

ORDINANCE NO. 2018-21

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ESCONDIDO, CALIFORNIA, APPROVING A DEVELOPMENT AGREEMENT BETWEEN OLEANDER PARTNERS, LLC, AND THE CITY OF ESCONDIDO FOR THE LION VALLEY ROAD RESIDENTIAL SUBDIVISION, ESCONDIDO SUBDIVISION 16-0012 (TR 878)

Planning Case No.: PHG 18-0028

The City Council of the City of Escondido, California, DOES HEREBY ORDAIN as follows:

SECTION 1. That proper notices of a public hearing have been given and a public hearing has been held before the Planning Commission and City Council on this issue.

SECTION 2. That the City Council has reviewed and considered the Final Initial Study/Negative Declaration (ER 2004-16) that was adopted for this project and has determined that all environmental issues associated with the project have been addressed, and no significant environmental impacts will result from approving this Development Agreement.

SECTION 4. That upon consideration of the Findings/Factors to be Considered, attached as Exhibit "A" and incorporated by this reference, the staff report, Planning Commission recommendation, and all public testimony presented at the hearing(s) held on this Development Agreement ("Agreement"), this City Council finds this Agreement is consistent with the General Plan and all applicable specific plans of

the City of Escondido, and approves the Agreement attached as Exhibit "B" and incorporated by this reference.

SECTION 5. That the City Clerk is hereby directed to certify to the passage of this ordinance and to cause the same or a summary to be prepared in accordance with Government Code section 36933, to be published one time within 15 days of its passage in a newspaper of general circulation, printed and published in the County and circulated in the City of Escondido.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Escondido at a regular meeting thereof this 5<sup>th</sup> day of December, 2018 by the following vote to wit:

AYES : Councilmembers: DIAZ, GALLO, MASSON, MORASCO

NOES : Councilmembers: NONE

ABSENT : Councilmembers: ABED

APPROVED:

DocuSigned by:  
*Sam Abed*  
6C713A0D961E4F1...

SAM ABED, Mayor of the  
City of Escondido, California

ATTEST:

DocuSigned by:  
*Eva Heter*  
8EE60D9386884A3...

EVA HETER, Interim City Clerk of the  
City of Escondido, California

\*\*\*\*\*

STATE OF CALIFORNIA )  
COUNTY OF SAN DIEGO : ss.  
CITY OF ESCONDIDO )

I, EVA HETER, Interim City Clerk of the City of Escondido, hereby certify that the foregoing ORDINANCE NO. 2018-22 passed at a regular meeting of the City Council of the City of Escondido held on the 5<sup>th</sup> day of December, 2018, after having been read at the regular meeting of said City Council held on the 28<sup>th</sup> day of November, 2018.

DocuSigned by:  
*Eva Heter*  
8EE60D9386884A3  
EVA HETER, Interim City Clerk of the  
City of Escondido, California

