

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FONTANA APPROVING, PURSUANT TO THE CERTIFIED CITRUS/OLEANDER INDUSTRIAL COMMERCE CENTER EIR (STATE CLEARINGHOUSE NO. 2022110389), THE DEVELOPMENT AGREEMENT 23-085 BETWEEN THE CITY OF FONTANA AND ACACIA REAL ESTATE GROUP, INC., WHICH PROVIDES A PUBLIC BENEFIT FEE IN THE AMOUNT OF \$3,192,624.00 AND AN ADDITIONAL ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00) TO FUND THE CITY'S DESIGN AND CONSTRUCTION OF AN ACTION SPORTS PARK AT MARTIN TUDOR REGIONAL PARK.

WHEREAS, the City Council ("City Council") of the City of Fontana ("City") is authorized by California Government Code sections 65864 et seq. and section 30-322 of the City's Development Code ("Development Code") to enter into an agreement for the development of real property with any person having a legal or equitable interest in such property in order to establish certain development rights in such property; and

WHEREAS, City has found that development agreements will strengthen the public planning process, encourage private participation in comprehensive planning by providing a greater degree of certainty in that process, reduce the economic costs of development, allow for the orderly planning of public improvements and services, allocate costs to achieve maximum utilization of public and private resources in the development process, and ensure that appropriate measures to enhance and protect the environment are achieved; and

WHEREAS, because of the logistics, magnitude of the expenditure, and considerable lead time required to plan and develop the Property, Acacia Real Estate Group, Inc. ("Developer") has proposed to enter into a development agreement concerning the Property ("Development Agreement"), to provide assurances that the Property can be developed without disruption caused by a change in the City's planning policies and requirements except as provided in the Development Agreement, which assurances will thereby reduce the actual or perceived risk of planning for and proceeding with development of the Property; and

WHEREAS, the City of Fontana, a California Municipal Corporation ("City") and Developer are supportive of entering into a Development Agreement whereby Developer will acquire fee title to certain real property (the "Property"); and

WHEREAS, Developer's interest in the Property, including that interest to be conveyed pursuant to the DA, constitutes a legal or equitable interest in real property pursuant to California Government Code section 65865; and

WHEREAS, Developer proposes the development of the Property for three industrial buildings totaling approximately 532,104 square feet, including up to 44,000 square feet of office space, entailing front end investment in the planning, entitlement and development of the Property to achieve the goals of the City's General Plan ("General Plan"), as further described and conditioned in the Development Agreement (collectively, such development shall be referred to herein as the "Project"); and

WHEREAS, City desires the timely, efficient, orderly and proper development of the Project in furtherance of the goals of the General Plan; and

WHEREAS, City has found that the development agreement attached hereto as Exhibit A and incorporated herein by reference ("Development Agreement") is consistent with City's General Plan and it has been reviewed and evaluated in accordance with Section 30-102 of the City Development Code; and

WHEREAS, City has determined that by entering into the Development Agreement: (i) City will promote orderly growth and quality development on the Property in accordance with the goals and policies set forth in the General Plan and (ii) City will benefit from increased employment and industrial opportunities created by the Project for residents of the City; and

WHEREAS, the original application was submitted on May 18, 2022, for a General Plan Amendment (GPA) No. 22-004, Zone Change Application (ZCA) No. 22-005, Specific Plan Amendment (SPA) No. 22-002, Development Agreement (DA) No. 23-005, Design Review (DRP) No. 22-029 (Building No. 1), Tentative Parcel Map (TPM) No. 20709 (TPM No. 22-009, Building No. 1), Design Review No. 22-061 (Building No. 2), Tentative Parcel Map (TPM) No. 20708 (TPM No. 22-030, Building No. 2), Design Review No. 22-062 (Building No. 3), Tentative Parcel Map (TPM) No. 20707 (TPM No. 22-031, Building No. 3). - a request for the site and architectural review for the construction of three (3) industrial commerce center buildings having maximum sizes of 151,618 square feet (s.f.), 196,336 s.f., and 192,895 s.f. (total of 504,849 s.f.); on three sites with a total project site of approximately 24.8 gross acres; and a Development Agreement No. 23-005 to include a review of the development agreement for a public benefit fee of \$2,145,608.25.

WHEREAS, on June 20, 2023, the Fontana Planning Commission ("Planning Commission") received public testimony and evidence presented by the Applicant, City staff and other interested parties at the Public Hearing held on the Citrus/Oleander Industrial Commerce Center project (State Clearinghouse No. 2022110389), MCN No. 22-053 and recommended approval to the City Council by Resolution No. 2023-025; and

WHEREAS, on July 25, 2023, the City Council held a duly noticed public hearing on Citrus/Oleander Industrial Commerce Center EIR (State Clearinghouse No. 2022110389) and MCN No. 22-053, where City Council received evidence and testimony concerning the project and denied the project with a vote of 3-2; and

WHEREAS, Sections 30-39 (General Plan Amendment, Time limitations) and 30-74 (Specific Plan Amendment, Time limitations) of the Zoning and Development Code state that if an application is denied by either the Planning Commission or City Council, another application of the same nature and effecting the same property shall not be filed with a period of one year from the date of denial. However, the aforementioned section also provides that a hearing body denying the application may give permission for a new application to be filed if a change in circumstances or plans indicate that a new application is warranted; and

WHEREAS, On October 4, 2023, John Shardlow with Allen Matkins Leck Gamble Mallory & Natsis LLP, submitted a request on behalf of the Applicant for permission to file a new application based on revisions to the proposed project; and

WHEREAS, on October 24, 2023, the City Council Approved the reconsideration with a vote of 4-1; and

WHEREAS, on October 25, 2023, the Applicant submitted a request for a General Plan Amendment No. 23-004 (GPA No. 23-004) to change the land use designation from Residential Planned Community (R-PC) and Multi-Family Medium/High Residential (R-MFMH) to General Industrial (I-G) on approximately 29.4 adjusted gross acres of a 18 parcels (APNs: 0255-011-13, -14, -15, -18, -19, -25, -26, -27, -28, -29, -30, -31, and -32, and 0255-021-17, -18, -22, -23, and -24, including a five-acre parcel that excludes development); Specific Plan Amendment No. 23-004 (SPA No. 23-004) to expand the Southwest Industrial Park (SWIP) Specific Plan boundary to include the entire property and designate the property Slover East industrial District (SED) ; Zoning District Map Amendment No. 23-006 (ZCA No. 23-006) to rezone the property from Residential Planned Community (R-PC) and Multi-Family Medium/High Density Residential (R-4) to SWIP, Tentative Parcel Map No. 22-009R1 (TPM No. 20709) to consolidate six (6) parcels located at the northeast corner of Citrus Avenue and Santa Ana Avenue into one parcel to develop the project site for Building No. 1, Tentative Parcel Map No. 22-030R1 (TPM No. 20708) to consolidate six (6) parcels located at the northwest corner of Oleander Avenue and Santa Ana Avenue into one parcel to develop the project site for Building No. 2, Tentative Parcel Map No. 22-031R1 (TPM No. 20707) to consolidate five (5) parcels located at the northeast corner of Oleander Avenue and Santa Ana Avenue into one parcel to develop the project site for Building No. 3 , Design Review No. 22-029 for the site and architecture review of Building No. 1, Design Review No. 22-061R1 for the site and architecture review of Building No. 2, Design Review No. 22-062R1 for the site and architecture review of Building 3 totaling approximately 532,104 square feet with associated landscaping and parking; and Development Agreement No. 23-085 to include a public benefit fee of \$3,192,624.00 and the owner shall remit payment of an additional One Million Five Hundred Thousand Dollars (\$1,500,000.00) to fund the City's design and construction of an Action Sports Park at Martin Tudor Regional Park. All of the amendments together are known as Master Case No. 23-100 (MCN 23-100); and

WHEREAS, on November 14, 2023, the City Council held a duly noticed public hearing on Citrus/Oleander Industrial Commerce Center EIR (State Clearinghouse No.

2022110389) and MCN No. 23-100, received testimony and evidence concerning the project and found it to be in conformance with the goals and policies of the General Plan, found that the project provides a community that is balanced between residential, commercial and industrial that is developed to high standards, and found that the project provides diverse economic and social opportunities for our citizens and those who wish to invest in the City of Fontana ("City"); and

WHEREAS, on November 14, 2023, pursuant to Resolution 2023-110 the City Council certified the Citrus/Oleander Industrial Commerce Center EIR (State Clearinghouse No. 2022110389) and adopted the Mitigated Monitoring and Reporting Program ("MMRP") for the revised project; and

WHEREAS, the terms and conditions of the Development Agreement have undergone review by City at publicly noticed hearings and have been found to be fair, just and reasonable, and consistent with the General Plan. Further, City finds that:

(i) the economic interests of the City's citizens and the public health, safety and welfare will be best served by entering into the Development Agreement;

(ii) the Development Agreement is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the Property is located;

(iii) the Development Agreement is consistent with the General Plan;

(iv) the Development Agreement is in conformity with the public convenience, general welfare and good land use practice;

(v) the Development Agreement will not be detrimental to the public health, safety and general welfare; and

(vi) the Development Agreement will not adversely affect the orderly development or the preservation of property values for the Property or any other property; and

WHEREAS, all the notices required by statute and the FMC have been given as required.

