

AGENDA
OVERSIGHT BOARD MEETING
FONTANA REDEVELOPMENT SUCCESSOR AGENCY

FRIDAY, JUNE 15, 2012
9:00 A.M.

Fontana City Hall
Executive Conference Room
8353 Sierra Avenue
Fontana, CA 92335

EVELYNE SSENKOLOTO, Chair
City of Fontana
Employee Appointment

ACQUANETTA WARREN, Vice-Chair
City of Fontana
Mayor Appointment

JOHN B. ROBERTS
City of Fontana
Fontana Fire Protection District Appointment

ALEJANDRO ALVAREZ
Fontana Unified School District
County Superintendent of Education Appointment

LYNNE FISCHER
County of San Bernardino
Board of Supervisors Appointment

CIRIACO "CID" PINEDO
Chaffey College District
Chaffey College Appointment

LAURA A. MANCHA
County of San Bernardino
Board of Supervisors Appointment
Public Member Appointment

In compliance with the Americans with Disabilities Act, the City of Fontana is wheelchair accessible. If other special Assistance is required, please contact the Fontana City Clerk's Office (909-350-7602) 48 hours prior to the scheduled meeting so the Oversight Board can make reasonable arrangements.

**AGENDA
OVERSIGHT BOARD MEETING
FONTANA REDEVELOPMENT SUCCESSOR AGENCY
FRIDAY, JUNE 15, 2012
9:00 A.M.**

This meeting will take place in the Fontana City Hall – Executive Conference Room
located at 8353 Sierra Avenue, Fontana, CA 92335

Welcome to a meeting of the Oversight Board – Fontana Redevelopment Successor Agency. A complete agenda packet is located on the table in the Executive Conference Room. To address the Board, please fill out a card located at the entrance indicating your desire to speak on either a specific agenda item or under Public Communications and give it to the Recording Secretary. Your name will be called when it is your turn to speak. In compliance with Americans with Disabilities Act, the Executive Conference Room is wheel chair accessible.

Traducción en Español disponible a petición. Favor de notificar al Departamento "City Clerk". Para mayor información, favor de marcar el número (909) 350-7602.

CALL TO ORDER/ROLL CALL:

PUBLIC COMMUNICATIONS:

This is an opportunity for citizens to speak for up to five minutes on items not on the agenda, but within the Oversight Board's jurisdiction. The Board is prohibited by law from discussing or taking immediate action on non-agendized items.

ITEM (A-G):

- A. Approval of Minutes from April 20, 2012 Meeting
- B. Recognized Obligation Payment Schedule (ROPS)/Department of Finance (DOF) – Update by Lisa Strong, Management Services Director
- C. Second Amendment to the Hilton Garden Inn Disposition and Development Agreement (DDA)
- D. Shared Driveway Easement Agreement - Westech College
- E. Utility and Parking Easement Agreement - Westech College
- F. The Original Alfredo's Restaurant - Oral Report by David Edgar, Deputy City Manager
- G. Staff/Board Member Communications

WORKSHOP:

Property Disposition Strategy – Presentation by RSG Advisor Felise Acosta

ADJOURNMENT:

Next Meeting: Next Oversight Board meeting is scheduled for Friday, August 24, 2012 at 9:00 A.M. in the Fontana City Hall, Executive Conference Room located at 8353 Sierra Avenue, Fontana, CA 92335.

**MINUTES OF THE OVERSIGHT BOARD
FONTANA REDEVELOPMENT SUCCESSOR AGENCY
FRIDAY, APRIL 20, 2012**

CALL TO ORDER/ROLL CALL:

The Meeting of the Oversight Board, Fontana Redevelopment Successor Agency, was called to order at 9:00 a.m., which was held on Friday, April 20, 2012, in the Fontana City Hall, Executive Conference Room, 8353 Sierra Avenue, Fontana, California.

OSB Members Present: Chairperson Evelyne Ssenkoloto, OSB Members Alejandro Alvarez, Cid Pinedo, and John Roberts. OSB Members Absent: Vice-Chair Acquanetta Warren.

OSB Staff Present: David Edgar, Deputy City Manager, Administrative Services; Jeff Ballinger, City Attorney, Best, Best & Krieger; Sandra Medina, Deputy City Clerk; Lisa Strong, Management Services Director; and Cecilia Lopez-Henderson, Administrative Project Coordinator (Recording Secretary).

PUBLIC COMMUNICATIONS:

There were no public communications received.

A. OATH OF OFFICE

Deputy City Clerk Sandra Medina administered the Oath of Office to Ms. Lynne Fischer, County of San Bernardino Board of Supervisors Appointment.

B. APPOINTMENT OF SECRETARY

ACTION: OSB Member Roberts nominated OSB Member Fischer for Secretary, seconded by OSB Member Alvarez. Motion passed unanimously by vote of 5-0.

C. APPROVAL OF MINUTES FROM APRIL 6, 2012 MEETING

ACTION: OSB Member Pinedo moved to approve the April 6, 2012 Minutes of the Oversight Board Meeting, Fontana Redevelopment Successor Agency, seconded by OSB Member Alvarez. Motion passed unanimously by vote of 5-0. Abstain: OSB Member Fischer.

D. RESOLUTION APPROVING SECOND RECOGNIZED OBLIGATION PAYMENT SCHEDULE (ROPS) FROM JULY 1, 2012 THROUGH DECEMBER 31, 2012.

