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## PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT (this “**Agreement**”), dated as of the \_\_\_\_ day of, \_\_\_\_\_ 2018 (the “**Date of this Agreement**”), is made by and between City of San Jose, a California charter city (“**Seller**”), and \_\_\_\_\_, a \_\_\_\_\_ company, or its assignee permitted under Section 12.4 below (“**Purchaser**”).

### Recitals

The Financing Authority of the City of San Jose, a California joint partnership (“**Authority**”) holds title to and desires to sell and transfer certain improved real property commonly known as the Hayes Mansion, a San Jose Historic Designated City Landmark, listed as California Historical Landmark No. 888 and listed on the National Register of Historic Places (December 29, 1975), located at 200 Edenvale Ave., San Jose California, related rights, personal property, and intangible property (hereinafter, the “**Property**”).

The Authority intends to transfer the Property to the City and the City desires to sell and transfer the Property to Purchaser and Purchaser desires to purchase and acquire the Property. The parties intend to complete the transfers at the Closing.

Purchaser agrees that to induce Seller to sell the property to Purchaser and as additional consideration to acquire the property the Purchaser agrees to provide the Seller and the public with certain access to the Property after the sale as set forth in Section 5 of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration the receipt and adequacy of which are hereby acknowledged, Seller and Purchaser hereby agree as follows:

### Section 1. The Property

#### 1.1. Description

Subject to the terms and conditions of this Agreement, and for the consideration herein set forth, Seller agrees to sell and transfer, and Purchaser agrees to purchase and acquire, all of Seller’s right, title, and interest in and to the following (collectively, the “**Property**”):

1. Certain land (the “**Land**”) located in the City of San Jose, County of Santa Clara, State of California, and more specifically described in **Exhibit A** attached hereto and incorporated herein by this reference;
2. The buildings, parking areas, improvements and fixtures now situated on the Land, including, without limitation, a full service hotel and conference center facility having two hundred fourteen (214) guest rooms within the hotel structure, and other facilities related to the use and operation of the hotel, conference center, and event space (collectively, the “**Improvements**”);
3. All fixtures (other than those which constitute Improvements), furniture, furnishings, tangible personal property, machinery, apparatus and equipment, building systems, vehicles, appliances, computer hardware, security systems, key cards (together with all devices for coding and monogramming such key cards), telephones, televisions, bedding, bed linens, towels, window treatments, telecommunications and internet equipment, wiring, and infrastructure, safety equipment, and other tangible items of personally owned or leased (but only to the extent expressly assumed by Purchaser hereunder) by Seller and currently used in the management, operation, repair, and maintenance of the Land and Improvements and situated thereon (collectively, but excluding any alcoholic beverages and any Inventory as hereinafter defined, the “**Personal Property**”). The Personal Property to be conveyed is subject to depletions, replacements, and

additions in the ordinary course of business as operated by Dolce Hayes Mansion (“**Hotel Operator**”), under the Hotel Management Agreement (as hereinafter defined), and with respect to any part of the Property which Seller directly operates, in accordance with Seller’s past practices (the Land, the Improvements, and the Personal Property will hereinafter sometimes be referred to collectively as the “**Hotel**”);

4. All easements (excluding those easements and rights of way set forth in **Exhibit B**), rights of way, hereditaments, and appurtenances, if any, belonging to or inuring to the benefit of Seller and pertaining to the Land, including those not recorded or fully used by the Seller or Hotel Operator;

5. The Assumed Leases (defined in Section 3.3.1 below);

6. The Assumed Contracts (defined in Section 3.3.2) below);

7. If assumed by Purchaser at Closing, the Management Agreement by and between Seller and Hotel Operator, dated December 2, 2003 (the “**Hotel Management Agreement**”) attached hereto as **Exhibit C**, subject to Purchaser’s right to exercise termination options available by agreement or for cause;

8. All transferable consents, authorizations, variances or waivers, licenses, permits and approvals from any governmental or quasi-governmental agency, department, board, commission, bureau, or other entity or instrumentality in respect of the Hotel (collectively, the “**Licenses**”), held by Seller, but excluding any alcoholic beverage license(s) (“**Alcoholic Beverage Licenses**”) relating to the Hotel;

9. All inventories of supplies used in connection with the operation of the Hotel, including, without limitation, paper goods, brochures, office supplies, food and beverage inventory (to the extent the transfer of same is permissible under applicable law), excluding alcoholic beverages, which shall be transferred only in accordance with Section 4.2 hereof, and including chinaware, glassware, flatware, table linens, soap, and other operational and guest supplies currently located at the Hotel, subject to depletions, replacements, and additions in the ordinary course of operating the Hotel by Hotel Operator in accordance with its rights under the Hotel Management Agreement (collectively, the “**Inventory**”);

10. Subject to the provisions of the Hotel Management Agreement, the books, records, files, budgets, projections, strategic plans, customer database and past booking records, business plans, and specifications, drawings, test reports, inspections and engineering reports, guest registers, employment records, maintenance records, rental and reservation records, and any customer or frequent guest lists of Seller in connection with the ownership, management, operation, and maintenance of the Hotel (collectively, the “**Books**”), exclusive of (i) Seller’s income tax records, and (ii) any other materials that Seller is not entitled to transfer, assign or deliver to Purchaser by reason of the Hotel Management Agreement;

11. The advance reservations and bookings for the Hotel for the period from and after the Date of Closing (as hereinafter defined), as the same may be amended, canceled and renewed by Hotel Operator in accordance with its rights under the Hotel Management Agreement (the “**Reservations**”) and advance deposits made in respect thereof (the “**Reservation Deposits**”);

12. The Included Accounts Receivable (as hereinafter defined in Section 7.6 of this Agreement);

13. All transferable warranties and guarantees, if any, relating to the Personal Property, without representation by Seller as to the transferability thereof or other matters with regard thereto;

14. All goodwill in connection with the ownership, operation, management, and maintenance of the Property, but excluding the name, trademark, serviceman, or logo of the name “Dolce Hayes Mansion” or “Dolce Hotels”;

15. All Intellectual Property (as hereinafter defined) owned by Seller in connection with the ownership, operation, management, and maintenance of the Property, but excluding the name, trademark, serviceman, or logo of the name “Dolce”; for purposes of this Section 1.1.15, “**Intellectual Property**” hereof means (i) all patents, trademarks, tradenames, including, without limitation, the name “Hayes Mansion”, servicemarks, copyrights, and registrations and applications therefor, and all computer software programs developed for and used primarily in connection with the business and operations of the Hotel, (ii) all licenses granted to Seller or Hotel Operator, as agent for Seller, which relate, in whole or part, to any of the items mentioned in (i) above, and (iii) all rights, claims or causes in action relating to or deriving from any of the foregoing.

16. All video tapes, films, signage and other advertising and promotional materials of any kind or nature used in connection with the advertising and promotion of the Hotel (subject, in all cases, to the rights of Hotel Operator under the Hotel Management Agreement);

17. All merchandise located at the Hotel, including, without limitation, any gift shop or newsstand maintained by Seller, and held for sale to guests and customers of the Hotel, or ordered in the ordinary course of business for future sale at the Hotel as of Closing; and

18. All other assets, properties, or rights of Seller located on or at the Property or which are used or held for use exclusively and directly in connection with the Hotel of every kind and description, tangible or intangible, vested or unvested, contingent or otherwise, as the same shall exist on the Date of Closing, except for those assets, properties or rights specifically excluded hereunder, not transferable to Purchaser.

## **1.2. “As-Is” Purchase**

1. Purchaser acknowledges and agrees that it has been or will, prior to the Approval Date (as hereinafter defined), be given a full opportunity to inspect and investigate every aspect of the Property, including all matters related to legal status or requirements, physical condition, title, leasing, Contracts, and other matters of significance.

2. Purchaser specifically acknowledges and agrees that the Property is being sold in an “AS IS” condition and “WITH ALL FAULTS” as of the Date of Closing, except for the warranties, representations, and covenants expressly set forth in this Agreement. Except as expressly set forth in this Agreement, no representations or warranties have been made or are made and no responsibility has been or is assumed by Seller or by any partner, officer, person, firm, agent, or representative acting or purporting to act on behalf of Seller as to any matters concerning the Property, including, without limitation, the condition or repair of the Property or the value, expense of operation, or income potential thereof or as to any other fact or condition which has or might affect the Property or the condition, repair, value, expense of operation, or income potential of the Property or any portion thereof. The parties agree that all understandings and agreements heretofore made between them or their respective agents or representatives are merged in this Agreement and the Exhibits hereto annexed, which alone fully and completely express their agreement, and that this Agreement has been entered into after full investigation, or with the parties satisfied with the opportunity afforded for full investigation. Purchaser is not relying on any statement or representation by Seller unless such statement or representation is specifically embodied in this Agreement or the Exhibits annexed hereto. Without limiting the foregoing, Seller makes no representations or warranties as to whether the Property contains asbestos or harmful or toxic substances or pertaining to the extent, location,

or nature of same. Further, to the extent that Seller has provided to Purchaser information from any inspection, engineering, or environmental reports concerning asbestos or harmful or toxic substances, Seller makes no representations or warranties with respect to the accuracy or completeness, methodology of preparation, or otherwise concerning the contents of such reports. Purchaser acknowledges that Seller has requested Purchaser to inspect fully the Property and investigate all matters relevant thereto and to rely solely on the results of Purchaser's own inspections or other information obtained or otherwise available to Purchaser, rather than any information that may have been provided by Seller to Purchaser.

3. Without limiting the above, except to the extent covered by an express representation or warranty of Seller set forth in this Agreement, Purchaser on behalf of itself and its successors and assigns waives and releases Seller and its successors and assigns from any and all demands, claims, legal or administrative proceedings, losses, liabilities, damages, penalties, fines, judgments, costs or expenses whatsoever (including, without limitation, attorney's fees and costs), whether direct or indirect, known or unknown, foreseen or unforeseen, arising from or relating to the physical condition of the Property or any law or regulation applicable thereto, including the presence or alleged presence of asbestos or harmful or toxic substances in, on, under, or about the Property including, without limitation, any claims under or on account of (i) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as the same may have been or may be amended from time to time, and similar state statutes, and any regulations promulgated thereunder, (ii) any other federal, state, or local law, ordinance, rule, or regulation, now or hereafter in effect, that deals with or otherwise in any manner relates to environmental matters of any kind, or (iii) this Agreement or the common law. Anything herein to the contrary notwithstanding, nothing in this Section 1.2 hereof will limit or diminish Seller's obligations with respect to any express indemnities set forth in this Agreement or in any document delivered at Closing pursuant to Section 10.2 below, or any express representation, warranty or covenant set forth in this Agreement or in any document delivered at Closing pursuant to Section 10.2 below, or with respect to any actual intentional fraud.

4. Purchaser expressly waives any rights or benefits available to it with respect to the foregoing release under any provision of applicable law which generally provides that a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time the release is agreed to, which, if known to such creditor, would materially affect a settlement. By execution of this Agreement, Purchaser acknowledges that it fully understands the foregoing, and with this understanding, nonetheless elects to and does assume all risk for claims known or unknown, described in this Section 1.2 hereof. Without limiting the generality of the foregoing:

The undersigned acknowledges that it has been advised by legal counsel and is familiar with the provisions of California Civ. Code § 1542, which provides as follows:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

The undersigned, being aware of this code section, hereby expressly waives any rights it may have thereunder, as well as under any other statutes or common law principles of similar effect.

5. The provisions of this Section 1.2 hereof shall survive the Closing or any termination of this Agreement and shall not merge with the Deed (as hereinafter defined) to be delivered at Closing.

### 1.3. Conveyance of Title

Seller agrees to convey, and Purchaser agrees to accept, subject to the conditions set forth herein, title to the Land and Improvements by grant deed in the condition described in Section 10.2.1 (the “**Deed**”) hereof. Seller agrees to convey, and Purchaser agrees to accept, title to the Personal Property, by bill of sale, without warranty, express or implied (except as expressly set forth in this Agreement), as to the title, condition, merchantability, or fitness for a particular purpose of such Personal Property; provided only that Seller shall warrant in such bill of sale that Seller has not previously conveyed the Personal Property or any interest therein (including a security interest) to any third party. The provisions of this Section 1.3 hereof shall survive the Closing and shall not merge with the Deed to be delivered by Seller to Purchaser at Closing.

## Section 2. Price and Payment

### 2.1. Purchase Price

1. The purchase price for the Property (the “**Purchase Price**”) is the sum of (i) Thirty Million Dollars (\$30,000,000.00), plus (ii) the amount of the Included Accounts Receivable determined as provided in Section 7.6.1 hereof, plus (iii) the amount of all food and beverage inventory (but not including the Alcoholic Beverage License) located on or used in connection with the Property, determined as provided in Sections 4.2 and 7.5 hereof, subject to the prorations and apportionments provided in Section 7 below.
2. On or before the Approval Date, the parties shall discuss and attempt to agree on an allocation of the Purchase Price among the constituent elements of the Property for tax purposes. Purchaser and Seller agree to (i) report the transactions contemplated in this Agreement for federal and state income tax purposes in accordance with this allocation, (ii) not take any position inconsistent with such allocation on their tax returns without the prior written consent of the other party, (iii) timely file federal income tax Form 8594 with the applicable tax return for the year in which the Closing occurs.
3. The sum of One Hundred Dollars (\$100.00) (the “**Independent Contract Consideration**”) out of the Deposit is independent of any other consideration provided hereunder, shall be fully earned by Seller upon the Effective Date hereof, and is not refundable to Purchaser under any circumstances. Accordingly, if this Agreement is terminated for any reason by either party, the Independent Contract Consideration shall be paid by the Title Company to Seller.

### 2.2. Payment

Payment of the Purchase Price is to be made in cash as follows:

1. Purchaser shall make an earnest money deposit as follows:
  - (a) Within two (2) business days after the Date of this Agreement, Purchaser shall make an earnest money cash deposit in the amount of Five Hundred Thousand Dollars (\$500,000.00) U.S. (the “**Initial Deposit**”), in cash, with Title Company (as hereinafter defined).
  - (b) Within two (2) business days after the Approval Date and provided Purchaser delivers an Approval Notice (as defined in and pursuant to Section 3.5.1 below) on or before the Approval Date, Purchaser shall deposit with Title Company an additional Five Hundred Thousand Dollars (\$500,000.00), in cash (the “**Additional Deposit**” and together with the Initial Deposit, collectively, the “**Deposit**”).

(c) The Deposit will be placed and held in escrow by *[name of title company]* at *[address of title company]*, Attention: *[name of title or escrow officer]* (the “**Title Company**”). The Deposit will be held by Title Company in an interest-bearing account at a mutually acceptable banking institution. Any interest earned by the Deposit shall be considered as part of the Deposit, and shall be paid to Purchaser, along with the Deposit, if the conditions to Purchaser’s obligations are not satisfied in a timely manner in accordance with the terms of this Agreement. Except as otherwise provided in this Agreement, at the Closing, the Deposit (including interest accrued thereon), shall be applied to the Purchase Price.

2. At Closing, the Title Company shall disburse to Seller by wire transfer of immediately available funds an amount equal to the Purchase Price, inclusive of the Deposit and any interest accrued thereon and the Independent Consideration, plus the net amount of any apportionments as provided in Section 7 hereof in favor of Seller, or less the net amount of any apportionments as provided in Section 7 hereof in favor of Purchaser.

### **2.3. Closing**

The consummation of the purchase and sale contemplated by this Agreement (“**Closing**”) and the payment of the Purchase Price will take place pursuant to an escrow closing on or before the forty-fifth (45th) business day following the Approval Date (the “**Date of Closing**”), at the offices of Title Company at 12:00 P.M. local time, or at such other time and place as may be mutually agreed on in writing by both Seller and Purchaser.

## **Section 3. Inspections and Approvals**

### **3.1. Inspections and Seller’s Deliveries**

1. Following the Date of this Agreement until the Approval Date, Purchaser and Purchaser’s agents or representatives shall have reasonable access to the Property (during business hours) for purposes of conducting any non-intrusive physical and environmental inspections and investigations of the Property. PURCHASER SHALL NOT CONDUCT OR INTENTIONALLY CAUSE OR KNOWINGLY PERMIT ANY PHYSICALLY INTRUSIVE TESTING OF, ON, OR UNDER THE PROPERTY WITHOUT FIRST OBTAINING SELLER’S WRITTEN CONSENT AS TO THE TIMING AND SCOPE OF WORK TO BE PERFORMED, SUCH CONSENT NOT TO BE UNREASONABLY WITHHELD, CONDITIONED OR DELAYED. IN THE EVENT THAT SELLER FAILS TO RESPOND TO ANY REQUEST FOR CONSENT WITHIN THREE (3) BUSINESS DAYS AFTER RECEIPT OF SUCH REQUEST, THEN SELLER SHALL BE DEEMED TO HAVE CONSENTED TO SUCH REQUEST. FOR PURPOSES OF THIS SECTION 3.1.1, “**PHYSICALLY INTRUSIVE TESTING**” MEANS ANY TESTING WHICH INVOLVES THE PENETRATION OF THE LAND OR THE IMPROVEMENTS AND/OR THE REMOVAL, COLLECTION, OR OBTAINING OF SOILS, BUILDING MATERIALS, OR OTHER PHYSICAL SAMPLES FROM THE LAND OR THE IMPROVEMENTS.

2. Any inspections will be at Purchaser’s expense. Purchaser agrees that, in making any inspections of the Property, Purchaser or Purchaser’s agents will carry not less than One Million Dollars (\$1,000,000.00), comprehensive general liability insurance with contractual liability endorsement which insures Purchaser’s Indemnity Obligations (as hereinafter defined) hereunder, and, upon request of Seller, will provide Seller with certificates or other written evidence of same; will use all commercially reasonable efforts to conduct its due diligence in a manner that is not materially disruptive to tenants, hotel guests, or any persons occupying or providing services at the Property; will abide by Section 3.6 below with respect to any information acquired pursuant to its inspections; and will restore promptly any material physical

damage caused by the inspections. Purchaser shall give Seller no less than twenty-four (24) hours' prior notice of its intention to conduct any inspections, and Seller reserves the right to have a representative present; provided, however, if Seller's representative is unable to attend such inspection after Purchaser notifies Seller of the inspection as required by this Section 3.1.2, then Purchaser may proceed with the inspection without Seller's representative in attendance. Purchaser agrees (which agreement shall survive Closing or termination of this Agreement) to indemnify, defend, and hold Seller harmless from any loss, injury, liability, damage, claim, lien, cost, or expense, including reasonable attorney's fees and costs, arising out of a breach of the foregoing agreements by Purchaser resulting in damage to the Property or injury to persons on the Property in connection with the inspection of the Property, or otherwise from the exercise by Purchaser or its agents or representatives of the right of access under this Section 3.1 or any earlier or later entry on to the Property by Purchaser or its agents or representatives for purposes of any other inspections or investigations permitted by Seller (collectively, "**Purchaser's Indemnity Obligations**"). However, Purchaser shall have no liability under the aforesaid indemnity for (i) any consequential damages, (ii) any actual damages suffered by Seller to the extent that Seller actually receives proceeds duly covering such damages under any policy of insurance maintained by Seller (or Hotel Operator as agent for Seller) with respect to the Property, or (iii) any damages related to the mere discovery of any issue at the Property. The amount of the liability insurance carried by Purchaser shall not constitute a limitation on Purchaser's Indemnity Obligations.

3. During the period provided herein for inspection and review of the Property, Purchaser and its agents and consultants will have reasonable access to all agreements, documents, and other information (financial or otherwise) relating to the Property, excluding appraisals, purchase offers or inquiries regarding the Property from prospective purchasers, and any documentation, data information, or materials subject to attorney-client or work product privilege or other privileges that may be asserted under California law (collectively, "**Confidential Materials**"), and subject to the reasonable approval of Hotel Operator, shall have the right to interview personnel working on the Property, whether engaged by Seller, Hotel Operator or others (including, without limitation, the general manager and chief engineer of the Hotel) regarding all matters relating to the management, use, operation, and physical and financial condition of the Property. Seller shall also use commercially reasonable efforts to cause its agents and representatives (including, without limitation, Hotel Operator,) to permit personnel interviews and to make promptly available to Purchaser, its agents and representatives, all agreements, documents, and other information (financial or otherwise) relating to the Property in the possession of such agents and representatives, excluding any Confidential Materials.

4. Seller makes no representations or warranties as to the truth, accuracy or completeness of any materials, data or other information supplied to Purchaser in connection with Purchaser's inspection of the Property (e.g., that such materials are complete, accurate, or the final version thereof, or that all such materials are in Seller's possession). It is the parties' express understanding and agreement that such materials are provided for Purchaser's convenience in making its own examination and determination prior to the Approval Date as to whether it wishes to purchase the Property, and, in doing so, Purchaser shall rely exclusively on its own independent investigation and evaluation of every aspect of the Property and not on any materials supplied by Seller. Purchaser expressly disclaims any intent to rely on any such materials provided to it by Seller in connection with its inspection and agrees that it shall rely solely on its own independently developed or verified information.

### **3.2. Title and Survey**

1. Within five (5) Business Days after the Date of this Agreement, Purchaser shall order (i) a preliminary title report on the Land, together with copies of all items shown as exceptions to title therein, prepared by the Title Company ("**Title Report**"), and (ii) an ALTA survey of the Land (the "**Survey**").

2. Within seven (7) days after Purchaser receives the Title Report and the Survey, Purchaser shall notify Seller in writing of any objections it may have to the Title Report or Survey. Any objections to the Title Report or Survey of which Purchaser timely notifies Seller pursuant to this Agreement are hereinafter referred to as “**Title Objections.**” Any matters as to which Purchaser has not delivered a Title Objection in accordance with the preceding two sentences shall be deemed to be Purchaser’s acceptance of such matter as shown on the Title Report or Survey, as applicable.

3. Within five (5) Business Days after receipt of Purchaser’s Title Objections (“**Seller’s Title Response Period**”), Seller shall give Purchaser written notice (“**Seller’s Title Notice**”) of whether it shall attempt to cure the Title Objections and which Title Objections it shall attempt to cure; provided that except as expressly set forth below with respect to Mandatory Release Matters, Seller shall have no obligation to cure or attempt to cure any of Purchaser’s Title Objections. If Seller fails to deliver a Seller’s Title Notice within Seller’s Title Response Period, then Seller shall be deemed to have elected not to cure any Title Objections other than Seller’s Monetary Liens (defined below). Purchaser’s sole recourse for any failure of Seller to cure a Title Objection shall be (A) as to Title Objections which Seller has elected (or is deemed to have elected) not to attempt to cure, to terminate this Agreement by giving written notice to Seller and Escrow Agent within two (2) Business Days after the receipt of Seller’s Title Notice (or if Seller does not give a Seller’s Title Notice, within two (2) Business Days after the last day Seller could have timely given a Seller’s Title Notice), and (B) as to any Title Objections which Seller has stated in Seller’s Title Notice that shall attempt to cure, but which are not in fact cured by Seller before Closing, to terminate this Agreement by written notice to Seller on the date set for Closing. If Purchaser terminates this Agreement pursuant to this Section 3.2.3, the Deposit shall be returned to Purchaser.

4. All matters shown in the Title Report which Seller fails to undertake an express obligation to cure as provided above, shall be deemed to be approved by Purchaser as “**Permitted Title Policy Exceptions.**” Notwithstanding anything in this Section 3.2 to the contrary, it is understood that Permitted Title Policy Exceptions shall not include, and that Seller shall in any case remove from the Property prior to (and as a condition of) Closing: (a) any and all deeds of trust, mortgages, mechanics’ liens, and other liens for security purposes affecting the Property made or created by Seller or Hotel Operator (as agent for Seller) (as opposed to any tenant under a lease or any other party other than Hotel Operator) during Seller’s period of ownership (the “**Ownership Period**”) of the Property, and (b) any deeds of trust, mortgages, mechanics’ liens, and other liens for security purposes affecting the Property, except for any liens arising under any covenants, conditions, and restrictions or similar documents affecting the Property and liens arising from the acts of Purchaser (collectively, “**Mandatory Removal Items**”).

5. If, after the expiration of the Due Diligence Period, any updates of the Title Report disclose any additional exceptions to title first appearing of record after the expiration of the Approval Date and not previously disclosed in the Title Report and/or shown on the Survey (“**Additional Title Matters**”), then Purchaser shall have the right to make additional Title Objections within five (5) Business Days after receipt of such updated Title Report. The absence of a timely notice by Purchaser of such additional Title Objections shall be deemed to be Purchaser’s acceptance of such Additional Title Matters. If Purchaser delivers such written notice to Seller on a timely basis, then within two (2) Business Days after receipt of Purchaser’s additional Title Objections, Seller shall give Purchaser a Seller’s Title Notice stating whether it intends to attempt to cure the additional Title Objections; provided that except as expressly set forth in Section 3.2.4 with respect to Mandatory Release Matters, Seller shall have no obligation to cure or attempt to cure Purchaser’s additional Title Objections, and Purchaser’s sole recourse shall be to terminate this Agreement by giving written notice to Seller and Title Company within five (5) Business Days after the receipt of such Seller’s Title Notice from Seller (or, if Seller does not give a Seller’s Title Notice, within five (5) Business Days after the last day Seller could have timely given a Seller’s Title Notice). If Seller

gives a Seller's Title Notice that states that Seller intends to attempt to cure such additional Title Objections, and if Seller fails to cure the same before Closing, then Purchaser shall have the right to terminate this Agreement by written notice to Seller on the Date of Closing. If Purchaser terminates this Agreement pursuant to this Section 3.2.5, the Deposit shall be returned to Purchaser.

### **3.3. Contracts**

1. Within five (5) Business Days after the Date of this Agreement, Seller shall deliver and Purchaser shall have the right to review (a) all of the leases and occupancy agreements entered into by Hotel Operator on behalf of Seller which as of the Closing shall affect all or any portion of the Land or Improvements as set forth on **Exhibit D** attached hereto (the "**Leases**"), and (b) all contracts, agreements, and equipment leases entered into by Hotel Operator on behalf of Seller, excluding the Leases, relating to the management, operation, or maintenance of the Hotel which as of the Closing shall affect all or any portion of the Land or Improvements as set forth on **Exhibit E** attached hereto (collectively, the "**Contracts**").

2. Prior to the Approval Date, Purchaser shall deliver a list of the Leases and the Contracts to Seller that Purchaser expressly agrees to assume upon the Closing and which Leases and Contracts can be assumed pursuant to their terms (respectively, the "**Assumed Leases**" and the "**Assumed Contracts**"). In the event Purchaser fails to deliver to Seller Purchaser's written election to assume one or more of the Leases or Contracts pursuant to this Section 3.3, such failure shall be deemed to constitute Purchaser's election to assume all of the Leases and Contracts that can be assumed pursuant to their terms. Prior to the Closing, Purchaser and Seller agree that, except for the Assumed Leases and Assumed Contracts, Seller shall be responsible for terminating all Leases and Contracts and Seller shall pay all costs and penalties related to such termination.

### **3.4. Permitted Encumbrances**

If Purchaser delivers an Approval Notice pursuant to Section 3.5, then Purchaser shall be deemed to have approved and to have agreed to purchase the Property subject to the following:

1. General and special real estate taxes and assessments, as listed by date of assessment in Exhibit \_\_\_ attached hereto and all matters of record or apparent from an inspection and survey;
2. All Assumed Contracts and Assumed Leases;
3. The lien of non-delinquent real and personal property taxes and assessments as described in the proforma Title Policy approved by Purchaser;
4. Water rights and claims or title to water, whether or not shown by the public records;
5. Discrepancies, conflicts in boundary lines, shortages in area, encroachments, and any state of facts which an inspection of the Property would disclose and which are not shown by the public records;
6. Rights of hotel guests who occupy the Hotel or any portion thereof as of the Date of Closing and guests having reservations relating to periods subsequent to the Date of Closing.
7. Pursuant to the CITY Surplus Property Policy an Affordable Housing Covenant to be recorded at the Closing;

8. Governmental laws, codes, ordinances, and restrictions now or hereafter in effect so far as these affect the Property or any part thereof, including, without limitation, zoning ordinances (and amendments and additions relating thereto) and the Americans with Disabilities Act (“ADA”);

All of the foregoing are referred to herein collectively as the “**Permitted Encumbrances.**” Nothing contained in this Section 3.4 is intended to limit the conditions precedent to Purchaser’s obligations contained herein or Seller’s covenants and agreements contained herein or the representations and warranties of Seller set forth in Section 6.1 below, or to preclude Purchaser from obtaining title endorsements or extended coverage for any such Permitted Encumbrances or to diminish the rights of Purchaser under the Title Policy (as hereinafter defined).

### **3.5. Purchaser’s Approval Right**

1. Purchaser shall have forty-five (45) business days from the Date of this Agreement (the “**Approval Date**”) to review all information relating to the Property and to conduct such inspections, tests, and investigations regarding the Property, including, without limitation, engineering, environmental, and ADA studies, as Purchaser may elect, at Purchaser’s sole cost and expense. If Purchaser is satisfied with the results of its inspections and investigations and desires to proceed with the purchase of the Property, then Purchaser shall deliver written notice to Seller (an “**Approval Notice**”) at any time on or before 5:00 pm Pacific time on the Approval Date, in which event Purchaser shall be deemed to have approved of the Property and all matters pertaining thereto and to have elected to proceed with the purchase of the Property as provided herein. If, for any reason, Purchaser fails to deliver an Approval Notice to Seller prior to 5:00 pm Pacific time on the Approval Date, then Purchaser shall be deemed to have elected to terminate this Agreement, in which case the Deposit (with all interest accrued thereon) shall be promptly returned to Purchaser and this Agreement shall be null and void and of no further force and effect and neither party shall have any further liability hereunder except as otherwise expressly provided herein. Purchaser shall have the right to deliver, or to decline to deliver, an Approval Notice for any reason or no reason at all in Purchaser’s sole and absolute discretion.

### **3.6. Confidentiality**

1. Unless otherwise required to be disclosed under federal or state law or the Purchaser specifically and expressly otherwise agrees in writing, all information regarding Purchaser (including, without limitation, its identity, advisors, officers, partners, and directors) made available to Seller by Purchaser and not in the public domain (“**Purchaser’s Proprietary Information**”) is confidential and shall not be disclosed to any other person except Seller’s brokers, advisors, employees, officers, and directors, and then only upon Seller making such person aware of these confidentiality restrictions and procuring such person’s agreement to be bound thereby, and except as may be required to comply with any federal or state law, regulation, court order, or subpoena.

2. Notwithstanding any other term of this Agreement, the provisions of this Section 3.6 shall survive Closing or the termination of this Agreement.

## **Section 4. Prior to Closing**

### **4.1. Seller's Covenants**

Until Closing, Seller or Seller's agent shall:

1. Cause the Property to be insured, in accordance with Seller's past practices with respect to the Property, against fire and other hazards covered by extended coverage endorsement and comprehensive public liability insurance against claims for bodily injury, death, and property damage occurring in, on or about the Property.
2. Not execute, or permit Hotel Operator to execute any new Leases or amend, terminate, or accept the surrender of, or waive any of Seller's or Hotel Operator's rights under, any existing tenancies without the prior consent of Purchaser, which consent shall not be unreasonably withheld, delayed, or conditioned; provided, however, that following the Approval Date (if Purchaser has delivered the Approval Notice), Purchaser may withhold its consent in its sole discretion. If Purchaser fails to respond to any request for approval within five (5) business days after such request is made in writing, Purchaser shall be deemed to have approved such request. With respect to any Leases in effect as of the Date of this Agreement, Seller and/or Hotel Operator, as applicable, shall be responsible for the construction of all tenant fixtures or improvements and payment of leasing and brokerage commissions payable by the landlord under such Lease, and Purchaser shall be entitled to a credit at Closing for the cost and expense of completing such fixtures and improvements (to the extent not completed prior to Closing) and for any commissions not paid prior to Closing. With respect to any Leases executed after the Date of this Agreement pursuant to the terms of this Section 4.1.2, in the event this Agreement is not terminated, Purchaser shall be responsible for the construction of all tenant fixtures or improvements and payment of leasing and brokerage commissions payable by the landlord under such Leases after the Date of Closing, and Seller shall be entitled to a credit for any costs and expenditures in connection with tenant fixtures or improvements constructed or commissions paid prior to Closing (provided, that Seller shall provide appropriate documentation in support of such expenditures and payments).
3. To the extent within Seller's control under the terms of the Hotel Management Agreement, cause Hotel Operator to continue to make and accept Reservations for use of the Hotels rooms, banquet and restaurant facilities, and meeting and convention facilities (and accept cancellations of such Reservations) in the ordinary course of business and as permitted by the Hotel Management Agreement at Hotel Operator's customary rates and charges for the Hotel, and Purchaser agrees to honor and assume all Reservations following Closing.
4. Not amend, modify, extend, terminate, or accept the surrender of, or waive any of Seller's rights under the Hotel Management Agreement, without the prior written consent of Purchaser, which consent may be withheld in Purchaser's sole discretion.
5. Subject to the rights of Hotel Operator under the Hotel Management Agreement, not create any liens, encumbrances, security interests, or other charges against the Property, other than those which will be discharged prior to Closing or which are permitted in accordance with the terms of this Agreement.
6. Not make any changes in the accounting methods employed by Seller in the financial statements prepared by Seller (as opposed to Hotel Operator) with respect to the Property.
7. Not consent to any zoning changes, or sell, transfer, assign, dispose of, or consent to the utilization of any development rights, including air rights, if any, or, subject to the rights of Hotel Operator under the

Hotel Management Agreement, modify, amend, or consent to any modifications, amendments, termination, lapse, or surrender of any license required for the operation of the Hotel, including any certificate of occupancy or the Alcoholic Beverage License.

8. Without the prior written consent of Purchaser, not compromise or settle any tax protest proceeding for the tax year in which the Closing occurs or any tax year subsequent thereto (i) with reference to (A) the assessed valuation of the Hotel, or (B) taxes attributable to the ownership, management, operation, or maintenance of the Hotel, or (ii) for which Purchaser is liable hereunder.

9. To the extent that Seller receives copies of any Contracts or Leases, or amendments thereof, entered into by Hotel Operator on or after the Date of this Agreement, furnish Purchaser with a copy of any such Hotel Operator Contract or Lease, or amendment thereof, entered into by Hotel Operator promptly after receiving a copy of such Hotel Operator Contract or Lease from Hotel Operator.

10. Except in the case of emergencies (in which case Seller shall give prompt notice of such emergencies to Purchaser), not consent to any matters requiring Seller's consent pursuant to the Hotel Management Agreement, without Purchaser's prior written consent, which consent may not be unreasonably withheld, delayed, or conditioned. Purchaser shall be deemed to have consented to any such matters if Purchaser fails to disapprove any such matters within three (3) business days after notice thereof.

11. Abide by and satisfy all obligations of Seller under the Hotel Management Agreement. Notwithstanding the foregoing, provided that Seller performs all routine day-to-day and periodic maintenance of the Property required to be performed directly by Seller (as opposed to Hotel Operator,) between the Approval Date and the Date of Closing under the terms of the Hotel Management Agreement, then Seller shall have no liability to Purchaser under this Section 4.1.11 either prior to or after the Closing for any matters related, directly or indirectly, to the physical condition of the Property or the Property's compliance (or lack thereof) with applicable governmental or quasi-governmental laws, rules, regulations, statutes, or ordinances.

12. Maintain any portions of the Property being managed by Seller (as opposed to Hotel Operator, to the extent such parties are obligated to maintain the Property under the Hotel Management Agreement, ) in a manner consistent with Seller's past practices. Notwithstanding the foregoing, provided that Seller performs all routine day-to-day and periodic maintenance of the portions of the Property being managed by Seller (as opposed to structural repairs or improvements of a capital nature) between the Approval Date and the Date of Closing, then Seller shall have no liability to Purchaser under this Section 4.1.12 either prior to or after the Closing for any matters related, directly or indirectly, to the physical condition of the Property or the Property's compliance (or lack thereof) with applicable governmental or quasi-governmental laws, rules, regulations, statutes, or ordinances.

13. Not later than five (5) business days after the Date of this Agreement, provide to Purchaser a schedule, certified by Seller, of any defaults of which Seller has knowledge (as defined in Section 6.1 below) by Hotel Operator under the Hotel Management Agreement.

#### **4.2. Alcoholic Beverage License<sup>1</sup>**

Not later than seven (7) days after the Approval Date, Purchaser will file a complete application with the ABC for the issuance of a temporary Alcoholic Beverage License in its own name or the name of its designee sufficient to permit the continuation of the lawful service of alcoholic beverages at the Hotel

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<sup>1</sup> NOTE: UNDER REVIEW BY LIQUOR COUNSEL

from and after the Date of Closing. Purchaser acknowledges that the owner of the current Alcoholic Beverage License for the Hotel is Hotel Operator. To the extent that any Alcoholic Beverage Licenses lawfully may be transferred under applicable governmental laws, rules, and regulations, Hotel Operator may arrange for the transfer of the existing Alcoholic Beverage License, provided that such transfer and cooperation (i) shall be at no cost or expense to Seller, (ii) shall not expose Seller to any continuing liability with respect to the operation of the Hotel or the sale of alcoholic beverages therefrom after the Date of Closing, and (iii) shall not obligate Seller to postpone the Date of Closing except as otherwise expressly provided in Section 2.3 hereof. If Hotel Operator is not operating the Hotel at the Date of Closing Seller shall not be required to transfer to Purchaser any alcoholic beverage inventory which is located at or held for use in the Hotel unless and until Purchaser has obtained a valid and effective Alcoholic Beverage License entitling Purchaser to sell alcoholic beverages at the Hotel. At such time as Hotel Operator is no longer operating the Hotel as a result of termination of the Hotel Operator Agreement or otherwise, Purchaser and Hotel Operator shall provide for (a) the purchase by Purchaser of all opened alcoholic beverage inventory for a fixed sum to be agreed on by Hotel Operator and Purchaser on a mutually agreed to date (the “**Opened Alcoholic Beverage Consideration**”), such payment to be made by Purchaser to Hotel Operator upon the transfer of such inventory to Purchaser, (b) the purchase by Purchaser of all unopened alcoholic beverage inventory (including, without limitation, all unopened alcoholic beverage inventory located in the guest room mini-bars) at Hotel Operator’s cost, such payment to be added to and such payment to be made by Purchaser to Hotel Operator upon the transfer of such inventory to Purchaser. Seller shall reasonably cooperate with Purchaser at no cost or expense to Seller (both before and for a period of one (1) year after the Date of Closing) in any lawful manner reasonably requested by Purchaser in connection with obtaining any and all regulatory approvals, whether temporary or permanent, required by any public agencies administering laws, rules, or regulations regulating the sale of alcoholic beverages and related permits. Notwithstanding anything to the contrary contained herein. The provisions of this Section 4.2 shall survive Closing or the termination of this Agreement.

### **4.3. Hotel Management Agreement**

1. Purchaser and Seller each acknowledge that prior to and as of the Date of this Agreement, the Hotel has been managed and operated by Hotel Operator pursuant to the Hotel Operator Agreement. Notwithstanding anything to the contrary contained in this Agreement, the obligations of Seller and Purchaser hereunder are conditioned on the approval by Hotel Operator on or before the Date of Closing of the sale of the Hotel and the assignment of the Hotel Management Agreement to Purchaser as contemplated under the Hotel Management Agreement. Purchaser shall cooperate with Seller as necessary to obtain such consent promptly after the Date of this Agreement, including, without limitation, providing such financial statements and other information as may be reasonably requested by Hotel Operator from time to time pursuant to the terms of the Hotel Management Agreement.
2. At the Closing, if Purchaser elects to assume the Hotel Management Agreement, then Seller shall assign to Purchaser and Purchaser shall assume the obligations of Seller under the Hotel Management Agreement pursuant to an assignment and assumption agreement in the form of **Exhibit F** hereto (the “**Assignment and Assumption of Hotel Management Agreement**”). Without limiting the generality of the foregoing, Purchaser shall expressly assume the obligations of Seller to pay to Hotel Operator for all amounts arising and due after the Date of Closing, in accordance with the terms of the Hotel Management Agreement.
3. Further, if Purchaser elects not to assume at Closing or subsequently elects to terminate the Hotel Management Agreement, Purchaser expressly assumes the obligations of Seller to pay 50.0% of the Termination Fee (as defined in the Hotel Management Agreement) to Hotel Operator, in accordance with the terms of Section 11.9 of the Hotel Management Agreement, and Seller shall pay the other 50.0% of the Termination Fee to Hotel Operator. From the Closing, a Hotel Management Holdback will be established

for which \$450,000 will remain in Escrow and be released to Seller upon the earlier of (i) Purchaser entering into a new Hotel Management Agreement for a term of at least three years or (ii) six (6) months from Closing. However, if before six (6) months from Closing, Purchaser terminates the Hotel Management Agreement, the Hotel Management Holdback will be used to pay the Hotel Operator the Termination Fee.

#### 4.4. Historic Tax Credits

1. Seller shall reasonably cooperate with Purchaser at no third-party cost or expense to Seller in any lawful manner reasonably requested by Purchaser in connection with obtaining historic tax credits for the rehabilitation and preservation of the Hotel.

### Section 5. City and Public Use

1. City Use. Seller and Purchaser hereby agree that for the period of time the Hotel is owned or under the control of Purchaser or any assignee of Purchaser pursuant to Section 12.4 below, Seller shall have the right to use the Hotel for meetings, seminars, conferences or receptions from time to time annually (based on a Contract Year), subject to availability, for up to Thirty Thousand Dollars (\$30,000.00) worth of meeting time billed per year at the Hotel's prevailing rates for meeting, audio visual equipment, overhead projectors, flip chart, white boards and amplification (but excluding food and beverage and guest suite use) (each, a "**Seller Event**"). The annual amount set forth in the foregoing sentence shall be adjusted annually based on any annual percentage increase in the Bay Area CPI Index between the Bay Area CPI Index announced for the month immediately preceding commencement of the Contract Year then ending and the Bay Area CPI Index announced for the month preceding the last month of the current Contract Year. Charges against each annual allocation shall accrue during the Contract Year in which such use occurs; however, it is expressly understood and agreed that any unused portion of the annual allocation in any Contract Year shall not carry forward to a subsequent Contract Year. Seller shall notify Purchaser no less than thirty (30) days prior to the desired date of the Seller Event, and Purchaser shall use reasonable efforts to accommodate Seller's requested date and time; provided, however, that Purchaser may, in its sole discretion either (i) re-schedule a Seller Event to another available date by providing notice to Seller no less than fourteen (14) days prior to the scheduled date, or (ii) move a Seller Event to another location at the Hotel by providing notice to Seller no less than three (3) days prior to the desired date of the Seller Event. Booking of such Seller Event is subject to availability in the sole discretion of Purchaser and advance reservation. For purposes of this Agreement, "Bay Area CPI Index" shall mean the Consumer Price Index (CMSA-San Francisco-Oakland-San Jose, 1982-84=100) calculated by the U.S. Department of Labor, Bureau of Labor Statistics (or successor governmental authority responsible therefor).

2. Community/Non-Profit Use. Seller and Purchaser hereby agree that for the period of time the Hotel is owned or under the control of Purchaser or any assignee of Purchaser pursuant to Section 12.4 below, in addition to the other uses set forth in this Section, Purchaser shall provide community non-profit groups and organizations acceptable to Purchaser with the use of meeting rooms in the Hotel free of the standard meeting room charge, up to an aggregate of thirty (30) individual Community Meetings per Contract Year. For purposes of this Section, a "**Community Meeting**" means a meeting of an individual non-profit group on a single day (regardless of the length of time of such meeting). Booking of such Community Meetings is subject to availability in the sole discretion of Purchaser and advance reservation, and shall be held only during non-peak days and hours approved by Purchaser in its sole discretion; provided, however, that Purchaser may, in its sole discretion either (i) re-schedule a Community Meeting to another available date by providing notice to such community non-profit group or organization no less than fourteen (14) days prior to the scheduled date, or (ii) move a Community Meeting to another location at the Hotel by providing notice to such community non-profit group or organization no less than three (3)

days prior to the desired date of the Community Meeting. Any unused allocation of Community Meetings in any Contract Year shall not carry forward to any subsequent Contract Year.

3. The provisions of this Section 5 hereof shall survive the Closing.

## **Section 6. Representations and Warranties**

### **6.1. By Seller**

Seller represents and warrants to Purchaser that as of the date of this Agreement and as of the Date of Closing:

1. Seller is a charter city, validly existing, and in good standing under the laws of the State of California, has duly authorized the execution and performance of this Agreement, and such execution and performance will not violate any material term of its certificate of incorporation or by-laws. Seller is duly authorized to execute, deliver and perform this Agreement, and all agreements, instruments, and documents herein provided to be executed by Seller will be duly executed by and binding on Seller as of the Date of Closing.

2. Except as shown in **Exhibit G**, to the knowledge of Seller, Seller has not received written notice that any actions, suits, or proceedings of any kind are pending or threatened against or affecting Seller or the Property in any court of law or in equity or by any governmental department, commission, board, bureau, agency, or other instrumentality which might affect the Property.

3. The execution, delivery, and performance of this Agreement does not and will not violate any agreement or commitment to which Seller is a party or by which Seller is bound, or any law or court order, or require any consent or approval of any person or party (or any such consent or approval has been obtained). Seller has complied with all procedures of the City of San Jose (the “City”), satisfied all City requirements and obtained all required approvals for the sale of the Property.

4. During the period of five (5) years prior to the date of this Agreement Seller has not received written notice from any governmental authority having jurisdiction over the Property stating that the Property is in violation of any applicable law, statute, ordinance, or regulation which has not been fully resolved as of the date hereof.

5. Seller has not received a written notice from Hotel Operator alleging a default or failure of performance by Seller under the terms of the Hotel Management Agreement.

6. Seller (as opposed to Hotel Operator as agent for Seller) has not entered into any service contracts in connection with the ownership, operation, or management of the Property which remain in effect on the Date of this Agreement except for the Hotel Management Agreement.

7. To Seller’s knowledge, Hotel Operator has not entered into any service contracts in connection with the ownership, operation, or management of the Property which remain in effect on the Date of this Agreement except for the Contracts.

8. All personnel employed at the Hotel are employees of Hotel Operator, and none of such personnel are employees of Seller.

9. There are no pending protests, appeals, or other proceedings which have been initiated by Seller for the reduction of Taxes (as hereinafter defined) assessed against the Property.

10. Seller (as opposed to Hotel Operator as agent of Seller) has not entered into any agreements, commitments, or understandings, written or oral, for the parking of cars of Hotel guests, invitees, or employees at locations other than the Parking Garage, and, Seller (as opposed to Hotel Operator as agent of Seller) has not entered into any agreements, commitments, or understandings, written or oral, limiting the number of parking spaces available to Hotel guests, invitees, or employees in the Parking Garage.

11. To Seller's knowledge, Hotel Operator has not entered into any agreements, commitments, or understandings, written or oral, for the parking of cars of Hotel guests, invitees, or employees at locations other than the Parking Garage, and, to Seller's knowledge, Hotel Operator has not entered into any agreements, commitments, or understandings, written or oral, limiting the number of parking spaces available to Hotel guests, invitees, or employees in the Parking Garage.

12. Seller has delivered a true and complete copy of the Hotel Operator Agreement to Purchaser prior to the Date of this Agreement.

13. Seller (as opposed to Hotel Operator as agent for Seller) does not provide or furnish to the guests or employees of the Hotel any products which are used or consumed at the Property or any services necessary to the operation of the Hotel.

14. To Seller's knowledge, Hotel Operator does not provide or furnish to the guests or employees of the Hotel any products which are used or consumed at the Property or any services necessary to the operation of the Hotel, except as set forth on Exhibit H.

15. Yves Hansel, Nanci Klein and Loren Haley (the "Seller Knowledge Parties") are the persons most familiar with the day to day operations of the Hotel and the matters warranted by Seller under this Section 6.1.