ORDINANCE NO. 2018-22

## EXHIBIT A

### FINDINGS OF FACT/FACTORS TO BE CONSIDERED SUB 16-0012 and PHG 18-0028 (TR 878)

#### Development Agreement Findings

1. A Development Agreement can be used to extend the life of a Tentative map for the life of the Development Agreement (Government Code Section 66452.6(a)(1). Although uncapped by statute as to duration, the Planning Commission finds that an additional one-year extension sufficiently accommodates time for the applicant to prepare a final map and improvement plans.
2. The proposed Development Agreement is consistent with the goals, policies, general land uses and programs specified in the General Plan because the approved residential development is consistent with the requirements of the "Suburban" land-use designations which allows single-family residential development on the site. The residential subdivision for the project previously was approved by the Planning Commission on January 11, 2005.
3. The General Plan land-use designation for the southern portion of the project site is "Suburban" (up to 3.3 single-family dwelling units per acre) with a minimum lot size of 10,000 SF. The project is consistent with the adopted General Plan land use designations, which anticipates single-family residential development on the project site. The approved subdivision is consistent with the General Plan density provisions because the density of the project is approximately 3,13 du/ac within the "Suburban" land-use designation. Proposed lot sizes range from approximately 10,000 SF to 12,268 SF, which would be consistent with the proposed R-1-10 zoning designations.
4. The proposed Development Agreement is compatible with the uses authorized in, and the regulations prescribed for the land-use district in which the real property is located, along with all other provisions of Title 21 of the Zoning Code, because the project meets all requirements of the General Plan and Zoning Code, as stated above.
5. The proposed Development Agreement is in conformity with public convenience, general welfare, and good land use practices. The design of the residential map and the type of improvements would not degrade the levels of service on the adjoining streets or drainage systems, with the implementation of the recommended Conditions of Approval. City water and sewer are existing and available to the site, and existing service to surrounding properties would not be adversely impacted. The project would not create any adverse noise impacts to adjacent properties due to the residential nature of the project and limited traffic generated by the project. The project would be in conformance with the General Plan as noted in Section 2 above.
6. The proposed Development Agreement would not adversely affect the orderly development of property or the preservation of property values because the proposed project would not disrupt or divide the physical arrangement of the area because the site is zoned for residential uses, and is adjacent to single-family residential uses and all sides. The project density, yield, and lot sizes would be consistent with the underlying "Suburban" land-use designation, and consistent with adjacent residential development and lot sizes. Access would be provided by the extension of Lion Valley Road, which is an existing residential street. Development of the project and proposed improvements to Lion Valley Road would not adversely alter or impact the existing circulation pattern throughout the surrounding neighborhood, nor preclude the development of surrounding parcels. Adequate public facilities are available and water service can be provided to the project with nominal extension of nearby existing facilities.

In addition to being compatible with the uses in, and the regulations prescribed for, the "Suburban" land use district, public benefits would be provided with the payment of fees to help maintain the Kit Carson Park infrastructure.

7. The proposed Development Agreement is consistent with the provisions of Government Code Sections 65864 et seq.

**Environmental Determinations:**

1. The requirements of the California Environmental Quality Act (CEQA) have been met and a Negative Declaration (City File No. ER 2004-16) was adopted for the project in 2005.

No special circumstances exist that would create a reasonable possibility that the Tentative Map Modification, granting the Tentative Map Extension, and approving the Development Agreement will have a significant effect on the environment beyond what was previously analyzed and disclosed. All of the requirements of the CEQA have been met and no additional environmental review is required in conformance with CEQA Section 15162(a) "Use of Previous Document." No significant issues remain unresolved through compliance with code requirements and the recommended conditions of approval. The project does not include any substantial changes which would require any revisions to the environmental document due to the involvement of new significant effects or a substantial increase in the severity of previously identified significant effects.

RECORDING REQUESTED BY:

CITY CLERK, CITY OF ESCONDIDO

WHEN RECORDED MAIL TO:

CITY CLERK  
CITY OF ESCONDIDO  
201 N. BROADWAY  
ESCONDIDO, CA 92025

*THIS SPACE FOR RECORDER'S USE ONLY*

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APN: 231-100-82 and 231-101-29

**Recording Fees Exempt per Government Code Section 27383**

**DEVELOPMENT AGREEMENT**

**For**

**Between**

**CITY OF ESCONDIDO**

**And**

**Oleander Partners, LLC**

\_\_\_\_\_, 2018

## **DEVELOPMENT AGREEMENT**

This Development Agreement ("Agreement") is entered into by and between the City of Escondido ("City") and Oleander Partners, LLC ("Owner").

### **RECITALS**

WHEREAS, Government Code Sections 65864 through 65869.5 and Articles 58 and 68 of the City's Zoning Code authorize the City to enter into binding development agreements with persons or entities having legal or equitable interests in real property for the purpose of establishing certainty in the development process for both the City and the property owner, and to enable specific terms regarding property development, to be negotiated and agreed upon; and

WHEREAS, the purposes of the Agreement are to eliminate uncertainty in the planning and development of the Project by assuring Owner that it may develop the Property, in accordance with existing laws, subject to the terms and conditions contained in the Agreement; assure the orderly installation of necessary improvements and the provision for public services appropriate for the development of the Project; and enable the City to obtain substantial public benefits by virtue of the Agreement.

NOW THEREFORE, in consideration of the mutual covenants and conditions set forth herein, the Parties agree as follows:

### **ARTICLE I**

#### **Definitions**

1.     **"Amendment"** refers to any written amendment to this Agreement approved by the City Council as provided in Article II, Section 3.
2.     **"Annual Review"** refers to the Owner's demonstration of compliance with the terms of this Agreement every 12 months.
3.     **"Assignee"** refers to an assignee of this Agreement in accordance with Article II, Section 2 and approved by the City in writing.
4.     **"City"** refers to the City of Escondido, its City Council, its mayors and council members, past and present, and employees and agents.
5.     **"Cure Period"** refers to the period of time in which a default may be cured, which will be 30 days.

