

UNRECORDED

NTC PARK IMPROVEMENT AGREEMENT

THIS AGREEMENT is made and entered into between the Redevelopment Agency of The City of San Diego (the "Agency"), The City of San Diego (the "City"), and McMillin NTC, LLC, a Delaware limited liability company (the "Master Developer").

RECITALS

- A. Master Developer and Agency have entered into a certain Disposition and Development Agreement (the "DDA") on file in the Office of the Agency as Document No. D-03175a. The DDA provides for the disposition of certain real property within the Naval Training Center ("NTC") Redevelopment Project to the Master Developer in exchange for the construction and installation of public infrastructure, the construction of new buildings and improvements, including public Park Improvements, and the rehabilitation and reuse of existing buildings within a "Historic Core" area, all in a manner which is specifically described in the DDA.
- B. In the DDA, Master Developer has agreed to complete Park Improvements in the amount of \$14,779,800 at the location shown on Exhibit A to this Agreement and within a time frame and upon a schedule as set forth in section 8.2 of the DDA.
- C. In section 6.11 of the DDA, Master Developer has agreed to secure performance of the obligations described above in Recital B above in three phases. Security for the Phase One Park Improvements consists of posting of a performance bond for the construction of \$5,000,000 of Phase One Park Improvements, to be provided upon the first occurrence of: (a) recordation of the Final Map for any of Map Areas 1, 2, 3, or 5; or (b) twenty-one months after Precise Plan Approval. Security for the Phase Two Park Improvements consists of posting a performance bond for the construction of an additional \$5,000,000 of Park Improvements (for a total of \$10,000,000), to be provided upon the first occurrence of: (a) issuance of building permits for more than 119 housing units (single family or rental) in Map Area 1 or Map Area 2; or (b) issuance of a building permit for the third or fourth office or research and development building to be constructed in Map Area 3; or (c) twenty-seven (27) months after the recordation of the Final Map for Map Area 1, 2, 3 or 5, whichever occurs first; or (d) forty-eight (48) months after Precise Plan Approval. Security for the Phase Three Park Improvements consists of posting a performance bond for the construction of an additional \$4,779,800 of Park Improvements (for a total of \$14,779,800), to be provided upon the first occurrence of: (a) approval of building permits for more than 179 housing units (single family or rental) in Map Area 1 or Map Area 2; or (b) issuance of a building permit for the fifth or sixth office or research and development building to be constructed in Map Area 3; or (c) issuance of a building permit for the second hotel to be constructed in Map Area 7 or Map Area 8; or (d) thirty-

DOCUMENT NO. RR-293410 Page 1 of 18DOCUMENT NO. D-03175c/R-03175FILED JUN 26 2000FILED JUN 26 2000OFFICE OF THE CITY CLERK
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SAN DIEGO, CALIF.

six months after the recordation of the Final Map for Map Area 1, 2, 3 or 5, whichever occurs first; or (e) fifty-seven months after Precise Plan Approval.

- D. In section 8.2 of the DDA, Master Developer has agreed to complete construction of the Park Improvements in accordance with the following schedule of performance: Subject to approval of a General Development Plan for the Park, and in accordance with this Agreement, Master Developer shall commence and diligently complete the design and construction of the Park Improvements in accordance with the following schedule, or sooner if required by the Precise Plan and the Development Permits or any condition of Map approval (with "Year 1" signifying the end of the twelve-month period following the date Master Developer satisfies all Phase Three Conditions with respect to either Map Area 5 or Map Area 6, whichever occurs first; provided, however, that recordation of the Final Map for Map Area 5 or Map Area 6 shall not be required, so long as: (1) Master Developer has satisfied all requirements and has made all submittals requested by the appropriate City staff for the recordation of the Map for Map Area 5 or Map Area 6; (2) Master Developer is making diligent and continuous efforts towards the recordation of such Map; and (3) Master Developer has also satisfied all requirements for the recordation of the Final Map for any of Map Areas 1, 2, 3, 4, 7 or 8):

<u>Area of Park</u>	<u>Commence</u>	<u>Complete</u>
14 Acres	Year 2	36 months after Commencement
13 Acres	Year 4	36 months after Commencement
13 Acres	Year 6	36 months after Commencement

- E. The purpose of this Agreement is to describe the obligations of Master Developer for the construction of the Park Improvements.