THE CITY COUNCIL OF THE CITY OF FONTANA DOES ORDAIN AS FOLLOWS:

SECTION 1. Recitals. The recitals are true, correct and incorporated herein by this reference.

SECTION 2. CEQA. Consistent with the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et seq.) and the State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.), on Citrus/Oleander Industrial Commerce Center EIR (State Clearinghouse No. 2022110389) was prepared for development, including the

General Plan Amendment and Tentative Vesting Map. The City Council has certified the Citrus/Oleander Industrial Commerce Center EIR and adopted the MMRP and, based on the CEQA Sections 15162 through 15164, staff has determined that none of the criteria requiring a subsequent environmental document have been met and that further environmental analysis is not required. A Notice of Determination has been prepared.

SECTION 3. Development Agreement Findings. Based on the entire record before the City Council and all written and oral evidence presented, the City Council finds this Ordinance promotes the public health, safety and welfare of the community because the Development Agreement will enable needed public improvements at the Property and the economic development of the Property will benefit the citizens of the City.

The City Council further finds that among the public benefits to accrue to the residents of the City as a result of the Development Agreement are:

1. The revitalization of an underdeveloped site.
2. The development of onsite infrastructure upgrades that would not occur otherwise.
3. The generation of additional property tax.
4. The stimulation of adjacent areas in the City by introducing new industrial facility and opportunities.
5. The implementation of numerous City planning and economic development policies which benefit the health and fiscal welfare of the City and its residents.
6. The payment of a public benefit fee from the Developer to the City to offset certain private benefits received by Developer under the DA.
7. The revitalization of an underdeveloped site.
8. The development of onsite infrastructure upgrades that would not occur otherwise.
9. The generation of additional property tax.
10. The stimulation of adjacent areas in the City by introducing new industrial facility and opportunities.
11. The implementation of numerous City planning and economic development policies which benefit the health and fiscal welfare of the City and its residents.
12. The payment of a public benefit fee from the Developer to the City to offset certain private benefits received by Developer under the DA.

SECTION 4. Development Agreement Approval. Pursuant to California Government Code sections 65865 *et seq.*, the City Council hereby approves the Development Agreement, a copy of which is on file with the City Clerk and incorporated by reference herein attached as "Exhibit A" for entitled "Development Agreement No. 23-085 between Acacia Real Estate Group, Inc. and the City of Fontana, a California municipal corporation.

SECTION 5. Recordation. The City Clerk shall cause to be recorded with the San Bernardino County Recorder a copy of the executed Development Agreement at the time and in the manner provided for in the DA.

SECTION 6. Effective Date/Publication. This Ordinance shall take effect thirty (30) days after the date of the adoption and prior to the expiration of fifteen (15) days from the passage thereof, shall be published by the City Clerk at least once in the Fontana Herald News, a local newspaper of the general circulation, published and circulated in the City of Fontana, and henceforth and thereafter the same shall be in full force and effect.

SECTION 7. Custodian of Records. The documents and materials that constitute the record of proceedings on which this Ordinance is based are located at the City Clerk's office located at 8353 Sierra Avenue, Fontana, CA 92335. The custodian of records is the City Clerk.

SECTION 8. Certification. The City Clerk of the City Council shall certify to the adoption of this Ordinance.

SECTION 9. Severability. If any provision of this Ordinance or the application of any such provision to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance that can be given effect without the invalid provision or application.

APPROVED and ADOPTED this 14th day of November 2023.

READ AND APPROVED AS TO LEGAL FORM:

City Attorney

I, Germaine Key, City Clerk of the City of Fontana, and Ex-Officio Clerk of the City Council, do hereby certify that the foregoing Ordinance is the actual Ordinance adopted by the City Council and was introduced at a regular meeting on the 14th day of November 2023, and was finally passed and adopted not less than five days thereafter on the 12th day of December 2023 by the following vote to wit:

AYES:

NOES:

ABSENT:

City Clerk of the City of Fontana

Mayor of the City of Fontana

ATTEST:

City Clerk

EXHIBIT "A"
DEVELOPMENT AGREEMENT

Recorded at request of:)
Clerk, City Council)
City of Fontana)

When recorded return to:)
City of Fontana)
8353 Sierra Avenue)
Fontana, CA 92335)
Attention: City Clerk)

Exempt from Filing Fees, Government Code Section 6103

DEVELOPMENT AGREEMENT NO. 23-085

A DEVELOPMENT AGREEMENT BETWEEN

CITY OF FONTANA
a California Municipal Corporation
("City")

and

ACACIA REAL ESTATE GROUP, INC.,
("Owner")

DEVELOPMENT AGREEMENT NO. 23-085

This Development Agreement (hereinafter "Agreement") is entered into effective on the date it is recorded with the San Bernardino County Recorder (hereinafter the "Effective Date") by and among the City of Fontana, a California municipal corporation (hereinafter, "CITY"), and Acacia Real Estate Group, Inc. (hereinafter, "OWNER"):

RECITALS

WHEREAS, CITY is authorized to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property, pursuant to Section 65864 et seq. of the Government Code; and

WHEREAS, OWNER has requested CITY to enter into a development agreement with respect to that certain real property located north of Santa Ana Avenue, east of Citrus Avenue, and west of Oleander Avenue (APNs: 0255-021-17, -18, -22 thru -24, 0255-011-13, -14, -18, -19, -25 thru -32). as more particularly described on Exhibit "A" to this Agreement (the "Property"), and proceedings have been taken in accordance with the rules and regulations of CITY; and

WHEREAS, by electing to enter into this Agreement, CITY shall bind future City Councils of CITY by the obligations specified herein and limit the future exercise of certain governmental and proprietary powers of CITY; and

WHEREAS, the terms and conditions of this Agreement have undergone extensive review by CITY and the City Council and have been found to be fair, just and reasonable; and

WHEREAS, the best interests of the citizens of the CITY and the public health, safety and welfare will be served by entering into this Agreement; and

WHEREAS, prior to the adoption of the Development Approvals described in this Agreement, the City Council of the City of Fontana reviewed, considered, and certified the Environmental Impact Report ("EIR") for the Citrus/Oleander Industrial Center of which the Project, as that term is defined below, is a part, and made findings concerning the mitigation measures for the Project, and adopted a Mitigation Monitoring and Reporting Program in accordance with CEQA and the State and City CEQA Guidelines; and

WHEREAS, DEVELOPER has filed an application for, and the City Council has approved Master Case (MCN) No. 23-100, Design Review (DRP) No. 22-029R1 (Building No. 1), Tentative Parcel Map (TPM) No. 22-009R1 (Building No. 1), Design Review No. 22-061R1 (Building No. 2) Tentative Parcel Map (TPM) No. 22-030R1 (Building No. 2), Design Review No. 22-062R1 (Building No. 3), Tentative Parcel Map (TPM) No. 22-031R1 (Building No. 3), General Plan Amendment (GPA) No. 23-004, Zone District Map

Amendment Application (ZCA) No. 23-006, and Specific Plan Amendment No. 23-004 (collectively, the "Project").

WHEREAS, this Agreement and the Project are consistent with the CITY's Comprehensive General Plan and any Specific Plan applicable thereto; and

WHEREAS, all actions taken and approvals given by CITY have been duly taken or approved in accordance with all applicable legal requirements for notice, public hearings, findings, votes, and other procedural matters; and

WHEREAS, development of the Property in accordance with this Agreement will provide substantial benefits to CITY and will further important policies and goals of CITY; and

WHEREAS, this Agreement will eliminate uncertainty in planning and provide for the orderly development of the Property, ensure progressive installation of necessary improvements, provide for public services appropriate to the development of the Project, and generally serve the purposes for which development agreements under Sections 65864 et seq of the Government Code are intended; and

WHEREAS, OWNER has incurred and will in the future incur substantial costs in excess of the generally applicable requirements in order to assure vesting of legal rights to develop the Property in accordance with this Agreement.

COVENANTS

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS AND EXHIBITS.

1.1 Definitions. The following terms when used in this Agreement shall be defined as follows:

1.1.1 "Agreement" means this Development Agreement.

1.1.2 "CITY" means the City of Fontana, a municipal corporation, organized and existing pursuant to the laws of the State of California.

1.1.3 "Development" means the improvement of the Property for the purposes of completing the structures, improvements and facilities comprising the Project including, but not limited to: grading; the construction of infrastructure and public facilities related to the Project whether located within or outside the Property; the construction of buildings and structures; and the installation of landscaping. "Development" does not include the

maintenance, repair, reconstruction or redevelopment of any building, structure, improvement or facility after the construction and completion thereof.

1.1.4 “Development Approvals” means all permits and other entitlements for use subject to approval or issuance by CITY in connection with development of the Property including, but not limited to:

- (a) conditional use permits and design review permits;
- (b) tentative parcel maps;
- (c) General Plan and Zoning Code amendments; and,
- (d) grading, encroachment and building permits.

1.1.5 “Development Exaction” means any requirement of CITY in connection with or pursuant to any Land Use Regulation or Development Approval for the dedication of land, the construction of improvements or public facilities, or the payment of fees in order to lessen, offset, mitigate or compensate for the impacts of development on the environment or other public interests.

1.1.6 “Development Impact Fee” means a monetary exaction other than a tax or special assessment, whether characterized as a fee or a tax and whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include park “in lieu” fees specified in Government Code Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 of the Government Code (commencing with Section 65864) of Chapter 4, or fees collected pursuant to agreements with redevelopment agencies which provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code).