6. **"Development Fees"** refers to the development related fees as provided in the City's Fee Guide and Exhibit B herein and referred to as development fees.
7. **"Director"** refers to the Director of Community Development or designee.
8. **"Effective Date"** of the Agreement shall be the day of the City Council's adoption of an ordinance approving this Agreement.
9. **"Entitlements"** refers to all approvals and permits necessary or incidental to the development of the Project or any portion thereof, whether discretionary or ministerial, including but not limited to, specific plans, tentative or final tract map approvals, whether standard or vesting, conditional use permits, variances, project plans, grading permits, building permits, and this Agreement and includes all conditions of approval regarding any particular Entitlement.
10. **"Exaction"** refers to any fee, tax, requirement, condition, dedication, restriction, or limitation imposed by the City upon the development of the Property at any time in accordance with the Existing Laws.
11. **"Existing Laws"** refers to the ordinances, resolutions, codes, rules, regulations, general plan, stormwater regulations and official policies of the City governing the development of the Property, including, but not limited to, the permitted uses of the Property, the density or intensity of use, the design, improvement and construction standards and specifications for the Project, including the maximum height and size of proposed buildings, and the provisions for reservation and dedication of land for public purposes, in effect on the Effective Date of this Agreement.
12. **"Future Exaction"** refers to Exactions imposed after the Effective Date, whether by ordinance, initiative, resolution, rule, regulation, policy, order or otherwise.
13. **"Future Laws"** refers to all ordinances, resolutions, codes, rules, regulations, and official policies implemented by the City after the Effective Date, whether by ordinance, initiative,



resolution, rule, regulation, policy, order or otherwise. Future Laws includes changes to the Existing Laws.

14. "**General Fees**" refers to all general development fees which the City may levy pursuant to Government Code Sections 66000 et seq. ("the Mitigation Fee Act"), including, but not limited to, application fees, processing fees, utility connection fees, inspection fees, capital facilities fees, development impact fees, traffic impact fees, park fees and such other similar fees as may be enacted from time to time and generally applied throughout the City, excluding Development Fees.

15. "**General Plan**" refers to the City's General Plan in effect on the Effective Date.

16. "**Minor Modifications**" refers to minor modifications regarding the performance of this Agreement that are consistent with the Entitlements and have minimal impacts to the City's operations in terms of timing, performance, value.

17. "**Modification**" refers to a modification approved by the City Council as provided in Article VI, Section 5.

18. "**Owner**" refers to Oleander Partners, LLC, who has legal or equitable interest in the real property which is the subject of this Agreement.

19. "**Operating Memorandum**" refers to addenda to this Agreement to document changes or adjustments in the performance of this Agreement as specified in Article III, Section 7.

20. "**Party**" refers to City or Owner, both of whom may be referred to individually as Party or collectively as Parties.

21. "**Project**" shall mean and refer to all improvements described in the Entitlements and this Agreement.

22. "**Property**" shall mean the certain real property located in the County of San Diego, State of California as described in the Exhibit A.

23. **"Public Benefits"** shall refer to the consideration given by Owner to the City, as described in Exhibit B attached hereto, in return for the City's good faith performance of all applicable terms and conditions in this Agreement.
24. **"Public Improvements"** refers to any public improvements required to be constructed as conditions of approval to the Entitlements or as additionally provided in this Agreement.
25. **"Review Letter"** refers to a letter from the City regarding a statement of Owner's compliance with this Agreement, following a positive Annual Review by the City.
26. **"Term"** shall refer to the term of this Agreement as provided in Article II, Section 1.

## ARTICLE II

### General Provisions

1. **Term of Agreement.** The term of this Agreement shall commence on the Effective Date and shall continue for eighteen (18) months unless terminated, modified, amended or extended as permitted by this Agreement. After the expiration of the Term, this Agreement shall be deemed terminated and of no further force or effect. This Agreement shall terminate with respect to any lot and such lot shall be released and no longer subject to the Agreement, without the execution or recordation of any further document, when a certificate of occupancy has been issued for the building(s) on the lot.
2. **Assignment.** The rights and obligations of Owner under the Agreement may be assigned by Owner as part of an assignment of the Property, only after receiving written approval from the City. Owner shall provide thirty days advance written notice to the City of any requested assignment. The City shall have the right to ensure that the proposed assignee has the financial capability to complete and fulfill any uncompleted requirements relating to the Public Benefits.

