

**LATERAL TIE-BACK AGREEMENT
AND CONSENT TO USE OF CRANES**

THIS LATERAL TIE-BACK AGREEMENT AND CONSENT TO USE OF CRANES (this “Agreement”) is made as of _____, 2019 (the “Effective Date”) by and between ICS CORPORATE YARD MULTIFAMILY, LLC, a Delaware limited liability company (“Developer”), and the CITY OF SAN JOSE, a municipal corporation of the State of California (“Owner”).

RECITALS

- A. Owner is the fee owner of certain real property located at 685 North 7th Street in the City of San Jose, County of Santa Clara, State of California, as more particularly described on Exhibit A attached hereto (the “Owner Property”). The Owner Property is currently vacant.
- B. Developer is the fee owner of certain real property located at 688 North 6th Street in the City of San Jose that is adjacent to and north of the Owner Property (the “Developer North Property”) as well as certain other real property located at 620 North 6th Street in the City of San Jose that is adjacent to and south of the Owner Property (the “Developer South Property”), each as more particularly described on Exhibit B attached hereto. The Developer North Property and the Developer South Property are referred to herein collectively as the “Developer Property.” Developer intends to develop a mixed use residential project on the Developer Property (the “Project”).
- C. The Owner Property and the Developer North Property share a common property line on the northwestern boundary of the Owner Property and on the southeastern boundary of the Developer North Property (the “Common North Boundary”). The Owner Property and the Developer South Property share a common property line on the southeastern boundary of the Owner Property and on the northwestern boundary of the Developer South Property (the “Common South Boundary”). The Common North Boundary and the Common South Boundary are referred to herein collectively as the “Common Boundary.”
- D. In connection with the development of the Project, the Developer intends to use a shoring system for its excavation that utilizes below-grade anchors (“Tie-Back Anchors”). The Tie-Back Anchors will be situated along the Common Boundary and will encroach into the subterranean portions of the Owner Property. The Tie-Back Anchors will be placed in the approximate locations shown on Exhibit C attached hereto. The drilling, installation, and other work related to the Tie-Back Anchors, as consented to by Owner pursuant to this Agreement, are collectively referred to as the “Subsurface Work.”
- E. In connection with the Subsurface Work and the construction of the Project, Developer intends to operate construction cranes on the Developer Property that will pass through the airspace above the Owner Property; provided, however, no materials or “loads” will ever be carried over or across the airspace directly above the Owner Property.

- F. Developer has requested that Owner grant certain easements and encroachments to Developer as provided herein and give its consent to the use of the Cranes (as defined below) in the airspace above the Owner Property and the rights of ingress and egress onto the Owner Property as may be reasonably necessary to perform the Subsurface Work.

NOW, THEREFORE, in consideration of the covenants, conditions and agreements contained herein and for other good and valuable consideration, the receipt and adequacy of which are acknowledged, the parties agree as follows:

1. Owner's Consent and Grant.

1.1 Grant of Subsurface Easement and Consent to Encroachment. Subject to Developer or its successors and assigns' faithful compliance, fulfillment and performance of each of the covenants and conditions in this Agreement, as applicable, Owner hereby grants to Developer and its contractors and subcontractors, and to Developer's successors and assigns that are expressly permitted pursuant to this Agreement, (i) an easement and right to encroach upon the subsurface areas of the Owner Property for the purpose of installing and maintaining the Tie-Back Anchors on those subterranean portions of the Owner Property that are along the Common Boundary to support the temporary shoring of soil and surface materials during the construction of the Project, and (ii) the right of ingress and egress by Developer and its contractors and consultants onto the Owner Property, upon prior notice in accordance with Section 3.3.3 below, at reasonable times to perform the Subsurface Work, provided such ingress and egress does not unreasonably disturb the use and enjoyment of the Owner Property by Owner and/or Owner's tenants. Owner understands and agrees that the Tie-Back Anchors that are installed by Developer on the subterranean portions of the Owner Property pursuant to this Agreement will be left in place in accordance with standard industry practice. Notwithstanding anything to the contrary contained herein, following completion of the Project, Owner shall have the right to remove or alter any Tie-Back Anchors that have been left on the Owner Property.