(Vice-Chair Warren arrived at 9:15 a.m.)

Chairperson Ssenkoloto asked whether correspondence was received on this item. Recording Secretary Cecilia Lopez-Henderson responded that correspondence dated April 10, 2012 was received from the Western Center on Law and Poverty. A copy is on file with the City Clerk's Department.

Deputy City Manager David Edgar summarized the correspondence and stated that the correspondence comes under the auspices of the Public Interest Law Project, but in actuality the letter is from the Western Center on Law and Poverty and is questioning the Oversight Board's (OSB) actions taken on April 6, 2012. Mr. Edgar stated that the OSB is not currently involved in the litigation with Western Center on Law and Poverty. Western City sued the former Redevelopment Agency of the City of Fontana on a previous action involving the Jurupa Redevelopment Project Area that occurred between 1982 and 1985. The litigation is going through the court right now, and a closed session will be scheduled, if and when this item comes before the OSB. This item is not on the agenda; therefore, no action is required on the part of the OSB.

OSB Member Fischer stated that the legal counsel for the OSB is for the agency and not the OSB. Ms. Fischer questioned whether the letter from the Western Center on Law and Poverty required a response. Legal Counsel Ballinger stated that the OSB does not need to respond to the lawsuit because the OSB has not been named. OSB Member Pinedo inquired about the comment regarding violation of the Brown Act. Legal Counsel Ballinger responded that if an agency has a website, then the agency meeting notice must be posted. Nevertheless, the City did post the agenda within the 72-hour requirement and therefore the posting requirements were met.

Management Services Director Lisa Strong presented the staff report on the Second Recognized Obligation Payment Schedule (ROPS), of which a complete copy is on file in the City Clerk's Department.

Ms. Strong stated that the first ROPS have been submitted to the Department of Finance (DOF), State Controller's Office, and the County. In response, the City received an email which stated that additional information was needed, but specific items in question were not provided.

Ms. Strong stated that when ROPS II is submitted to the County, the City will be requesting its share of the tax increment to pay for the obligations, which are exactly the same that were covered by the first ROPS, with the exception of an audit. The audit has been estimated at \$50,000 because it was not sure what exactly will be audited. All the other obligations that are in ROPS II are the next six months worth of payments. Ms. Strong explained that bonded indebtedness was split into two payments that are due for the year, so the payments are evened out through the year. Ms. Strong added that the only exceptions are Numbers 2 and 3 on ROPS II, which are the Jurupa Hills bonds. The full amounts are shown in the first six months because an Owner Participation Agreement (OPA) requires those to be paid first before the OPA is paid.

OSB Member Fischer questioned whether any of the items that are on ROPS II were discussed on the ROPS drafts that might have been sent to the DOF. Ms. Strong responded that the DOF did ask for documentation on four items and the City was informed that three of the items should be removed. The DOF stated that denial letters would be sent to the City and the City has not received any denial letters, so the items were left on ROPS II. The item that the DOF requested information for was Number 9, the Owner Participation Agreement (OPA) with Ten-Ninety, but the DOF did not state that this item was to be removed; additional information was requested on Number 5, the Agreement of Purchase and Sale for the North Fontana Redevelopment Project Area. The other item was Number 26, the Duncan Canyon Interchange that the DOF requested additional information. The reason was that a construction contract was not in place, even though many contracts going back to 2006 with SANBAG were in place, the DOF stated that this item would need to be removed. Lastly, additional information was requested for Number 4, a City loan between the City's sewer fund and a project area. The reason that Number 4 was removed was that the loan was not entered into within two years of the establishment of the redevelopment agency.

Ms. Strong referred to Form B, ROPS II, which shows the debt service bond payments split in half, which can cause a short fall in the first six months. Basically, the City is asking the DOF if this money can be held in cash flow reserves, so that the City does not run short when those payments are made. When the bonds are paid off, this money can be returned. The City cannot take the chance that enough money will not be available to make the bond service payments. These items will be classified as cash flow reserves on the balance sheet, and all bonds have been listed that might need cash flow. Ms. Strong stated that Form C, administrative costs, is shown as one line item. A cost allocation plan was prepared, which is how it was determined that it was well above the limit, so it was capped at the limit. There is no Form D because last time Form D had the pass-through payments and now the County will be handling those. The cover sheet contains all this information.

ACTION: Motion was made by OSB Member Pinedo, seconded by Vice-Chair Warren and passed unanimously by vote of 6-0 to adopt Resolution No. FOB 2012-04 of the Oversight Board of the Successor Agency to the Dissolved Fontana Redevelopment Agency, approving a Recognized Obligation Payment Schedule (ROPS) for July 1, 2012 through December 31, 2012 pursuant to Health and Safety Code Sections 34177(l) and 34180(g).

E. STAFF/BOARD MEMBER COMMUNICATIONS

OSB Member Fischer asked who the staff contacts are regarding questions concerning ROPS or future OSB meetings. Deputy City Manager David Edgar responded that questions regarding finance can be directed to Lisa Strong, and questions regarding the agenda, minutes and meeting dates, can be directed to Cecilia Lopez-Henderson. OSB Member Pinedo stated that he may not be present at the June 15, 2012 OSB meeting due to a scheduling conflict. No other Board Member communications were made.