Any assignment agreement must be in writing and expressly provide that (a) the assignment shall be subject to this Agreement; and (b) the Assignee assumes all of Owner's rights and obligations with respect to the Property, or portion thereof, assigned.

3. **Amendment of Agreement.** The Agreement may be amended in writing by the mutual consent of the Parties in accordance with Article 58, Chapter 33 of the Escondido Zoning Code as well as any applicable state or federal law. The Agreement shall include any amendment properly approved and executed. Minor Modifications in the manner of performance shall not constitute an Amendment to the Agreement and may be accomplished through an Operating Memorandum. The Term of the Agreement, as established in Article II Section 1, can be extended at the discretion of the Planning Director without further City Council approval for a total of no more than 12 months.

4. **Enforcement.** Unless amended or terminated as provided herein, this Agreement is enforceable by either Party or its successors and assigns, notwithstanding any Future Laws, which alter or amend the Existing Laws.

5. **Defense and Indemnification.**

a. Owner agrees to defend, indemnify, and hold harmless the City and provide and pay all costs for a defense of and judgment against the City, including any award for attorney's fees and litigation costs, in any legal action filed in a court of competent jurisdiction by a third party challenging the Project, or any component thereof, or this Agreement.

b. Owner shall further indemnify, defend, and hold harmless the City and its officers, employees and agents from and against any and all liabilities, claims, actions, causes of action, proceedings, suits, administrative proceedings, damages, fines, penalties, judgments, orders, liens, levies, costs and expenses of whatever nature, including reasonable attorneys' fees and

disbursements, arising out of any violation, or claim of violation of the San Diego Municipal Storm Water Permit (Order No. R9-2016-0001) of the California Regional Water Quality Control Board Region 9, San Diego, as amended or extended, which the City might suffer, incur, or become subject by reason of or occurring as a result of or allegedly caused by the construction of the Project.

c. The City shall have no liability to the Owner or any other person for, and Owner shall indemnify, defend, protect, and hold harmless the City from and against, any and all liabilities, claims, actions, causes of action, proceedings, suits, damages, judgments, liens, levies, costs and expenses of whatever nature, including reasonable attorneys' fees and disbursements, which the City may suffer or incur or to which the City may become subject as a result of or allegedly caused by the payment of prevailing wages for construction of any of the Public Benefits or Public Improvements.

d. If any action or proceeding is brought against the City by reason of any of the matters against which Owner has agreed to indemnify the City as provided above, Owner, upon notice from the City, shall defend the City at Owner's expense by counsel acceptable to City, such acceptance not to be unreasonably withheld. The City need not have first paid for any of the matters to which the City is entitled to indemnification in order to be so indemnified. The provisions of this section shall survive the expiration or earlier termination of this Agreement.

6. **Third Party Challenges.** In the event the validity, applicability, or implementation of the Agreement is challenged by means of legal proceedings by any party other than the City and Owner, it shall be the City's option, at its sole and absolute discretion, whether to undertake the defense of such challenge. If the City determines not to defend such challenge, it shall be the option of Owner, to defend the validity, applicability, or implementation of this Agreement in the

proceeding at Owner's sole expense. The City and Owner agree to cooperate in the defense of any such challenges.

7. **Notices.** All notices or communication between the City and Owner pursuant to the Agreement shall be in writing and shall be given by personal delivery, overnight delivery service, certified or registered mail, facsimile or telecopy to the addresses set forth below. The addresses may be changed by giving (ten) 10 days written notice.

**A. City**

City of Escondido  
Attention: Director of Community Development  
201 N. Broadway  
Escondido, CA 92025

with a copy to:

City Attorney  
201 N. Broadway  
Escondido, CA 92025

**B. Owner**

Oleander Partners, LLC  
Attention: William Yen  
5230 Carrol Canyon Road, Ste 224  
San Diego, CA 92121

with a copy to:

Dave Ferguson  
Lounsbery Ferguson Altona & Peak  
960 Canterbury Pl, Ste 300  
Escondido, CA 92025

8. **Conflict of State or Federal Laws.** If state or federal laws or regulations enacted after the Effective Date prevent compliance with any provision of this Agreement or require changes in any Entitlements, those laws or regulations shall be controlling, and the Parties shall make a good faith, reasonable attempt to modify this Agreement to comply both with the intent of the Agreement and with the new laws or regulations.