1.2 Consent to Building Cranes. Subject to Developer or its successors and assigns' compliance, fulfillment and performance of each of the covenants and conditions contained in this Agreement, as applicable, Owner hereby consents to the use and operation through the airspace above the Owner Property of the booms and/or counterweights of one or more cranes placed on the Developer Property by Developer (the "Cranes") in connection with the construction of the Project; provided that Developer does the following: (1) the Cranes are only used by Developer in a manner which does not unreasonably interfere with Owner's use and enjoyment of the Owner Property, (2) no materials or "loads" shall ever be carried or transported above, over or across the Owner Property at any time; and (3) Developer shall cause the Cranes to be operated in compliance with all governmental requirements and applicable laws. Moreover, Developer shall be responsible for and liable to Owner for any damages or injury to persons or property as a result of Developer's operation of the Cranes, and shall immediately cause the repair of such damage or injury to begin promptly and/or to promptly indemnify Owner for any damage to the Owner Property caused by, arising out of, or resulting from, the operation of its Crane.

1.3 Termination. The grant of the easements and encroachment provided in Section 1.1 above and the consent to the use of the Cranes as provided in Section 1.2 above will terminate upon the earlier of (A) three years after the Effective Date, or (B) the completion of the Project (the "Completion Date"). Notwithstanding anything to the contrary contained in this Agreement, Developer's rights under Sections 1.1 and 1.2 of this Agreement shall automatically terminate if Developer breaches any material term, covenant or condition set forth in this Agreement and fails to cure such breach within thirty (30) days of receipt of written notice of such breach from Owner to Developer.

2. Compensation. As compensation for the rights granted herein, Developer shall pay to Owner a fee in the amount of Fifty Thousand Dollars (\$50,000). The payment shall be delivered to Owner by certified check or other method agreed to by Owner together with a copy of this Agreement executed by Developer.

3. Developer Covenants.

3.1 Approval of Plans.

3.1.1 Prior to the commencement of the Subsurface Work, Developer shall submit the plans and schedule for such Subsurface Work (the "Plans") to the Owner and obtain the Owner's written approval of the Plans (to be given within ten (10) days of submission); provided, however, Owner may only disapprove plans submitted or resubmitted for its approval if, in its reasonable judgment, the improvements and work contemplated in the plans would negatively affect the lateral support or use of the Owner Property. Any disapproval of submitted or resubmitted Plans shall include a detailed explanation of the reason for disapproval and the steps necessary to obtain approval.

3.1.2 Owner shall not, when reviewing submitted or resubmitted Plans in its proprietary capacity as fee owner of the Owner Property, be responsible for reviewing, nor shall its approval of any Plans be deemed an approval of, structural safety, architectural or engineering design or conformance with the building or other codes.

3.1.3 Developer acknowledges that, as a municipality, Owner has certain governmental regulatory authority over both Owner Property and Developer Property. Developer agrees and expressly acknowledges that any approval or consent required or permitted hereunder by the City of San José, acting in its capacity as the Owner under this Agreement: (1) is distinct from any approval or consent of such entity acting in the capacity of governmental regulatory authority, whether or not related to the same matter, and (2) shall not compromise, diminish or in any way limit the authority of such entity to give, deny or condition its approval or consent when acting as a governmental regulatory authority.

3.2 Inspection of Existing Condition; Repair.

- 3.2.1 Prior to commencement of the Subsurface Work, Developer shall perform a visual pre-construction survey of the Owner Property, including collecting photographic evidence of the condition of the Owner Property, and shall provide copies of such photographs and other evidence to Owner.
- 3.2.2 Immediately after completion of the Project, Developer shall perform an inspection of the Owner Property for damage and shall repair and/or restore any damage to the Owner Property caused by the Subsurface Work. Developer shall also promptly repair and/or restore any damage caused as a result of the operation of the Cranes.