1.1.7 “Development Plan” means the Existing Development Approvals and the Existing Land Use Regulations, as those terms are defined herein, applicable to development of the Property.

1.1.8 “Effective Date” means the date the ordinance approving this Agreement becomes effective.

1.1.9 “Existing Development Approvals” means all Development Approvals approved or issued prior to the Effective Date.

1.1.10 “Existing Land Use Regulations” means all Land Use Regulations in effect on the Effective Date.

1.1.11 “Land Use Regulations” means all ordinances, resolutions, codes, rules, regulations and official policies of CITY governing the development and use of land, including, without limitation, the permitted use of land, the density or intensity of use, subdivision requirements, timing and phasing of development, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement and construction standards and specifications applicable to the development of the Property. “Land Use Regulations” does not include any CITY ordinance, resolution, code, rule, regulation or official policy, governing:

- (a) the conduct of businesses, professions, and occupations;
- (b) taxes and assessments;
- (c) the control and abatement of nuisances;
- (d) the granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property;
- (e) the exercise of the power of eminent domain.

1.1.12 “Mortgagee” means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device lender, and their successors and assigns.

1.1.13 “OWNER” means the persons and entities listed as OWNER on page 1 of this Agreement and their successors in interest to all or any part of the Property.

1.1.14 “Project” means the development of the Property contemplated by the Development Plan as such Plan may be further defined, enhanced or modified pursuant to the provisions of this Agreement.

1.1.15 “Property” means the real property described on Exhibit “A” as shown on to this Agreement.

1.1.16 “Public Benefit Fee” means the one-time public benefit fee described in Section 4.3 of this Agreement.

1.1.17 “Reservations of Authority” means the rights and authority excepted from the assurances and rights provided to OWNER under this Agreement and reserved to CITY under Section 3.6 of this Agreement.

1.1.18 “Subsequent Development Approvals” means all Development Approvals required subsequent to the Effective Date in connection with development of the Property.

1.1.19 “Subsequent Land Use Regulations” means any Land Use Regulations adopted and effective after the Effective Date of this Agreement.

1.2 Exhibits. The following documents are attached to, and by this reference made a part of, this Agreement:

Exhibit “A” — Legal Description of all three Properties.

Exhibit “B” — Map showing Property and its location.

Exhibit “C” - Map showing location of the Pump Track, Mountain Bike Trails, and Operation Facility

Exhibit “D” – Map Showing location of the Race Track

2. GENERAL PROVISIONS.

2.1 Binding Effect of Agreement. The Property is hereby made subject to this Agreement. Development of the Property is hereby authorized and shall be carried out only in accordance with the terms of this Agreement.

2.2 Ownership of Property. OWNER represents and covenants that it is the legal or equitable owner of the fee simple title to the Property or a portion thereof.

2.3 Term. The initial term of this Agreement shall commence on the Effective Date and shall continue for a period of ten (10) years thereafter unless this term is modified or extended pursuant to the provisions of this Agreement. Notwithstanding the foregoing, the term of this Development Agreement may be extended for an additional five (5) years following expiration of the initial term, provided the following have occurred:

- (a) OWNER provides at least ninety (90) days written notice to CITY prior to the expiration of the initial term; and
- (b) OWNER shall have obtained building permits for at least sixty-seven percent (67%) of the gross area of the industrial building(s) contemplated by the Project; and
- (c) OWNER is not then in uncured default of this Agreement.

The initial term and, if and upon extension, the 5-year extension, shall sometimes be referred to herein collectively as the “Term.”

The term of this Agreement shall not be considered to run and shall toll for any period in which the Project is being challenged or litigated by a third-party.

2.4 Assignment.

Exhibit A

2.4.1 Right to Assign. OWNER shall have the right to sell, transfer or assign the Property in whole or in part (provided that no such partial transfer shall violate the Subdivision Map Act, Government Code Section 66410 et seq., to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement; provided, however, that any such sale, transfer or assignment shall include the assignment and assumption of the rights, duties and obligations arising under or from this Agreement and be made in strict compliance with the following conditions precedent:

(a) No sale, transfer or assignment of any right or interest under this Agreement shall be made unless made together with the sale, transfer or assignment of all or a part of the Property.

(b) Concurrent with any such sale, transfer or assignment, or within fifteen (15) business days thereafter, OWNER shall notify CITY, in writing, of such sale, transfer or assignment and shall provide CITY with an executed agreement, in a form substantially similar to that attached hereto as Exhibit "A" which has been deemed reasonably acceptable to CITY, by the purchaser, transferee or assignee and providing therein that the purchaser, transferee or assignee expressly and unconditionally assumes all the duties and obligations of OWNER under this Agreement.

(c) Any sale, transfer or assignment not made in strict compliance with the foregoing conditions shall constitute a default by OWNER under this Agreement. Notwithstanding the failure of any purchaser, transferee or assignee to execute the agreement required by Paragraph (b) of this Subsection 2.4.1, the burdens of this Agreement shall be binding upon such purchaser, transferee or assignee, but the benefits of this Agreement shall not inure to such purchaser, transferee or assignee until and unless such agreement is executed.

2.4.2 Release of Transferring Owner. Notwithstanding any sale, transfer or assignment, a transferring owner shall continue to be obligated under this Agreement unless such transferring owner is given a release in writing by CITY, which release shall be provided by CITY upon the full satisfaction by such transferring owner of the following conditions:

(a) OWNER no longer has a legal or equitable interest in all or any part of the Property.

(b) OWNER is not then in default under this Agreement.

(c) OWNER has provided CITY with the notice and executed agreement required under Paragraph (b) of Subsection 2.4.1 above.

(d) The purchaser, transferee or assignee provides CITY with security equivalent to any security previously provided by OWNER to secure performance of its obligations hereunder.

2.4.3 Subsequent Assignment. Any subsequent sale, transfer or assignment after an initial sale, transfer or assignment shall be made only in accordance with and subject to the terms and conditions of this Section.

2.4.4 Partial Release of Purchaser, Transferee or Assignee of Industrial or Commercial Lot. A purchaser, transferee or assignee of a lot, which has been finally subdivided as provided for in the Development Plan and for which a commercial or industrial plot plan for development of the lot has been finally approved pursuant to the Development Plan, may submit a request, in writing, to CITY to release said lot from the obligations under this Agreement relating to all other portions of the property. Within thirty (30) days of such request, CITY shall review, and if the above conditions are satisfied shall approve the request for release and notify the purchaser, transferee or assignee in writing thereof. No such release approved pursuant to this Subsection 2.4.4 shall cause, or otherwise affect, a release of OWNER from its duties and obligations under this Agreement.

2.4.5 Termination of Agreement With Respect to Individual Lots Upon Sale to Public and Completion of Construction. The provisions of Subsection 2.4.1 shall not apply to the sale or lease (for a period longer than one year) of any lot which has been finally subdivided and is individually (and not in "bulk") sold or leased to a member of the public or other ultimate user. Notwithstanding any other provisions of this Agreement, this Agreement shall terminate with respect to any lot and such lot shall be released and no longer be subject to this Agreement without the execution or recordation of any further document upon satisfaction of both of the following conditions:

(a) The lot has been finally subdivided and individually (and not in "bulk") sold or leased (for a period longer than one year) to a member of the public or other ultimate user; and,

(b) A certificate of occupancy or temporary certificate of occupancy has been issued for a building on the lot, and the fees set forth under Section 4 of this Agreement have been paid.

2.5 Amendment or Cancellation of Agreement. This Agreement may be amended or canceled in whole or in part only by written consent of all parties in the manner provided for in Government Code Section 65868 and the Development Agreement Policies. This provision shall not limit any remedy of CITY or OWNER as provided by this Agreement. Any amendment of this Agreement which has been requested by OWNER shall only be processed and considered by the CITY upon the payment of the applicable processing charge.

2.6 Termination. This Agreement shall be deemed terminated and of no further effect upon the occurrence of any of the following events:

2.3. (a) Expiration of the stated term of this Agreement as set forth in Section

(b) Entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement.

(c) The adoption of a referendum measure overriding or repealing the ordinance approving this Agreement.

(d) Completion of the Project in accordance with the terms of this Agreement including issuance of all required occupancy permits and acceptance by CITY or applicable public agency of all required dedications.

(e) Termination of this Agreement based on any default of OWNER and following the termination proceedings required by the Development Agreement Policies.

Termination of this Agreement shall not constitute termination of any other land use entitlements approved for the Property. Upon the termination of this Agreement, no party shall have any further right or obligation hereunder except with respect to any obligation to have been performed prior to such termination or with respect to any default in the performance of the provisions of this Agreement which has occurred prior to such termination or with respect to any obligations which are specifically set forth as surviving this Agreement. Upon such termination, any public facilities and services mitigation fees paid pursuant to Section 4.2 of this Agreement by OWNER to CITY buildings on which construction has not yet begun shall be refunded to OWNER by CITY.

2.7 Notices.

(a) As used in this Agreement, "notice" includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder.

