



CITY OF MILPITAS

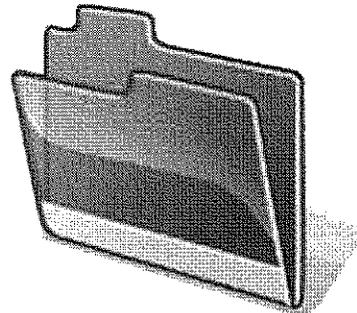
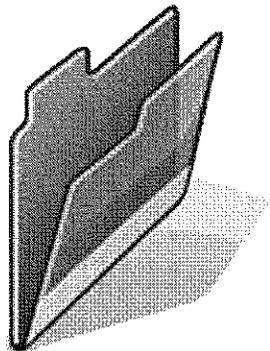
455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

09/18/2012

Agenda Item No. 13



ATTACHMENT RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION



RECORDING REQUESTED BY:

WHEN RECORDED, MAIL TO:

Attn:

(SPACE ABOVE FOR RECORDER'S USE)

APNs:

**AGREEMENT AFFECTING REAL PROPERTY
FOR CENTRIA WEST (APEX) DEVELOPMENT**

THIS AGREEMENT AFFECTING REAL PROPERTY FOR CENTRIA WEST (APEX) DEVELOPMENT ("**Agreement**") is made and entered into as of the ____ day of _____ [], by and between Milpitas Centria West, LLC, a Delaware limited liability company ("**Developer**"), and CITY OF MILPITAS, a municipal corporation (the "**City**"). Developer and the City may collectively be referred to herein as the "**Party**" or the "**Parties**".

RECITALS:

- A. Developer is the owner of certain real property located in the City of Milpitas, County of Santa Clara, State of California, more particularly described on Exhibit "A" attached hereto and incorporated herein by reference (the "**Developer Property**"). Developer has or intends to construct residential dwelling units on the Developer Property for the purposes of leasing and operating apartments. For purposes hereof, Developer Property shall mean and refer to the real property described in Exhibit "A".
- B. Pursuant to that certain Subdivision Public Improvement Agreement between the Developer and the City dated as of August 19, 2011, the City and Developer have agreed that the Developer will construct certain improvements on a the parcel owned by the City, which is immediately adjacent to Developer Property which as shall serve as a public park, as shown on Exhibit "B", attached hereto and incorporated herein (the "**Park Land**").
- C. The City seeks Developer to provide maintenance obligations and establish certain rights incidental to such efforts on the improvements that will be constructed on the Park Land, as further described herein.

NOW, THEREFORE, for value consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. Grant of License. The City grants Developer a license to maintain those improvements on the Park Land as further described on Exhibit "C" attached hereto and incorporated herein by reference (the "**Park Improvements**"). The parties acknowledge that the Park Improvements have been dedicated to the City.
2. Party Status. For purposes of this Agreement, Developer shall be considered solely as a licensee and not as an agent or subsidiary of the City; no possessory interest or right to own, lease, occupy or control the Park Improvements or the Park Land is granted herein.
3. Maintenance Obligations of Park.
 - a. Developer shall have the sole affirmative obligation at all times during the term of this Agreement to maintain Park Improvements. Developer shall perform such maintenance in substantial accordance with maintenance standards set forth by the City for the City's parks located in the City containing similar improvements as the Park Improvements (the "**City Standards**"). After completion of the improvements, the City and the Developer shall meet to establish such maintenance obligations. Thereafter the City and Developer shall meet annually to confirm the scope of the maintenance obligations being performed by the Developer is consistent with the City Standards. The costs of such maintenance shall be exclusively borne by Developer. In no way, shape, or form will Developer get any payments or tax credits from the City for the performance of such maintenance. With respect to the maintenance of the tennis court described on Exhibit C, such maintenance shall include, but are not limited to the following:
 - i. Weekly: Wash court (s) to remove dirt and debris from surface and keep court (s) free of foreign matter such as dirt, leaves, animal feces, and pine needles.
 - ii. Monthly: Check net tension and height (adjust if necessary), check shady areas of court (s) for mold and mildew and if so take appropriate actions to remove the fungus and retard further growth, and inspect expansion joints and refill any joints that are open.
 - iii. Annually: Inspect caulking at expansion joints and refill exposed joints, inspect nets and windscreens and replace if needed, remove, clean, and repaint net posts, inspect light fixture lenses and clean if necessary, and inspect surface coatings and repair and or resurface if necessary.
 - iv. Every five (5) years the tennis court (s) must be resurfaced with a fresh acrylic surfacing system.
 - v. The net shall be replaced as needed.
 - vi. The wind screens shall be replaced as needed.
 - vii. The courts shall be restriped as needed.
 - b. Service Requests: Developer shall respond to all special service requests within seven (7) days. Special service requests can include any aspect of duty under the maintenance scope of work, including graffiti abatement and the repair of vandalism (e.g., turf damage and the scattering of broken glass). Safety hazards shall be addressed within the same day; all other repairs shall be worked within the

regular maintenance schedule as soon as possible and within a maximum of seven (7) days.

