

to 2855, inclusive, (including, without limitation, California Civil Code Sections 2809, 2810, 2819, 2839, 2845, 2848, 2849 and 2850), 2899 and 3433, and any successor sections. Guarantors acknowledge and agree that all waivers of defenses arising from any impairment of Guarantors' rights of subrogation, reimbursement, contribution and indemnification and waivers of any other rights, privileges, defenses or protections available to Guarantors by reason of Sections 2787 to 2855, inclusive, of the California Civil Code are intended by Guarantors to be effective to the maximum extent permitted by applicable law.

Guarantors agree that they shall file all claims against Developer in any bankruptcy or other similar proceeding in which the filing of claims is required by law on any indebtedness of Developer to Guarantors, and will assign to the Commission, all rights of Guarantors. If Guarantors do not file such claim, the Commission, as attorney-in-fact for Guarantors, are authorized to do so in the name of Guarantors to the extent of amounts guaranteed hereunder or, in the Commission's discretion, to assign the claim and to file a proof of claim in the name of the Commission or the Commission's nominee. In all such cases, whether in bankruptcy or otherwise, the person or persons authorized to pay such claim shall pay to the Commission the full amount of any such claim, and, to the full extent necessary for that purpose, Guarantors assign to the Commission all of Guarantors' rights to any such payments or distributions to which Guarantors would otherwise be entitled.

Guarantors are presently informed of the financial condition of Developer and of all other circumstances which a diligent inquiry would reveal and which bear upon the risk of nonpayment or nonperformance of the Guaranty Obligations. Guarantors hereby covenant that they will continue to keep itself informed of Developer's financial condition and of all other circumstances which bear upon the risk of nonpayment or nonperformance of the Indemnity Obligation. Guarantors hereby waive their rights, if any, to require, and the Commission is relieved of any obligation or duty to disclose to Guarantors any information which the Commission may now or hereafter acquire concerning such condition or circumstances.

This Guaranty shall continue in full force and effect until the Guaranty Obligations are fully paid, performed, and discharged.

This Guaranty shall be binding upon the successors and assigns of Guarantors and shall inure to the benefit of the Commission's successors and assigns.

No modification of this Guaranty shall be effective for any purpose unless it is in writing and executed by an officer of the Commission authorized to do so.

If: (a) this Guaranty is placed in the hands of an attorney for collection or is collected through any legal proceeding; (b) an attorney is retained to represent Commission in any bankruptcy, reorganization, receivership, or other proceedings affecting creditors' rights and involving a claim under this Guaranty; (c) an attorney is retained to provide advice or other representation with respect to this Guaranty; or (d) an attorney is retained to represent Commission in any proceedings whatsoever in connection with this Guaranty, then Guarantors shall pay to Commission upon demand all attorney's fees, costs and expenses incurred in connection therewith (all of which are referred to herein as "Enforcement Costs"), in addition to all other amounts due hereunder, regardless of whether all or a portion of such Enforcement Costs are incurred in a single proceeding or multiple proceedings brought to enforce this Guaranty.

The parties hereto intend and believe that each provision in this Guaranty comports with all applicable local, state and federal laws and judicial decisions. However, if any provision or provisions, or if any portion of any provision or provisions, in this Guaranty is found by a court of law to be in violation of any applicable local, state or federal ordinance, statute, law, administrative or judicial decision, or public policy, and if such court should declare such portion, provision or provisions of this Guaranty to be illegal, invalid, unlawful, void or unenforceable as written, then it is the intent of all parties hereto that such portion, provision or provisions shall be given force to the fullest possible extent that they are legal, valid and enforceable, that the remainder of this Guaranty shall be construed as if such illegal, invalid, unlawful, void or unenforceable portion, provision or provisions were not contained therein, and that the rights, obligations and interest of Commission under the remainder of this Guaranty shall continue in full force and effect.

TO THE GREATEST EXTENT PERMITTED BY LAW, GUARANTORS HEREBY WAIVE ANY AND ALL RIGHTS TO REQUIRE MARSHALLING OF ASSETS BY COMMISSION. WITH RESPECT TO ANY SUIT, ACTION OR PROCEEDINGS RELATING TO THIS GUARANTY (EACH, A "PROCEEDING"), COMMISSION AND GUARANTORS IRREVOCABLY (A) SUBMIT TO THE NON-EXCLUSIVE JURISDICTION OF THE STATE AND FEDERAL COURTS HAVING JURISDICTION IN THE CITY OF ESCONDIDO, COUNTY OF SAN DIEGO AND STATE OF CALIFORNIA, AND (B) WAIVE ANY OBJECTION WHICH EACH MAY HAVE AT ANY TIME TO THE LAYING OF VENUE OF ANY PROCEEDING BROUGHT IN ANY SUCH COURT, WAIVE ANY CLAIM THAT ANY PROCEEDING HAS BEEN BROUGHT IN AN INCONVENIENT FORUM AND FURTHER WAIVE THE RIGHT TO OBJECT, WITH RESPECT TO SUCH PROCEEDING, THAT SUCH COURT DOES NOT HAVE JURISDICTION OVER SUCH PARTY. NOTHING IN THIS GUARANTY SHALL PRECLUDE COMMISSION FROM BRINGING A PROCEEDING IN ANY OTHER JURISDICTION NOR WILL THE BRINGING OF A PROCEEDING IN ANY ONE OR MORE JURISDICTIONS PRECLUDE THE BRINGING OF A PROCEEDING IN ANY OTHER JURISDICTION. COMMISSION AND GUARANTORS FURTHER AGREE AND CONSENT THAT, IN ADDITION TO ANY METHODS OF SERVICE OF PROCESS PROVIDED FOR UNDER APPLICABLE LAW, ALL SERVICE OF PROCESS IN ANY PROCEEDING IN ANY CALIFORNIA STATE OR UNITED STATES COURT SITTING IN THE CITY OF ESCONDIDO OR COUNTY OF SAN DIEGO AND MAY BE MADE BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUESTED, DIRECTED TO THE APPLICABLE PARTY AT THE ADDRESS INDICATED BELOW, AND SERVICE SO MADE SHALL BE COMPLETE UPON RECEIPT; EXCEPT THAT IF SUCH PARTY SHALL REFUSE TO ACCEPT DELIVERY, SERVICE SHALL BE DEEMED COMPLETE FIVE (5) DAYS AFTER THE SAME SHALL HAVE BEEN SO MAILED.

All acts and transactions hereunder and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of California. Guarantors consent to the jurisdiction of the State of California and consents to service of process by any means authorized by California law, including, without limitation, service of process by mail.

Guarantors herein warrant and represent that (i) as of the date hereof, they have combined net assets of at least Forty Million Dollars (\$40,000,000) and not less than Five Million Dollars (\$5,000,000) shall be cash and/or marketable securities exclusive of any other contingent obligations, and (ii) will maintain such financial condition until Completion of the Project. Prior to the Closing of the Conveyance, Guarantors shall provide Commission with a financial statement dated within thirty (30) days of the Closing. Guarantors further warrant and represent that the

Guarantors will not materially change its financial condition during the term of the Guaranty and shall provide Commission with updated financial statements on each anniversary date of this Guaranty.

