

(1) Black Mountain Road, Westview Parkway: Portions of Black Mountain Road and Westview Parkway which are, together with utilities and other appurtenances thereto, to be constructed on and adjacent to the property; said construction is herein referred to as "the Black Mountain/Westview Parkway Construction." The Black Mountain/Westview Parkway Construction shall be accomplished in compliance with (i) condition of said vesting tentative map set forth in Exhibit D and (ii) improvement plans approved by the City Engineer of City (23584-D for Black Mountain Road, 23643-D for Westview Parkway, and 23729-D for Westview Parkway Offsite), herein referred collectively to as "the Black Mountain/Westview Parkway Improvement Plans." A copy of the Black Mountain/Westview Parkway Improvement Plans is attached as Exhibit L.

(2) Hage Neighborhood Park: Property Owner shall also design and improve five (5) acres for a 9 acre neighborhood park, known as the Hage neighborhood park, also known as "Westview Park," adjacent to Hage Elementary School Site, in a manner satisfactory to the City Engineer. The site will consist

of an approximate 9 acre park site and a 10 acre school site; said construction is herein referred to as "Hage Neighborhood Park Construction."

Property Owner shall improve this 5 acre park site in accordance with section 5.9.1 prior to the occupancy of any of the residential units. Property Owner shall enter into an agreement with the City authorizing reimbursement for such work from the appropriate funds prior to the approval of the final map.

The Hage Neighborhood Park Construction shall be accomplished in compliance with (i) conditions of said vesting tentative map set forth in Exhibit D; and (ii) approved General Development Plan for the Hage Neighborhood Park ("the Hage Neighborhood Park General Development Plans"), a copy of which is attached as Exhibit M.

(3) Third Community Park: Unit No. 8 is designated as a public park and is to be acquired in accordance with procedures established in Section 64479 et seq. of the Subdivision Map Act. Prior to the approval of a final map including this park site, the City may, at its option, enter into an agreement to acquire the site within two (2) years. Failure to enter into such agreement will terminate the park reservation.

The designation of Unit No. 8 as a park site shall be deleted provided a Community Plan Amendment is approved by the City Council redesignating the land use and a lease is executed with the San Diego Community College District and the City of San Diego for a 30 acre site. Twenty-five acre athletic complex of the 30 acre site is to be improved prior to occupancy

of any of the residential units; said construction is herein referred to as "Third Community Park Construction." Property Owner shall request FBA credits for this improvement.

The Third Community Park Construction shall be accomplished in compliance with (i) condition of said vesting tentative map set forth in Exhibit D; and (ii) approved General Development Plan for the Third Community Park ("the Third Community Park General Development Plans"), a copy of which is attached as Exhibit N.

(4) Mira Mesa Library: Property Owner is required by the Financing Plan to participate in the cost of construction of the Mira Mesa Library ("Library"). Subject to section 6.4, on January 10, 1992, Property Owner shall advance to the City, FBA Funds ("funds advanced"), subject to reimbursement pursuant to section 6.3, in an amount not to exceed Three Million Dollars (\$3,000,000.00) for the Library. Said advancement of funds is prior to the time funds are required pursuant to the Financing Plan.

(5) Penasquitos Canyon Preserve Non-Reimbursable Contribution: Property Owner agrees to make a non-reimbursable contribution of One Hundred Thousand Dollars (\$100,000.00) to the City for use in the Penasquitos Canyon Preserve. The contribution shall be made on or before the issuance of the first building permit for a residential unit constructed in the Project.

(6) Community Swimming Pool: Property Owner is required by the Financing Plan to participate in the cost construction of the community swimming pool ("Pool") in th

Community Park. Subject to section 6.4, on July 1, 1990, Property Owner shall advance to the City, FBA Funds ("funds advanced"), subject to reimbursement pursuant to section 6.3, in an amount not to exceed Two Million Four Hundred Thousand Dollars (\$2,400,000.00) towards the cost of the construction of the Pool. Said advancement of funds is prior to the time funds are required pursuant to the Financing Plan.

(7) Field House: Property Owner is required by the Financing Plan to participate in the cost of the construction of the field house ("Field House") as part of phase two of the Third Community Park. Subject to section 6.4, on July 1, 1994, Property Owner shall advance to the City, FBA Funds ("funds advanced"), subject to reimbursement pursuant to section 6.3, in an amount not to exceed Two Million Dollars (\$2,000,000.00) towards the cost of construction of the Field House. Said advancement of funds is prior to the time funds are required pursuant to the Financing Plan.