Whenever used in this Agreement, the phrases "to Seller's knowledge," "of which Seller has knowledge" and similar verbiage shall be limited in meaning to the actual, (as distinguished from implied, imputed, and constructive) knowledge of any of the Seller Knowledge Parties on the Effective Date, or as remade on the Closing Date pursuant to the Closing Certificate, without inquiry or investigation, and without attribution to the Seller Knowledge Parties of facts and matters otherwise within the personal knowledge of any other officers or employees of Seller or third parties, including, without limitation, Hotel Operator.

Seller shall have no liability for inaccuracies in the representations and warranties set forth in this Section 6.1 to the extent that, as of the Date of Closing, Purchaser has actual knowledge that a representation or warranty is inaccurate and proceeds to close escrow notwithstanding such facts. Seller shall be entitled to state in writing on the closing certificate to be delivered by Seller pursuant to Section 10.2.1 below exceptions to the representations, warranties, and covenants set forth above. If any such exceptions are noted on the closing certificate and if such exceptions are not reasonably acceptable to Purchaser, a condition to Purchaser's obligation to purchase the Property shall be deemed not satisfied and Purchaser shall have the right either (i) to terminate this Agreement and to receive promptly the Deposit (including interest accrued thereon), or (ii) to elect to close escrow notwithstanding such exceptions. In either event, Seller shall have no further obligation or liability with respect to such exception except that if Purchaser elects to terminate this Agreement as a result of such exception, then Seller shall be liable to Purchaser (i) to the extent such inaccuracy in any representation or warranty constitutes or results from Seller's material breach or default under this Agreement, (ii) with respect to any representation or warranty contained in Sections 6.1.1, 6.1.2, 6.1.4 or 6.1.5 above that was materially inaccurate on the Date of this Agreement, and (iii) with respect to any representation or warranty contained in Sections 6.1.10, 6.1.11 or 6.1.15 above that was materially inaccurate on the Date of this Agreement, except to the extent

that Seller notify Purchaser in writing or Purchaser otherwise obtains actual knowledge of such inaccuracy on or before the Approval Date.

## **6.2. By Purchaser**

Purchaser represents and warrants to Seller that:

1. Purchaser is a limited liability company, Purchaser is duly organized, validly existing, and in good standing under the laws of the state of Purchaser's formation and is, or will be on the Date of Closing, authorized to do business in the State of California, has duly authorized the execution and performance of this Agreement, and such execution and performance will not violate any material term of its certificate of formation or operating agreement.
2. No petition in bankruptcy (voluntary or otherwise), assignment for the benefit of creditors, or petition seeking reorganization or arrangement or other action under federal or state bankruptcy laws is pending against or contemplated by Purchaser, its general partner(s), controlling shareholders, or controlling members.
3. Purchaser expressly acknowledges that it has a sufficient opportunity under this Agreement to inspect and investigate the Property, the Leases, the Contracts, and all other aspects of the Property and operations thereon, and to determine whether the condition of the Property, including the condition of zoning, permits and approvals and use, operation, and development potential of the Property, is satisfactory to Purchaser. Purchaser further acknowledges that if Purchaser delivers the Approval Notice in accordance with Section 3.5 above, then the Property will be conveyed in "as is" condition, without warranties or representations of any kind, except for the express warranties and representations contained in this Agreement and the covenants implied under law by delivery of a grant deed.

## **6.3. Mutual**

1. Seller and Purchaser each represent to the other that it has had no dealings, negotiations, or consultations with any broker, representative, employee, agent, or other intermediary in connection with this Agreement or the sale of the Property. Seller and Purchaser agree that each will indemnify, defend, and hold the other free and harmless from the claims of any broker(s), representative(s), employee(s), agent(s), or other intermediary(ies) claiming to have represented Seller or Purchaser, as the case may be, or otherwise claiming to be entitled to compensation in connection with this Agreement or in connection with the sale of the Property on account of any alleged agreement or undertaking by Seller or Purchaser, as the case may be. The provisions of this Section 6.3 shall survive Closing or the termination of this Agreement.

## **Section 7. Costs, Adjustments and Apportionments**

### **7.1. Purchaser's Closing Costs**

Purchaser will pay the following costs of Closing to the extent due and payable (regardless of whether the transaction contemplated hereby closes or this Agreement is terminated pursuant to the terms hereof):

1. The fees and disbursements of its counsel, inspecting architects, engineers, and other consultants, if any;
2. The transfer taxes assessed by County of Santa Clara with respect to the sale of the Property to Purchaser;

3. One-half of the escrow fees payable with respect to the sale of the Property pursuant to the escrow established pursuant to this Agreement;
4. One-half of any sales or use taxes relating to the transfer of the Personal Property to Purchaser;
5. The cost of any update to the Survey obtained by Purchaser;
6. The cost of the premium differential for ALTA extended coverage title insurance and the cost of any title endorsements requested by Purchaser;
7. Any recording fees; and
8. All other expense(s) incurred by Purchaser or its representative(s) in inspecting or evaluating the Property or closing this transaction.

### **7.2. Seller's Closing Costs**

Seller will pay the following costs of Closing:

1. The fees and disbursements of Seller's counsel;
2. One-half of the escrow fees payable with respect to the sale of the Property pursuant to the escrow established under this Agreement;
3. The cost an owner's CLTA title policy;
4. The transfer taxes assessed by the City of San Jose with respect to the sale of the Property to Purchaser; and
5. One-half of any sales tax relating to the transfer of the Personal Property to Purchaser.

### **7.3. Other Closing Costs**

Any other costs or charges of closing the purchase and sale of the Property not specifically mentioned in this Agreement shall be allocated between Seller and Purchaser in accordance with applicable local custom for similar transactions.

### **7.4. Apportionments**

The following apportionments shall be made between Seller and Purchaser as of 11:59 P.M. local time, on the day immediately preceding the Date of Closing (the "**Apportionment Date**"):

1. Tour agents' and travel agents' commissions.
2. Subject to Sections 4.3.2 and 4.3.3 above, amounts paid or payable under the Hotel Management Agreement.
3. General real estate taxes, general and special assessments, water or sewer rates and charges (if not metered), personal property taxes, taxes and assessments imposed against the Property or its owner resulting from the operation of the Hotel and Parking Garage, or any other governmental tax or charge levied or assessed against the Property (collectively, the "**Taxes**"), relating to the Property and payable during the year in which Closing occurs. If the Closing shall occur before the actual Taxes payable during

the year of Closing are known, the apportionment of Taxes shall be upon the basis of the latest available tax rates and assessed value of the Property, and, if the Taxes for the year of Closing are thereafter determined to be more or less than the Taxes for the preceding year (after any appeal of the assessed valuation thereof is concluded), Seller and Purchaser promptly (but no later than the date that is thirty (30) days from and after the date that the final invoices for taxes for the Property for the year in which the Closing occurs are issued by the applicable taxing authority(ies), except in the case of an ongoing tax protest) shall adjust the proration of such Taxes, and Seller or Purchaser, as the case may be, shall pay to the other any amount required as a result of such adjustment. If Seller undertakes a tax protest with respect to all or any portion of the Taxes for the year in which Closing occurs or any previous year, any refund (less Seller's reasonable out-of-pocket costs of obtaining such refund) relating to any previous year shall be the property of Seller, and any refund (less Seller's reasonable out-of-pocket costs of obtaining such refund) relating to the year in which Closing occurs shall be prorated as of the Apportionment Date. Further, if, following the Closing, any governmental authority conducts or proposes to conduct any audit of Taxes imposed as a result of the operation of the Hotel and the Parking Garage prior to Closing, Seller, at its own expense, shall reasonably cooperate with Purchaser in connection with such audit and for the purpose of appropriately allocating the Hotel and the Parking Garage assessments for the periods before and after Closing. The covenants of the preceding sentences shall survive the Closing. All Taxes assessed after the Apportionment Date shall be paid by Purchaser to the extent attributable to the period after Closing.

4. With respect to electricity, telephone, television, cable television, steam, gas, water, and sewer services that are metered at the Hotel and other utilities (collectively, the "Utilities"), Seller shall endeavor to have the respective companies providing the Utilities read the meters for the Utilities on or immediately prior to the Apportionment Date. Seller shall be responsible for all charges based on such final meter reading, and Purchaser shall be responsible for all charges thereafter. If such readings are not obtainable less than two (2) days prior to Closing, then, until such time as readings are obtained, charges for all Utilities for which readings were not obtained shall be prorated as of the Apportionment Date based on the per diem rate obtained by using the last period and bills for such Utilities that are available. Upon the taking of a subsequent actual reading, such apportionment shall be adjusted to reflect the actual per diem rate for the billing period in which the Date of Closing falls, and Seller or Purchaser, as the case may be, shall promptly deliver to the other the amount determined to be due on such adjustment.

5. Room charges for the night commencing on the Apportionment Date and ending on the morning of the Date of Closing shall be paid one-half (1/2) to Seller, and one-half (1/2) to Purchaser. Dinner and bar charges for the evening of the Apportionment Date shall be the property of Seller. Breakfast and all other charges for the morning of the Date of Closing shall be the property of Purchaser.

6. All security deposits actually held by Seller on the Date of Closing in accordance with the terms of any Leases shall be credited to Purchaser.

7. All Reservation Deposits actually held by Seller (as opposed to Hotel Operator as agent for Seller), if any, on the Date of Closing will be transferred to Purchaser.

8. Seller shall receive full reimbursement from Purchaser at Closing for each of the following items:

(a) prepaid fees or other charges for transferable licenses, permits, telephone equipment, telephone rental, or other items, if any, to the extent the rights to such prepaid fees or other charges are assigned by Seller to Purchaser at Closing; and

(b) transferable deposits with companies providing Utilities, if any, to the extent the rights to such transferable deposits are assigned by Seller to Purchaser at Closing.

9. To the extent not inconsistent with any of the foregoing, all other items of income and expense as are customarily adjusted or prorated upon the sale and purchase of a hotel property similar to the Hotel shall be adjusted and prorated between Seller and Purchaser accordingly.

Seller and Purchaser acknowledge that the apportionments in this Section 7.4 shall be prepared, to the extent applicable, in accordance with the current edition of the Uniform System of Accounts for Hotels of the Hotel Association of New York City, Inc., as adopted by the American Hotel Association of the United States and Canada.

The provisions of this Section 7.4 shall survive the Closing and shall not merge with the Deed to be delivered at Closing.

### **7.5. Food and Beverage Inventory**

As part of the Purchase Price, Purchaser shall separately pay Seller at Closing the sum of (i) a fixed amount to be agreed on by Seller and Purchaser on or before the Approval Date representing the value of all opened food and beverage inventory (excluding alcoholic beverages) (the “**Opened Food and Non-Alcoholic Beverage Consideration**”), plus (ii) the full amount of all unopened food and beverage inventory, at Seller’s cost, located on or used in connection with the Property (including, without limitation, all unopened food and beverage inventory located in the guest room mini-bars) as of the Apportionment Date (excluding alcoholic beverages, which shall be purchased by Purchaser, at Seller’s cost, only through and upon the Closing of any escrow established pursuant to Section 4.2 hereof for the transfer of the existing Alcoholic Beverage License). During the night of the Apportionment Date, and prior to the time scheduled for the commencement of Closing on the Date of Closing, representatives of both Seller and Purchaser shall prepare an inventory of unopened food and beverage items, together with a schedule identifying the unit cost of such unopened items, as actually paid by Seller as supported by the Books for the Property. Purchaser shall purchase all opened food and beverage inventory by paying Seller the Opened Food and Non-Alcoholic Beverage Consideration as provided above, and all unopened food and beverage inventory by paying Seller an amount equal to Seller’s cost therefor, as shown on the aforesaid inventory and schedule, such amounts to be added to and as part of the Purchase Price. Notwithstanding anything to the contrary contained herein, in the event Seller and Purchaser fail to agree on the amount of the Opened Food and Non-Alcoholic Beverage Consideration on or before the Approval Date as contemplated herein, then Purchaser shall have the right to terminate this Agreement by written notice to Seller given not later than the Approval Date. If either party elects to terminate this Agreement pursuant to this Section 7.5, then the Deposit (including all interest accrued thereon) shall be promptly returned to Purchaser and the parties shall have no further liability to each other under this Agreement except as otherwise provided herein.

### **7.6. Accounts Receivable and Accounts Payable**

1. As a part of the Purchase Price, (i) Purchaser shall separately pay Seller at Closing a sum equal to (A) one hundred percent (100%) of all accounts receivable outstanding for thirty (30) days or less as of the Date of Closing, plus (B) seventy percent (70%) of all accounts receivable outstanding for a period between thirty-one (31) and sixty (60) days prior to the Date of Closing, including any accounts receivable owing from any present guests of the Hotel incurred during that guest’s present stay (collectively, the “**Included Accounts Receivable**”); and (ii) room charges for all guests of the Hotel for the night of the Apportionment Date shall be apportioned between the parties in accordance with Section 7.4.5 above.

Notwithstanding anything to the contrary contained in clause (i) above, collections on Included Accounts Receivable shall be paid over to Seller to the extent Seller did not receive a credit for such sums at Closing as and when they are actually received by Purchaser, it being understood that sums paid on any Included Account Receivable shall be credited against the debt most recently accrued in or to such account. In addition, if Included Accounts Receivable are not paid within forty-five (45) days following the Date of Closing, then Purchaser shall have the right to deliver to Seller a statement, certified by Purchaser or Hotel Operator to be true and correct, listing all such Included Accounts Receivable that have not been collected (collectively, the “**Uncollected Receivables**”) and Seller shall, within ten (10) business days following receipt of such statement, remit to Purchaser the full amount previously paid or credited at Closing to Seller with respect to such Uncollected Receivables. If Purchaser shall thereafter receive any payments on such Uncollected Receivables, Purchaser shall remit all sums so collected to Seller in the same manner as provided above with respect to collections on Included Accounts Receivable.

2. Purchaser shall be credited, at Closing, for any accounts payable outstanding on the Date of Closing, with respect to the operation of the Property prior to Closing, except those accounts payable that are disputed by Seller. Seller shall identify all such disputed accounts payable as provided in Section 7.6.3 hereof and shall indemnify, defend, and hold Purchaser harmless against any liability arising out of any accounts payable dispute(s) so identified by Seller. The accounts payable for which Purchaser is entitled to a credit against the Purchase Price at Closing are hereinafter referred to as the “**Assumed Accounts Payable**.” In consideration of the credit against the Purchase Price, Purchaser agrees to pay all Assumed Accounts Payable as and when due and further agrees to indemnify, defend, and hold Seller harmless from and against any cost or liability resulting from nonpayment or late payment of any of such Assumed Accounts Payable as further provided in Section 10.3 hereof.

3. During the night of the Apportionment Date, and prior to the time scheduled for the commencement of the Closing on the Date of Closing, Seller’s representatives shall prepare and deliver to Purchaser or its representatives a schedule detailing all Assumed Accounts Payable incurred prior to the Apportionment Date. Seller shall specifically identify in such schedule all disputed amounts payable for which Seller shall retain responsibility following the closing as provided in Section 7.6.2 hereof.

The provisions of this Section 7.6 shall not merge with the Deed delivered hereunder but shall survive the Closing.

### **7.7. House Banks**

The sale of the Property does not include cash, checks and other funds, including till money, house banks, and notes, securities, and other evidence of indebtedness held at the Hotel as of the Apportionment Date (collectively, the “**House Banks**”), and the same shall be retained by or credited to Seller on the Date of Closing, subject only to the apportionments as provided in Section 7.4 hereof.

### **7.8. Working Capital, Funds of Owner**

1. Seller shall receive a credit at Closing for the aggregate amount of all funds of Seller held by Hotel Operator or on deposit to the credit of Seller or Hotel Operator as Seller’s agent, with banking institutions on the Date of Closing, including, without limitation, all funds advanced by Seller to Hotel Operator as working capital for the Hotel, and specifically including any funds in the FF&E Account maintained under the Hotel Management Agreement.

2. The provisions of this Section 7.8 shall not merge with the Deed delivered hereunder but shall survive the Closing.

## **7.9. Reservation Deposits**

1. Seller shall receive a credit at Closing for the aggregate amount of any Reservation Deposits held by Hotel Operator on the Date of Closing and actually forfeited or deemed forfeited by the parties making such Reservation Deposits, to the extent the same are attributable to reservations and bookings for the Hotel through and including the night commencing on the Apportionment Date. The foregoing notwithstanding, forfeited Reservation Deposits attributable to booking for the night commencing on the Apportionment Date shall be paid fifty percent (50%) to Seller and fifty percent (50%) to Purchaser.
2. The provisions of this Section 7.9 shall not merge with the Deed delivered hereunder but shall survive the Closing.

## **7.10. Safe and Baggage**

1. On the Date of Closing, Seller shall cause the delivery to Purchaser of all of Seller's keys and combinations, if any, to the safe in the Hotel. On the Date of Closing, Seller shall give written notices to those persons who have deposited items in the safe, advising them of the sale of the Hotel to Purchaser and requesting the removal or verification of their contents in the safe. All such removals or verifications on the Date of Closing shall be under the supervision of Seller's and Purchaser's respective representatives. All contents that are to remain in the safe shall be recorded (the "**Inventoried Safe Deposit Box**"). Items belonging to guests who have not responded to such written notice by so removing and verifying their safe contents by the end of the Date of Closing shall be recorded in the presence of the respective representatives (the "**Non-Inventoried Safe Deposit Boxes**"). Purchaser shall be responsible for, and shall indemnify Seller from and against any losses incurred with respect to, any theft, loss or damage to the contents of an Inventoried Safe Deposit Box, and any losses incurred with respect to, any theft, loss or damage to the contents of a Non-Inventoried Safe Deposit Box, except to the extent a claim has been made prior to Closing. Seller shall be responsible for, and shall indemnify Purchaser from and against any losses incurred with respect to, any theft, loss or damage to the contents of a Non-Inventoried Safe Deposit Box for which a claim has been made prior to Closing. The indemnification obligations under this Section 7.10.1 shall apply only to the extent such losses are not recovered by the applicable indemnitee through insurance.
2. On the Date of Closing, representatives of Purchaser and Seller shall take an inventory of all baggage, valises, and trunks checked or left in the care of Seller. From and after the Date of Closing, Purchaser shall be responsible for all baggage listed in said inventory, and Purchaser hereby agrees to indemnify, defend, and hold Seller harmless from and against any liability therefor arising after Closing. Seller agrees to indemnify, defend and hold Purchaser harmless from and against liability arising with respect to the baggage, valises and trunks prior to Closing. At Closing, Seller shall deliver to Purchaser, to the extent the same are in the possession of Seller (as opposed to Hotel Operator), all Books as to the baggage, valises, and trunks at the Hotel, and the keys to the safe of the Hotel and the trunks, lockers, and storage rooms.
3. The provisions of this Section 7.10 shall not merge with the Deed delivered hereunder but shall survive the Closing.

## **7.11. Property Not Included In Sale**

1. Tax deposits, utility deposits, and other deposits, except for transferable utility deposits which are to be apportioned as herein provided, shall not be included in the Property to be sold hereunder.

2. Seller shall retain the right to collect accounts receivable other than Included Accounts Receivable, provided that if any of the same are collected by Purchaser within 90 days of the Closing Date, Purchaser shall first pay any accounts receivable from such party due following the date of Closing with any remainder promptly being paid over to Seller.
3. The provisions of this Section 7.11 shall not merge with the Deed delivered hereunder but shall survive the Closing.
4. Art work specified in **Exhibit I**.

### **7.12. Benefit and Liability**

The purpose and intent of the provisions as to prorations, adjustments, and apportionments set forth in this Section 7 and elsewhere in this Agreement are that Seller shall bear all expenses of ownership and operation of the Property and, subject to Section 7.4.5 above, shall receive all income therefrom accruing through the Apportionment Date, and Purchaser shall bear all such expenses and, subject to Section 7.4.5 hereof, receive all such income accruing thereafter. If the computation of the apportionments and adjustments described in this Section 7 shows that a net amount is owed by Seller to Purchaser, such amount shall be credited against the Purchase Price as set forth in Section 2.2.2 hereof. If such computation shows that a net amount is owed by Purchaser to Seller, such amount shall be paid by wire transfer to Seller by Purchaser on the Date of Closing in addition to the payment of the cash portion of the Purchase Price to be made by Purchaser under Section 2.2.2 hereof. The foregoing computations shall be subject to further adjustment as provided in Section 10.8 hereof. The provisions of this Section 7.12 shall not merge with the Deed delivered hereunder but shall survive the Closing.

### **7.13. Adjustments**

All costs and prorations under this Section 7 shall be subject to adjustment pursuant to Section 10.8 below.

## **Section 8. Damage, Destruction or Condemnation**

### **8.1. Material Event**

If, prior to Closing, five percent (5%) or more of the guest rooms, or [\_\_\_\_\_] (\_\_\_) or more of the parking spaces in the Parking Garage are damaged or destroyed or taken under power of eminent domain, or Seller has received written notice from a governmental authority that such property will be taken under power or eminent domain, or any portion of the Property is damaged such that the cost of repairing or correcting such damage equals or exceeds one percent (1%) of the Purchase Price, Purchaser may elect to terminate this Agreement by giving written notice of its election to Seller within ten (10) business days after receiving notice of such destruction or taking. If Purchaser does not give such written notice within such ten (10) business day period, the Closing shall occur on the Date of Closing and at the Purchase Price provided for in Section 2 hereof, provided that there shall be a credit against the Purchase Price due hereunder equal to the amount of any physical damage insurance proceeds or condemnation awards collected by Seller or Hotel Operator as a result of any such damage or condemnation, up to the amount of the Purchase Price (excluding the amounts payable under Sections 4.2, 7.5, and 7.6 above), plus the amount of any deductible under Seller's and/or Hotel Operator's insurance policy covering such loss, plus an amount equal to any uninsured loss, including the amount of any self-insured retention, less any sums expended by Seller toward the restoration or repair of the Property. If the proceeds or awards have not been collected as of the Date of Closing, then Seller shall assign and, if applicable, shall cause Hotel Operator to assign such proceeds or awards to Purchaser, with a credit for any deductible and the amount

of any uninsured loss, plus an amount equal to any uninsured loss, including the amount of any self-insured retention, except to the extent needed to reimburse Seller for sums expended by Seller to repair or restore the Property. Purchaser shall additionally be entitled to receive the proceeds of any business interruption insurance payable as a result of such damage or condemnation, but only to the extent such proceeds are attributable to the period from and after the Date of Closing.

### **8.2. Immaterial Event**

If, prior to Closing, less than five percent (5%) of the guest rooms, or less than [\_\_\_\_\_] (\_\_\_) of the parking spaces in the Parking Garage are damaged or destroyed or taken under power of eminent domain, or Seller receives written notice from a governmental authority that such property will be taken under power of eminent domain, or any portion of the Property is damaged such that the cost of repairing or correcting such damage is less than one percent (1%) of the Purchase Price, then Purchaser shall close this transaction on the Date of Closing and at the Purchase Price agreed on in Section 2 hereof, provided that there shall be a credit against the Purchase Price due hereunder equal to the amount of any physical damage insurance proceeds or condemnation awards collected by Seller as a result of any such damage or condemnation, up to the amount of the Purchase Price (excluding the amounts payable under Sections 7.5 and 7.6 above), plus the amount of any deductible under Seller's insurance policy covering such loss and the amount of any uninsured loss, less any sums expended by Seller toward the restoration or repair of the Property. If the proceeds or awards have not been collected as of the Date of Closing, then such proceeds or awards shall be assigned to Purchaser, with a credit for any deductible and the amount of any uninsured loss, except to the extent needed to reimburse Seller for sums expended to repair or restore the Property. Purchaser shall additionally be entitled to receive the proceeds of any business interruption insurance payable as a result of such damage or condemnation, but only to the extent such proceeds are attributable to the period from and after the Date of Closing.

### **8.3. Termination and Return of Deposit**

If either party elects to terminate this Agreement pursuant to this Section 8, Seller shall promptly direct the Title Company to return the Deposit (including all interest accrued thereon) to Purchaser, and thereafter, neither Seller nor Purchaser shall have any obligation or liability hereunder except as otherwise provided herein, and Purchaser shall have no interest in the Property.

### **Section 9. Notices**

Any notice required or permitted to be given hereunder shall be deemed to be given when hand delivered or sent by facsimile, e-mail or by overnight express service, in either case addressed to the parties at their respective addresses referenced below:

If to Seller:                    David Sykes  
   City Manager  
   200 Santa Clara Street, 17<sup>th</sup> Floor  
   San Jose, CA 95113  
   Fax: 408 292-6179  
   Email:

With a copy to: City Attorney  
200 E. Santa Clara Street, 16<sup>th</sup> Floor  
San Jose, CA 95113  
Fax: 408 998-3131  
Email:

If to Purchaser: JMA Ventures, LLC  
Attention: Todd Chapman / Kevin Morgan  
460 Bush Street  
San Francisco, CA 94108  
Email

With a copy to: c/o UBS Realty Investors LLC  
455 Market Street, Suite 1000  
San Francisco, California 94105  
Attention: Rod Chu  
Telecopy: (415) 538-8141  
Email: Rodney.chu@ubs.com

With a copy to: UBS Realty Investors LLC  
Ten State House Square – 15th Floor  
Hartford, Connecticut 06103  
Attention: General Counsel  
Telecopy: (860) 816 9004  
Email: steven.kapiloff@ubs.com

With a copy to: Shartsis Friese LLP  
One Maritime Plaza, 18th Floor  
San Francisco, CA 94111  
Attention: Peter Aitelli  
Facsimile: (415) 421-2922  
Email: paitelli@sflaw.com

or in each case to such other address as either party may from time to time designate by giving notice in writing to the other party. All notices sent by facsimile or e-mail shall additionally be hand-delivered or sent by overnight express service within one (1) business day after the sending of the facsimile transmission or e-mail, as applicable. All notices delivered in the manner provided herein shall be deemed given upon actual receipt (or attempted delivery if delivery is refused).

## **Section 10. Closing and Escrow**

### **10.1. Escrow Instructions**

Upon execution of this Agreement, Seller shall deliver an executed counterpart of this Agreement to the Title Company to serve as the instructions to Title Company as the escrow holder for consummation of the transaction contemplated herein. Seller and Purchaser agree to execute such additional and supplementary escrow instructions as may be appropriate to enable Title Company to comply with the terms of this Agreement or as may be required to establish and accomplish closing of any escrow required to be established for the transfer of the current Alcoholic Beverage License(s) and/or alcoholic beverage

inventory for the Hotel. However, if there is any conflict between the provisions of this Agreement and any such additional or supplementary escrow instructions, the terms of this Agreement shall prevail.

## 10.2. Seller's Deliveries

Seller shall deliver either at the Closing or by making available at the Property, as appropriate, the following original documents, each executed and, if required, acknowledged:

1. A grant deed from Seller in the form attached hereto as **Exhibit J**.
2. An Affordable Housing Covenant in the form set forth in **Exhibit K** which provides for development of the affordable housing units in certain circumstances set forth in the Covenant.
3. A bill of sale executed by Seller in the form attached hereto as **Exhibit L** conveying the Personal Property and all Intellectual Property.
4. If Purchaser elects to assume the Hotel Management Agreement, (i) the Assignment and Assumption of Hotel Management Agreement in the form attached hereto as **Exhibit F**, and (ii) an estoppel certificate, duly executed by the Hotel Operator in the form attached hereto as **Exhibit M**.
5. Originals of all Leases which are in effect as of Closing, a current listing of any tenant security deposits and prepaid rents held by Seller with respect to the Property, and an assignment of all Leases, security deposits and prepaid rents by way of an assignment and assumption agreement executed by Seller in the form attached hereto as **Exhibit N**.
6. An assignment of all transferable warranties and guarantees then in effect, if any, with respect to the Improvements or any repairs or renovations to such Improvements and Personal Property being conveyed hereunder, which assignment shall be executed by Seller in the form attached hereto as **Exhibit O**, without representation by Seller as to assignability or other matters.
7. An affidavit from Seller pursuant to the Foreign Investment in Real Property Tax Act in the form attached hereto as **Exhibit P** and a California [Form 590] Certificate.
8. A closing certification from Seller with respect to representations, warranties, and covenants in the form of **Exhibit Q**.
9. An incumbency certificate from Seller in the form of **Exhibit R**.
10. All keys and/or combinations, if any, in Seller's possession to all rooms, offices, and other portions of the Hotel.
11. If Purchaser elects to assume the existing Collective Bargaining Agreement between Dolce Hayes Mansion and Unite Here, Local 19, dated as of October 2014 (the "**Union Agreement**"), (i) an assignment of the Union Agreement to Purchaser by way of an assignment and assumption agreement executed by Seller in the form attached hereto as **Exhibit S**, and (ii) an estoppel certificate, duly executed by the Union in the form attached hereto as **Exhibit T**.
12. A digital copy of the Books.
13. An Agreement for Edenvale Park Parking Facilities Operation and Management between the City of San Jose and 200 Edenvale Avenue Hotel Associates LLC in the form attached hereto as **Exhibit U** (the "**Park Agreement**").

### **10.3. Purchaser's Deliveries**

At Closing, Purchaser shall: (a) pay Seller the Purchase Price subject to the apportionments as provided in Section 7 hereof; (b) execute and deliver counterparts of the agreements referred to in Sections 10.2.4, 10.2.5 and 10.2.15 hereof; (c) execute and deliver a certificate with respect to representations and warranties in the form of **Exhibit V**; (d) deliver to Seller corporate, partnership or trust resolutions, incumbency certificates, evidence of due incorporation or formation and good standing, and other evidence reasonably satisfactory to the Title Company of Purchaser's authority to lawfully and validly enter into and perform all of Purchaser's obligations under this Agreement; and (e) execute and deliver all documents required in contemplation of Closing and/or as required by Escrow.

### **10.4. Possession**

Purchaser shall be entitled to possession of the Property upon conclusion of the Closing.

### **10.5. Insurance**

Seller shall have no obligation to insure the Property or cause the Property to be insured after the Date of Closing, and Purchaser shall be responsible for causing the Property to be insured thereafter.

### **10.6. Utility Services and Deposits**

Seller shall be entitled to the return of any deposit(s) posted by it with any utility company not assigned to Purchaser pursuant to Section 7.4.4 hereof, and Purchaser shall notify each utility company serving the Property to terminate Seller's account, effective at 12:01 A.M. on the Date of Closing.

### **10.7. Notice Letters**

Subsequent to Closing, Seller shall provide to Purchaser or send directly to tenants under the Assumed Leases copies of letters in the form attached hereto as **Exhibit W**, advising the tenants that (i) Purchaser has purchased the Property, (ii) the security deposit, if any, has been delivered to Purchaser in connection with such sale, (iii) Seller is relieved of any and all liability for any such security deposit, and (iv) that each tenant from and after the date of the closing shall pay its rent to Purchaser.

### **10.8. Post-Closing Adjustments**

Concurrently with the Closing, representatives of Seller and Purchaser shall cause a preliminary closing statement to be prepared reflecting their respective closing costs, the apportionments, the payment of the Purchase Price, and all other terms of this Agreement affecting or relating to the amount of and adjustments to the consideration to be paid for the Property. In the event either Purchaser or Seller become aware of any item in the closing statement which requires adjustment as a result of new information or the ascertainment of actual amounts for items which are the subject of estimates at Closing, it shall promptly advise the other in writing and provide such supporting documentation as shall reasonably be required. Upon the ninetieth (90th) day following the Date of Closing, or earlier upon mutual agreement of the parties, Purchaser or Seller, as the case may be, shall make such additional payment or refund as shall be required by the aggregate of any such post-Closing adjustments, including, without limitation, the adjustments resulting from collection of Accounts Receivable as provided in Section 7.6.1 hereof, and a final closing statement shall be prepared to reflect such revisions, subject only to subsequent adjustments provided for in Sections 7.4.3 and 7.6.1 hereof. This provision shall not merge with the Deed delivered hereunder but shall survive Closing.

**Section 11. Default; Failure of Condition**

**11.1. Purchaser's Default**

IN THE EVENT THAT PURCHASER FAILS TO COMPLETE THE PURCHASE OF THE PROPERTY FOR ANY REASON OTHER THAN (A) A DEFAULT BY SELLER AND THE EXPIRATION OF THE CURE PERIOD, IF ANY, PROVIDED UNDER SECTION 12.6 HEREOF, (B) THE EXISTENCE OF A PENDING DEFAULT (AS DEFINED AND CONTEMPLATED IN SECTION 12.6 HEREOF), (C) THE FAILURE OF ANY CONDITION TO PURCHASER'S OBLIGATION TO CLOSE THIS TRANSACTION WHICH IS EXPRESSLY SET FORTH HEREIN, (D) THE TERMINATION OR DEEMED TERMINATION OF THIS AGREEMENT BY PURCHASER PURSUANT TO A TERMINATION RIGHT EXPRESSLY SET FORTH HEREIN OR OTHERWISE PROVIDED BY LAW OR FAILURE OF PURCHASER TO DELIVER AN APPROVAL NOTICE AS AND WHEN REQUIRED UNDER SECTION 3.5 ABOVE, SELLER SHALL HAVE THE RIGHT TO TERMINATE THIS AGREEMENT AND IN SUCH EVENT THE DEPOSIT (TOGETHER WITH ALL INTEREST ACCRUED THEREON) SHALL BE DELIVERED TO SELLER BY TITLE COMPANY UPON WRITTEN DEMAND, AND THE DEPOSIT (TOGETHER WITH ALL INTEREST ACCRUED THEREON) SHALL BE RETAINED BY SELLER AS LIQUIDATED DAMAGES WITH RESPECT TO SUCH DEFAULT. THEREAFTER, BOTH PARTIES SHALL BE RELIEVED OF AND RELEASED FROM ANY FURTHER LIABILITY HEREUNDER, EXCEPT FOR THE INDEMNIFICATION OBLIGATIONS EXPRESSLY SET FORTH IN ANY SECTION OF THIS AGREEMENT, WHICH OBLIGATIONS SHALL BE PERFORMABLE AND OWING IN ADDITION TO ANY SUMS RETAINED HEREUNDER BY SELLER AS LIQUIDATED DAMAGES. SELLER AND PURCHASER AGREE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICABLE TO FIX ACTUAL DAMAGES TO SELLER AS A RESULT OF A DEFAULT BY PURCHASER AND THAT THEY HAVE AGREED THE DEPOSIT IS A FAIR AND REASONABLE AMOUNT TO BE RETAINED BY SELLER AS AGREED AND LIQUIDATED DAMAGES IN LIGHT OF SELLER'S REMOVAL OF THE PROPERTY FROM THE MARKET AND THE COSTS INCURRED BY SELLER AND THAT RETENTION OF THE DEPOSIT (TOGETHER WITH ALL INTEREST ACCRUED THEREON) BY SELLER SHALL NOT CONSTITUTE A PENALTY OR FORFEITURE.

Purchaser's Initials: \_\_\_\_\_

Seller's Initials: \_\_\_\_\_

**11.2. Seller's Default**

IF SELLER REFUSES OR FAILS TO CONVEY THE PROPERTY AS HEREIN PROVIDED FOR ANY REASON OTHER THAN (A) A DEFAULT BY PURCHASER AND THE EXPIRATION OF THE CURE PERIOD, IF ANY, PROVIDED UNDER SECTION 12.6, (B) THE EXISTENCE OF A PENDING DEFAULT, OR (C) THE FAILURE OF A CONDITION TO SELLER'S OBLIGATION TO CLOSE THIS TRANSACTION WHICH IS EXPRESSLY SET FORTH HEREIN, PURCHASER SHALL ELECT AS ITS SOLE REMEDY HEREUNDER EITHER (I) TO TERMINATE THIS AGREEMENT AND RECOVER THE DEPOSIT PLUS ANY ACTUAL COSTS INCURRED IN CONNECTION WITH THE TRANSACTION NOT TO EXCEED THE AMOUNT OF \$ \_\_\_\_\_, OR (II) TO PURSUE SPECIFIC PERFORMANCE BY SELLER OF THE TERMS OF THIS AGREEMENT.

Purchaser's Initials: \_\_\_\_\_

Seller's Initials: \_\_\_\_\_

### **11.3. Failure of Condition**

If prior to Closing Seller discloses to Purchaser or Purchaser discovers that: (i) title to the Property is subject to defects, limitations, or encumbrances other than Permitted Title Policy Exceptions or Title Company is otherwise unwilling to issue the Title Policy to Purchaser in the form contemplated under Section 11.4.2 below, or (ii) any representation or warranty of Seller contained in this Agreement is or, as of the Date of Closing, will be untrue, or (iii) Seller has failed to perform an obligation, covenant, or agreement of Seller under this Agreement, or (iv) the conditions set forth in Section 11.4 below will not be satisfied as of the Date of Closing, then Purchaser shall promptly give Seller written notice of its objection thereto. In such event, without limiting Seller's rights under the final unnumbered paragraph of Section 6.1 hereof, Seller shall act in good faith and use commercially reasonable efforts and shall cooperate with Purchaser to cure such objection, provided that Purchaser may not object to the state of title of the Property on the basis of a Permitted Title Policy Exception [or the Affordable Housing Covenant]. The parties acknowledge and agree that Seller shall have no obligation to cure any objection, except to the extent such objectionable condition constitutes or results from a breach or default by Seller hereunder. If Purchaser fails to waive the objection within ten (10) days after notice from Seller that Seller will not cure the objection, this Agreement will terminate automatically, neither party shall have any liability to the other except as otherwise provided herein (and except that Seller shall not be relieved of liability to the extent the objection constitutes or results from a breach or default by Seller hereunder), and Seller shall promptly direct Title Company to return the Deposit (together with all interest accrued thereon) to Purchaser. However, if Purchaser is in default under this Agreement on or before the date of the termination thereof and if all applicable cure periods provided herein, if any, have expired, then Title Company shall immediately deliver the Deposit (together with all interest accrued thereon) to Seller in accordance with Section 11.1 hereof. It is understood that, subject to Seller's right of cure set forth above, in the event that Closing fails to occur by reason of the failure of any condition to Purchaser's obligation hereunder or for any other reason other than Purchaser's sole default hereunder, Purchaser shall be entitled to terminate this Agreement and to receive promptly a refund of the Deposit (including interest accrued thereon).

### **11.4. Conditions Precedent To Closing**

1. Seller's Conditions. Without limiting any conditions precedent set forth in other provisions of this Agreement, each of the following shall be a condition precedent to Seller's obligations to sell the Property, which may be waived only by a written waiver signed by Seller and delivered to Purchaser:

(a) On the Date of Closing, Purchaser shall not be in material default in the performance of any covenant or agreement in any material respect to be performed by Purchaser under this Agreement.

(b) On the Date of Closing, the representations and warranties of Purchaser set forth in Section 6.2 hereof shall be true and correct in all material respects as if made on and as of the Date of Closing.

(c) Approval by Hotel Operator of the sale of the Hotel and the assignment of the Hotel Operator Agreement to Purchaser.

(d) Delivery by Purchaser into Escrow of all items described in Section 10.3.

2. Purchaser's Conditions. Without limiting any conditions precedent set forth in other provisions of this Agreement, each of the following shall be a condition precedent to Purchaser's obligations to purchase the Property, which may be waived only by a written waiver signed by Purchaser and delivered to Seller:

(a) On the Date of Closing, Title Company shall be irrevocably committed to issue to Purchaser an ALTA owner's policy or binder (at Purchaser's option) with extended coverage (the "**Title Policy**") in the amount of the Purchase Price, subject to only the Permitted Title Policy Exceptions. The Title Policy shall be in form and substance reasonably satisfactory to Purchaser, shall show fee title vested in Purchaser or its designee subject only to the Permitted Title Policy Exceptions, and shall contain such endorsements and coverages as Purchaser may reasonably request and Title Company shall agree to issue, with such agreement memorialized in writing, on or before the Approval Date. It is understood that this condition shall be deemed satisfied if the Title Policy cannot be issued solely by reason of Purchaser's failure to act with reasonable diligence in requesting and arranging for endorsements and coverages and in providing documents and information reasonably required by Title Company in connection with the issuance of the Title Policy.

(b) On the Date of Closing, Seller shall not be in material default in the performance of any covenant or agreement in any material respect to be performed by Seller under this Agreement.

(c) On the Date of Closing, the representations and warranties of Seller set forth in Section 6.1 hereof shall be true and correct in all material respects as if made on and as of the Date of Closing.

(d) On the Date of Closing, no judicial or administrative suit, action, investigation, inquiry, or other proceeding by any party shall have been instituted against Seller which affects the Property or Seller's ability to convey the Property to Purchaser hereunder.

(e) Hotel Operator shall have approved the sale of the Hotel and the assignment of the Hotel Management Agreement, the Contracts and the Leases to Purchaser; the ABC shall have issued a temporary Alcoholic Beverage License to Purchaser or its designee or approved the transfer to Purchaser of the existing Alcoholic Beverage License for the Hotel; and all appropriate governmental authorities shall have approved the transfer to Purchaser or its designee of all governmental permits, approvals, or licenses required for the operation of the Hotel and the Property in the manner it is currently operated, or shall have granted Purchaser or its designee new permits, approvals, and licenses allowing such operation to continue.

(f) Seller shall have delivered to Purchaser a schedule of Included Accounts Receivable, certified by Seller or Hotel Operator to be true and complete as of the Date of Closing. Such schedule shall list each account debtor and refer to specific invoice numbers, if any.

(g) On the Date of Closing, there shall have been no actual, threatened, or imminent change in the present zoning of the Hotel or any part thereof which would adversely affect the operation or value of the Property as currently being operated. On the Date of Closing, no restrictions, limitations, or regulations shall have been issued, proposed, under consideration, or likely to be proposed by any governmental authorities having or asserting jurisdiction over the Property or the ownership interest thereof or the existing or future uses of the Property or any portion thereof which would materially affect the operation of the Property as currently being operated.

(h) Purchaser shall have received the result of a recent search, by a person satisfactory to Purchaser, of the Uniform Commercial Code judgment and tax lien filings which may have been filed with respect to any of the Personal Property of Seller, and such search shall not disclose the existence of

any liens encumbering such Personal Property except for Approved Title Policy Exceptions and liens which are to be discharged by Seller under the terms of this Agreement or which Seller otherwise agrees to discharge at or prior to Closing.

(i) If Purchaser does not elect to assume the Union Agreement, Purchaser and the Union shall have executed a union agreement.

(j) Seller shall have caused Authority to convey the Property to Seller.

(k) Delivery by Seller into Escrow all items required under Section 10.2.

3. Hart-Scott-Rodino Compliance. It shall be a condition precedent to the obligations of each party to this Agreement that at the time of the Closing:

(a) If required by applicable law, Purchaser and Seller shall have each made the filing or filings required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “**Hart-Scott-Rodino Act**”);

(b) All applicable time periods (subject to reductions pursuant to governmental waivers) under the Hart-Scott-Rodino Act shall have expired; and

(c) No action, suit, or proceeding shall have been instituted and remain pending before a court or other governmental agency or public authority to restrain, prohibit, or otherwise challenge the transactions contemplated by this Agreement, nor shall any governmental agency or public authority have notified any party hereto that the consummation of such transactions would or might violate any laws.

(d) To the extent required by applicable law, each party to this Agreement shall use its best efforts to comply promptly with all requirements of the Hart-Scott-Rodino Act applicable to the transactions contemplated by this Agreement.

## **Section 12. Miscellaneous**

### **12.1. Entire Agreement**

This Agreement, together with the Exhibits attached hereto, all of which are incorporated herein by reference, is the entire Agreement between the parties with respect to the subject matter hereof, and no alteration, modification or interpretation hereof shall be binding unless in writing and signed by both parties.

### **12.2. Severability**

If any provision of this Agreement or application to any party or circumstances shall be determined by any court of competent jurisdiction to be invalid and unenforceable to any extent, the remainder of this Agreement or the application of such provision to such person or circumstances, other than those as to which it is so determined invalid or unenforceable, shall not be affected thereby, and each provision hereof shall be valid and shall be enforced to the fullest extent permitted by law.

### **12.3. Applicable Law**

This Agreement shall be construed and enforced in accordance with the laws of the State of California, without regard to principles of conflicts of laws.

#### **12.4. Assignability**

Purchaser cannot assign this Agreement without first obtaining Seller's prior written consent, which consent shall be given or withheld in Seller's sole and absolute discretion. However, Purchaser shall be entitled to assign this Agreement without Seller's consent prior to the Closing Date to a limited liability company or other entity formed by Purchaser of which Purchaser acts as manager or managing member. Any assignment in contravention of this provision shall be void and of no force or effect. No assignment shall delay the Closing hereunder or release Purchaser from any obligation or liability under this Agreement. Any permitted assignee shall be deemed to have made any and all representations and warranties made by Purchaser hereunder, as if the assignee were the original signatory hereto.

#### **12.5. Successors Bound**

Subject to Section 12.4 hereof, this Agreement shall be binding upon and inure to the benefit of Purchaser and Seller and their respective successors and permitted assigns.

#### **12.6. Breach**

Should either party be in breach of or default under or otherwise fail to comply with any of the terms of this Agreement, other than a failure by Purchaser to make the Deposit or pay the Purchase Price, the complying party shall have the option to cancel this Agreement upon three (3) Business Days written notice to the other party of the alleged breach and failure by such other party to cure such breach within such three (3) Business day period. The non-defaulting party shall promptly notify the defaulting party in writing of any alleged default upon obtaining knowledge thereof. The Date of Closing shall be extended to the extent necessary to afford the defaulting party the full three (3) Business Day period within which to cure such default. The failure or refusal by a party to perform on the scheduled Date of Closing (except in respect of a Pending Default by the other party) shall be deemed to be an immediate default without the necessity of notice. If the Date of Closing shall have been once extended as a result of default by a party, such party shall not be entitled to any further notice or cure rights with respect to that or any other default. If Seller is in breach or default hereunder and is proceeding to cure such default or breach during the cure period specified herein, the Approval Date (if such breach or default occurred prior to the Approval Date) or the Date of Closing shall be extended for the number of days during which Seller is in breach or default. For purposes of this Section 12.6, a "**Pending Default**" shall be a default for which (i) written notice was given by the non-defaulting party, and (ii) the cure period extends beyond the scheduled date of Closing.

#### **12.7. Captions**

The captions in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope of this Agreement or the scope or content of any of its provisions.

#### **12.8. No Partnership**

Nothing contained in this Agreement shall be construed to create a partnership or joint venture between the parties or their successors in interest.

#### **12.9. Time of Essence**

Time is of the essence in this Agreement.

### **12.10. Counterparts**

This Agreement may be executed and delivered in any number of counterparts, each of which so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.

### **12.11. Recordation**

Purchaser and Seller agree not to record this Agreement or any memorandum thereof.

### **12.12. Proper Execution**

The submission by Seller to Purchaser of this Agreement in unsigned form shall be deemed to be a submission solely for Purchaser's consideration and not for acceptance and execution. Such submission shall have no binding force or effect, shall not constitute an option, and shall not confer any rights on Purchaser or impose any obligations on Seller, irrespective of any reliance thereon, change of position, or partial performance. The submission by Seller of this Agreement for execution by Purchaser and the actual execution and delivery thereof by Purchaser to Seller shall similarly have no binding force and effect on Seller unless and until Seller shall have executed this Agreement and a counterpart thereof shall have been delivered to Purchaser.

### **12.13. Mediation**

The parties agree prior to commencing any legal action or exercising right to terminate under this Agreement to submit any dispute or claim not resolved within any cure period set forth in this Agreement to good faith mediation which shall be held in California. The mediation session must be held within thirty (30) days after one party makes written demand to the other for mediation. The parties agree that they shall participate in a minimum of one half-day mediation session before the mediation may be declared unsuccessful and terminated by either party. Evidence of anything said, any admissions made, and any documents prepared in the course of the mediation shall not be admissible in evidence or subject to discovery in any court action pursuant to Evidence Code Section 1152.5. The mediator shall be an attorney who is selected by the mutual agreement of the parties and who is experienced in real property matters. If the parties are unable to agree upon a mediator of these qualifications, then the mediator shall be appointed by JAMS/Endispute. The mediation shall be conducted in accordance with such rules as the parties agree upon, or in the absence of agreement, in accordance with the Commercial Mediation Rules of JAMS/Endispute. The mediation conference shall take place at a location within twenty (20) miles of the Property at an office of JAMS/Endispute, if possible. The mediator's fees and administrative fees, if any, shall be split equally between the parties, but each party shall bear its own attorney's fees in any mediation unless otherwise agreed.