3.3 Covenants re: Installation and Construction and Access to the Owner Property.

- 3.3.1 Developer shall cause the Subsurface Work to be performed in accordance with the Owner approved Plans and all applicable laws. Developer shall only place the Tie-Back Anchors in substantially the locations shown on Exhibit C hereto.
- 3.3.2 The drilling and installation of the Tie- Back Anchors shall be performed only from the Developer Property. Developer shall not enter the Owner Property for the purpose of installing the Tie-Back Anchors.
- 3.3.3 No less than five (5) business days prior to Developer's first entry onto the Owner Property to perform any pre-construction work or evaluation on the Owner Property, and no less than ten (10) business days prior to Developer's first entry onto the Owner Property to commence any construction work or the performance of any Subsurface Work, Developer shall provide written notice to Owner at 200 East Santa Clara Street, San Jose, CA Attention Real Estate Services and Asset Management. Such notice shall include (1) the date that construction will begin, (2) a schedule that generally describes the work that will be performed and the days in which it will be performed, (3) evidence of the insurance required hereunder, and (4) the name and contact information of the project manager in charge of the work that will be performed.
- 3.3.4 Developer shall be responsible for and shall promptly pay for all costs associated with any preconstruction work or construction work required to be performed on the Owner Property in accordance with this Agreement and the cost of the Subsurface Work and any other cost necessary for the full performance of Developer's covenants and obligations under this Agreement.
- 3.3.5 Developer covenants (i) that it will not carry out the installation of any improvements, or otherwise excavate or perform the Subsurface Work or any other construction on the Developer Property in a manner that will adversely impact the lateral support of the Owner Property, and (ii) that all

Project improvements shall be designed on a stand-alone basis and shall not rely on the Tie-Back Anchors or any other improvements located on the Owner Property.

- 3.3.6 Developer shall not allow any Crane booms to be left or stored over the Owner Property when the Cranes are not in active use. For purposes of this Agreement, "active use" means continuous use for the moving of loads and supporting construction during the course of each construction work shift.

4. Developer's Indemnity. To the fullest extent permitted by law, Developer agrees to indemnify, hold harmless and defend Owner and Owner's successors, assigns, contractors, agents, employees, invitees, licensees, permittees and lessees (collectively, the "Indemnified Parties") from and against any and all losses, damages (including, without limitation, damages for injury to property or persons), claims, actions, liabilities, costs and expenses (including, without limitation, actual attorneys' fees, litigation and court costs, amounts paid in settlement and amounts paid to discharge judgments) to which the Indemnified Parties, or any of them, may become subject under federal or state laws or otherwise, arising out of or based upon or in any way relating to the performance of the Subsurface Work or the use of the Cranes, including, without limitation, the following:

(a) any act or omission of Developer or any of its agents, contractors, subcontractors, servants, employees or licensees in connection with the Subsurface Work or use of the Cranes,

(b) any violation of any applicable rules, laws, regulations, or ordinances related to the Subsurface Work or use of the Cranes, or

(c) the uncured breach by Developer of any covenant, condition, term or provision of this Agreement following written notice of such breach to Developer and passage of the cure period, except, for each of the immediately preceding clauses (a), (b), and (c), to the extent caused by the sole active negligence or intentional misconduct of the Indemnified Parties.

In the event that any action or proceeding is brought against any Indemnified Party with respect to which indemnity may be sought hereunder, Developer, upon written notice from the Indemnified Party, shall immediately (i) assume the investigation and defense thereof, including the employment of counsel selected by Developer, and approved by the Indemnified Party in its reasonable discretion, and (ii) shall assume the payment of all expenses related thereto, with full power to litigate, compromise or settle the same in its sole and absolute discretion. Each Indemnified Party shall have the right to employ separate counsel selected by Developer, and approved by such Indemnified Party in its reasonable discretion, in any such action or proceeding and participate in the investigation and defense thereof, and Developer shall pay the actual fees and expenses of such separate counsel; provided, however, that such Indemnified Party may only employ separate counsel at the expense of Developer if in Owner's reasonable judgment a conflict of interest exists by reason of common representation or if all parties commonly represented do not agree as to the action (or inaction) of counsel. The indemnity herein shall survive any termination or expiration of this Agreement.

5. Waiver. If at some future date Owner or its successor in interest excavates the Owner Property, Developer acknowledges that such excavation may result in movement or removal of the Tie-Back Anchors left in place by Developer. As a material part of the consideration for the grant of the easements, encroachments and consents contained herein, Developer, on behalf of itself and its successors and assigns, waives any claim it may have arising from damage of any kind to the Developer Property or the Project as a result of the movement or removal of the Tie-Back Anchors by Owner or its successors in interest, or any of their contractors or agents engaged in such excavation except for claims arising out of damage caused by Owner's or its successor in interest's or any of their contractors' or agents' sole, active negligence or willful misconduct.