ARTICLE I - OBLIGATIONS AND DURATION

- 1.1 The DDA is incorporated by reference into this Agreement, including all defined terms contained within the DDA, unless specifically defined differently in this Agreement. This Agreement shall be effective on the date it is executed by the last Party to sign the Agreement, and it shall be effective until the Park Improvements are completed. Notwithstanding the forgoing commitment by Master Developer to complete the Park Improvements, this Agreement is not intended, nor shall it be interpreted or applied in a manner which would alter, supercede or compromise the rights of the Parties under Part 9 of the DDA with respect to remedies and termination. The mutual covenants of the Parties with regard to remedies and termination under the DDA are specifically incorporated by reference into this Agreement and apply as a qualification to Master Developer's obligations herein.

- 1.2. Master Developer agrees to secure performance of and complete the Total Park Improvements in accordance with the time schedule described in sections 6.11 and 8.2 of the DDA.

ARTICLE II - PROJECT COST

- 2.1 **Estimated Design and Construction Cost.** The estimated design and construction cost of the Park Improvements is approximately \$14,779,800 (“Estimated Design and Construction Cost”), which amount shall include a 10% contingency for design and construction cost overruns. It is acknowledged by the Parties that the Estimated Design and Construction Cost is based upon preliminary cost estimates, and is not the result of competitive bids, and is subject to change. Any excess contingency monies not expended on design or construction cost overruns, shall be utilized to fund additive or deductive alternates not originally included in the base bid.
- 2.2 **Obligation to Deliver Park.** Master Developer agrees to deliver the Park Improvements (hereinafter referred to as the “Project”) to Agency and City upon and subject to the provisions and conditions of this Agreement as follows:
 - 2.2.1 **Park Design.** Master Developer agrees to design a GDP and prepare an Estimated Budget for the Project which shall include all Park Improvements identified and incorporated into the Project pursuant to the park planning and approval process described below in Section 3.4 of this Agreement.
 - 2.2.2 **Master Developer’s Financial Commitment.** Master Developer’s financial commitment for the project, pursuant to obligations set forth in the DDA and this Agreement, is to fund construction of those Park Improvements identified in the Estimated Budget. However, Master Developer shall only be financially responsible for Park Improvements identified in the Estimated Budget up to \$14,779,800, plus 10% advancement of funds (subject to reimbursement) for any Additional Requirements imposed as a consequence of the park planning and approval process described below in Section 3.4 of this Agreement. City must undertake, with its own separate funds, to finance and construct other portions of the Project which may be added to the Estimated Budget and which otherwise cause the Estimated Budget to exceed the total funds committed by Master Developer in the DDA and this Agreement.
 - 2.2.3 **Master Developer’s Construction Commitment.** Master Developer’s commitment to construct Park Improvements is qualified by the financial commitment described above in Section 2.2.2. City must undertake, on its own, to construct other portions of the Project which may be added to the Estimated

Budget and which otherwise cause the Estimated Budget to exceed the total funds committed by Master Developer in the DDA and this Agreement.

2.3 Actual Design and Construction Cost. The actual design and construction cost shall include, as hereinafter provided, Indirect Costs, Direct Costs, costs of Change Orders, and Other Cost Increases defined below (“Actual Design and Construction Costs”) which are incurred by Master Developer.

2.3.1 Indirect Costs. Indirect Costs include, but shall not be limited to, any costs actually incurred by Master Developer for the Park’s environmental CEQA review, engineering, design, soils testing, insurance premiums, bonds, preparing plans and specifications and bid documents, and soliciting and reviewing bids for the construction of the Park Improvements, and awarding and administering all contracts related to the construction of the Park (including contract supervision by Developer in an amount equal to 5 percent of Construction Costs, which shall be excluded from Construction Costs when calculating such amount), City’s Project administration, all inspection costs (excluding building department but including all special inspections) not to exceed 2 ½ percent of all direct costs (as defined below in section 2.3.2 of this Agreement).

2.3.2 Direct Costs. Direct Costs shall include, but are not limited to, costs related to all costs of labor, materials, rough and final grading, surveying, equipment, deconstruction/demolition of existing structures, and costs associated with the provision of public water and sewer to serve the Park from the closest public point of connection.

2.3.3 Change Orders. A “Change Order” is a written order, approved by the City, from any Master Developer authorized representative (“Master Developer’s Agent”) to the contractor performing the work authorizing a change in the work to be performed. Change Orders may be needed where changes in the Project are made necessary due to unanticipated conditions arising during construction or changes in the plans and specifications after construction begins. City must approve all Change Orders in writing and deliver such Change Orders to Master Developer’s Agent as identified in section 9.1 herein.