The Date of Closing shall be extended until such time that the mediator has made his or her final decision under this Section 12.13.

### **12.14. Operations**

1. Purchaser agrees that, so long as Purchaser (or its assignee under Section 12.4) operates the Property as a hotel, it will in good faith continue to operate the Hotel at an equivalent or higher level of quality as the Hotel is operated as of the Date of Closing. This covenant shall survive the Closing.

### **12.15. Survival and Limitation of Representations and Warranties and Covenants**

The representations and warranties of the parties set forth in Section 6 above and the covenants of Seller set forth in Section 4.1 above shall survive the Closing, but written notification of any claim arising therefrom must be received by the party making the applicable representation and warranty or covenant within twelve (12) months of the date of Closing or such claim shall be forever barred and such party shall have no liability with respect thereto.

### **12.16. Purchase Offers**

From and after the Date of this Agreement and until the Closing or the date on which this Agreement shall be terminated in accordance with the terms hereof, Seller shall not market the Property or solicit or respond to (except to acknowledge the receipt thereof) offers for the purchase of the Property from any party or commence negotiations concerning the sale of the Property with any such party. However, Seller may receive and acknowledge the receipt of unsolicited offers which are submitted to Seller.

### **12.17. Further Assurances**

Purchaser and Seller have agreed that at any time or from time to time after the execution of this Agreement, whether before or within a period of twelve (12) months after Closing, they will execute and deliver such further reasonable documents and undertake such other reasonable actions at no out-of-pocket cost or expense to the party performing such actions (except as otherwise specifically provided herein) as the other party may reasonably request in order to effect fully the purposes of this Agreement.

### **12.18. Full Performance**

The acceptance of the Deed and other closing documents by Purchaser from Seller shall be deemed full performance on the part of the Seller of all of its obligations under this Agreement, excluding Seller's indemnification obligations contained herein and any covenants or provisions of this Agreement which expressly survive the Closing, and Purchaser's satisfaction and waiver of all of its conditions precedent to Closing contained herein.

[Signatures Follow on Next Page]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

SELLER: [City of San Jose, a California charter city]

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

PURCHASER:

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

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# EXHIBIT A

### LEGAL DESCRIPTION

Real property in the City of San Jose, County of Santa Clara, State of California, described as follows:

BEGINNING AT THE POINT OF INTERSECTION OF THE CENTER LINE OF EDENVALE AVENUE, 40 FEET WIDE, WITH THE SOUTHERLY BOUNDARY LINE OF THAT CERTAIN 9.37 ACRE PARCEL OF LAND DESCRIBED IN DEED EXECUTED BY BENJAMIN B. SMITH, ET UX, TO CHARLES C. SNYDER, ET AL, DATED SEPTEMBER 15, 1954 AND RECORDED SEPTEMBER 15, 1954 IN 2962 OF OFFICIAL RECORDS, PAGE 146, SAID POINT OF INTERSECTION BEING DISTANT ALONG SAID CENTER LINE OF EDENVALE AVENUE NORTH 1° 27' 20" EAST 1022.57 FEET FROM THE POINT OF INTERSECTION OF SAID CENTER LINE WITH THE CENTER LINE OF CHEYNOWETH AVENUE, 40 FEET WIDE;

THENCE ALONG SAID CENTER LINE OF EDENVALE AVENUE, NORTH 1° 27' 20" EAST 419.80 FEET TO THE POINT OF INTERSECTION THEREOF WITH A NORTHERLY BOUNDARY LINE OF SAID 9.37 ACRE PARCEL;

THENCE LEAVING SAID CENTER LINE AND RUNNING ALONG SAID NORTHERLY BOUNDARY LINE OF THE 9.37 ACRE PARCEL NORTH 88° 23' 40" WEST 572.64 FEET TO THE MOST NORTHWESTERLY CORNER THEREOF;

THENCE ALONG ONE OF THE WESTERLY BOUNDARY LINES OF SAID 9.37 ACRE PARCEL SOUTH 1° 27' 20" WEST AND PARALLEL WITH THE CENTER LINE OF EDENVALE AVENUE, 462.95 FEET TO THE SOUTHWESTERLY CORNER THEREOF;

THENCE ALONG THE SOUTHERLY BOUNDARY LINE OF SAID PARCEL OF LAND, THE FOLLOWING COURSES AND DISTANCES:

SOUTH 69° 28' EAST 115.00 FEET;

SOUTH 76° 33' EAST 50.00 FEET;

SOUTH 81° 36' EAST 50.00 FEET;

NORTH 88° 12' EAST 50.00 FEET;

NORTH 75° 17' EAST 176.00 FEET;

NORTH 65° 56' EAST 100.00 FEET; AND

SOUTH 88° 32' 40" EAST 56.58 FEET TO A HARROW TOOTH SET IN THE CENTER LINE OF EDENVALE AVENUE BEING THE POINT OF BEGINNING, AND BEING A PART OF LOT 9 OF THE SANTA TERESA RANCHO, SANTA CLARA COUNTY.

APN: 685-04-027

# EXHIBIT B

Exhibit B: Excluded Easements

To be determined

# EXHIBIT C

FULLY-EXECUTED

DEPT. FILE COPY

Fin 104403  
3.5  
Plt S.

Execution Original

*Dolce*

**INTERNATIONAL®**  
Conference Destinations™

City of San Jose, CA

And

Dolce International/San Jose, Inc.

**MANAGEMENT AGREEMENT**

Dated: December 2, 2003

**MANAGEMENT AGREEMENT**

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12/2/03  
3.5

Execution Original

**MANAGEMENT AGREEMENT**

This AGREEMENT ("Agreement") dated as of December 2, 2003 (the "Effective Date"), by and between The City of San Jose, California, (the "Owner") and Dolce International/San Jose, Inc. ("Manager").

**PREAMBLE:**

WHEREAS, the Owner is the owner of certain property (the "Property") located at 200 Edenvale Avenue, San Jose, CA 95136, as is described on **Exhibit "A"** attached hereto and incorporated herein by this reference; and which is currently listed on the National Register of Historic Places and has been designated as a State and City Historic Landmark and which includes a conference center (the "Center") containing guest rooms, meeting and conference facilities, food and beverage facilities, surface parking areas, health and fitness facilities; and

WHEREAS, adjacent to the Center is Edenvale Garden Park (the "Park"), a public park owned by Owner, within which is located an underground parking garage consisting of approximately 142 underground parking spaces and 214 surface spaces (the "Parking Garage"), which Parking Garage is open to the public without charge including persons using the facilities at the Property; and

WHEREAS, Manager has developed expertise, including but not limited to promoting, advertising, and providing quality lodging and services, purchasing supplies and equipment, selecting and training personnel, making repairs and performing other functions required to maintain and to manage conference centers and in consulting in the design and furnishing of such facilities; and

WHEREAS, the Owner, in reliance upon the expertise and experience of Manager, desires to retain Manager to operate the Center as a conference center; and

WHEREAS, the parties hereto desire to enter into an agreement whereby Manager shall operate and manage the Center to the end that the Owner shall have the benefit of the experience, skill and ability of Manager in the operation of conference centers to the mutual profit of both the Owner and Manager, all upon the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants and agreements set forth herein below, the Owner and Manager hereby agree as follows:

**Article 1**  
**Definitions**

The terms defined in this Article 1 shall, for all purposes of this Agreement, have the meanings herein specified, unless the context otherwise specifies or requires:

- 1.1 **Affiliate:** The term "Affiliate" shall mean any person, firm, corporation, partnership, joint venture, trust or entity which is controlled by or is under common control by or with the applicable person or any person, corporation, joint venture, partner, joint venturer, entity, shareholder, officer or director of such person. For the purposes of this definition, "control" and the correlative meaning of the terms "controlled by" and "under common control by or with" shall mean the possession, directly or indirectly, of the power to direct

or cause the direction of the management and policies of the Affiliate through the ownership of an interest in the Affiliate.

- 1.2 Approved Annual Budget: The term "Approved Annual Budget" shall have the meaning given it in Article 4 hereof.
- 1.3 Asset Management Fee: The term "Asset Management Fee" means the management fee paid by Owner to Asset Manager, not to exceed \$50,000 in any Contract Year, subject to adjustment each Contract Year, commencing June 1, 2005, by the percentage increase in the Bay Area CPI Index between the Bay Area CPI Index announced for the month immediately preceding commencement of the applicable Contract Year then ending and the Bay Area CPI Index announced for the month preceding the last month of the Current Contract Year.
- 1.4 Asset Manager: The term "Asset Manager" means HVS International, its successor or assign, or such other hospitality consultant firm retained by Owner as asset manager of the Center.
- 1.5 Capital Improvement: The term "Capital Improvement" shall mean any alteration, repair or improvement to the Center or the Property which costs in excess of Five Thousand Dollars (\$5,000) and which has a useful life of more than five (5) years.
- 1.6 Center: The term "Center" shall have the meaning given it in the Preamble hereto.
- 1.7 Comerica: The term "Comerica" shall mean Comerica Bank.
- 1.8 Comerica Revolving Loan: The term "Comerica Revolving Loan" shall mean the \$5,000,000 revolving line of credit loan from Comerica Bank to Owner.
- 1.9 Comerica Term Loan: The term "Comerica Term Loan" shall mean the \$2,000,000 term loan from Comerica Bank to Owner.
- 1.10 Comerica Loan Agreement: The term "Comerica Loan Agreement" shall mean that certain Loan Agreement dated as of October 30, 2003, between Owner and Comerica, regarding the terms of the Comerica Term Loan and the Comerica Revolving Loan.
- 1.11 Commencement Date: The term "Commencement Date" shall mean January 1, 2004.
- 1.12 Competitive Set: The term "Competitive Set" shall mean the hotel or conference centers that are identified from time to time as the Center's direct competitors and are included for reporting purposes in the monthly STAR Report (or such other report or media as mutually approved by Owner and Manager in the event that STAR Report is no longer prepared or published) prepared for the Center. The Center's initial Competitive Set is set forth on Exhibit E attached hereto. Any modification to the Competitive Set is subject to mutual agreement of Owner and Manager.
- 1.13 Complete Meeting Package: The term "Complete Meeting Package" or "CMP" shall mean a sales package sold per day per person that includes an overnight guest room, three meals, the meeting room, standard meeting technology equipment in the meeting room, and morning and afternoon conference breaks.

- 1.14 Contract Year: The term "Contract Year" shall mean the annual period commencing July 1 and ending June 30 of each calendar year, except the first Contract Year shall begin on the Commencement Date and shall end on June 30, 2004.
- 1.15 Devcon Agreement: The term "Devcon Agreement" shall mean that certain Repayment Agreement between Owner and Devcon Construction Incorporated.
- 1.16 Direct Expenses: The term "Direct Expenses" when used with respect to any period shall mean the total for such period of expenses of the Rooms, Food, Beverage, Conference Services, Spa and Minor Operations departments, determined in accordance with generally accepted accounting principles and the International Association of Conference Centers Uniform System of Accounts for Conference Centers, Second Edition ("IACC Uniform System of Accounts").
- 1.17 Dolce International: The term "Dolce International" shall mean Dolce International Holdings, Inc., a Delaware Corporation, and its successors. The term "Dolce" in this Agreement is used interchangeably with Dolce International.
- 1.18 Effective Date: The term "Effective Date" shall mean the date set forth in the first paragraph of this Agreement.
- 1.19 European Plan: The term "European Plan" or "EP" shall mean the sales term for a customer purchasing a room only for overnight stay.
- 1.20 FF&E Reserve: The term "FF&E Reserve" shall mean the City of San Jose Community Facilities Revenue Fund established and held by Owner, to be funded each calendar month, in an amount equal to four percent (4%) of Gross Revenues for the previous calendar month, and to be utilized exclusively to fund (i) the costs of any single repair to or at the Center or the Property that exceeds \$5,000, (ii) capital expenditures on or at the Center or the Property, and (iii) the costs for replacement of capital improvements on or at the Center or the Property. The FF&E Reserve will be accounted for as required by the Comerica Loan Agreement during the term of the Comerica Loan Agreement.
- 1.21 GAP: The term "GAP" has the meaning ascribed to such term in Section 2.2(d) hereof.
- 1.22 Gross Operating Profit: The term "Gross Operating Profit" when used with respect to any period shall mean the amount obtained by subtracting Direct Expenses, Indirect Expenses and Base Management Fee for such period from Gross Revenues for such period, determined in accordance with generally accepted accounting principles and the IACC Uniform System of Accounts. An example of the calculation of Gross Operating Profit is attached hereto as Exhibit B.
- 1.23 Gross Revenues: The term "Gross Revenues" when used with respect to any period shall mean the sum of the following items attributable to such period determined in accordance with the IACC Uniform System of Accounts and generally accepted accounting principles:
- 1.23(a) all revenues derived from the operation of the Center during such period, including, without limitation, revenues from the sale of all conference

services; rentals of conference facilities and guest rooms; sale of food, liquor, soft drinks or other beverages; charges for technology used in guest rooms and meeting rooms; revenues associated with fitness or recreation facilities, including where applicable golf courses, tennis courts, spa, health and fitness clubs, pro shops and swimming pools; sales of cigars, cigarettes, candy, merchandise, and any and all other goods, services or merchandise; provided, however, that there shall be excluded any federal, state and municipal excise taxes and sales taxes paid by customers in connection with goods, merchandise or services purchased by them to the extent such taxes are separately itemized on the customers' bills or checks, and excluding also gratuities paid to employees as payroll expenses and if separately itemized on the customers' bills or checks, and further excluding transient occupancy taxes (hotel taxes), insurance and condemnation proceeds and any consideration for sales of furniture, fixtures and equipment;

1.23(b) revenues derived during such period in connection with the operation of any vending machines located in the Center, but including only revenues received, collected or payable to Manager on behalf of Owner (rather than the gross revenues of such vending machines); and

1.23(c) revenues derived during such period from any subtenant, concessionaire, assign or other person, firm or corporation, but only to the extent of the amounts received, collected or payable to Manager on behalf of Owner.

1.24 Hayes Mansion Bond Documents: The term "Hayes Mansion Bond Documents" shall mean all documents delivered in connection with the Hayes Mansion Bonds.

1.25 Hayes Mansion Bond Expenses: The term "Hayes Mansion Bond Expenses" shall mean the expenses and fees reasonably necessary to administer the Hayes Mansion Bonds, including without limitation, the premium for annual bond insurance, bond rating service maintenance fees, trustee and dissemination agent fees, fees for liquidity facilities, remarketing agents' fees, rebate consultant fees, rebate payments to the Internal Revenue Service and the cost of an Owner employee to administer and monitor the Hayes Mansion Bonds (not to exceed \$10,000 per Contract Year, subject to adjustment each Contract Year by the increase in the Bay Area CPI Index over the previous Contract Year). To the extent that a particular bond expense is paid on an annual, semi-annual, quarterly or bi-monthly basis, it may be prorated on a monthly basis for the purposes of calculating the Hayes Mansion Expenses and the Operating Expenses.

1.26 Hayes Mansion Bonds: The term "Hayes Mansion Bonds" shall mean the lease revenue bonds issued by the City of San Jose Financing Authority in 1993 for the construction of improvements to the Center known as Phase I improvements in the original aggregate principal amount of approximately \$11 million and the lease revenue bonds issued by the City of San Jose Financing Authority in 2001 for both the construction of additional improvements to the Center known as the Phase III improvements, improvement to the adjacent Edenvale Garden Park and the refunding of lease revenue bonds previously issued by the City of San Jose Financing Authority for improvements to the Center in the original aggregate amount of approximately \$53,300,000.

- 1.27** Hayes Mansion Debt Service: The term "Hayes Mansion Debt Service" shall mean Owner's obligation to repay principal and interest in the form of debt service payments on the Hayes Mansion Bonds. To the extent that a repayment schedule for the Hayes Mansion Debt Service requires payment on other than a monthly basis, such payment may be prorated on a monthly basis for the purposes of calculating Hayes Mansion Expenses and the Operating Expenses.
- 1.28** Hayes Mansion Expenses: The term "Hayes Mansion Expenses" shall mean, for purposes of Section 9.1(b) of this Agreement only, for a particular period, all costs and expenses paid by or on behalf of Owner in connection with (a) the ownership, marketing, leasing, operation or maintenance (both long and short term) of the Center and the Property (including, without limitation, the Asset Management Fee and the Base Management Fee); (b) the repair of furniture, fixtures and equipment at the Center and the repair of the Center, in each case not to exceed a maximum payment of \$5,000 for any single repair; (c) payments to the FF&E Reserve each calendar month in an amount not to exceed 4% of the Hayes Mansion Revenues for the preceding calendar month (which funds are to be used by Owner for repairs to or at the Center or the Property that are not included within the scope of clause (b), for capital expenditures on or at the Center or the Property, and for replacement of capital improvements on or at the Center or the Property); (d) all furnishings, fixtures, tools and equipment relating to the Center; (e) Hayes Mansion Bond Expenses; (f) Hayes Mansion Debt Service; and (g) payments of interest only on the Comerica Revolving Loan and principal and interest on the Comerica Term Loan.
- 1.29** Hayes Mansion Revenues: The term "Hayes Mansion Revenues" shall mean, for purposes of Section 9.1(b) of this Agreement only, for a particular period, all revenues actually received by or on behalf of Owner in connection with the operation, use or lease of the Center or the Property.
- 1.30** Indirect Expenses: The term "Indirect Expenses" when used with respect to any period shall mean the total for such period of expenses of the Engineering, Sales and Marketing, Administrative and General, and Utilities departments, determined in accordance with generally accepted accounting principles and the IACC Uniform System of Accounts.
- 1.31** Manager: The term "Manager" shall mean Dolce International/San Jose, Inc., a Delaware corporation and wholly owned subsidiary of Dolce International Holdings, Inc., as Manager under this Agreement, and, subject to the provisions of Article 12, shall include its successors and assigns.
- 1.32** Manager's Proprietary Property: The term "Manager's Proprietary Property" shall mean the trade name "Dolce", the "Dolce" logo, all trademarks of Dolce or Manager, including but not limited to "A Dolce Conference Destination" and "Focus. Learn. Succeed." and other property related to trade name such as signage, brochures, and the like. It also includes proprietary sales, service and operating standards, methods, training and manuals, including without limitation service programs such as Dolce Diamond Legendary Service and any successor programs, and customer names, addresses and all other data for accounts included in Manager's Global Account Program defined in Section 2.2(d) hereof and any successor sales programs.

- 1.33** National Consumer Price Index: The term "National Consumer Price Index" shall mean the Consumer Price Index (U.S., All Urban Wage Earners and Clerical Workers, 1987=100) calculated by the U.S. Department of Labor, Bureau of Labor Statistics (or successor governmental authority responsible therefor).
- 1.34** Net Revenues: The term "Net Revenues" shall mean, for any specified period, the amount equal to the Hayes Mansion Revenues received during that period, minus the Hayes Mansion Expenses paid during the same period.
- 1.35** Operating Expenses: The term "Operating Expenses" when used with respect to any period shall mean the aggregate of all costs and expenses paid or incurred by Manager or the Owner in connection with the operation of the Center attributable to such period, determined in accordance with the IACC Uniform System of Accounts and generally accepted accounting principles, but in any event shall include, without limitation, the following items (each of which shall be without mark-up unless otherwise specified in this Agreement):
- 1.35(a)** the cost of wages, salaries, incentives and bonuses, severance or settlement payments to terminated employees of the Center, payroll taxes, social security taxes and other necessary employee costs, fringe benefits and other usual and customary incidental employee benefits paid to or for personnel employed at or for the operation of the Center, including, but not limited to, pension, profit sharing or other employee retirement, disability, health and welfare or other benefit plans or insurance provisions;
  - 1.35(b)** the cost of food and beverages, cigars, cigarettes, candy and all other goods, wares, merchandise, and property sold in or from the Center or in such manner that the amounts received therefore are included in the Gross Revenues;
  - 1.35(c)** the cost of conference materials and services used in the operation of the Center;
  - 1.35(d)** the cost of insurance premiums for insurance policies whether maintained by the Owner or the Manager on behalf of the Owner and Manager and relating to the operations of the Center and the Parking Garage;
  - 1.35(e)** the cost of keeping, repairing and maintaining the Center, the Park and the Parking Garage;
  - 1.35(f)** the cost for repairs and replacements to furniture, fixtures or equipment used in the operation of the Center, where such costs are properly treated as expenses rather than as capital improvements;
  - 1.35(g)** the cost of gas, electricity, janitorial services, cold and hot water, steam, heating, air conditioning and ventilation;
  - 1.35(h)** the cost for laundry and linen services;

- 1.35(i) the amount of real estate and personal property taxes with respect to the Center;
- 1.35(j) expenses incurred in connection with the audit of the financial statements of the Center provided in Sections 5.1 and 5.3 hereof;
- 1.35(k) the management fees as provided in Article 9 of this Agreement;
- 1.35(l) advertising, promotion, publicity and public relation expenses;
- 1.35(m) reasonable travel and out-of-pocket expenses incurred by Manager or Manager's affiliates which are directly related to the business of the Center;
- 1.35(n) the proportionate amount of expenses incurred with respect to marketing services and advertising performed by Manager or Manager's affiliates, and apportioned between the Center and other projects which Manager or Manager's affiliates operate and which are promoted through Manager in the ratio that the revenue generated, or if Manager so elects, room nights available, by Manager for the Center bears to the revenues generated, or room nights available, by Manager for all such facilities (including the Center); provided, however, that such marketing expenses shall not exceed, without the written consent of Owner, \$80,000 in the first full Contract Year (subject to cumulative increase each Contract Year thereafter equal to the percentage increase in the National CPI Index between the National CPI Index announced for the month immediately preceding commencement of the applicable Contract Year then ending and the National CPI Index announced for the month preceding the last month of the Current Contract Year);
- 1.35(o) sales commissions to Manager or Manager's affiliates on consumed group business, including no-show or cancellation revenue actually collected, referred by the Manager or Manager's affiliates or regional sales offices to the Center (but excluding sales commissions paid to employees of Manager located and employed at the Property); sales commissions are 7% for Complete Meeting Package business and 10% for European Plan business.
- 1.35(p) sales commissions payable to sales managers of other properties managed by Manager or Manager's affiliates for group meeting referrals to the Center which convert to consumed business (specifically excluding sales commissions paid to employees of Manager located and employed at the Property). The commission will be at the rate in effect for all sales managers at all properties managed by Manager or Manager's affiliates (as of the Effective Date, sales commissions are \$6.00 per room night for GAP bookings and \$3.00 per room night for non-GAP bookings).
- 1.35(q) sales commission to Dolce International or one of its affiliates equal to two percent (2%) of room revenue resulting from room reservations (for non-group meetings) booked and consumed that result from the customer using Dolce International's Global Distribution System or Central Reservations Office to book the reservation. This commission will be calculated and billed

to the Center monthly by Dolce and payable within thirty (30) days of invoice date.

- 1.35(r) a purchasing fee of 5% paid to Manager or Manager's affiliate of the costs (excluding sales taxes) of furnishings, fixtures, equipment and supplies which are purchased through Dolce's corporate purchasing function.
  - 1.35(s) the allocable costs of Dolce's training and quality assurance programs where such costs are part of an overall program insuring consistent training, service and quality at Dolce-managed properties.
  - 1.35(t) a technology fee to Dolce or one of its affiliates for support and maintenance of the Dolce Wide Area Network ("WAN") that Manager's employees at the Center will use for email and internet access, and all other computer applications used by the Center that Dolce hosts at its corporate office. This fee will be \$7.50 per month per person per computer application hosted at the Dolce corporate office. This fee will cumulatively increase annually effective January 1, 2005 for the increase in the National Consumer Price Index over the prior year.
  - 1.35(u) legal, accounting and other professional fees and expenses (including settlement costs approved by the Owner) incurred with respect to matters directly relating to the operation of the Center, whether arranged by the Owner or by Manager on behalf of the Owner or Center. Examples of these matters include, but are not limited to, real estate assessment protests, collection efforts, resolution of employee claims, and review of sales or purchase contracts. This category of expense is not intended to cover expenses incurred by Manager with respect to the interpretation of this Agreement. Such fees will also include up to fifty percent (50%) of the full-time equivalent of a principal accountant employed by Owner with respect to the Property; provided, however, Owner agrees that such accountant shall not, to the extent reasonably practical, duplicate the work of the Manager's controller for the Center.
  - 1.35(v) any other expense directly related to the operation of the Center and the Property.
  - 1.35(w) the periodic payments of principal and/or interest due under any loan, whether secured or unsecured, related to the Property or the Center.
  - 1.35(x) the Hayes Mansion Bond Expenses and Hayes Mansion Debt Service.
  - 1.35(y) the Asset Management Fee.
  - 1.35(z) the FF&E Reserve.
  - 1.35(aa) recurring bank fees or loan fees.
- 1.36 Owner: The term "Owner" shall mean City of San Jose, California and shall include its successors and assigns.

- 1.37 Person: The term "Person" shall mean any individual, firm, corporation, partnership, joint stock company, business trust, voluntary association or government or any department or agency thereof.
- 1.38 Property: The term "Property" shall have the meaning given it in the Preamble hereto.
- 1.39 REVPAR Penetration Index: The term "REVPAR Penetration Index" shall mean the statistic prepared by Smith Travel and included in the Center's monthly STAR Report in which room revenue per available room (REVPAR) of the Center is divided by the REVPAR of the hotel properties in the Center's Competitive Set and multiplied by 100. This statistic is one measurement as to whether the Center is receiving more or less of its market share of revenues.
- 1.40 STAR Report: The term "STAR Report" shall mean the monthly report prepared by Smith Travel Research, an independent research organization serving the lodging industry, that provides performance measurements for the Center's market and selected competitors.
- 1.41 Strategic Team: The term "Strategic Team" shall mean the senior management team at the Center responsible for day-to-day operations. The Strategic Team generally consists of the General Manager, Controller, Assistant General Manager, Director of Sales and Marketing, Director of Human Resources, Director of F&B, Conference Director and Director of Engineering. The titles and positions of the Strategic Team may change from time to time as Manager may determine.
- 1.42 Term: The term "Term" shall have the meaning given it in Section 10.3 hereof.
- 1.43 Other Definitions: The following terms are defined where identified in this Agreement.

| <u>Term</u>                     | <u>Where Defined</u> |
|---------------------------------|----------------------|
| Additional Capital Improvements | 20.3                 |
| Annual Budget                   | 4.1                  |
| Base Management Fee             | 9.1(a)               |
| Bay Area CPI Index              | 2.6                  |
| Center Capital Improvement Plan | 4.2                  |
| Center Name                     | 2.3(a)               |
| Community Meeting               | 2.7                  |
| Defaulting Party                | 11.1                 |
| Event of Default                | 11.1                 |
| IACC                            | 1.16                 |
| Incentive Fee Period            | 9.1(e)               |
| Incentive Management Fee        | 9.1(b)               |
| Lender                          | 11.4                 |
| Management Fees                 | 9.1                  |
| Non-Defaulting Party            | 11.1                 |
| Owner Event                     | 2.6                  |
| Park                            | Preamble             |
| Parking Garage                  | Preamble             |

|                        |        |
|------------------------|--------|
| Proposed Annual Budget | 4.1    |
| Renewal Option         | 10.2   |
| Renewal Term           | 10.2   |
| Restoration Standard   | 7.1    |
| Service Mark           | 2.3    |
| Tag Line               | 2.3(b) |
| Termination Fee        | 11.9   |
| Volatility Reserve     | 9.1(b) |

## Article 2

### Use and Manner of Operation of the Center

**2.1** Right to Manage and Operate. The Owner hereby grants to Manager the sole and exclusive right to manage and operate the Center pursuant to the terms of this Agreement, subject to the Owner's concurrence with all general operating policies and major business decisions affecting the Center. Manager shall manage the Center as a "Dolce" conference center and operate the Center commensurate with a first class conference center, consistent with IACC standards. Unless approved by Owner, Manager shall operate the Center twenty-four hours a day, seven days a week. Manager shall cooperate with Asset Manager in the operation of the Center as reasonably requested.

**2.2** Corporate Marketing and Sales Programs. Manager's corporate marketing and sales programs and services are acknowledged by Owner and Manager as integral to the successful operation of the Center. Manager will provide these programs and services to the Center in a manner and to a standard consistent with all conference centers managed by Manager or Manager affiliate and positioned in the market as a "Dolce Conference Destination". The costs of these programs and services represent Operating Expenses of the Center as described in Section 1.35 hereof.

Among these services and programs which Manager will implement at the Center are the following:

**2.2(a)** Dolce International maintains a Corporate Marketing department which functions as an in-house agency for properties managed by its affiliates. This department provides among other services, creative and execution services for advertising, collateral materials, web site development and maintenance, direct mail, public relations, trade shows and promotional events. The costs of this Corporate Marketing department are allocated to managed properties as described in Section 1.35(n) hereof.

Direct costs for advertising space, creative design, production and printing, photography, postage and similar expenses will be paid by the Center as an Operating Expense, without markup or other fee by Manager or Dolce International.

**2.2(b)** Through its Corporate Marketing department, Dolce International will provide strategic marketing direction and support for the Center with respect to positioning as a Dolce Conference Destination in the marketplace, pricing,

and strategies to execute the annual Sales and Marketing plan prepared as part of the annual budget process.

**2.2(c)** The Center will be positioned under the Dolce International brand, and accordingly will reflect this brand identity in its name, logo, collateral material, on-site printed materials, signage, and in such other ways as Dolce International or Manager deems appropriate to give maximum advantage to the Center's sales and marketing efforts. Dolce International agrees to incorporate the Center in all Corporate Marketing activities which present the portfolio of Dolce-managed properties.

**2.2(d)** The Center will be included in the Dolce International Global Account Program ("GAP"). This Dolce proprietary program represents the principal corporate customers of Dolce International who conduct significant levels of meetings at multiple Dolce-managed properties.

Manager will train and support the sales managers on-site at the Center to maximize the number of meetings held at the Center by GAP customers, and to encourage participation in cross-selling the Center with the on-site sales teams at other Dolce-managed properties.

**2.3** Center Name and Rights to Name. As part of positioning the Center under the Dolce brand, the Owner and Manager agree that the Owner shall have the right to register the following service mark for the Center with the United States Patent and Trademark Office (the "Service Mark"). The initial Service Mark for the Center, which may change at the Owner's discretion, is:

Dolce Hayes Mansion  
A Dolce Conference Destination

In this regard, the Owner and Manager acknowledge and agree that the Service Mark shall be used exclusively in connection with the advertising and promotion efforts for, and in connection with the management of, the Center by Manager. The Owner and Manager further acknowledge and agree that:

**2.3(a)** Owner shall retain all rights to the use of the name "Hayes Mansion" (the "Center Name"), and that all use of the Center Name shall inure solely to the benefit of Owner, and

**2.3(b)** Manager and Dolce International shall retain all rights to the use of the tag line "A Dolce Conference Destination" (the "Tag Line"), and that all use of the Tag Line inure to the benefit of Manager and Dolce International; provided, however, that for so long as this Agreement shall continue in full force and effect, Manager shall grant to Owner, and Manager does hereby grant to Owner, a non-exclusive and non-transferable license to use the Tag Line in connection with the advertising and promotion efforts for, and in connection with the management of the Center. Owner hereby agrees to use the Tag Line only in accordance with instructions from Manager and Dolce International and shall submit to the inspection of its promotional materials, upon request, to allow Manager and Dolce International to exercise the

required quality control over the Tag Line wherever it appears. Owner further agrees that, upon the expiration or termination of this Agreement, Owner shall, promptly after such expiration or earlier termination of this Agreement and at Owner's sole cost and expense, take such action as may be necessary to amend the registration of the Service Mark so as to delete and omit all reference to any portion of the Tag Line.

**2.4 ~~Manager's Operation of Center - Responsibilities~~ Manager agrees that it shall, on the Owner's behalf and during the term of this Agreement:**

- 2.4(a)** manage, operate and maintain the Center as a conference center consistent with and in the manner contemplated herein, and provide all services and activities which are customarily and usually provided in an operation of comparable class and standing and consistent with the standard set forth in Section 2.1;
- 2.4(b)** hire, pay, supervise, train and discharge all personnel required in connection with the operation of the Property (all of whom shall be the employees of Manager); establish and from time to time modify appropriate employee benefit plans and pension plans; withhold all employee income required by federal, state or local taxing authorities; comply with all employer governmental reporting requirements and make all payments due from Manager on behalf of or for the benefit of employees of the Property to all applicable governmental authorities; and determine all matters with regard to such personnel, including, without limitation, compensation, bonuses, severance payments or settlements to terminated employees, fringe benefits and replacement of personnel; provided, however, that Manager shall promptly notify the Owner of any changes, transfers and/or replacements of the Center's Strategic Team Members and shall obtain the Owner's prior approval of the initial selection and any change in or transfer of the General Manager.
- 2.4(c)** procure from all governmental agencies and authorities having jurisdiction over the Center, all licenses, permits or authorizations necessary for the operation and maintenance of the Center and maintain the same; so long as the Owner is not in default hereunder, pay all taxes, licenses, certificates, permit and examination fees and other charges which may be levied on the Owner or Manager in connection with the Center; provided, however, that the Owner shall be responsible for obtaining all permits or authorizations necessary to operate the Center on the Property, including any permits or authorizations required under applicable planning and zoning regulations;
- 2.4(d)** promptly observe and comply with the provisions of all present and future laws, rules and regulations governing the activities of Manager hereunder or the operation of the Center (including, without limitation, the City of San Jose's Wage Policy Requirements, a copy of which is attached hereto as **Exhibit C**, and the City of San Jose's Environmentally Preferable Procurement Policy, a copy of which is attached to this Agreement as **Exhibit D**, as each may be amended or modified from time to time);

- 2.4(e) advertise and promote the Center in keeping with the highest standards and practices of conference centers and consistent with the character of the Center and the terms and conditions of this Agreement and with all applicable laws and regulations;
- 2.4(f) arrange for bookings of customers at the center and the reservation and renting of rooms and conference facilities;
- 2.4(g) subject to the requirements of Section 20, make or cause to be made all non-structural repairs to and maintenance of the Center as may be necessary in the opinion of Manager, and make repairs to and replacements of furnishings, fixtures and equipment necessary for the operation of the Center as a conference center; provided, however, that no such single repair or replacement costing in excess of \$5,000 shall be made without the prior written consent of the Owner, except that emergency repairs or replacements immediately necessary for the preservation of safety of the Center or for the safety of guests, tenants or other persons required to avoid the suspension of any necessary service to the Center may be made by Manager without the prior approval of the Owner if, under the circumstances, appropriate officers or representatives of the Owner cannot be conveniently notified before the required emergency repairs or replacements must be made and notice is promptly given to Owner;
- 2.4(h) cause the Center to be kept and operated in a clean, safe and attractive condition at all times;
- 2.4(i) unless otherwise directed by Owner, pay all Operating Expenses when due;
- 2.4(j) purchase or enter into contracts for requisite services and supplies required to operate the Center as a conference center, which contracts may include, but shall not be limited to, the following: linen, supplies, maintenance contracts; printing and preparation of printed materials, including stationery and menus; and rubbish removal; provided, however, that no such contract (even if provided for in the Annual Budget) shall be entered into by Manager for the account of the Owner without the prior written consent of the Owner if such contract obligates the Owner to spend in excess of \$50,000 per annum with any single supplier, is not terminable upon no more than thirty (30) days' prior notice, or is not fully assignable by Owner without restriction; provided, further, however, that any contract not provided for in the Annual Budget, to the extent that such contract requires payment by Owner of more than \$10,000 per annum with any single supplier, must be approved by Owner in writing prior to execution of such contract;
- 2.4(k) provide administrative and accounting services necessary for the proper operation of the Center and maintain all books and records required to be maintained under this Agreement in accordance with the IACC Uniform System of Accounts as adopted by the International Association of Conference Centers and generally accepted accounting principles;

- 2.4(i) be responsible for the dignified conduct of personnel employed at the Center and require such personnel to be properly attired and to conduct themselves in a courteous manner;
- 2.4(m) take all reasonable measures in every proper manner to develop and maintain the business of the Center;
- 2.4(n) deposit all of the Gross Revenues in a bank account or accounts in the Owner's or Center's name, and make provision for withdrawal of funds for payment of Operating Expenses, management fees and disbursements from said bank account or accounts. Said accounts shall be the property of the Owner and shall be used exclusively in connection with the operation of the Center and the performance of the terms and conditions of this Agreement, and Manager agrees to segregate all receipts, accounts and records pertaining to the operation of the Center from all other business conducted by Manager. Checks or other documents of withdrawal drawn upon the operating accounts shall be signed by representatives of Manager or employees of the Center designated by Manager, which persons drawing on such accounts shall be bonded or otherwise insured, and Owner shall designate at least one authorized signatory for each such account. It is expressly understood that the Owner shall have access to all funds of the Owner held by the Manager in connection with the Center, subject to Owner's responsibilities under Section 3.3 hereof;
- 2.4(o) effectuate the Approved Annual Budgets;
- 2.4(p) negotiate for the best interest of the Owner with any labor unions representing employees of the Center, and Manager shall consult with the Owner in advance of, and, to the extent practicable, during the course of, negotiations with any labor union;
- 2.4(q) consummate arrangements with concessionaires, licensees, tenants or other intended users of the facilities of the Center, with all such arrangements being subject to the Owner's prior written approval;
- 2.4(r) use its best efforts to do, or cause to be done, all such acts and things in and about the Center as shall be reasonably necessary to comply with all insurance and legal requirements, and, with the Owner's consent, to discharge any lien, encumbrance or charge or with respect to the Center and the operation thereof other than those placed upon the Center by or at the instance of the Owner;
- 2.4(s) pay all insurance premiums covering or affecting the Center when due;
- 2.4(t) conduct the operations of the Center in full compliance with all Federal, State and other local laws, regulations and policies, including, but not limited to, nondiscrimination with respect to sex, race, age, creed, national origin, or disability, sexual orientation, or actual or perceived gender identity; employee and guest safety; accessibility of facilities, and environmental regulations.

- 2.4(u) abide by grievance procedures set forth in any collective bargaining (or similar) agreement with the Hotel Employees and Restaurant Employees International Union, AFL-CIO, Local 19;
- 2.4(v) comply with all provisions of any collective bargaining (or similar) agreement with the Hotel Employees and Restaurant Employees International Union, AFL-CIO, Local 19 or, if no such agreement shall exist, comply with the Living Wage requirements, as set forth on Exhibit C attached hereto;
- 2.4(w) Manager shall, through monthly reporting (with meetings from time to time at the discretion of Owner), keep Owner's Director of Finance advised in writing of all matters affecting the Center that are of a significant nature and shall obtain the Director's prior written approval of any actions or policies which are likely, in Manager's reasonable opinion, to have a significant adverse impact on cash flow or as otherwise required under this Agreement; provided, however, such prior written approval shall not be required with regard to Manager's response to emergency situations in accordance with the terms and conditions of this Agreement. For purposes of this Section 2.4(w), any action which is, in Manager's reasonable opinion, likely to result in a material adverse deviation from the Approved Annual Budget shall require the prior written approval of Owner's Director of Finance;
- 2.4(x) Manager shall use commercially reasonable efforts to collect for Owner's account income of any nature from the Center's operations and the giving of receipts in connection therewith;
- 2.4(y) Manager shall maintain an internal control structure designed to provide assurance that the Center and the Property are safeguarded from loss or unauthorized use, that transactions are executed in accordance with this Agreement and that financial records are reliable for the purposes of preparing financial statements. The internal control structure shall be supported by the selection, training and development of qualified personnel, by an appropriate segregation of duties, and by the dissemination of written policies and procedures;
- 2.4(z) Manager shall keep Owner informed and advised of all material financial and other matters concerning the Center and the operation thereof and give due consideration to suggestions which Owner's designees or consultants may offer with respect thereto from time to time;
- 2.4(aa) Manager shall maintain the Parking Garage in good order and clean and working condition, including, without limitation, the tasks set forth in Exhibit G. Manager shall provide security for the Parking Garage in accordance with the security plan approved by Owner's Department of Planning, Building and Code Enforcement as part of Conditional Use Permit No. 00-06-039, a copy of which is attached hereto as Exhibit H;
- 2.4(bb) Manager shall maintain the Park in accordance with the requirements set forth in Exhibit G.

- 2.5 Covenant of Manager Regarding Notes/Guarantees/Loan Agreements. Manager covenants and agrees that it will not, and nothing herein shall be deemed to authorize Manager to, execute any notes, guarantees, loan agreements or other evidences of indebtedness or borrow any money on behalf of the Owner or the Center or as a part of the Operating Expenses herein authorized. It is also expressly understood and agreed that Manager has no power or authority to enter into any mortgage, deed of trust, security agreement or any other instrument (other than for the rental of rooms or facilities expressly authorized herein) encumbering all or any part of the Center or any accounts or other personal property arising from or attributable to the Center or its operations. This paragraph shall not prohibit Manager from incurring indebtedness on behalf of the Owner to suppliers of goods and services to the Center which are required in the operation of the Center in the ordinary course of business and in conformity with the customs and business practices of the industry and the terms of this Agreement and from entering into agreements and instruments in connection therewith.
- 2.6 City Use. Manager and Owner hereby agree that during the Term Owner shall have the right to use the Center for meetings, seminars, conferences or receptions from time to time annually (based on a Contract Year), subject to availability, for up to Thirty Thousand Dollars (\$30,000) worth of meeting time billed per year at the Center's prevailing peak or non-peak rates for meeting, audio visual equipment, overhead projectors, flip chart, white boards and amplification (but excluding food and beverage and guest suite use) (each, an "Owner Event"). The annual amount set forth in the foregoing sentence shall be adjusted annually based on any annual percentage increase in the Bay Area CPI Index between the Bay Area CPI Index announced for the month immediately preceding commencement of the Contract Year then ending and the Bay Area CPI Index announced for the month preceding the last month of the current Contract Year. Charges against each annual allocation shall accrue during the Contract Year in which such use occurs; however, it is expressly understood and agreed that any unused portion of the annual allocation in any Contract Year shall not carry forward to a subsequent Contract Year. Owner shall notify Manager no less than thirty (30) days prior to the desired date of the Owner Event, and Manager shall use reasonable efforts to accommodate Owner's requested date and time; provided, however, that Manager may move or re-schedule an Owner Event by providing notice to Owner no less than seven (7) days prior to the scheduled date. For purposes of this Agreement, "Bay Area CPI Index" shall mean the Consumer Price Index (CMSA-San Francisco-Oakland-San Jose, 1982-84=100) calculated by the U.S. Department of Labor, Bureau of Labor Statistics (or successor governmental authority responsible therefor).
- 2.7 Community/Non-Profit Use. Manager and Owner hereby agree that during the Term, in addition to the other uses set forth in this Article 2, Manager shall provide community non-profit groups and organizations acceptable to Manager with the use of meeting rooms in the Center free of the standard meeting room charge, up to an aggregate of thirty (30) individual Community Meetings per Contract Year. For purposes of this Section 2.7, a "Community Meeting" means a meeting of an individual non-profit group on a single day (regardless of the length of time of such meeting). Booking of such Community Meetings is subject to availability in the sole discretion of Manager and advance reservation, and shall be held only during non-peak days and hours. Any unused allocation of Community Meetings in any Contract Year shall not carry forward to any subsequent Contract Year.

- 2.8** Public Access. In addition to the uses set forth in this Article 2, Manager shall provide the following public access to the Center:
- 2.8(a)** First and second floor areas of the Premises which are designated "circulation space" on the floor plans set forth on Appendix A attached hereto shall be open to the public during normal business hours. The public shall have access to any restaurant in the Center on an as available basis during normal business hours. These areas will additionally be decorated with photographs, artifacts and furnishings which have historical significance to both the Center and the period during which the Center was constructed.
  - 2.8(b)** All other areas on the first and second floors of the Center shall be available for guided tours (to both groups and individuals) subject to notice (no less than five [5] business days) to, and availability of, Manager. Manager may establish reasonable hours and rules of conduct for such tours. In addition, the Center shall be open for guided tours every Sunday (that is not a federal or state holiday) from 2:30 PM to 5:00PM PST each week.
  - 2.8(c)** The grounds surrounding the Center shall be open to the public use and enjoyment subject to Manager's right to establish reasonable regulations, areas of restricted access and restrictions on use consistent with applicable law.

### Article 3

#### Operating Responsibilities of the Owner

- 3.1** Exclusive Right to Operate. Subject to the provisions of this Agreement, the Owner agrees that Manager shall have the exclusive right to use and operate the Center for the duration of this Agreement and the Owner covenants that Manager may peaceably and quietly (free from any person claiming through Owner) enjoy the use of the Center and of all furniture, fixtures and equipment and articles of personal property owned by the Owner and used in connection with the operation of the Center (including all repairs, replacements and additions thereto and substitutions therefore).
- 3.2** Booking Responsibilities. The Owner agrees that all booking of reservations for the use of the guest rooms, dining facilities or conference rooms or any other facility of the Center shall be made by or through Manager.
- ~~**3.3** Operating Account Balance. The Owner agrees to provide funds to Manager sufficient to maintain a cash balance in the operating account maintained by Manager pursuant to Section 2.4(n) hereof of not less than \$250,000 (or such lesser amount as mutually agreed by Owner and Manager) which shall be used by the Manager solely in connection with the operation of the Center and the responsibilities of Manager under this Agreement. Manager shall furnish the Owner monthly statements showing the cash balance in such operating account and the cash forecast for the following month no later than fourteen (14) days prior to the end of each calendar month, and the Owner shall provide Manager with an amount sufficient to maintain a cash balance of \$250,000 (or such lesser amount as mutually agreed by Owner and Manager) within ten (10) days following submission of any monthly statement showing a cash balance of less than~~

\$250,000 (or such lesser amount as mutually agreed by Owner and Manager). In the event, however, that the Owner fails to provide the operating account funds as required by this Section 3.3; then, notwithstanding any provision to the contrary contained in this Agreement, to the extent of any shortfall in the cash balance, Manager shall be relieved of its obligation to pay Operating Expenses and other amounts provided for this Agreement, and Manager's sole remedy shall be to cancel and terminate this Agreement by written notice to the Owner in accordance with Article 16 hereof.

#### **Article 4**

#### **Annual Operating Budget; Capital Improvement Plan; Transition Budget**

~~4.1~~ ~~Proposed Annual Operating Budget.~~ Manager shall submit to the Owner, on or before March 1 of each Contract Year (unless otherwise indicated), a proposed operating budget (the "Proposed Annual Budget") which shall include estimated costs and expenses for the ensuing Contract Year, covering:

- 4.1(a) property operation and maintenance;
- 4.1(b) furnishings, fixtures and equipment purchases and replacements and repair;
- 4.1(c) operating equipment; and
- 4.1(d) all other Operating Expenses described in Section 1.35 hereof.

In addition to the foregoing items, Manager shall provide the following separate reports with the Proposed Annual Budget (each of which shall support such Proposed Annual Budget):

- 4.1(e) sales and marketing;
- 4.1(f) human resources;
- 4.1(g) technology;
- 4.1(h) departmental budgets;
- 4.1(i) cash flow forecasts by month for the full Contract Year; and
- 4.1(j) a summary income statement.