(b) All notices shall be in writing and shall be considered given either: (i) when delivered in person to the recipient named below; or (ii) on the date of delivery shown on the return receipt, after deposit in the United States mail in a sealed envelope as either registered or certified mail with return receipt requested, and postage and postal charges prepaid, and addressed to the recipient named below; or (iii) on the date of delivery shown in the records of the telegraph company after transmission by telegraph to the recipient named below. All notices shall be addressed as follows:

If to CITY:

City of Fontana
8353 Sierra Avenue
Fontana, CA 92335
Attn: City Manager
Telephone: (909) 350-7600

Copy to:

Best, Best & Krieger, LLP
2855 E Guasti Road
Ontario, CA 91761
Attn: City Attorney
Telephone: (909) 989-8584
Facsimile: (909) 944-1441

If to OWNER:

Acacia Real Estate Group, Inc.
Attn: David B. Pittman
260 Newport Center Drive, Suite 100
Newport Beach, CA 92660
Telephone: (714) 270-0777

Copy to:

Freeman, Freeman, Smiley
Attn: Jon S. Grizel
5 Park Plaza, Suite No. 650
Irvine, CA 92614
Telephone: (949) 252-2715

(c) Either party may, by notice given at any time, require subsequent notices to be given to another person or entity, whether a party or an officer or representative of a party, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

3. DEVELOPMENT OF THE PROPERTY.

3.1 Rights to Develop. Subject to the terms of this Agreement including the Reservations of Authority, OWNER shall have a vested right to develop the Property in accordance with, and to the extent of, the Development Plan. The Project shall remain subject to all Subsequent Development Approvals required to complete the Project as contemplated by the Development Plan. Except as otherwise provided in this Agreement, the permitted uses of the Property, the density and intensity of use, the maximum height and size of proposed buildings, and provisions for reservation and dedication of land for public purposes shall be those set forth in the Development Plan.

3.2 Effect of Agreement on Land Use Regulations. Except as otherwise provided under the terms of this Agreement including the Reservations of Authority, the rules, regulations and official policies governing permitted uses of the Property, the density and intensity of use of the Property, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications

applicable to development of the Property shall be the Existing Land Use Regulations. In connection with any Subsequent Development Approval, CITY shall exercise its discretion in accordance with the Development Plan, and as provided by this Agreement including, but not limited to, the Reservations of Authority. CITY shall accept for processing, review and action all applications for Subsequent Development Approvals, and such applications shall be processed in the normal manner for processing such matters.

3.3 Timing of Development. The parties acknowledge that OWNER cannot at this time predict when or the rate at which phases of the Property will be developed. Such decisions depend upon numerous factors which are not within the control of OWNER, such as market orientation and demand, interest rates, absorption, completion and other similar factors. Since the California Supreme Court held in Pardee Construction Co. v. City of Camarillo, (1984) 37 Cal.3d 465, that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the parties' intent to cure that deficiency by acknowledging and providing that OWNER shall have the right to develop the Property in such order and at such rate and at such times as OWNER deems appropriate within the exercise of its subjective business judgment, subject only to any timing or phasing requirements set forth in the Development Plan or the Phasing Plan set forth in Section 3.4. Notwithstanding anything to the contrary set forth in this Section 3.3 or in this Agreement, City acknowledges that OWNER shall have no obligation to construct the Project and that OWNER shall not be subject to any penalty nor shall City be entitled to any legal or equitable remedy, including, without limitation, a claim for specific performance of this Agreement, if OWNER determines not to construct the Project for any reason.

3.4 Phasing Plan. Development of the Property shall be subject to all timing and phasing requirements established by the Development Plan.

3.5 Changes and Amendments. The parties acknowledge that refinement and further development of the Project will require Subsequent Development Approvals and may demonstrate that changes are appropriate and mutually desirable in the Existing Development Approvals. In the event OWNER finds that a change in the Existing Development Approvals is necessary or appropriate, OWNER shall apply for a Subsequent Development Approval to effectuate such change and CITY shall process and act on such application in accordance with the Existing Land Use Regulations, except as otherwise provided by this Agreement including the Reservations of Authority. If approved, any such change in the Existing Development Approvals shall be incorporated herein as Exhibit "E", and may be further changed from time to time as provided in this Section. Unless otherwise required by law, as determined in CITY's reasonable discretion, a change to the Existing Development Approvals shall be deemed "minor" and not require an amendment to this Agreement provided such change does not:

- (a) Alter the permitted uses of the Property as a whole; or,

- or,
- (b) Increase the density or intensity of use of the Property as a whole;
 - (c) Increase the maximum height and size of permitted buildings; or,
 - (d) Delete a requirement for the reservation or dedication of land for public purposes within the Property as a whole; or,
 - (e) Constitute a project requiring a subsequent or supplemental environmental impact report pursuant to Section 21166 of the Public Resources Code.

3.6 Reservations of Authority.

3.6.1 Limitations, Reservations and Exceptions. Notwithstanding any other provision of this Agreement, the following Subsequent Land Use Regulations shall apply to the development of the Property.

(a) Processing fees and charges of every kind and nature imposed by CITY to cover the estimated actual costs to CITY of processing applications for Development Approvals or for monitoring compliance with any Development Approvals granted or issued.

(b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure.

(c) Regulations, policies, and rules governing construction standards and specifications including, without limitation, the CITY's Building Code, Plumbing Code, Mechanical Code, Electrical Code, Fire Code and Grading Code.

(d) Regulations imposing Development Exactions; provided, however, that no such subsequently adopted Development Exaction shall be applicable to development of the Property unless such Development Exaction is applied uniformly to development, either throughout the CITY or within a defined area of benefit which includes the Property. No such subsequently adopted Development Exaction shall apply if its application to the Property would physically prevent development of the Property for the uses and to the density or intensity of development set forth in the Development Plan. In the event any such subsequently adopted Development Exaction fulfills the same purposes, in whole or in part, as the fees set forth in Section 4 of this Agreement, CITY shall allow a credit against such subsequently adopted Development Exaction for the fees paid under Section 4 of this Agreement to the extent such fees fulfill the same purposes.

(e) Regulations which may be in conflict with the Development Plan but which are reasonably necessary to protect the public health and safety. To the extent possible, any such regulations shall be applied and construed so as to provide OWNER with the rights and assurances provided under this Agreement.

(f) Regulations which are not in conflict with the Development Plan. Any regulation, whether adopted by initiative or otherwise, limiting the rate or timing of development of the Property shall be deemed to conflict with the Development Plan and shall therefore not be applicable to the development of the Property.

3.6.2 Subsequent Development Approvals. This Agreement shall not prevent CITY, in acting on Subsequent Development Approvals, from applying Subsequent Land Use Regulations which do not conflict with the Development Plan, nor shall this Agreement prevent CITY from denying or conditionally approving any Subsequent Development Approval on the basis of the Existing Land Use Regulations or any Subsequent Land Use Regulation not in conflict with the Development Plan.

3.6.3 Modification or Suspension by State or Federal Law. In the event that State or Federal laws or regulations, enacted after the Effective Date of this Agreement, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations, provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce. In the event OWNER alleges that such State or Federal laws or regulations preclude or prevent compliance with one or more provisions of this Agreement, and the CITY does not agree, the OWNER may, at its sole cost and expense, seek declaratory relief (or other similar non-monetary remedies); provided however, that nothing contained in this Section 3.6.3 shall impose on CITY any monetary liability for contesting such declaratory relief (or other similar non-monetary relief).

3.6.4 Intent. The parties acknowledge and agree that CITY is restricted in its authority to limit its police power by contract and that the foregoing limitations, reservations and exceptions are intended to reserve to CITY all of its police power which cannot be so limited. This Agreement shall be construed, contrary to its stated terms if necessary, to reserve to CITY all such power and authority which cannot be restricted by contract.

3.7 Public Works. If OWNER is required by this Agreement to construct any public works facilities which will be dedicated to CITY or any other public agency upon completion, and if required by applicable laws to do so, OWNER shall perform such work in the same manner and subject to the same requirements as would be applicable to CITY or such other public agency should it have undertaken such construction.

3.8 Provision of Real Property Interests by CITY. In any instance where OWNER is required to construct any public improvement on land not owned by OWNER, OWNER shall at its sole cost and expense provide or cause to be provided, the real property interests necessary for the construction of such public improvements. In the event OWNER is unable, after exercising reasonable efforts, including, but not limited to,

the rights under Sections 1001 and 1002 of the Civil Code, to acquire the real property interests necessary for the construction of such public improvements, and if so instructed by OWNER and upon OWNER'S provision of adequate security for costs CITY may reasonably incur, CITY shall negotiate the purchase of the necessary real property interests to allow OWNER to construct the public improvements as required by this Agreement and, if necessary, in accordance with the procedures established by law, use its power of eminent domain to acquire such required real property interests. OWNER shall pay all costs associated with such acquisition or condemnation proceedings. This section 3.8 is not intended by the parties to impose upon the OWNER an enforceable duty to acquire land or construct any public improvements on land not owned by OWNER, except to the extent that the OWNER elects to proceed with the development of the Project, and then only in accordance with valid conditions imposed by the CITY upon the development of the Project under the Subdivision Map Act or other legal authority.

3.9 Regulation by Other Public Agencies. It is acknowledged by the parties that other public agencies not within the control of CITY possess authority to regulate aspects of the development of the Property separately from or jointly with CITY and this Agreement does not limit the authority of such other public agencies. CITY agrees to cooperate fully, at no cost to CITY, with OWNER in obtaining any required permits or compliance with the regulations of other public agencies provided such cooperation is not in conflict with any laws, regulations or policies of the CITY.