The City shall timely assist Owner in securing any permits, including permits from other public agencies, which may be required as a result of the modifications, suspensions, or alternate courses of action.

### **ARTICLE III**

#### **Development of the Property**

1. **Applicable Rules, Regulations, and Policies.** Owner shall have the vested right, to the fullest extent allowed by law, to develop the Property in accordance with the Entitlements, Existing Laws and this Agreement. During the Term, the Entitlements, Existing Laws and this Agreement shall control the overall design, development and construction of the Project. Notwithstanding the foregoing, nothing in this Agreement shall preclude the City from applying changes occurring from time to time in the uniform codes published in Title 24 of the California Code of Regulations and adopted by the City, including local amendments, in effect when the building permits are issued.
2. **Future Laws.** Future Laws shall not apply to the Project except as expressly provided in this Agreement. Future Laws may be applied to the Project if they are not in conflict with the Existing Laws. Owner may give the City written notice of its election to have any Future Law applied to the Property, in which case such Future Law will be considered an Existing Law for purposes of this Agreement.
3. **Future Discretionary Reviews.** Except as set forth in this Agreement, the City shall retain its discretionary rights in reviewing applications for Entitlements. Owner's applications for Entitlements and the City's review thereof, must comply with the Existing Laws and with the terms and conditions of this Agreement. The City shall not impose any conditions upon Entitlements that are more restrictive than or inconsistent with the terms of this Agreement or the Existing Laws,

except as required by state or federal law. The City may conduct, in accordance with CEQA and the Existing Laws, an environmental review for Entitlements. The City may impose, if required by CEQA, additional mitigation measures to mitigate significant adverse environmental effects that were not previously considered, or were found to be infeasible to mitigate at the time of approval of this Agreement. Nothing herein is intended to require or authorize additional CEQA environmental review or mitigation measures beyond that otherwise required by CEQA.

4. **Permitted Uses and Density.** The Agreement shall vest the right to develop the Property to the fullest extent allowed by law with respect to the permitted uses of land, density and intensity of uses, and the rate or timing and phasing of development as described in the Entitlements which are hereby incorporated as if fully set forth in this Agreement. The permitted uses, density, and intensity of use of the Project, the maximum height and size of proposed buildings and provisions for reservation or dedication of land for public purposes, shall substantially conform to those specified in the Entitlements, Existing Laws and this Agreement. The permitted uses of the Property, including a plan of development, the density and intensity of use, the maximum height and size of proposed buildings are set forth in SUB 17-0007, PHG 17-0034, ENV 17-0011, and PHG 17-0034 as they be amended from time to time, and are hereby incorporated by reference. All other aspects of the Project that are not specified in the Entitlements shall be determined by the Existing Laws, except as expressly provided herein.

5. **Time for Construction and Completion of the Project.** Owner cannot predict when or the rate or the order in which the Property or the parcels will be developed, if at all. Such decisions depend upon numerous factors that are not within the control of the Owner, such as market orientation and demand, interest rates, absorption, completion, and other similar factors. Therefore, Owner shall have the right to develop the Property in phases, in such order, at such rate, and at

such times as Owner deems appropriate in Owner's business judgment, subject only to the provisions of this Agreement and the Entitlements. Owner shall be entitled to apply for and receive approval of permits, building permits, and other Entitlements for use at any time and for any or all portions or phases of the Project, provided that application is made in a manner consistent with this Agreement and the Entitlements.

The City may require, and will process, all customary plans and agreements generally applicable to developers in the City for similar works of onsite or offsite improvements.

6. **Moratorium.** No City-imposed moratorium or other limitation (whether relating to the rate, timing or sequencing of the development or construction of all or any part of the Property, whether imposed by ordinance, initiative, resolution, policy, order or otherwise, and whether enacted by the City Council, an agency of the City, the electorate, or otherwise) affecting parcel or subdivision maps (whether tentative, vesting tentative, or final), building permits, occupancy certificates or other entitlements to use or service (including, without limitation, water and sewer) approved, issued or granted within the City, or portions of the City, shall apply to the Property to the extent such moratorium or other limitation is in conflict with this Agreement; provided, however, the provisions of this Section shall not affect the City's compliance with moratoria or other limitations mandated by other governmental agencies or court-imposed moratoria, as established by the initiative process, or as otherwise established by law.