(8) Library and Park Non-Reimbursable Contributions: Property Owner agrees to make a non-reimbursable contribution of Five Hundred Thousand Dollars (\$500,000.00) to City to be used for general improvements for the Mira Mesa Library. The contribution to the City shall be paid on demand by the City but no earlier than July 1, 1993. Property Owner agrees to make an additional non-reimbursable contribution of One Million Dollars (\$1,000,000.00) to City to be used for general public improvements within the Mira Mesa Planning Area. The contribution for general public improvements shall be paid to the City as follows: Five Hundred Thousand Dollars (\$500,000.00) on

demand by the City but no earlier than July 1, 1995; and the balance of Five Hundred Thousand Dollars (\$500,000.00), together with accrued interest, if any, on demand by the City but no earlier than July 1, 1997.

The dollar amounts set forth in section 6.1(a)(8) as non-reimbursable contributions are stated in 1989 dollars. Said amounts shall increase at the rate of 4% for the remainder of fiscal year 1989 and at a rate thereafter consistent with the inflation factor of the Financing Plan for each fiscal year until paid.

6.1 (b) Additional Extraordinary and Significant Benefits; Mesa Del Sol Improvements. City Council approval of the Mesa Del Sol Subdivision in part obligated Shapell to construct the following improvements ("Mesa Del Sol Improvements"):

(1) Black Mountain Road full-width north of Galvin Avenue to the northerly subdivision boundary.

(2) Traffic signal system at Hillery Drive and Black Mountain Road.

(3) To improve four acres of a nine acre neighborhood park known as the Hage Neighborhood Park, satisfactory to the City Engineer.

(i) As additional extraordinary and significant benefits, Property Owner agrees, if directed by City, to construct the Mesa Del Sol Improvements set forth in section 6.1(b) if Shapell is declared in default by the City under Final Map No. 9407 of its agreement relating to the improvements for

Mesa Del Sol.¹ If Shapell or the successor in interest to the Mesa Del Sol subdivision is successful in obtaining a new PRD, tentative map or similar plan for the Mesa Del Sol Project, and/or Shapell or its successor in interest is exonerated from the default, then Property Owner will be relieved of the condition to provide the Mesa Del Sol Improvements described in section 6.1(b). In the event Property Owner is relieved of the condition to construct the Mesa Del Sol Improvements, any reference herein to the Mesa Del Sol Improvements shall be of no force or effect.

6.2 (a) THE BLACK MOUNTAIN/WESTVIEW PARKWAY CONSTRUCTION:

(1) Plans: Property Owner has, at Property Owner's sole cost, submitted to City the Black Mountain/Westview Parkway Improvement Plans for the Black Mountain/Westview Parkway Construction. City shall, in its customary and usual manner, review and critique the Black Mountain/Westview Parkway Improvement Plans and notify Property Owner of any required changes thereto. Property Owner shall promptly make such changes to the Black Mountain/Westview Parkway Improvement Plans.

(2) Bond(s): No later than thirty (30) days after City notifies Property Owner that the Black Mountain/Westview Parkway Improvement Plans are satisfactory to City,

¹Improvements to Black Mountain Road shall be constructed to specifications approved by the City Engineer and upon City provided right-of-way.

Property Owner shall deliver to City a faithful performance and labor and materials bond(s) or other acceptable security, in penal amounts determined by City, which bond(s) shall secure the obligations of Property Owner pursuant to the development permit(s) described below.

(3) Improvement Permit(s): Upon receipt of the bond(s) described in Subsection 6.2(a)(2), City shall issue to Property Owner permit(s) authorizing and obligating Property Owner to perform, or cause to perform, the work set forth in the Black Mountain/Westview Parkway Improvement Plans ("the Improvement Permit(s)"). Property Owner shall diligently prosecute to completion the Black Mountain/Westview Parkway Construction.

(4) Vacation, Dedication: The Council shall take all necessary action to vacate portions of existing right-of-way, as required by Subdivision Board requirements, and dedicate as a public road those portions of Black Mountain Road, Samoa Avenue and Galvin Avenue which traverse City-owned land. Further, City shall timely accept, from the County of San Diego, dedication as a public road of those portions of Black Mountain Road which traverse County-owned lands.

(5) Dedication: Prior to or concurrently with Property Owner's delivery to City of the bond(s) described in Subsection 6.2(a)(2), Property Owner shall deliver to City, and City shall accept, a proper and lawful deed(s) in favor of City, executed and acknowledged by Property Owner, conveying to City (or dedicating as public streets, as City shall determine in its discretion) those portions of Westview Parkway and Black Mountain

Road which are (i) shown on said vesting Tentative Map No. 86-0969; and (ii) not presently owned by City or the County of San Diego (or dedicated as public streets).