The departmental budgets and the summary income statement shall be comparative with the prior Contract Year. The Proposed Annual Budget shall further include an estimated profit and loss statement for such year in the form of the statement of profit and loss recommended by the IACC Uniform System of Accounts. Manager shall prepare each Proposed Annual Budget with appropriate diligence and after giving due consideration to all relevant factors affecting the operation of the Center, including without limitation, market and economic conditions applicable to the Contract Year and operation of the Center in accordance with the standard set forth in Section 2.1. The

Proposed Annual Budget shall be subject to the approval in writing by the Owner, and the Owner hereby agrees to examine each Proposed Annual Budget submitted to it, and if found reasonable and proper, the Owner will then approve in writing such Proposed Annual Budget, it being contemplated that the Approved Annual Budget will be agreed upon by the parties hereto on or before June 15th of the Contract Year during which said Proposed Annual Budget is submitted; and if the Owner shall fail to either approve the Proposed Annual Budget on or before June 15th of the Contract Year during which said Proposed Annual Budget is submitted, or to submit its objections thereto to Manager within such period, then the Owner shall be deemed to have approved the same. If the Owner objects in the manner provided above to any such Proposed Annual Budget submitted by Manager, the Owner and Manager shall then attempt to mutually agree upon an Approved Annual Budget satisfactory to both Owner and Manager; and if the Owner and Manager are not able to mutually agree thereto, either:

- 4.1(x) Manager may agree to operate under the terms of the annual budget counter-proposed by the Owner; or
- 4.1(y) Manager can refuse to operate under the terms of the annual budget so counter-proposed by the Owner, in which case an additional event of termination shall be deemed to have occurred, as provided in Section 11.3, hereof; or
- 4.1(z) Manager may, at its option, terminate this Agreement upon ninety (90) days' notice to the Owner.

The annual budget approved by Owner and Manager shall be referred to herein as the "Approved Annual Budget."

~~4.2 Annual Capital Improvement Program.~~ Manager shall submit to the Owner, on or before January 15 of each Contract Year (unless otherwise indicated), a proposed list of Capital Improvements which Manager recommends to be undertaken at the Center during the ensuing five year period (the "Center Capital Improvement Program"). Manager will include in the Center Capital Improvement Program the Manager's recommended expenditures for Capital Improvements in priority order including the estimated costs for design, materials, construction and the proposed contingency for each identified Capital Improvement, based on Manager's knowledge of the Center, the Property, knowledge of conference center and hotel facilities and related construction and its costs, knowledge of revenue-enhancing strategies, and Manager's role in maintaining the quality of the Center and the Property; provided, however, that Manager shall not be obligated to obtain any bids in connection with its preparation of the Center Capital Improvement Plan. Manager and Owner recognize and agree that the Capital Improvement Program will be considered by Owner in conjunction with Owner's review of the overall Capital Improvement Program for the City of San José and the recommendations of Manager for Capital Improvements at the Center will be evaluated against the needs for Capital Improvements to Owner's other facilities and properties. Owner's approval of any proposed Capital Improvement identified in the Center Capital Improvement Program is conceptual only and implementation of any such improvement is contingent upon the approval of Owner and the availability of funds in the FF&E Reserve.

- ~~4.3~~ Approved Annual Budget Compliance. Manager shall at all times comply with the applicable Approved Annual Budget, and shall not deviate in any substantial respect therefrom. Notwithstanding the foregoing, Manager shall be entitled to make additional expenditures not authorized under the then applicable Approved Annual Budget, in case of emergencies arising out of fire or any other like or unlike casualty, or in order to comply with any applicable insurance or legal requirements. Manager shall, notwithstanding the foregoing, be entitled to revise any Approved Annual Budget not more than one time per calendar quarter and subject to the Owner's prior reasonable approval, in the event that there is an unanticipated, significant increase or decrease in the Gross Revenues realized by, or Operating Expenses incurred by, Manager in the operation of the Center.
- ~~4.4~~ Annual Facilities Audit Process. During the preparation of the Proposed Annual Budget, Manager shall schedule a facilities audit to be conducted by the Owner and Manager in order to mutually determine the items of furniture, fixtures and operating equipment to be included in the category thereof for the replacement and repair thereof, such that the Center shall be maintained in accordance with Section 2.1 of this Agreement.
- ~~4.5~~ Initial Transition Budget. Manager has provided to Owner as of the Effective Date an initial transition budget, a copy of which is set forth on Exhibit I. The expenses set forth in such budget shall be folded into the operating budget for the Center.
- ~~4.6~~ Transitional Cash Flow Forecast and Operating Statement. Notwithstanding the foregoing, Manager shall submit to Owner for approval within forty-five (45) days after the Effective Date a proposed cash flow and operating statement forecast for the period from January 1, 2004 to June 30, 2004. Owner shall have ten (10) days after receipt to approve such forecast. If Owner fails to notify Manager of its approval or disapproval within such ten (10)-day period, such forecast shall be deemed approved. If Owner notifies Manager of its disapproval of the forecast within such ten (10)-day period, Owner and Manager shall work together to develop a mutually agreed forecast as soon as reasonably possible thereafter.

## Article 5

### Books and Records

- ~~5.1~~ Accounting Standards. Manager shall keep, on behalf of the Owner and in accordance with the IACC Uniform System of Accounts as adopted by the International Association of Conference Centers and generally accepted accounting principles, separate records and books of accounts regarding all transactions at, through, or in any way connected with the operation of the Center. Such books and records, sufficient for audit purposes, shall be kept at all times at the Center and shall, during ordinary business hours, along with any bookkeeping or accounting equipment used by Manager, be open to examination for the purposes of inspection, or audit by the Owner or its representatives during normal business hours and so as not to interfere with the operation of the Center. Any such inspection or audit shall be at the cost of the Center. Manager shall cooperate with the Owner or its representatives in such inspection or audit.

~~5.2 Monthly Reporting Requirements:~~ Manager shall deliver to the Owner within fifteen (15) days after the end of each calendar month, the following reports for the Center relating to the operation of the Center for previous calendar month (unless otherwise indicated):

- 5.2.1 an unaudited financial statement prepared from the books of account maintained by Manager and containing (i) a statement of the current assets and current liabilities of the Center at the end of such calendar month, and (ii) a profit and loss statement showing the results of operations, including the Gross Revenues, of the Center for such calendar month and cumulatively for the then current Contract Year (including budget vs. actual);
- 5.2.2 a General Manager's summary overview;
- 5.2.3 actual and forecasted cash flow and profit and loss by month for the balance of the current Contract Year;
- 5.2.4 financial operating statistics;
- 5.2.5 rooms statistics;
- 5.2.6 an aged accounts receivable summary;
- 5.2.7 a listing of accounts receivable over 60 days;
- 5.2.8 a detailed sales backlog;
- 5.2.9 a STAR Report;
- 5.2.10 a capital program forecast;
- 5.2.11 quality evaluations;
- 5.2.12 an internal audit checklist;
- 5.2.13 a check register;
- 5.2.14 a quarterly litigation summary;
- 5.2.15 a detailed calculation of the Base Management Fee payable to Manager with respect to the prior month;
- 5.2.16 a monthly calculation of Net Revenues for purposes of this Agreement, the Comerica Loan Agreement and the Devcon Agreement; and
- 5.2.17 any other reports reasonably requested by Owner.

~~5.3 Annual Audited Financial Statement Reporting:~~ At the end of each Contract Year, an audit of the books and records of the Center shall be performed by a firm of independent certified public accountants acceptable to the Owner at the Center's expense, such audit to be completed and a report to be furnished within one hundred eighty (180) days after

the end of such Contract Year. The audited financial statements shall include a balance sheet, income statement and statement of changes in financial position and a statement of the Gross Revenues (if not shown on the income statement) prepared in accordance with generally accepted accounting principles accompanied by an opinion with regard thereto, if obtainable, of the accounting firm performing such audit.

- 5.4 Zoning Rules and Regulations. The Owner and Manager shall comply in all material respects with any zoning rules or regulations applicable to the Center and the Parking Garage.
- 5.5 Licensing and Permitting. All licenses, permits or necessary authorizations for the operation of the Center shall be obtained in the Owner's name, except in cases where such licenses, permits or authorizations are required to be in Manager's name or in cases where the parties determine that it would be desirable to obtain any such licenses, permits or authorizations in Manager's name. The Owner and Manager shall cooperate in obtaining such license, authorization or permit and shall execute all documents and take all other action necessary to secure such licenses, permits or authorizations.

## **Article 6** **Insurance**

- 6.1 Insurance Requirements. The Owner, or Manager at Owner's request, will procure and maintain for the Center and the Parking Garage at the Center's expense with responsible and properly licensed companies such public liability, indemnity, property, worker's compensation, employment practices liability, fire and casualty use, occupancy, business interruption, comprehensive crime and other insurance and such surety, fidelity and other bonds in the amount and type set forth on, and in compliance with the provisions of, **Exhibit F** attached hereto and incorporated herein. Such types and amounts of insurance may be changed by mutual consent of Manager and the Owner. All policies evidencing such insurance shall be primary as to all covered risks and shall name both the Owner and Manager as insureds as their interest may appear, and may, at the Owner's election, name any mortgagee, lien holder or other security interest holder of all or any part of the Property as an additional insured thereunder, as its interest may appear. All insurance policies and bonds obtained by the Owner hereunder shall contain an agreement by the insurers that such policy shall not be canceled except upon thirty (30) days' prior written notice to all named insureds.
- 6.2 Fidelity Bonds. Manager shall maintain throughout the term of this Agreement such fidelity and other bonds as the Owner shall reasonably request from time to time for the full protection of the interests of the Owner and Manager. Any such bond or bonds may also protect the interests of the holder of any mortgage or other security instrument with respect to any portion of the Property, and shall be in such amount and obtained from such surety companies as the Owner and Manager deem appropriate.
- 6.3 Claims Reporting. The Owner and Manager shall each give prompt notice to the other of any claims made against either or both of them and shall cooperate fully with the other and with any insurance carrier to the end that all such claims will be properly investigated and defended. To the extent practicable, the Owner and Manager shall jointly select counsel to represent their mutual intents in any litigation. Manager shall also cause to be

Investigated all accidents and claims for damage relating to the operation and maintenance of the Center, as they become known to Manager, shall report to Owner any such incident that is material, and shall provide to Owner a report monthly setting forth all accidents and claims for damage relating to the Center in a form acceptable to Owner's Director of Finance, cause to be investigated all damage to or destruction of the Center, as it becomes known to Manager, shall report to Owner any such incident that is material, together with the estimated cost of repair thereof, and shall provide to Owner a report monthly setting forth all damage to or destruction of the Center in a form acceptable to Owner's Director of Finance, and prepare any and all reports required by Owner as the result of an incident mentioned in this Section.

**6.4** Loss Payment and Evidence of Insurance. The policies of insurance and bonds required to be carried hereunder shall, to the extent obtainable, contain an agreement by the insurers or sureties that any loss shall be payable notwithstanding any act or negligence of Manager or the Owner which might otherwise result in the forfeiture of said insurance or bond and that the coverage afforded thereby shall not be affected by the performance of any work in or about the Center. Each such policy or bond shall, if obtainable, also contain an endorsement or rider providing that the insurer or surety issuing such policy or bond waives any and all rights of subrogation to the rights of any injured party against any party to this Agreement in case of any such party's negligence or default in connection with any loss or damage which is covered by such insurance policy or bond. If such provision has been endorsed upon any insurance policy or bond, each party hereto shall apply the proceeds received under such policy or bond to relieve the other party pro tanto from any obligation or liability of such party on account of its negligence or default in connection with such loss or damage which is covered by such policy or bond.

**6.5** Periodic Insurance Policy Limited Review. All insurance policy limits provided under this Article 6 shall be reviewed by Owner and Manager every three (3) years following the Effective Date, or sooner if reasonably requested by Owner or Manager, to determine the suitability of such insurance limits in view of exposures reasonably anticipated over the ensuing three (3) years. Owner and Manager hereby acknowledge that changing practices in the insurance industry and changes in the local law and custom may necessitate additions to types or amounts of coverage during the term of this Agreement. Owner and Manager agree to comply with any insurance requirements not expressly set forth herein that the other reasonably requests in order to protect the Center and the respective interests of Owner and Manager.

## **Article 7**

### **Damage or Destruction and Condemnation**

**7.1** Damage or Destruction – Restoration Provisions. Subject to the requirements of the Hayes Mansion Bond Documents, if the Center, or any portion thereof, shall be damaged or destroyed at any time or times during the Term by fire or any other casualty, the Owner or its affiliates, at no expense or risk to Manager, to the extent of the availability of insurance proceeds, shall repair, rebuild or replace the same (such repairing, rebuilding or replacing being herein called "restoration") so that after such restoration the Center shall be substantially the same as prior to such damage or destruction (the "Restoration Standard"). Notwithstanding the foregoing, Owner shall

have no obligation to cause the restoration of the Center if the Owner, in its sole discretion, determines that insurance proceeds are insufficient to restore the Center to the Restoration Standard. In the event of complete destruction of the Center, the Owner or its affiliates shall have no requirement to restore the Center. In addition, in the event that the (i) insurance proceeds are paid pursuant to the Hayes Mansion Bond Documents to redeem Hayes Mansion Bonds; or (ii) the insurance proceeds are insufficient to restore the Center to the Restoration Standard, or (iii) the Center is completely destroyed, this Agreement shall terminate as of the date that any one of the foregoing events occurs or is determined. Subject to the rights of the mortgagees, lien holders, holders of the Hayes Mansion Bonds, or other security interest holders of all or part of the Property, all proceeds of insurance shall be made available to the Owner or its affiliates for restoration of the Center.

**7.2. Condemnation and Termination of Agreement.** If, at any time during the Term of this Agreement, title to the whole or substantially all of the Center shall be taken or condemned for any public or quasi-public purpose by any lawful power or authority by the exercise of right of condemnation or eminent domain, or by agreement between the Owner or its affiliates and those authorized to exercise such right, this Agreement shall terminate and expire on the date of such taking. For purposes of this Agreement, "substantially all of the Center" shall be deemed to have been taken if the untaken portion cannot be practically and economically used or converted for use by the Owner for the purpose for which the Center is being used immediately prior to such taking.

**7.3 Condemnation -- Restoration.** Subject to the requirements of the Hayes Mansion Bond Documents, in the event of any such condemnation or taking of less than the whole or substantially all of the Center, the Owner or its affiliates, at no expense or risk to Manager, shall, to the extent of the proceeds of the taking, repair, rebuild or replace the Center to the Restoration Standard. Notwithstanding the foregoing, Owner shall have no obligation to restore the Center if the Owner, in its sole discretion, determines that the proceeds of the taking are insufficient to restore the Center to the Restoration Standard. In the event that the proceeds of the taking are paid to the trustee pursuant to the Hayes Mansion Bond Documents to redeem the Hayes Mansion Bonds, this Agreement shall terminate. Subject to the rights of the ground lessor, mortgagees, lienholders, holders of Hayes Mansion Bonds, or other security interest holders of all or part of the Property, all proceeds of such taking being made available to the Owner or its affiliates for restoration of the Center.

**7.4 Rights to Proceeds.** Subject to the requirements of the Hayes Mansion Bond Documents, Owner and Manager acknowledge and agree that any proceeds of casualty insurance or of a taking are the sole property of Owner, and Manager shall have no interest in such proceeds.

**Article 8**  
**Liquor License**

- 8.1 Liquor License Application.** Manager agrees to apply for a liquor license, and the Owner agrees to cooperate with Manager in connection with an application for a liquor license which, when issued, shall permit the sale of alcoholic beverages in the Center. Manager and the Owner agree to amend this Agreement to reflect any reasonable requirements of a regulatory authority in connection with the issuance of a liquor license. This Agreement is conditioned upon the issuance of such a liquor license. In the event that the appropriate governmental authorities refuse to issue such a license, this Agreement may be canceled and terminated by either party on thirty (30) days' prior written notice to the other party, and neither party shall have any further obligation to the other under this Agreement.
- 8.2 Liquor License Compliance.** Manager agrees that it will conduct its operation in compliance with all laws, rules, regulations and ordinances pertaining to alcohol beverage control, and Manager, with the Owner's cooperation, agrees that it shall take all steps required to avoid doing or failing to do anything which might result in a warning, suspension, revocation or non-renewal of any liquor license covering the Center. Each party further agrees to cooperate with the other in every way to contest vigorously any action or proceeding which might result in a suspension, revocation or non-renewal of any liquor license covering the Center and to use its best efforts to obtain a lifting in the case of a suspension, reinstatement in the case of a revocation and a renewal in the case of a non-renewal of any such liquor license.
- 8.3 Revocation or Non-Renewal.** In the event of a revocation or non-renewal of any liquor license covering the Center due to an act or omission of either Manager or the Owner with the result that the Center is without a liquor license for a period of sixty (60) days or more, the other party may terminate this Agreement on thirty (30) days' prior written notice to the other. If, upon the expiration of such ninety (90) days, the Center is not licensed with a liquor license, the termination shall take effect pursuant to such notice, and this Agreement shall thereupon be terminated, and neither party shall have any obligations to the other party, except with respect to the liability concerning, or based on events occurring, prior to the date of such termination.
- 8.4 Assignment Impacting Liquor License.** Each party to this Agreement warrants that it will not assign this Agreement or make any corporate change or do any other act which would require the approval of the appropriate liquor licensing authorities without first obtaining such approval, and each party agrees that any such action purported to be taken by it without the required approval of the appropriate liquor licensing authorities shall be null and void.

**Article 9**  
**Management Fees**

**9.1** **Management Fee Calculation and Payment Dates.** As compensation for the services to be rendered by Manager pursuant to this Agreement, the Owner shall pay Manager management fees ("Management Fees") as follows:

**9.1(a)** a monthly base management fee ("Base Management Fee") of three percent (3%) of monthly Gross Revenues. For the first three months of the term, the Base Management Fee will be the greater of 3% of the monthly Gross Revenues or \$30,000 per month.

**9.1(b)** For so long as this Agreement remains in effect, Manager shall be entitled to receive the following amounts as an incentive management fee (the "Incentive Management Fee") during each Contract Year, calculated and paid as set forth in Section 9.1(e):

- (i) During the initial Term, twenty-five percent (25%) of any Net Revenues for the applicable Incentive Fee Period;
- (ii) During the initial Term, after payment in full of all amounts owing by Owner with respect to the Comerica Term Loan and the Devcon Agreement, thirty-five percent (35%) of Net Revenues for the applicable Incentive Fee Period;
- (iii) During the initial Term, after the occurrence of the events described in Section 9.1(b)(ii) and the payment in full of all amounts owing by Owner under the Comerica Revolving Loan, thirty-seven percent (37%) of Net Revenues for the applicable Incentive Fee Period; provided, however, that Owner hereby agrees that it will apply any Net Revenues first toward the repayment of the Comerica Revolving Loan until paid in full following repayment of the obligations under the Comerica Term Loan and the Devcon Agreement;
- (iv) During the initial Term, after the occurrence of the events described in Sections 9.1(b)(ii) and 9.1(b)(iii) and the funding of \$1,500,000 in the Volatility Reserve, forty percent (40%) of Net Revenues for the applicable Incentive Fee Period; and
- (v) During any Renewal Term, provided that the events described in Sections 9.1(b)(ii), 9.1(b)(iii) and 9.1(b)(iv) have occurred, thirty percent (30%) of Net Revenues for the applicable Incentive Fee Period; provided, however, that in the event that the Volatility Reserve has not been fully funded, twenty-five percent (25%) of Net Revenues for the applicable Incentive Fee Period.

For purposes of this Section 9.1(b), "Volatility Reserve" shall mean the bond market volatility reserve established by Owner and funded by Manager, not to exceed \$1,500,000. For illustration purposes only, attached hereto as **Exhibit B** is a pro forma 10-year cash flow statement indicating the potential

cash flow of the Center and corresponding potential Incentive Management Fee to be earned by Manager during the initial Term.

- 9.1(c)** The Base Management Fee provided for in Section 9.1(a) shall be paid monthly in arrears on or before the tenth (10th) day following the Owner's receipt of the unaudited financial statement for the preceding month delivered pursuant to Section 5.2 hereof and shall be calculated on the Gross Revenues for that month as set forth in this statement. Manager shall be entitled to withdraw from the Operating Account described in Section 2.4(n) hereof, on the date that the Base Management Fee is due and payable an amount equal to the Base Management Fee due for the preceding month. Manager shall be entitled to so withdraw the Base Management Fee prior to the payment of any of the other Operating Expenses and if, after the payment of the Base Management Fee, there are insufficient funds in the Operating Account to pay the remainder of the due and payable Operating Expenses, Manager shall have no obligation to supply Manager's own funds for the payment thereof, and Manager shall immediately notify the Owner in writing of the amount of the deficiency, whereupon the Owner shall, no later than ten (10) days thereafter, deposit in the Operating Account the amount necessary to pay all such Operating Expenses as provided for in Section 3.3 hereof, unless otherwise mutually agreed by the Owner and Manager.
- 9.1(d)** If the Base Management Fee for a Contract Year is greater than the total of fees previously paid in a Contract Year on a monthly basis, any additional base management fees shown to be due on receipt of the year-end financial statements will be paid within ten (10) days following the Owner's receipt of such statements, and, if the Base Management Fee for the Contract year is less than the total of fees previously paid in a Contract Year, on a monthly basis any excess base management fee paid during any year shall be deducted from the fees payable in the next succeeding months following the Owner's receipt of such statements.
- 9.1(e)** The Incentive Management Fee for each period from July 1 to December 31 of each Contract Year shall be calculated and paid no later than February 15 of that Contract Year, and the Incentive Management Fee for each period from January 1 to June 30 of each Contract Year shall be calculated and paid no later than August 15 of the following Contract Year. The period from July 1 to December 31 and from January 1 to June 30 of each Contract Year shall, for purposes of calculating the Incentive Management Fee, be referred to herein as an "Incentive Fee Period."
- 9.1(f)** The Base Management Fee shall be subject to adjustment as follows:
- (i) Effective as of the Contract Year commencing July 1, 2006, and continuing thereafter during the Term, within thirty (30) days after the end of each Contract Year, Owner and Manager shall determine the Gross Operating Profit of the Center for the immediately prior Contract Year. If Manager achieves, for that Contract Year, either (i) at least 90% of budgeted Gross Operating Profit or (ii) at least 90% of

the REVPAR Penetration Index for the Center's Competitive Set, then Manager shall receive the full Base Management Fee for that Contract Year. If Manager does not achieve at least one of the thresholds set forth in the foregoing sentence, then the Base Management Fee for that Contract Year shall be reduced from three percent (3%) of Gross Revenues to two percent (2%) of Gross Revenues. To effectuate such reduction, Owner shall receive during the first month (and any subsequent months, to the extent necessary) of the current Contract Year, a credit against payment of the Base Management Fee equal to one percent (1%) of the Gross Revenues of the Center for the prior Contract Year.

- (ii) Effective as of the Contract Year commencing July 1, 2006, and continuing thereafter during the Term, if it is determined pursuant to the foregoing section that Manager failed to achieve, for that Contract Year, at least one of the following: at least 80% of the budgeted Gross Operating Profit or at least 80% of the REVPAR Penetration Index for the Center's Competitive Set, such event shall constitute an Event of Default entitling Owner to the rights and remedies of Article 11 of this Agreement.

- 9.2 Non-Accumulation of Management Fee. Management Fees shall be computed separately for each Contract Year and shall not be accumulated from Contract Year to Contract Year.
- 9.3 Travel Reimbursement. In addition to the Base Management Fee and Incentive Management Fee, Manager shall be reimbursed monthly for all reasonable travel and out-of-pocket expenses incurred by Manager or Manager's Affiliates, which are directly related to the business of the Center and consistent with the Approved Budget or as otherwise agreed in writing by Owner.
- 9.4 Asset Management Fee. Notwithstanding the foregoing, Manager hereby agrees and acknowledges that Owner shall be entitled to pay to Asset Manager, during the Term, the Asset Management Fee.

## Article 10 Term

- 10.1 Initial Term. The original term of this Agreement shall commence on the date hereof and shall continue until June 30, 2014, unless this Agreement shall be extended or sooner terminated as herein provided.
- 10.2 Renewal Option. Manager shall have the right and option ("Renewal Option") to extend such original term for two (2) successive periods ("Renewal Terms") of five (5) calendar years each, provided, that, as to each Renewal Option, (i) Manager shall give written notice to the Owner of its election to exercise such Renewal Option at least six (6) months prior to the expiration of the pending term and an Event of Default on the part of Manager is not occurring, and (ii) Manager has met or exceeded, in at least two out of the three immediately preceding Contract Years, either of the following: at least ninety

percent (90%) of the budgeted Gross Operating Profit or at least 90% of the REVPAR Penetration Index for the Center's Competitive Set. If Manager fails to exercise the Renewal Option for the first Renewal Term, Manager's right to extend this Agreement shall terminate. If at the date upon which Manager exercises any Renewal Option, Manager is in default beyond any grace period herein provided, the extension of the term shall be null and void.

- 10.3 Term. As used herein, the "Term" shall mean the original term and any renewal term or terms which may later come into effect pursuant to the provisions hereof.

## Article 11 Default and Termination

- 11.1 Manager Event of Default. For purposes of this Agreement, an event of default ("Event of Default") shall be the failure by either party (the "Defaulting Party") to perform, keep or fulfill conditions set forth in this Agreement in any material respect, and the continuance of such failure, subject to the following sentence, for (a) a period of five (5) days after receipt by the Defaulting Party of notice thereof from the other party hereto (the "Non-Defaulting Party") specifying such failure, if such failure or breach relates to (i) the creation by Manager of a public safety hazard, (ii) the failure of Manager to pay Operating Expenses when due (and when sufficient funds are available), and (iii) failure of Manager to keep all required insurance in full force and effect, or (b) a period of thirty (30) days after receipt by the Defaulting Party of notice thereof from the Non-Defaulting Party specifying such failure, for all failures other than those set forth in the preceding clause (a). In the event such failure under clause (b) of the preceding sentence is of a nature that it cannot, with due diligence and in good faith, be cured within such thirty (30) day period, for so long a period of time as reasonably necessary to prosecute the curing of such failure with due diligence and in good faith (provided such Defaulting Party shall commence the curing of such failure within said thirty (30) day period and shall thereafter proceed with due diligence and good faith to cure the same). It shall also be an Event of Default if Manager fails to achieve, after July 1, 2006, at least one of the following in any Contract Year: at least 80% of the budgeted Gross Operating Profit or at least 80% of the REVPAR Penetration Index for the Center's Competitive Set (as described in Section 9.1(f)). If an Event of Default shall occur, the Non-Defaulting Party may give to the Defaulting Party notice of intention to terminate this Agreement after the expiration of the applicable cure period, and upon the expiration of such period, the Term shall expire and this Agreement shall terminate; provided, however, that if the Event of Default is Manager's failure to achieve at least one of the following: the requisite Gross Operating Profit or REVPAR Penetration Index for the Center's Competitive Set for any Contract Year, Owner may terminate this Agreement by written notice to Manager effective three (3) business days after Manager's receipt of such notice. Termination by reason of an Event of Default shall be without prejudice to any right to damages or any other right or remedy available to such party at law or in equity which the Non-Defaulting Party may have against the Defaulting Party under applicable law.
- 11.2 Owner Event of Default. The Owner shall be deemed to have committed an Event of Default if the Owner shall be in default in the making of any payments required to be made hereunder to Manager and such default is not cured within thirty (30) days after written notice thereof is given by Manager.

**11.3** Termination Provisions. In addition to the foregoing, this Agreement and the employment of Manager shall be terminated, and except as to liabilities or claims which shall have accrued or arisen prior to such termination, all obligations hereunder shall cease upon the happening of any of the following events:

**11.3(a)** if there shall be filed by Manager in any court pursuant to any statute either of the United States or of any state a petition in bankruptcy or insolvency, or for a reorganization, or for the appointment of a receiver or trustee of all or a substantial portion of Manager's property, or if Manager makes a general arrangement for the benefit of creditors, or if a petition in bankruptcy is filed against Manager which is not discharged within ninety (90) days thereafter;

**11.3(b)** the loss by the Owner or its Affiliates of the Center or of the right of possession or the right to collect the income from the Center due to any default on any mortgage or other obligation, or by operation of law;

**11.3(c)** the election or exercise by either party of the right to terminate as expressly granted to such party and provided for under any of the other provisions or Sections of this Agreement; and

**11.3(d)** the refusal of Manager to operate the Center under the provisions of any annual budget counter-proposed by the Owner in the manner provided in Section 4.1 hereof.

**11.4** Lender and First Mortgage Lien. The parties hereto understand that a bank or other financial institution (the "Lender") may be granted a first mortgage lien on the Property, or the Center in connection with the financing of the Center or Property. The Owner and Manager recognize that the Lender may require certain assurances in connection with the financing, such as conditional assignment or subordination of this Agreement, and the parties agree to comply with the reasonable requirements of the Lender.

**11.5** No Waiver. No waiver by either Party of any default on the part of the other in the performance, keeping or fulfillment of any covenant, promise, term, condition, undertaking or obligation of this Agreement shall be construed to be a waiver by such Party of any other or subsequent default in performance, keeping or fulfillment of the same or any other covenant, promise, term, condition, undertaking or obligation of this Agreement.

**11.6** Assets Property of Owner. Upon the termination of this Agreement for any reason, all assets acquired hereunder, including cash, shall be the property of the Owner. Any obligations incurred in the operation of the Center, which were incurred in accordance with the provisions of this Agreement, shall be assumed by the Owner, and the Owner shall indemnify and hold Manager harmless against all claims, demands, or liabilities made against Manager with respect to any such obligation and all expenses incurred by Manager in connection therewith.

**11.7** Manager Responsibilities at Termination. Upon the termination of this Agreement for any reason:

- 11.7(a) Manager shall have forty-eight (48) hours after such termination in which Manager shall remove its own property from the Center;
- 11.7(b) Manager shall leave the Center in a clean and orderly condition;
- 11.7(c) Manager shall, in connection with the termination of this Agreement, surrender (and assign, if permitted) to the Owner any and all licenses, permits and/or other authorizations or property held by Manager on behalf of the Owner required for the operation of the Center in accordance with the directions of the Owner and with applicable governmental laws, regulations, orders or other provisions;
- 11.7(d) Manager shall deliver to the Owner any and all equipment, supplies, keys, lock and safe combinations, reservation lists, ledgers, bank statements or operating accounts, budgets, accounting books and records, software programs and other information related to any computerized function, insurance policies, bonds, and other documents, memoranda, schedules, lists, contracts, agreements, correspondence, records and other properties required for the operation of the Center and/or required to be developed, maintained or kept by Manager pursuant to the terms and provisions of this Agreement. Without limiting the foregoing, Manager shall deliver to the Owner all utility contracts, service contracts, leases, licenses and other contracts entered into in connection with the operation of the Center and all warranty contracts, warranty cards, operating instructions and other information and guarantees concerning all equipment installed in or used in connection with the operation of the Center. Any and all contracts, leases, licenses, warranties, guarantees, bank accounts, and other Center assets which are held in Manager's name shall, if permitted, be assigned by Manager to the Owner, and Manager agrees to execute and deliver such instruments of assignment in connection therewith in such form and with such specific descriptions as may be from time to time requested by the Owner after termination of this Agreement;
- 11.7(e) Manager and Owner acknowledge that Manager will use certain proprietary information, manuals, handbooks, standards and other material in performing Manager's responsibilities. After termination of this Agreement, Manager will remove all of Manager's Proprietary Property, including, but not limited to, operating and standards manuals and handbooks, marketing information and strategies, computer files, and all information related to the Manager's GAP and GAP customer accounts; provided, however, that the Center's customer list and related information in the Center's Delphi system is owned by, and shall upon termination of this Agreement be delivered by Manager to, Owner (and shall not be considered part of Manager's Proprietary Property). Thereafter, the Owner shall have no right to use any of Manager's Proprietary Property in connection with the ownership or operation of the Property or the Center. The Owner acknowledges that in the event of a breach of the foregoing sentence by the Owner, the remedies available to Manager at law would be inadequate to preserve and protect Manager, and that Manager shall have the right to enforce this Section 11.7(e) by

seeking and obtaining equitable relief. The Owner acknowledges that this Section 11.7(e) shall survive the termination of this Agreement; and

11.7(f) Within 20 days after the date of termination of this Agreement, Manager shall provide to Owner an accounting through the date of termination of all payments made related to the management of the Center through and including the date of termination. Manager shall also provide all financial and other records related to the operation of the Center to Owner through the date of termination and shall continue to provide reasonable assistance to Owner after the date of termination of this Agreement (but not after the expiration of 60 days after the date of termination) to the extent necessary to provide reasonable assistance to any new manager of the Center. This obligation is unconditional and shall survive the expiration or sooner termination of this Agreement. Manager shall have reasonable access to the books and records of the Center necessary to provide the final accounting. Owner shall reimburse Manager for all expenses of Manager in assisting the new management of the Center after the date of termination.

11.8 Termination During Initial Term. In the event of a sale of the Property by Owner to a party other than Manager or Manager's Affiliate during the initial Term, this Agreement must be assigned to, and assumed by, any purchaser of the Property, and Owner shall, upon such assignment and assumption, be released from its obligations under this Agreement. In the event of a sale of the Property by Owner to any party other than Manager or Manager's Affiliate during any Renewal Term, Owner may terminate this Agreement subject to Owner's obligation to pay to Manager the Termination Fee pursuant to Section 11.9. In the event of a sale of the Property by Owner to Manager or Manager's Affiliate, during the initial Term or any Renewal Term, no Termination Fee shall be owed by Owner to Manager.

11.9 Termination Fee Payment. If this Agreement is terminated at any time as a result of (i) Manager's uncured default under provisions of this Article 11, (ii) Manager's failure to obtain a liquor license pursuant to Section 8.1 of this Agreement, (iii) the revocation or non-renewal of a liquor license due to Manager's act or omission, (iv) the occurrence of an event described in Section 11.3(a) of this Agreement, (v) the failure of Manager and Owner to approve the Proposed Annual Budget and Manager elects to terminate this Agreement, or (vi) Manager's failure to achieve, for any Contract Year (commencing July 1, 2006), at least one of the following: at least 80% of the Gross Operating Profit or at least 80% of the REVPAR Penetration Index for the Center's Competitive Set, then no termination fee shall be due from Owner to Manager. In the event that this Agreement is terminated on or before June 30, 2006 for any reason other than those set forth in clauses (i) through (v), inclusive, of the foregoing sentence, Manager shall receive a fee (the "Termination Fee") equal to the greater of \$250,000 or two times the sum of the Base and Incentive Management Fees earned by Manager in the twelve (12) months immediately prior to the Termination effective date. If this Agreement is terminated after June 30, 2006 for any reason other than those set forth in clauses (i) through (vi), inclusive, of the first sentence of this Section 11.9, Manager shall receive a Termination Fee equal to the lesser of (i) one times the sum of the Base and Incentive Management Fees earned by Manager in the twelve (12) months immediately prior to the Termination effective date or (ii) \$800,000; provided, however, that if this Agreement is terminated during any Renewal Term by reason of the Property not being restored pursuant to

Article 7 of this Agreement, then there shall be no termination fee due from Owner to Manager, but Owner shall reimburse Manager for all actual costs of relocation and severance of the Strategic Team (not to exceed \$200,000).

**Article 12**  
**Assignment**

- 12.1** **Assignment by Manager.** Owner and Manager agree that the expertise and experience of Manager are material considerations for Owner to execute this Agreement. Manager shall not assign or transfer this Agreement or any interest therein, whether by operation of law or otherwise, (except to Dolce International or another wholly-owned subsidiary of Dolce International) without the prior written consent of the Owner. For purposes of this Section 12.1, any transfer of the majority of the stock of Manager (other than a transfer to Dolce International or a wholly-owned subsidiary of Dolce International) shall be deemed an assignment and shall be prohibited without the prior written consent of Owner.

**Article 13**  
**Transfer of Vehicles**

- 13.1** **Owner Transfer of Vehicles.** Owner and Manager hereby agree that Owner shall convey to manager possession and ownership of the following vehicles, AS IS and without warranty of any kind, for use by Manager in carrying out its management and operational responsibilities under this Agreement, said vehicles to remain the property of Manager during the Term. Owner agrees to endorse (or cause to be endorsed) all certificates of title and to execute all other documentation necessary to cause the transfer of title to the vehicles to Manager. During the period of ownership of such vehicles, Manager shall provide insurance coverage for said vehicles as required by Section 6.1 of this Agreement. If during the term, Manager determines that some or all of the vehicles referenced in this Section 13.1 have exhausted their useful life, then, upon notice to Owner by Manager, Owner may request and receive, absent monetary or other consideration, the return of said vehicles from Manager; otherwise, Manager may dispose of any such vehicle as it deems necessary and appropriate. Upon the expiration of the Term or termination of this Agreement, Manager shall promptly re-convey title to the vehicles, and shall return possession of said vehicles, to Owner, AS IS and without warranty of any kind, and Manager shall execute all documentation necessary to effectuate such conveyance. The vehicles subject to this Section 13.1 are:

- 13.1(a)** 1996 Ford Club (VIN#1FBJS31G3THA61915);
- 13.1(b)** 1996 Ford Club (VIN#1FBJS31G3THA61913);
- 13.1(c)** 1996 Ford Club (VIN#1FBJS31G3THA61912);
- 13.1(d)** 1996 Ford Ranger (VIN#1FTCR10A5TTA32236); and
- 13.1(e)** 1999 Lincoln Town Car (VIN#1LNHM81WXY638368).

#### Article 14

##### Negation of Partnership and Interest in Real Property

- 14.1 Relationship between Owner and Manager. Nothing contained in this Agreement shall constitute, or be construed to be or to create, a partnership, joint venture or lease between the Owner and Manager with respect to the Property or the Center, or the construction, development or operation thereof.
- 14.2 No Real Property, Lien or Security Interest. This Agreement shall not be deemed at any time to be an interest in real estate or a lien or security interest of any nature against the Center or the Property or any other land used in connection with the Center, or any equipment, fixtures, inventory, motor vehicles, contracts, documents, accounts, notes, drafts, acceptances, instruments, chattel paper, general intangibles or other personal property now existing or that may hereafter be acquired or entered into with respect to the Center or the Property or the construction, development or operation thereof. The rights of Manager shall at all times be subject and subordinated to all mortgages, deeds of trust, security agreements, the Hayes Mansion Bonds and other security instruments which may now or hereafter be outstanding and to all renewals, modifications, rearrangements, consolidations, replacements and extensions thereof. This clause shall be self-operative and no further instrument of subordination shall be required. Manager shall execute promptly any certificate or other document that the Owner or its Affiliates or any mortgagee or other security holder may reasonably request as to such subordination so long as such subordination does not obligate Manager to provide services hereunder without a corresponding obligation on the part of the Owner or any successor in interest to pay the Management Fees and reimbursable expenses due hereunder. Manager hereby irrevocably constitutes and appoints the Owner as Manager's attorney-in-fact to execute any such certificate or document for and on behalf of Manager. Said power of attorney shall be deemed to be coupled with an interest and shall survive the dissolution, bankruptcy or legal disability of Manager.

#### Article 15

##### Force Majeure

- 15.1 Force Majeure. In the event of either party hereto being rendered unable, wholly or in part, by force majeure applying to its operations, to carry out its obligations under this Agreement, other than to make payments of amounts due hereunder, it is agreed that the obligations of such party, so far as they are affected by such force majeure shall be suspended during the continuance of any inability so caused and such cause shall, so far as possible, be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, terrorism, insurrections, riots, epidemics, fires, storms, floods or other casualties, and any other cause whether of the kind herein enumerated or otherwise not within the control of the party claiming suspension, all of which by the exercise of due diligence such party is unable to foresee or overcome; however, the settlement of strikes or lockouts shall be entirely within the control of the party having the difficulty, and the above requirement that any force majeure shall be remedied with the exercise of due diligence shall not require the settlement of strikes or

lockouts by acceding to the demands of the opposing party when such course is inadvisable in the direction of the party having the difficulty.

**Article 16**  
**Notices**

- 16.1** **Notice Provisions.** All notices to be given hereunder (and all requests for required consent) shall be given in writing and shall be deemed given when delivered by messenger or by the U.S. mails (and, if mailed, shall be deemed received three (3) business days after the post-marked date thereof), with postage prepaid, registered or certified, and, if intended for the Owner, delivered or addressed to the Owner c/o Director of Finance (or his or her designee), City of San Jose, 801 North First Street, San Jose, California 95110, and, if intended for Manager, delivered or addressed to Manager c/o Stephen Giblin, President, Dolce International/San Jose, Inc., at 28 West Grand Avenue, Montvale, New Jersey 07645, with a copy to J. William Boyar, Boyar & Miller, 4265 San Felipe, Suite 1200, Houston, Texas 77027. Either party hereto may change the address for notices hereunder by such party giving notice of such changes to the other party hereto in the manner hereinabove provided. If Manager is given the name and address of any Lender, it will give copies of all notices given to the Owner to such Lender, in the manner set forth in this Article 16.

**Article 17**  
**Indemnification**

- 17.1** **Manager Indemnification Provisions.** To the extent that Owner shall not be fully recompensed by insurance, Manager hereby agrees to indemnify, defend and hold harmless the Owner for, from and against any cost, loss, damage or expense (including, but not limited to, reasonable attorneys' fees and all court costs and other expenses of litigation, whether or not recoverable under local law) resulting from the material breach of this Agreement by Manager or the fraud, negligence or willful misconduct of Manager or its officers, employees and agents in the performance of their respective obligations under this Agreement. Amounts paid by Manager to Owner in fulfillment of Manager's obligations under this Section 17.1 shall not be deemed an expense of operating the Center and shall not be deducted in computing Gross Operating Profit for the Center, it being understood and agreed that all such amounts will be the responsibility of Manager.
- 17.2** **Owner Indemnification Provisions.** To the extent that Manager shall not be fully recompensed by insurance, Owner hereby agrees to indemnify, defend and hold Manager for, from and against any costs, loss, damage or expense (including but not limited to, reasonable attorneys' fees and all court costs and other expenses of litigation, whether or not recoverable under local law) resulting from (i) the fraud, negligence or willful misconduct of the Owner, and (ii) payment of Operating Expenses incurred by Manager in accordance with the terms of this Agreement; provided, however, that any such action or claim shall not have arisen by reason of any matter for which Manager is responsible for providing indemnification to the Owner pursuant to Section 17.1.

- 17.3 Consequential or Punitive Damages. Notwithstanding anything to the contrary provided in this Agreement, neither party shall be liable to the other hereunder for any consequential or punitive damages.
- 17.4 Indemnification Acknowledgement. The Owner and Manager understand, acknowledge and agree that each of them has relied on the indemnity of the other as an inducement and as a material part of the consideration for entering this Agreement. The Owner and Manager further agree that the indemnity set forth above shall survive the expiration or termination (whether with or without cause) of this Agreement.

### Article 18

#### Prohibition on Gifts; Revolving Door Prohibitions

- 18.1 Owner's Gift Ordinance. Manager acknowledges that Chapter 12.08 of the San José Municipal Code prohibits Owner's officers and designated employees from accepting gifts as defined in Chapter 12.08. Manager agrees not to offer any Owner officer or designated employee any gift prohibited by Chapter 12.08.
- 18.2 Material Breach with Respect to Gift Ordinance. Manager's offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement. In addition to any other remedies Owner may have in law or equity, Owner may terminate this Agreement for such breach as provided in Article 11 of this Agreement.
- 18.3 Revolving Door Ordinance. Manager is familiar with Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance") relating to the disqualification of Owner's former officers and employees in matters that are connected with their former duties or official responsibilities. Manager shall not knowingly utilize either directly or indirectly any officer, employee, or agent of Manager to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

### Article 19

#### Miscellaneous

- 19.1 Non-Waiver of Rights. Failure on the part of either party hereto to complain of any action or nonaction on the part of the other, no matter how long the same may continue, shall never be deemed to be a waiver by such party of any of its rights hereunder. The consent or approval by either party hereto to or of any action of the other requiring such consent or approval shall not be deemed to waive or render unnecessary such consent or approval to or of any subsequent similar act.
- 19.2 Rights of Successors. Except as herein otherwise expressly provided, the terms and provisions hereof shall be binding upon and shall inure to the benefit of the respective successors and assigns of the Owner and Manager. Nothing in this Section 0 shall be construed to waive the conditions elsewhere contained in this Agreement applicable to assignments or other transfers.

- 19.3** Time of Essence. Time is and shall be of the essence of this Agreement and of each term and provision hereof.
- 19.4** Governing Law and Venue. This Agreement shall be governed exclusively by the provisions hereof and by the laws of the State of California as the same may from time to time exist. In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the state court of the County of Santa Clara, California, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.
- 19.5** Severability. If any term or provision hereof or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provisions of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
- 19.6** Owner Right of Entry. The Owner and its agents and representatives shall have the right to enter upon the Center at all times. Manager and its agents and representatives shall have the right to enter upon the Center at all times prior to termination of the Agreement.
- 19.7** Construction. Words of any gender used in this Agreement shall be held and construed to and include any other gender, and words singular shall be held to include the plural, unless the context otherwise requires. The captions or headings used in this Agreement are inserted and included solely for convenience and shall never be considered or given any effect in construing the provisions hereof if any question of intent should arise.
- 19.8** Entire Agreement. No verbal or parole agreements pertaining to this Agreement shall be binding on the Owner or Manager, the entire agreement to be such as is written into this Agreement, and the Owner and Manager hereby agree that each has carefully read this instrument and that the same terms and conditions herein set out are satisfactory.
- 19.9** No Assumption. The review, approval, inspection, examination or consent of Owner of or to any item to be reviewed, approved, inspected, examined or consented to by Owner shall not constitute assumption of any responsibility by Owner for either the accuracy or sufficiency of such item or the quality or suitability of such item for its intended use, but rather for the sole purpose of protecting Owner's interest.
- 19.10** Owner Representative. Where this Agreement requires or permits Owner to act and no officer of Owner is specified, the City of San Jose City Manager or the designated representative of the City of San Jose's City Manager, has the authority to act on Owner's behalf.
- 19.11** Modification of Agreement Ability. Except as otherwise expressly provided herein, this Agreement may not be modified by the parties hereto unless in writing and signed by both parties.

- 19.12 Third Parties. Nothing contained in this Agreement shall be construed so as to confer any rights or benefits upon any person or entity not a party to this Agreement.

**Article 20**  
**Capital Improvements**

- 20.1 Capital Improvements - Oversight. Owner and Manager may agree, on a case by case basis, that Manager shall oversee the design and construction of Capital Improvements to the Center or the Property. All Capital Improvements made by Manager shall comply with the provisions of this Article and such other terms and conditions then in effect that govern construction of improvements on Owner's property. Notwithstanding any terms in this Agreement to the contrary, Manager and Owner agree and acknowledge that unless otherwise agreed, Owner shall be responsible for overseeing and implementing all Capital Improvements to the Center and the Property.
- 20.2 Manager's Implementation of Capital Improvements. Except as provided in Section 20.3 below, Manager will only implement those Capital Improvements identified in the Approved Annual Budget prepared by Manager and approved by the Owner pursuant to Article 4. The parties acknowledge and agree that Manager in the Approved Annual Budget will include the Manager's recommended expenditures for Capital Improvements in priority order including the estimated costs for design, materials, construction and the proposed contingency for each identified Capital Improvement, based on Manager's knowledge of the Center, the Property, knowledge of conference center and hotel facilities and related construction and its costs, knowledge of revenue-enhancing strategies, and Manager's role in maintaining the quality of the asset. Owner's approval of the Approved Annual Budget will be deemed approval of the Capital Improvements identified therein to the extent monies in the FF&E Reserve are available.
- 20.3 Manager Implementation of Capital Improvements Not Identified in Capital Improvement Program. Owner and Manager may from time agree that Manager may oversee the design and construction of Capital Improvements that are not identified in the Approved Annual Budget but for which Owner has appropriated funds to pay for the expense of the Capital Improvement ("Additional Capital Improvements"). Provided that funds have been appropriated by Owner, the City Manager, on behalf of Owner, is hereby authorized to enter into a memorandum or similar agreement with Manager on such terms as Owner and Manager deem reasonable, regarding the Additional Capital Improvements. Manager shall follow the requirements of this Article 20 with respect to the design and construction of the Additional Capital Improvements.
- 20.4 Payment to Contractors. Owner will pay Manager for work completed with respect to any approved Capital Improvement overseen and implemented by Manager within 30 days of the Manager's presentation to Owner of requisitions evidencing the expense incurred, the amount remaining to be expended and the percentage of the Capital Improvement that has been completed to date unless the Owner and Manager have agreed in writing, to a different payment schedule for the project. Owner shall have the right to reject any requisition which does not meet the requirements of this Section 20.4. Owner shall have the right to disapprove any requisition if the work performed on the Capital Improvement does not meet the requirements of this Agreement.