2.3.3.a Approval of Change Orders. Master Developer’s Agent shall notify City’s Project Manager, described below, of the need for a Change Order and City’s Project Manager shall either approve or reject said Change Order within five working days of receiving Master Developer’s Agent’s written notice. City staff may approve Change Orders. City’s approval shall not be unreasonably withheld. City shall exercise good faith, and best efforts to grant approval(s) promptly. Should the City fail to respond to Master Developer’s Agent’s request for a Change Order within the

prescribed period of time, following proper notice by Master Developer's Agent, the Change Order request shall be deemed approved by the City. For purposes of notification with regard to Change Orders, the City's Project Manager shall mean the person responsible for overseeing Project design and construction.

2.3.3.b Minor Changes. Notwithstanding the above, Master Developer shall have the authority, without City or Agency consent, to order minor changes in the work which do not cost more than \$1,000 per change, and do not lengthen the Project's construction period by more than three days. Master Developer shall, within twenty-four hours prior to implementation of any such change, notify the City's Project Manager (or Supervisor if Project Manager is not available) of the nature and cost of the change. The total amount of minor changes permitted pursuant to this section shall not exceed \$10,000 without City's prior written approval.

2.3.4 Other Cost Increases. Notwithstanding anything herein which may provide to the contrary, the Parties acknowledge that the Actual Design and Construction Cost may be increased (a) due to actual bids received exceeding the Estimated Budget; (b) due to acts of God, acts of any governmental authority, the elements, war, litigation, shortages of material, labor strikes, inflation, later commonly accepted or adopted higher standards and specifications of construction, concealed or unknown conditions encountered in the completion of the Project, or other cause beyond Master Developer's control, (c) due to Direct or Indirect Costs being greater than estimated, or (d) due to other factors not the result of unreasonable conduct by Master Developer. The Estimated Budget may be increased by the amount of such increases, subject to approval by City and Agency, which approval shall not be unreasonably withheld.

2.3.4.a Increases of 10% or less. If an increase in the Estimated Budget is caused as result of a change to the General Development Plan ("GDP") imposed by the City or the California Coastal Commission, and such changes cause the Estimated Budget to exceed \$14,779,800 by 10% or less, then such amount shall be treated as an Additional Requirement, as more fully described below in section 5.1 of this Agreement. If any such increase will cause the Actual Design and Construction Cost, as defined herein, to exceed the total funds committed by Master Developer in the DDA for the Project (\$14,779,800), then Agency shall treat such increase as an Additional Requirement as defined in section 9.15 of the DDA and shall reimburse Master Developer for such additional costs in the manner described in Article V of this Agreement and section 9.15 of the DDA.

2.3.4(b) Increases of more than 10%. If an increase in the Estimated Budget is caused as result of a change to the GDP imposed by the City or the California Coastal Commission, and such changes cause the Estimated Budget to exceed \$14,779,800 by more than 10%, then City must undertake, with its own separate funds, to finance and construct other portions of the Project which may be added to the Estimated Budget and which otherwise cause the Estimated Budget to exceed the total funds committed by Master Developer in the DDA and this Agreement.

ARTICLE III - PROJECT DESIGN AND BUDGET

- 3.1 Plans and Specifications.** This Agreement has been prepared precedent to the preparation of final Park site improvement and grading plans, landscaping and irrigation plans, and other construction-related plans and documents. Master Developer agrees to provide complete plans, specifications, and bid documents for the design and construction of the Project in three phases as described in Recitals D and E.
- 3.2 Selection of Consultant.** Within sixty days after approval of Precise Plan Approval, Master Developer shall select a Consultant to design the Project in three phases. Master Developer shall promptly deliver to City the Consultant's name and qualifications. Within ten days after receiving the Consultant's name and qualifications, the City shall notify Master Developer in writing of the acceptance or objections to the selected Consultant. If the City objects to the Consultant, the City and Master Developer shall mutually select a Consultant.
- 3.3 Preparation of General Development Plan and Estimated Budget.** Master Developer's Consultant shall complete a GDP and an Estimated Budget ("Estimated Budget") covering design and construction of the Project in three phases. The GDP and Estimated Budget shall be delivered to City within six months after Precise Plan Approval.
- 3.4 Final Approval of GDP and Estimated Budget.** Master Developer's Consultant shall present the GDP and Estimated Budget to the Park Planning Subcommittee of the Citizen's Implementation Advisory Committee, Environmental Analysis Section of City, applicable Area Committee, Design Review Committee, City's Park and Recreation Board, the City's Planning Commission, the City Council, the California Coastal Commission, and any other state and/or federal resource agency with jurisdiction to approve development of the Park.