6. Access to Owner Property. Developer shall not obstruct access to the Owner Property from N. 7th Street during construction of the Project and Developer shall not materially interfere in any way with the use and enjoyment of the Owner Property.

7. Insurance. At all times during the performance of the Subsurface Work or use of the Cranes and for at least one (1) year following the Completion Date, Developer shall carry, or shall cause its contractor to carry, minimum policies of insurance as described on Exhibit D ("Developer Insurance Policy"). Developer shall cause Owner to be named as an additional insured under such Developer Insurance Policy. Prior to entering upon the Owner Property or commencing with the Subsurface Work, Developer shall provide Owner with a certificate evidencing that its obligations under this Section have been satisfied, which certificate shall include a reference that the Developer Insurance Policy cannot be terminated or amended without at least thirty (30) days written notice to Owner.

8. Notices. Any notice or other communication required or permitted to be given under this Agreement shall be in writing and sent by registered or certified United States mail, postage prepaid, return receipt requested, or by personal delivery (by overnight courier or otherwise), or by electronic mail (email) and addressed as follows:

If to Developer: ICS Corporate Yard Multifamily, LLC
c/o Shea Properties
130 Vantis, Suite 200
Aliso Viejo, CA 92656
Attn: Sean McEachern
E-mail: sean.mceachern@sheaproperties.com

If to Owner: City of San Jose
Office of Economic Development Real Estate Services & Asset
Management
200 East Santa Clara St.
San Jose, CA 95113
Attn: Real Estate
Email: _____

With a copy to: City of San Jose
Office of the City Attorney

200 East Santa Clara, 16th Floor
San Jose, CA 95113
Attention: Real Estate Attorney
Email: _____

or to such other address as either party may from time to time specify in writing to the other in the manner aforesaid. If sent by United States mail, registered or certified mail, postage prepaid, return receipt requested, such notices or other communications shall be deemed delivered upon delivery or refusal to accept delivery as indicated on the return receipt. If sent by personal delivery (by overnight courier or otherwise), such notices or other communications shall be deemed delivered upon delivery. If sent by email, such notices or other communications shall be deemed delivered upon delivery, provided such email is sent prior to 5:00 p.m. California Time on such date (otherwise such email shall be deemed to be delivered and effective as of the next business day), and provided further that delivery is also made promptly thereafter by mail or overnight courier as provided above.

9. Entire Agreement/Amendment. This Agreement sets forth the entire understanding of the parties relating to the Subsurface Work and use of the Cranes, and supersedes all prior understandings relating to them, whether written or oral. This Agreement may be amended in whole or in part only by mutual written agreement of the Owner and Developer.

10. No Attorney Fees. In the event any action or proceeding is initiated to enforce or interpret the provisions of this Agreement, each party hereto shall bear its own attorney's fees and other legal costs.

11. Authorization to Director of Economic Development. Where this Agreement requires or permits Owner to act and no officer of Owner is specified, the Director of Economic Development ("Director") or the designated representative of the Director has the authority to act on Owner's behalf.

12. Legal Relationship. Nothing contained in this Agreement shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent, partnership, joint venture or any association between Owner and Developer. Owner and Developer expressly agree that no act of the parties hereto shall be deemed to create any relationship between Owner and Developer other than the relationship of grantee and grantor.

13. Time of the Essence. Time is of the essence hereof, and waiver by the Owner or Developer of a breach of any term, covenant or condition herein contained, whether express or implied, shall not constitute a waiver of any subsequent breach thereof, or a breach of any other term, covenant, or condition herein contained. No acceptance by Owner of any partial payment of any sum due hereunder shall be deemed an accord and satisfaction or otherwise bar Owner from recovering the full amount due, even if such payment is designated "payment in full," bears any restrictive endorsement, or is otherwise conditionally tendered. The times for Developer's performance of any obligations set forth in this Agreement and the Exhibits may be extended by the Director, if he/she finds, at his/her sole discretion, that Developer has been delayed for reasons not in Developer's control. Any such extension shall be in writing.