**20.5** Plans and Specifications. Prior to making any Capital Improvement, at Owner's direction, Manager shall submit for the Public Works Director's (alternatively, "DPW Director") review and written approval a complete set of plans and specifications for the work to be performed. Notwithstanding the foregoing, if the DPW Director determines that no plans and specifications are necessary for a particular Capital Improvement due to the nature of the Capital Improvement, Manager will not be required to submit plans and specifications. References in this Agreement to the Director of Public Works shall include his or her authorized designees.

**20.5(a)** The plans and specifications shall include an estimate of the cost of the work to be performed and a schedule of construction.

**20.5(b)** The plans and specifications shall be stamped and approved by the appropriate design professionals.

**20.5(c)** The plans and specifications shall comply with all applicable federal, state and local requirements including without limitation, the City of San Jose Department of Public Works Standard Specifications, dated July 1992, and any subsequent modifications to such Standard Specifications. The plans and specifications shall incorporate any other design guidelines and requirements provided by Owner.

**20.6** Manager's Construction Contract Requirements. Manager shall not construct any Capital Improvement except pursuant to a written construction contract entered into pursuant to the requirements set forth herein.

**20.6(a)** No construction agreement shall be awarded to any contractor other than one qualified and properly licensed in the State of California to perform such construction work.

**20.6(b)** Manager shall be responsible for obtaining all permits, approvals, and authorizations necessary to construct a Capital Improvement. Manager shall not award a construction contract for a Capital Improvement until it has obtained all such permits, approvals and authorizations.

**20.6(c)** In the event that the estimated cost of a proposed Capital Improvement is less than the amount required under the San José City Charter for publicly bidding a public works project, Manager shall obtain at least three (3) quotes, from three (3) separate contractors, to perform the work as set forth in the approved plans and specifications. If the Owner has authorized Manager to obtain quotes without first having approved plans and specifications, then the proposed work will be described with sufficient detail so as to provide responding contractors with the information necessary to respond with an accurate and complete quote. Manager shall award the construction contract to the lowest quote obtained, subject to first obtaining Owner's approval and the requirements of Section 20.6(e).

**20.6(d)** In the event that the estimated cost of a proposed Capital Improvement is over the amount required under the San Jose City Charter for publicly bidding a public works project, then Manager shall award the construction

contract to the lowest responsive bidder who is responsible, subject to first obtaining Owner's approval and the requirements of Section 20.6(e). In doing so, Manager shall comply with the public bidding procedures and requirements as set forth in the San Jose City Charter and in Chapter 14.04 of the San Jose Municipal Code, as these may be amended.

- 20.6(e)** If the lowest quote or bid obtained by Manager pursuant to Sections 20.6(c) or 20.6(d) is over the estimate for the Capital Improvement set forth in the approved plans and specifications, or in the absence of approved plans and specifications, the estimate set forth in the Annual Capital Budget or the estimated amount for the Additional Capital Improvement, Manager and the designated representative of Owner shall meet and confer in good faith to determine whether to award the construction contract to the lowest responsive bidder, who is responsible to reduce the scope of the work and obtain new quotes for, or bid or rebid the Capital Improvement project, as applicable, or to proceed in some other manner.

- 20.7** Evidence of Insurance Requirements. Each and every construction agreement for a Capital Improvement entered into between Manager and a contractor shall contain insurance provisions naming Owner as an additional insured. All policies, endorsements, certificates and/or binders shall be subject to approval by the Director of Finance or the Director's authorized designee as to form and content.

- 20.8** Construction/Performance Bond Requirements. Prior to commencing construction of a Capital Improvement, Manager or its contractor shall furnish to Owner, at no expense to Owner, the following bonds: (1) a payment bond securing the payment of all construction labor and materials and (2) a bond of faithful performance securing completion of all the work and construction and, if requested by Owner, (3) a warranty bond protecting Owner from any work or labor done or materials or equipment furnished under the contract for the Capital Improvement, which is defective or not in accordance with the terms of the contract. Notwithstanding the preceding sentence, the DPW Director may waive the requirement for a faithful performance bond if such waiver is consistent with the policies and procedures established by the City for the waiver of faithful performance bonds. The bonds shall be executed by a surety possessing a valid certificate of authority issued by the California Department of Insurance, and shall name the Owner as obligee. The payment and performance bonds shall be for an amount equal to one hundred percent (100%) of the total amount of the contract secured by each respective bond. The form of the bonds shall be approved by the City Attorney and they shall be filed with the San Jose City Clerk. The bonds shall be substantially in the forms set forth in Appendix 1 to this Agreement. In the event that Owner revises the forms set forth in Appendix 1, Manager, at Owner's direction, shall use the revised forms.

- 20.9** Construction Provisions for Capital Improvements. Construction of each Capital Improvement shall be in accordance with the following provisions:

- 20.9(a)** Construction of a Capital Improvement shall be in accordance with the plans and specifications approved by the Department of Public Works and Owner's standard specifications. During construction, Manager may execute change orders involving minor, routine changes to the plans and specifications as

needed to facilitate construction of the Capital Improvement, provided that no such changes shall alter the scope or increase the cost of the Capital Improvement. Manager shall not execute a change order involving anything other than a minor, routine change to the plans and specifications without first obtaining the consent of Owner's designated representative.

**20.9(b)** Owner shall have the right to inspect the work at any time during the construction of the Capital Project. If at any point during construction, Owner determines that the work is not being performed in a manner that complies with the provisions of this Agreement, Owner shall have the right to stop the construction and direct the Manager to correct the deficiency.

**20.9(c)** Manager shall not finally accept any work without first obtaining the written approval and acceptance of the DPW Director. Immediately following the DPW Director's final written approval and acceptance of the Capital Improvement, Manager shall finally accept the project and immediately record in the Office of the Santa Clara County Recorder a notice of completion complying with the requirement of California Civil Code Section 3093.

**20.9(d)** Following completion of the Capital Improvement, Manager shall provide Owner with two (2) completed sets of as-built drawings and a CAD disk, if drawings were produced on disk, and a breakdown that shows all costs incurred for such work.

**20.10** Compliance with Applicable Law. Manager shall cause the Capital Improvements to be designed and constructed in accordance with all applicable laws. Without limiting the generality of the foregoing, Manager shall assume all responsibility for coordinating and obtaining required approvals from all government and regulatory agencies (i.e. City of San Jose Fire Department, County Health Department and the like) for the design and construction of any Capital Improvement. Owner agrees to cooperate with Manager in seeking the necessary or desired governmental approvals.

**20.11** Prevailing Wages. As required by Owner's policy regarding payment of prevailing wages and Sections 1770 et. seq. of the California Labor Code and implementing regulations, Manager shall pay, or cause to be paid, prevailing rates of wages for all work done in connection with the construction of any Capital Improvement. In this connection, Manager shall cause each contractor and subcontractor to keep an accurate payroll record showing name, address, social security number, work classification, straight-time and overtime hours worked each day and week and the actual per diem wages paid to each person certified in a trade or craft, apprentice, work or other employee of the contractor or subcontractor, as applicable, performing work on a Capital Improvement. Manager shall cause to be provided or made available for inspection, as may be requested by Owner, a certified copy of such payroll records.

**Article 21**  
**Noncompete**

**21.1** Manager hereby agrees that it will not operate another executive conference center or conference resort during the Term or any Renewal Term within the city limits of San Jose, California, Santa Clara, California, Los Gatos, California, Milpitas, California, Campbell, California and Morgan Hill, California, excluding conference centers owned by a university or a company for their predominant business use in such areas.

**[Remainder of Page Intentionally Left Blank]**

WITNESS the execution hereof in several counterparts, each of which shall be deemed an original, and all of which shall constitute but one and the same instrument, as of the 2<sup>nd</sup> day of December 2003.

THE OWNER:

City of San Jose, California

APPROVED AS TO FORM:

RICHARD DOYLE, CITY ATTORNEY

By: [Signature]  
Name: Danielle Kennealey  
Title: Sr. Deputy City Attorney

By: [Signature]  
Name: PATRICIA L. O'NEARA  
(Print Name)  
Title: CITY CLERK

MANAGER:

Dolce International/San Jose, Inc.

WITNESS:

[Signature]

By: [Signature]  
Name: A. DOLCE  
(Print Name)  
Title: Chairman + CEO

Exhibits:

- "A" - Description of the Property
- "B" - 10-Year Pro Forma
- "C" - City of San Jose Wage Policy Requirements
- "D" - City of San Jose Environmentally Preferable Procurement Policy
- "E" - Initial Competitive Set
- "F" - Insurance
- "G" - Parking Garage and Park Maintenance Requirements
- "H" - Security Plan
- "I" - Transitional Budget

Appendices:

- "A" - Circulation Space
- "1" - Forms of Bonds

EXHIBIT A  
DESCRIPTION OF THE PROPERTY

BEGINNING at the point of intersection of the center line of Edenvale Avenue, 40 feet wide, with the Southerly boundary line of that certain 9.37 acre parcel of land described in Deed executed by Benjamin B. Smith, et ux, to Charles C. Snyder, et al, dated September 15, 1954 and recorded September 15, 1954 in Book 2962 of Official Records, page 146, said point of intersection being distant along said center line of Edenvale Avenue North  $1^{\circ} 27' 20''$  East 1022.57 feet from the point of intersection of said center line with the center line of Cheynoweth Avenue, 40 feet wide; thence along said center line of Edenvale Avenue, North  $1^{\circ} 27' 20''$  East 419.80 feet to the point of intersection thereof with a Northerly boundary line of said 9.37 acre parcel; thence leaving said center line and running along said Northerly boundary line of the 9.37 acre parcel North  $88^{\circ} 32' 40''$  West 572.64 feet to the most Northwesterly corner thereof; thence along one of the Westerly boundary lines of said 9.37 acre parcel South  $1^{\circ} 27' 20''$  West and parallel with the center line of Edenvale Avenue, 462.95 feet to the Southwesterly corner thereof; thence along the Southerly boundary line of said parcel of land, the following courses and distances: South  $69^{\circ} 28'$  East 115.00 feet; South  $78^{\circ} 33'$  East 50.00 feet; South  $81^{\circ} 36'$  East 50.00 feet; North  $88^{\circ} 12'$  East 50.00 feet; North  $75^{\circ} 17'$  East 175.00 feet; North  $65^{\circ} 56'$  East 100.00 feet and South  $88^{\circ} 32' 40''$  East 56.58 feet to a harrow tooth set in the center line of Edenvale Avenue being the point of beginning, containing 6.227 acres of land, more or less, and being a part of Lot 9 of the Santa Teresa Rancho, Santa Clara County.

**Doice International**

Project: Hayes Mansion Rooms 214  
 Currency: USD  
 28-Nov-03

**Hayes Mansion (for Illustrative Purposes Only)**

**EXHIBIT B**

|                              | Year # 1           | Year # 2          | Year # 3          | Year # 4          | Year # 5          | Year # 6          | Year # 7          | Year # 8          | Year # 9          | Year # 10         |
|------------------------------|--------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| <b>REVENUE</b>               |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Rooms                        | 4,588,000          | 5,018,000         | 7,309,000         | 8,202,000         | 8,894,000         | 8,954,820         | 9,223,495         | 9,500,169         | 9,785,174         | 10,078,729        |
| Food (8 Bev 2003)            | 4,408,000          | 5,547,000         | 8,417,000         | 8,925,000         | 7,250,000         | 7,487,500         | 7,591,525         | 7,922,271         | 8,159,939         | 8,404,737         |
| Beverage                     | 823,000            | 1,160,000         | 1,487,000         | 1,514,000         | 1,575,000         | 1,822,260         | 1,670,918         | 1,721,045         | 1,772,678         | 1,825,857         |
| Conference Services          | 1,880,000          | 2,513,000         | 2,853,000         | 3,185,000         | 3,333,000         | 3,432,980         | 3,535,060         | 3,642,050         | 3,751,321         | 3,863,860         |
| Spa                          | 300,000            | 414,000           | 518,000           | 631,000           | 736,000           | 758,080           | 780,822           | 804,247           | 828,374           | 853,225           |
| Minor Operations             | 371,000            | 586,000           | 878,000           | 744,000           | 770,000           | 793,100           | 814,400           | 841,400           | 868,642           | 892,644           |
| <b>GROSS REVENUE</b>         | <b>12,470,000</b>  | <b>18,208,000</b> | <b>19,342,000</b> | <b>21,201,000</b> | <b>22,358,000</b> | <b>23,028,740</b> | <b>23,718,602</b> | <b>24,431,180</b> | <b>25,164,126</b> | <b>25,919,050</b> |
| <b>DIRECT EXPENSES</b>       |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Rooms                        | 1,244,000          | 1,431,000         | 1,800,000         | 1,715,000         | 1,774,000         | 1,827,220         | 1,882,037         | 1,938,498         | 1,995,663         | 2,056,562         |
| Food & Beverage              | 3,580,000          | 4,413,000         | 5,073,000         | 5,418,000         | 5,846,000         | 5,815,380         | 5,989,844         | 6,189,537         | 6,354,823         | 6,545,281         |
| Conference Services          | 811,000            | 1,010,000         | 1,118,000         | 1,183,000         | 1,228,000         | 1,284,840         | 1,302,785         | 1,341,889         | 1,382,125         | 1,423,589         |
| Spa                          | 270,000            | 352,000           | 414,000           | 473,000           | 515,000           | 530,450           | 548,384           | 582,754           | 578,837           | 597,026           |
| Minor Operations             | 213,000            | 328,000           | 388,000           | 427,000           | 442,000           | 455,290           | 468,918           | 482,885           | 497,475           | 512,389           |
| <b>TOTAL DIRECT EXPENSES</b> | <b>6,088,000</b>   | <b>7,532,000</b>  | <b>8,694,000</b>  | <b>9,217,000</b>  | <b>9,608,000</b>  | <b>9,893,150</b>  | <b>10,189,945</b> | <b>10,495,643</b> | <b>10,810,512</b> | <b>11,134,827</b> |
| Gross Operating Income       | 6,372,000          | 8,676,000         | 10,748,000        | 11,984,000        | 12,750,000        | 13,135,590        | 13,528,658        | 13,935,547        | 14,353,614        | 14,784,222        |
| <b>INDIRECT EXPENSES</b>     |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Engineering                  | 834,000            | 858,000           | 881,000           | 703,000           | 722,000           | 741,855           | 782,258           | 793,218           | 804,757           | 826,887           |
| Sales and Marketing          | 1,406,000          | 1,409,000         | 1,483,000         | 1,541,000         | 1,585,000         | 1,828,588         | 1,873,374         | 1,719,537         | 1,768,675         | 1,815,258         |
| Administrative and General   | 1,327,000          | 1,402,000         | 1,474,000         | 1,539,000         | 1,577,000         | 1,820,386         | 1,664,828         | 1,710,713         | 1,757,758         | 1,806,058         |
| Base Mgt Fee                 | 374,000            | 488,000           | 580,000           | 638,000           | 671,000           | 881,000           | 712,000           | 733,000           | 755,000           | 778,000           |
| Utilities                    | 688,000            | 808,000           | 828,000           | 955,000           | 1,020,000         | 1,048,050         | 1,079,871         | 1,106,465         | 1,138,914         | 1,168,179         |
| <b>TOTAL INDIRECT</b>        | <b>4,409,000</b>   | <b>4,783,000</b>  | <b>5,146,000</b>  | <b>5,405,000</b>  | <b>5,675,000</b>  | <b>5,729,860</b>  | <b>5,889,429</b>  | <b>6,052,806</b>  | <b>6,221,103</b>  | <b>6,394,420</b>  |
| Gross Operating Profit       | 1,963,000          | 3,913,000         | 5,602,000         | 6,579,000         | 7,175,000         | 7,405,730         | 7,640,229         | 7,882,739         | 8,132,511         | 8,389,802         |
| <b>FIXED EXPENSES</b>        |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Insurance                    | 191,000            | 249,000           | 287,000           | 325,000           | 343,000           | 343,001           | 343,002           | 343,003           | 343,004           | 343,005           |
| Property Taxes               | 292,000            | 299,000           | 306,000           | 313,000           | 321,000           | 321,001           | 321,002           | 321,003           | 321,004           | 321,005           |
| Asset Mgr Fee                | 50,000             | 61,250            | 62,531            | 63,845            | 65,181            | 66,670            | 67,985            | 69,434            | 70,920            | 72,443            |
| Lease & Other                | 281,000            | 287,000           | 274,000           | 280,000           | 287,000           | 294,893           | 303,002           | 311,338           | 319,896           | 328,683           |
| <b>TOTAL FIXED EXPENSES</b>  | <b>794,000</b>     | <b>866,250</b>    | <b>829,531</b>    | <b>971,845</b>    | <b>1,006,181</b>  | <b>1,015,465</b>  | <b>1,024,891</b>  | <b>1,034,775</b>  | <b>1,044,625</b>  | <b>1,055,147</b>  |
| Net Operating Income         | 1,169,000          | 3,046,750         | 4,872,469         | 5,606,155         | 6,171,809         | 6,390,265         | 6,615,238         | 6,847,964         | 7,087,887         | 7,334,655         |
| <b>OTHER EXPENSES</b>        |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Furniture, Fixt. & Equip.    | 499,000            | 648,000           | 774,000           | 848,000           | 894,000           | 921,150           | 948,784           | 977,248           | 1,006,565         | 1,036,762         |
| Hayes Debt & Bond Expenses   | 1,850,000          | 2,400,000         | 2,800,000         | 3,400,000         | 4,050,000         | 4,050,000         | 4,050,000         | 4,050,000         | 4,050,000         | 4,050,000         |
| Commerce Term Loan pmts      | 549,000            | 535,000           | 521,000           | 507,000           |                   |                   |                   |                   |                   |                   |
| Commerce LOC Interest pmts   | 35,000             | 74,000            | 83,000            | 83,000            | 78,000            | 55,000            | 31,000            |                   |                   |                   |
| <b>TOTAL OTHER EXPENSES</b>  | <b>3,833,000</b>   | <b>3,657,000</b>  | <b>3,978,000</b>  | <b>4,838,000</b>  | <b>5,022,000</b>  | <b>5,026,150</b>  | <b>5,029,784</b>  | <b>5,027,248</b>  | <b>5,056,565</b>  | <b>5,086,762</b>  |
| <b>NET REVENUE</b>           | <b>(1,864,000)</b> | <b>(610,250)</b>  | <b>684,469</b>    | <b>768,155</b>    | <b>1,148,809</b>  | <b>1,364,115</b>  | <b>1,585,454</b>  | <b>1,820,717</b>  | <b>2,031,121</b>  | <b>2,247,893</b>  |
| Incentive Management Fee     |                    |                   | 173,617           | 182,039           | 402,433           | 477,440           | 554,809           | 673,865           | 812,448           | 899,157           |

Exhibit CWAGE REQUIREMENTS

Pursuant to City of San Jose Prevailing Wage and Living Wage policies, Contractor and any subcontractor shall be obligated to pay not less than the prevailing wage or living wage as indicated in this Exhibit.

**I. CITY COUNCIL WAGE POLICIES****A. Living Wage Policy**

Under City Council Resolution 68900, contractors who are awarded certain City service and labor contracts are required to pay a minimum level of compensation to covered employees who work on these projects.

Living wages shall mean the wages paid under a collective bargaining agreement between the Contractor and a recognized union representing employees who will perform services pursuant to the Agreement.

However, if the wage rates set forth in the collective bargaining agreement fall below the then current Living Wage Rate set by the City of San Jose, the required rate of pay shall be the Living Wage Rate, unless the collective bargaining agreement expressly provides that the agreement shall supercede the requirements of the Living Wage Policy.

If there is no collective bargaining agreement as described above, not less than the following Living Wage Rate must be paid to covered employees performing work identified in the applicable wage determination issued by the City of San Jose's Office of Equality Assurance.

1. If health insurance benefits are provided, a wage of not less than Ten Dollars and Thirty-One Cents (\$10.31) per hour.
2. If health benefits are not provided, a wage of not less than Eleven Dollars and Fifty-Six Cents (\$11.56) per hour.

**B. Prevailing Wage Policy**

Under City Council Resolution No. 61144, contractors for certain types of contracts are required to pay prevailing wages to their employees who work on City projects.

Prevailing Wages shall mean the wages paid under a collective bargaining agreement between the Contractor and a recognized union representing workers who perform services pursuant to this agreement; or

If there is no collective bargaining agreement as described above, not less than the prevailing rate of per diem wages for the employee craft/classification as determined by the City of San Jose's Office of Equality Assurance.

The Prevailing Wage will be subject to annual adjustment on the anniversary of the contract. Adjustment will be based on the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index, All Items, for all Urban Consumers [CPI-U] for San Francisco-Oakland-San Jose).

### C. Reports

The Office of Equality Assurance will monitor the payment of prevailing and living wages by requiring the Contractor and all Subcontractors to file a LABOR COMPLIANCE WORKFORCE STATEMENT and LABOR COMPLIANCE FRINGE BENEFIT STATEMENT with supporting documentation.

The Contractor and Subcontractors shall also report such other additional information, including certified payrolls, as requested by the Director of Equality Assurance to ensure adherence to the Policies.

Labor compliance statements must be filed in the Office of Equality Assurance within 10 days of execution of this Agreement at the address below.

City of San Jose  
Office of Equality Assurance  
4 North 2<sup>nd</sup> Street, Suite 925  
San Jose, CA 95113  
Phone: 408.277.4025

**THIS EXHIBIT INCLUDES THE LABOR COMPLIANCE WORKFORCE STATEMENT AND LABOR COMPLIANCE FRINGE BENEFIT STATEMENT TO BE SUBMITTED BY THE AWARDED CONTRACTOR ONLY. DO NOT SUBMIT THESE FORMS WITH YOUR PROPOSAL.**

## II. LIVING WAGE POLICY PROVISIONS

On November 17, 1998, by Resolution No. 68554 and amended on June 8, 1999 by Resolution 68900, the San Jose City Council adopted its Living Wage Policy to meet the employment and economic development needs of low wage workers by mandating:

1. A minimum level of compensation for workers employed by contractors and subcontractors who are awarded certain City of San Jose service and labor contracts with an expenditure in excess of \$20,000 and recipients who receive direct monetary financial assistance from the City in the amount of \$100,000 or more in any twelve month period, excluding non-profit corporation;
2. The provision of health insurance benefits or the ability to afford health insurance;
3. Retention of employees when certain new contractors take over a continuing City service;
4. An environment of labor peace; and
5. Employee Work Environment Evaluation (Third Tier Review)

## A. WAGE REQUIREMENTS

### 1. Covered Employees Defined

For the purpose of this provision, Covered Employees means any person employed by the Contractor or Subcontractor who meets the following conditions:

- a) The person does not provide volunteer services that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;
- b) The person expends at least half of his/her time on work for the City.
- c) The person is at least eighteen (18) years of age; and
- d) The person is not in training for the period of training specified under training standards approved by the City of San Jose.

## B. EMPLOYEE RETENTION REQUIREMENTS

One of the provisions of the Living Wage Policy is a requirement that on certain contracts over \$50,000, the new Contractor must retain the workers who have been performing the City services under the previous contractor. Employee retention is applicable to the Operator and all Subcontractors under the Agreement in two respects: (1) the Contractor will be obligated to adhere to these requirements in hiring, and (2) the Contractor will also be obligated to cooperate with the City in transitioning to a new contractor at the end of the term of the Agreement.

The following provisions are applicable to this RFP and will become part of the Agreement:

### 1. Qualified Retention Employee Defined

Qualified Retention Employee means any person employed by the predecessor contractor or any subcontractor to the predecessor contractor who meets the following requirements:

- i. The person provides direct labor or service on the City contract;
- ii. The person is not an "exempt" employee under the Fair Labor Standards Act (FSLA); and
- iii. The person has been employed on the City contract by the predecessor service contractor or subcontractor for at least a six-month period prior to the date of the new contract.

## 2. Current Eligible Retention Employee Defined

Current Eligible Retention Employee means a current employee of the new Contractor who meets the following requirements:

- i. The person has been employed by the Contractor for at least the six month period prior to the date of the new service or labor contract;
- ii. The person would otherwise need to be terminated as a result of the implementation of the City of San Jose Living Wage Policy; and
- iii. The Contractor chooses to designate the person as a Current Eligible Retention Employee.

The Contractor must establish requirements i. and ii. above by submitting payroll records or other reliable evidence satisfactory to the Director of Equality Assurance. If the Contractor cannot submit such evidence, the employee cannot be designated a Current Eligible Retention Employee.

## C. EMPLOYMENT OF QUALIFIED RETENTION EMPLOYEES

The new Contractor shall offer continued employment to all Qualified Retention Employees who are interested in such continued employment.

The City will provide the new Contractor with information regarding which employees of the Predecessor are Qualified Retention Employees to the extent such information is available to the City of San Jose.

Notwithstanding anything to the contrary in this provision, the new Contractor may deem an employee not to be a Qualified Retention Employee if, and only if:

1. The employee has been convicted of a crime that is related to the job or to his/her job performance; or
2. The Contractor can demonstrate to the City that the employee presents a significant danger to customers, co-workers or City staff.

In the event that the new Contractor does not have enough positions available to hire all Qualified Retention Employees desiring continued employment and to retain its Current Eligible Retention Employees, the new Contractor shall hire Qualified Retention Employees and retain Current Eligible Retention Employees by seniority within each employment classification. For any positions that become available during the initial ninety (90) day period of the contract, the new Contractor shall hire Qualified Retention Employees and rehire its Current Eligible Retention Employees by seniority within each employment classification.

1. Retention Requirements

- a. Qualified Retention Employees hired by the new Contractor may not be discharged without cause during the initial ninety (90) day period of their employment.
- b. The new Contractor shall offer continued employment to each Qualified Retention Employee who receives a satisfactory performance evaluation at the end of the initial ninety (90) day period of employment. Such employment shall be offered under the same terms and conditions established by the new Contractor for all of its employees.

2. Third Party Beneficiary

Qualified Retention Employees are third party beneficiaries of this Agreement, which means that the employee has the right to enforce the provisions of the Agreement independent of the City's right to enforce the provisions of the Agreement. The third party rights will become effective only when the Agreement becomes effective. No third party rights are intended to apply to any employee regarding the RFP process.

3. Obligations Upon Termination

Upon termination of this Agreement Contractor shall fully cooperate with all City requests regarding contacts with Contractor's employees to enable a transition in the workforce to a new Contractor.

**D. EMPLOYEE WORK ENVIRONMENT EVALUATION (Third Tier Review)**

All service or labor contracts are required to undergo an Employee Work Environment Evaluation, commonly referred to as "Third Tier Review." This Review looks into a proposer's history as an employer and work condition commitments. Each proposer is required to complete an Employee Work Environment Questionnaire and return it with the proposal.

If the Questionnaire is not returned, the proposal will be deemed to be non-responsive. All proposals are required to address: employee health benefits; compensated days off; employee complaint procedures; compliance with state and federal workplace standards; Employee Retention requirements, if applicable; and Service Disruption/Labor Peace provisions, if applicable.

**E. LABOR PEACE**

The Office of Equality Assurance has determined that the level of vulnerability of the proposed contract to service or labor disputes is sufficient to warrant that labor peace is essential to the propriety interests of the City. The determination was based on considerations including, but not limited to the following factors:

1. The service or labor will be provided on City site or a site which is important to the propriety interests of the City;
2. The service provider relies on a significant amount of public patronage;
3. The economic effect of any disruption of City expenditures or revenues is significant;
4. The effect of any disruption on the citizens, tourists and businesses in the community is significant.

Proposers are to include in their proposal how they will assure that no labor dispute or unrest will occur during the term of the City contract. Failure to address this topic in the submission of the proposal will deem the proposal to be non-responsive.

Proposers are cautioned that the City contract will include details and requirements of Labor Peace based on the proposal response.

## F. ENFORCEMENT

### 1. General

Contractor acknowledges it has read and understands that, pursuant to the terms and conditions of this Contract, it is required to pay workers either a prevailing or living wage ("Wage Provision") and to submit certain documentation to the City establishing its compliance with such requirement. ("Documentation Provision.") Contractor further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively "Goals"):

- a) It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- b) It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
- c) Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.
- d) It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

### 2. Remedies

The service contract or financial assistance agreement shall provide that if a violation of any provision of this Policy occurs and is not corrected after written notice, the City may, at its option, do any or all of the following:

- a) **Suspension or termination:** Suspend and/or terminate the contract or financial assistance agreement for cause;
- b) **Restitution:** Require the employer to pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages, and in the case of financial assistance to refund any sums disbursed by the City.
- c) **Debarment:** Debar the contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance.
- d) **Withholding Of Payment:** Contractor agrees that the Documentation Provision is critical to the City's ability to monitor Contractor's compliance with the Wage Provision and to ultimately achieve the Goals. Contractor further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Provision. In light of the critical importance of the Documentation Provision, the City and Contractor agree that Contractor's compliance with this Provision, as well as the Wage Provision, is an express condition of City's obligation to make each payment due to the Contractor pursuant to this Contract. The City is not obligated to make any payment due the Contractor until Contractor has performed all of its obligations under these provisions. Any payment by the City despite Contractor's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Contract or a waiver of the right to withhold payment for any subsequent breach of the Wage Provision or the Documentation Provision.
- e) **Liquidated Damages For Breach Of Wage Provision:** Contractor agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City's damage would not be remedied by Contractor's payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. The City and Contractor mutually agree that making a precise determination of the amount of City's damages as a result of Contractor's breach of the Wage Provision would be impractical and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, Contractor shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should be paid.

### G. AUDIT RIGHTS

All records or documents required to be kept pursuant to this Contract to verify compliance with the Wage Provision shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Contractor's address indicated for receipt of notices in this Contract.

### H. COEXISTENCE WITH ANY OTHER EMPLOYEE RIGHTS

These provisions shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.



## City of San Jose Wage Determination

**CONTRACT SCOPE:** HAYES MANSION CONFERENCE CENTER  
**WAGE POLICY:** PREVAILING WAGE POLICY ONLY

Contracts governed only by the City of San José's Prevailing Wage Policy contained in Resolution 61144 utilize the Prevailing Wage food service classifications identified below.

| Classification   | Hourly Rate | Min. Rate | Min. Rate | Min. Rate | Hourly Pay |
|--|-------------|-----------|-----------|-----------|------------|
| Banquet Manager  | \$20.53     | \$2.30    | \$ .39    | \$ .47    | \$23.69    |
| Admin. Assistant / Catering Secretary                    | \$12.33     | \$2.30    | \$ .24    | \$ .28    | \$15.15    |
| Sous Chef  | \$17.09     | \$2.30    | \$ .33    | \$ .39    | \$20.11    |
| Supervisor (Kitchen, Food & Beverage, Catering, Steward) | \$14.16     | \$2.30    | \$ .27    | \$ .33    | \$17.06    |
| Pastry Chef  | \$13.23     | \$2.30    | \$ .25    | \$ .31    | \$16.09    |
| First Cook   | \$12.66     | \$2.30    | \$ .24    | \$ .29    | \$15.49    |
| Cook   | \$12.01     | \$2.30    | \$ .23    | \$ .28    | \$14.82    |
| Pantry Person (Deli Worker, Café Attendant)              | \$ 9.81     | \$2.30    | \$ .19    | \$ .23    | \$12.53    |
| Bartender  | \$10.25     | \$2.30    | \$ .20    | \$ .24    | \$12.99    |
| Bar Back/Bar Attendant                                   | \$ 8.88     | \$2.30    | \$ .17    | \$ .20    | \$12.55    |
| Host/Hostess/Cashier                                     | \$ 8.55     | \$2.30    | \$ .16    | \$ .19    | \$12.21    |
| Stand Worker   | \$ 8.55     | \$2.30    | \$ .16    | \$ .19    | \$12.21    |
| Food Server  | \$ 6.98     | \$2.30    | \$ .13    | \$ .16    | \$ 9.57    |
| Cocktail Server  | \$ 7.04     | \$2.30    | \$ .14    | \$ .16    | \$ 9.54    |
| Steward  | \$ 6.22     | \$2.30    | \$ .12    | \$ .15    | \$ 8.07    |
| Dishwasher   | \$ 6.58     | \$2.30    | \$ .13    | \$ .16    | \$ 8.44    |
| Bussperson   | \$ 6.01     | \$2.30    | \$ .12    | \$ .15    | \$ 7.66    |
| Store Room Clerk   | \$ 8.88     | \$2.30    | \$ .17    | \$ .20    | \$12.55    |

The shaded classifications above change under the Living Wage Policy

| Breakdown of Benefits                                   |  |                     |
|---|--|---------------------|
| Paid Vacation (Calculate at applicable hourly pay rate) | After 1 year   | 5 Days - 40 Hours   |
|   | After 2 years  | 10 Days - 80 Hours  |
|   | After 10 years   | 15 Days - 120 Hours |
| Health & Welfare  | \$2.02 per hour  |                     |
| Pension   | \$ .28 per hour  |                     |
| Paid Sick Leave   | Six (6) paid sick days                                     |                     |
| Holidays  | No Paid Holidays. See Hours and Days of Work on next page. |                     |

The full amount of the total hourly wage must be paid directly to the worker, UNLESS the Contractor is making payments to a benefit plan. If the Contractor is making payments to a benefit plan but the benefits being paid do not add up to the full amount of benefits listed above, the Contractor must pay the difference directly to the worker.

Issue Date: August 14, 2003

4 North Second Street, Floor 9, Suite 925 San Jose, CA 95113 tel (408) 277-4025 fax (408) 277-3885 ny (408) 971-0134

HAYES MANSION CONFERENCE CENTER  
PREVAILING WAGE POLICY ONLY DETERMINATION

Page 2

**Hours and Days of Work**

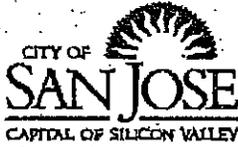
*(Industrial Welfare Commission Order No. 16-2001)*

*City of San José contracts subject to City prevailing wage or living wage policies will use the same guidelines for all covered classifications/employees.*

Employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7<sup>th</sup>) consecutive day of work in a workweek; and
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) on the seventh (7<sup>th</sup>) consecutive day of work in a workweek.

**WAGE RATES WILL BE SUBJECT TO ANNUAL ADJUSTMENT ON THE ANNIVERSARY DATE OF THE CONTRACT.**



## City of San Jose Wage Determination

**CONTRACT SCOPE:** HAYES MANSION CONFERENCE CENTER  
**WAGE POLICY:** COMBINED PREVAILING WAGE & LIVING WAGE POLICIES

Contracts governed by both the City of San José's Living Wage Policy (Resolution No. 68900) and its Prevailing Wage Policy (Resolution No. 61144) utilize both Living Wage and Prevailing Wage classifications for food services as identified under the applicable Policy below.

### CLASSIFICATIONS SUBJECT TO PREVAILING WAGE POLICY

| Classification   | Living Wage | Prevailing Wage | Health & Welfare | Pension | Total   |
|--|-------------|-----------------|------------------|---------|---------|
| Banquet Manager  | \$20.53     | \$2.30          | \$ .39           | \$ .47  | \$23.69 |
| Admin. Assistant / Catering Secretary                    | \$12.33     | \$2.30          | \$ .24           | \$ .28  | \$15.15 |
| Sous Chef  | \$17.09     | \$2.30          | \$ .33           | \$ .39  | \$20.11 |
| Supervisor (Kitchen, Food & Beverage, Catering, Steward) | \$14.16     | \$2.30          | \$ .27           | \$ .33  | \$17.06 |
| Pastry Chef  | \$13.23     | \$2.30          | \$ .25           | \$ .31  | \$16.09 |
| First Cook   | \$12.66     | \$2.30          | \$ .24           | \$ .29  | \$15.49 |
| Cook   | \$12.01     | \$2.30          | \$ .23           | \$ .28  | \$14.82 |
| Pantry Person (Deli Worker, Café Attendant)              | \$ 9.81     | \$2.30          | \$ .19           | \$ .23  | \$12.53 |
| Bartender  | \$10.25     | \$2.30          | \$ .20           | \$ .24  | \$12.99 |
| Store Room Clerk   | \$ 8.88     | \$2.30          | \$ .17           | \$ .20  | \$12.55 |

| Breakdown of Benefits                                   |  |
|---|--|
| Paid Vacation (Calculate at applicable hourly pay rate) | After 1 year   |
|   | After 2 years  |
|   | After 10 years   |
| Health & Welfare  | \$2.02 per hour  |
| Pension   | \$ .28 per hour  |
| Paid Sick Leave   | Six (6) paid sick days                                     |
| Holidays  | No Paid Holidays. See Hours and Days of Work on next page. |

The full amount of the total hourly wage must be paid directly to the worker, UNLESS the Contractor is making payments to a benefit plan. If the Contractor is making payments to a benefit plan but the benefits being paid do not add up to the full amount of benefits listed above, the Contractor must pay the difference directly to the worker.

**HAYES MANSION CONFERENCE CENTER  
PREVAILING WAGE & LIVING WAGE POLICY DETERMINATION  
Page 2**

**CLASSIFICATIONS SUBJECT TO LIVING WAGE POLICY**

| Classification   | Basic Hourly Pay Rate  | Health/Welfare and Pension | Total Hourly Pay |
|--|--|----------------------------|------------------|
| Bar Back/Bar Attendant   | <b>Living Wage Rate</b>  |                            |                  |
| Host/Hostess/<br>Cashier/Stand Worker                                      | \$10.31  | \$1.25                     | \$11.56          |
| Food Server  | Note: The Living Wage rate is higher than the Prevailing Wage rate for all classifications listed to the left. |                            |                  |
| Cocktail Server  |  |                            |                  |
| Steward  |  |                            |                  |
| Dishwasher   |  |                            |                  |
| Busperson  |  |                            |                  |
| Spa Concierge/Spa<br>Esthetician/Body/Massage<br>Therapist/Nail Technician |  |                            |                  |

\*The full amount of the total hourly wage must be paid directly to the worker, unless the Contractor is making payments to a medical benefit plan.

**Hours and Days of Work**

(Industrial Welfare Commission Order No. 16-2001)

*City of San José contracts subject to City prevailing wage or living wage policies will use the same guidelines for all covered classifications/employees.*

Employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7<sup>th</sup>) consecutive day of work in a workweek; and
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) on the seventh (7<sup>th</sup>) consecutive day of work in a workweek.

**WAGE RATES WILL BE SUBJECT TO ANNUAL ADJUSTMENT ON THE ANNIVERSARY DATE OF THE CONTRACT.**

Issue Date: August 14, 2003

4 North Second Street, Floor 9, Suite 925 San Jose, CA 95113 tel (408) 277-4025 fax (408) 277-3885 tty (408) 971-0134

Exhibit D

## CITY OF SAN JOSÉ COUNCIL POLICY

| TITLE   | PAGE           | POLICY NUMBER |
|---|----------------|---------------|
| Environmentally Preferable Procurement Policy | 1 of 4         | 4-5           |
|   | EFFECTIVE DATE | REVISED DATE  |
| 9/25/01                                       |                |               |
| APPROVED BY:                                  |                |               |
| Council Action: 09/25/01, Item 4.2            |                |               |

BACKGROUND

The mission statement of the Environmental and Utility Services City Service Area (CSA) reflects a commitment to provide environmental leadership through policy development and program design.

By incorporating environmental considerations in public purchasing, the City of San José can serve this commitment by reducing its burden on the local and global environment, removing unnecessary hazards from its operations, protecting public health, reducing costs and liabilities, and potentially improving the environmental quality of the region. This policy is an effective way to direct the City's effort in procuring environmentally preferable products and services.

PURPOSE

The primary purpose of this policy is to minimize negative environmental impacts of the City's activities by ensuring the procurement of services and products that:

- reduce toxicity;
- conserve natural resources, materials, and energy;
- maximize recyclability and recycled content.

A collateral purpose is to support markets for recycled goods and other environmentally preferable products and services.

DEFINITIONS

The following terms shall have the assigned definitions for all purposes under this policy:

- A. City of San José means the City of San José elected officials, staff, and agencies.

**COUNCIL POLICY 4-6**

Effective Date: 9/25/01

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- B. Environmentally Preferable Products and Services** means products and services that have a lesser or reduced effect on human health and the environment when compared with competing products that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product.
- C. Life Cycle Cost** means the amortized annual cost of a product, including capital costs, installation costs, operating costs, maintenance costs, and disposal costs discounted over the lifetime of the product.
- D. Practicable** means sufficient in performance and available at a reasonable price.
- E. Recyclable Product** means a product which, after its intended end use, can demonstrably be diverted from the City of San José's solid waste stream for use as a raw material in the manufacture of another product.
- F. Recycled Material** means material and byproducts that have been recovered or diverted from solid waste, and have been utilized in place of raw or virgin material in manufacturing a product. It is derived from post-consumer recycled material, manufacturing waste, industrial scrap, agricultural waste, and other waste material, but does not include material or byproducts generated from, and commonly reused within, an original manufacturing process.
- G. Virgin Material** means any material occurring in its natural form. Virgin Material is used in the form of raw material in the manufacture of new products.

**POLICY**

The City of San José commits to:

1. Procure environmentally preferable products and services where criteria have been established by governmental or other widely recognized authorities (e.g. Energy Star, EPA Eco Purchasing Guidelines).
2. Integrate environmental factors into the City's buying decisions where external authorities have not established criteria. Examples:
  - replacing disposables with reusables or recyclables;
  - supporting eco-labelling practices by buying products bearing such labels in preference to others, where they are available and provide value for money
  - taking into account life cycle costs and benefits;
  - evaluating, as appropriate, the environmental performance of vendors in providing products and services;

COUNCIL POLICY 4-6  
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3. Raise staff awareness on the environmental issues affecting procurement by providing relevant information and training;
4. Encourage suppliers and contractors to offer environmentally preferable products and services at competitive prices;
5. Encourage providers of services to consider environmental impacts of service delivery.
6. Comply with all environmental legislative and regulatory requirements in the procurement of products and services.

Nothing in this policy shall be construed as requiring a department, agency or contractor to procure products that do not perform adequately for their intended use or are not available at a reasonable price in a reasonable period of time.

Procedures and Guidelines may be established as necessary to ensure the continuation of a strong Environmental Procurement Program.

#### **Responsibility**

All City of San José departments, offices and agencies shall identify and purchase the most environmentally responsible products and services that are available for the intended purpose and that meet the performance requirements. Factors that should be considered when determining the environmentally preferable good or service include, but are not limited to:

- Minimization of virgin material use in product or service life cycle
- Maximization of recycled products used in product or service life cycle
- Environmental cost of entire product or service life cycle
- Reuse of existing products or materials in product or service life cycle
- Recyclability of product
- Minimization of packaging
- Reduction of energy/water consumption
- Toxicity reduction or elimination
- Elimination of uncertified hardwoods in product or service life cycle
- Durability and maintenance requirements
- Ultimate disposal of the product

#### **Purchasing Division Responsibilities:**

1. Develop and maintain information about environmentally preferable products and recycled products containing the maximum practicable amount of recycled materials, to be purchased by departments, agencies, consultants and contractors whenever possible.

**COUNCIL POLICY 4-6**  
Effective Date: 9/25/01  
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2. Inform departments, agencies and contractors of their responsibilities under this policy and provide implementation assistance.
3. Institute product testing and trial service to evaluate environmentally responsible alternatives pursuant to established testing guidelines.
4. Require the use of recycled materials and recycled products by incorporating them in bid specifications where practicable;
5. Disseminate information on recycled and environmentally preferable product procurement requirements, specifications, and performance to assist vendors with procurement opportunities with the City.
6. Establish guidelines governing the review and approval of specifications for the procurement of selected materials based on considerations of recycling, energy and water conservation, life cycle costing and other environmental considerations.
7. Submit reports of policy impacts on an annual basis.

*Environmental Services Department Responsibilities:*

1. Support Purchasing in its implementation of this policy by providing training, information when requested, and assistance in the evaluation of the EPP status of a product or service.
2. Support departments and agencies in evaluation and analysis of products and services for EPP criteria.
3. Help establish and promote needed environmental procurement legislation.

*Department and Agency Responsibilities:*

1. Evaluate each requested product and service to determine the extent to which the specifications could include an environmentally preferable option.
2. Ensure that contracts issued by the departments and agencies include environmentally preferable products and recycled products wherever practicable;
3. Determine standard at which products are considered environmentally preferable and use in selective criteria.
4. Expand the awareness and use of environmentally preferable products.

**Document Review**

This policy must be reviewed every three years.

EXHIBIT E

INITIAL COMPETITIVE SET

Crowne Plaza San Jose Downtown  
Hyatt San Jose  
Hyatt St. Claire  
Chaminade at Santa Cruz  
Fairmont San Jose  
Hilton San Jose & Towers  
Marriott San Jose

**EXHIBIT F**

**INSURANCE**

Manager shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by Manager, its agents, representatives, employees or subcontractors. The cost of such insurance is an operating expense of the Center as provided in Section 1.35(d) of this Agreement.

**A. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage described in Insurance Services Office Form Number GL 0002 (Ed. 01/96) covering Commercial General Liability together with Insurance Services Office Form Number GL 0404 covering Broad Form Comprehensive General Liability; or that described in Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001 (Ed. 01/96), including XCU (Explosion, Collapse & Underground) coverage, Liquor Liability, Fire Legal Liability; and
2. The coverage described in Insurance Services Office Form Number CA 0001 (Ed. 12/93) covering Automobile Liability, Code 1 "any auto", or Code 2 "owned autos" and Endorsement CA 0025. Coverage shall also include Code 8 "hired autos" and Code 9 "nonowned autos"; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance;
4. Crime Coverage; and
5. Employment Practices Liability (EPL).

**B. Minimum Limits of Insurance**

Manager shall maintain limits no less than:

1. Commercial General Liability: \$5,000,000 per occurrence for bodily injury, personal injury and property damage; \$1,000,000 Liquor Liability, \$100,000 Fire Legal Liability; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability; Workers' Compensation limits as required by the California Labor and Employers Liability limits of \$1,000,000 per accident; and
4. Crime Coverage

A Combination Crime policy with minimum limits not less than \$50,000 for Form A: Employee Dishonesty

Form B: Forgery or Alteration  
Form C: Theft, Disappearance, Destruction Inside/Outside Premises  
Form D: Robbery and Safe Burglary Inside/Outside Premises

5. EPL: Minimum of \$3,000,000 with retention of \$250,000.

**C. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by Owner. At the option of Owner, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects Owner, its officer, employees, agents and contractors; or Manager shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by Owner.

**D. Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

**1. Commercial General Liability and Automobile Liability Coverages**

a. Owner, its officials, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Manager; products and completed operations of Manager; premises owned, leased or used by Manager; and automobiles owned, leased, hired or borrowed by Manager. The coverage shall contain no special limitations on the scope of protection afforded to Owner, its officers, employees, agents and contractors.

b. Manager's insurance coverage shall be primary insurance as respects Owner, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by Owner, its officials, employees, agents or contractors shall be excess of Manager's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies by Manager shall not affect coverage provided to Owner, their officials, employees, agents, or contractors.

d. Coverage shall state that Manager's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

**2. All Coverages**

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to Owner.