3.4.1 Changes to GDP. As a result of any presentations described in section 3.4 above, City may request changes in the GDP, if applicable, and Master Developer shall make those changes.

3.4.2 Changes to Plans and Specifications. Promptly after the presentation of the GDP to the Park Planning Subcommittee of the Citizen's Implementation Advisory Committee, Environmental Analysis Section of City, applicable Area Committee, Design Review Committee, City's Park and Recreation Board, the City's Planning Commission, the City Council, and the California Coastal Commission, Master Developer's Consultant shall prepare and deliver to City working drawings and specifications ("Plans and Specifications") consistent with the approved GDP. City agrees to diligently review the Plans and Specifications and provide City's written comments to Master Developer within 60 days of the date such Plans and Specifications are delivered to the City in accordance with the notice provisions in Article IX of this Agreement. Approval shall not be unreasonably withheld. Plans and Specifications shall include the City's standard drawings and specifications. Master Developer's Consultant shall, if requested by City, make changes to the Plans and Specifications subject to the following:

3.4.2.a Increases of 10% or less. If an increase in the Estimated Budget Cost is caused as result of a change imposed by the City to the Plans and Specifications and such change causes the Estimated Budget to exceed \$14,779,800 by 10% or less, then such amount shall be treated as an Additional Requirement, as more fully described in section 5.1 of this Agreement. If any such increase will cause the Actual Design and Construction Cost, as defined herein, to exceed the total funds committed by Master Developer in the DDA for the Project (\$14,779,800), then Agency shall treat such increase as an Additional Requirement as defined in section 9.15 of the DDA and shall reimburse Master Developer for such additional costs in the manner described in Article V of this Agreement and section 9.15 of the DDA.

3.4.2(b) Increases of more than 10%. If an increase in the Estimated Budget is caused as result of a change imposed by the City to the Plans and Specifications and such change causes the Estimated Budget to exceed \$14,779,800 by more than 10%, then City must undertake, with its own separate funds, to finance and construct other portions of the Project which may be added to the Estimated Budget and which otherwise cause the Estimated Budget to exceed the total funds committed by Master Developer in the DDA and this Agreement.

3.4.3. Reallocation of Savings; Costs in Excess of Budget. Master Developer shall reallocate savings realized with respect to particular line items on the proposed

Project budget to pay for additive or deductive bid alternates (if any). Master Developer must obtain City's approval of any reallocation of savings. City shall respond to a request of any reallocation of savings by the Master Developer within thirty days.

3.5 Issuance of Necessary Permits. The Parties acknowledge that the construction work to be performed on the Project by Master Developer in compliance with this Agreement is subject to the prior issuance of building, land development, and/or public improvement permits. In the event that City, or any other governmental agency, unreasonably refuses to issue the permit(s) necessary to authorize the work to be performed or if the permit(s) is unreasonably canceled or suspended, then Master Developer's obligation to the Agency to complete construction of the Phase One, Phase Two, or Phase Three Park Improvements within the time frames set forth in Recital D of this Agreement and section 8.2 of the DDA may be delayed in accordance with the "Force Majeure Delay" provisions set forth in section 10.2 of the DDA.

3.5.1 Master Developer agrees to submit plans and specifications and to apply for any grading, demolition, or building permits required by the City to complete the work described in this Agreement.

ARTICLE IV - SOLICITATION OF BIDS

4.1 Solicitation of Bids. Other than for rough grading of the Project site, Master Developer shall solicit bids for the construction of each Phase of the Project. Bids shall be solicited from at least three qualified contractors and the bidding response time shall not be less than twenty working days.

4.2 Bid Opening and Award of Contract. The City's representative(s) shall be provided with a copy of the tabulation of bid results. Contract(s) for the construction of the Project shall be awarded by Master Developer to the qualified contractor(s) submitting the lowest responsible bid(s), as determined by Master Developer. Notwithstanding the foregoing bidding process, if the Park Improvements are funded by proceeds from the Community Facilities District, the bidding procedures set forth in this Article will be superceded and replaced by the bidding procedures set forth in the Acquisition and Funding Agreement approved in connection with formation of the Community Facilities District.