Deputy City Manager David Edgar stated that future OSB meetings will revolve around two sets of issues: one is the future ROPS, and the other is property dispositions. There are approximately 120 small and large parcels in the City of Fontana that require development of a strategy and approach. Presently, the County has been given direction by the DOF to put together an audit to review and that should be done by July 15, 2012. There are three property matters that will go forward on the June 15, 2012 OSB agenda as follows:

- A restaurant agreement with the Hilton Garden Hotel that needs to be extended and cannot wait until the property disposition;
- An agreement with Alfredo's Restaurant, currently in San Bernardino, who want to open a second facility in downtown Fontana; and
- Easement agreements for Westech College. Westech is building a facility within the former Civic Auditorium property, and there are some easement agreements that need to be taken forward for the properties to the north and south. The easement agreements are currently controlled by the former Redevelopment Agency.

Mr. Edgar stated that legislation is being tracked concerning a strategic plan that the State may require for the disposition of those properties. The Steinberg legislation contemplates this, but it is not known whether the legislation will pass. In the interim, however, the City is working on a strategic plan so that there is some logic to the disposition of properties.

ADJOURNMENT:

The Fontana Oversight Board Meeting adjourned by consensus at 9:30 a.m. to the next Fontana Oversight Board Meeting on Friday, June 15, 2012 at 9:00 a.m., Fontana City Hall, Executive Conference Room, 8353 Sierra Avenue, Fontana, California.

Lynne Fischer
Secretary

Evelyne Ssenkoloto
Chairperson

**OVERSIGHT BOARD ACTION REPORT
FONTANA REDEVELOPMENT SUCCESSOR AGENCY
JUNE 15, 2012**

FROM: Department of Housing and Business Development

SUBJECT: Second Amendment to the Hilton Garden Inn Disposition and Development Agreement (DDA)

RECOMMENDED ACTION:

Adopt Resolution No. FOB 2012 - _____ approving the second amendment to the Disposition and Development Agreement with Sierra Hotel Group LLC to facilitate development of the restaurant parcel located adjacent to a Hilton Gardens Hotel, and authorize the City Manager to execute said agreement and any other documents necessary to effectuate said approval.

BACKGROUND:

In June, 2007 the City Council approved a Disposition and Development Agreement (DDA) with Sierra Hotel Group LLC to facilitate construction of the Hilton Garden Inn Hotel. The Hilton Garden Inn opened for business on April 14, 2009. In addition, the DDA also allowed for the development of a restaurant facility on the land located adjacent to the Hilton Garden Inn Hotel.

On May 13, 2008, the DDA with Sierra Hotel Group was amended to reflect certain changes to both the Hotel and restaurant facilities. Included within the original and amended DDA, however, were provisions allowing Sierra Hotel Group LLC to purchase and develop the land located adjacent to the Hotel as a restaurant facility.

ISSUES/ANALYSIS:

The Sierra Hotel Group LLC has recently been working with City of Fontana staff in conjunction with a proposed second amendment to the DDA. As requested, the proposed Amendment would include the following provisions:

- Sierra Hotel Group LLC would purchase the land located adjacent to the Hilton Garden Inn facility.
- Said property (APN #019437124), consisting of approximately .92 acres, is currently owned by the "Successor Agency" to the former Fontana Redevelopment Agency.
- Sierra Hotel Group LLC would purchase the land for the previously agreed to price of \$200,000 (as contained within the approved and amended DDA).

- Said acquisition would be completed no later than December 31, 2012. This acquisition is being funded as part of the Hotel refinancing currently being undertaken by the developer.
- Sierra Hotel Group LLC would have until December 31, 2015 to complete construction and formal "opening" of a restaurant facility on the subject property.

Sierra Hotel Group LLC is an experienced Hotel developer and builder - with a combined net worth in excess of \$20M.

Approval of the Second Amendment to the DDA with Sierra Hotel Group LLC will facilitate acquisition of the land and development of a restaurant facility on the property located adjacent to the Hilton Garden Inn.

FISCAL IMPACT:

Payment of \$200,000 by Sierra Hotel Group LLC for land located adjacent to the Hilton Garden Inn.

MOTION:

Approve staff's recommendation.

SUBMITTED BY:



David R. Edgar
Deputy City Manager

APPROVED BY:



Kenneth R. Hunt
City Manager

ATTACHMENT

1. Resolution No. FOB 2012 - ____ and Second Amendment to the Restated Disposition and Development Agreement.

RESOLUTION FOB NO. 2012 - ____

**A RESOLUTION OF THE OVERSIGHT BOARD OF THE
SUCCESSOR AGENCY TO THE FONTANA
REDEVELOPMENT AGENCY, APPROVING A SECOND
AMENDMENT TO AMENDED AND RESTATED
DISPOSITION AND DEVELOPMENT AGREEMENT
(HILTON GARDEN INN)**

WHEREAS, pursuant to Health and Safety Code section 34173(d), the City of Fontana ("Successor Agency") is the successor agency to the Fontana Redevelopment Agency ("Agency"); and

WHEREAS, pursuant to Health and Safety Code section 34179(a), the Oversight Board is the Successor Agency's oversight board; and