Any notice, demand, request or other communication which any party hereto may be required or may desire to give hereunder shall be in writing and shall be deemed to have been properly given (a) if hand delivered, when delivered; (b) if mailed by United States Certified Mail (postage prepaid, return receipt requested), three Business Days after mailing (c) if by Federal Express or other reliable overnight courier service, on the next Business Day after delivered to such courier service or (d) if by telecopier on the day of transmission so long as copy is sent on the same day by overnight courier as set forth below:

Guarantor: Bahen Enterprises, LLC  
3189 Danville, Boulevard, Suite 425  
Alamo, California 94507  
Attn: Robert Bahen  
Telephone (925) 552-9742  
Facsimile (925) 552-9748

Lender: I&H Capital Investment, Inc.  
4020 N. MacArthur Blvd. Suite 123-266  
Irving, Texas 75038  
Attn: Brent Brasher  
Telephone (972) 815-5353  
Facsimile (972) 852-7965

With copies to: Sheppard, Mullin, Richter & Hampton, LLP  
501 West Broadway, Suite 1900  
San Diego, CA 92101  
Attn: Christopher B. Neils, Esq.  
Telephone (619) 338-6530  
Facsimile (619) 234-3815

C. W. Clark, Inc.  
4180 La Jolla Village Drive, Suite 405  
La Jolla, CA 92037  
Attn: Craig W. Clark  
Telephone (858) 452-7170  
Facsimile (858) 453-7260

To Commission: Escondido Community Development Commission  
201 North Broadway  
Escondido, California 92025  
Attn: Executive Director  
Telephone (760) 839-4631  
Facsimile (760) 839-4578

With a copy to:

Commission Counsel  
201 North Broadway  
Escondido, California 92025  
Attn: Jeffrey R. Epp, Commission Counsel  
Telephone: (760) 839-4608  
Facsimile: (760) 741-7541

or at such other address as the party to be served with notice may have furnished in writing to the party seeking or desiring to serve notice as a place for the service of notice.

<SIGNATURE PAGE CONTINUES ON FOLLOWING PAGE>

IN WITNESS WHEREOF, Guarantors have duly executed this Guaranty as of the date first above written.

BAHEN ENTERPRISES, LLC  
a California limited liability company

By: Robert Bahen  
Its Managing Member

By: Robert Bahen  
Its \_\_\_\_\_

WITNESSED HERETO BY THE COMMISSION:

ESCONDIDO COMMUNITY DEVELOPMENT  
COMMISSION, a public body, corporate and  
politic

ROBERT H. BAHEN, a married man

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

By: Robert Bahen

**ATTACHMENT NO. 13**

**CONSENT OF SPOUSE**

The undersigned acknowledges that the undersigned has read the AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT by and between the ESCONDIDO COMMUNITY DEVELOPMENT COMMISSION (the "Commission") and ESCONDIDO DEVELOPMENT, LLC (the "Agreement") and the GUARANTY attached thereto as Attachment No. 12 executed by BAHEN ENTERPRISES, a California limited liability company and ROBERT H. BAHEN, a married man (the "Developer") dated June 11, 2010 (the "Guaranty"). Capitalized terms used and not otherwise defined in this Consent of Spouse have the respective meanings given to them in the Agreement and the Guaranty, as applicable.

The undersigned, intending to be legally bound:

1. represents and warrants that the undersigned is the spouse of Robert H. Bahen;
2. consents to and approves the execution, delivery and performance by the undersigned's spouse of, and agrees to be bound by the Agreement and the Guaranty, as each relates to the interests of Robert H. Bahen;
3. consents to and approves the consummation of the transactions contemplated by the Agreement and/or the Guaranty;
4. agrees to execute and deliver any document, and to take any other action, that the Agreement and/or the Guaranty, or any party to the Agreement and/or the Guaranty, may reasonably request for the purpose of facilitating, consummating or evidencing any of the transactions contemplated by the Agreement and/or the Guaranty;
5. irrevocably appoints Robert H. Bahen (with full power of substitution) as the undersigned's agent and attorney-in-fact for the purpose of executing and delivering (on behalf of the undersigned) any contract, consent or other document, and for the purpose of taking any other action, relating directly or indirectly to the Agreement and/or the Guaranty; and
6. represents and warrants that the undersigned has had the opportunity to obtain legal advice, from counsel of the undersigned's own choosing and independent of the undersigned's spouse as to the undersigned's legal rights and as to the legal effect of this Consent of Spouse.

The representations, warranties, covenants, obligations and other provisions set forth in this Consent of Spouse shall survive the Closing, notwithstanding any investigation conducted with respect thereto or any knowledge of any other person.

Dated: June 11, 2010

  
Signature

Jan Bahen  
Printed Name

**ATTACHMENT No. 14**

**EXISTING LAND USE APPROVALS AND PERMITS**

City Resolution No. 2006-217 (R)

Amendment to the Civic Center District of the Downtown Specific Planning Area, A Preliminary and Master development Plan and certifying a Mitigated Negative Declaration.

- 2005-21-PD/SPA
- ER 2005-13

Site address 250 West Valley Parkway

**ATTACHMENT NO. 15  
CONSTRUCTION LOAN AGREEMENT**

**CONSTRUCTION LOAN AGREEMENT**

between

ESCONDIDO DEVELOPMENT, LLC,  
a Delaware limited liability company

ROBERT BAHEN, an individual

and

J & H CAPITAL INVESTMENTS, LLC,  
a Texas limited liability company

Entered into as of August 1, 2010



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## CONSTRUCTION LOAN AGREEMENT

THIS CONSTRUCTION LOAN AGREEMENT ("Agreement") is entered into as of August 1, 2010, by and between ESCONDIDO DEVELOPMENT, LLC, a Delaware limited liability company and ROBERT BAHEN, an individual (collectively, the "Borrower"), and J & H CAPITAL INVESTMENTS, INC., a Texas corporation ("Lender").

### RECITALS

- A. Borrower owns or will own certain leasehold real property commonly known as 250 West Valley Parkway, Escondido, California 92025 and described in Exhibit A hereto ("Property").
- B. Borrower proposes to construct on the Property certain improvements together with all appurtenances, fixtures, and tenant improvements now or hereafter located on the Property ("Improvements"). The Improvements shall be constructed in accordance with plans and specifications which Borrower has heretofore, or will hereafter deliver to Lender, as amended in order to comply with the terms and conditions of this Agreement ("Plans and Specifications"). Borrower has requested from Lender a loan for the purpose of such construction.

NOW, THEREFORE, Borrower and Lender agree as follows:

### ARTICLE 1 DEFINITIONS

- 1.1 **DEFINED TERMS.** The following capitalized terms generally used in this Agreement shall have the meanings defined or referenced below. Certain other capitalized terms used only in specific sections of this Agreement are defined in such sections.

"Account" - means an account with Chicago Title Company, account number 9300 15355-K55, in the name of Borrower or Borrower's designee into which Loan proceeds will be deposited.

"Agreement" - shall have the meaning ascribed to such term in the preamble hereto.

"Architect" - means Lee & Sakahara Architects AIA, Inc.

"Architect's Agreement" - means that certain agreement dated \_\_\_\_\_ by and between Borrower and Architect.

"Bankruptcy Code" - means the Bankruptcy Reform Act of 1978 (11 USC § 101-1330) as now or hereafter amended or recodified.

"Borrower" - means Escondido Development, LLC, a Delaware limited liability company, and Robert Bahen, an individual, collectively.

"Business Day" - means a day of the week (but not a Saturday, Sunday or holiday) on which the offices of Lender are open to the public for carrying on substantially all of Lender's business functions. Unless specifically referenced in this Agreement as a Business Day, all references to "days" shall be to calendar days.