4. Insurance of Developer.

- a. Before beginning any work under this Agreement, Developer shall procure "occurrence coverage" insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work consisting of the construction of the Park Improvements and the ongoing maintenance of the Park Improvements hereunder by the Developer and its agents, representatives, employees, and subcontractors. Developer shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City. Developer shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce copies of said policies to the City upon demand. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

- b. *Workers' Compensation.* Developer shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Developer. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. The insurer shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

An endorsement shall state that coverage shall not be suspended, voided, canceled, except after thirty (30) days' prior written notice has been given to the City.

- c. *Commercial General and Automobile Liability Insurance.*
 - i. *General requirements.* Developer, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than TWO MILLION DOLLARS (\$2,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from Developer's performance, or failure to perform, its obligations under this Agreement, including the use of owned and non-owned automobiles.

 - ii. *Minimum scope of coverage.* Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form

number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

- d. *Additional requirements.* Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:
- i. City and its officers, officials, agents, and employees shall be covered as additional insureds with respect to each of the following: liability arising out of activities performed pursuant to this Agreement by or on behalf of Developer, including the insured's general supervision of Developer; products and completed operations of Developer with respect to the Park Improvements; premises owned, occupied, or used by Developer to the extent the same pertain to Developer's obligation under this Agreement; and automobiles owned, leased, or used by the Developer to the extent the same pertains to the Developer's obligation under this Agreement.
 - ii. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
 - iii. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, agents, and employees, and that, except as otherwise provided herein, no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
 - iv. Any failure of Developer to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, officials, agents, and employees.
 - v. An endorsement shall state that coverage shall not be suspended, voided, or canceled except after thirty (30) days' prior written notice has been given to the City.
- e. Insurance coverage levels under this Agreement may be modified by the City, in its sole discretion, upon one (1) year's advance notice to the Developer.
- f. Developer shall provide to the City certificates of insurance upon acquisition and renewal of insurance coverage.

5. Duration. This contract is perpetual but can be terminated by either party with one (1) year's written notice.
6. Right of City to Remedy Failure of Maintenance Obligation. If Developer fails to comply with the provisions of this Agreement, then the City may deliver written notice to Developer identifying the specific defects regarding the maintenance of the Developer Maintained Improvements. Subject to this Section 6, Developer shall have fifteen (15) business days to correct the City's concerns, provided that if such correction cannot be completed within such fifteen (15) business day time period, then Developer shall be afforded a reasonable amount of additional time to correct such City's concerns provided Developer commences

such correction during such fifteen (15) business day time period and diligently pursues such correction. Notice provided by the City shall specify the date Developer must remedy the City's concerns in order to avoid action by the City. If the Developer disagrees in good faith with the City's concerns, Developer shall notify the City of such disagreement within seven (7) business days of receipt of such notice and the parties shall discuss in good faith the City's concerns and Developer's disagreement with such concerns. Notwithstanding the foregoing, if the City determines an emergency situation exists which must be remedied immediately, then the City will provide written notice to Developer specifying the emergency situation must be remedied within twenty-four (24) hours.

If after notice from the City, Developer fails to correct the specific defects identified in the City's notice within the specified time period set forth above, the City shall have the right to remedy the defects. The City may retain, as its election its own contractors, or the Developer's contractors, or other third party maintenance company to complete the work. Any costs incurred by the City for maintenance of the Park shall be solely borne by the Developer. The City shall provide an invoice for the maintenance cost incurred by the City to Developer. Developer shall remit payment to the City within thirty (30) days from receipt of the invoice. The Parties agree that any maintenance undertaken by the City under this section shall not terminate the maintenance obligation of Developer. In the event of non-compliance with the City's notice more than twice in any twelve (12) month period, or lack of prompt reimbursement the City retains the right to terminate the contract.