WHEREAS, the Agency and Sierra Hotel Group, LLC, a California limited liability company ("Developer"), previously entered into that certain Amended and Restated Disposition and Development Agreement (Hilton Garden Inn), dated as of June 1, 2007, as later amended by that certain First Amendment to Amended and Restated Disposition and Development Agreement (Hilton Garden Inn), dated as of May 13, 2008, by and between the Agency and Developer (collectively, the "Agreement"), providing for Developer's purchase, sale and development of that certain real property located in the City of Fontana, California, and more particularly described in the Agreement as the "Property;"

WHEREAS, Developer acquired the "Hotel Parcel" (defined in the Agreement) portion of the Property and developed a business-class hotel and conference center facility (defined in the Agreement as the "Hotel") on the Hotel Parcel;

WHEREAS, the Agreement further contemplates Developer acquiring the "Restaurant Parcel" (defined in the Agreement) portion of the Property that is now owned by Successor Agency by virtue of Health and Safety Code Section 34170, et seq., and developing a restaurant in conjunction with the Hotel (defined in the Agreement as the "Restaurant") on the Restaurant Parcel;

WHEREAS, since entry into the Agreement, market factors have affected the timing of development of the Restaurant and require modification of certain provisions in the Agreement regarding transfer of the Restaurant Parcel to Developer for development of the Restaurant in order to maintain the viability of developing the Restaurant in conjunction with the Hotel;

WHEREAS, the Second Amendment to Amended and Restated Disposition and Development Agreement (Hilton Garden Inn) in substantially the form attached to this Resolution as Exhibit "A" ("Second Amendment") will maximize the value of the Restaurant Parcel because the previous development of the adjacent Hotel Parcel with

the Hotel and the location of the Restaurant Parcel on the corner of the block completely surrounded by the Hotel Parcel make development of the Restaurant Parcel by Developer as the Restaurant the best and most valuable use for the Restaurant Parcel;

WHEREAS, pursuant to Health and Safety Code section 34181(e), the Oversight Board is responsible for directing the Successor Agency to determine whether any agreements between the Agency and any private parties should be terminated or renegotiated to reduce liabilities and increase net revenues to the taxing entities and the Oversight Board is authorized to approve any amendments of such agreements, where the Oversight Board finds the amendments to be in the interests of the taxing entities;

NOW, THEREFORE, THE OVERSIGHT BOARD OF THE SUCCESSOR AGENCY TO THE FONTANA REDEVELOPMENT AGENCY DOES HEREBY RESOLVE AND FIND AS FOLLOWS:

Section 1. Recitals. The Recitals set forth above are true and correct and are incorporated into this Resolution by this reference.

Section 2. CEQA Compliance. The City of Fontana, as lead agency, previously adopted an Environmental Impact Report (No. 88-136) for the Sierra Business Park, which was certified by the City Council on June 3, 2003 regarding development of the Restaurant on the Restaurant parcel in compliance with the California Environmental Quality Act ("CEQA"). The Oversight Board hereby finds and determines that the Second Amendment will not result in any changes to the development of the Restaurant or the circumstances surrounding the development of the Restaurant and there is no new information regarding the development of the Restaurant, since adoption of the Environmental Impact Report (No. 88-136) for the Sierra Business Park, which was certified by the City Council on June 3, 2003, that would require or allow additional environmental review or documentation regarding the development of the Restaurant, pursuant to California Code of Regulations, title 14, section 15162. The City Clerk of the City of Fontana, acting on behalf of the Oversight Board, is authorized and directed to file a Notice of Exemption or Determination, as applicable, under CEQA with the appropriate official of the County of San Bernardino, California, within five (5) days following the date of adoption of this Resolution.

Section 3. Approval of Second Amendment. The Oversight Board hereby approves the Second Amendment, in substantially the form attached to this Resolution as Exhibit "A" and authorizes the Successor Agency to enter into the Second Amendment and perform the obligations of the Successor Agency pursuant to the Second Amendment.

Section 4. Severability. If any provision of this Resolution or the application of any such provision to any person or circumstance is held invalid, such invalidity shall

not affect other provisions or applications of this Resolution that can be given effect without the invalid provision or application, and to this end the provisions of this Resolution are severable. The Oversight Board declares that the Oversight Board would have adopted this Resolution irrespective of the invalidity of any particular portion of this Resolution.

Section 5. Certification. The Secretary, acting on behalf of the Oversight Board, shall certify to the adoption of this Resolution.

Section 6. Effective Date. Pursuant to Health and Safety Code section 34179(h), all actions taken by the Oversight Board may be reviewed by the State of California Department of Finance, and, therefore, this Resolution shall not be effective for three (3) business days, pending a request for review by the State of California Department of Finance.

APPROVED AND ADOPTED THIS 15th day of June, 2012.