"Contractor" - means Jaynes Corporation of California

"Construction Agreement" - means that certain agreement to construct the Improvements dated January 28, 2010 by and between Borrower and Contractor.

"Deed of Trust" - means that certain Leasehold Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing of even date herewith executed by Escondido

Development, LLC, a Delaware limited liability company, as Trustor, to Chicago Title Company, an escrow company, as Trustee, for the benefit of Lender, as Beneficiary, as hereafter amended, supplemented, replaced or modified.

"Default" - shall have the meaning ascribed to such term in Section 9.1.

"Effective Date" - means the date the Deed of Trust is recorded in the Office of the County Recorder of the county where the Property is located.

"Extended Maturity Date" - means July 1, 2018.

"Improvements" - shall have the meaning ascribed to such term in Recital B.

"Lender" - means J & H Capital Investments, Inc., a Texas corporation.

"Loan" - means the principal sum that Lender agrees to lend and Borrower agrees to borrow pursuant to the terms and conditions of this Agreement: FIFTY-FIVE MILLION EIGHTY-ONE THOUSAND TWO HUNDRED FIFTY AND NO/100THS DOLLARS (\$55,081,250.00).

"Loan Documents" - means those documents, as hereafter amended, supplemented, replaced or modified, properly executed and in recordable form, if necessary, listed in Exhibit B as Loan Documents.

"Maturity Date" - means the Original Maturity Date or the Extended Maturity Date, as applicable.

"Note" - means that certain Promissory Note (Fixed Rate, Interest Only-Installment Payments) of even date herewith, in the original principal amount of the Loan, executed by Borrower and payable to the order of Lender, as hereafter amended, supplemented, replaced or modified.

"Obligations" - shall have the meaning ascribed to such term in the Deed of Trust.

"Option to Extend" - means Borrower's option to extend the term of the Loan from the Original Maturity Date to the Extended Maturity Date, as set forth in the Note.

"Original Maturity Date" - means July 1, 2015.

"Other Related Documents" - means those documents, as hereafter amended, supplemented, replaced or modified from time to time, properly executed and in recordable form, if necessary, listed in Exhibit B as Other Related Documents.

"Plans and Specifications" - shall have the meaning ascribed to such term in Recital B.

"Property" - shall have the meaning ascribed to such term in Recital A.

"Rate of Interest" - shall be the per annum rate of interest set forth in the Note.

"Title Policy" - means the LP-10 ALTA Lender's Policy of Title Insurance as issued by Chicago Title Company, Inc.

- 1.2 **EXHIBITS INCORPORATED.** All exhibits, schedules or other items attached hereto, are incorporated into this Agreement by such attachment for all purposes.

## ARTICLE 2 LOAN

- 2.1 **LOAN.** By and subject to the terms of this, Lender agrees to lend to Borrower and Borrower agrees to borrow from Lender the principal sum of up to FIFTY-FIVE MILLION EIGHTY-ONE THOUSAND TWO HUNDRED FIFTY AND NO/100THS DOLLARS (\$55,081,250.00), said sum to be evidenced by the Note of even date herewith. The Note shall be secured, in part, by the Deed of Trust, of even date herewith, encumbering certain real property and improvements as legally defined therein. Amounts disbursed to or on behalf of Borrower pursuant to the Note shall be used to finance the acquisition and construction of the Property and Improvements and for such other purposes and uses as may be permitted under this Agreement and the other Loan Documents.
- 2.2 **LOAN DOCUMENTS.** Borrower shall deliver to Lender concurrently with this Agreement each of the documents, properly executed and in recordable form, as applicable, described in Exhibit B as Loan Documents, together with those documents described in Exhibit B as Other Related Documents.
- 2.3 **EFFECTIVE DATE.** The date of the Loan Documents is for reference purposes only. The Effective Date of delivery and transfer to Lender of the security under the Loan Documents and of Borrower's and Lender's obligations under the Loan Documents shall be the date the Deed of Trust is recorded in the Office of the County Recorder of the county where the Property is located.
- 2.4 **MATURITY DATE.** Subject to the terms of Section 2.7 below, the Maturity Date of the Loan shall be ORIGINAL MATURITY DATE, at which time all sums due and owing under this Agreement and the other Loan Documents shall be repaid in full. All payments due to Lender under this Agreement, whether at the Maturity Date or otherwise, shall be paid in immediately available funds.
- 2.5 **CREDIT FOR PRINCIPAL PAYMENTS.** Any payment made upon the outstanding principal balance of the Loan shall be credited as of the Business Day received, provided such payment is received by Lender no later than 11:00 a.m. (Pacific Standard Time) and constitutes immediately available funds. Any principal payment received after said time or which does not constitute immediately available funds shall be credited upon such funds having become unconditionally and immediately available to Lender.
- 2.6 **FULL REPAYMENT AND RECONVEYANCE.** Upon receipt of all sums owing and outstanding under the Loan Documents, Lender shall issue a full reconveyance of the Property and Improvements from the lien of the Deed of Trust; provided, however, that all of the following conditions shall be satisfied at the time of, and with respect to, such reconveyance: (a) Lender shall have received all escrow, closing and recording costs, the costs of preparing and delivering such reconveyance and any sums then due and payable under the Loan Documents; and (b) Lender shall have received a written release satisfactory to Lender of any set aside letter, letter of credit or other form of undertaking which Lender has issued to any surety, governmental agency or any other party in connection with the Loan and/or the Property and Improvements. Lender's obligation to make further disbursements under the Loan shall terminate as to any portion of the Loan undisbursed as of the date of issuance of such full release or reconveyance, and any commitment of Lender to lend any undisbursed portion of the Loan shall be canceled.
- 2.7 **OPTION TO EXTEND.** Borrower shall have the option to extend the term of the Loan from the Maturity Date (for purposes of this Section, "Original Maturity Date"), to the Extended Maturity Date, as set forth in the Note.
- 2.8 **LIMITATION ON BORROWER'S LIABILITY.** Lender's recovery against Borrower under the Loan Documents shall be limited solely to the collateral given to Lender as security for Borrower's performance under the Loan Documents and such recovery shall not be a lien, or the basis of a

claim of lien or levy of execution, against the general assets of Borrower. The limitations hereof shall not be deemed to limit: (i) any right Lender might otherwise have to obtain injunctive relief against Borrower; (ii) any suit or action or the reasonable attorneys' fees and costs incurred in connection with the preservation, enforcement or foreclosure of the liens, mortgages, assignments and security interests now or at any time hereafter securing the payment and performance of all sums and obligations under this Agreement or any of the Loan Documents, whether resulting from fraud, willful misrepresentation, waste or failure to pay any income or other taxes, assessments, or other charges; or (iii) the collection of amounts which may become owing or payable under or on account of insurance, condemnation awards or damages for other public actions or surety bonds maintained or provided by Borrower; provided, however, that the assertion by Lender of any such right, suit, action or collection of amounts shall not result in a monetary claim upon the general assets of Borrower except as otherwise provided herein.

- 2.9 **LIMITATION ON MEMBERS' LIABILITY.** Lender's recovery against any member of Borrower under the Loan Documents shall be limited solely to the collateral given to Lender as security for Borrower's performance under the Loan Documents and to the general assets of Borrower itself.