ARTICLE V - REIMBURSEMENT FOR ADDITIONAL REQUIREMENTS

5.1 Right to Reimbursement. Agency shall reimburse Master Developer for any amount of the Project Cost which qualifies as an Additional Requirement, as described in sections 2.2.2, 2.3.4.a, and 3.4.2.a of this Agreement.

- 5.2 Source and Method of Reimbursement.** Master Developer shall be entitled to reimbursement from the Agency for the amount specified above in section 5.1 from (a) future tax increment or the proceeds of tax increment financing from future tax increment generated within the NTC Redevelopment Project Area, or (b) the Agency's share of revenue participation. Reimbursement shall be distributed in accordance with section 9.15 in the DDA.
- 5.3 Priority of Reimbursement for Project.** Agency agrees that upon the date when any reimbursement obligation of the Agency has been established pursuant to implementation of this Agreement, from that date forward, the Agency's obligation to reimburse Master Developer from the sources of revenue set forth above in section 5.2 will take priority over any other non-committed use of those sources of revenue.
- 5.4 Record-keeping.** Master Developer shall keep an accurate record of the actual cost of the Project in accordance with generally accepted accounting procedures. Master Developer shall allow the City's authorized representatives to examine and provide copies of any records relevant to the verification of the actual cost of constructing the Project, including, without limitation, all contract bids and invoices. Any changes that occur during the course of construction shall be properly documented. Backup documentation shall be kept by Master Developer for five years after their completion of the Project and be provided to City, upon request, for its review.

ARTICLE VI - CONSTRUCTION

- 6.1 Standards of Construction.** All construction for the Project shall be accomplished in a good and workmanlike manner, lien free and in compliance with the approved plans (working drawings and specifications) and current editions of *Standard Specifications for Public Works Construction* (including the City of San Diego standard special provisions) ("Green Book") and City of San Diego Standard Drawings. In the event of conflict between the approved plans and the Green Book and/or standard drawings, the former will govern.
- 6.2 Construction Period.**
- 6.2.1 Preconstruction Meeting.** There shall be a pre-construction meeting to review the City's inspection requirements. The preconstruction meeting participants shall consist of representatives of the inspection team as set forth in section 6.3 herein.
- 6.2.2 Commencement.** Upon Precise Plan Approval and after award of the contract by Master Developer as provided herein in section 4.2, Master Developer shall cause construction to commence Phase One Park Improvements in accordance with the schedule set forth in Recital D of this Agreement.

6.2.3 Completion. The Project shall be deemed complete at such time as it is finally inspected and accepted by the inspection team identified below for each phase of the Project. Any minor correction items (the "Punch List") which are noted during the Walk-Through Inspection, described below, shall be corrected within sixty days after the Walk-Through Inspection or at a later time agreed upon by the Inspection Team Parties. As soon as practicable after Project acceptance by City, Master Developer shall provide as-built drawings by the Consultants verifying that the Project was constructed in accordance with the City approved plans. As soon as practicable, after the Project is complete, Agency shall file a Notice of Completion.

6.3 Inspection. The Project shall be inspected by a team composed of representatives from (a) the Engineering and Capital Projects Department, (b) the Park and Recreation Department, (c) Planning and Development Review Department, (d) Master Developer, and (e) the Project's Design Civil Engineer and/or Landscape Architect ("Consultants") at the stages listed below:

Park Inspection Stages

- A. Deconstruction/Demolition of Existing Structures.
- B. Rough grading and drainage certification.
- C. Mainline irrigation pressure test.
- D. Hardscape (staking and layout).
- E. Finish grading and soil preparation.
- F. Irrigation coverage test.
- G. Selection of plant material at nursery.
- H. Plant placement approval.
- I. Pre-assembled equipment and/or on-site construction facilities.
- J. A walk-through inspection shall be conducted within ten working days after notice to City by Master Developer of completion of the construction requirements for the Project ("Walk-Through Inspection"). This inspection will be conducted by the Inspector from the Park and Recreation Department, the Resident Engineer of the Engineering and Capital Projects Department, and

Master Developer's construction superintendent. The purpose of this inspection is to confirm that the Project is complete and ready for a Final Inspection. A list of items specifying corrections to be made ("Punch List"), if any, shall be prepared by the CITY during the Walk-Through Inspection. The Punch List shall be presented to Master Developer at the conclusion of the inspection. Master Developer shall cause the items listed on the Punch List to be corrected prior to the Final Inspection. The date the Walk-Through Inspection is conducted will start the plant maintenance period.