3.10 Tentative Parcel Map Extension. Notwithstanding the provisions of Section 66452.6 of the Government Code, no tentative subdivision map or tentative parcel map, heretofore or hereafter approved in connection with development of the Property, shall be granted an extension of time except in accordance with the Existing Land Use Regulations.

3.11 Vesting Tentative Maps. If any tentative or final subdivision map, or tentative or final parcel map, heretofore or hereafter approved in connection with development of the Property, is a vesting map under the Subdivision Map Act (Government Code Section 66410 et seq.) and if this Agreement is determined by a final judgment to be invalid or unenforceable insofar as it grants a vested right to develop to OWNER, then and to that extent the rights and protections afforded OWNER under the laws and ordinances applicable to vesting maps shall supersede the provisions of this Agreement. Except as set forth immediately above, development of the Property shall occur only as provided in this Agreement, and the provisions in this Agreement shall be controlling over any conflicting provision of law or ordinance concerning vesting maps.

3.12 Utilities. The Project shall be connected to all utilities necessary to provide adequate water, sewer, gas, electric, and other utility service to the Project. OWNER shall contract with the CITY for CITY-owned or operated utilities serving the Project for such prices and on such terms as may be mutually agreed to between the parties.

4. PUBLIC BENEFITS.

4.1 Intent. The parties acknowledge and agree that development of the Property will result in substantial public needs which will not be fully met by the Development Plan and further acknowledge and agree that this Agreement confers substantial private benefits on OWNER which should be balanced by commensurate public benefits. Accordingly, the parties intend to provide consideration to the public to balance the private benefits conferred on OWNER by providing more fully for the satisfaction of the public needs resulting from the Project.

4.2 Development Impact Fees.

4.2.1 Amount and Components of Fee(s). Development Impact Fees (DIF) shall be paid by OWNER. The DIF amounts to be paid by OWNER shall be the amounts that are in effect at the time such amounts are due. Nothing contained in this Agreement shall affect the ability of the CITY to impose new DIF or amend the amounts of existing DIF. Additionally, nothing contained in this Agreement shall affect the ability of other public agencies that are not controlled by CITY to impose and amend, from time to time, DIF established or imposed by such other public agencies, even though such DIF may be collected by CITY.

4.2.2 Time of Payment. The fees required pursuant to Subsection 4.2.1 shall be paid to CITY prior to the issuance of building permits. No fees shall be payable for building permits issued prior to the Effective Date of this Agreement, but the fees required pursuant to Subsection 4.2.1 shall be paid prior to the re-issuance or extension of any building permit for which such fees have not previously been paid.

4.2.3 Credits. OWNER shall be entitled to credit against the fees required pursuant to Subsection 4.2.1 for the dedication of land, the construction of improvements or the payment of fees.

4.3 Public Benefit Fee. Prior to the issuance of the Building Permit for any building within the Property, as consideration for the privileges conferred by this Agreement, OWNER shall pay to the City a one-time public benefit fee totaling \$3,192,624.00.

4.4 Martin Tudor Regional Park Action Sports Park. Prior to the issuance of the first Certificate of Occupancy for a building to be constructed within the Property, as consideration for the privileges conferred by this Agreement, OWNER shall remit payment of an additional One Million Five Hundred Thousand Dollars (\$1,500,000.00) to fund the City's design and construction of an Action Sports Park, as defined in Section 4.4(a) below, at Martin Tudor Regional Park.

- a. The Action Sports Park shall include, but may not be limited to, three primary components: 1) a pump track, 2) a mountain bike jump course track, and 3) a Remote-Control ("RC") car racetrack.
 - i. The pump track and the mountain bike jump course track (collectively, the "Bike Tracks") shall be located in the areas depicted on Exhibit "C", attached hereto and incorporated herein by reference.
 - 1. The Bike Tracks shall each occupy an area consisting of not less than 20,000 square feet in total track area.
 - 2. The Bike Tracks shall be fully enclosed by fencing designed to control access to the Bike Tracks.
 - 3. A building consisting of not less than 2,000 square feet for the operation and control of the entry to Bike Tracks shall be included in the design and shall be located in close proximity to the entry to the Bike Tracks. The building shall include connections to permanent utilities which includes a sanitary septic system, water, electricity, phone and internet.
 - 4. Not less than two restrooms shall be included in the design, which shall be located in close proximity to the Bike Track entry.
 - a. Restrooms must be connected to permanent electricity, water and sanitary septic system.
 - i. Temporary restrooms are not an acceptable alternative.
 - b. Restrooms shall be capable of being locked when not in service.
 - 5. Shaded Bleachers or other shaded seating options allowing for not less than 30 observers shall be included.
 - 6. Security cameras shall be installed providing video surveillance opportunities for the Bike Track and operational building area. Camera system design and components shall be subject to review and approval of the Fontana Police Department.
 - 7. Bike Tracks shall be designed and constructed as continuous lap tracks.
 - 8. Pump Track riding surface shall be constructed with concrete, asphaltic concrete, or other comparable material, subject to review and approval of the Community Services Department
 - ii. The RC car racetrack shall occupy an area consisting of not less than 10,000 square feet and shall be located in the area depicted on Exhibit "D", attached hereto and incorporated herein by reference.
 - 1. A raised platform for use by the RC car operators, not more than 36" in total height, shall be required.
 - a. Raised platform shall meet appropriate ADA standards for access.

- b. Raised platform shall include appropriate features for shading of the platform.
- 2. RC racetrack shall be designed and constructed as a continuous lap track.
- 3. Shaded Bleachers capable of seating not less than 20 observers shall be included in close proximity to the RC racetrack.

5. FINANCING OF PUBLIC IMPROVEMENTS.

If deemed appropriate, CITY and OWNER will cooperate in the formation of any special assessment district, community facilities district or alternate financing mechanism to pay for the construction and/or maintenance and operation of public infrastructure facilities required as part of the Development Plan. CITY also agrees that, to the extent any such district or other financing entity is formed and sells bonds in order to finance such reimbursements, OWNER may be reimbursed to the extent that OWNER spends funds or dedicates land for the establishment of public facilities. Notwithstanding the foregoing, it is acknowledged and agreed by the parties that nothing contained in this Agreement shall be construed as requiring CITY or the City Council to form any such district or to issue and sell bonds.

6. REVIEW FOR COMPLIANCE.

6.1 Periodic Review. The Planning Director shall review this Agreement annually, on or before the anniversary of the Effective Date, in order to ascertain the good faith compliance by OWNER with the terms of the Agreement. OWNER shall submit an Annual Monitoring Report, in a form acceptable to the Planning Director, within 30 days after written notice from the Planning Director. The Annual Monitoring Report shall be accompanied by an annual review and administration fee sufficient to defray the estimated costs of review and administration of the Agreement during the succeeding year. The amount of the annual review and administration fee shall be set annually or as deemed necessary by resolution of the City Council.

6.2 Special Review. The City Council may order a special review of compliance with this Agreement at any time. The Planning Director shall conduct such special reviews.

6.3 Procedure.

(a) During either a periodic review or a special review, OWNER shall be required to demonstrate good faith compliance with the terms of the Agreement. The burden of proof on this issue shall be on OWNER.

(b) Upon completion of a periodic review or a special review, the Planning Director shall submit a report to the City Council setting forth the evidence

concerning good faith compliance by OWNER with the terms of this Agreement and his or her recommended finding on that issue.

(c) If the City Council finds on the basis of substantial evidence that OWNER has complied in good faith with the terms and conditions of this Agreement, the review shall be concluded.

(d) If the City Council makes a preliminary finding that OWNER has not complied in good faith with the terms and conditions of this Agreement, the Council may modify or terminate this Agreement as provided in Section 6.4 and Section 6.5. Notice of default as provided under Section 7.4 of this Agreement shall be given to OWNER prior to or concurrent with, proceedings under Section 6.4 and Section 6.5.

6.4 Proceedings Upon Modification or Termination. If, upon a finding under Section 6.3, CITY determines to proceed with modification or termination of this Agreement, CITY shall give written notice to OWNER of its intention so to do. The notice shall be given at least ten calendar days prior to the scheduled hearing and shall contain:

(a) The time and place of the hearing;

(b) A statement as to whether or not CITY proposes to terminate or to modify the Agreement; and,

(c) Such other information as is reasonably necessary to inform OWNER of the nature of the proceeding.

6.5 Hearing on Modification or Termination. At the time and place set for the hearing on modification or termination, OWNER shall be given an opportunity to be heard. OWNER shall be required to demonstrate good faith compliance with the terms and conditions of this Agreement. The burden of proof on this issue shall be on OWNER. If the City Council finds, based upon substantial evidence, that OWNER has not complied in good faith with the terms or conditions of the Agreement, the City Council may terminate this Agreement or modify this Agreement to impose such conditions as are reasonably necessary to obtain compliance with the terms of this Agreement. . The decision of the City Council shall be final, subject only to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure.