### ARTICLE 3 DISBURSEMENT

- 3.1 **CONDITIONS PRECEDENT.** Lender's obligation to make any disbursements or take any other action under the Loan Documents shall be subject at all times to satisfaction of each of the following conditions precedent:

- (a) There shall exist no Default, as defined in this Agreement, or Default as defined in any of the other Loan Documents or in the Other Related Documents, or event, omission or failure of condition which would constitute a Default after notice or lapse of time, or both; and
- (b) Lender shall have received all Loan Documents, other documents, instruments, policies, and forms of evidence or other materials requested by Lender under the terms of this Agreement or any of the other Loan Documents; and
- (c) Lender shall have received and approved in form and substance satisfactory to Lender:
  - (i) two sets of the Plans and Specifications, together with evidence of all necessary or appropriate approvals of governmental agencies; (ii) copies of all agreements which are material to completion of the Improvements; (iii) copies of all building permits and similar permits, licenses, approvals, development agreements and other authorizations of governmental agencies required in the Disposition and Development Agreement in connection with the development of the Property and Improvements; and (iv) copies of any initial study, negative declaration, mitigated negative declaration, environmental impact report, notice of determination or notice of exemption prepared, adopted, certified or filed by or with any governmental agency in connection with the Property and Improvements.

- 3.2 **ACCOUNT, PLEDGE AND ASSIGNMENT, AND DISBURSEMENT AUTHORIZATION.** Upon the Effective Date, the proceeds of the Loan in an amount equal to Fifty-Five Million Eighty-One Thousand Two Hundred Fifty and 00/100 Dollars (\$55,081,250.00) shall be deposited into the Account under the terms of this Agreement; provided, however, that Lender acknowledges and agrees that no interest shall run on any funds deposited into the Account unless and until such funds are actually disbursed from the Account to Borrower for Borrower's use in accordance with the terms of this Agreement. Disbursements hereunder may be made by Lender upon the written request of any person who has been authorized by Borrower to request such disbursements until such time as written notice of Borrower's revocation of such authority is received by Lender. As additional security for Borrower's performance under the Loan Documents, Borrower hereby irrevocably pledges and assigns to Lender the balance of the proceeds of the Loan at any time deposited in the Account.

- 3.3 **LOAN DISBURSEMENTS.** Subject to the conditions set forth in Section 3.1, the proceeds of the Loan shall be disbursed in accordance with the terms and conditions of Exhibit D. All disbursements shall be held by Borrower in trust and applied by Borrower solely for the purposes for which the funds have been disbursed. Lender has no obligation to monitor or determine Borrower's use or application of the disbursements.

#### ARTICLE 4 CONSTRUCTION

- 4.1 **CONSTRUCTION AGREEMENT.** Borrower and Contractor have entered into the Construction Agreement pursuant to the terms and conditions of which Contractor is to construct the Improvements. Borrower shall require Contractor to perform in accordance with the terms of the Construction Agreement and shall not amend, modify or alter the responsibilities of Contractor under the Construction Agreement without Lender's prior written consent. Borrower shall execute, upon Lender's request, an assignment of Borrower's rights under the Construction Agreement to Lender as security for Borrower's obligations under this Agreement and the other Loan Documents and shall cause the Contractor to consent to any such assignment.
- 4.2 **ARCHITECT'S AGREEMENT.** Borrower and Architect have entered into the Architect's Agreement, pursuant to which Architect is to design the Improvements. Borrower shall require Architect to perform in accordance with the terms of the Architect's Agreement and shall not amend, modify or alter the responsibilities of Architect under the Architect's Agreement without Lender's prior written consent. Upon Lender's request, Borrower shall execute an assignment of the Architect's Agreement and the Plans and Specifications to Lender as additional security for Borrower's performance under this Agreement and the other Loan Documents and shall cause the Architect to consent to any such assignment.
- 4.3 **PLANS AND SPECIFICATIONS.**
- (a) **Changes; Lender Consent.** Except as otherwise provided in this Agreement, Borrower shall not make any changes in the Plans and Specifications without Lender's prior written consent if such change: (i) constitutes a material change in the building material or equipment specifications, or in the architectural or structural design, value or quality of any of the Improvements; (ii) would result in an increase of construction costs in excess of TWO HUNDRED FIFTY THOUSAND DOLLARS (\$250,000.00) for any single change or in excess of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) for all such changes; or (iii) would affect the structural integrity, quality of building materials, or overall efficiency of operating systems of the Improvements. Without limiting the above, Lender agrees that Borrower may make minor changes in the Plans and Specifications without Lender's prior written consent, provided that such changes do not violate any of the conditions specified herein. Borrower shall at all times maintain, for inspection by Lender, a full set of working drawings of the Improvements.
- (b) **Changes; Submission Requirements.** Borrower shall submit any proposed change in the Plans and Specifications to Lender at least ten (10) days prior to the commencement of construction relating to such proposed change whether or not such change is subject to Lender's consent. Requests for any change which requires consent shall be accompanied by working drawings and a written description of the proposed change, submitted on a change order form acceptable to Lender, signed by Borrower and, if required by Lender, also by the Architect and the Contractor. At its option, Lender may require Borrower to provide: (i) evidence satisfactory to Lender of the cost and time necessary to complete the proposed change; (ii) a deposit in the amount of any increased costs into Borrower's Funds Account; and (iii) a complete set of "as built" Plans and Specifications for the completed Improvements.
- (c) **Final Plans and Specifications.** Upon completion of the Improvements, Borrower shall deliver to Lender within ten (10) days a set of final Plans and Specifications.

- 4.4 **CONTRACTOR/CONSTRUCTION INFORMATION.** Within ten (10) days of Lender's written request, Borrower shall deliver to Lender from time to time in a form acceptable to Lender: (a) a list detailing the name, address and phone number of each contractor, subcontractor and material supplier to be employed or used for construction of the Improvements together with the dollar amount, including changes, if any, of each contract and subcontract, and the portion thereof, if any, paid through the date of such list; (b) copies of each contract and subcontract identified in such list, including any changes thereto; (c) a cost breakdown of the projected total cost of constructing the Improvements, and that portion, if any, of each cost item which has been incurred; and (d) a construction progress schedule detailing the progress of construction and the projected sequencing and completion time for uncompleted work, all as of the date of such schedule.

Borrower agrees that Lender may disapprove any contractor, subcontractor or material supplier which, in Lender's good faith determination, is deemed financially or otherwise unqualified; provided, however, that the absence of any such disapproval shall not constitute a warranty or representation of qualification by Lender. Lender may contact any such contractor, subcontractor or material supplier to discuss the course of construction.