K. The "Final Inspection" for the Project shall be scheduled and conducted (provided Master Developer has corrected the Punch List Items) within sixty calendar days following the date of the Walk-Through Inspection.

6.4 Plant Maintenance Period. The plant maintenance period shall commence on the date the Walk-Through Inspection is conducted. Master Developer shall maintain the plants and continue plant maintenance until Acceptance of the Project by City or for ninety calendar days after the date of the Walk-Through Inspection, whichever event first occurs. Thereafter, the City shall be responsible for all maintenance as provided for below.

6.5 Acceptance. Upon completion of the work required on the Punch List, the Agency and City shall accept the Project as being complete. Acceptance by Agency and City of the completed Project shall not be unreasonably withheld. Upon completion of the work required by the Punch List, and Acceptance by the City, Agency will file a Notice of Completion with the County Recorder of San Diego County. Until such time as the City has accepted the Project and exonerated the bonds posted for the Project, the Project shall not be opened for use by the general public. If City, however, directs Master Developer to open the Project before these events have occurred, then the date of the City's correspondence directing the Project to be opened shall constitute the date of Acceptance, however Master Developer shall *only* be responsible for completing Punch List items pursuant to the satisfaction of the City and Agency.

6.6 City to Provide Maintenance. Upon Acceptance of the Project, the City shall be responsible for all irrigation and maintenance of plant material and Project improvements. Master Developer shall not be responsible for the repair of any of the Project improvements, the replacement of any plant material as a result of the City not performing its irrigation and maintenance responsibility, or for any damage resulting from the public's access to the Project. Should the City request that Master Developer perform the City's maintenance function for a certain period of time, a separate contract will be entered into for this purpose. The cost for performing this additional maintenance shall not be included in the Total Project Cost.

- 6.7 **Dedication Ceremony.** Master Developer shall have the opportunity to conduct and host a public groundbreaking and/or dedication ceremony or similar ceremony (“Ceremony”) on the Project site at any time prior to commencement of construction or following the Final Inspection of the Project. Any groundbreaking or dedication ceremony shall be coordinated with City and Agency and shall be conducted consistent with published City guidelines which are applicable to such events. Master Developer shall be responsible to restore or repair any damage to the Project site attributable to a Master Developer sponsored Ceremony.
- 6.8 **Turnover of Documents and Bond Exoneration.** Upon Acceptance of the Project by the City and Agency, Master Developer shall provide to the City reproducible copies of the “as-built drawings” and related materials which would ordinarily be applicable to the City’s operation and maintenance of the improvements. In addition, upon Acceptance, the City and/or Agency agree to expeditiously exonerate a partial release (90 percent) of all bonds associated with the Project. The remainder of the bond amount (10 percent) shall be released at the end of the warranty period, one year after Acceptance of the Project by City and Agency.

ARTICLE VII - INDEMNIFICATION, INSURANCE, AND WARRANTIES

- 7.1 Master Developer agrees to defend, indemnify, protect, and hold harmless the Agency and City, its agents, officers, and employees, from and against all claims, demands, causes of action, liability or loss asserted or established for damages or injuries to any person or property. The indemnification and hold harmless obligation contained in this section includes claims, demands, causes of action, liability or loss asserted or established by the Master Developer's employees, agents, or officers, or judgments arising directly or indirectly out of obligations, work, or services involved in the performance of this Agreement. Claims, demands, causes of action, liability, or loss that arise from, are connected with, or are caused or claimed to be caused by the acts or omissions of the Master Developer, the Master Developer's agents, officers, and employees are covered. Also covered are the claims, demands, causes of action, liability, or loss arising from, connected with, caused by, or claimed to be caused by the active or passive negligence acts or omissions of the City or Agency, its agents, officers, or employees which may be in combination with the negligence of the Master Developer, its employees, agents, or officers, or any third party. The Master Developer's duty to defend, indemnify, protect, and hold harmless shall not include any claims or liabilities arising from the established sole negligence or sole willful misconduct of the City or Agency, its agents, officers or employees.
- 7.2 Master Developer or its assignees shall, at their sole cost and expense, at all times during the term of this Agreement, maintain in full force and effect, for the joint benefit of Master Developer or its assignees and City as co-insureds, a broad form comprehensive coverage policy of public liability insurance. The policy shall name Master Developer or