6.6 Certificate of Agreement Compliance. If, at the conclusion of a Periodic or Special Review, OWNER is found to be in compliance with this Agreement, CITY shall, upon written request by OWNER, issue a Certificate of Agreement Compliance ("Certificate") to OWNER stating that after the most recent Periodic or Special Review and based upon the information known or made known to the Planning Director and City Council that (1) this Agreement remains in effect and (2) OWNER is not in default. The Certificate shall be in recordable form, shall contain information necessary to communicate constructive record notice of the finding of compliance, shall state whether the Certificate is issued after a Periodic or Special Review and shall state the anticipated

date of commencement of the next Periodic Review. OWNER may record the Certificate with the County Recorder.

Whether or not the Certificate is relied upon by assignees or other transferees or OWNER, CITY shall not be bound by a Certificate if a default existed at the time of the Periodic or Special Review, but was concealed from or otherwise not known to the Planning Director or City Council.

7. DEFAULT AND REMEDIES.

7.1 Remedies in General. It is acknowledged by the parties that CITY would not have entered into this Agreement if it were to be liable in damages under this Agreement, or with respect to this Agreement or the application thereof.

In general, each of the parties hereto may pursue any remedy at law or equity available for the breach of any provision of this Agreement, except that CITY shall not be liable in damages to OWNER, or to any successor in interest of OWNER, or to any other person, and OWNER covenants not to sue for damages or claim any damages:

(a) For any breach of this Agreement or for any cause of action which arises out of this Agreement; or

(b) For the taking, impairment or restriction of any right or interest conveyed or provided under or pursuant to this Agreement; or

(c) Arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement.

7.2 Specific Performance. Except as set forth in Section 3.3, above, the parties acknowledge that money damages and remedies at law generally are inadequate and specific performance and other non-monetary relief are particularly appropriate remedies for the enforcement of this Agreement and should be available to all parties for the following reasons:

(a) Money damages are unavailable against CITY as provided in Section 7.1 above.

(b) Due to the size, nature and scope of the project, it may not be practical or possible to restore the Property to its natural condition once implementation of this Agreement has begun. After such implementation, OWNER may be foreclosed from other choices it may have had to utilize the Property or portions thereof. OWNER has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement, and it is not possible to determine the sum of money which would adequately compensate OWNER for such efforts.

7.3 Release. Except for non-damage remedies, including the remedy of specific performance and judicial review as provided for in Section 6.5, OWNER, for itself, its successors and assignees, hereby releases the CITY, its officers, agents and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth Amendment of the United States Constitution, or any other law or ordinance which seeks to impose any other liability or damage, whatsoever, upon the CITY because it entered into this Agreement or because of the terms of this Agreement.

7.4 Termination or Modification of Agreement for Default of OWNER. Subject to the provisions contained in Subsection 6.5 herein, CITY may terminate or modify this Agreement for any failure of OWNER to perform any material duty or obligation of OWNER under this Agreement, or to comply in good faith with the terms of this Agreement (hereinafter referred to as "default"); provided, however, CITY may terminate or modify this Agreement pursuant to this Section only after providing written notice to OWNER of default setting forth the nature of the default and the actions, if any, required by OWNER to cure such default and, where the default can be cured, OWNER has failed to take such actions and cure such default within 60 days after the effective date of such notice or, in the event that such default cannot be cured within such 60 day period but can be cured within a longer time, has failed to commence the actions necessary to cure such default within such 60 day period and to diligently proceed to complete such actions and cure such default.

7.5 Termination of Agreement for Default of CITY. OWNER may terminate this Agreement only in the event of a default by CITY in the performance of a material term of this Agreement and only after providing written notice to CITY of default setting forth the nature of the default and the actions, if any, required by CITY to cure such default and, where the default can be cured, CITY has failed to take such actions and cure such default within 60 days after the effective date of such notice or, in the event that such default cannot be cured within such 60 day period but can be cured within a longer time, has failed to commence the actions necessary to cure such default within such 60 day period and to diligently proceed to complete such actions and cure such default.

8. THIRD PARTY LITIGATION.

8.1 General Plan Litigation. CITY has determined that this Agreement is consistent with its Comprehensive General Plan, as such General Plan existed as of the Effective Date of this Agreement ("General Plan"), and that the General Plan meets all requirements of law. OWNER has reviewed the General Plan and concurs with CITY's determination.

CITY shall have no liability in damages under this Agreement for any failure of CITY to perform under this Agreement or the inability of OWNER to develop the Property as contemplated by the Development Plan of this Agreement as the result of a judicial

determination that on the Effective Date, or at any time thereafter, the General Plan, or portions thereof, are invalid or inadequate or not in compliance with law.

8.2 Third Party Litigation Concerning Agreement. OWNER shall defend, at its expense, including reasonable attorneys' fees, indemnify, and hold harmless CITY, its agents, officers and employees from any claim, action or proceeding against CITY, its agents, officers, or employees to attack, set aside, void, or annul the approval of this Agreement or the approval of any permit granted pursuant to this Agreement. CITY shall promptly notify OWNER of any such claim, action or proceeding, and CITY shall cooperate in the defense. If CITY fails to promptly notify OWNER of any such claim, action or proceeding, or if CITY fails to cooperate in the defense, OWNER shall not thereafter be responsible to defend, indemnify, or hold harmless CITY. CITY may in its discretion participate in the defense of any such claim, action or proceeding.

8.3 Indemnity. In addition to the provisions of 8.2 above, OWNER shall indemnify and hold CITY, its officers, agents, employees and independent contractors free and harmless from any liability whatsoever, based or asserted upon any act or omission of OWNER, its officers, agents, employees, subcontractors and independent contractors, for property damage, bodily injury, or death (OWNER's employees included) or any other element of damage of any kind or nature, relating to or in any way connected with or arising from the activities contemplated hereunder, including, but not limited to, the study, design, engineering, construction, completion, failure and conveyance of the public improvements, save and except claims for damages arising through the sole active negligence or sole willful misconduct of CITY. OWNER shall defend, at its expense, including reasonable attorneys' fees, CITY, its officers, agents, employees and independent contractors in any legal action based upon such alleged acts or omissions. CITY may in its discretion participate in the defense of any such legal action.

8.4 Environmental Assurances. OWNER shall indemnify and hold CITY, its officers, agents, and employees free and harmless from any liability, based or asserted, upon any act or omission of OWNER, its officers, agents, employees, subcontractors, and independent contractors for any violation of any federal, state or local law, ordinance or regulation relating to industrial hygiene or to environmental conditions on, under or about the Property, including, but not limited to, soil and groundwater conditions, and OWNER shall defend, at its expense, including reasonable attorneys' fees, CITY, its officers, agents and employees in any action based or asserted upon any such alleged act or omission. CITY may in its discretion participate in the defense of any such action.

8.5 Reservation of Rights. With respect to Sections 8.2, 8.3 and 8.4 herein, CITY reserves the right to either (1) approve the attorney(s) which OWNER selects, hires or otherwise engages to defend CITY hereunder, which approval shall not be unreasonably withheld, or (2) conduct its own defense, provided, however, that OWNER shall reimburse CITY forthwith for any and all reasonable expenses incurred for such defense, including reasonable attorneys' fees, upon billing and accounting therefor.

8.6 Survival. The provisions of this Sections 8.1 through 8.6, inclusive, shall survive the termination of this Agreement.

9. MORTGAGEE PROTECTION.

9.1 The parties hereto agree that this Agreement shall not prevent or limit OWNER, in any manner, at OWNER's sole discretion, from encumbering the Property or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Property. CITY acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with OWNER and representatives of such lenders to negotiate in good faith any such request for interpretation or modification. CITY will not unreasonably withhold its consent to any such requested interpretation or modification provided such interpretation or modification is consistent with the intent and purposes of this Agreement. Any Mortgagee of the Property shall be entitled to the following rights and privileges:

(a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Property made in good faith and for value, unless otherwise required by law.

(b) The Mortgagee of any mortgage or deed of trust encumbering the Property, or any part thereof, which Mortgagee, has submitted a request in writing to the CITY in the manner specified herein for giving notices, shall be entitled to receive written notification from CITY of any default by OWNER in the performance of OWNER's obligations under this Agreement.

(c) If CITY timely receives a request from a Mortgagee requesting a copy of any notice of default given to OWNER under the terms of this Agreement, CITY shall provide a copy of that notice to the Mortgagee within ten (10) days of sending the notice of default to OWNER. The Mortgagee shall have the right, but not the obligation, to cure the default during the remaining cure period allowed such party under this Agreement.

(d) Any Mortgagee who comes into possession of the Property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Property, or part thereof, subject to the terms of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, no Mortgagee shall have an obligation or duty under this Agreement to perform any of OWNER's obligations or other affirmative covenants of OWNER hereunder, or to guarantee such performance; provided, however, that to the extent that any covenant to be performed by OWNER is a condition precedent to the performance of a covenant by CITY, the performance thereof shall continue to be a condition precedent to CITY's performance hereunder, and further provided that any sale, transfer or assignment by any Mortgagee in possession shall be subject to the provisions of Section 2.4 of this Agreement.