Evelyn Ssenkoloto, Chairperson
Oversight Board of the Successor
Agency to the Fontana Redevelopment
Agency

ATTEST:

Lynne Fischer, Secretary
Oversight Board of the Successor Agency
to the Fontana Redevelopment Agency

EXHIBIT A

**SECOND AMENDMENT TO AMENDED AND RESTATED DISPOSITION AND
DEVELOPMENT AGREEMENT (HILTON GARDEN INN)**

[Attached behind this cover page]

**SECOND AMENDMENT
TO
AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT
(Hilton Garden Inn)**

THIS SECOND AMENDMENT TO AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT (Hilton Garden Inn) (this “**Second Amendment**”) is entered into as of [TO BE DETERMINED] (“**Second Amendment Effective Date**”), by and between the CITY OF FONTANA, a California municipal corporation, as successor agency to the Fontana Redevelopment Agency, pursuant to Health and Safety Code Section 34170, et seq. (“**Successor Agency**”), and SIERRA HOTEL GROUP LLC, a California limited liability company (“**Developer**”), to amend that certain Amended and Restated Disposition and Development Agreement (Hilton Garden Inn), dated as of June 1, 2007, as amended by that certain First Amendment to Amended and Restated Disposition and Development Agreement (Hilton Garden Inn), dated as of [TO BE DETERMINED], by and between the Fontana Redevelopment Agency and Developer (collectively, the “**Agreement**”), with reference to the following facts:

RECITALS

A. The Fontana Redevelopment Agency (“**Agency**”) and Developer previously entered into the Agreement for Developer’s purchase, sale and development of that certain real property located in the City of Fontana, California, and more particularly described in the Agreement as the “Property;”

B. Developer has acquired the “Hotel Parcel” (defined in the Agreement) portion of the Property and developed a business-class hotel and conference center facility (defined in the Agreement as the “Hotel”) on the Hotel Parcel;

C. The Agreement further contemplates Developer acquiring the “Restaurant Parcel” (defined in the Agreement) portion of the Property that is now owned by Successor Agency by virtue of Health and Safety Code Section 34170, et seq., and developing a restaurant in conjunction with the Hotel (defined in the Agreement as the “Restaurant”) on the Restaurant Parcel;

D. Since entry into the Agreement, market factors have affected the timing of development of the Restaurant and require extension of certain dates in the Agreement regarding transfer of the Restaurant Parcel to Developer for development of the Restaurant in order to maintain the viability of developing the Restaurant in conjunction with the Hotel;

E. With the approval of its “Oversight Board” established pursuant to Health and Safety Code Section 34179, Successor Agency enters into this Second Amendment with Developer to maximize the value of the Restaurant Parcel because the previous development of the adjacent Hotel Parcel with the Hotel and the location of the Restaurant Parcel on the corner of the block completely surrounded by the Hotel Parcel make development of the Restaurant Parcel by Developer as the Restaurant the best and most valuable use for the Restaurant Parcel;

and

F. Successor Agency and Developer intend to extend certain dates in the Agreement regarding transfer of the Restaurant Parcel to Developer and for development of the Restaurant by entering into this Second Amendment.

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES SET FORTH IN THIS SECOND AMENDMENT AND OTHER VALUABLE CONSIDERATION, SUCCESSOR AGENCY AND DEVELOPER AGREE AS FOLLOWS:

1. INCORPORATION OF RECITALS. The Recitals of fact set forth above are true and correct and are incorporated into this Second Amendment by this reference, as though fully set forth in this Second Amendment.

2. INCORPORATION OF DEFINED TERMS. All terms, phrases and words indicated to be defined terms by initial capitalization in this Second Amendment that are not specifically defined in this Second Amendment shall have the meaning ascribed to the same term, phrase, or word in the Agreement. All defined terms that are no longer used in the Agreement because of the effects of this Second Amendment on the Agreement shall be considered deleted from the Agreement.

3. EFFECT OF SECOND AMENDMENT. Except as set forth in this Second Amendment, the Agreement is, in all other respects, confirmed and all of the terms, provisions and conditions of the Agreement, as amended by this Second Amendment, shall be and remain in full force and effect. From and after the Second Amendment Effective Date, wherever the term "Agreement" appears in the Agreement, it shall be read and understood to mean the Agreement, as amended by this Second Amendment.

4. SUBSTITUTION OF SUCCESSOR AGENCY. As of the Second Amendment Effective Date, all references in the Agreement to "Agency" shall mean and refer to Successor Agency and all references to "Executive Director" shall mean and refer to the City Manager of Successor Agency.

5. AMENDMENTS TO SPECIFIC PROVISIONS OF THE AGREEMENT. The Successor Agency and Developer mutually agree to specifically amend the Agreement as follows:

5.1 Sections 2.1(ddd) of the Agreement is hereby amended to read in its entirety as follows:

[RESERVED]

5.2 Section 2.1(jjj) of the Agreement is hereby amended to read in its entirety as follows:

"Restaurant Parcel Closing Date" means on or before the earlier of: (i) the fifth (5th) business day following the Escrow Holder's receipt of written confirmation from both the Agency and

Developer of the satisfaction or waiver of all conditions precedent to the Restaurant Parcel Closing; or (ii) June 30, 2015.

5.3 Section 3.2(b) of the Agreement is hereby amended, with the intent of eliminating any and all right of the Developer to finance acquisition of the Restaurant Parcel through delivery of the Restaurant Parcel Note to the Agency, to read in its entirety as follows:

On the Restaurant Parcel Closing Date, the Developer shall pay the Restaurant Parcel Purchase Price, less the amount of the Earnest Money Deposit, to the Agency in immediately available funds.