(b) THE HAGE NEIGHBORHOOD PARK AND THIRD COMMUNITY PARK CONSTRUCTION:

(1) Plans: Property Owner shall submit to City the Hage Neighborhood Park and Third Community Park Improvement Plans for 5 acres of the Hage Neighborhood Park and the 25 acre athletic complex in the Third Community Park Construction. City shall, in its customary and usual manner, review and critique the Hage Neighborhood Park and Third Community Park Improvement Plans and notify Property Owner of any required changes thereto. Property Owner shall promptly make such changes to the Hage Neighborhood Park and Third Community Park Improvement Plans.

(2) Bond(s): No later than thirty (30) days after City notifies Property Owner that the Hage Neighborhood Park and Third Community Park Improvement Plans are satisfactory to City Property Owner shall deliver to City a faithful performance and labor and materials bond(s) or other acceptable security, in penal amounts determined by City, which bond(s) shall secure the obligations of Property Owner pursuant to the development permit(s) described below.

(3) Improvement Permit(s): Upon receipt of the bond(s) described in Subsection 6.2(a)(2), City shall issue to Property Owner a permit(s) authorizing and obligating Property Owner to perform, or cause to perform, the work set forth in the Hage Neighborhood Park and Third Community Park Improvement Plans ("the Permit(s)"). Property Owner shall diligently prosecute to

completion the Hage Neighborhood Park and Third Community Park Construction.

6.3 Reimbursement for Parks, Library, Pool, and Mesa Del Sol Improvements: After Council's adoption of an ordinance approving this Agreement, City and Property Owner shall execute an agreement(s) setting forth the specific terms and conditions upon which Property Owner shall be reimbursed for the construction costs of Hage Neighborhood Park, the 25 acre athletic complex in the Third Community Park, the Mesa Del Sol Improvements and for the funds advanced towards the construction of the Library, Pool and Field House. Said agreement(s) shall contain all pertinent terms and conditions and be in compliance with (i) this Agreement; (ii) conditions of vesting tentative map No. 86-0969 set forth in Exhibit D; and (iii) the approved General Development Plans. Said agreement(s) shall further provide that:

(a) Property Owner shall provide for the complete design and construction for 5 acres of the Hage Park, a 25 acre athletic complex in the Third Community Park, and the Mesa Del Sol Improvements as described in Section 6.1(b) in accordance with the approved Improvement Plans;

(b) Property Owner shall be reimbursed by City the total actual cost of construction ("construction costs"), not to exceed the costs set forth in the Financing Plan, which shall include all documented costs incurred by Property Owner in designing, constructing and installing 5 acres of the Hage Park, the 25 acre athletic complex in the Third Community

6.1(b);

(c) Property Owner shall be reimbursed by City for construction costs and funds advanced, together with interest as provided hereinafter, towards the construction of the FBA projects;

(i) City shall accrue and pay interest on construction costs incurred and funds advanced by Property Owner for Mira Mesa FBA projects (Hage Park, 25 acre athletic complex at Third Community Park, Library, Pool and Field House at Third Community Park). Interest shall accrue from the date construction costs are incurred and/or funds advanced until the end of the fiscal year of need for the particular FBA project as provided in the Financing Plan. The interest rate shall be the rate assumed for "cash on hand" cash flow projections in the Financing Plan.

(d) City shall reimburse Property Owner the costs of construction and/or funds advanced, together with accrued interest as allowed herein, by:

(i) Cash payment from the FBA for the Mira Mesa Community Plan area. Said cash payment shall be made at the time scheduled in the Mira Mesa Public Facilities Financing Plan. In the event there are funds available, payment may be made prior to the time scheduled so long as it is

not necessary to either increase the proposed FBA nor delay any other projects in the Financing Plan.

(ii) In the event City cannot fully reimburse Property Owner from the available funds described above, any remaining unreimbursed amounts shall be paid by granting to Property Owner credits against fees required by the Mira Mesa FBA. Said credit may be used by Property Owner, or its successors or assigns at the time, and from time to time, in payment of such FBA fee charges as Property Owner, or its successors or assigns, obtain building permits.

(iii) Notwithstanding the above, Property Owner may elect to receive full reimbursement in the form of FBA credit.

6.3.1 ADDITIONAL METHODS FOR REIMBURSEMENT OF MESA DEL SOL IMPROVEMENTS:

(1) In addition to the method described above for reimbursement of Mesa Del Sol Improvements, City agrees:

(a) Following the effective date of this Agreement, the City will accept a written request by Property Owner for the formation of a Reimbursement or Acquisition District for those public facilities described in Section 6.1(b) which are for the primary benefit of the Mesa Del Sol subdivision and which Property Owner constructs. City shall not unreasonably deny Property Owner's request for the formation of a Reimbursement or Acquisition District.