- 4.5 **PROHIBITED CONTRACTS.** Without Lender's prior written consent, Borrower shall not contract for any materials, furnishings, equipment, fixtures or other parts or components of the Improvements, if any third party shall retain any ownership interest (other than lien rights created by operation of law) in such items after their delivery to the Property and Improvements. Borrower shall have five (5) days to effect the removal of any such retained interest.
- 4.6 **LIENS AND STOP NOTICES.** If a claim of lien is recorded which affects the Property or Improvements or a bonded stop notice is served upon Lender, Borrower shall, within twenty (20) calendar days of such recording or service or within five (5) calendar days of Lender's demand, whichever occurs first: (a) pay and discharge the claim of lien or bonded stop notice; (b) effect the release thereof by recording or delivering to Lender a surety bond in sufficient form and amount; or (c) provide Lender with other assurances which Lender deems, in its sole discretion, to be satisfactory for the payment of such claim of lien or bonded stop notice and for the full and continuous protection of Lender from the effect of such lien or bonded stop notice.
- 4.7 **CONSTRUCTION RESPONSIBILITIES.** Borrower shall construct the Improvements in a workmanlike manner according to the Plans and Specifications and the recommendations of any soils or engineering report approved by Lender. Borrower shall comply with all applicable laws, ordinances, rules, regulations, building restrictions, recorded covenants and restrictions, and requirements of all regulatory authorities having jurisdiction over the Property or Improvements. Borrower shall be solely responsible for all aspects of Borrower's business and conduct in connection with the Property and Improvements, including, without limitation, for the quality and suitability of the Plans and Specifications and their compliance with all governmental requirements, the supervision of the work of construction, the qualifications, financial condition and performance of all architects, engineers, contractors, material suppliers, consultants and property managers, and the accuracy of all applications for payment and the proper application of all disbursements. Lender is not obligated to supervise, inspect or inform Borrower or any third party of any aspect of the construction of the Improvements or any other matter referred to above.
- 4.8 **ASSESSMENTS AND COMMUNITY FACILITIES DISTRICTS.** Without Lender's prior written consent, Borrower shall not cause or suffer to become effective or otherwise consent to the formation of any assessment district or community facilities district which includes all or any part of the Property and Improvements pursuant to: (a) the Mello-Roos Community Facilities Act of 1982; (b) the Municipal Improvement Act of 1913; or (c) any other comparable or similar statute or regulation. Nor shall Borrower cause or otherwise consent to the levying of special taxes or assessments against the Property and Improvements by any such assessment district or community facilities district.



- 4.9 **DELAY.** Borrower shall promptly notify Lender in writing of any event causing delay or interruption of construction, or the timely completion of construction. The notice shall specify the particular work delayed, and the cause and period of each delay.
- 4.10 **INSPECTIONS.** Lender shall have the right to enter upon the Property at all reasonable times to inspect the Improvements and the construction work to verify information disclosed or required pursuant to this Agreement. Any inspection or review of the Improvements by Lender is solely to determine whether Borrower is properly discharging its obligations to Lender and may not be relied upon by Borrower or by any third party as a representation or warranty of compliance with this Agreement or any other agreement. Lender owes no duty of care to Borrower or any third party to protect against, or to inform Borrower or any third party of, any negligent, faulty, inadequate or defective design or construction of the Improvements as determined by Lender.

#### ARTICLE 5 INSURANCE

Borrower shall, while any obligation of Borrower under any Loan Document remains outstanding, maintain at Borrower's sole expense, the following policies of insurance in form and substance satisfactory to Lender. Capitalized terms used in this Article shall have the same meaning as such terms are commonly and presently defined in the insurance industry.

- 5.1 **TITLE INSURANCE.** A Title Policy, together with any endorsements which Lender may require, insuring Lender, in the principal amount of the Loan, of the validity and the priority of the lien of the Deed of Trust upon the Property and Improvements, subject only to matters approved by Lender in writing. During the term of the Loan, Borrower shall deliver to Lender, within ten (10) days of Lender's written request, such other endorsements to the Title Policy as Lender may reasonably require with respect to the Property.
- 5.2 **PROPERTY INSURANCE.** A Builders All Risk/Special Form Completed Value (Non-Reporting Form) Hazard Insurance policy, including without limitation, theft coverage and such other coverages and endorsements as Lender may require, insuring Lender against damage to the Property and Improvements in an amount not less than 100% of the full replacement cost at the time of completion of the Improvements. Such coverage should adequately insure any and all Loan collateral, whether such collateral is onsite, stored offsite or otherwise. Lender shall be named on the policy as Mortgagee and named under a Lender's Loss Payable Endorsement (form #438BFU or equivalent).
- 5.3 **LIABILITY INSURANCE.** A policy of Commercial General Liability insurance on an occurrence basis, with coverages and limits as required by Lender, insuring against liability for injury and/or death to any person and/or damage to any property occurring on the Property and/or in the Improvements. During the period of any construction, Borrower may cause its contractors and/or subcontractors to maintain in full force and effect any or all of the liability insurance required hereunder. Lender may require that Borrower be named as an additional insured on any such policy. Whether Borrower employs a general contractor or performs as owner-builder, Lender may require that coverage include statutory workers' compensation insurance.
- 5.4 **OTHER COVERAGE.** Borrower shall provide to Lender evidence of such other reasonable insurance in such reasonable amounts as Lender may from time to time request against such other insurable hazards which at the time are commonly insured against for property similar to the subject Property located in or around the region in which the subject Property is located. Such coverage requirements may include but are not limited to coverage for earthquake, acts of terrorism, business income, delayed business income, rental loss, sink hole, soft costs, tenant improvement or environmental.
- 5.5 **GENERAL.** Borrower shall provide to Lender insurance certificates or other evidence of coverage in form acceptable to Lender, with coverage amounts, deductibles, limits and retentions as required by Lender. All insurance policies shall provide that the coverage shall not be

cancelable or materially changed without 10 days prior written notice to Lender of any cancellation for nonpayment of premiums, and not less than 30 days prior written notice to Lender of any other cancellation or any modification (including a reduction in coverage). Lender shall be named under a Lender's Loss Payable Endorsement (form #438BFU or equivalent) on all insurance policies which Borrower actually maintains with respect to the Property and Improvements. All insurance policies shall be issued and maintained by insurers approved to do business in the state in which the Property is located and must have an A.M. Best Company financial rating and policyholder surplus acceptable to Lender.

#### ARTICLE 6 REPRESENTATIONS AND WARRANTIES

As a material inducement to Lender's entry into this Agreement, Borrower represents and warrants to Lender as of the Effective Date that:

- 6.1 **AUTHORITY/ENFORCEABILITY.** Borrower is in compliance with all laws and regulations applicable to its organization, existence and transaction of business and has all necessary rights and powers to own, develop and operate the leasehold Property and Improvements as contemplated by the Loan Documents.
- 6.2 **BINDING OBLIGATIONS.** Borrower is authorized to execute, deliver and perform its obligations under the Loan Documents, and such obligations shall be valid and binding obligations of Borrower.
- 6.3 **FORMATION AND ORGANIZATIONAL DOCUMENTS.** Borrower has delivered to Lender all formation and organizational documents of Borrower, and all such formation and organizational documents remain in full force and effect and have not been amended or modified since they were delivered to Lender.
- 6.4 **NO VIOLATION.** Borrower's execution, delivery, and performance under the Loan Documents do not: (a) require any consent or approval not heretofore obtained under any partnership agreement, operating agreement, articles of incorporation, bylaws or other document; (b) violate any governmental requirement applicable to the Property and Improvements or any other statute, law, regulation or ordinance or any order or ruling of any court or governmental entity; (c) conflict with, or constitute a breach or default or permit the acceleration of obligations under any agreement, contract, lease, or other document by which the Borrower is or the Property and Improvements are bound or regulated; or (d) violate any statute, law, regulation or ordinance, or any order of any court or governmental entity.