5.4 Sections 4.10(a) through (e) and 4.11(e) of the Agreement are hereby amended to read in their entirety as follows:

[RESERVED]

5.5 Section 4.14 of the Agreement is hereby amended to read in its entirety as follows:

Rights to Terminate Escrows. If for any reason the Hotel Parcel Closing does not occur on or before the Hotel Parcel Closing Date, then any Party not then in default of this Agreement may cancel the Hotel Parcel Escrow and terminate this Agreement, without liability to the other Party or any other person for such actions, by delivering written notice of termination to the other Party and Escrow Holder. Notwithstanding any provision of this Agreement to the contrary, if for any reason the Restaurant Parcel Closing does not occur on or before December 31, 2012, the obligations of the Parties under this Agreement regarding purchase, sale or development of the Restaurant Parcel shall automatically terminate and any open Restaurant Parcel Escrow shall be automatically cancelled, without further notice to or from the Parties, without further action by the Parties and without liability of either Party to the other Party or any other person regarding such termination. If the Restaurant Parcel Escrow is cancelled pursuant to the immediately preceding sentence, the Parties shall proceed in accordance with Sections 4.16 and 4.17, as though the Restaurant Parcel Escrow were cancelled by right of a Party and without a default by either Party. If the Hotel Parcel Closing does not occur by the Hotel Parcel Closing Date, then the subject escrow shall close as soon as reasonably possible following the first date on which Escrow Holder is in a position to close the subject escrow pursuant to the terms and conditions of this Agreement.

5.6 Section 5.3 of the Agreement is hereby amended to read in its entirety as follows:

Construction Start and Completion of Phases of Project. Developer shall commence construction of each phase of the

Project in accordance with the Schedule of Performance and, thereafter, shall diligently proceed to complete the construction of each phase of the Project, in a good and workmanlike manner in accordance with the approved plans, specifications and conditions for the Project approved by the City and the Schedule of Performance. The Hotel shall be open for business to the general public by December 15, 2008 (the "**Hotel Completion Date**"). The Restaurant shall have been issued a final certificate of occupancy by the City and be open for business to the general public by December 31, 2015 (the "**Restaurant Completion Date**"). The Agency's City Manager may, in his or her sole and absolute discretion, extend either or both the Hotel Completion Date or the Restaurant Completion Date on terms that the Executive Director may require, each for up to twelve (12) months in the aggregate. Developer will, promptly upon completion of the Hotel and the Restaurant, respectively, cause the Hotel or the Restaurant, as applicable, to be inspected by each Governmental Agency with jurisdiction over the Project, shall correct any defects and deficiencies that may be disclosed by any such inspection and shall cause to be duly issued all occupancy certificates and other licenses, permits and authorizations necessary for the operation and occupancy of the completed Hotel or the completed Restaurant, as applicable. Developer shall do and perform all of the foregoing acts and things and cause to be issued and executed all such occupancy certificates, licenses and authorizations on or before the respective Hotel Completion Date or Restaurant Completion Date, as applicable. After commencement of the work of improvement of any phase of the Project, Developer shall not permit the work of improvement of that phase of the Project to cease or be suspended for a time period in excess of sixty (60) calendar days, either consecutively or in the aggregate, for any reason. No Unavoidable Delay shall suspend or otherwise abate any obligation of Developer to pay any sum of money or suspend or automatically abate any other obligation of Developer or automatically extend any completion date.

5.7 Section 10.1(b) of the Agreement is hereby amended to read in its entirety as follows:

The following are the authorized addresses for the submission of notices, demands or communications to the Parties:

To Developer:	Sierra Hotel Group LLC
	1905 Park Avenue, Suite 220
	San Jose, CA 95126
	Attention: John Della Penna

With courtesy copy to: Mark Carlquist
654 North Santa Cruz Avenue, Suite E
Los Gatos, CA 95030

To the Agency: City of Fontana
8353 Sierra Avenue
Fontana, CA 92335
Attention: Director of Business Development

With courtesy copy to: Best Best & Krieger LLP
3500 Porsche Way, Suite 200
Ontario, CA 91764
Attention: Jeff Ballinger

5.8 The authority provided in Section 10.12 of the Agreement to the Executive Director (now City Manager) to extend dates in the Agreement is hereby renewed and re-instated, as of the Second Amendment Effective Date.

5.9 Exhibit "D" attached to the Agreement is hereby replaced in its entirety with Exhibit 1 attached to this Second Amendment.

6. TAX CONSEQUENCES. Developer acknowledges and agrees that Developer shall bear any and all responsibility, liability, costs, and expenses connected in any way with any tax consequences experienced by Developer related to this Second Amendment.

7. CONFLICT. In the event of a conflict between the terms and conditions of this Second Amendment and the terms and conditions of the Agreement, the terms and conditions of this Second Amendment shall control.

8. COUNTERPARTS. This Second Amendment may be signed in counterparts, each of which shall be deemed an original, and all such counterparts, when taken together, shall constitute one agreement.

9. WARRANTY AGAINST PAYMENT OF CONSIDERATION FOR AGREEMENT. Developer represents and warrants that: (i) Developer has not employed or retained any person to solicit or secure this Second Amendment upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees of Developer; and (ii) no gratuities, in the form of entertainment, gifts or otherwise have been or will be given by Developer or any of Developer's agents, employees or representatives to any elected or appointed official or employee of Successor Agency in an attempt to secure this Second Amendment or favorable terms or conditions for this Second Amendment. Breach of the representations or warranties of this Section 9 shall give Successor Agency the right to terminate this Second Amendment, with seven (7) days notice to Developer. Upon any such termination of this Second Amendment, Developer shall immediately refund any payments made to or on behalf of Developer by Successor Agency pursuant to or otherwise related to this Second Amendment, prior to the date of any such termination.