**E. Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to Owner's Risk Manager.

F. **Verification of Coverage**

Manager shall furnish Owner with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

CITY OF SAN JOSE  
Risk Management  
801 N. First Street, Room 110  
San Jose, California 95110-1716

G. **Sub-Contractors**

Manager shall include all sub-contractors as insured under its policies or shall obtain separate certificates and endorsements for each sub-contractor.

**EXHIBIT G**

**Maintenance Responsibilities**

**Parking Garage Maintenance Obligations**

1. Manager shall perform the following tasks at least as often as specified below and more frequently as may be needed in order to maintain the Parking Garage as specified in Section 2.4(aa):
  - (a) Daily
    1. Pick up trash and litter, and empty any trash receptacles.
    2. Check for safety hazards and address them immediately (e.g. broken light bulbs, broken metal).
    3. Wash any area, where needed, to remove odors (e.g. urine).
    4. Check that all signage is in place and not damaged.
    5. Check intercoms for proper functioning and repair as needed.
  - 22.
  - (b) Weekly
    1. Check emergency telephones for proper functioning and repair as needed.
    2. Check lights for proper functioning; replace light bulbs as needed and repair as needed.
    3. Check any fire extinguishers to ensure they are in place and not damaged. Replace as needed.
  - (c) Bi-weekly - Power sweep garage.
  - (d) Quarterly
    1. Check mechanical systems for proper functioning, including without limitation, the ventilation system and the back up generators. Repair as needed.
    2. Pressure wash surfaces.
2. Graffiti Removal - Manager shall be responsible for the removal of graffiti located on the interior and exterior surfaces of the Parking Garage (including, without limitation, stairwells, the handicapped access ramp and the vehicle ramp) that is capable of being removed by any of the following methods: painting over, removal with cleaners and/or solvents, or power-washing. Manager shall inspect the Parking Garage daily for graffiti. Within twenty-four (24) hours after Manager has identified graffiti for which Manager is responsible for removal, Manager shall remove such graffiti. Manager shall make it a priority to remove any graffiti tag containing offensive language as soon as possible, but not later than twenty-four (24) hours after it has been identified. Manager shall not be responsible for removing graffiti that has been etched into any surface of the Parking Garage.

Park Improvements Maintenance Obligations

1. Manager shall perform the following tasks at least as often as specified below in order to maintain the Park as specified in Section 2.4(bb):
  - (a) Maintain the lawn adjacent to the Hayes Mansion. Includes cutting, trimming and fertilizing.
  - (b) Keep parking area and tennis courts free of debris.
  - (c) Repaint, restripe and repair tennis court as needed.
  - (d) Replant flower beds three times a year in designated areas.
  - (e) Brush hog the natural areas of the park fourteen (14) times annually.
  - (f) Maintain the portion of irrigation system existing as of the date of this Agreement.
  
2. Manager is not responsible for:
  - (a) Irrigation of natural areas.
  - (b) Maintenance of irrigation systems and public art that are part of the Phase III (c) Improvements.
  - (c) Removal of trash from trash barrels or dumpsters.
  - (d) Removal of tree branches greater than two (2) inches in diameter.
  - (e) Repair of vandalism, including graffiti.

Exhibit H**RESOLUTION NO. 2000-89**

Resolution of the Planning Commission of the City of San Jose granting, subject to conditions, a Conditional Use Permit to use certain real property described herein for the purpose of constructing a parking structure below the existing parking lot.

**FILE NO. CP00-06-039****BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSE:**

WHEREAS, pursuant to the provisions of Chapter 20.44 of Title 20 of the San Jose Municipal Code, on, June 5, 2000, an application (File No. CP00-06-039) was filed for a Conditional Use Permit for the purpose of constructing a parking structure below the existing parking lot, on that certain real property (hereinafter referred to as "subject property"), situate in the A(PD) Zoning District, located at the west side of Edenvale Avenue, approximately 200 feet southwest of Monterey Road in Edenvale Garden Park, San Jose, and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, this Planning Commission has reviewed and considered a Negative Declaration for said project; and

WHEREAS, pursuant to and in accordance with Chapter 20.44 of Title 20 of the San Jose Municipal Code, this Planning Commission conducted a hearing on said application, notice of which was duly given; and

WHEREAS, at said hearing, this Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this Planning Commission received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this Planning Commission received in evidence a development plan for the subject property entitled, "Edenvale Garden Parking Structure," dated June 1, 2000 and revised August 22, 2000. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

File No. CP 00-06-039

Page 2

WHEREAS, said hearing was conducted in all respects as required by the San Jose Municipal Code and the rules of this Planning Commission;

NOW, THEREFORE:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. This site has a designation of Public/Quasi-Public on the adopted San Jose 2020 General Plan Land Use Transportation Diagram.
2. The project site is located in the A(PD) Planned Development Zoning District.
3. A Negative Declaration has been adopted for this project which indicates that certain mitigation will be incorporated into the project to prevent the occurrence of any significant adverse effect on the environment.
4. The proposed project will not individually or cumulatively have an adverse effect on wildlife resources, as defined in Section 711.2 of the California Department of Fish and Game Code.
5. The proposed parking lot will be contained within the perimeter area of the existing surface parking lot.
6. The applicant is proposing to develop a 356 parking lot with 142 underground spaces and 214 surface spaces at the location of the existing 160 space surface parking lot at the southeast corner of the site.
7. The applicant is proposing that 301 of the spaces within the proposed parking lot be counted toward meeting the parking requirement of the adjacent conference center use.
8. The parking lot is directly adjacent to the parking area of the adjacent conference center use to the south.
9. The public will have full access to the proposed parking lot.
10. The proposed parking lot will be in an area of the park designated for such uses on the Edenvale Garden Park Master Plan.
11. Significant trees both on-site and on the perimeter of the parking garage will be preserved.
12. Security in the form of on-site security guard, gates to the underground parking spaces, and an alarm system in the underground portion of the garage will be provided.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project is consistent with the adopted San Jose 2020 General Plan Land Use/Transportation Diagram of the City of San Jose.

2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.
4. The proposed parking lot will continue to provide off-site parking for visitors.
5. The proposed parking lot is adequately sized to accommodate the off-site needs of the conference center facility and park visitors.
6. The proposed parking lot conforms to the City's development policies and standards with regard to park design.
7. The proposed parking area is located in an area of the park that can ensure reasonable accessibility to the adjacent conference center use.
8. The proposed parking lot conforms to the intent of the policies contained within the Edenvale Park Master Plan.
9. Adequate security is provided for the garage facility.

**Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:**

1. The proposed use at the location requested will not:
  - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
  - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
  - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title; or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and
3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
  - b. By other public or private service facilities as are required.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners

of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

**CONDITIONS PRECEDENT**

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be signed, notarized, and returned to the Department of City Planning within 60 days from the date of issuance of the resolution granting the permit. Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit. Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara must be submitted along with the Acceptance Form.
2. **Plan Revisions.** Within 60 days of the issuance of this Permit and prior to recordation, the Applicant shall revise the project plans to include the item(s) listed below to the satisfaction of the Director of Planning. Failure to provide said revisions within 60 days shall render this permit null and void.
  - Grading and Drainage Plan;
  - Lighting Plan including the locations of light standards in the underground garage;
  - Landscape Plan.

Within 60 days of the issuance of this Permit and prior to recordation, the Applicant shall revise the project plans to include the item(s) listed below to the satisfaction of the Director of Planning and Director of Conventions, Arts and Entertainment. Failure to provide said revisions within 60 days shall render this permit null and void.

- Security Plan clearly illustrating location of garage door and pedestrian access security gates, location of alarm buttons in underground garage, including details, and a brief description of the 24 hour on-site security provided by the Network Conference Company;
- Construction Staging Area Plan clearly illustrating the location of parking for construction workers, equipment, and other required materials.

3. **Site Development Permit.** This permit fulfills the requirement for a Site Development Permit.

**CONCURRENT CONDITIONS**

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Previous Conditions.** All of the conditions of the previously approved Conditional Use Permit CPSH94-12-083 shall remain unchanged and in full force and effect unless such conditions are specifically modified or deleted by this Amendment.
2. **Conformance with Plans.** Construction and development shall conform to approved development plans entitled, "Proposed Parking Structure Below the Existing Parking Lot,"

dated June 1, 2000 revised August 22, 2000 on file with the Department of City Planning and Building and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).

3. **Tree Preservation Guidelines.** All construction activity and subsequent monitoring must comply with report entitled "Condition Report to Include Guidelines for Tree Preservation and Protection - Edenvale Park Parking Structure" by S.P. McClenahan Co. Inc. dated August 5, 2000.
4. **Off-Site Parking.** This permit shall allow 301 parking spaces to be provided for the adjacent conference center use and 55 surface parking spaces for Edenvale Garden Park use.
5. **Construction Phase Parking.** The Network Conference Company shall provide 15 parking spaces for park users either at the south end of the existing surface lot where parking spaces are not impacted by the ongoing construction activity or provide 15 parking spaces on the Hayes Mansion site at the north-westerly side of the site where valet parking is currently located. Signage shall be erected and maintained during the construction phase to direct park users to the appropriate parking location.
6. **Construction Hours.** Construction shall be limited to the hours of 7:00am to 7:00pm Monday through Friday for any on-site or off-site work within 500 feet of any residential unit.

#### CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
2. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:
  - a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
  - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
  - c. The use as presently conducted creates a nuisance.

ADOPTED and issued this 30<sup>th</sup> day of August, 2000, by the following vote:

AYES:

NOES:

ABSENT:

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Chairperson

ATTEST:

James R. Derryberry, Secretary

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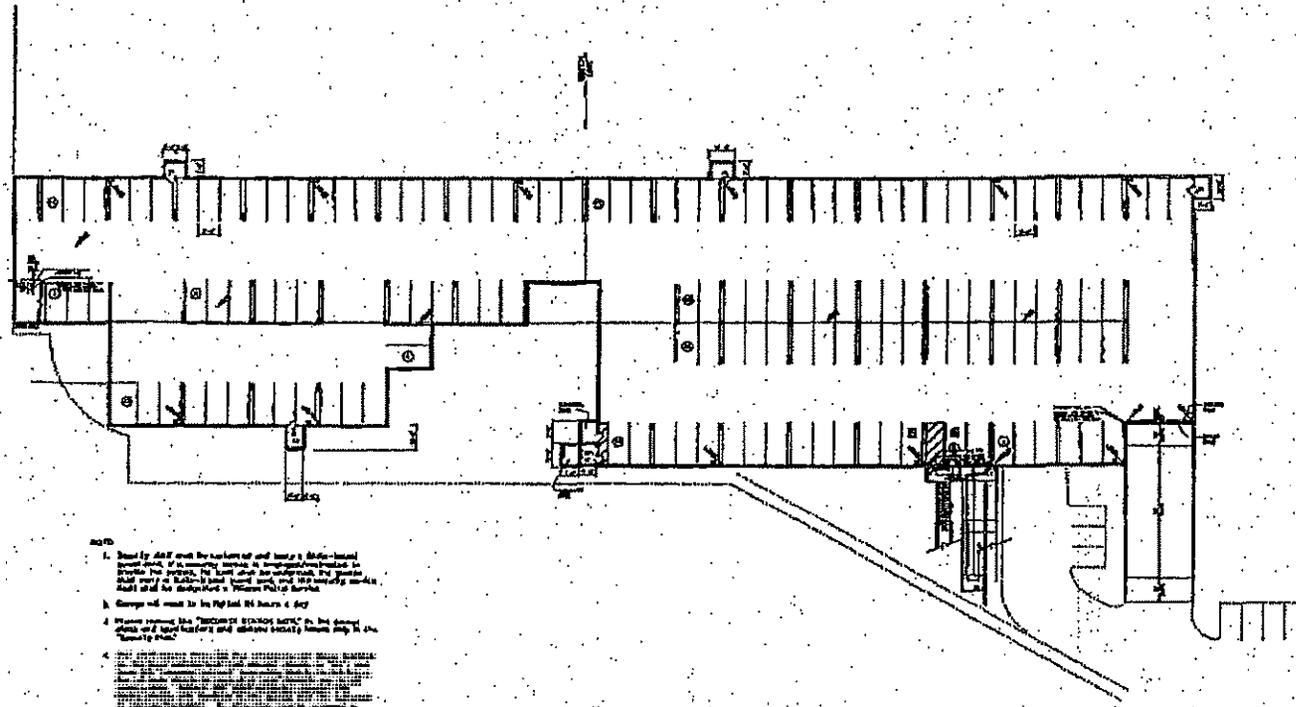
Deputy

**NOTICE TO PARTIES**

The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6:

c: Building Division (2)  
Engineering Services  
Jeff Davenport, Network Conference Company, 200 Edenvale Avenue, San Jose, CA 95136  
City of San Jose, 801 North First Street, San Jose, CA 95110.

AA:ll/207-10



- NOTES
1. Detail for deck and brackets of and base of deck-level structure. If it is necessary to provide a temporary structure to support the parking level and the structure, the detail shall be submitted to the Engineer for review.
  2. Structure shall be designed to support the weight of the structure and the weight of the vehicles parked on the structure.
  3. Structure shall be designed to support the weight of the structure and the weight of the vehicles parked on the structure.
  4. Structure shall be designed to support the weight of the structure and the weight of the vehicles parked on the structure.
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  9. Structure shall be designed to support the weight of the structure and the weight of the vehicles parked on the structure.
  10. Structure shall be designed to support the weight of the structure and the weight of the vehicles parked on the structure.

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# EDENVALE GARDEN PARK PARKING STRUCTURE

Exhibit I



The table below summarizes our estimated Transition Budget:

Transition Process

| Transition Budget                        |           |
|--|-----------|
|  | Budget    |
| Summary Total                            |           |
| Travel                                   | \$18,000  |
| Sales & Marketing                        | 20,000    |
| Recruiting / Relocation                  | 50,000    |
| Operating Supplies/Forms/Courier Charges | 3,000     |
| Licenses / Permits                       | 3,000     |
| Technology                               | 78,500    |
| Contingency                              | 5,000     |
| Total                                    | \$177,500 |

Appendix "A"

**ORLO'S RESTAURANT**

Classic cuisine with a Mediterranean flair.  
Dinner served nightly.  
Lunch Monday - Friday.  
Patio seating available.

**SUNDAY BRUNCH**

Served in the Silver Creek Dining Room.  
Seafood Bar.  
Carving Stations.  
Soups and Salads.  
A variety of spectacular Entrees.  
Delectable Desserts.  
...and much more.

**SPECIAL EVENTS**

Beautiful Event Rooms Throughout The Mansion.  
Birthday Parties.  
Anniversaries.  
Retirement Parties.  
Weddings.  
Corporate Parties.



**THE HAYES MANSION**

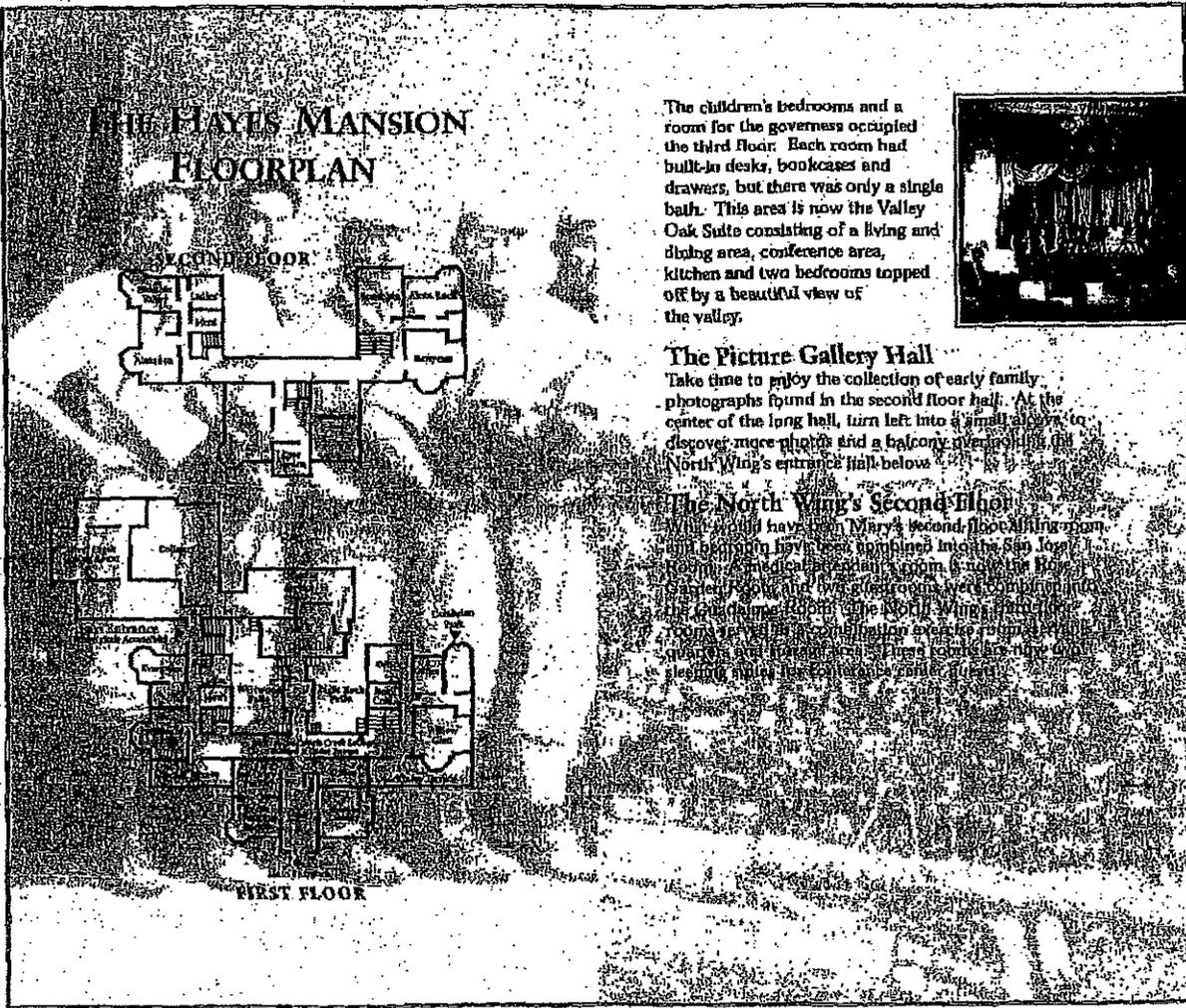
200 ERMENVALE AVENUE, SAN JOSE, CA 95136 • 408-226-3200  
www.hayesmansion.com



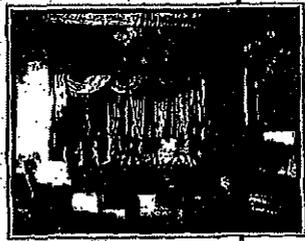
Welcome to the Hayes Mansion Conference Center, once the grand home of the socially prominent, wealthy and politically powerful Hayes family. Allow about a half-hour to walk around the mansion. You are welcome to visit the public areas of the mansion - however, please do not enter meeting rooms or guestrooms. We hope you enjoy visiting the mansion as much as we enjoy working in this very special place.

—Curt S. Abramson, General Manager

# THE HAYS MANSION FLOORPLAN



The children's bedrooms and a room for the governess occupied the third floor. Each room had built-in desks, bookcases and drawers, but there was only a single bath. This area is now the Valley Oak Suite consisting of a living and dining area, conference area, kitchen and two bedrooms topped off by a beautiful view of the valley.



Mary Hays' sitting room

**The Picture Gallery Hall**  
Take time to enjoy the collection of early family photographs found in the second floor hall. At the center of the long hall, turn left into a small alcove to discover more photos and a balcony overlooking the North Wing's entrance hall below.

**The North Wing's Second Floor**  
What would have been Mary's second floor sitting room and bedroom have been combined into the San Jose room. The dining room, a room for the boys, a study, two and two bedrooms were combined into the same room. The North Wing's second floor rooms have been reconstructed exactly to match the original and furnish area. Please remember that the sleeping quarters are located on the third floor.

### Elevator

Note the tiny elevator, which originally had wooden floors, tucked into the far corner of the reception area. An extravagance in 1906, it was built to transport Mary, who was ill, to the bedrooms when the house was designed.

### Mary's Office

Continue just beyond the elevator to the rear of the reception area. On the far right is a stunning photograph of Mary Hayes Chalmers. Directly behind you, built into the wall is just one of the safety features Mary had installed in the mansion. Beyond her picture is where the way to her office. Now a conference room, it was here that the family patriarch planned to prepare his sermons and use her healing powers to treat the sick with the laying-on-of-hands technique. Mary had more than 3,000 clients for her healing powers at the time of her death.

### The Marble Loggia

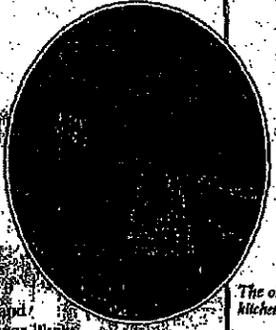
The marble loggia is the central section of the mansion on the first floor. This area was originally used as a sitting room where the family and friends could visit in an informal, comfortable setting.

### The South Wing

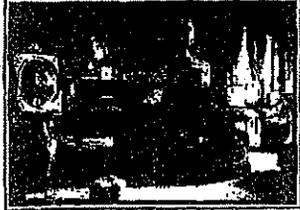
Crossing the marble loggia from the reception area, go straight ahead through the glass and marble plant conservatory towards the dining area. The old plant conservatory was used as a dining room.

The South Wing is flanked on the east and west by large patios, which separate the area from the residential East and West Wings of the house.

The family's dining area was now ORLO's fine dining restaurant, which is open to the public for lunch and dinner. The right door leads to what was likely to have been the adults' dining room and the left leads to the children's dining room. The Hayes family had a total of 11 children, so when they entertained dinner guests, a pocket door could be used to separate the adult diners from the children's dining area. The original dining room was a large room with a fireplace and a bay window. Today ORLO's offers guests an elegant experience with all the graciousness of the original. Above ORLO's were two servants' quarters. Both the second and third floors now serve as private office space for the conference center.



The old kitchen



J.O. Hayes dining room

### The West Wing

Upon returning to the marble loggia, turn left and walk down the hall. Separated from the South Wing by a large outdoor patio is the West Wing home of Everts Hayes and his family. Originally this area could be closed off with copper fire doors. Visitors can still see the copper door frames in the hall doorways on the first and second floors.

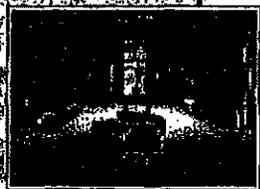
Everts' home had a separate front door and an inglenook section under the staircase outfitted as a waiting area for visitors who came to see his immediate family. Step inside. This cozy waiting area looked just as it did when Everts and his family lived here, except that the coal basket is missing from the fireplace. Being too shallow for wood fires, all the fireplace was designed to burn coal. It held a grate through a system of



Skagway  
to Stern  
City

### Begin Your Tour: The North Wing Entrance

The North Wing of the mansion, originally designed to be shared by all, remains architecturally unchanged since the early days. Today's visitors use this same grand entry as the mansion's early guests. Step into the vestibule and view an built wall just inside the front door. The family's photos of their lives in the North Wing of the Club are framed in the lobby before it was sold in 1933. Ahead is the entrance hall which is now the conference center's reception area.



North  
Wing  
entrance

### The Folsom Library

Located on your right, the first large room is the library. Before stepping inside, look to the left to see a photograph of the library in the early days. The Hayes brothers had a library which had been furnished for the family. It was a generous donation from the Hayes family. The library now serves as a comfortable reading room for conference center guests.

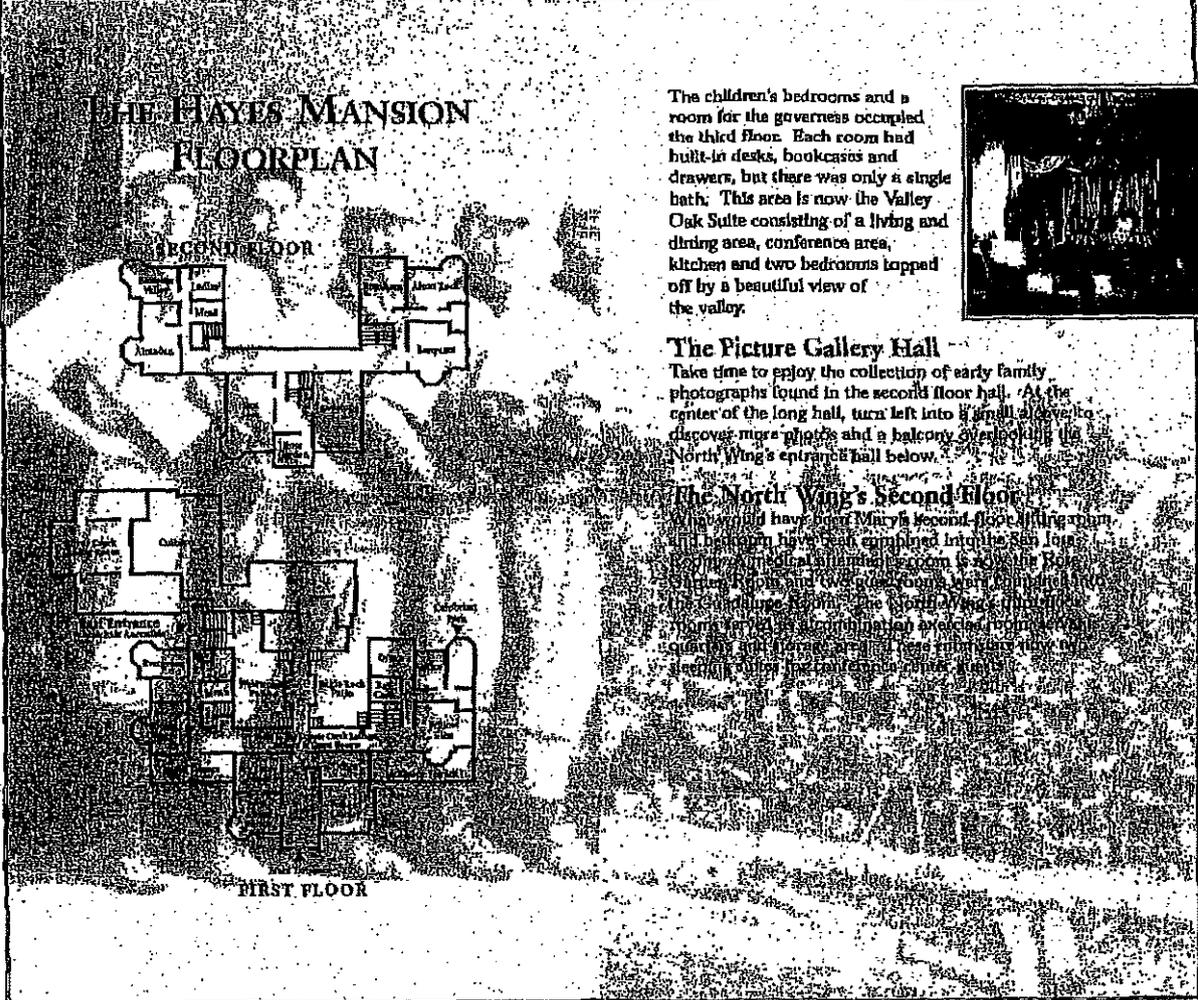
### Everts Anson Parlor and Jay Olney Parlor

Across the entrance hall from the library, the Everts Anson Parlor was the place for formal dinners and guests. The Jay Olney Parlor, with its features, was a place where the family gathered. It was a place where the family gathered. The original furnishings are pictured between the two rooms in the entrance hall.



Everts  
Anson  
Parlor

811074



The children's bedrooms and a room for the governess occupied the third floor. Each room had built-in desks, bookcases and drawers, but there was only a single bath. This area is now the Valley Oak Suite consisting of a living and dining area, conference area, kitchen and two bedrooms topped off by a beautiful view of the valley.



Mary Hayes' sitting room

**The Picture Gallery Hall**

Take time to enjoy the collection of early family photographs found in the second floor hall. At the center of the long hall, turn left into a small alcove to discover more photos and a balcony overlooking the North Wing's entrance hall below.

**The North Wing's Second Floor**

What would have been Mary's second floor sitting room and bedroom have been combined into the San Jose. Some of the original furniture is in the room. The room is a beautiful example of early California architecture. The room is a beautiful example of early California architecture. The room is a beautiful example of early California architecture.

### The East Wing.

Return to the main Picture Gallery Hall and continue into the East Wing, where the family of Mrs. C. M. Hayes lived. Restrooms and the elevator now occupy the second floor space once given to four bedrooms and the master bedroom is now known as the Almaden Room. One bedroom, the Blossom Valley Room, is still intact as it was nearly one hundred years ago. The third floor, which was the children's sleeping quarters, is a two night suite.



Silver Chest Room

The high vaulted stair hall to the main floor is now a grand under the stairs of the first floor. Along the hallway leads to the rear addition of the castle, the entrance to the office was found in the hall, where the restrooms are now, with the second school building.

Return to the main wing. The room in the corner, is now a grand under the stairs of the first floor. Along the hallway leads to the rear addition of the castle, the entrance to the office was found in the hall, where the restrooms are now, with the second school building.

**The Information**  
After the first part of the tour, the children are directed to the picture gallery. The children are directed to the picture gallery. The children are directed to the picture gallery.

Already wealthy from a Michigan mining venture with their mother, the Hayes brothers, both lawyers, turned their attention to community service as they became increasingly outraged by local government corruption in Santa Clara County. They organized the Good Government League to support honest politicians, and corralled the power of the press in their political clean-up campaign with their purchase of The San Jose Herald and the Mercury, two local papers they combined to form what is now the San Jose Mercury News.



The Family Portrait

Given the standing of the Hayes family in area society, it is no small wonder that many noted visitors were welcomed at the new mansion. Mrs. Leland Stanford, wife of the founder of Stanford University, and Sarah Winchester, builder of the Winchester Mystery House, who, with Mrs. Wood, the local matron, for long discussions about the great death, were not invited in the new home of the Hayes family.

Because the Hayes brothers were not invited, the mansion was also host to many prominent guests, including President Theodore Roosevelt, William McKinley and Herbert Hoover. In the early years, they would come by way of the Southern Pacific Railroad. Train passengers would get off at the Little Edenville station on Monterey Road to be met by the family's horse and carriage. In later years, they would arrive from the station by automobile, but they would still receive the traditional welcome of the grand Portia Cothare at the front of the house.



**Overview of the Hayes Family & Mansion**

After passing out of the hands of the Hayes family in the 1950s, this magnificent dwelling became empty and solitary by 1980, desperately in need of repair and nearly covered by overgrown ivy and underbrush. Located next to the dying Frontier Village Amusement Park, it was known by many as San Jose's ultimate haunted house. Restored to its former graciousness in 1994, thanks to a successful public/private venture, it is now The Hayes Mansion Conference Center, a meeting facility offering the latest advancements in technology for local corporations and the international business community.



E.A. Hayes

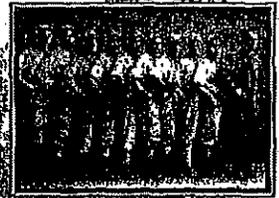
This elegant, 41,000 square-foot, 60-room Mediterranean-style home, designed by architect George Page and built in 1905, was once the intended residence of wealthy faith-healer, Mary Hayes-Chynoweth and her two grown sons, lawyers Everts Anson (E.A.) and Jay Orley (J.O.) Hayes. Mary Hayes-Chynoweth ordered the home built to

replace a 40-plus-room Queen Anne Victorian that burned to the ground in 1899. Though Mary and her sons did not grudge the loss of their home, having their fine Victorian home destroyed prompted the family to build a new home with turn-of-the-century cutting-edge safety in mind.

The new house had fire hose cabinets connected to water tanks on the third floor of each section. The brick, stucco-coated walls, the kitchen in an oval separate building and large patios separating the residential East and West Wings. Mary died a few months before the mansion was complete, but the estate stood for more than 50 years as the home for Mary's sons and their growing families.

Under the care of the Network Conference Company, which leases the site from the City of San Jose and operates the Hayes Mansion Conference Center, the mansion was restored and the addition was built in 1996 to match the mansion's architecture. The 135 guestrooms and 14 meeting rooms house visitors from around the world at this state-of-the-art meeting facility. Just like the old days, guests are still welcomed with the same personal attention and gracious hospitality the Hayes family afforded visitors at the turn of the century. If you would like to plan a conference or meeting at the Hayes, please inquire at the front desk or call 408-226-3200 or 408-420-3200.

For more information on The Hayes Mansion's rich history, read Nancy Newlin's book titled *The Grand Estate of Mary Hayes-Chynoweth*. The book can be purchased in our gift shop.



San Jose High School baseball team, circa 1906

The Hayes Mansion Conference Center is a premier meeting and event facility. The center offers a variety of services, including meeting rooms, banquet facilities, and a full-service catering team. The center is located in the heart of San Jose, California, and is easily accessible by public transportation. For more information, please call 408-226-3200.

**APPENDIX 1**

Bond No. \_\_\_\_\_

Premium \_\_\_\_\_

**FAITHFUL PERFORMANCE BOND**

WHEREAS, the CITY OF SAN JOSE, a municipal corporation of the State of California ("Owner"), and Dolce International/San José Inc., a Delaware corporation, qualified to do business in the State of California ("Manager"), and \_\_\_\_\_, as General Contractor, collectively referred to herein as principals ("Principals"); and

WHEREAS, Manager has entered into an Agreement for the management of the Hayes Mansion, which is incorporated herein by reference and referred to as the "Contract," pursuant to which the Manager shall cause the installation and completion of certain designated public improvements; and,

WHEREAS, under the terms of the Contract and prior to commencing any work under the Contract, Manager is required to furnish a bond to Owner for faithful performance of the Contract; and, General Contractor has agreed to provide this bond to the Owner of San Jose on behalf of, and jointly and severally with, the Manager.

NOW, THEREFORE, we the Principals and [insert full name of Surety], a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto Owner in the sum of **[AMOUNT OF CONSTRUCTION COST] DOLLARS (\$\_\_\_\_\_)**, for the payment of which sum well and truly to be made, we the Principals and Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The condition of this obligation is such that, if the Principals, Principals' heirs, executors, administrators, successors, or assigns shall in all things stand to and abide by, and well and truly keep and perform all covenants, conditions, and agreements required to be kept and performed by Principals in the Contract and any changes, additions, or alterations made thereto, to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meanings, and shall indemnify and save harmless Owner, its officers, employees, and agents, as therein provided, then this obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

As a part of the obligation secured hereby and in addition to the sum specified above, there shall be included all costs, expenses, and fees, including attorney's fees, reasonably incurred by Owner in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the Contract or to the work to be performed thereunder or to the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration, or addition.

General Contractor by executing this bond agrees that the foregoing recitals are true and correct and agrees it is bound to perform its duties and responsibilities as Principal under this bond.

IN WITNESS WHEREOF, this instrument has been duly executed by authorized representatives of the Principals and Surety. SIGNED AND SEALED on \_\_\_\_\_, 20\_\_\_\_\_.

**PRINCIPALS:**

"MANAGER"

DOLCE INTERNATIONAL/SAN JOSE INC.

By: \_\_\_\_\_  
Name:  
Title:

"GENERAL CONTRACTOR:"

\_\_\_\_\_  
(Principal name) (Seal)

**SURETY:**

\_\_\_\_\_  
(Surety name) (Seal)

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print name and Title)

Address: Telephone:

**Affix Corporate Seals**

**Attach Notary Jurats for All Signatures**

**Attach Power-of-Attorney if executed by Attorney-in-Fact**

Execution Original

Bond No. \_\_\_\_\_

Premium \_\_\_\_\_

PAYMENT (LABOR AND MATERIALS) BOND

**WHEREAS**, the CITY OF SAN JOSE, a municipal corporation of the State of California ("Owner"), and Dolce International/San José Inc., a Delaware corporation, qualified to do business in the State of California ("Manager"), and \_\_\_\_\_, as General Contractor, collectively referred to herein as principals ("Principals"); and

**WHEREAS, Manager has entered into an Agreement for the management of the Hayes Mansion, which is incorporated herein by reference and referred to as the "Contract," pursuant to which the Manager shall cause the installation and completion of certain designated public improvements; and,**

**WHEREAS**, under the terms of the Contract and prior to commencing any work under the Contract, Manager is required to furnish a good and sufficient payment bond to the Owner to secure the claims to which reference is made in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the California Civil Code; and General Contractor has agreed to provide this bond to the Owner on behalf of, and jointly and severally with, the Manager.

**NOW, THEREFORE**, we the Principals and **insert full name of Surety**, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto Owner, and unto all contractors, subcontractors, suppliers, laborers, materialmen and other persons employed in the performance of the Contract and referred to in the aforesaid Civil Code, as obligees, in the sum of **[AMOUNT OF CONSTRUCTION COST] DOLLARS (\$\_\_\_\_\_)**, on the condition that if Principals shall fail to pay for any materials or equipment furnished or used or for any work or labor thereon of any kind, or for amounts due under the Unemployment Insurance Act with respect to such work or labor, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Principals and all subcontractors with respect to such work or labor, then the Surety shall pay the same in an amount not exceeding the sum specified above. If suit is brought upon this bond, Surety shall pay, in addition to the above sum, all costs, expenses, and fees, including attorney's fees, reasonably incurred by any obligee in successfully enforcing the obligation secured hereby, all to be taxed as costs and included in the judgment rendered. Should the condition of this bond be fully performed, then this obligation shall become null and void; otherwise, it shall be and remain in full force and effect, and shall bind Principals, Surety, their heirs, executors, administrators, successors, and assigns, jointly and severally.

**IT IS HEREBY EXPRESSLY STIPULATED AND AGREED** that this bond shall inure to the benefit of all persons, companies, corporations, political subdivisions, and State agencies entitled to file claims under Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond. The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration or addition.

General Contractor by executing this bond agrees that the foregoing recitals are true and correct and agrees it is bound to perform its duties and responsibilities as Principal under this bond.

IN WITNESS WHEREOF, this instrument has been duly executed by authorized representatives of the Principals and Surety. SIGNED AND SEALED on \_\_\_\_\_, 20\_\_\_\_\_.

**PRINCIPALS:**

"MANAGER"

DOLCE INTERNATIONAL/SAN JOSE INC.

By \_\_\_\_\_

Name:

Title:

"GENERAL CONTRACTOR:"

\_\_\_\_\_  
(Principal name) (Seal)

**SURETY:**

\_\_\_\_\_  
(Surety name) (Seal)

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print name and Title)

Address:

Phone:

Execution Original

Affix Corporate Seals

**Affach Notary Jurats for All Signatures**

**Affach Power-of-Afforney if executed by Attorney-in-Fact**

Execution Original

Bond No. \_\_\_\_\_  
Premium \_\_\_\_\_

### WARRANTY BOND

**WHEREAS**, the City of San Jose, a municipal corporation of the State of California ("Owner") and Dolce International/San José Inc., a Delaware corporation, qualified to do business in the State of California ("Manager"), and \_\_\_\_\_ General Contractor, collectively referred to herein as principals ("Principals"); and

**WHEREAS**, Manager has entered into an Agreement for the management of the Hayes Mansion, which is incorporated herein by reference and referred to as the "Contract," pursuant to which the Manager shall cause the installation and completion of certain designated public improvements; and,

**WHEREAS**, under the terms of the Contract, Manager is required to furnish a bond to Owner to make good and protect Owner against the results of any work or labor done or materials or equipment furnished which are defective or not in accordance with the terms of the Contract having been used or incorporated in any part of the work so contracted for, which shall have appeared or been discovered, within the period of one (1) year from and after the completion and final acceptance of the work done under the Contract; and, General Contractor has agreed to provide this bond to the City of San Jose on behalf of, and jointly and severally with, the Manager.

**NOW, THEREFORE**, we the Principals and [insert full name of Surety], a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto Owner in the sum of [AMOUNT OF CONSTRUCTION COST] DOLLARS (\$ \_\_\_\_\_), for the payment of which sum well and truly to be made, we the Principals and Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The condition of this obligation is such that, if the Principals shall well and truly make good and protect Owner against the results of any work or labor done or materials or equipment furnished which are defective or not in accordance with the terms of the Contract having been used or incorporated in any part of the work performed under the Contract, which shall have appeared or been discovered within said one-year period from and after completion of all work under the Contract and final acceptance by Owner of said work, then this obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any change, extension of time, alteration or addition.

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**PRINCIPALS:**

"MANAGER"

DOLCE INTERNATIONAL/SAN JOSE INC.

By \_\_\_\_\_  
Name:  
Title:  
\_\_\_\_\_

"GENERAL CONTRACTOR:"

\_\_\_\_\_  
(Principal name) (Seal)

**SURETY:**

\_\_\_\_\_  
(Surety Name) (Seal)

BY: \_\_\_\_\_  
(Signature)

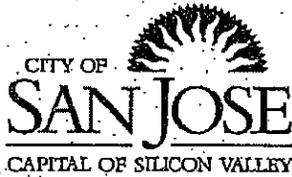
\_\_\_\_\_  
(Print name and Title)

Address:

Telephone:

**Affix Corporate Seals**

Attach Notary Jurats for All Signatures  
Attach Power-of-Attorney if executed by Attorney-in-Fact



# Memorandum

**TO:** Honorable Mayor and Council

**FROM:** Kay Winer  
Scott P. Johnson

**SUBJECT:** Hayes Mansion Management Agreement

**DATE:** November 24, 2003

---

Approved                     *Dei Bergsch*                     Date                     11-25-03                    

---

**COUNCIL DISTRICT:** City-Wide  
**SNI:** N/A

## RECOMMENDATION

Approval of a Management Agreement with Dolce International/San Jose, Inc. to operate the Hayes Mansion for ten years with two, five-year options, for a management fee of 3% of Gross Revenues, an Incentive Fee, and payment by City of the expenses of the operation, not covered by revenues.

## BACKGROUND

On October 21, 2003, the Council adopted a resolution authorizing the City Manager to enter into exclusive negotiations for thirty days with Dolce International Holdings, Inc to negotiate a Management Agreement to operate the Hayes Mansion. Dolce International Holdings, Inc. has formed a subsidiary corporation Dolce International/San José, Inc. for the purpose of operating the Hayes Mansion.

Negotiations with Dolce have been completed. Major provisions of the Management Agreement are provided in the next section of this report. Included in the Agreement are provisions directed by Council action at the October 21 meeting for inclusion in the Agreement. They are: a Management Incentive Fee that would be paid to Dolce when certain financial thresholds are reached. Under this program, both parties would benefit because the City would have financial resources to retire the Comerica and Devcon loans at an earlier date. Secondly, the Environmental Preferable Procurement Policy would be included in the operations at the Hayes and finally, the City would engage an Asset Manager to act as the "Owner's Representative", providing advice on management, operational and financial matters at the Hayes Mansion.

Dolce has been working with Hayes Renaissance, LP ("HRLP") to assure a smooth transition of the operation. Discussions between Dolce and Local 19 are also proceeding well, as confirmed by both parties.

## ANALYSIS

Major provisions of the Management Agreement are described below.

### Term of Agreement

- Ten years commencing January 1, 2004 through June 30, 2014. (The additional six months is needed to effect a change from a calendar year to the City's fiscal year of July 1 through June 30.)
- Two, five-year options that can be exercised by Dolce at its option, on the condition that performance measures identified in the Agreement have been met for at least two of the three years immediately preceding the end of the original term or the extension period. The performance measures are that Dolce has met or exceeded at least 90% of the budgeted Gross Operating Profit<sup>1</sup> projected in the Annual Budget for the Hayes Mansion or 90% of the REVPAR<sup>2</sup> for the Hayes Mansion's Competitive Set. The current Competitive Set includes the Marriott, Fairmont, Crowne Plaza, Hyatt San Jose, Hyatt St Claire, Hilton San Jose & Towers, and Chaminade in Santa Cruz. The Competitive Set is subject to change from time to time based on the mutual agreement of the parties. The data source is Smith Travel Research, an independent research organization serving the lodging industry that provides performance measurements.
- In the event that the City sells the Hayes Mansion within the first ten year period of the Agreement, the sale must provide that Dolce International/San Jose, Inc. will be retained as the manager of the facility under the same terms and conditions. This means that Dolce could exercise the extension periods if it met the Agreement's requirements.
- In the event the City sells the Hayes Mansion during one of the extension periods, the City is not obligated to require the new owner to assume the Agreement. Instead, the City is obligated to pay Dolce the Termination Fee described below.

### Dolce's Management Responsibilities

Under the proposed agreement, Dolce acts as the on-site manager of the Hayes Mansion in exchange for the Base Management Fee and Incentive Fee described below. Dolce will also provide routine maintenance and security for the parking garage in the adjacent Edenvale Garden Park and routine maintenance for certain park improvements. These tasks were previously the responsibility of HRLP as the tenant under the Hayes Mansion lease.

<sup>1</sup> Gross Operating Profit: Gross Revenues minus certain operating expenses.

<sup>2</sup> REVPAR: REVPAR is an industry measurement that determines whether the Hayes is receiving more or less of its market share of revenues.

The City will also be required to pay the operating expenses of the Hayes Mansion from the Hayes Mansion revenues or to the extent that these are not sufficient, from other City funds, including the Comerica Line of Credit. These operating expenses include all of the costs associated with operating the Hayes Mansion, such as wages and salaries, utilities, insurance, routine maintenance and food, beverage and merchandise sold at the Hayes Mansion. Dolce will also be reimbursed for various identified expenses related to marketing the Hayes Mansion, travel directly related to the operation of the Mansion, and booking fees and commissions for reservations made through Dolce's Central Reservation office or at other Dolce facilities.

### Dolce Compensation

#### Base Management Fee

- For the first three months of the Agreement, the Base Management Fee will be \$30,000 per month or 3% of Gross Revenues per month, whichever is greater. Thereafter, the Base Management Fee will be 3 % of Gross Revenues per month.
- Gross Revenues for purposes of calculating the Base Management Fee is defined as all revenues derived from the operation of the Hayes Mansion, including revenues from the sale of all conference services, rentals of facilities and guest rooms, sale of food, all beverages, charges for technology used in guest and meeting rooms, and revenues associated with fitness or recreation facilities and excluding taxes, insurance proceeds, and the gratuities actually paid to employees. Gross revenues do not include any funds that may be received in consideration for insurance claims or sale of furniture, fixtures and equipment.

#### Reduction of Base Management Fee If Performance Measures Are Not Met

For any year of the contract term commencing July 1, 2006 that performance measures are not met, the fee paid by the City to Dolce will be reduced by a percentage point for that year, i.e. the Base Management Fee will be reduced from 3% to 2% of Gross Revenues. This will be in the form of a credit to the City by reducing Management Fee payments payable by the City to Dolce in the subsequent year until the credit has been fully realized by the City. The performance to be achieved is at least 90% of budgeted Gross Operating Profit or 90% of the REVPAR Penetration Index for the Hayes' competitive set, as described previously in this report. I think this is where we define gross operating profit, not above.

#### Incentive Management Fee

Incentive management fees have been negotiated that provide financial incentives to Dolce for their management of the Hayes Mansion to generate net revenues from the operations of the Hayes Mansion to pay off the Devcon and Comerica loans approved in the Transition Agreement between the City and Hayes Renaissance Limited Partnership (HRLP). In addition, Dolce will be compensated in assisting the City in re-establishing the Phase III Market Rate Volatility Account (MRVA) to a level of \$1.5 million. The MRVA was initially established to mitigate market risk on the City's variable rate debt. Funds from the MRVA were subsequently used to

provide economic relief to HRLP. Once the interim debt for Hayes is paid off, this will provide reserves to mitigate the risk of fluctuations in short term variable interest rates.