#### ARTICLE 7 COVENANTS OF BORROWER

- 7.1 **EXPENSES.** Borrower shall immediately pay Lender upon demand all costs and expenses incurred by Lender in connection with: (a) the administration of this Agreement, the other Loan Documents and Other Related Documents for the term of the Loan; and (b) the enforcement or satisfaction by Lender of any of Borrower's obligations under this Agreement, the other Loan Documents or the Other Related Documents. For all purposes of this Agreement, Lender's costs and expenses shall include, without limitation, reasonable legal fees and expenses, UCC filing fees and/or UCC vendor fees, reconveyance and notary fees. If any of the services described above are provided by an employee of Lender, Lender's costs and expenses for such services shall be calculated in accordance with Lender's standard charge for such services. In no event shall such expenses to Borrower exceed FIVE THOUSAND DOLLARS (\$5,000.00) annually.
- 7.2 **FURTHER ASSURANCES.** Upon Lender's request and at Borrower's sole cost and expense, Borrower shall execute, acknowledge and deliver any other instruments and perform any other acts necessary, desirable or proper, as determined by Lender, to carry out the purposes of this

Agreement and the other Loan Documents or to perfect and preserve any liens created by the Loan Documents.

- 7.3 **ASSIGNMENT.** Without the prior written consent of Lender, Borrower shall not assign Borrower's interest under any of the Loan Documents, or in any monies due or to become due thereunder, and any assignment without such consent shall be void. In this regard, Borrower acknowledges that Lender would not make this Loan except in reliance on Borrower's expertise, reputation, prior experience in developing and constructing commercial real property, Lender's knowledge of Borrower, and Lender's understanding that this Agreement is more in the nature of an agreement involving personal services than a standard loan where Lender would rely on security which already exists.

#### ARTICLE 8 REPORTING COVENANTS

- 8.1 **FINANCIAL INFORMATION.** Borrower shall deliver to Lender, as soon as available, but in no event later than one hundred twenty (120) days after Borrower's fiscal year end, a current financial statement (including, without limitation, an income and expense statement and balance sheet).

Within thirty (30) days of Lender's written request, Borrower shall also deliver to Lender such quarterly and other financial information reasonably requested by Lender with respect to Borrower. If audited financial information is prepared, Borrower shall deliver to Lender copies of that information within fifteen (15) days of its final preparation. Except as otherwise agreed to by Lender, all such financial information shall be prepared in accordance with generally accepted accounting principles consistently applied.

- 8.2 **BOOKS AND RECORDS.** Borrower shall maintain complete books of account and other records for the Property and Improvements and for disbursement and use of the proceeds of the Loan and Borrower's Funds, and the same shall be available for inspection and copying by Lender upon reasonable prior notice.

#### ARTICLE 9 DEFAULTS AND REMEDIES

- 9.1 **DEFAULT.** The occurrence of any one or more of the following shall constitute an event of default ("Default") under this Agreement and the other Loan Documents:

- (a) **Monetary.** Borrower's failure to pay when due any sums payable under the Note or any of the other Loan Documents; provided, however, that if a cure period is provided for the remedy of such failure, Borrower's failure to perform will not constitute a Default until such date as the specified cure period expires; or
- (b) **Performance of Obligations.** Borrower's failure to perform any obligation in addition to those in Section 10.1 (a) above under any of the Loan Documents; provided, however, that if a cure period is provided for the remedy of such failure, Borrower's failure to perform will not constitute a Default until such date as the specified cure period expires; or
- (c) **Construction; Use.** (i) There is any material deviation in the work of construction from the Plans and Specifications or governmental requirements or the appearance or use of defective workmanship or materials in constructing the Improvements, and Borrower fails to remedy the same to Lender's satisfaction within ten (10) days of Lender's written demand to do so; or (ii) there is a cessation of construction of the Improvements prior to completion for a continuous period of more than fifteen (15) days (except as caused by an event of force majeure for which a longer delay may be permitted under Article IV); or

- (d) **Representations and Warranties.** The failure of any representation or warranty of Borrower in any of the Loan Documents and the continuation of such failure for more than ten (10) days after written notice to Borrower from Lender requesting that Borrower cure such failure; or
- (e) **Voluntary Bankruptcy; Insolvency; Dissolution.** (i) The filing of a petition by Borrower for relief under the Bankruptcy Code, or under any other present or future state or federal law regarding bankruptcy, reorganization or other debtor relief law; (ii) the filing of any pleading or an answer by Borrower in any involuntary proceeding under the Bankruptcy Code or other debtor relief law which admits the jurisdiction of the court or the petition's material allegations regarding Borrower's insolvency; (iii) a general assignment by Borrower for the benefit of creditors; or (iv) Borrower applying for, or the appointment of, a receiver, trustee, custodian or liquidator of Borrower or any of its property; or
- (f) **Involuntary Bankruptcy.** The failure of Borrower to effect a full dismissal of any involuntary petition under the Bankruptcy Code or under any other debtor relief law that is filed against Borrower or in any way restrains or limits Borrower or Lender regarding the Loan, the Property or the Improvements, prior to the earlier of the entry of any court order granting relief sought in such involuntary petition, or thirty (30) days after the date of filing of such involuntary petition.

- 9.2 **ACCELERATION UPON DEFAULT; REMEDIES.** Upon the occurrence of any Default specified in this Article 11, Lender may, at its sole option, declare all sums owing to Lender under the Note, this Agreement and the other Loan Documents immediately due and payable. Upon such acceleration, Lender may, in addition to all other remedies permitted under this Agreement and the other Loan Documents and at law or equity, apply any sums in the Account to the sums owing under the Loan Documents and any and all obligations of Lender to fund further disbursements under the Loan shall terminate.
- 9.3 **DISBURSEMENTS TO THIRD PARTIES.** Upon the occurrence of a Default occasioned by Borrower's failure to pay money to a third party as required by this Agreement, Lender may but shall not be obligated to make such payment from the Loan proceeds or other funds of Lender. If such payment is made from funds of Lender, Borrower shall immediately repay such funds upon written demand of Lender. In either case, the Default with respect to which any such payment has been made by Lender shall not be deemed cured until such deposit or repayment (as the case may be) has been made by Borrower to Lender.
- 9.4 **REPAYMENT OF FUNDS ADVANCED.** Any funds expended by Lender in the exercise of its rights or remedies under this Agreement and the other Loan Documents shall be payable to Lender upon demand, together with interest at the rate applicable to the principal balance of the Note from the date the funds were expended.
- 9.5 **RIGHTS CUMULATIVE, NO WAIVER.** All Lender's rights and remedies provided in this Agreement and the other Loan Documents, together with those granted by law or at equity, are cumulative and may be exercised by Lender at any time. Lender's exercise of any right or remedy shall not constitute a cure of any Default unless all sums then due and payable to Lender under the Loan Documents are repaid and Borrower has cured all other Defaults. No waiver shall be implied from any failure of Lender to take, or any delay by Lender in taking, action concerning any Default or failure of condition under the Loan Documents, or from any previous waiver of any similar or unrelated Default or failure of condition. Any waiver or approval under any of the Loan Documents must be in writing and shall be limited to its specific terms.