10. RELATIONSHIP OF PARTIES. The Parties each intend and agree that Successor Agency and Developer are independent contracting entities and do not intend by this Second Amendment to create any partnership, joint venture, or similar business arrangement, relationship or association between them.

11. PRINCIPLES OF INTERPRETATION. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Second Amendment. The Parties have both participated substantially in the negotiation, drafting, and revision of this Second Amendment, with advice from legal and other counsel and advisers of their own selection. A word, term or phrase defined in the singular in this Second Amendment may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which shall govern all language in this Second Amendment. The words "include" and "including" in this Second Amendment shall be construed to be followed by the words: "without limitation." Each collective noun in this Second Amendment shall be interpreted as if followed by the words "(or any part of it)," except where the context clearly requires otherwise. Every reference to any document, including this Second Amendment, refers to such document, as modified from time to time (excepting any modification that violates this Second Amendment), and includes all exhibits, schedules, addenda and riders to such document. The word "or" in this Second Amendment includes the word "and." Every reference to a law, statute, regulation, order, form or similar governmental requirement in this Second Amendment refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time.

12. GOVERNING LAW. The laws of the State of California shall govern the interpretation and enforcement of this Second Amendment, without application of conflicts or choice of laws principles.

13. BINDING ON SUCCESSORS AND ASSIGNS. This Second Amendment shall be binding upon and inure to the benefit of the Parties and their respective legal representatives, successors and assigns.

14. NO OTHER REPRESENTATIONS OR WARRANTIES. Except as expressly set forth in this Second Amendment, no Party makes any representation or warranty material to this Second Amendment to any other Party.

15. NO THIRD-PARTY BENEFICIARIES. Nothing in this Second Amendment, express or implied, is intended to confer any rights or remedies under or by reason of this Second Amendment on any person other than the Parties and their respective permitted successors and assigns, nor is anything in this Second Amendment intended to relieve or discharge any obligation of any "Third Person" (as defined below) to any Party or give any Third Person any right of subrogation or action over or against any Party. "Third Person" means any person that is not a Party, an affiliate of a Party or an elected official, shareholder, member, principal, partner, employee or agent of a Party.

16. NO WAIVER. Failure to insist on any one occasion upon strict compliance with any term, covenant, condition, restriction or agreement contained in this Second Amendment shall not be deemed a waiver of such term, covenant, condition, restriction or agreement, nor shall any waiver or relinquishment of any rights or powers under this Second Amendment, at any one time

or more times, be deemed a waiver or relinquishment of such right or power at any other time or times.

[Signatures on following page]

**SIGNATURE PAGE
TO
SECOND AMENDMENT
TO
AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT
(HILTON GARDEN INN)**

Successor Agency and Developer sign and enter into this Second Amendment, by and through the signatures of their respective authorized representatives, as follows:

SUCCESSOR AGENCY:

CITY OF FONTANA, as successor agency to
the former Fontana Redevelopment Agency, a
California municipal corporation

Kenneth R. Hunt
City Manager

Attest:

Tonia Lewis
City Clerk

APPROVED AS TO FORM:

BEST BEST & KRIEGER LLP

City Attorney

DEVELOPER:

SIERRA HOTEL GROUP LLC,
a California limited liability company

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

BORELLI DEVELOPMENT COMPANY,
a California corporation

By: _____
Name: _____
Its: _____

**EXHIBIT 1
TO
SECOND AMENDMENT
TO
AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT
(HILTON GARDEN INN)**

SCHEDULE OF PERFORMANCE

Developer shall submit complete application for Conditional Use Permit and Design Review for Project to City of Fontana Planning Department	Before November 1, 2006
Developer to submit building plans for Hotel to City of Fontana Building Department	Before March 1, 2007
Developer shall have obtained any and all necessary approvals from Hilton regarding the location, design and construction of the Hotel	Before November 1, 2006
Developer shall obtain the approval of the City of Fontana for the Conditional Use Permit for the construction and operation of the Project	Before April 30, 2007
Developer shall obtain all building permits from the City of Fontana necessary for the construction and installation of the Hotel on the Hotel Parcel	Before August 1, 2007
Developer shall commence construction and installation of the Hotel on the Hotel Parcel	Before October 1, 2007
Developer shall complete construction and installation of the Hotel on the Hotel Parcel	Before December 15, 2008
Developer shall complete construction and installation of the Restaurant on Restaurant Parcel (evidenced by City issuance of a final certificate of occupancy for the Restaurant)	On or before December 31, 2015

Resolution FOB No. 2012 - ____

STATE OF CALIFORNIA)
COUNTY OF SAN BERNARDINO) ss
CITY OF FONTANA)

I, Lynne Fischer, acting as the Secretary of the Oversight Board of the Successor Agency to the Fontana Redevelopment Agency, do hereby certify that the foregoing Resolution No. 2012-____ was duly and regularly adopted by the Oversight Board of the Successor Agency to the Fontana Redevelopment Agency at a regular meeting thereof on the 15th day of June, 2012, and that the same was passed and adopted by the following vote, to wit:

AYES:
NOES:
ABSENT:
ABSTAIN:

Lynne Fischer, Secretary
Oversight Board of the Successor Agency
to the Fontana Redevelopment Agency

**OVERSIGHT BOARD ACTION REPORT
FONTANA REDEVELOPMENT SUCCESSOR AGENCY
JUNE 15, 2012**

FROM: Department of Housing and Business Development

SUBJECT: Shared Driveway Easement Agreement – Westech College

RECOMMENDED ACTION:

Adopt Resolution No. FOB 2012-____ approving the Shared Driveway Easement Agreement with NYMA properties to facilitate the construction of Westech College and authorize the City Manager to execute said agreement and any other documents necessary to effectuate said approval.