7. **Operating Memoranda.** The Parties acknowledge that the provisions of this Agreement require cooperation between the City and Owner, and that the refinements and further development of the Project hereunder may demonstrate that changes are appropriate with respect to the details of performance of the Parties hereunder. The Parties desire, therefore, to retain a certain degree of flexibility with respect to those items covered in general terms under this Agreement. If and when,



from time to time during the Term, the Parties find that such changes or adjustments are necessary or appropriate, they may effectuate such changes or adjustments through Operating Memoranda approved by the Parties, which, after execution, shall be attached hereto as addenda and become a part hereof, and may be further changed and amended from time to time as necessary with further approval by the City and Owner. No such Operating Memorandum shall require prior notice or hearing, or constitute an amendment or modification to this Agreement; and in the case of the City, such Operating Memorandum may be acted upon by the City Manager or his designee. Failure of the Parties to enter into any such Operating Memorandum shall not affect or abrogate any of the rights, duties or obligations of the Parties hereunder or the provisions of this Agreement. An Operating Memorandum may be recorded as an addendum to this Agreement.

8. **Term of Map(s) and Other Project Approvals.** Pursuant to California Government Code Section 66452.6(a), the term of the subdivision map that is processed on all or any portion of the Property and the term of each of the Entitlements shall be extended for a period of time through the Term of the Agreement. Should this Agreement be terminated, the Owner shall have thirty days to submit an application for the extension of any portion of an approved tentative map.

9. **Infrastructure Capacity.** Subject to Owner's proportionate contribution to infrastructure and the Public Benefits provided by Owner, in accordance with the requirements of the Entitlements, the City hereby acknowledges that it will have sufficient capacity in its infrastructure services and utility systems, including, without limitation, traffic circulation, flood control, sanitation service and, except for reasons beyond the City's control, sewer collection, sewer treatment, water supply, treatment, distribution and service, to accommodate the Project. To the extent that the City renders such services or provides such utilities, the City hereby agrees that it

will serve the Project and that there shall be no restriction on connections or service for the Project except for reasons beyond the City's control.

10. **Easements.** Easements dedicated for pedestrian use shall be permitted to include public easements for underground improvements, including but not limited to, drainage, water, sewer, gas, electricity, telephone, cable and other utilities and facilities, so long as they do not unreasonably interfere with pedestrian use.

11. **Public Improvements.** Owner agrees to design and construct the improvements as provided in Exhibit B to this Agreement. The requirement to design and construct the improvements in Exhibit B shall survive the termination of this Agreement.

12. **Fees.** The Owner shall pay the Development Fees and General Fees in the amounts in effect at the time Owner submits payment of the fees unless otherwise explicitly provided in this Agreement.

#### ARTICLE IV

##### Provision of Public Benefits

1. **Description of Public Benefits.** Owner shall provide the City with the Public Benefits, as further described in Exhibit B, as consideration for the City's good faith performance of all applicable terms and conditions in this Agreement.

2. **Occupancy Contingent on Construction of Public Improvements.** Owner acknowledges that the City shall not grant a certificate of occupancy for any building constructed on the Property prior to the construction of all improvements and provision of any benefits as described in Exhibit B. This contingency for occupancy shall survive the termination of this Agreement.

3. **Recordation of Final Map Contingent on Security for Public Benefits.** Prior to recordation of the Final Map, Owner must enter into an improvement agreement or agreements

which will detail Owner's construction obligations for Public Improvements and the Public Benefits and will require Owner to provide financial security for completion of construction, in a form or forms as approved by the City Attorney.

4. **Processing During Third Party Litigation.** The filing of any third-party lawsuit(s) against the City or Owner relating to this Agreement, any Entitlements, or to other development issues affecting the Property shall not delay or stop the development, processing or construction of the Project or approval of Entitlements, unless the third party obtains a court order preventing the activity.

## ARTICLE V

### Annual Review

1. **Owner Responsibilities.** At least every twelve months during the Term, Owner shall demonstrate good faith substantial compliance with the major provisions of the Agreement and provide, to the best extent possible, the status and timing of development of the Project and related public improvements to the City for an Annual Review. If requested by the City, Owner shall provide any additional detail or information necessary to demonstrate good faith compliance with any particular provision of this Agreement identified by the City.