14. Counterparts. This Agreement 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.

15. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of Owner and Developer and their respective successors and assigns. Developer may not assign this Agreement without the written consent of Owner, which consent shall be within the sole and absolute discretion of Owner. The assignment by Developer shall not relieve Developer of any of its obligations under this Agreement, unless otherwise agreed to by Owner in writing. For the purposes of this Agreement, there shall be an assignment if there is a transfer or assignment of any of Developer's rights under this Agreement to a person or entity that is not a party to this Agreement, or there is a transfer by statute or operation of law of more than 50% of the rights, title, profits or interest in Developer. Notwithstanding the foregoing or any provision of this Agreement to the contrary, Developer shall have the right, without Owner's consent or approval, at any time and from time to time, to mortgage, collaterally assign, or otherwise encumber and grant security interests in all or any part of its interest in this Agreement.

[Signatures on following pages]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

Owner:

CITY OF SAN JOSE,
a municipal corporation of the State of California

Kim Walesh
Director, Office of Economic Development
Deputy City Manager


APPROVED AS TO FORM:

Senior Deputy City Attorney

Developer:

ICS CORPORATE YARD MULTIFAMILY, LLC,
a Delaware limited liability company

By: Shea Properties Management Company, Inc.,
a Delaware corporation,
its manager

By: 
Name: Greg Anderson
Title: Assistant Secretary


By: 
Name: Julia Guizan
Title: Vice President

EXHIBIT A

LEGAL DESCRIPTION OF THE "OWNER PROPERTY"

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

PARCEL 2, AS SHOWN ON THE PARCEL MAP FILED FOR RECORD OCTOBER 1, 2015 IN BOOK 887 OF MAPS, PAGES 15 AND 16, SANTA CLARA COUNTY RECORDS.

EXHIBIT B

LEGAL DESCRIPTION OF THE “DEVELOPER PROPERTY”

DEVELOPER NORTH PROPERTY:

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

PARCEL 1, AS SHOWN ON THE PARCEL MAP FILED FOR RECORD OCTOBER 1, 2015 IN BOOK 887 OF MAPS, PAGES 15 AND 16, SANTA CLARA COUNTY RECORDS.

DEVELOPER SOUTH PROPERTY:

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

PARCEL 2, AS SHOWN ON THE PARCEL MAP FILED FOR RECORD OCTOBER 1, 2015 IN BOOK 887 OF MAPS, PAGES 15 AND 16, SANTA CLARA COUNTY RECORDS.

EXHIBIT C

TIE-BACK ANCHORS

EXHIBIT D

INSURANCE REQUIREMENTS

Developer or its contractor (either Developer or its contractor being referred to in this Exhibit D as "Contractor") shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by Contractor or its agents, representatives, employees or subcontractors.

D-1 Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001); and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
4. For all design and engineering services to be provided by Contractor or Subcontractors, Professional Liability Errors and Omissions insurance for all professional services; and
5. Contractor's Pollution Liability Insurance, including coverage for all operations, completed operations and professional services (without exclusion for asbestos or lead).

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

D-2 Minimum Limits of Insurance

Contractor shall maintain limits no less than:

1. Commercial General Liability: \$5,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.

3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.
4. Professional Liability Errors and Omissions: \$1,000,000 per claim/\$1,000,000 aggregate limit.
5. Contractor's Pollution Liability: \$1,000,000 each occurrence/aggregate limit

D-3 Deductibles and Self-Insured Retentions

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

D-4 Other Insurance Provisions

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

1. General Liability and Automobile Liability Coverages
 - a. The City, its officials, employees, agents, tenants, and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; premises owned, leased or used by the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.
 - b. The Contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the contractor's insurance and shall not contribute with it.
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.
 - d. Coverage shall state that the Contractor'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.

- e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

2. Workers' Compensation and Employers' Liability

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City; except that ten (10) days' prior written notice shall apply in the event of cancellation for nonpayment of premium.

D-5 Acceptability of Insurance

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

D-6 Verification of Coverage

Contractor shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. 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.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE, which shall be provided by the Contractor's insurance company as evidence of the stipulated coverages. This proof of insurance shall;

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San Jose — Department of Finance
Risk Management
200 East Santa Clara St., 14th Floor Tower
San Jose, CA 95113-1905

D-7 Subcontractors

Contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.