(b) If City declares Shapell to be in default of its agreement relating to the improvement of Mesa Del Sol, City shall proceed in good faith to cause the improvement security for said subdivision to be forfeited to the City. The proceeds of the forfeited improvement security and/or the proceeds of any judgment the City obtains against Shapell and/or its surety as a result of such default shall be applied towards the reimbursement of Property Owner for the construction costs it has incurred in constructing those improvements which are described in Section 6.1(b) ("Mesa Del Sol Improvements"). Any such reimbursement shall reduce the overall reimbursement owed for Mesa Del Sol Improvements accordingly.

It is specifically understood and agreed to by and between the parties hereto that: (a) City has full power, exclusive control and sole discretion over declaring Shapell and/or its successor in interest to be in default of its agreement relating to the improvements of Mesa Del Sol and its enforcing of the obligation of Shapell, its successor in interest, and its surety; (b) Property Owner is not responsible for, nor has it directed, suggested or participated in any way in the City's decision whether or not to declare Shapell and/or its successor in interest in default of its agreement relating to the improvements of Mesa Del Sol and its enforcing of the obligations of Shapell, its successor in interest and its surety.

(c) Property Owner shall be entitled to receive interest on the construction costs of the Mesa Del Sol Improvements from the time they are incurred until reimbursed at

the maximum rate provided by the applicable method(s) by which Property Owner is reimbursed.

(d) If by December 31, 1995, the City has not formed any of the cost reimbursement districts identified in section 6.3.1 (or their equivalent), then the City shall make a good faith effort to reimburse Property Owner for the Mesa Del Sol Improvements described in section 6.1(b).

6.4 Security for Performance of FBA Reimbursed Public Facilities. Property Owner shall post with City an irrevocable letter of credit issued by a financial institution approved by the City Manager and City Attorney in a form satisfactory to the City Manager and City Attorney guaranteeing payment of the FBA reimbursed public facilities and improvements. Said irrevocable letter of credit shall name City as beneficiary and shall authorize City to negotiate and obtain all or any portion of the funds represented by the irrevocable letter of credit from the financial institution issuing same in the event Property Owner fails to pay for FBA reimbursed facilities as set forth in Sections 6.1(a)(2), 6.1(a)(3), 6.1(a)(4), 6.1(a)(6) and 6.1(a)(7). Notwithstanding any provision in this Agreement or said irrevocable letter of credit to the contrary, City shall not be entitled to negotiate or obtain any funds represented by the irrevocable letter of credit prior to thirty (30) days of the awarding contract(s) for the design and/or construction of each facility described in Section 6.1(a)(2), 6.1(a)(3), 6.1(a)(4), 6.1(a)(6) and 6.1(a)(7). Property Owner may apply to City Manager and the City Manager may allow a reduction in the amount of the irrevocable letter of credit at such time as the public

facilities and improvements are completed and paid for. Said irrevocable letter of credit shall be deposited with City prior to the effective date of this Agreement.

6.5 Public Improvements, Facilities and Services.

Owner agrees to provide the public improvements, facilities and services required by the VTM and FM. The terms and conditions for providing such public improvements, facilities and services are set forth in the VTM and FM. Fulfillment of the requirements specified in such documents shall be governed by the terms of those approvals and shall in no way be affected by the termination, cancellation or expiration of this Agreement.

7. ANNUAL REVIEW.

7.1 City and Owner Responsibilities. City shall, at least every twelve (12) months during the term of this Agreement, review the extent of good faith substantial compliance by Owner with the terms of this Agreement. Pursuant to Government Code section 65865.1, as amended, and City Municipal Code section 105.0108, Owner shall have the duty to demonstrate by substantial evidence its good faith compliance with the terms of the Agreement at the periodic review.

Either party may address any requirement of the Agreement during the review.

7.2 Review Letter. If Owner is found to be in compliance with the Agreement after annual review, City shall, upon written request by Owner, issue a Review Letter to Owner (the "Letter") stating that based upon information known or made known to the City Council, the City Planning Commission and/or the City Planning Director, the Agreement remains in effect and Owner is

not in default. Owner may record the Letter in the Official Records of the County of San Diego.

7.3 Failure of Periodic Review. City's failure to review at least annually Owner's compliance with the terms and conditions of this Agreement shall not constitute or be asserted by any party as a breach of the Agreement by Owner or City.