#### ARTICLE 10 MISCELLANEOUS PROVISIONS

- 10.1 **INDEMNITY.** BORROWER HEREBY AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER, ITS DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, SUCCESSORS

AND ASSIGNS FROM AND AGAINST ANY AND ALL LOSSES, DAMAGES, LIABILITIES, CLAIMS, ACTIONS, JUDGMENTS, COURT COSTS AND LEGAL OR OTHER EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND EXPENSES) WHICH LENDER MAY INCUR AS A DIRECT OR INDIRECT CONSEQUENCE OF (A) THE FAILURE OF BORROWER TO PERFORM ANY OBLIGATIONS AS AND WHEN REQUIRED BY THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS; (B) ANY FAILURE OF ANY OF BORROWER'S REPRESENTATIONS OR WARRANTIES TO BE TRUE AND CORRECT; OR (C) ANY ACT OR OMISSION BY BORROWER. BORROWER SHALL IMMEDIATELY PAY TO LENDER UPON DEMAND ANY AMOUNTS OWING UNDER THIS INDEMNITY, TOGETHER WITH INTEREST FROM THE DATE THE INDEBTEDNESS ARISES UNTIL PAID AT THE RATE OF INTEREST APPLICABLE TO THE PRINCIPAL BALANCE OF THE NOTE. BORROWER'S DUTY AND OBLIGATIONS TO DEFEND, INDEMNIFY AND HOLD HARMLESS LENDER SHALL SURVIVE CANCELLATION OF THE NOTE AND THE RELEASE, RECONVEYANCE OR PARTIAL RECONVEYANCE OF THE DEED OF TRUST.

- 10.2 **FORM OF DOCUMENTS.** The form and substance of all documents, instruments, and forms of evidence to be delivered to Lender under the terms of this Agreement and any of the other Loan Documents shall be subject to Lender's approval and shall not be modified, superseded or terminated in any respect without Lender's prior written approval.
- 10.3 **NO THIRD PARTIES BENEFITED.** No person other than Lender and Borrower and their permitted successors and assigns shall have any right of action under any of the Loan Documents.
- 10.4 **NOTICES.** All notices, demands, or other communications under this Agreement and the other Loan Documents shall be in writing and shall be delivered to the appropriate party at the address set forth on the signature page of this Agreement (subject to change from time to time by written notice to all other parties to this Agreement). All communications shall be deemed served upon delivery of, or if mailed, upon the first to occur of receipt or the expiration of three (3) days after the deposit in the United States Postal Service mail, postage prepaid and addressed to the address of Borrower or Lender at the address specified; provided, however, that non-receipt of any communication as the result of any change of address of which the sending party was not notified or as the result of a refusal to accept delivery shall be deemed receipt of such communication.
- 10.5 **RIGHT OF CONTEST.** Borrower may contest in good faith any claim, demand, levy or assessment (other than liens and stop notices) by any person other than Lender which would constitute a Default if: (a) Borrower pursues the contest diligently, in a manner which Lender determines is not prejudicial to Lender, and does not impair the rights of Lender under any of the Loan Documents; and (b) Borrower deposits with Lender any funds or other forms of assurance which Lender in good faith determines from time to time appropriate to protect Lender from the consequences of the contest being unsuccessful. Borrower's compliance with this Section shall operate to prevent such claim, demand, levy or assessment from becoming a Default.
- 10.6 **RELATIONSHIP OF PARTIES.** The relationship of Borrower and Lender under the Loan Documents is, and shall at all times remain, solely that of borrower and lender, and Lender neither undertakes nor assumes any responsibility or duty to Borrower or to any third party with respect to the Property or Improvements, except as expressly provided in this Agreement and the other Loan Documents.
- 10.7 **DELAY OUTSIDE LENDER'S CONTROL.** Lender shall not be liable in any way to Borrower or any third party for Lender's failure to perform or delay in performing under the Loan Documents (and Lender may suspend or terminate all or any portion of Lender's obligations under the Loan Documents) if such failure to perform or delay in performing results directly or indirectly from, or is based upon, the action, inaction, or purported action, of any governmental or local authority, or because of war, rebellion, insurrection, strike, lock-out, boycott or blockade (whether presently in

effect, announced or in the sole judgment of Lender deemed probable), or from any Act of God or other cause or event beyond Lender's control.

- 10.8 **ATTORNEYS' FEES AND EXPENSES; ENFORCEMENT.** If any attorney is engaged by Lender to enforce or defend any provision of this Agreement, any of the other Loan Documents or Other Related Documents, or as a consequence of any Default under the Loan Documents, with or without the filing of any legal action or proceeding, and including, without limitation, any fees and expenses incurred in any bankruptcy proceeding of the Borrower, then Borrower shall immediately pay to Lender, upon demand, the amount of all attorneys' fees and expenses and all costs incurred by Lender in connection therewith, together with interest thereon from the date of such demand until paid at the rate of interest applicable to the principal balance of the Note as specified therein.
- 10.9 **IMMEDIATELY AVAILABLE FUNDS.** Unless otherwise expressly provided for in this Agreement, all amounts payable by Borrower to Lender shall be payable only in United States currency, immediately available funds.
- 10.10 **LENDER'S CONSENT.** Wherever in this Agreement there is a requirement for Lender's consent and/or a document to be provided or an action taken "to the satisfaction of Lender," it is understood by such phrase that Lender shall exercise its consent, right or judgment in a reasonable manner given the specific facts and circumstance applicable at the time.
- 10.11 **SIGNS.** Lender may place on the Property reasonable signs standard to construction loan transactions stating that construction financing is being provided by Lender and any other lenders or participants in the Loan.
- 10.12 **LENDER'S AGENTS.** Lender may designate an agent or independent contractor to exercise any of Lender's rights under this Agreement and any of the other Loan Documents. Any reference to Lender in any of the Loan Documents shall include Lender's agents, employees or independent contractors. Borrower shall pay the costs of such agent or independent contractor either directly to such person or to Lender in reimbursement of such costs, as applicable.
- 10.13 **WAIVER OF RIGHT TO TRIAL BY JURY. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH PARTY TO THIS AGREEMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION (a) ARISING UNDER THE LOAN DOCUMENTS, INCLUDING, WITHOUT LIMITATION, ANY PRESENT OR FUTURE MODIFICATION THEREOF OR (b) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THE LOAN DOCUMENTS (AS NOW OR HEREAFTER MODIFIED) OR ANY OTHER INSTRUMENT, DOCUMENT OR AGREEMENT EXECUTED OR DELIVERED IN CONNECTION HERewith, OR THE TRANSACTIONS RELATED HERETO OR THERETO, IN EACH CASE WHETHER SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION IS NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF ANY RIGHT THEY MIGHT OTHERWISE HAVE TO TRIAL BY JURY.**
- 10.14 **SEVERABILITY.** If any provision or obligation under this Agreement and the other Loan Documents shall be determined by a court of competent jurisdiction to be invalid, illegal or unenforceable, that provision shall be deemed severed from the Loan Documents and the validity, legality and enforceability of the remaining provisions or obligations shall remain in full force as though the invalid, illegal, or unenforceable provision had never been a part of the Loan Documents, provided, however, that if the rate of interest or any other amount payable under the Note or this Agreement or any other Loan Document, or the right of collectibility therefor, are

declared to be or become invalid, illegal or unenforceable, Lender's obligations to make advances under the Loan Documents shall not be enforceable by Borrower.