its assignees and City as insureds and indemnify against liability for damage or injury to the property or person (including death) of any agent, employee, licensee, or invitee of Master Developer or any other person entering upon or using the Land or any part thereof, and arising from the use thereof. Such insurance policy or policies shall be maintained on the minimum basis of \$1,000,000 for damage to property or bodily injury to or death of any person. Such insurance policy or policies shall be in addition to the indemnification provision of section 7.1 above, and also shall be stated to be primary and non-contributing with any insurance which may be carried by City. Master Developer shall deliver to City the certificate of each insurance carrier as to each such insurance policy seven days prior to commencement of any grading or construction of the Park pursuant to the terms of this Agreement. Such insurance shall be kept in full force and effect until twelve months after completion of the Park.

- 7.3 Master Developer shall guarantee all work on the Project against defective workmanship and materials furnished by Master Developer for a period of one year, except that shrubs, turf and groundcover shall be guaranteed for a period of ninety days, from the date of Acceptance by City and Agency. Master Developer shall replace or repair any such defective work in a manner satisfactory to City and Agency after notice to do so from City and Agency and within the time specified in the notice.

ARTICLE VIII - MEDIATION

- 8.1 **Mandatory Non-binding Mediation.** If a dispute arises out of, or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled through normal contract negotiations, the Parties agree to first endeavor to settle the dispute in an amicable manner, using mandatory mediation under the Construction Industry Mediation Rules of the American Arbitration Association or any other neutral organization agreed upon before having recourse in a court of law.
- 8.2 **Mandatory Mediation Costs.** The expenses of witnesses for either side shall be paid by the Party producing such witnesses. All other expenses of the mediation, including required traveling and expenses of the mediator, and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the Parties, unless they agree otherwise.
- 8.3 **Selection of Mediator.** A single mediator that is acceptable to both Parties shall be used to mediate the dispute. The mediator will be knowledgeable in construction aspects and may be selected from lists furnished by the American Arbitration Association ("AAA") or any other agreed upon mediator. To initiate mediation, the initiating Party shall serve a Request for Mediation on the opposing Party. If the mediator is selected from a list provided by AAA, the initiating party shall concurrently file with AAA a "Request for Mediation" along with the appropriate fees; a list of three requested mediators marked in preference order, and a preference for available dates.

- 8.3.1 If AAA is selected to coordinate the mediation ("Administrator"), within ten working days from the receipt of the initiating Party's Request for Mediation, the opposing Party shall file the following: a list of preferred Mediators listed in preference order, after striking any Mediators to which they have any factual objection, and a preference for available dates. If the opposing party strikes all of initiating Party's preferred Mediators, opposing Party shall submit a list of three preferred Mediators listed in preference order to initiating Party and Administrator. Initiating Party shall file a list of preferred Mediators *listed* in preference order, after striking any Mediator to which they have any factual objection. This process shall continue until both sides have agreed upon a Mediator.
- 8.3.2 The Administrator will appoint or the Parties shall agree upon the highest, mutually preferred, Mediator from the individual Parties' lists who is available to serve within the designated time frames.
- 8.3.3 If the Parties agree not to use AAA, then a mutually agreed upon mediator, date and place for the mediation shall be agreed upon.
- 8.4 **Conduct of Mediation Sessions.** Mediation hearings will be conducted in an informal manner and discovery will not be allowed. All discussions, statements, or admissions will be confidential to the Party's legal position. The Parties may agree to exchange any information they deem necessary.
- 8.4.1 Both Parties must have an authorized representative attend the mediation. Each representative must have the authority to recommend entering into a settlement. Either Party may have attorney(s) or expert(s) present. Upon reasonable demand, either Party may request and receive a list of witnesses and notification whether attorney(s) will be present.
- 8.4.2 Any agreements resulting from mediation shall be documented, in writing. All mediation results and documentation, by themselves, shall be "non-binding" and inadmissible for any purpose in any legal proceeding, unless such admission is otherwise agreed upon, in writing, by both Parties. Mediators shall not be subject to any subpoena or liability and their actions shall not be subject to discovery.