8. DEFAULT.

8.1 Events of Default. Property Owner is in default under this Agreement upon the happening of one or more of the following events or conditions:

(1) If a warranty, representation or statement made or furnished by Property Owner to the City is false or proves to have been false in any material respect when it was made;

(2) A finding and determination by the City made following a periodic review under the procedure provided for in Government Code section 65865.1 that upon the basis of substantial evidence the Property Owner has not complied in good faith with one or more of the terms or conditions of this Agreement;

(3) Any other event, condition, act or omission which materially interferes with the intent and objectives of this Agreement.

8.2 Procedure Upon Default.

(1) Upon the occurrence of default, the City shall give Property Owner (the "defaulting party") thirty (30) days written notice specifying the nature of the alleged default and, when appropriate, the manner in which

said default may be satisfactorily cured. After proper notice and expiration of said thirty (30) day cure period without cure, City may terminate or amend this Agreement in accordance with the procedure adopted by the City. Failure or delay in giving notice of default shall not constitute a waiver of any default, nor shall it change the time of default.

(2) City does not waive any claim or defect in performance by Property Owner, if on periodic review the City does not propose to modify or terminate this Agreement.

(3) Non-performance shall not be excused because of a failure of a third person.

(4) An express repudiation, refusal or renunciation of the contract, if the same is in writing and signed by the Property Owners, shall be sufficient to terminate this Agreement and a hearing on the matter shall not be required; however, Property Owner is required to provide the extraordinary and significant benefits specified in Section 6.1(a), regardless of any such termination.

(5) Adoption of a law or other governmental activity making performance by the applicant unprofitable or more difficult or more expensive does not excuse the performance of the obligation by the Property Owner.

(6) All other remedies at law or in equity which are not inconsistent with the provisions of this Agreement or are available to the parties to pursue in the event there is a breach.

8.3 Damages Upon Termination. In no event shall Property Owner be entitled to any damages against City upon termination of this Agreement.

8.4 Institution of Legal Action. In addition to any other rights or remedies, either party may institute legal action to cure, correct, or remedy any default or breach, to specifically enforce any covenants or agreements set forth in the Agreement or to enjoin any threatened or attempted violation of the Agreement; or to obtain any remedies consistent with the purpose of the Agreement. Legal actions shall be instituted in the Superior Court of the County of San Diego, State of California, or in the Federal District Court in the Southern District of California.

9. ENCUMBRANCES AND RELEASES ON PROPERTY.

9.1 Discretion to Encumber. This Agreement shall not prevent or limit Owner, in any manner, at Owner's sole discretion, from encumbering the Property or any portion of the Property or any improvement on the Property by any mortgage, deed of trust or other security device securing financing with respect to the Property or its improvement.

9.2 Entitlement to Written Notice of Default. The mortgagee of a mortgage or beneficiary of a deed of trust encumbering the Property or any part thereof and their successors and assigns shall, upon written request to City, be entitled to receive from City written notification of any default by Owner of the performance of Owner's obligations under the Agreement which has not been cured within thirty (30) days following the date of default.

9.3 Releases. City agrees that upon written request of Property Owner and payment of all fees and performance of the requirements and conditions required of Owner by this Agreement with respect to the Property, or any portion thereof, City may execute and deliver to Owner appropriate release(s) of further obligations imposed by this Agreement in form and substance acceptable to the San Diego County Recorder or as may otherwise be necessary to effect the release.

10. MISCELLANEOUS PROVISIONS.

10.1 Rules of Construction. The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory; "may" is permissive.

If there is more than one signer of this Agreement, their obligations are joint and several.

10.2 Entire Agreement, Waivers and Amendments. This Agreement constitutes the entire understanding and agreement of the parties with respect to the matters set forth in this Agreement. This Agreement supersedes all negotiation or previous agreements between the parties respecting this Agreement. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of City or of Owner. All amendments to this Agreement must be in writing signed by the appropriate authorities of City and Owner, in a form suitable for recording in the Official Records of San Diego County, California. Within ten (10) days following the effective date of this Agreement, a copy of this Agreement shall be recorded in the Official Records of San Diego County, California. Upon the completion of performance of this Agreement or its revocation or

termination, a statement evidencing completion, revocation or termination signed by the appropriate agents of Owner and City shall be recorded in the Official Records of San Diego County, California.

10.3 Project as a Private Undertaking. It is specifically understood by the parties that: (a) the Project is a private development; (b) City has no interest in or responsibilities for or duty to third parties concerning any improvements to the Property until City accepts the improvements pursuant to the provisions of this Agreement or in connection with subdivision map approvals; and (c) Owner shall have the full power and exclusive control of the Property subject to the obligations of Owner set forth in this Agreement.

10.4 Incorporation of Recitals. The Recitals set forth in Section 1 of this Agreement are part of this Agreement.

10.5 Captions. The captions of this Agreement are for convenience and reference only and shall not define, explain, modify, construe, limit, amplify or aid in the interpretation, construction or meaning of any of the provisions of this Agreement.