2. **Opportunity to be Heard.** Owner shall be permitted an opportunity to be heard orally and in writing at any noticed public hearing regarding its performance under this Agreement. Owner shall be heard before each appropriate board agency or commission and the City Council at any required public hearing concerning a review of performance under this Agreement.

3. **Information to be Provided to Owner.** The City shall mail to Owner a copy of staff reports and related exhibits concerning Agreement performance, a minimum of ten calendar days prior to consideration and review by the City Council.

4. **Annual Review Letter.** If Owner is found to be in substantial compliance with this Agreement after the Annual Review, the City shall issue, upon written request by Owner, a Review Letter to Owner stating that, based upon information known or made known to the City Council, the City Planning Commission, and/or the City Manager, this Agreement remains in effect and Owner is in compliance. Owner may record the Review Letter in the Official Records of the County of San Diego.
5. **Failure of Annual Review.** The City's failure to perform an Annual Review of Owner's substantial compliance with the terms and conditions of the Agreement shall not constitute or be asserted as a default by Owner.

## ARTICLE VI

### Delay, Default, Remedies, and Termination

1. **Notice and Cure of Default.** In the event of a material default, the Party alleging a default shall give the defaulting Party a notice of default in writing. The notice of default shall specify the nature of the alleged material default. During the Cure Period, the Party charged shall not be considered in breach. If the default is cured within the Cure Period, then no breach shall be deemed to exist. Any notice given pursuant to the preceding sentence shall specify the nature of the alleged failure and, where appropriate, the manner in which such alleged failure satisfactorily may be cured.
2. **Waiver.** Failure or delay in giving notice of default shall not constitute a waiver of any other material default. Except as otherwise expressly provided in this Agreement, a failure or delay in asserting any rights or remedies as to any default shall not operate as a waiver of any default or of any rights or remedies otherwise available to a Party or deprive a Party of the right to institute

and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any rights or remedies it may have.

3. **Default by Owner.** The Director may recommend the review and termination of this Agreement to the City Council upon an occurrence of a material default that is not cured within the Cure Period. The foregoing does not limit any of the City's other remedies upon a material breach of this Agreement by the Owner.

4. **Default by the City.** Upon a material default by the City, that is not cured within the Cure Period, Owner, without limiting any of its other remedies, shall not be obligated to complete any of its obligations under this Agreement.

5. **Termination or Modification.** Any termination or modification of this Agreement shall be done in accordance with Article 58, Chapter 33 of the Escondido Zoning Code as well as any applicable state or federal law. Owner shall have sixty days from the Effective Date to sign the Agreement or the Agreement shall automatically expire.

## ARTICLE VII

### Encumbrances and Releases on Property

1. **Discretion to Encumber.** This Agreement shall not prevent or limit Owner, in any manner, from encumbering the Property or any portion of the Property or any improvement on the Property by any mortgage. The City acknowledges that lenders providing financing may require modifications to this Agreement and the City agrees, upon request, from time to time, to meet with Owner and/or representatives of lenders to negotiate in good faith any lender request for modification provided any modification does not will not affect the timely completion or

fulfillment of any requirements in the Entitlements or this Agreement relating to the Public Benefits.

## ARTICLE VIII

### Miscellaneous Provisions

1. **Rules of Construction.** The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory; "may" is permissive.
2. **Severability.** If any non-material provision of this Agreement shall be adjudged by a court of competent jurisdiction to be invalid, void, or illegal, it shall in no way affect, impair, or invalidate any other provision of this Agreement. If any material part of the Agreement is adjudged by a court of competent jurisdiction to be invalid, void, or illegal, the Parties shall take all steps necessary to modify the Agreement to implement the original intent of the Parties in a valid and binding manner. These steps may include the waiver by either of the Parties of their right under the unenforceable provision. If, however, this Agreement objectively cannot be modified to implement the original intent of the Parties and the Party substantially benefited by the material provision does not waive its rights under the unenforceable provision, the executory portions of the Agreement shall become void.
3. **Entire Agreement.** Except as expressly referred to herein, this Agreement constitutes the entire understanding and agreement of the Parties with respect to the subject matter of this Agreement. This Agreement supersedes all other negotiations and previous agreements between the Parties with respect to that subject matter.
4. **Waivers.** All waivers of the provisions of this Agreement must be in writing and signed by the appropriate agents of the City or of Owner.