7. Utilities. The City shall be responsible for all utilities in connection with the operation of the Park and the Park Improvements. All utilities that are the responsibility of the City shall be metered separately and such utilities shall be in the account name of the City.

8. Indemnification.

- a. Developer hereby covenants and agrees to indemnify, defend, and hold City, its officers, agents, and employees harmless from and against any and all claims, damages (including damage to property and injury to persons), demands, losses, obligations, judgments, liabilities, costs and expenses (including, without limitation, attorneys' and other fees) arising from or in any way connected with or related to any of the following: (i) any lawsuit, arbitration, administrative proceeding or other legal action directly concerning the maintenance or construction of the Park Improvements by Developer and/or its agents and, (ii), any breach by Developer of any of its obligations under this Agreement. However, in no event shall Developer be obligated to defend or indemnify the City with respect to the sole negligence or willful misconduct of the City, its employees, representatives, or agents.

9. Assignment. Developer may, upon written notification to the City and approved by City, such approval not to be unreasonably withheld, assign all of its rights and obligations set forth in this Agreement only to successors in interest to the ownership of the Developer Property. Developer hereby covenants and warrants for itself and its successors and assigns, that, except as otherwise provided for herein, conveyance of any interest in the Developer Property to a common interest association, such as a homeowners' association, shall constitute an assumption by any successors, assigns or transferees of Developer, of the obligation under this Agreement. Upon a City-approved assignment, the successor or assign shall have all rights and obligations of Developer set forth in this Agreement, and

Developer shall thereafter have no further rights, liabilities or obligations under the Agreement and shall be released from all such liability hereunder.

8. Notices. Unless otherwise provided in this Agreement, all notices, demands, or other communications given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been given upon personal delivery or as of the second business day after mailing in the United States registered or certified mail, return receipt requested, postage prepaid, addressed as follows or to such other address or to such other person as either party may designate:

If to Developer:

Milpitas Centria West, LLC
c/o Lyon Realty Advisors, Inc.
4901 Birch Street
Newport Beach, California 92660
Attention: Frank T. Suryan, Jr.

With a copy to:

Lyon Management Group, Inc
4901 Birch Street
Newport Beach, California 92660
Attention: General Counsel

If to City:

City Engineer
City of Milpitas
455 East Calaveras Boulevard
Milpitas, CA 95035

9. Headings. The titles or headings of the sections of this Agreement are not a part of the Agreement and shall have no effect upon the construction of or interpretation of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as set forth below.

Dated: _____ MILPITAS CENTRIA
WEST, LLC, a Delaware limited liability company

By: Colony – LCV Venture, LLC, a Delaware limited liability company, its Sole Member

By: _____

Name: _____
Its: _____
"DEVELOPER"

CITY OF MILPITAS,
a municipal corporation

Thomas C. Williams
City Manager

[INSERT NOTARY]

LEGAL DESCRIPTION

EXHIBIT "A"

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

Lot 1, as shown on that certain Map entitled, "Tract No. 9773 Centria", which was filed in the
office of the Recorder of the County of Santa Clara, State of California, on July 24, 2006 in Book
804 of Maps, Pages 9 through 14.

APN: 086-12-021

WPH/Centria
Grant Deed
28156-00026/101116417.1

EXHIBIT "A"

EXHIBIT B

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

PARCEL ONE:

All of that certain parcel of land designated and delineated as "Parcel B" upon that certain Map entitled "Record of Survey, being a portion of Los Esteros and Milpitas Ranchos in the County of Santa Clara, California," which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on October 24, 1968 in Book 244 of Maps at Page 3.

Excepting therefrom that portion described as Parcel 506776-A in the Deed from the County of Santa Clara to the City of Milpitas, Recorded May 4, 1994 in Book N 428, Page 657, Instrument No. 12481692, Official Records.

PARCEL TWO:

That portion of Parcel A as shown on the Record of Survey, being a portion of Los Esteros and Milpitas Ranchos, filed October 24, 1968 on Book 244 of Maps, Page 3, in the office of the Santa Clara County Recorder, lying Southwesterly of the Southwesterly line of Parcel 506776-A as described in the Deed from the County of Santa Clara to the City of Milpitas Recorded May 4, 1994 in Book N428, Page 657, Instrument No. 12481692, Official Records.

APN: 086-12-010

EXHIBIT "C"

PARK IMPROVEMENTS

[To be included upon completion of Park Improvements]