10.6 Consent. Where the consent or approval of a party is required in or necessary under this Agreement, the consent or approval shall not be unreasonably withheld.

10.7 Covenant of Cooperation. The parties shall cooperate with, deal with each other in good faith, and assist each other in the performance of the provisions of this Agreement.

10.8 ~~Recording~~. The City Clerk shall cause a copy of this Agreement to be recorded with the Office of the County Recorder of San Diego County, California, within ten (10) days following the effective date of this Agreement.

10.9 ~~Delay~~, Extension of Time for Performance. In addition to any specific provisions of this Agreement, performance by either party of its obligations hereunder shall be excused during any period of delay caused at any time by reason of Acts of God or civil proceedings, riots, strikes, picketing, or damage to work in process by reason of fire, floods, earthquake, or other such casualties provided, however, that each party shall promptly notify the other party of any delay hereunder as soon as possible after the same has been ascertained. However, this section shall not apply to circumstances that could have been prevented by the exercise of prudence, diligence and due care. The term of this Agreement shall be extended by the period of time that Property Owner is actually delayed as a result of such cause.

IN WITNESS WHEREOF, this Agreement has been executed by the City of San Diego, acting by and through its City Manager, pursuant to Ordinance No. O- 17178, authorizing such execution, and by Property Owner.

Dated this 14th day of November, 1988.

THE CITY OF SAN DIEGO

By: *Paul Austin*
City Manager

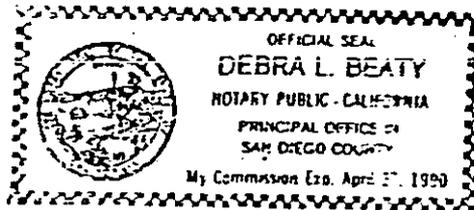
ASSISTANT

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

On this 7th day of December, 1988, before me, Debra L. Beaty, a Notary Public in and for said state, personally appeared MICHAEL D. MADIGAN, personally known to me (or proved to me on the basis of satisfactory evidence) to be the Senior Vice President and STEPHEN F. DOYLE, personally known to me (or proved to me on the basis of satisfactory evidence) to be the Vice President of FARDEE CONSTRUCTION COMPANY, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the within instrument pursuant to its bylaws or a resolution of its board of directors.

WITNESS my hand and official seal.

Debra L. Beaty
Notary Public



PCC/DASD/CC:REGW7
JEP/10-86

LEGAL DESCRIPTION

PARCEL 1:

Parcel 1 of PARCEL MAP NO. 13508, in the City of San Diego, County of San Diego, State of California, filed in the Office of the County Recorder of San Diego County, October 9, 1984 as PLS No 84-382661 of Official Records.

PARCEL 2:

The Northeast Quarter of Section 30, according to Record of Survey 8671, filed in the Office of the County Recorder of San Diego County, April 11, 1966 and the Northeast Quarter of the Southeast Quarter of Section 30 in Township 14 South, Range 2 West, San Bernardino Base and Meridian, in the City of San Diego, County of San Diego, State of California, according to Official Plat thereof of said land filed in the district land office on October 28, 1879.

EXCEPTING THEREFROM that portion of the Northeast Quarter of the Southeast Quarter of Section 30, Township 14 South, Range 2 West, San Bernardino Base and Meridian, described as follows:

Beginning at the Southeast corner of the Northeast Quarter of the Southeast Quarter of said Section 30, said corner being distant along the East line of said Section 30, North 01°14'00" East, 1353.91 feet (Record 1,354.05 feet) from a 1 1/2 inch iron pipe and capmarking the corner common to Sections 29, 30, 31 and 32; thence along the South line of said Northeast Quarter of the Southeast Quarter of Section 30, South 88°30'39" West, 30.03 feet; thence leaving said South line North 01°14'00" East, 71.67 feet; thence South 88°46'00" East, 30.00 feet to the East line of said Section 30; thence along said East line South 01°14'00" West, 70.25 feet to the Point of Beginning.

ALSO EXCEPTING THEREFROM all that portion being described as follows:

Beginning at the Northeast corner of Section 30, Township 14 South, Range 2 West, San Bernardino Base and Meridian, according to Record of Survey Map No. 6204, filed in the Office of the County Recorder of San Diego County, April 22, 1963 and designated thereon as R. P. 4, being also a numbered corner in said Section 30 as shown on Record of Survey Map No. 6671, filed in the Office of the County Recorder of San Diego County, April 11, 1966; thence along the Northerly line of said Section 30, according to said Record of Survey Map No. 6204, South 87°39'26" West; a distance of 2710.88 feet to an intersection with the North-South center line of Section 30 as shown on said Record of Survey Map No. 6671; thence North 1°07'50" West - North 1°01'09" West; according to Record of Survey 8671 - along the North-South center line as shown on said Record of Survey 8671, a distance of 115.44 feet to the North Quarter corner of Section 30, as shown on said Record of Survey 8671; thence along the Northerly line of said Section 30, according to Record of Survey 8671, South 89°54'09" East - North 89°33'50" East according to Record of Survey 8671-, a distance of 2710.88 feet to the Point of Beginning.