ARTICLE IX - NOTICES

- 9.1. **Notices.** Any demand upon or notice required or permitted to be given by one Party to the other Party shall be in writing. Except as otherwise provided by law, any demand upon or notice required or permitted to be given by one Party to the other Party shall be effective

(a) on personal delivery, (b) on the second business day after mailing by certified or registered U.S. Mail, return receipt requested, (c) on the succeeding business day after mailing by Express Mail or after deposit with a private delivery service of general use (e.g., Federal Express) postage or fee prepaid as appropriate, or (d) upon successful transmission of facsimile, addressed to the Party at the address shown below:

Notice to the City shall be addressed to:

Director, Park and Recreation Department
City of San Diego
City Administration Building
202 "C" Street, M.S. #9B
San Diego, California 92101
Facsimile No: (619) 236-6219

AND

Notice to the Master Developer shall be addressed to:

McMillin-NTC, LLC
2727 Hoover Avenue
National City, CA 91950

Notice to the Agency shall be addressed to:

Redevelopment Agency of the City of San Diego
Attn: NTC Project Manager
City Administration Building
202 C Street
San Diego, CA 92101

Notice of change of address shall be given by written notice in the manner set forth in this paragraph.

ARTICLE X - MISCELLANEOUS

- 10.1 Headings.** All article headings are for convenience only and shall not affect the interpretation of this Agreement.

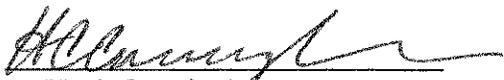
- 10.2 Non-Assignment Except in Accordance with the DDA.** The Master Developer shall not assign the obligations under this Agreement, whether by express assignment or by sale of the company, nor any monies due or to become due, without the Agency's prior written approval and as provided for in the DDA. Any assignment in violation of this paragraph shall constitute a Default and is grounds for immediate termination of this Agreement, at the sole discretion of the Agency. In no event shall any putative assignment create a contractual relationship between the Agency and any putative assignee.
- 10.3 Covenants and Conditions.** All provisions of this Agreement expressed as either covenants or conditions on the part of the City, Agency, or the Master Developer, shall be deemed to be both covenants and conditions.
- 10.4 Compliance with Controlling Law.** The Master Developer shall comply with all laws, ordinances, regulations, and policies of the federal, state, and local governments applicable to this Agreement. The laws of the State of California shall govern and control the terms and conditions of this Agreement.
- 10.5 Jurisdiction, Venue, and Attorney's Fees.** The venue for any suit or proceeding concerning this Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California. The prevailing Party in any such suit or proceeding shall be entitled to a reasonable award of attorney's fees in addition to any other award made in such suit or proceeding.
- 10.6 Integration.** This Agreement and the exhibits and references incorporated into this Agreement fully express all understandings of the Parties concerning the matters covered in this Agreement. No change, alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or an amendment to this Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Agreement.
- 10.7 Counterparts.** This Agreement may be executed in counterparts, which when taken together shall constitute a single signed original as though all parties had executed the same page.
- 10.8 No Waiver.** No failure of the Agency, the City or the Master Developer to insist upon the strict performance by the other of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term, or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.

- 10.9 **Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.
- 10.11 **Drafting Ambiguities.** The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms, and conditions of this Agreement, and the decision of whether to seek advice of counsel with respect to this Agreement is a decision which is the sole responsibility of each Party. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.
- 10.12 **Signing Authority.** The representative for each Party signing on behalf of a corporation, partnership, joint venture or governmental entity declares that authority has been obtained to sign on behalf of the corporation, partnership, joint venture, or entity, and agrees to hold the other Party or Parties hereto harmless if it is later determined that such authority does not exist.

IN WITNESS WHEREOF, this Agreement is executed by the Agency, the City, and the Master Developer on this 10th day of July, 2000.

**Redevelopment Agency of
The City of San Diego**

DATED: 7/10/00

By: 
Hank Cunningham
Deputy Executive Director

**McMillin-NTC, LLC,
a Delaware limited liability company**

DATED: 6-9-00

By: 
By: 

**The City of San Diego,
a municipal corporation**

DATED: _____

By: 
Marcia C. McLatchy
Director, Park and Recreation

(Attach notary certificates.)

Approved as to form and legality
this 30 day of JUNE, 2000.

CASEY GWINN
Agency General Counsel

By: 
Richard A. Duvernay
Deputy General Counsel

RAD:lc - 6/6/00
K:\CGSD\INTC\park.wpd