9.2. **Deposit of Legal Defense Costs.** In the event of any litigation or legal challenge filed against City as described in this Section 9, then within twenty (20) calendar days following written demand by City therefor, Owner shall deposit with City funds into a deposit account maintained by City ("Fund") to reimburse City for City's costs and expenses, including without limitation attorney's fees, ultimately incurred by City to defend any such claim, action, or proceeding. The initial deposit shall be the sum of fifty thousand dollars (\$50,000). The Fund, once established, shall at all times contain an amount necessary to cover not less than three (3) months of budgeted or anticipated expenditures by City relating to City's defense of such claim, action, or proceeding, including any and all appeals from decisions related thereto, as such budgeted or anticipated expenditures are determined by City in its sole and absolute discretion. For such purposes, City may from time to time, in City's sole and absolute discretion, make written demand upon Owner for deposit of additional funds by Owner into the Fund, in which event Owner shall deposit such additional funds into the Fund within twenty (20) calendar days following written demand by City.

10. MISCELLANEOUS PROVISIONS.

10.1 Recordation of Agreement. This Agreement and any amendment or cancellation thereof shall be recorded with the San Bernardino County Recorder by the City Clerk within the period required by Section 65868.5 of the Government Code. If the parties to this Agreement or their successors in interest amend or cancel this Agreement as provided for herein and in Government Code Section 65868, or if the CITY terminates or modifies the agreement as provided for herein and in Government Code Section 65865.1 for failure of the applicant to comply in good faith with the terms or conditions of this Agreement, the City Clerk shall have notice of such action recorded with the San Bernardino County Recorder.

10.2 Entire Agreement. This Agreement sets forth and contains the entire understanding and agreement of the parties, and there are no oral or written representations, understandings or ancillary covenants, undertakings or agreements which are not contained or expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.

10.3 Severability. If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Agreement. Notwithstanding the foregoing, the provision of the Public Benefits set forth in Section 4 of this Agreement, including the payment of the fees set forth therein, are essential elements of this Agreement and CITY would not have entered into this Agreement but for such provisions, and therefore in the event such provisions are determined to be invalid, void or unenforceable, this entire Agreement shall be null and void and of no force and effect whatsoever.

10.4 Governing Law; Interpretation. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in interpreting this Agreement, all parties having been represented by counsel in the negotiation and preparation hereof.

10.5 Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

10.6 Singular and Plural. As used herein, the singular of any word includes the plural.

10.7 Joint and Several Obligations. If at any time during the term of this Agreement the Property is owned, in whole or in part, by more than one owner, all obligations of such owners under this Agreement shall be joint and several, and the default of any such owner shall be the default of all such owners. Notwithstanding the foregoing, no owner of a single lot which has been finally subdivided and sold to such owner as a member of the general public or otherwise as an ultimate user shall have any obligation under this Agreement except as provided under Section 4 hereof.

10.8 Time of Essence. Time is of the essence in the performance of .the provisions of this Agreement as to which time is an element.

10.9 Waiver. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

10.10 No Third Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit of the parties and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

10.11 Force Majeure. Neither party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by floods, earthquakes, epidemics, pandemics, other Acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond the party's control, (including the party's employment force), government regulations, court actions (such as restraining orders or injunctions), or other causes beyond the party's control. If any such events shall occur, the term of this Agreement and the time for performance by either party of any of its obligations hereunder may be extended by the written agreement of the parties for the period of time that such events prevented such performance, provided that the term of

this Agreement shall not be extended under any circumstances for more than five (5) years.

10.12 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed hereunder by such benefited party.

10.13 Successors in Interest. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the parties to this Agreement. All provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do or refrain from doing some act hereunder with regard to development of the Property: (a) is for the benefit of and is a burden upon every portion of the Property; (b) runs with the Property and each portion thereof; and, (c) is binding upon each party and each successor in interest during ownership of the Property or any portion thereof.

10.14 Counterparts. This Agreement may be executed by the parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the parties had executed the same instrument.

10.15 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by a party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of San Bernardino, State of California, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

10.16 Project as a Private Undertaking. It is specifically understood and agreed by and between the parties hereto that the development of the Project is a private development, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement. The only relationship between CITY and OWNER is that of a government entity regulating the development of private property and the owner of such property.

10.17 Further Actions and Instruments. Each of the parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. Upon the request of either party at any time, 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 this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

10.18 Eminent Domain. No provision of this Agreement shall be construed to limit or restrict the exercise by CITY of its power of eminent domain.

10.19 Agent for Service of Process. In the event OWNER is not a resident of the State of California or it is an association, partnership or joint venture without a member, partner or joint venturer resident of the State of California, or it is a foreign corporation, then in any such event, OWNER shall file with the Planning Director, upon its execution of this Agreement, a designation of a natural person residing in the State of California, giving his or her name, residence and business addresses, as its agent for the purpose of service of process in any court action arising out of or based upon this Agreement, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon OWNER. If for any reason service of such process upon such agent is not feasible, then in such event OWNER may be personally served with such process out of this County and such service shall constitute valid service upon OWNER. OWNER is amenable to the process so served, submits to the jurisdiction of the Court so obtained and waives any and all objections and protests thereto. OWNER for itself, assigns and successors hereby waives the provisions of the Hague Convention (Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638).

10.20 Estoppel Certificate. Within thirty (30) business days following a written request by any of the parties, the other party shall execute and deliver to the requesting party a statement certifying that (i) either this Agreement is unmodified and in full force and effect or there have been specified (date and nature) modifications to the Agreement, but it remains in full force and effect as modified; and (ii) either there are no known current uncured defaults under this Agreement or that the responding party alleges that specified (date and nature) defaults exist. The statement shall also provide any other reasonable information requested. The failure to timely deliver this statement shall constitute a conclusive presumption that this Agreement is in full force and effect without modification except as may be represented by the requesting party and that there are no uncured defaults in the performance of the requesting party, except as may be represented by the requesting party. OWNER shall pay to CITY all costs incurred by CITY in connection with the issuance of estoppel certificates under this Section 10.20 prior to CITY's issuance of such certificates.

10.21 Authority to Execute. The person or persons executing this Agreement on behalf of OWNER warrants and represents that he or she/they have the authority to execute this Agreement on behalf of his or her/their corporation, partnership or business entity and warrants and represents that he or she/they has/have the authority to bind OWNER to the performance of its obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Development Agreement on the last day and year set forth below.

OWNER

ACACIA REAL ESTATE GROUP, INC.,
a California corporation

By: _____
David Pittman

Its: President

Dated: _____

ACKNOWLEDGMENT

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

State of California

County of _____)

On _____ before _____ me,

(insert name and title of the officer)

personally _____ appeared

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

CITY:

CITY OF FONTANA, a California
municipal corporation

By: _____
Acquanetta Warren, Mayor

Dated: _____

By: _____
Matthew C. Ballantyne, City Manager

ATTEST:

By: _____
Germaine Key, City Clerk

APPROVED AS TO LEGAL FORM:

BEST BEST & KRIEGER LLP

City Attorney

ACKNOWLEDGMENT

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

State of California

County of _____)

On _____ before _____ me,

(insert name and title of the officer)

personally _____ appeared

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

“EXHIBIT A”

TENTATIVE PARCEL MAP NO. 20707

IN THE CITY OF FONTANA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

BEING A CONSOLIDATION OF PARCELS 1, 2 AND 3 OF PARCEL MAP 1778, IN THE CITY OF FONTANA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER MAP FILED IN BOOK 22, PAGE 80 OF PARCEL MAPS, TOGETHER WITH A PORTION OF THE WEST HALF OF FARM LOT 758 OF MAP SHOWING SUBDIVISION OF LANDS BELONGING TO SEMTI-TROPIC LAND AND WATER COMPANY, AS PER MAP RECORDED IN BOOK 11, PAGE 12 OF MAPS, BOTH IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

TENTATIVE PARCEL MAP NO. 20708

IN THE CITY OF FONTANA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

BEING A CONSOLIDATION OF THE EAST 10 ACRES OF FARM LOT 757 OF MAP SHOWING SUBDIVISION OF LANDS BELONGING TO SEMTI-TRAPIC LAND AND WATER COMPANY, IN THE CITY OF FONTANA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 11, PAGE 12 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

TENTATIVE PARCEL MAP NO. 20709

IN THE CITY OF FONTANA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

BEING A CONSOLIDATION OF THE EAST 3 ACRES OF THE WEST 8 ACRES OF FARM LOT 757 OF MAP SHOWING SUBDIVISION OF LANDS BELONGING TO SEMTI-TRAPIC LAND AND WATER COMPANY, IN THE CITY OF FONTANA, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 11, PAGE 12 OF MAPS, TOGETHER WITH PARCELS 1, 2, 3 AND 4 OF PARCEL MAP NO. 5352, AS PER MAP FILED IN BOOK 51, PAGE 89 OF PARCEL MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