AND ALSO EXCEPTING THEREFROM any portion lying within North Point Unit No. 2, according to Map No. 8303, recorded May 6, 1976.

All that real property situated in the City of San Diego, County of San Diego, State of California, bounded and desc. as follows:

Beginning at the Northeast corner of Section 30, Township 14 South, Range 2 West, San Bernardino Base and Meridian, according to Record of Survey Map No. 8204, filed in the Office of the County Recorder of San Diego County, April 27, 1963 and designated therein as L. P. 4, being also a numbered corner in the boundary line of Rancho Pasquitos, being also the Northeast corner of said Section 30 as shown on Record of Survey Map No. 6671, filed in the Office of the County Recorder of San Diego County, April 11, 1944; thence along the Northerly line of said Section 30, according to said Record of Survey Map No. 8204, South 87°39'28" West a distance of 2710.68 feet to an intersection with the North-South center line of Section 30 as shown on said Record of Survey Map No. 6671; thence North 1°07'50" West - North 1°01'09" West according to Record of Survey 6671 - along the North-South center line as shown on said Record of Survey 6671, a distance of 115.44 feet to the North Quarter corner of Section 30, as shown on said Record of Survey 6671; thence along the Northerly line of said Section 30, according to Record of Survey 6671, South 89°54'09" East - North 89°33'50" East according to Record of Survey 6671 - a distance of 2710.68 feet to the Point of Beginning.

PARCEL 4:

Being a portion of the Northwest Quarter of the Southeast Quarter of Section 30, Township 14 South, Range 2 West, San Bernardino Base and Meridian, in the City of San Diego, County of San Diego, State of California, described as follows:

Beginning at the Northeast corner of said Northwest Quarter of the Southeast Quarter of Section 30; thence along the East line of said Northwest Quarter of the Southeast Quarter, South 01°28'04" West, 275.00 feet to a point on a curve concave Northeasterly and having a radius of 275.00 feet, a radial line to said point bears South 0°25'04" West; thence Northwesterly along the arc of said curve, through an angle of 87°14'31" a distance of 418.73 feet to an intersection with the North line of said Northwest Quarter of the Southeast Quarter; thence along said North line, North 87°42'36" East, 275.00 feet to the Point of Beginning.

Parcel 5:

Lots 1 through 6 inclusive of Casa Mira View according to Map thereof No. 9257 as filed in the Office of the County Recorder of San Diego County, June 25, 1979 as File No. 79-263324 of Official Records, in the City of San Diego, County of San Diego, State of California.

Parcel 6:

That portion of Sango Avenue and Calvin Street Right of Ways adjacent to Lots 1 through 6 inclusive of Casa Mira View according to Map thereof 9257 that would revert to said Lots 1 through 6 inclusive, upon proper action to close and vacate said right of ways to public use.

Being all that portion of the Southeast Quarter of the Southeast Quarter of Section 30 and the Southwest Quarter of the Southwest Quarter of Section 29, all in Township 14 South, Range 2 West, San Bernardino Meridian, in the City of San Diego, County of San Diego, State of California, described as follows:

Beginning at the southeast corner of said Section 30;
Thence South $88^{\circ}15'58''$ West a distance of 103.72 feet;
Thence North $31^{\circ}35'22''$ East a distance of 37.05 feet to the beginning of a tangent 1146.00 foot radius curve concave northwesterly;
Thence northerly along the arc of said curve through a central angle of $31^{\circ}59'32''$ a distance of 639.89 feet to a point on the arc of a non-tangent 970.00 foot radius curve concave westerly, a radial line to said point bears North $78^{\circ}52'54''$ East;
Thence southerly along the arc of said curve through a central angle of $06^{\circ}56'30''$ a distance of 117.52 feet;
Thence tangent to said curve South $04^{\circ}10'36''$ East a distance of 339.34 feet to the beginning of a tangent 1970 foot radius curve concave westerly;
Thence southerly along the arc of said curve through a central angle of $02^{\circ}26'17''$ a distance of 83.83 feet;
Thence tangent to said curve South $01^{\circ}41'19''$ East a distance of 74.23 feet to the beginning of a tangent 20.00 foot radius curve concave northwesterly;
Thence southwesterly along the arc of said curve through a central angle of $90^{\circ}00'00''$ a distance of 31.42 feet;
Thence tangent to said curve South $88^{\circ}15'41''$ West a distance of 113.10 feet to the point of beginning.