5. **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 days following the Effective Date. 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 the City shall be recorded in the Official Records of San Diego County, California.
6. **Project as a Private Undertaking.** It is specifically understood by the Parties that the Project is a private development and that Owner shall have the full power and exclusive control of the Property subject to the provisions of this Agreement. Any improvements completed remain the property of the Owner unless the City has explicitly accepted any improvement.
7. **Captions.** The captions of the 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 the Agreement.
8. **Consent.** Where the consent or approval of a Party is required or necessary under this Agreement, the consent or approval shall not be withheld unreasonably.
9. **The City's Ongoing Statutory Authority.** Except as expressly stated, nothing in this Agreement shall limit the City's authority and responsibility under the California Constitution and applicable California statutes to act in the best interests of the public health, safety, and welfare, and nothing in this Agreement is intended to limit in any way the legislative discretion otherwise afforded the Escondido City Council under state or federal law.
10. **Covenant of Cooperation.** The Parties shall cooperate with and assist each other in the performance of the provisions of the Agreement including assistance in obtaining permits for the development of the Property which may be required from public agencies other than the City. The

covenant of cooperation shall include, to the maximum extent permitted by law, that the City shall use its best efforts to prevent any ordinance, measure, moratorium or other limitation from invalidating, prevailing over or making impossible any provision of the Agreement, and the City shall cooperate with Owner to keep this Agreement in full force and effect. Owner reserves the right to challenge any such ordinance, measure, moratorium, or other limitation in a court of law if it becomes necessary to protect the development rights vested in the Property pursuant to this Agreement.

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

12. **Successors and Assigns.** Subject to Article II Section 2 above, the burdens of this Agreement shall be binding upon, and the benefits of this Agreement inure to, all successors-in-interest and assigns of the Parties.

13. **Time of the Essence.** Time is of the essence of this Agreement and of each and every term and condition hereof.

14. **Applicable Laws.** This Agreement shall be construed and enforced in accordance with the laws of the State of California. All statutory references are to California statutes.

15. **No Waiver of Existing Rights or Applicable Laws.** This Agreement shall not constitute a waiver of any of Owner's existing rights or applicable laws, nor shall it limit or expand Owner's



right to challenge any General Fee as being contrary to applicable law or to challenge any existing or Future Exaction as being in excess of Exactions permitted by applicable law.

16. **Authorization.** Each person executing this Agreement hereby warrants and represents that he/she has the authority to enter into this Agreement and to bind his/her respective entity to the provisions hereof. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original.

17. **No Third-Party Beneficiaries.** This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS WHEREOF, the Parties have executed this Agreement:

CITY OF ESCONDIDO

CITY OF ESCONDIDO

By: \_\_\_\_\_  
Sam Abed  
Its: Mayor

By: \_\_\_\_\_  
Eva Heter  
Its: Interim City Clerk

Oleander Partners, LLC

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

APPROVED AS TO FORM:

CITY OF ESCONDIDO  
OFFICE OF THE CITY ATTORNEY  
MICHAEL R. MCGUINNESS, City Attorney

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

OWNER  
Oleander Partners, LLC

By: \_\_\_\_\_  
Dave Ferguson, Esq.  
Attorney for Owner

**Exhibit A**

**LEGAL DESCRIPTION**

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

**EXHIBIT B**

**I. PUBLIC BENEFITS AND IMPROVEMENTS**

- A. Project improvements include completion of Lion Valley Road, a looping water system, an onsite drainage system and retention basin that will filter stormwater into a public drainage system, 400'± of offsite drainage improvements along Bear Valley Parkway, and onsite grading and retaining walls. These improvements will not only serve the Project and mitigate its impacts, but provide the following benefits to the surrounding community:
- a. Prevent existing erosion and siltation from the adjacent properties on the south of the Project from running onto public streets and polluting the drainage system.
  - b. Redirect existing drainage from entering and inundating properties to the north of the Project.
  - c. Replace existing deteriorated wooden fences with new block walls.
  - d. Provide a full cul-de-sac for emergency vehicle turn-arounds on Lion Valley Road.
  - e. Loop the existing water system promoting greater reliability for the neighborhood in case of emergencies.
- B. Owner shall provide the City a cash contribution of ten thousand dollars (\$10,000) towards internal streets and parking lots at Kit Carson Park.