**“EXHIBIT B”
MASTER SITE PLAN**

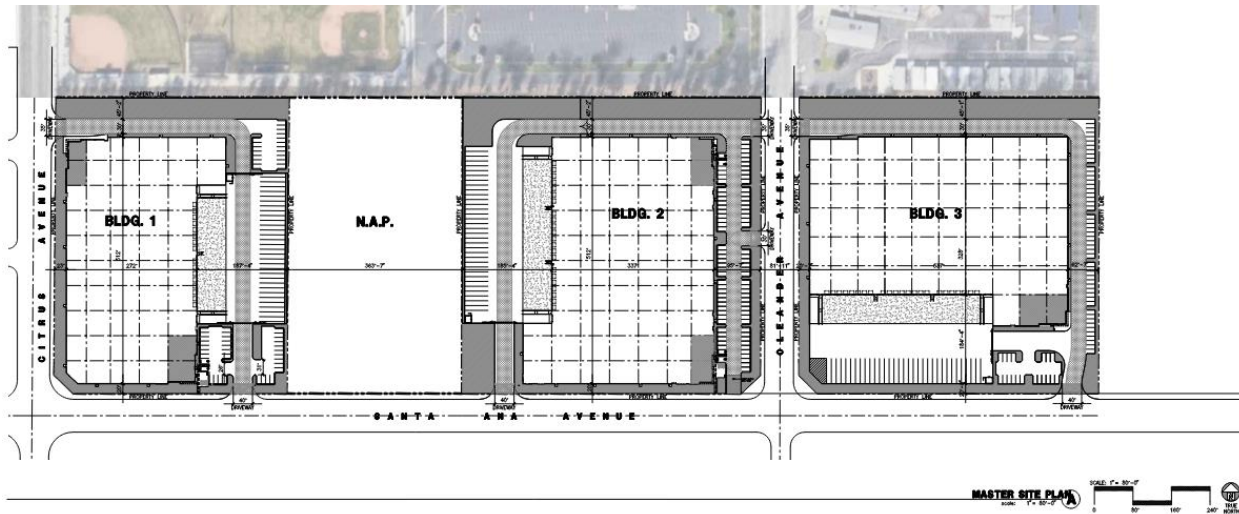


Exhibit A

“EXHIBIT C”

FONTANA ACTION PARK

**Pump Track, Mountain Bike Trails and Operations Facility
Project Boundary**

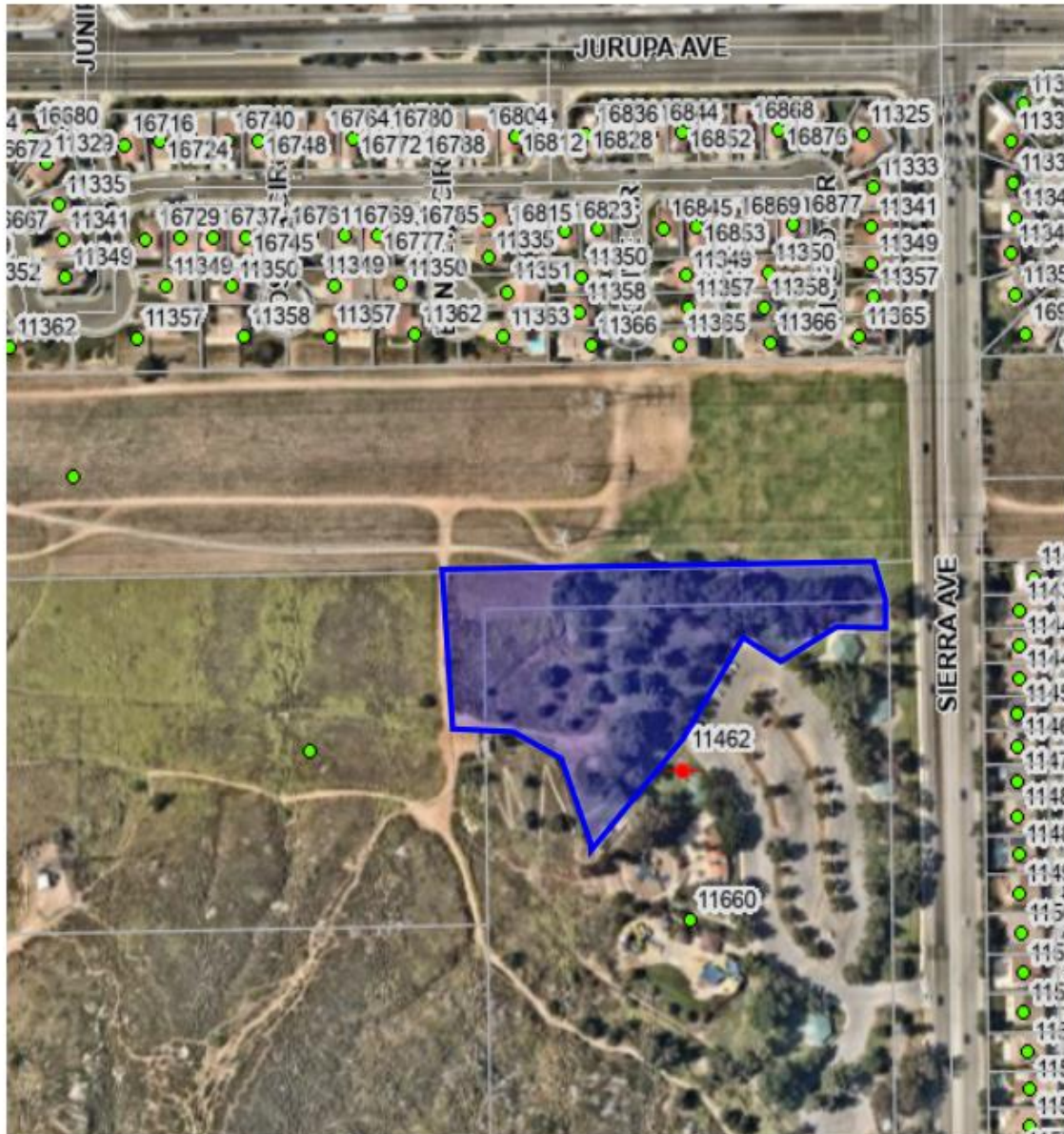


Exhibit A

“EXHIBIT D”

FONTANA ACTION PARK

RC Track
Project Boundary

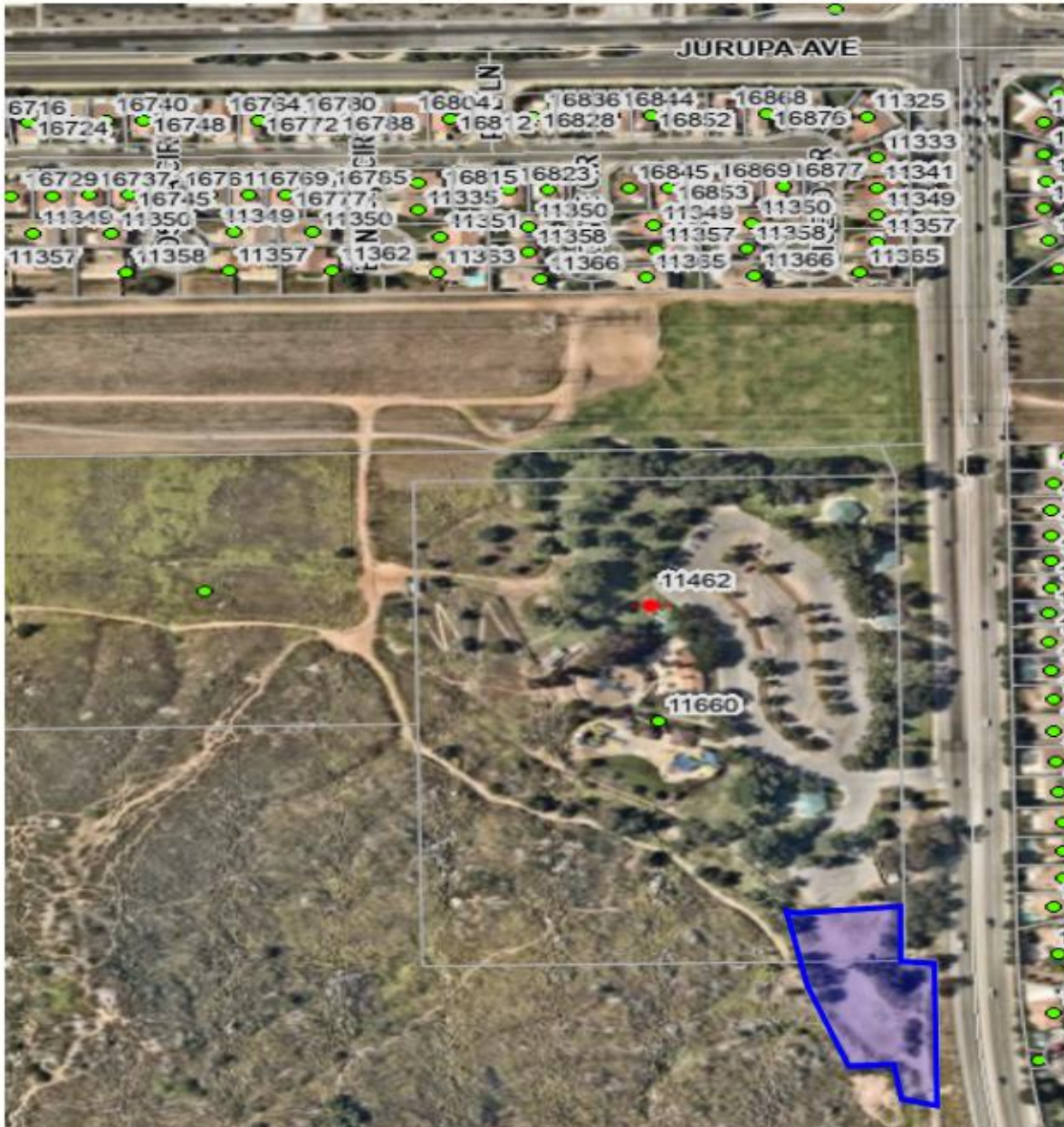


Exhibit A