Parcel 8

Lots 365 through 370 inclusive of North Point Unit 2 Map No. 8303 as filed in the Office of the County Recorder of San Diego County, in the City of San Diego, County of San Diego, State of California.

Parcel 9

Being that Portion of the Southwest Quarter of the Southwest Quarter of Section 29 Township 14 South, Range 2 West, San Bernardino Meridian in the City of San Diego, County of San Diego, State of California more particularly described as follows:

Beginning at the Northeast Corner of Lot 6 of Casa Mira View Map No. 9257 as filed in the Office of the County Recorder of said County;
Thence along the easterly line of said Lot 6, South $11^{\circ} 04' 17''$ East 13.00 feet to the True Point of Beginning;

Thence leaving said easterly line South $06^{\circ} 09' 09''$ West 301.77 feet;
Thence South $05^{\circ} 23' 15''$ West 373.94 feet;
Thence South $06^{\circ} 56' 02''$ West 196.13 feet;
Thence South $10^{\circ} 39' 43''$ West 129.84 feet;
Thence South $08^{\circ} 42' 34''$ West 340.41 feet to an angle point in the easterly line of Lot 3 of said Map No. 9257;
Thence along the easterly line of Lots 3, 4, 5 and 6 of said Map 9257 North $7^{\circ} 22' 03''$ East 299.61 feet;
Thence North $02^{\circ} 42' 36''$ West 524.75 feet;
Thence North $24^{\circ} 30' 01''$ East 250.79 feet;
Thence North $09^{\circ} 53' 19''$ East 285.84 feet to the True Point of Beginning.

Parcel 10

Being a portion of the Northwest Quarter of the Northwest Quarter of Section 32 Township 14 South Range 2 West San Bernardino Meridian, in the City of San Diego, County of San Diego State of California more particularly described as follows:

Beginning at the Southeast Corner of Lot 1 of Casa Mira View Map No. 9257 as filed in the Office of the County Recorder of said County;
Thence along the easterly lines of said Lot 1 and Lot 2 of said Map North $00^{\circ} 32' 09''$ East a distance of 77.94 feet;
Thence North $49^{\circ} 19' 03''$ East a distance of 417.34 feet;
Thence North $28^{\circ} 21' 55''$ East a distance of 298.34 feet;
Thence leaving said easterly line of Lot 2 South $25^{\circ} 33' 27''$ West a distance of 178.97 feet;
Thence South $30^{\circ} 18' 48''$ West a distance of 108.57 feet;
Thence South $34^{\circ} 27' 13''$ West a distance of 286.72 feet;
Thence South $36^{\circ} 26' 33''$ West a distance of 143.87;
Thence South $88^{\circ} 15' 44''$ West a distance of 85.00 feet to the Point of Beginning.

(O-89-54)

ORDINANCE NUMBER O- 17178 (NEW SERIES)

ADOPTED ON NOV 14 1988

AN ORDINANCE APPROVING THE DEVELOPMENT
AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND
PARDEE CONSTRUCTION COMPANY.

WHEREAS, Pardee Construction Company ("Owner") is the legal or equitable owner of that certain real property consisting of approximately 260 acres located within the Mira Mesa community planning area; and

WHEREAS, The City of San Diego, a charter city, is authorized pursuant to Government Code Sections 65864 - 65869.5 to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property in order to establish certainty in the development process. The City further enters into this Development Agreement pursuant to its Charter and self-rule powers and San Diego Municipal Code Sections 105.0101 et seq. and Council Policy No. 600-37; and

WHEREAS, the parties desire to enter into this Development Agreement relating to the above-described real property in conformance with the provisions of the Government Code in order to achieve the development of private land uses together with the provision of public services, public uses, and urban infrastructure all in the promotion of the health, safety, and general welfare of the City of San Diego; and

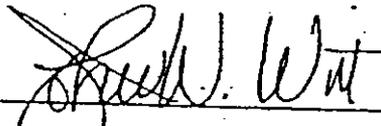
ordinance. Failure of Owner to execute the Development Agreement within 30 days, shall render this action null and void. The City Clerk is directed to record said Development Agreement and this ordinance with the County Recorder of San Diego County within ten days after its execution.

Section 4. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED AS TO FORM ONLY:

John W. Witt, City Attorney

By



TFS:hbg
09/13/88
Or.Dept:Plan
0-89-54
Form=o.devagr