**Incentive fees for the initial 10-year agreement period are:**

Threshold #1

25% of annual Net Revenues [Gross revenues less Hayes expenses, City debt service, principal and interest on Comerica Term Loan and interest on Comerica Revolving Loan]

Threshold #2

35% of Net Revenues after Threshold #1 is achieved AND Comerica Term Loan and Devcon Note are paid off.

Threshold #3

37% of Net Revenues after Threshold #1 and #2 is achieved AND the Comerica Revolving Line of Credit is paid off.

Threshold #4

40% of Net Revenues after Thresholds #1, #2 and #3 are achieved AND Phase III Market rate Volatility Account reaches a balance of \$1.5 million.

**Incentive Fees During Renewal Periods**

The negotiated incentive fees to be paid to Dolce in the event of any renewal periods is 30% of Net Revenues after achieving Threshold #4. In the event that Threshold #4 is not achieved, the incentive fee is 25% of Net Revenues.

For illustrative purposes, Exhibit B is attached to show the method to be used in calculating Net Revenues and Incentive Fees. This illustrative example is based on Dolce's Ten-Year Proforma.

Base on Dolce's Ten-Year Proforma, Dolce projects that Net Revenues would be generated from the operations of the Hayes Mansion by year three (threshold #1 would be achieved). The Comerica Term Loan and the Devcon Note would be paid off by the end of year four (threshold #2 would be achieved). The Comerica Revolving Line of Credit would be paid off by the end of year seven (threshold #3 would be achieved). The MRVA would achieve a balance of \$1.5 million in year 9 (threshold #4 would be achieved).

The Comerica Revolving Line of Credit should be retained until sufficient Hayes operating reserves are accumulated. Based on Dolce's proforma, the Comerica Revolving Line of Credit would be paid off in year seven from Net Revenues, which would require the City to negotiate an extension of the repayment date. However, staff recommends that the City maintain the Comerica Revolving Line of Credit as a means to fund any potential shortfall from operations to fund Hayes operating costs and the City's Hayes debt service costs until sufficient Hayes operating reserves are accumulated from the Hayes Net Revenues.

### **Key Business Terms and Conditions**

#### **Default and Termination**

In the event that either party is in breach of a material term of this Agreement, the other party may terminate the Agreement after allowing the defaulting party to cure the breach within the specified cure period. In most instances, the cure period is 30 days.

However, commencing on July 1, 2006 and throughout the remaining term of the Agreement, if Dolce fails to attain at least 80% of the budgeted Gross Operating Profit or 80% of the REVPAR Penetration Index for the Competitive Set, the City may terminate the Agreement upon 3 business days notice.

If City elects to terminate the Agreement for any reason other than certain specified events, including breach by Dolce or Dolce's failure to meet the performance measure described above, the City will be required to pay to Dolce a termination fee calculated as follows:

- For the first two years of the Agreement, the termination fee is the greater of two times the Base and Incentive Management Fees earned by Dolce in the 12 months preceding the termination date or \$250,000.
- Beginning in year 3 of the ten-year agreement and any years of the two five-year options, the termination fee is the lesser of the Base and Incentive Management Fees earned by Dolce in the 12 months preceding the termination date or \$800,000.

#### **Damage and Destruction/Condemnation**

In the event that the Hayes Mansion is totally destroyed or is condemned, then the Agreement will terminate. If the Hayes Mansion is partially destroyed or partially taken by a governmental entity and the proceeds of the insurance or the taking are insufficient in the City's judgment to rebuild, the Agreement will also terminate. If the Agreement terminates during the initial term of the Agreement, the City is obligated to pay to Dolce the termination fee described above. If the Agreement terminates during an option period, then City is obligated to pay the actual cost of relocation of Dolce's Strategic Team located at the Hayes Mansion with a cap of \$200,000.

#### **Insurance and Indemnity**

Under the Agreement, Dolce is required to provide various types of insurance coverage, including general liability, workers' compensation, auto and employment practices liability. The City will be named as an additional insured for each of the required policies.

The City and Dolce each agree to indemnify the other, to the extent a loss or claim is not covered by insurance, for its acts or omissions. In addition, the City agrees to indemnify Dolce for any Operating Expense incurred by Dolce in accordance with the terms of the Agreement.

### Wage Policies

Dolce will abide by the City's adopted Wage Requirements, including Worker Retention and Labor Peace. With respect to Labor Peace, Dolce has committed to abide by the terms of its agreement with Local 19 which includes a grievance procedure. Although Dolce anticipates operating the facility under a bargaining agreement with Local 19, the Agreement provides that, absent a bargaining agreement during its term of Agreement, the living wage will be applied.

### Hayes Mansion Assets

The transition agreement with HRLP provides that HRLP transfers ownership of all Hayes assets owned by HRLP to the City. The agreement with Dolce does not provide for the transfer of ownership of any Hayes assets to Dolce with once exception. HRLP owns five vehicles that are used in the operation of the Hayes Mansion. In order for the vehicles to be covered under Dolce's automobile insurance policy, title to these vehicles will be transferred from HRLP to Dolce. Upon iteration of the Agreement, or the end of the useful life of these vehicles, Dolce is obligated to transfer the vehicles to the City.

### Budget Process

#### Transition Budget

A transition budget has been submitted by Dolce that includes certain travel, relocation, technology, and costs for preparation of collateral and marketing materials specific to the Hayes Mansion. The total expenses are not to exceed \$177,500 and expenses will be submitted with the reimbursement requests to the City and payable as operating expenses of the Hayes Mansion.

#### Annual Operating Budget

Dolce is responsible for preparing the Annual Budget for the Hayes Mansion for a July 1 to June 30 Fiscal Year. Dolce will prepare the proposed annual budget with appropriate diligence and give due consideration to all relevant factors affecting the operation of the Center, including without limitation, market and economic conditions. Accompanying the proposed budget will be supporting reports, including: sales and marketing; human resource, technology, cash flow forecasts by month for the fiscal year; and a summary income statement. The proposed budget will also include an estimated profit and loss statement in the format recommended by the International Association of Conference Center Uniform System of Accounts and Dolce's projected Gross Operating Profit for the ensuing Fiscal Year.

In the event that the City and Dolce do not reach agreement on the proposed Annual Budget, any of the following could occur:

- Dolce may refuse to operate the Hayes Mansion and may terminate the Agreement;
- Dolce may terminate the Agreement on 90 days notice; or

- Dolce may agree to operate Hayes Mansion based on the Annual Budget desired by the City.

As the Agreement will commence during the middle of the 2003-04 Fiscal Year, Dolce is not obligated to provide the detailed Annual Budget. Instead, no later than forty-five days following the execution of Agreement Dolce is obligated to prepare for City's review and approval, a six month cash flow projection through June 30, 2004.

### Proposed Capital Improvements

Dolce shall submit, on or before January 15 of each year, a proposed list of Capital Improvements which are recommended to be undertaken during the ensuing five-year period. The recommended expenditures will be submitted in priority order, including the estimated costs for design, materials, construction, and the proposed contingency for each identified Capital Improvement. A Facilities Reserve Fund equal to 4% of Gross Revenues for the previous calendar month is established to be utilized exclusively to fund the costs of repair or for capital improvements that exceed \$5,000, and the costs for replacement of capital improvements on or at the Hayes Mansion. Dolce recognizes and agrees, however, that should the Reserve Fund be inadequate to fund any or all of the Capital Improvement Program submitted for the Hayes Mansion, these improvements will be evaluated against the needs for capital improvements in all of the City's other facilities and properties.

### City Oversight

#### Asset Manager

Dolce agrees to cooperate with the Asset Manager selected by the City. HVS International, Inc., the City's current hospitality consultant, will be engaged to provide these services for the upcoming year. The Asset Manager will advise the City on management, operational and financial performance matters. The Agreement specifies that the amount of the contract for these services is for an amount not to exceed \$50,000 per year with an annual CPI adjustment. This is a type of operating expense that is not subtracted from Gross Revenues in order to arrive at Gross Operating Profit.

#### City Review of Books and Records

Dolce shall submit to the City within fifteen days after the end of each calendar month, and may be requested to attend meetings with the Finance Department. Among the reports to be submitted are:

- An unaudited financial statement containing a statement of current assets and current liabilities; a profit and loss statement, including the Gross Revenues for each calendar month and cumulatively, including budget vs. actual.
- Actual and forecasted Cash flow and profit and loss by month for the balance of the fiscal year.

Honorable Mayor and Council  
Hayes Management Agreement  
November 24, 2003  
Page 9

**COORDINATION**

This report was prepared jointly by the City Manager's Office, Finance Department and the City Attorney's Office.

**CEQA**

Not a project.

*Kay Winer*

Kay Winer  
Deputy City Manager

*Scott P. Johnson*

Scott P. Johnson  
Director of Finance



- Capital expenditure report.
- Detailed Sales backlog.
- Variety of financial and accounting reports.
- Any other reports as reasonably requested by the City's Director of Finance

An audit of the books and records of the Hayes Mansion shall be performed by an independent certified public accounting firm acceptable to the City to be completed with a report submitted to the City within 180 days after the end of the fiscal year.

#### Approval of General Manager

City will have the right to approve Dolce's approval of the initial selection and any change in or transfer of the General Manager assigned to the Hayes Mansion.

#### Corporate Marketing and Sales Programs and Services

- The services and programs to be implemented will include those provided by Dolce's Corporate Marketing department that functions as an in-house agency providing creative and execution services for advertising, collateral materials, web site development and maintenance, direct mail, public relations, trade shows and promotional events.
- The Corporate Marketing Department will provide strategic marketing direction and support for the Hayes Mansion by positioning the facility in the marketplace; develop strategies to execute the annual Sales and Marketing plan prepared as part of the annual budget process.
- The Hayes Mansion will be positioned under the Dolce International brand; Dolce agrees to incorporate the Hayes Mansion in all corporate marketing activities which present the portfolio of Dolce-managed properties.
- Hayes Mansion will be included in the Dolce International Global Account Program. This proprietary program represents the principal corporate customers of Dolce Internal who conduct significant levels of meetings at multiple Dolce-managed properties.

#### Standards of Operation and Maintenance

The Hayes Mansion will be operated by Dolce as a first class conference center, consistent with International Association of Conference Center (IACC) standards. Unless approved by City, Dolce shall operate the Hayes Mansion twenty four hours a day, seven days a week.

#### PUBLIC OUTREACH

Not applicable.

**Dolce International**

Proforma Hayes Mansion Rooms 214  
 Currency: USD  
 25-Nov-03

**Hayes Mansion (for Illustrative Purposes Only)**

**Exhibit B**

|                              | Year # 1           | Year # 2          | Year # 3          | Year # 4          | Year # 5          | Year # 6          | Year # 7          | Year # 8          | Year # 9          | Year # 10         |
|------------------------------|--------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| <b>REVENUE</b>               |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Rooms                        | 4,588,000          | 6,018,000         | 7,309,000         | 8,202,000         | 8,694,000         | 8,954,820         | 9,223,465         | 9,500,169         | 9,785,174         | 10,078,729        |
| Food (& Bev 2003)            | 4,408,000          | 5,547,000         | 6,417,000         | 6,925,000         | 7,250,000         | 7,467,500         | 7,691,525         | 7,922,271         | 8,159,939         | 8,404,737         |
| Beverage                     | 823,000            | 1,150,000         | 1,467,000         | 1,514,000         | 1,575,000         | 1,622,250         | 1,670,918         | 1,721,045         | 1,772,678         | 1,825,857         |
| Conference Services          | 1,980,000          | 2,513,000         | 2,953,000         | 3,185,000         | 3,333,000         | 3,432,990         | 3,535,980         | 3,642,059         | 3,751,321         | 3,863,860         |
| Spa                          | 300,000            | 414,000           | 518,000           | 631,000           | 736,000           | 758,080           | 780,822           | 804,247           | 828,374           | 853,226           |
| Minor Operations             | 371,000            | 568,000           | 678,000           | 744,000           | 770,000           | 793,100           | 816,893           | 841,400           | 866,642           | 892,641           |
| <b>TOTAL REVENUE</b>         | <b>12,470,000</b>  | <b>16,208,000</b> | <b>18,342,000</b> | <b>21,201,000</b> | <b>22,358,000</b> | <b>23,028,740</b> | <b>23,719,602</b> | <b>24,431,190</b> | <b>25,164,126</b> | <b>25,919,050</b> |
| <b>DIRECT EXPENSES</b>       |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Rooms                        | 1,244,000          | 1,431,000         | 1,600,000         | 1,715,000         | 1,774,000         | 1,827,220         | 1,882,037         | 1,938,458         | 1,996,653         | 2,056,552         |
| Food & Beverage              | 3,560,000          | 4,413,000         | 5,073,000         | 5,419,000         | 5,648,000         | 5,815,380         | 5,989,841         | 6,159,537         | 6,354,623         | 6,545,261         |
| Conference Services          | 811,000            | 1,010,000         | 1,118,000         | 1,183,000         | 1,228,000         | 1,264,640         | 1,302,785         | 1,341,869         | 1,382,125         | 1,423,589         |
| Spa                          | 270,000            | 352,000           | 414,000           | 473,000           | 516,000           | 530,450           | 546,364           | 562,754           | 579,637           | 597,028           |
| Minor Operations             | 213,000            | 328,000           | 389,000           | 427,000           | 442,000           | 455,260           | 468,918           | 482,985           | 497,475           | 512,399           |
| <b>TOTAL DIRECT EXPENSES</b> | <b>6,098,000</b>   | <b>7,532,000</b>  | <b>8,594,000</b>  | <b>9,217,000</b>  | <b>9,605,000</b>  | <b>9,893,150</b>  | <b>10,189,945</b> | <b>10,495,643</b> | <b>10,810,512</b> | <b>11,134,827</b> |
| Gross Operating Income       | 6,372,000          | 8,676,000         | 10,748,000        | 11,984,000        | 12,753,000        | 13,135,590        | 13,529,656        | 13,935,547        | 14,353,614        | 14,784,222        |
| <b>INDIRECT EXPENSES</b>     |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Engineering                  | 634,000            | 658,000           | 681,000           | 703,000           | 722,000           | 741,855           | 762,256           | 783,218           | 804,757           | 826,867           |
| Sales and Marketing          | 1,408,000          | 1,409,000         | 1,483,000         | 1,541,000         | 1,585,000         | 1,628,588         | 1,673,374         | 1,719,391         | 1,766,676         | 1,815,258         |
| Administrative and General   | 1,327,000          | 1,402,000         | 1,474,000         | 1,530,000         | 1,577,000         | 1,620,388         | 1,664,928         | 1,710,713         | 1,757,758         | 1,806,096         |
| Base Mgt Fee                 | 374,000            | 488,000           | 580,000           | 636,000           | 671,000           | 691,000           | 712,000           | 733,000           | 755,000           | 778,000           |
| Utilities                    | 668,000            | 808,000           | 928,000           | 996,000           | 1,020,000         | 1,048,050         | 1,076,871         | 1,106,485         | 1,136,914         | 1,168,179         |
| <b>TOTAL INDIRECT</b>        | <b>4,409,000</b>   | <b>4,763,000</b>  | <b>5,146,000</b>  | <b>5,406,000</b>  | <b>5,675,000</b>  | <b>5,729,860</b>  | <b>5,889,429</b>  | <b>6,052,808</b>  | <b>6,221,103</b>  | <b>6,394,420</b>  |
| Gross Operating Profit       | 1,963,000          | 3,913,000         | 5,602,000         | 6,578,000         | 7,178,000         | 7,405,730         | 7,640,229         | 7,882,739         | 8,132,511         | 8,389,802         |
| <b>FIXED EXPENSES</b>        |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Insurance                    | 181,000            | 248,000           | 287,000           | 325,000           | 343,000           | 343,001           | 343,002           | 343,003           | 343,004           | 343,005           |
| Property Taxes               | 292,000            | 299,000           | 308,000           | 313,000           | 321,000           | 321,001           | 321,002           | 321,003           | 321,004           | 321,005           |
| Asset Mgr Fee                | 50,000             | 51,250            | 52,531            | 53,845            | 55,191            | 56,570            | 57,985            | 59,434            | 60,920            | 62,443            |
| Lease & Oth                  | 281,000            | 287,000           | 274,000           | 280,000           | 287,000           | 294,893           | 303,002           | 311,335           | 319,896           | 328,693           |
| <b>TOTAL FIXED EXPENSES</b>  | <b>794,000</b>     | <b>885,250</b>    | <b>929,531</b>    | <b>971,845</b>    | <b>1,006,191</b>  | <b>1,015,465</b>  | <b>1,024,991</b>  | <b>1,034,775</b>  | <b>1,044,825</b>  | <b>1,055,147</b>  |
| Net Operating Income         | 1,169,000          | 3,046,750         | 4,672,469         | 5,606,155         | 6,171,809         | 6,390,265         | 6,615,238         | 6,847,964         | 7,087,687         | 7,334,655         |
| <b>OTHER EXPENSES</b>        |                    |                   |                   |                   |                   |                   |                   |                   |                   |                   |
| Furniture, Fixt. & Equip.    | 489,000            | 648,000           | 774,000           | 848,000           | 894,000           | 921,150           | 948,784           | 977,248           | 1,006,565         | 1,036,762         |
| Hayes Debt Service           | 1,950,000          | 2,400,000         | 2,800,000         | 3,400,000         | 4,050,000         | 4,050,000         | 4,050,000         | 4,050,000         | 4,050,000         | 4,050,000         |
| Comerica term loan prnts     | 548,000            | 536,000           | 521,000           | 607,000           |                   |                   |                   |                   |                   |                   |
| Comerica line interest prnts | 35,000             | 74,000            | 83,000            | 83,000            | 78,000            | 56,000            | 31,000            |                   |                   |                   |
| <b>TOTAL OTHER EXPENSES</b>  | <b>3,033,000</b>   | <b>3,657,000</b>  | <b>3,978,000</b>  | <b>4,838,000</b>  | <b>5,022,000</b>  | <b>5,026,150</b>  | <b>5,029,784</b>  | <b>5,027,248</b>  | <b>5,056,565</b>  | <b>5,086,762</b>  |
| <b>NET REVENUE</b>           | <b>(1,864,000)</b> | <b>(610,250)</b>  | <b>694,469</b>    | <b>766,155</b>    | <b>1,149,809</b>  | <b>1,364,115</b>  | <b>1,585,454</b>  | <b>1,820,717</b>  | <b>2,031,121</b>  | <b>2,247,893</b>  |
| Incentive Management Fee     |                    |                   | 173,817           | 182,039           | 402,433           | 477,440           | 554,809           | 673,665           | 812,449           | 899,157           |

**INSTRUCTIONS FOR INSURANCE APPLICATION:**

Forward the following to: **RISK MANAGEMENT**, 801 N. First Street, Room 110

San Jose, CA 95110-1716

1. This form (149-7) completed;
2. Copy of face page of Contract;
3. Copy of insurance requirements included in contract.

DATE: 12/1/03

|  |  |
|--|--|
| Service Provider: Dolce International                | Phone No. 201-505-5917                   |
| Project: Hayes Lease and Operating Agreement         | Project Amount: Mo. Rent                 |
| Estimated Start Date 12/5/03                         | Estimated Completion Date: June 30, 2014 |
| Scope of Work<br>Operator of Hayes Conference Center |  |
| Department: City Manager/Finance                     | Division: Debt Management                |
| Department   | Extension: 4695                          |
| Contact: Julia Cooper                                |  |

**COMPLIANCE WITH INSURANCE REQUIREMENTS**

|   |
|---|
| Comments:   |
| Signature: <u>Jon Lang</u> Date: DEC 03 2003<br>Risk Management |

FOR RISK MANAGEMENT USE ONLY  
Date Forwarded to City Clerk: DEC 04 2003

**COMPLIANCE WITH BOND REQUIREMENTS**

|  |
|--|
| Signature: _____ Date: _____<br>City Clerk |
|--|

Form 149-7 (07/02)

# EXHIBIT D

Exhibit D: Leases

To be determined

# EXHIBIT E

Exhibit E: Contracts

To be determined

# EXHIBIT F

**ASSIGNMENT AND ASSUMPTION AGREEMENT  
RELATING TO THE SALE OF THE HAYES MANSION PROPERTY**

THIS ASSIGNMENT AND ASSUMPTION AGREEMENT RELATING TO THE SALE OF THE HAYES MANSION PROPERTY (the "Assumption Agreement") is made and entered into as of \_\_\_\_\_, 2016, by and between **CITY OF SAN JOSE, CALIFORNIA**, a California municipal corporation (the "City") and \_\_\_\_\_, a \_\_\_\_\_ company (the "Transferee").

RECITALS

WHEREAS, City entered into a Management Agreement dated December 2, 2003 with Dolce International/San Jose, Inc. a \_\_\_\_\_ corporation (the "Agreement") attached hereto as **EXHIBIT A** to operate the Hayes Mansion property located at \_\_\_\_\_, San Jose, California ("Property"); and

WHEREAS, City has agreed to sell the Property to Transferee and City and Transferee desire to assign the Agreement to Transferee; and

WHEREAS, the Transferee is willing to undertake, and agrees to assume all of the City's obligations under the Agreement;

WHEREAS, in order to evidence the undertaking of, agreement to, and assumption by the Transferee of the Agreement and all the rights, duties and obligations of the City under the Agreement, the City and the Transferee have agreed to enter into this Assumption Agreement;

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Transferee, and the City agree as follows:

**SECTION 1. ASSIGNMENT AND ASSUMPTION OF OBLIGATIONS.** Effective as of \_\_\_\_\_, 2016 (the "Effective Date"), the City hereby fully and unconditionally assigns from and after the Effective Date to the Transferee all of its obligations, right, title and interest in and under the Agreement. The Transferee accepts such assignment and, from and following the Effective Date, hereby fully and unconditionally assumes in full, all of the duties and obligations of the City arising after the Effective Date in and under the Agreement undertakes and agrees, with the City, to perform each and every duty and obligation of the "Owner", as defined in the Agreement).

SECTION 2 MISCELLANEOUS.

B. Agreement Obligations. All obligations of Owner under the Agreement prior to the Effective Date shall be obligations of City and all such obligations on or after the Effective Date shall be obligations of Transferee. **City shall have no rights and shall be released of all obligations under the Agreement, commencing on the Effective Date.**

C. Notices to the Transferee. All notices to be given to the Owner under and pursuant to the Agreement shall be given to the Transferee at the following address: \_\_\_\_\_.

D. Governing Law. This Assumption Agreement and all related documents shall be deemed to be contracts made and delivered in the State of California and shall be governed by and construed in accordance with the laws of the State of California.

E. Execution in Counterparts. This Assumption Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

F. No Further Modifications. All terms and conditions of the City Documents not expressly modified by this Assumption Agreement are expressly reaffirmed as if set forth in their entirety herein and shall remain unaffected, unchanged and unimpaired by reason of this Assumption Agreement.

G. Construction. This Agreement shall be interpreted and construed only by the contents hereof, and there shall be no presumption or standard of construction in favor of or against either party.

WHEREAS, the parties have executed this Assumption Agreement on the date first written above.

**CITY:**

City of San Jose, a California

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**TRANSFeree:**

\_\_\_\_\_ a \_\_\_\_\_  
company

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT A  
Agreement

# EXHIBIT G

Exhibit G: Actions, Suits or Proceedings

To be determined

# EXHIBIT H

Exhibit H: Products Provided by Hotel Operator to Guests or Employees

To be determined

# EXHIBIT I

### Hayes Mansion Public Art

| Title                   | Artist        | Description                                       |
|-------------------------|---------------|---|
| Labor Theory of Value   | Rick Arnitz   | 50" x 90", oil enamel on canvas, 2003             |
| Rolling Meadows         | Brian Blood   | 48" x 60" oil on canvas, 2006                     |
| Hayes Green             | Jamie Brunson | 48" x 48", oil and alkyd on panel, 2006           |
| Olema Hills             | Willard Dixon | 48" x 66", oil on canvas, 2005                    |
| Westering (Littorialis) | Wade Hoefer   | 44" x 95", oil on canvas, 2006                    |
| Tropic Fruit            | Amy Kaufman   | 48" x 72", oil on canvas, 2000                    |
| Orchard 4               | Jeff Long     | 60" x 84", oil, alkyd and collage on canvas, 2005 |
| Summer Storm            | Carole Pierce | 50" x 120", oil on canvas, 2006                   |
| Ochre Without Window    | Silvia Poloto | 40" x 78", acrylic on canvas, 2006                |

# EXHIBIT J

When Recorded mail to:

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SPACE ABOVE THIS LINE FOR RECORDER

MAIL TAX STATEMENTS TO:

*Document transfer tax is* \_\_\_\_\_

*Computed on full value of property conveyed*

*City Transfer tax is* \_\_\_\_\_

\_\_\_\_\_  
*Signature of declarant* \_\_\_\_\_

APN:

**GRANT DEED**

For value received, CITY OF SAN JOSE, a municipal corporation of the State of California, does hereby GRANT to \_\_\_\_\_, all that certain real property located in the City of San José, County of Santa Clara, State of California described in Exhibit A, which Exhibit is attached hereto and incorporated herein by reference.

**GRANTOR**

CITY OF SAN JOSE

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

Date: \_\_\_\_\_

**EXHIBIT A**  
Legal Description

# EXHIBIT K

When Recorded Return to:  
City of San José – Housing Department  
200 E. Santa Clara Street, 12th Floor  
San José, California 95113-1905  
Attention: Asset Management Team  
Re: Hayes Mansion

TO BE RECORDED WITHOUT FEE PER GOVERNMENT CODE SECTIONS 6103 AND 27383

**AFFORDABILITY COVENANT  
IMPLEMENTING CITY COUNCIL RESOLUTION NO. 77725  
(PROCEDURE FOR THE DISPOSITION OF SURPLUS CITY-OWNED PROPERTY)**

This Affordability Covenant (“Covenant”) implements City Council Resolution No. 77725 (Updated Procedure for the Disposition of Surplus City-Owned Property to Reflect the General Terms of Assembly Bill 2135) and is made by \_\_\_\_\_, a corporation of the state of STATE (“Buyer”) on this \_\_\_\_\_ day of \_\_\_\_\_, 2016, for the benefit of the **CITY OF SAN JOSÉ** (“City”), a municipal corporation, with respect to the following facts:

A. On or about September 27, 2014, the Governor of the State of California signed into law AB 2135, which became effective January 1, 2015. AB 2135 modified the procedures concerning the sale of surplus properties by a local agency by amending Government Code Section 54220 *et seq.* As a charter city, City is not required to comply with AB 2135. Nonetheless, on April 26, 2016, the San José City Council adopted Council Resolution No. 77725 updating the procedure for the disposition of surplus city-owned property, as set forth in Chapter 4.20 of the San José Municipal Code, a procedure which reflects the general terms of AB 2135 (the “Policy”).

B. The Policy imposes new restrictions on surplus property, including the requirement that certain residential projects built on surplus property provide a certain level of units at affordable costs for rental or for-sale, even if no “Preferred Entities” (e.g., affordable housing developers) have expressed interest in purchasing the surplus property. The Policy reads, in relevant part:

**M. Property is developable**—If the property is sold on the open market, the Surplus Sale policy requires that if it is ever used for the development of ten (10) or more residential uses, then the entity (or its successor-in-interest) must provide not less than fifteen percent (15%) of the total number of units developed on the parcel(s) at affordable prices for rental, for-sale, or long term lease (35 years or more) of the property. An affordable housing restriction documenting the total number of restricted units and the affordable prices must be recorded against the surplus land at the time of sale. The restriction is to run with the land for fifty-five (55)

years, and be enforceable against any owner (or its successor-in-interest) who violates the covenant or restriction.

C. City offered for sale that certain real property located in the City of San José, County of Santa Clara, State of California, known as "Hayes Mansion" more particularly described in **EXHIBIT A** and depicted in **EXHIBIT B** (hereinafter "Property") attached hereto and incorporated herein, through a competitive process in accordance with Section 4.20.040 of the San José Municipal Code. City staff had determined that Buyer is the highest bidder. On April 26, 2016, the San José City Council adopted a resolution finding that Property was surplus to City's needs, authorizing the sale of the Property to Buyer, and, accordingly, authorizing the City Manager to negotiate and execute a purchase and sale agreement based upon the terms outlined in the memorandum to City Council dated June 14, 2016, the deed and all other documents necessary to complete the transaction, including execution of this Covenant.

D. The Policy requires an affordable housing restriction to be recorded against the surplus property at the time of sale in the event any such real property is ever subsequently used for residential purposes. Accordingly, as City has required as a condition of Buyer's purchase of the Property, Buyer has agreed to enter into this Covenant, which specifies the terms and conditions of the Buyer's obligation to satisfy Paragraph M of the Policy.

NOW, THEREFORE, BUYER hereby declares and covenants:

**1. Covenants Running With the Land.**

a. Affordability Covenant. If the Property is ever developed (in whole, in part, or is in any way made part of a larger development) for a project that contains 10 or more residential units, the covenants and restrictions, as set forth below, shall apply and the Buyer (and its successors and assigns) must ensure that no less than fifteen percent (15%) of those residential units shall be sold at an Affordable Housing Cost to Moderate Income Households, or if such units are to be rented (or otherwise made available) at an Affordable Cost to Lower Income Households, as defined herein ("Affordable Units"), in either event (sold or rented) for a term of 55 years, which shall commence on the later of the date of recordation of the Notice of Completion for the Affordable Units, or the date on which the first Affordable Unit is occupied. Whether an Affordable Unit is sold or rented at an Affordable Cost shall be determined by City in its sole discretion.

i. For-Sale Affordable Units. If the Property is ever developed as provided in subsection (a) above, the Affordable Units required to be provided, if sold, must be priced at an Affordable Housing Cost to Moderate Income Households, as set forth below, and the Buyer (and its successors and assigns) must comply with the covenants and restrictions contained in **Exhibit C**.

ii. For-Rent Affordable Units. If the Property is ever developed as provided in subsection (a) above, the Affordable Units required to be provided, if

rented, must be priced at an Affordable Rent to Lower Income Households, as set forth below, and the Buyer (and its successor and assigns) must comply with the covenants and restrictions contained in **Exhibit D**.

b. **Notification of Sale or Transfer**. No later than five (5) days before the closing of the sale or transfer of the Property, Buyer (and its successor and assign) shall provide notice to City of such sale or transfer. Such notification shall be in writing and shall set forth the name and address of the new owner and the date of sale. Such notices be shall sent to the Office of the City Manager, at 200 East Santa Clara Street, 17<sup>th</sup> Floor Tower, San José, California 95113, Attention: Director of Economic Development.

c. **Covenants Running With the Land**. Buyer hereby subjects the Property and any Affordable Units constructed on the Property to the covenants and restrictions set forth in Exhibits C and D, except as provided in any subordination agreement or other written agreement executed by City. Each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a "Contract") shall conclusively be held to have been executed, delivered and accepted subject to this Covenant regardless of whether the terms of this Covenant are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Covenant.

d. **Declarations**. Buyer hereby declares that: (i) the covenants and restrictions contained herein shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Buyer; (ii) the burden of the covenants and restrictions set forth in this Covenant touch and concern the Property and the Property is rendered less valuable thereby; and (iii) the benefit of the covenants and restrictions set forth in this Covenant touch and concern the land by enhancing and increasing the enjoyment and use of any Affordable Units by eligible households, the intended beneficiaries of such covenants and restrictions.

e. **Covenants Binding**. All covenants and restrictions contained herein without regard to technical classification or designation shall be binding upon Buyer and its successors in interest for the benefit of the eligible households, and such covenants and restrictions shall run in favor of such parties for the entire period during which such covenants and restrictions shall be in force and effect, without regard to whether the Buyer is an owner of any land or interest therein to which such covenant and restrictions relate.

2. **Lienor's Remedies**. The provisions of this Covenant do not limit the right of any obligee to exercise any of its remedies for the enforcement of any pledge or lien upon the Property; provided, however, that in the event of any foreclosure, under any mortgage, deed of trust or other lien or encumbrance, or a sale pursuant to any power of sale included in any such mortgage or deed of trust, or in the case of a deed in lieu of foreclosure, the purchaser (or other transferee) and their successors in interest and

assigns and the Property shall be, and shall continue to be, subject to all of the covenants and restrictions set forth in this Covenant, subject to the terms of any subordination agreement or other written agreement executed by City.

3. **Amendments.** The City shall have the right to consent and agree to changes in, or to eliminate in whole or in part, any of the covenants or restrictions contained in this Covenant without the consent of any tenant, lessee, easement holder, licensee, mortgagee, trustee, beneficiary under a deed of trust or any other person or entity having any interest less than a fee in the Property. This Covenant shall not be amended except upon the recordation of an amendment duly executed and acknowledged by City.

4. **Recitals and Exhibits.** The above recitals and the attached Exhibits A-D are hereby incorporated and made a part hereof.

5. **Covenant to be Attached.** Buyer shall attach a copy of any covenant or restriction required by paragraph 1 above to any purchase and sale contract or lease with respect to any Affordable Unit.

6. **Successors, Assigns.** The provisions contained in this Covenant shall bind the Buyer and each successor and assign, and shall inure to the benefit of the City, which shall have the right to enforce this Covenant or any of the terms contained herein and which may perform any of the obligations contained herein to be performed by the City.

7. **Severability.** If any provision of this Covenant, or the application thereof to any person, place, or circumstance, shall be held by a court of competent jurisdiction to be invalid, unenforceable, or void, the remainder of this Covenant and such provisions as applied to other persons, places, and circumstances shall remain in full force and effect.

**IN WITNESS WHEREOF**, BUYER has executed this Covenant as of the date first written above.

**BUYER**

\_\_\_\_\_, A CORPORATION OF  
THE STATE OF \_\_\_\_\_

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

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 \_\_\_\_\_

County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_, Notary Public, personally  
DATE NAME OF NOTARY  
appeared \_\_\_\_\_  
NAME(S) OF SIGNER(S)

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 acknowledge 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 OF NOTARY

**EXHIBIT A**  
**DESCRIPTION OF PROPERTY**

**EXHIBIT B**  
**DEPICTION OF PROPERTY**

**EXHIBIT C**

**AFFORDABILITY COVENANT**

**(FOR-SALE AFFORDABLE UNITS)**

**AFFORDABILITY COVENANT  
IMPLEMENTING CITY COUNCIL RESOLUTION NO. 77725  
(PROCEDURE FOR THE DISPOSITION OF SURPLUS CITY-OWNED PROPERTY)**

The following covenants and restrictions contained in this Affordability Covenant ("Covenant") apply to "For-Sale Affordable Units," as noted in Paragraph 1(a)(i) above.

1. Definitions.

(a) For Persons or Families of Moderate Income, "Affordable Housing Cost" shall mean Housing Cost calculated in accordance with Section 50052.5 of the Health and Safety Code, except that it shall be based on 100% of the Area Median Income ("AMI"), as shown in the table contained in 25 Cal. Code Reg. 6932 for Santa Clara County, ("AMI"), adjusted for family size appropriate to the unit. "Housing Cost" shall be calculated in accordance with the provisions of California Code of Regulation, Title 25, Section 6920, as amended from time to time, which as of the date hereof include all of the following costs associated with that Affordable Unit:

- (i) Principal and interest on a mortgage loan including any rehabilitation loans, and any loan insurance fees associated therewith.
- (ii) Property taxes and assessments.
- (iii) Fire and casualty insurance covering replacement value of property improvements.
- (iv) Property maintenance and repair.
- (v) A reasonable allowance for utilities (excluding telephone service).
- (vi) Any homeowner association fees.
- (vii) Ground rent, if the unit is situated on rented land.

(viii) Monthly housing cost of a purchaser shall be an average of estimated costs for the next twelve (12) months.

(b) "Affordable Unit" shall mean the residential units on the Property sold at an Affordable Housing Cost.

(c) "City" shall mean the City of San José.

(d) "Eligible Person or Family" for units sold at an Affordable Housing Cost shall mean a person or family with an income level at or below Moderate Income Households as adjusted for actual family size in accordance with the procedures set forth below, as shown in the table contained in 25 Cal. Code Reg. 6932, as amended from time to time.

(e) "Event of Default" shall mean those events described in Section 9.

(f) "Fair Market Value" shall mean the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obligated to sell, and a buyer, being ready, willing and able to buy but under no particular or urgent necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the Affordable Unit is reasonably adaptable and available but as though this Covenant did not exist.

(g) "Notice of Intent to Transfer" shall mean a notice delivered by Buyer to the City pursuant to Section 5.

(h) "Owner" shall mean Buyer and any successor in interest of Buyer in all or any part of the Affordable Unit, including the initial purchaser from Buyer.

(i) "Persons or Families of Moderate Income" shall have the same definition as set forth in Section 50093 of the Health and Safety Code.

(j) "Proposed Transferee" shall mean an Eligible Person or Family to whom an Owner desires and proposes to Transfer the Affordable Unit.

(k) "Sales Price" shall mean all sums paid by a purchaser to a seller for, or in conjunction with, the acquisition of an Affordable Unit, including but not limited to the purchase price designated in any purchase agreement, consideration for personal property and all other costs and fees paid by the purchaser to or for the benefit of the seller.

(l) "Section" shall refer to sections in the California Health and Safety Code, as amended from time to time, unless otherwise noted.

(m) "Term" shall be fifty-five (55) years, which shall commence on the later of the date of recordation of the Notice of Completion for the Affordable Units, or the date on which the first Affordable Unit is occupied.

(n) "Transfer" shall mean any sale, assignment, conveyance or transfer, voluntary or involuntary, of any interest in the Affordable Unit. Without limiting the generality of the foregoing, Transfer shall include (i) a transfer by devise, inheritance or intestacy to a party who does not meet the definition of Eligible Person or Family, (ii) a lease or occupancy agreement of all or any portion of an Affordable Unit, (iii) creation of a life estate, (iv) creation of a joint tenancy interest, (v) execution of a land sale contract by which possession of an Affordable Unit is transferred to another party and title remains in the transferor, (vi) a gift of all or any portion of an Affordable Unit, or (vii) any voluntary conveyance of an Affordable Unit. Transfer shall not include (1) a transfer of the project in bulk (as compared to a transfer of individual condominium units to individual condominium unit buyers), (2) transfer by devise, inheritance or intestacy to a spouse, a transfer to a spouse pursuant to the right of survivorship under a joint tenancy, or (3) a transfer to a spouse in a dissolution proceeding, however any subsequent Transfer shall be subject to this Covenant.

(o) "Transferee" shall mean any natural person or entity that obtains ownership or possessory rights in the Affordable Unit pursuant to a Transfer.

2. Acknowledgement of Affordability Restrictions. Owner hereby acknowledges and agrees that:

(a) Owner understands all of the provisions of this Covenant.

(b) For the Term hereof, Owner hereby subjects the Affordable Units to certain restrictions, and limits the price for which Owner may sell the Affordable Units and the persons to whom Owner may sell the Affordable Units. The resale price limitations, and other provisions contained in this Covenant, restrict the full benefits of owning the Affordable Units. Owner may not enjoy the same economic or other benefits from selling the Affordable Units that Owner would enjoy if this Covenant did not exist.

(c) Owner accepts and agrees to the provisions of this Covenant with the understanding that this Covenant will remain in full force and effect as to the Affordable Units following any Transfer of any Affordable Unit throughout the Term.

(d) Owner acknowledges and agrees that the Proposed Transferees of the Affordable Units will be purchasing the Affordable Units at a discount which is equal to the difference between (i) the Fair Market Value of the Affordable Unit at the close of escrow for the sale to such Proposed Transferee less (ii) the actual Sales Price of the Affordable Unit to such Proposed Transferee ("City Loan"). The City Loan shall be repaid to the City by Owner upon an Event of Default hereunder or upon any Transfer which requires the payment of an equity share as described in Section 6 below. Upon any Transfer by the Owner of an Affordable Unit, Owner shall notify the City in writing of

the amount of the City Loan in connection with any such Transfer, and a deed of trust in a form acceptable to the City shall be recorded by the proposed transferee against the Affordable Unit to secure repayment of the City Loan.

3. Restrictions on Transfer of Any Affordable Unit. OWNER UNDERSTANDS THAT THE DETERMINATION OF THE SALES PRICE OF THE AFFORDABLE UNIT CAN BE MADE ONLY AT THE TIME OF THE PROPOSED TRANSFER TAKING INTO CONSIDERATION INTEREST RATES, PROPERTY TAXES AND OTHER FACTORS THAT CANNOT BE ACCURATELY PREDICTED AND THAT THE SALES PRICE PERMITTED HEREUNDER MAY NOT INCREASE OR DECREASE IN THE SAME MANNER AS OTHER SIMILAR REAL PROPERTY WHICH IS NOT ENCUMBERED BY THIS COVENANT. OWNER FURTHER ACKNOWLEDGES THAT AT ALL TIMES IN SETTING THE SALES PRICE OF THE AFFORDABLE UNIT THE PRIMARY OBJECTIVE OF THE CITY AND THIS COVENANT IS TO PROVIDE HOUSING TO ELIGIBLE PERSONS OR FAMILIES AT AFFORDABLE HOUSING COST. THE SALES PRICE WILL ALMOST CERTAINLY BE LESS THAN OTHER SIMILAR PROPERTIES WHICH HAVE NO RESTRICTIONS.

4. Transfer of an Affordable Unit. Owner may transfer an Affordable Unit only in strict accordance with the provisions of this Covenant. Specifically, except as set forth in Section 6 herein, Owner may Transfer an Affordable Unit (i) only to an Eligible Person or Family and (ii) only if the Transfer has been approved in writing by the City in accordance with the provisions of Section 5, except when Section 7 applies. In order to comply with this Section, Owner must calculate the Affordable Housing Cost for the Proposed Transferee of the Affordable Unit in accordance with the definition set forth in Section 1(a) of this Covenant. After calculating the Affordable Housing Cost for the Proposed Transferee, the Owner must ensure that the sum of the Sales Price and all costs listed in the definition of Housing Cost set forth in Section 1(a) of this Covenant do not exceed that Affordable Housing Cost. The calculation of the Sales Price under this Section is illustrated by example in **EXHIBIT A** attached hereto, unless such example is modified or amended by mutual agreement between Buyer and the City.

5. Process to Obtain Approval of Transfer of An Affordable Unit. In the event Owner desires to Transfer an Affordable Unit, prior to the Transfer, the Owner shall notify the City by delivering a "Notice of Intent to Transfer" in the form attached hereto as Form 1. When the Owner identifies a Proposed Transferee to whom Owner wishes to Transfer the Affordable Unit, the following process shall be followed:

(a) Notice to City: Owner shall send to the San José Department of Housing (or its successor), at 200 East Santa Clara Street, 12<sup>th</sup> Floor Tower, San José, California 95113 and to the San José Department of Public Works Real Estate Division at 200 East Santa Clara Street, 5<sup>th</sup> Floor Tower, San José, California 95113 the form attached hereto as Form 2 fully completed and executed by Owner and the Proposed Transferee (the "Approval Request").

(b) Qualification of Proposed Transferee: The Proposed Transferee shall provide the City with sufficient information in form required by the City for the City to determine if the Proposed Transferee meets the following requirements:

(i) The Proposed Transferee shall certify its intent to occupy the Affordable Unit as the Proposed Transferee's principal residence.

(ii) The Proposed Transferee shall be an Eligible Person or Family.

(c) Qualification of Transaction: For the Transfer to qualify as an approved Transfer the transaction shall meet the following requirements:

(i) The Sales Price shall not exceed the lesser of:

(A) The Fair Market Value of the Affordable Unit, or

(B) The maximum price at which the Housing Cost to be paid by the Proposed Transferee would not exceed Affordable Housing Cost. The calculation of the Sales Price under this subsection (B) is illustrated by example in **EXHIBIT A** attached hereto, unless such example is modified or amended by mutual agreement between Buyer and City. However, in adjusting for family size to determine the maximum income level on which to base the calculation of Affordable Housing Cost, the family size of the Proposed Transferee shall be: (i) for 2-bedroom units, 3 persons (ii) for 3-bedroom units, 4 persons (iii) for 4 bedroom units, 5 persons and (iv) 5-bedroom units, 6 persons. The City shall have the sole discretion whether to grant any the request to make an adjustment to the above-referenced family size.

(ii) The price paid to Owner by the Proposed Transferee for Owner's personal property shall not exceed the Fair Market Value of such property. No other consideration of any nature whatsoever shall be delivered by the Proposed Transferee to Owner unless fully disclosed to and approved by the City.

(d) Certificates from Parties: The Owner and Proposed Transferee each shall certify in writing, in Form 2 delivered to the City, that the Transfer shall be closed in accordance with and only with the terms of the sales contract and other documents submitted to and approved by the City and that all consideration delivered by the Proposed Transferee to Owner has been fully disclosed to the City. The written certificate shall also include a provision that in the event a Transfer is made in violation of the terms of this Covenant or false or misleading statements are made in any documents or certificate submitted to the City for its approval of the Transfer, City or Buyer shall have the right to file an action at law or in equity to make the parties terminate and/or rescind the sale contract and/or declare the sale void notwithstanding the fact that the Transfer may have closed and become final as between Owner/seller and his/her transferee. In any such event, any costs, liabilities or obligations incurred by the Owner/seller and his/her transferee for the return of any monies paid or received in

violation of this Covenant or for any costs and legal expenses, shall be borne by the Owner/seller and/or his/her transferee and the Owner/Seller shall hold the City and/or Buyer and its designees harmless and reimburse their expenses, legal fees and costs for any action they reasonably take in good faith in enforcing the terms of this Covenant.

(e) Written Consent of City Required Before Transfer. An Affordable Unit, and any interest therein, shall not be Transferred except with the express written consent of the City, which consent shall be given only if the Transfer is consistent with the City's goal of creating, preserving, maintaining and protecting housing in San José for Eligible Persons and Families and shall be in accordance with the provisions of Section 4 of this Covenant. This provision shall not prohibit the encumbering of title for the sole purpose of securing financing; however, in the event of foreclosure or transfer by deed in lieu of foreclosure the provisions of Section 11 of this Covenant shall apply with regard to proceeds and this Covenant shall continue to apply to the Affordable Unit subject to foreclosure in accordance with Section 17, except as otherwise required by Fannie Mae or other similar mortgage insurer or secondary purchaser.

(f) Delivery of Documents. Upon the close of the proposed Transfer, the Owner and Transferee shall provide the City with a certified copy of the recorded Assumption Agreement, (a copy of which is attached hereto as Form 3) a copy of the final sales contract, settlement statement, escrow instructions, and any other document which City or Buyer may reasonably request.

(g) Assistance by City. In the event that the Owner desires to locate a Proposed Transferee, the City shall be available, at the Owner's request, to assist the Owner during the process outlined in subsections (a)-(f) above. Specifically and without limitation, the City shall assist the Owner in identifying a Proposed Transferee, determining whether the Proposed Transferee is an Eligible Family and in calculating the Affordable Housing Cost and the Sales Price for the Proposed Transferee. The City shall have the right to designate a third party to provide such assistance to the Owner. If such a third party is designated by the City, that third party shall have the right to charge a reasonable fee for the assistance provided to the Owner. Owner shall have the right to approve such a designated third party, which approval shall not be unreasonably withheld.

6. Equity Share. In the event there does not exist an Event of Default, and Owner, who is not Buyer, wishes to Transfer the Affordable Unit to a Person or Family who is not an Eligible Person or Family, then Owner can Transfer the Affordable Unit only if, in addition to repayment of the City Loan, a share of the equity from the Affordable Unit is paid to the City in the same percentage as the percentage of the City's Loan to the Fair Market Value of the Affordable Unit at the time of the City Loan (the "Equity Share"). Equity subject to sharing shall be calculated by subtracting the Fair Market Value of the Affordable Unit at the time of the Owner's acquisition of the Affordable Unit from the sales price for a sale to a Person or Family who is not an Eligible Person or Family (less Borrower's Closing Costs and "capital improvements" as such terms are defined herein). When the total amount due to the City under this Covenant, including the Equity Share, is

paid, the City shall remove or cause to be removed this Covenant as a lien on the Affordable Unit, and this Covenant will cease to be a covenant running with the land.