- 10.15 **HEIRS, SUCCESSORS AND ASSIGNS.** Except as otherwise expressly provided under the terms and conditions of this Agreement, the terms of the Loan Documents shall bind and inure to the benefit of the heirs, successors and assigns of the parties.
- 10.16 **TIME.** Time is of the essence of each and every term of this Agreement.
- 10.17 **HEADINGS.** All article, section or other headings appearing in this Agreement and any of the other Loan Documents are for convenience of reference only and shall be disregarded in construing this Agreement and any of the other Loan Documents.
- 10.18 **GOVERNING LAW.** This Agreement shall be governed by, and construed and enforced in accordance with the laws of the State of California, except to the extent preempted by federal laws. Borrower and all persons and entities in any manner obligated to Lender under the Loan Documents consent to the jurisdiction of any federal or state court within the State of California having proper venue and also consent to service of process by any means authorized by California or federal law.
- 10.19 **USA PATRIOT ACT NOTICE, COMPLIANCE.** The USA Patriot Act of 2001 (Public Law 107-56) and federal regulations issued with respect thereto require all financial institutions to obtain, verify and record certain information that identifies individuals or business entities which open an "account" with such financial institution. Consequently, Lender (for itself and/or as Agent for all Lenders hereunder) may from time-to-time request, and Borrower shall provide to Lender, Borrower's name, address, tax identification number and/or such other identification information as shall be necessary for Lender to comply with federal law. An "account" for this purpose may include, without limitation, a deposit account, cash management service, a transaction or asset account, a credit account, a loan or other extension of credit, and/or other financial services product.
- 10.20 **INTEGRATION; INTERPRETATION.** The Loan Documents contain or expressly incorporate by reference the entire agreement of the parties with respect to the matters contemplated therein and supersede all prior negotiations or agreements, written or oral. The Loan Documents shall not be modified except by written instrument executed by all parties. Any reference to the Loan Documents includes any amendments, renewals or extensions now or hereafter approved by Lender in writing.
- 10.21 **JOINT AND SEVERAL LIABILITY.** The liability of all persons and entities obligated in any manner under this Agreement and any of the Loan Documents shall be joint and several.
- 10.22 **COUNTERPARTS.** To facilitate execution, this document may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. All counterparts shall collectively constitute a single document. It shall not be necessary in making proof of this document to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties hereto. Any signature page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature pages.

IN WITNESS WHEREOF, Borrower and Lender have executed this Agreement as of the date appearing on the first page of this Agreement.

"LENDER"

J & H CAPITAL INVESTMENTS, INC.,  
a Texas corporation

*Brent Brasher*

By: \_\_\_\_\_  
Name: Brent Brasher  
Its: Principal

Lender's Address:  
J & H Capital Investments, Inc.  
4020 N. MacArthur Blvd., Suite 123-266  
Irving, Texas 75038  
Attention: Brent Brasher

"BORROWER"

ESCONDIDO DEVELOPMENT, LLC,  
a Delaware limited liability company

By: Transcan Escondido Hotel Owners, LLC

By: *Robert Bahen*  
Name: ROBERT BAHEN  
Its: Managing Member

By: *Robert Bahen*  
Robert Bahen, an individual

Borrower's Address:  
Escondido Development, LLC  
c/o Transcan Development, LLC  
3189 Danville Boulevard, Suite 425  
Alamo, California 94507  
Attention: Mr. Robert Bahen



**EXHIBIT A - DESCRIPTION OF PROPERTY**

That certain land situated in the City of Escondido, County of San Diego, State of California, and described as follows:

EXHIBIT "A"

LEGAL DESCRIPTION  
OF  
HOTEL AND CONFERENCE CENTER SITE

A PORTION OF BLOCK 13 OF RANCHO RINCON DEL DIABLO, IN THE CITY OF ESCONDIDO, COUNTY OF SAN DIEGO STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 336, AS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY AND DESCRIBED AS FOLLOWS:

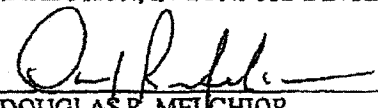
BEGINNING AT THE SOUTHWESTERLY CORNER OF SAID BLOCK NO. 13 OF SAID RANCHO RINCON DEL DIABLO ACCORDING TO SAID MAP NO. 336; THENCE ALONG THE WESTERLY LINE OF SAID BLOCK 13, BEING ALSO THE EASTERLY RIGHT-OF-WAY OF ESCONDIDO BOULEVARD (FORMERLY KNOWN AS NUTMEG STREET) NORTH 30°46'47" WEST, 191.79 FEET; THENCE LEAVING SAID WESTERLY LINE NORTH 59°13'13" EAST, 114.59 FEET; THENCE SOUTH 30°46'47" EAST, 25.37 FEET; THENCE NORTH 59°13'13" EAST, 113.19 FEET; THENCE NORTH 30°46'47" WEST, 65.03 FEET; THENCE NORTH 59°13'13" EAST, 110.81 FEET; THENCE NORTH 30°46'47" WEST, 107.44 FEET TO A POINT ON THE CENTER LINE OF FORMER PENNSYLVANIA AVENUE (VACATED TO PUBLIC USE); THENCE NORTHEASTERLY ALONG SAID CENTERLINE OF FORMER PENNSYLVANIA AVENUE (VACATED TO PUBLIC USE) NORTH 59°12'57" EAST, 106.46 FEET TO A POINT 5.00 FEET EASTERLY MEASURED AT RIGHT ANGLES TO THE CENTERLINE OF FORMER MAPLE STREET (VACATED TO PUBLIC USE); THENCE SOUTHERLY PARALLEL TO AND 5.00 FEET EASTERLY OF SAID CENTER LINE OF FORMER MAPLE STREET (VACATED TO PUBLIC USE) SOUTH 30°44'51" EAST, 207.50 FEET; THENCE NORTH 59°15'09" EAST, 28.00 FEET; THENCE SOUTH 30°44'51" EAST, 16.00 FEET; THENCE NORTH 59°15'09" EAST, 10.00 FEET; THENCE SOUTH 30°44'51" EAST 16.00 FEET; THENCE SOUTH 59°15'09" WEST 38.00 FEET; THENCE SOUTH 30°44'51" EAST 16.30 FEET; THENCE NORTH 59°15'09" EAST 22.50 FEET; THENCE SOUTH 30°44'51" EAST 9.70 FEET; THENCE SOUTH 59°15'09" WEST 22.50 FEET; THENCE PARALLEL TO AND 5.00 FEET EASTERLY OF SAID CENTERLINE SOUTH 30°44'51" EAST, 73.47 FEET TO A POINT ON THE SOUTHERLY LINE OF SAID BLOCK 13 OF SAID RANCHO RINCON DEL DIABLO, BEING ALSO THE NORTHERLY RIGHT-OF-WAY LINE OF WEST VALLEY PARKWAY (FORMERLY KNOWN AS OHIO AVENUE); THENCE WESTERLY ALONG SAID RIGHT-OF-WAY SOUTH 59°13'46" WEST, 5.00 FEET TO A POINT ON THE CENTER LINE OF SAID FORMER MAPLE STREET (VACATED TO PUBLIC USE); THENCE CONTINUING WESTERLY ON SAID RIGHT-OF-WAY SOUTH 59°13'46" WEST, 439.86 FEET TO THE POINT OF BEGINNING.

CONTAINING: 103,797.95 SQ. FT.

2.383 ACRES MORE OR LESS

ATTACHED HERETO AND MADE A PART HEREOF THIS LEGAL DESCRIPTION IS A PLAT LABELED EXHIBIT "B"

THIS REAL PROPERTY DESCRIPTION HAS BEEN PREPARED BY ME, OR UNDER MY DIRECTION, IN CONFORMANCE WITH THE PROFESSIONAL LAND SURVEYORS ACT.

  
DOUGLAS R. MELCHIOR  
P.L.S. 4611  
LICENSE EXPIRES 9-30-10

10-21-2009  
DATE