7. Transfer by Devise, Inheritance or Intestacy. Notwithstanding anything to the contrary in this Covenant, in the event a Transfer is by devise, inheritance or intestacy this Section 7 shall govern the Transfer. Within thirty (30) days of the Transfer, the Transferee shall deliver written notice to the City that the Transfer has occurred. If such Transferee is not an Eligible Person or Family, this Transferee shall market the Affordable Unit for rental to an Eligible Person or Family and shall rent the Affordable Unit to an Eligible Person or Family until the Transferee desires to Transfer the Affordable Unit. In all events, the provisions of all Sections of this Covenant shall govern any subsequent transfer of any Affordable Unit.

8. Covenants of Owner. Owner, who is not Buyer or any subsequent assignee or transferee who acquires the project in bulk (as compared to an Owner who acquires an individual condominium unit), of each Affordable Unit by acceptance of a deed to the Affordable Unit covenants and agrees that, at all time during the Term of this Covenant, its Affordable Unit:

(a) Owner Occupancy. Will be continuously occupied by Owner, except as provided in Section 7 above.

(b) No Rental. Except as provided in Section 7 above, and as otherwise agreed to by the City in advance, shall not be rented, subleased, or subject to any other business arrangement whereby consideration shall be paid by any occupant of an Affordable Unit to the Owner of the Affordable Unit; provided, if the Unit is occupied by a Family of Moderate Income, the family members, whose income was considered in determining the eligibility of that family, may make monetary contributions toward the Housing Costs of the Affordable Unit.

9. Default. As to the Affordable Units, the occurrence of any of the following events shall constitute an Event of Default under this Covenant:

(a) Breach of Covenant. Breach of any covenant of Owner contained in this Covenant and the failure of the Owner to cure such breach within fifteen (15) days after receipt of written notice of such violation; provided, in the event of a second similar violation within a twenty-four (24) month period, Owner shall have only ten (10) days within which to cure any such subsequent violation.

(b) Transfer. Any Transfer in violation of the provisions of this Covenant.

(c) Notice. Failure of Owner to give notice required in Section 5 above.

(d) Breach of Section 7. If and when applicable, a breach of Section 7 hereof.

(e) Further Encumbrance. The recordation of any deed of trust (a "Further Encumbrance") securing a note having an original principal sum which, when added to the sum of the principal amount(s) of any notes secured by any deeds of trust against the Affordable Unit as of the date of recordation of the Further Encumbrance, exceeds the appraised value of the Affordable Unit.

(f) Default on Encumbrance. Recordation of a Notice of Default under the provisions of the California Civil Code by any lender having a security interest in an Affordable Unit.

(g) Failure to Maintain. The failure of Owner to maintain an Affordable Unit in good condition and repair throughout the Term.

(h) Other Breach. Any other breach by Owner of any provision of this Covenant, determined by the City in its reasonable discretion.

Notwithstanding the above, for the purpose of this Covenant, a default by any Owner of an Affordable Unit shall not constitute a default of any other Owner of an Affordable Unit and may not constitute a default of Buyer.

10. Remedies. Upon the occurrence of an Event of Default, the City shall have the following remedies:

(a) Specific Performance. The City shall have the right to bring an action for specific performance of this Covenant to require the Owner to comply with the terms and provisions of this Covenant. Buyer acknowledges that it is the intention of Owner/Buyer and the City that these provisions be specifically enforceable to maintain the supply of affordable housing for Eligible Persons and Families.

(b) Application to Court. The City may apply to a court of competent jurisdiction for an injunction prohibiting a proposed Transfer in violation of this Covenant, for a declaration that a Transfer is void or for any other such relief as may be appropriate.

(c) Right to Excess Proceeds. In the event the Event of Default is a Transfer in violation of Section 3 above then, in addition to any other remedy which the City may have, the City shall be entitled to receive a sum ("Excess Proceeds") equal to the amount the City would have received if the Transferee had complied with the terms of this Covenant. Any Excess Proceeds shall be due and payable by the Owner to the City at escrow closing, or transfer of possession if there is no escrow closing prior to transfer of possession with regard to the noncomplying Transfer. The payment of the Excess Proceeds to the City shall not terminate this Covenant, which shall continue through the Term hereof.

(d) All Remedies Available and Cumulative. Upon the occurrence of an Event of Default, the City shall have the right to exercise all the rights and remedies, and to maintain any action at law or suits in equity or other real property proceedings, to enforce the provisions of this Covenant and to cure any Event of Default or violation hereof. No delay in enforcing the provisions hereof as to any Event of Default or violation shall impair, damage or waive the right of the City to enforce the provisions of this Covenant in the future or any continuing or new breach or violation of any of the covenants or restrictions contained in this Covenant. All rights and remedies, including without limitation those set forth in subsections herein, of any party legally entitled to enforce this Covenant shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such right and remedy.

11. Restrictions on Condemnation, Insurance and Foreclosure Proceeds. In the event (i) of a judicial foreclosure, a trustee's deed upon a nonjudicial foreclosure, a deed in lieu of foreclosure or any other involuntary Transfer to the holder of a secured interest in an Affordable Unit, (collectively "Foreclosure"), (ii) an Affordable Unit is destroyed and insurance proceeds are to be distributed to Owner instead of being used to rebuild the Affordable Unit, (iii) of a condemnation or Transfer in lieu of condemnation, if the proceeds thereof are to be distributed to the Owner, or (iv) if the Affordable Unit is a condominium or townhouse unit, upon liquidation of the homeowner's association and distribution of the assets of the association to the members thereof, including Owner, to the extent that the proceeds of any event described above exceed the proceeds that otherwise would be payable to Owner in the event of a Transfer of the Affordable Unit in compliance with the terms of this Covenant, all such proceeds, in excess of those due to the Owner, shall be paid to the City when available to Owner.

12. No Discrimination. Owner covenants and agrees that with regard to each Affordable Unit there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code or on the basis of actual or perceived gender identity, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of any Affordable Unit, nor shall the Owner or any person claiming under or through Owner, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of purchasers and owners of any Affordable Unit.

13. Non-Discrimination Clauses. All deeds made relative to an Affordable Unit shall contain or be subject to substantially the following non-discrimination and non-segregation clauses:

(a) Deeds. In Deeds/Leases: "The Grantee/Lessee herein covenants by and for himself, his heirs, executors, administrators, and assigns, and all

persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code or on the basis of actual or perceived gender identity, in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the land herein conveyed, nor shall the Grantee/Lessee or any person claiming under or through Grant/Lessee, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the land herein conveyed. The foregoing covenants shall run with the land.”

The failure of any deed to contain this provision shall not affect the validity of the deed or lease.

14. Covenants Running with the Land. Buyer hereby subjects any Affordable Units subsequently developed on the Property to the covenants and restrictions set forth in this Covenant. Buyer hereby declares its express intent that the covenants and restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon all parties having any interest in the Affordable Units, as the case may be, throughout the Term. Each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring an Affordable Unit or any interest therein, as the case may be, (a “Contract”) shall conclusively be held to have been executed, delivered and accepted subject to this Covenant regardless of whether the other party or parties to such Contract have actual knowledge of this Covenant.

Buyer and City hereby declare their understanding and intent that: (i) the covenants and restrictions contained in this Covenant shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Owner; (ii) the burden of the covenants and restrictions set forth in this Covenant touch and concern the Affordable Units in that the Buyer’s legal interest in the Affordable Unit and all improvements thereon may be rendered less valuable thereby; and (iii) the benefit of the covenants and restrictions set forth in this Covenant touch and concern the land by enhancing and increasing the enjoyment and use of the Affordable Units by Eligible Persons or Families, the intended beneficiaries of such covenants and restrictions.

All covenants and restrictions contained herein without regard to technical classification or designation shall be binding upon Buyer and each Owner for the benefit of City and Eligible Persons and Families and such covenants and restrictions shall run in favor of such parties for the entire period during which such covenants and restrictions shall be in force and effect, without regard to whether City is an owner of any land or interest therein to which such covenants and restrictions relate.

15. Covenant to be Attached. Owner shall attach a copy of this Covenant to any purchase and sale contract (or lease, pursuant to Section 7 above) with respect to any Affordable Unit.

16. Successors, Assigns. The provisions contained in this Covenant shall bind Buyer and each Owner, and shall inure to the benefit of the City, which shall have the right to enforce this Covenant or any of the terms contained herein and which may perform any of the obligations contained herein to be performed by the City.

17. Lienor's Remedies. The provisions of this Covenant do not limit the right of any holder of an obligation which is secured by an Affordable Unit, as the case may be, to exercise any of its remedies for the enforcement of any pledge or lien; provided, however, except as may be required by Fannie Mae or other similar mortgage insurer or secondary purchaser, that in the event of any foreclosure, the purchaser (or other transferee) and their successors in interest and assigns and the Affordable Unit, shall continue to be subject to this Covenant.

18. Amendments. The City and its successors and assigns, and the Owner, shall have the right to consent and agree to changes in, or to eliminate in whole or in part, any of the provisions contained in this Covenant without the consent of any easement holder, licensee, mortgagee, trustee, beneficiary under a deed of trust or any other person or entity having any interest less than a fee in the Affordable Unit. This Covenant shall not be amended or modified except upon the written consent of City and Buyer and its successor or designee, and upon the recordation of an amendment hereto duly executed and acknowledged by the City and by Owner

19. Severability. If any provision of this Covenant, or the application thereof to any person, place, or circumstance, shall be held by a court of competent jurisdiction to be invalid, unenforceable, or void, the remainder of this Covenant and such provisions as applied to other persons, places, and circumstance shall remain in full force and effect.

20. Governing Law. This Covenant shall be governed by and construed in accordance with the law of the State of California, without regard to any choice of law principles.

21. Counterparts. This Covenant may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same agreement.

22. Rescission. Any rescission, partial or otherwise, of this Covenant to remove this Covenant of record against any or all of the Property may be executed by the City and shall be effective upon execution.

23. Distribution of For-Sale Units. The Affordable Units shall be distributed throughout the Project and not grouped or clustered or otherwise separated from other

non-Affordable Units during the entire term of this Covenant. Affordable Units shall be of comparable quality with similar amenities available to other non-Affordable Units in the Project excluding any upgrades paid separately for by the buyer of any unit. Owners of the Affordable Units shall have equal access and enjoyment to all common facilities of the project. No less than 60 days prior to initial marketing, Buyer shall submit for the City's approval an Affordable Unit Mix, which shows the spatial layout of Affordable Units and provides a percentage of unit types (i.e., combination of the number of bedrooms and bathrooms) for the Affordable Units that is commensurate to project's overall mix of unit types. The City-approved Affordable Unit Mix shall be documented in an Exhibit to the recorded Covenant..

**EXHIBIT A**

**MODERATE INCOME STANDARD:  
CALCULATION OF MAXIMUM SALES PRICE**

The following calculation is provided for illustration purposes only; the City of San José is solely responsible for providing Affordable Housing Cost and Allowable Sales Price determinations.

Illustration of the calculation of the maximum Sales Price for a Person or Family of Moderate Income\* to be paid by a **Purchaser** of the Affordable Unit, pursuant to the provisions of Health and Safety Code section 50052.5, subject to the definition of Affordable Housing Cost, as defined in the Covenant. The calculation in this Exhibit is based on the following definition of household size: the defined household size is equal to one person greater than the number of bedrooms in the unit.

Assumptions for calculating the maximum Sales Price:

1. Unit Size = \_\_\_\_\_
2. Family Size = \_\_\_\_\_
3. Interest Rate\*\* = \_\_\_\_\_
4. Property taxes and assessments (per month) = \_\_\_\_\_  
(based on actual tax rate with value based on the Market Price of unit)
5. Actual insurance premiums (per month) = \_\_\_\_\_  
(if not included in homeowner's association dues)
6. Property maintenance and repair (per month)\*\*\* = \_\_\_\_\_  
(if not included in homeowner's association dues)
7. Project's budgeted Homeowner's Association Dues = \_\_\_\_\_
8. Utility allowance (per month)\*\*\*\* = \_\_\_\_\_
9. Mortgage Insurance Premium, if any = \_\_\_\_\_

Pursuant to Health & Safety Code §50052.5, Affordable Housing Cost shall not be less than 28% of the Gross Income of the household nor exceed 35% of 110% Area Median. However, the calculation of Affordable Housing Cost shall be subject to how that term is defined in the Covenant.

\* Pursuant to 25 Cal. Code of Regulations §6932, the current maximum income level for a Person or Family of Moderate Income at 120% of the area median income published

by Santa Clara County with a family size of 4 for example is \$127,560.00, effective April 2015. The State of California periodically changes maximum income amounts, by household size, pursuant to said Code of regulations. The amount is likely to change in the future; and if so, the most current maximum income level issued by the State will be used for calculating the program's maximum income level at that time.

\*\* The interest rate shall be based on a 5% down, 30-year, fully amortizing fixed-rate mortgage that is widely available in the current owner-occupied mortgage market.

\*\*\* Amount is obtained from schedule of allowances provided by City.

\*\*\*\* Amount is obtained from the Housing Authority of the County of Santa Clara's most recent schedule of utility allowances that are appropriate for the specific development's characteristics.

**ILLUSTRATIVE CALCULATION OF MAXIMUM SALES PRICE**  
**MODERATE INCOME LEVEL:**

The following calculation is provided for illustration purposes only; the City of San José is solely responsible for providing Affordable Housing Cost and Allowable Sales Price determinations.

**I. Calculate monthly Affordable Housing Cost:**

|                                    |  |
|------------------------------------|--|
| 106,300.00                         | [100% of Area Median Income adjusted for family size (4 person household / 3 bedroom unit; 100% AMI = \$106,300)]  |
| <u>    X    .35</u><br>\$37,205.00 | [Affordable Housing Cost cannot exceed 35% times 100% of Area Median Income]   |
| <u>divided by 12</u><br>Cost]      | [To calculate the maximum <u>monthly</u> Affordable Housing Cost]  |
| \$3,100.42                         | [As this hypothetical illustrates, no Family of Moderate Income with a family size of 4 shall spend more than \$3,100.00 per month, as of the date hereof, on the sum of the items which make up the Affordable Housing Cost.] |

**II. Calculation of maximum amount to be spent on principal and interest of all mortgage loans and loan insurance fees, if any, plus other homeowner costs:**

|                 |  |
|-----------------|--|
| A.   \$   3,100 | [Maximum monthly Affordable Housing Cost] less:    |
| B.   [-]_____   | [Property taxes and assessments (per month)]       |
| C.   [-]_____   | [Insurance premiums (per month)]                   |
| D.   [-]_____   | [Utility allowance (per month)]                    |
| E.   [-]_____   | [Mortgage Insurance Premiums (per month)]          |
| F.   [-]_____   | [Property maintenance and repair (per month)]      |
| G.   [-]_____   | [Homeowner's Association dues (per month)] equals: |
| H.   _____      | Maximum Monthly Mortgage Payment                   |

**III. Calculation of Sales Price:** The Sales Price is calculated by adding the Maximum Mortgage Amount to the down payment. The Maximum Mortgage Amount

will be based on a fixed rate, 5% down, 30-year, fully amortizing, widely available owner-occupied loan, and the above calculated Maximum Monthly Mortgage Payment allowable. The calculation is as follows:

1. At a \_\_\_\_\_% interest rate, and a loan term of 30 years, the Maximum Monthly Mortgage Payment (H.) of \$\_\_\_\_\_ will allow a Maximum Mortgage Amount of \$\_\_\_\_\_.
2. The Maximum Mortgage Amount of \$\_\_\_\_\_ divided by .95 equals a Sales Price of \$\_\_\_\_\_. For purposes of calculating the Sales Price, the down payment shall be deemed to be 5%.

**(Note: The above steps require the use of a financial calculator.)**

FORM 1

NOTICE OF INTENT TO TRANSFER

From: \_\_\_\_\_ ("Owner")  
\_\_\_\_\_ ("Owner") (collectively, "Owner")

To: City of San José, Housing Department, Asset Management Team

Re: \_\_\_\_\_ (street address)  
San José, California 95\_\_\_\_\_, (the "Property")

Owner desires to [sell, convey, transfer by inheritance or devise, lease, gift, otherwise convey] (circle appropriate words) the Property. Owner understands that he/she must inform the City's Housing Department no less than 60 days prior to an impending sale, and pay the City the required Equity Share at the time of sale.

Owner desires to [check one]:

\_\_\_\_\_ attempt to locate an Eligible Person to purchase the Property at Affordable Housing Cost  
or

\_\_\_\_\_ attempt to locate a non-Eligible Person to purchase the Property and pay any required Equity Share to the City

If the Owner wants to find the Eligible Person, the Owner has ninety (90) days to find the Eligible Person and notify the City in writing (see Approval Request).

If the City has a program to help locate an Eligible Person, does the Owner want the City to help look for an Eligible Person to buy the Property?

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

\_\_\_\_\_  
Signature of Owner

\_\_\_\_\_  
Day time phone number of Owner

\_\_\_\_\_  
Signature of Owner

\_\_\_\_\_  
Day time phone number of Owner

Date: \_\_\_\_\_

FORM 2

APPROVAL REQUEST

\_\_\_\_\_, 20\_\_

San José Department of Housing

\_\_\_\_\_  
\_\_\_\_\_

Attention: Housing Director

Re: Request for Approval of Proposed Transferee

To Whom It May Concern:

The undersigned is/are the owner of real property in San José, located at \_\_\_\_\_  
(the "Property"), of which certain units were financed by the City of San José ("City")  
with 20%-Funds.

The Owner now desires to transfer the Property, or the Affordable Unit, as the  
case might be, and by this letter is requesting the City to approve the proposed  
transferee.

1. The Proposed Transferee is/are:

Names: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

Current Address: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

Telephone No.: (1) \_\_\_\_\_ (home/work)

(2) \_\_\_\_\_ (home/work)

(3) \_\_\_\_\_ (home/work)

2. The terms of the Proposed Transfer are:

(a) Sales price of \$\_\_\_\_\_. This sales price is based on the lesser of

Choose one:  
Either (i) Fair Market Value of:

\$\_\_\_\_\_

Or (ii) the maximum price at which the Housing Cost of the Proposed Transferee would not exceed Affordable Housing Cost. The calculation of the Sales Price under this subsection is illustrated in Exhibit B attached to the Use Restriction but is determined solely by the City of San José:

\$\_\_\_\_\_

Price of any personal property being sold by the owner to the Proposed Transferee (if none, so state):

\$\_\_\_\_\_

(b) Price to be paid by the Proposed Transferee for any services of Owner if none, so state):

\$\_\_\_\_\_

(c) All other amounts of money or other consideration, if any, concerning the Property or any other matter to be paid by the Proposed Transferee to the Owner (if none, so state):

\$\_\_\_\_\_

(d) Sources of payment of Sales Price:

Cash down payment \$\_\_\_\_\_

First (1<sup>st</sup>) loan \$\_\_\_\_\_

Second (2<sup>nd</sup>) loan \$\_\_\_\_\_

Other (describe): \_\_\_\_\_ \$\_\_\_\_\_

Total, Sales Price:

\$\_\_\_\_\_

(e) The financing, obtained by the Proposed Transferee to purchase the Property is as follows:

First (1<sup>st</sup>) Loan:

Loan amount: \$ \_\_\_\_\_

Monthly payments: \$ \_\_\_\_\_

Interest rate \_\_\_\_\_ %

If variable interest, describe adjustment mechanism: \_\_\_\_\_

Due date: \_\_\_\_\_

Balloon payment amount: \$ \_\_\_\_\_

Points and fees: \$ \_\_\_\_\_

Lender \_\_\_\_\_ (name):

Lender's \_\_\_\_\_ address:

Second (2<sup>nd</sup>) Loan:

Loan amount: \$ \_\_\_\_\_

Monthly payments: \$ \_\_\_\_\_

Interest rate \_\_\_\_\_ %

If variable interest, describe adjustment mechanism: \_\_\_\_\_

Due date: \_\_\_\_\_

Balloon payment amount: \$ \_\_\_\_\_

Points and fees: \$ \_\_\_\_\_

Lender (name): \_\_\_\_\_

Lender's address: \_\_\_\_\_

\_\_\_\_\_

Other Loans: (describe, if none, so state): \_\_\_\_\_

(f) The monthly Housing Cost to be paid by the Proposed Transferee:

First (1<sup>st</sup>) loan monthly payment \$ \_\_\_\_\_

Second (2<sup>nd</sup>) loan monthly payment \$ \_\_\_\_\_

Other loans, total monthly payment(s) \$ \_\_\_\_\_

Taxes (1/12 of yearly taxes): \$ \_\_\_\_\_

Utilities \$ \_\_\_\_\_

Maintenance (estimated monthly): \$ \_\_\_\_\_

Insurance (1/12 of yearly premium): \$ \_\_\_\_\_

Homeowner's dues (monthly): \$ \_\_\_\_\_

Total

\$ \_\_\_\_\_

3. The Proposed Transferee represents and warrants the following:

(a) The Property will be the principal residence of the proposed transferee, and the proposed transferee understands he/she is not allowed to rent the Property.

(b) The combined maximum annual income for all household members of the Proposed Transferee is: (1) \$ \_\_\_\_\_; (2) \$ \_\_\_\_\_; (3) \$ \_\_\_\_\_.

(c) The proposed transferee will deliver to the City a signed financial statement on a form acceptable to City.

4. The Proposed Transferee household consists of the following persons who will reside in the Property:

Adults (18 and over) - [name of each]

\_\_\_\_\_

\_\_\_\_\_

Minors (under 18) - [name of each]:

|       |       |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

5. The Proposed Transferee must submit to the City, on a form available from the City, an income certification so the City may determine if the proposed transferee is an Eligible Person.

6. A true and correct copy of the agreement between the owner and the Proposed Transferee is attached hereto.

7. The Owner and Proposed Transferee each hereby certify that the Transfer shall be closed in accordance with and only with the terms of the sales contract and other documents submitted to and approved by the City and that all consideration delivered by the Proposed Transferee to Owner has been fully disclosed to the City.

8. The Owner and Proposed Transferee each hereby also certify that in the event a Transfer is made in violation of the terms of this Covenant or false or misleading statements are made in any documents or certificate submitted to the City for its approval of the Transfer, the City or Developer shall have the right to file an action at law or in equity to make the parties terminate and/or rescind the sale contract and/or declare the sale void notwithstanding the fact that the Transfer may have closed and become final as between Owner/Seller and his/her transferee. In any such event, any costs, liabilities or obligations incurred by the Owner/Seller and his/her transferee for the return of any monies paid or received in violation of this Covenant or for any costs and legal expenses, shall be borne by the Owner/Seller and/or his/her transferee and the Owner/Seller shall hold the city and/or Developer and its designees harmless and reimburse their expenses, legal fees and costs for any action they reasonably take in good faith in enforcing the terms of this Covenant.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Owner:

\_\_\_\_\_  
signature

\_\_\_\_\_  
name [print]

\_\_\_\_\_  
telephone

Date: \_\_\_\_\_

Proposed Transferee(s):

\_\_\_\_\_  
signature

\_\_\_\_\_  
name [print]

\_\_\_\_\_  
telephone

Date: \_\_\_\_\_

\_\_\_\_\_  
signature

\_\_\_\_\_  
name [print]

\_\_\_\_\_  
street address

\_\_\_\_\_  
City, State, Zip Code

\_\_\_\_\_  
signature

\_\_\_\_\_  
name [print]

\_\_\_\_\_  
street address

\_\_\_\_\_  
City, State, Zip Code

Form 3

WHEN RECORDED RETURN TO:

**ASSUMPTION AGREEMENT**

This Assumption Agreement is entered into by:

The City of San José ("City") and

\_\_\_\_\_ ("Seller")

\_\_\_\_\_ ("Buyer")

Date of Agreement: \_\_\_\_\_

**FACTS**

- A. Seller is the owner of property commonly known as \_\_\_\_\_, San José, California (the "Property").
- B. The Property is subject to recorded Affordability Restrictions which restricts the purchase price that can be charged for the Property and the persons to whom the Property can be sold (the "Covenant").
- C. Buyer desires to purchase the Property. Buyer understands that the Covenant will limit the purchase price they can receive when they sell the Property and will limit the people to whom they can sell the Property.
- D. Buyer is able to purchase the Property because the purchase price of the Property is less than other similar property without restrictions. For this reason Buyer desires to purchase the Property.
- E. In order to purchase the Property, Buyer must assume all obligations of Seller under the Covenant and must agree to be bound by all the provisions in the Covenant.

NOW, THEREFORE, Buyer agrees as follows:

1. Acknowledgment of Limitation on Future Sales Price. BUYER UNDERSTANDS THAT WHEN BUYER DESIRES TO SELL OR TRANSFER THE PROPERTY THAT THE SALES PRICE CAN BE DETERMINED ONLY AT THE TIME OF THE PROPOSED TRANSFER TAKING INTO CONSIDERATION INTEREST RATES, PROPERTY TAXES AND OTHER FACTS THAT CANNOT BE PREDICTED ACCURATELY AND THAT THE SALES PRICE MAY NOT INCREASE OR DECREASE IN THE SAME MANNER AS OTHER SIMILAR PROPERTY THAT IS NOT ENCUMBERED WITH THE RESTRICTION. BUYER ALSO ACKNOWLEDGES THAT AT ALL TIMES IN SETTING THE SALE PRICE THE PRIMARY OBJECTIVE OF THE CITY AND THE RESTRICTION IS TO PROVIDE HOUSING TO ELIGIBLE PERSONS OR FAMILIES AT AFFORDABLE HOUSING COST. THE SALES PRICE, WHEN BUYER DECIDES TO SELL THE PROPERTY, ALMOST CERTAINLY WILL BE LESS THAN OTHER SIMILAR PROPERTIES WHICH HAVE NO RESTRICTION.

2. Understand Covenant. Buyer represents that they have read the Covenant and fully understand the Covenant.

3. Owner Occupancy. Buyer agrees that they will occupy the Property as their primary residence and that they will comply with all provisions of the Covenant relating to occupancy of the Property.

4. Assumption of Obligations Under Covenant. As a material consideration to the City in approving Buyer, Buyer hereby assumes all obligations of Seller, as they relate to the Property, under the Covenant. Buyer agrees to be bound by all duties and obligations of Seller in the Covenant and agrees to comply with all provisions thereof for the term of the Covenant. Buyer agrees, as set forth above, in order to take advantage of the purchase price for which the Property is offered.

IN WITNESS WHEREOF, the parties have executed this Assumption Agreement to be effective on the date of recordation of a deed conveying the Property to Buyer.

\_\_\_\_\_  
Date: Buyer

\_\_\_\_\_  
Date: Buyer

Based on information provided by Seller and Buyer and on Buyer's execution hereof, the City of San José hereby approves Buyer to purchase the Property.

City of San José  
Housing Department

Date: \_\_\_\_\_

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

**EXHIBIT D**

**AFFORDABILITY COVENANT**

**(FOR-RENT AFFORDABLE UNITS)**

**AFFORDABILITY COVENANT  
IMPLEMENTING CITY COUNCIL RESOLUTION NO. 77725  
(PROCEDURE FOR THE DISPOSITION OF SURPLUS CITY-OWNED PROPERTY)**

The following covenants and restrictions contained in this Affordability Covenant ("Covenant") apply to "For-Rent Affordable Units," as noted in Paragraph 1(a)(ii) above.

**1. Affordability Restrictions.**

(a) Covenant for Affordable Housing Cost. For a period commencing upon the later of the recordation of the Notice of Completion for the Affordable Units or the occupation of the first Affordable Unit, **15% of the constructed units** shall be rented or otherwise made available ongoing at or below an Affordable Housing Cost to **Low Income Households** ("Affordable Unit(s)"). A person or family shall be determined to be eligible (an "Eligible Household") to rent an Affordable Unit (i) if the Affordable Unit is made available to such person or family at Affordable Housing Cost based on the maximum income level for a Low Income Household as applicable for that Affordable Unit, as adjusted for family size in accordance with the procedures set forth below, as shown in the table contained in 25 Cal. Code Reg. 6932, as amended from time to time, and (ii) such person or family is Low Income Household as required for that Affordable Unit. In adjusting for family size to determine the maximum income level on which to base the calculation of Affordable Housing Cost, the number of bedrooms in each Affordable Unit: studio - one person, one bedroom - two persons, two bedrooms - three persons, three bedrooms - four persons, and four bedrooms - five persons or as otherwise consistent with Health and Safety Code Sections 50052.5 and 50053. **EXHIBIT A** attached hereto and incorporated herein by this reference contains illustrations of the calculation of Affordable Housing Cost for a rental unit for Low Income Households. Buyer shall prohibit any person or family who has not been determined to be Eligible at the time of taking possession of an Affordable Unit from renting or occupying any Affordable Unit and shall cause any such person or family to vacate any Affordable Unit so rented or occupied.

(b) Recertification of Income; Continued Availability at Restricted Level. On an annual basis, Buyer shall submit a report (the "Annual Report") recertifying income and providing year-end rent rolls for the Affordable Units to the City in the City's requested format unless otherwise agreed to in advance by the City prior to

May 1<sup>st</sup> beginning the first year after the building containing dwelling unit receives a certificate of occupancy, which contains, with respect to each Affordable Unit, the rental rate and income and family size of the occupant. The Annual Report shall be based on information supplied by the tenant or occupant of each Affordable Unit in a certified statement on a form provided or previously approved by the City.

(c) Redesignation of Affordable Units. If, at the time of recertification of an Eligible Household's income exceeds the upper limit for Persons and Families of Low Income as calculated for the specific Affordable Units then, at such time as Buyer becomes aware of such occurrence, the Buyer may increase the rent to market rates payable by such tenant, provided that within thirty (30) days of such rent increase, Buyer designates that unit within the project as an Affordable Unit and rents such unit to an Eligible Household.

(d) Definition of Vacate. For the purposes of this Covenant, "vacate" shall include, without limitation, departure from an Affordable Unit at the termination (whether at the end of a term or upon default) of the lease pursuant to which the Affordable Unit was occupied ("Lease"), abandonment of the Affordable Unit, sublease or assignment of an Affordable Unit (whether or not such sublease or assignment complied with the terms and conditions of the Lease).

**2. Definitions.** The definitions of Area Median Income, Lower (or Low) Income Household shall have the definitions given these terms in Health and Safety Code Sections 50052.5, 50053, 50079.5, 50105, 50106 and 50093, as amended from time to time. For the purpose of this Agreement, "Affordable Housing Costs" shall mean "affordable rent" as defined in Health and Safety Code Section 50053, as amended from time to time.

**3. Default and Remedies.**

(a) Covenants Running With The Land. The Buyer hereby subjects the Property and the Units to the covenants and restrictions set forth in this Covenant. Buyer hereby declares its express intent that the covenants and restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon the Buyer's successors in interest; provided, however, that on the termination of this Covenant, said covenants and restrictions shall expire. Except as provided in any subordination agreement or other written agreement executed by City, each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a "Contract") shall conclusively be held to have been executed, delivered and accepted subject to this Covenant regardless of whether the terms of this Covenant are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Covenant.

Buyer and the City hereby declare their understanding and intent that:

(i) the covenants and restrictions contained in this Covenant shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Buyer; and

(ii) the burden of the covenants and restrictions set forth in this Covenant touch and concern the Property in that the Buyer's legal interest in the Property and all improvements thereon is rendered less valuable thereby; and

(iii) the benefit of the covenants and restrictions set forth in this Covenant touch and concern the land by enhancing and increasing the enjoyment and use of the Property and Units by Extremely Low, Very Low, and Low Income Households, the intended beneficiaries of such covenants and restrictions.

All covenants and restrictions contained herein without regard to technical classification or designation shall be binding upon Buyer and its successors in interest for the benefit of the City, Buyer, Extremely Low Income Households, Very Low Income Households, and Low Income Households, and such covenants and restrictions shall run in favor of such parties for the entire period during which such covenants and restrictions shall be in force and effect, without regard to whether the City or Buyer is an owner of any land or interest therein to which such covenant and restrictions relate.

(b) Non-Complying Units. In addition to and without limitation of any other rights and remedies set forth in this Covenant or otherwise available to any party legally entitled to enforce this Covenant, in the event of any Default (as defined in Section 3(d) below), after thirty (30) day notice by City to Buyer, City shall have the right to lease and Buyer shall lease to City on demand or City for a rental of \$1.00 per Affordable Unit per year any and all of the "Non-Complying Units" (as defined below) at such time as the Non-Complying Affordable Unit(s) is vacated. "Non-Complying Units" shall mean an Affordable Unit, which is occupied and/or leased in violation of Section 1 of this Covenant. Determination of such a violation may be based on information provided in the Annual Report or determined by City in its reasonable discretion based on information otherwise available to it. Notwithstanding any term or condition of the lease under which the City leases a Non-Complying Affordable Unit pursuant to this subsection 3(b), Buyer hereby consents to and grants City the right to assign such lease or sublet such Affordable Unit(s) to Very Low Income Households, as appropriate, at Affordable Housing Cost or to any non-profit housing provider (a "Provider") in the community for \$1.00 per year on the condition that such Provider subleases such Affordable Unit(s) or assigns such lease(s) to Extremely Low Income Households, Very Low Income Households, and Low Income Households at Affordable Housing Cost. If the City assigns or sublets to any Provider, notwithstanding any term or condition of the lease between the Borrower and the City, the Buyer hereby consents to and grants such Provider the right to assign such lease or sublet such Affordable Unit to any Eligible Person at an Affordable Housing Cost. If the City leases any Affordable Unit(s) or a Provider subleases any Affordable Unit(s) or is the assignee of any lease(s) from

the City, the City, or Provider, as the case may be, to the extent necessary to ensure compliance with Section 1 hereof, shall sublease such Affordable Unit(s) or assign such lease(s) to any Eligible Person at Affordable Housing Cost. Any rent paid under such a sublease or assignment shall be paid to the Buyer after the City or Provider, as the case may be, has been reimbursed for any expenses incurred by it in connection with exercising the rights and remedies set forth in this subsection 3(b); provided, that if the Buyer is in default under any loan documents in connection with the financing of the Property or any improvements thereon, such rent shall be paid to the party legally entitled thereto.

(c) Excess Rent. In the event that and to the extent that the Buyer receives rents or other payments from the operation of the Units or other improvements constructed on the Property in excess of what is permitted to charge and receive pursuant to this Covenant, after thirty (30) day notice by City to Buyer, Buyer agrees and covenants to pay to the City the full amount of such excess immediately on demand by the City. Buyer and the City agree and intend that the payment of such excess, absent other remedies described in this Covenant to ensure for the term hereof that rents or other payments do not exceed those Buyer is permitted to charge and receive pursuant to this Covenant, shall not alone be an adequate remedy to accomplish the purposes of this Covenant.

(d) All Remedies Available and Cumulative. In the event of any breach of any of the covenants or restrictions set forth herein (a "Default"), the City or members of the community (as defined in the Health and Safety Code) shall have the right to exercise all the rights and remedies, and to maintain any action at law or suits in equity or other real property proceedings, including without limitation, specific performance, to enforce the covenants and restrictions and the curing of any breach or violation thereof. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof in the future for any continuing or new breach or violation of any of the covenants or restrictions contained in this Covenant. All rights and remedies, including without limitation those set forth in paragraphs 3(a) through (c) above, of any party legally entitled to enforce this Covenant shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such rights and remedies.

**4. Reporting.** In addition to the Annual Report, Buyer shall provide all information reasonably requested by the City with respect to the number of Units in the Property and the income levels of the persons or families renting or otherwise occupying the Units.

**5. Covenant to be Attached.** Buyer shall attach a copy of this Covenant to any lease or purchase and sale contract with respect to any Affordable Unit.

6. **Successors, Assigns.** The provisions contained in this Covenant shall bind Buyer, its successors in interest and assigns and shall inure to the benefit of the City and members of the community.

7. **Lienor's Remedies.** The provisions of this Covenant do not limit the right of any obligee to exercise any of its remedies for the enforcement of any pledge or lien upon the Property; provided, however, that in the event of any foreclosure, under any mortgage, deed of trust or other lien or encumbrance, or a sale pursuant to any power of sale included in any such mortgage or deed of trust, or in the case of a deed in lieu of foreclosure, the purchaser (or other transferee) and their successors in interest and assigns and the Property shall be, and shall continue to be, subject to all of the covenants and restrictions set forth in this Covenant, subject to the terms of any subordination agreement or other written agreement executed by City.

8. **Amendments.** The City and their successors and assigns, on the one hand, and the Buyer and its successors in interest and assigns, on the other, shall have the right to consent and agree to changes in, or to eliminate in whole or in part, any of the covenants or restrictions contained in this Covenant without the consent of any tenant, lessee, easement holder, licensee, mortgagee, trustee, beneficiary under a deed of trust or any other person or entity having any interest less than a fee in the Property. This Covenant shall not be amended, modified or terminated except upon the written consent of the City and upon the recordation of an amendment hereto duly executed and acknowledged by Buyer.

9. **Severability.** If any provision of this Covenant, or the application thereof to any person, place, or circumstance, shall be held by a court of competent jurisdiction to be invalid, unenforceable, or void, the remainder of this Covenant and such provisions as applied to other persons, places, and circumstances shall remain in full force and effect.

10. **No Discrimination.** Buyer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

11. **Notices.** All notices, demands, and other communications required or permitted hereunder shall be made in writing and shall be deemed to have been duly given and received when delivered by hand or, if mailed, three (3) business days after

deposit in the mail, postage prepaid, certified or registered mail, return receipt requested, and addressed to City at:

City of San José  
Housing Department  
200 East Santa Clara Street, 12<sup>th</sup> Floor Tower  
San José, California 95113-1905  
Attn: Asset Management

**12. Governing Law.** This Covenant shall be governed by and construed in accordance with the law of the State of California.

**13. Distribution of Rental Units.** The Affordable Units required under this Covenant shall be distributed, to the extent possible, throughout the project and not grouped or clustered or otherwise separated from other non-Affordable Units during the entire term of this Covenant. Affordable Units may float within the project and the Buyer shall indicate in its Annual Report, which units are the Affordable Units. Buyer shall require that the Affordable Units be of comparable quality with similar amenities available to other non-Affordable Units in the project. Renters of the Affordable Units shall have equal access and enjoyment to all common facilities of the project. No less than 60 days prior to initial marketing, Buyer shall submit for the City's approval an Affordable Unit Mix, which shall provide a percentage of unit types (i.e., combination of the number of bedrooms and bathrooms) for the Affordable Units that is commensurate to the project's overall mix of unit types.

**14. Right to Inspect.** The City shall have the right, upon reasonable notice to Buyer or the property manager for the project, to inspect the Affordable Units and non-Affordable Units to determine compliance with the terms of this Covenant.

**15. Notice of Vacancies.** Buyer agrees that all impending vacancies for Affordable Units will be posted within ten (10) days of notice to Buyer of such impending vacancy on [www.scchousingsearch.org](http://www.scchousingsearch.org) or such other website as may be requested by City. Additionally, Buyer will post any opening of closed waitlists for the Project, opening of new waitlists, or closing of open waitlists must be posted at least ten (10) days prior to the opening or closing of the waitlist.

**16. Notice of Change of Owner or Property Manager.** Buyer shall notify the City Housing Department within thirty (30) days after a transfer or change in ownership of the project or after a change in the property manager for the project, and shall provide updated contact information.

## EXHIBIT A

The following hypothetical illustrates the calculation of Affordable Housing Cost for Low Income Households who are renting a two-bedroom unit with an assumed family size of 3 persons in Santa Clara County.

### Assumptions.

1. Affordable Unit to be made available to Low Income Households with incomes not exceeding 80% AMI. Person or Family need not have the maximum income for a Person or Family in the income category (adjusted for family size).
2. Family Size = 3 Persons (for purposes of this example)
3. Electricity charges are separately metered and directly billed to the tenants by PG&E. A reasonable allowance for such charges based on the Utility Allowance Schedule published by the County of Santa Clara Housing Authority at [www.hacsc.org](http://www.hacsc.org) ("Allowance") is deducted.

As of April 2016, per 25 CCR Section 6932, the maximum income level for a Low Income Household (80% of AMI) with a family size of 3 in Santa Clara County is \$76,400.00.

Pursuant to 25 CCR Section 6918 rent for the purposes of this Exhibit ("Rent") includes, among other things, payment for use or occupancy of a housing unit and charges or fees charged or passed through by the landlord other than security deposits. The Utility Allowance for an Affordable Unit is based on a tenant paying for gas and/or electricity for cooking, apartment space heat and lights (if additional utilities are paid for by tenant, then the Utility Allowance should be adjusted accordingly). Pursuant to Section 50053 of the Health and Safety Code, the Rent paid by a Low Income Household shall not exceed 30% of 80% of the area median income adjusted for family size.

### CALCULATION OF RENT CHARGEABLE:

|                    |   |
|--------------------|---|
| \$76,400.00        | [80% of the area median income adjusted for family size (3 persons)]  |
| X <u>      .30</u> | [Annual rent cannot exceed 30% of 80% of area median income]  |
| \$22,920.00        |   |
| ÷ <u>      12</u>  | [maximum <u>annual</u> rent divided by 12 to calculate the maximum <u>monthly</u> Rent]                                 |
| \$ 1,910.00        |   |
| <u>-\$ 51.00</u>   | [less an assumed monthly utility allowance for the specific unit; here, a gas heater and electric 2-bedroom apartment.] |
| \$ 1,859.00        | [equals Maximum Rent after reasonable allowance for utilities]  |

As this hypothetical illustrates, as of December 2013, no Low Income Household at 80% AMI with a family size of 3 that pays its own electric and gas bill should be charged or pay Rent in excess of \$1,910.00 per month less the approved utility allowance, for a maximum tenant-paid rent of \$1,859.00; this amount may be adjusted as the CCR Sections above are amended or the utility allowance amount is adjusted.

# EXHIBIT L

## Bill of Sale

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned, THE CITY OF SAN JOSE, a California charter city ("**Seller**"), does hereby give, grant, bargain, sell, transfer, assign, convey and deliver to \_\_\_\_\_ ("**Buyer**"), pursuant to that certain Agreement for Purchase and Sale of Real Property dated as of December , 2017, between Seller and Buyer (the "**Purchase Agreement**"), all Seller's right, title and interest in, to and under the personal property identified and described on Schedule A attached hereto and made a part hereof together with all other Personal Property (as defined in the Purchase Agreement) to be transferred to Buyer as provided in the Purchase Agreement. Seller makes no representations or warranties of any kind with respect to the assets transferred hereunder, it being understood that Buyer takes the same on an "as is, where is" basis.

All references to "Seller" and "Buyer" herein shall be deemed to include their respective heirs, representatives, nominees, successors and/or assigns, where the context permits.

Dated: \_\_\_\_\_, 20\_\_.

**THE CITY OF SAN JOSE,**  
a California charter city

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

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Schedule A

(List of personal property to be inserted)

# EXHIBIT M

Exhibit M: Estoppel Certificate (Hotel Manager)

To be determined

# EXHIBIT N

Exhibit N: Assignment of Hotel Retail Tenant Agreements

To be determined

# EXHIBIT O

**ASSIGNMENT AGREEMENT  
OF WARRANTIES AND GURARANTEES  
RELATING TO THE SALE OF THE HAYES MANSION PROPERTY ASSETS**

THIS ASSIGNMENT AGREEMENT OF WARRANTIES AND GURARANTEES RELATING TO THE SALE OF THE HAYES MANSION PROPERTY ASSETS (the "Assignment Agreement") is made and entered into as of \_\_\_\_\_, 2017, by and between **CITY OF SAN JOSE, CALIFORNIA**, a California charter city (the "City") and \_\_\_\_\_ (the "Transferee").

RECITALS

WHEREAS, City entered into a Management Agreement dated December 2, 2003 with Dolce International/San Jose, Inc. a Delaware corporation (the "Agreement") to operate the Hayes Mansion property located at 200 Edenvale Ave., San Jose, California ("Property"); and

WHEREAS, the City has warranties and guarantees for certain assets and other items of the Hayes Mansion as more specifically listed in Exhibit A attached hereto ("Warranties and Guarantees");

WHEREAS, City has agreed to sell the Property to Transferee, and City and Transferee desire to assign the Warranties and Guarantees to Transferee; and

WHEREAS, in order to evidence the undertaking of, agreement to, and assignment to the Transferee of the Warranties and Guarantees and all the rights, duties and obligations of the City under the Warranties and Guarantees, the City and the Transferee have agreed to enter into this Assignment Agreement;

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Transferee, and the City agree as follows:

**SECTION 1 ASSIGNMENT**. Effective as of the Closing Date for the sale of the Property as such term is defined in the Purchase and Sale Agreement between City and Transferee dated \_\_\_\_\_, 2017 (the "Effective Date"), the City hereby fully and unconditionally assigns from and after the Effective Date to the Transferee all of its obligations, right, title and interest in and under the Warranties and Guarantees.

**SECTION 2 MISCELLANEOUS**.

A. Governing Law. This Assignment Agreement and all related documents shall be deemed to be contracts made and delivered in the State of California and shall be governed by and construed in accordance with the laws of the State of California.

B. Execution in Counterparts. This Assignment Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

C. No Further Modifications. All terms and conditions of the City Documents not expressly modified by this Assignment Agreement are expressly reaffirmed as if set forth in their entirety herein and shall remain unaffected, unchanged and unimpaired by reason of this Assignment Agreement.

D. Construction. This Assignment Agreement shall be interpreted and construed only by the contents hereof, and there shall be no presumption or standard of construction in favor of or against either party.

WHEREAS, the parties have executed this Assignment Agreement on the date first written above.

**CITY:**

City of San José, a California charter city

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**TRANSFeree:**

\_\_\_\_\_

EXHIBIT A  
Assets with Warranties and Guarantees

# EXHIBIT P

**Non-Foreign Affidavit**

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by THE CITY OF SAN JOSE, a California charter city ("**Seller**"), the undersigned hereby certifies the following on behalf of Seller:

- 1. Seller is not a foreign corporation, foreign partnership, foreign limited liability company, foreign trust or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
- 2. Seller is not a disregarded entity as defined in § 1.1445-2(b)(2)(iii) of the Income Tax Regulations.
- 3. Seller's U. S. employer identification number is \_\_\_\_\_; and
- 4. Seller's office address is: City of San Jose  
Attention: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Seller understands that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalty of perjury I declare that I have examined this certificate and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of Seller.

Dated: \_\_\_\_\_, 20\_\_\_\_

**THE CITY OF SAN JOSE**, a California charter city

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

# EXHIBIT Q

**CLOSING STATEMENT  
OF REPRESENTATIONS AND WARRANTIES**

THIS STATEMENT OF REPRESENTATIONS AND WARRANTIES is given pursuant to that Certain Purchase and Sale Agreement, dated \_\_\_\_\_, 2017, by and between **CITY OF SAN JOSE, CALIFORNIA**, a California charter city ("Seller") and \_\_\_\_\_ ("Purchaser").

Seller hereby certifies to Purchaser that each representation and warranty made by Seller in the Agreement is true and correct in all material aspects as of this \_\_\_\_\_ day of \_\_\_\_\_.

Purchaser hereby certifies to Seller that each representation and warranty made by Purchaser in the Agreement is true and correct in all material aspects as of this \_\_\_\_\_ day of \_\_\_\_\_.

**SELLER:**

City of San José, a California charter city

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**PURCHASER:**

\_\_\_\_\_

# EXHIBIT R

Exhibit R: Incumbency Certificate from Seller

To be determined

# EXHIBIT S

Exhibit S: Assignment and Assumption Agreement of Union Agreement

To be determined

# EXHIBIT T

Exhibit T: Estoppel Certificate (Union)

To be determined

# EXHIBIT U

Exhibit U: Parking Agreement

To be determined

# EXHIBIT V

Exhibit V: Purchaser's Closing Certificate

To be determined

# EXHIBIT W

Exhibit W: Copies of Letters Advising Tenants

To be determined