BACKGROUND:

The Mayor and City Council have identified development of the property on which the Civic Auditorium is currently located as a “priority project”. To that end, on April 24, 2012, the City Council approved a Disposition and Development Agreement (DDA) with NYMA Properties (i.e. “Dix Development”).

The DDA with Dix Development will facilitate construction of a two-story 20,000 square foot college facility (“Westech College”) on the property located at 9460 Sierra Avenue (the current location of the Civic Auditorium). It is anticipated that between 450 and 500 students will attend classes each semester at the Westech College facility in Fontana. Courses to be offered will include medical assistant and technician training, health insurance, office administration, phlebotomist certification and computer drafting and design.

ISSUES/ANALYSIS:

As part of the construction of Westech College, the City of Fontana and Dix Development have been working on a shared driveway easement for the property located adjacent to, and north of, 9460 Sierra Avenue. That Agreement includes the following provisions;

- Dix Development is constructing a college facility on the property located at 9460 Sierra Avenue. Said property will be transferred to Dix development prior to the commencement of construction.
- The Successor Agency to the former Fontana Redevelopment Agency currently owns the property located directly adjacent to, and north of, 9460 Sierra Avenue.

- As part of the construction of Westech College, Dix Development would be permitted to complete certain driveway improvements on the property owned by the Successor Agency to the former Fontana Redevelopment Agency. When completed, the improvements would be shared by, and for the mutual benefit of, both the developer's property and the Successor Agency's property. Said improvements are specifically for the ingress and egress of vehicles and pedestrians.
- The Successor Agency desires to convey to developer and the developer desires to obtain from the Successor Agency a permanent, non-exclusive easement over that portion of the Successor Agency property to be improved with the driveway improvements for the ingress and egress of vehicles and pedestrians.
- Construction of the requested driveway improvements would be the sole and absolute responsibility of Dix Development.
- Construction of the requested driveway improvements at this location will create a vehicular and pedestrian oriented "entrance statement" to the property, will centrally align the entrance to Sierra Avenue and will enhance the overall value of both properties.

Construction of the Westech College facility is scheduled to commence in late summer. Adoption of the resolution and approval of the Easement Agreement with NYMA Properties will facilitate one component of that construction. Westech College is scheduled to open for classes in spring, 2013.

FISCAL IMPACT:

No direct fiscal impact. The driveway improvements will, however, increase the value of the Successor Agency property.

MOTION:

Approve staff's recommendation.

SUBMITTED BY:



David R. Edgar
Deputy City Manager

APPROVED BY:



Kenneth R. Hunt
City Manager

ATTACHMENT:

1. Resolution No. FOB 2012-____ approving the Shared Driveway Easement and Easement Agreement.

RESOLUTION FOB NO. ____

**A RESOLUTION OF THE OVERSIGHT BOARD OF THE
SUCCESSOR AGENCY TO THE FONTANA
REDEVELOPMENT AGENCY APPROVING A SHARED
DRIVEWAY EASEMENT AGREEMENT (WESTECH
COLLEGE)**

WHEREAS, pursuant to Health and Safety Code section 34173(d), the City of Fontana ("Successor Agency") is the successor agency to the Fontana Redevelopment Agency ("Agency"); and

WHEREAS, pursuant to Health and Safety Code section 34179(a), the Oversight Board is the Successor Agency's oversight board; and

WHEREAS, the Agency and Dix Development, Inc., a California corporation, the predecessor to NYMA Properties, LLC, a Delaware limited liability company ("Developer"), previously entered into that certain Disposition and Development Agreement (Westech College), dated as of April 24, 2011, by and between the Agency and Developer (collectively, the "Agreement"), providing for Developer's development of that certain real property located in the City of Fontana, California, and more particularly described in the Agreement ("Project Site"); and

WHEREAS, Successor Agency owns certain real property adjacent to Project Site in the City of Fontana, California ("Agency Property"); and

WHEREAS, the Agreement further contemplates Developer constructing certain Driveway Improvements on a portion of the Agency Property and on a portion of Project Site for their shared use by the Agency Property and the Project Site; and

WHEREAS, the terms of such shared use of the Driveway Improvements are established by that certain Shared Driveway Easement Agreement by and between the Agency and the Developer ("Easement Agreement") in substantially the form attached to this Resolution as Exhibit A; and

WHEREAS, the Oversight Board has determined that the Easement Agreement will significantly benefit the use and value of the Agency Property by providing a safe and maintained access to the Agency Property from Sierra Avenue, at no cost to the Successor Agency; and

NOW, THEREFORE, THE OVERSIGHT BOARD OF THE SUCCESSOR AGENCY TO THE FONTANA REDEVELOPMENT AGENCY DOES HEREBY RESOLVE AND FIND AS FOLLOWS:

Section 1. Recitals. The Recitals set forth above are true and correct and are incorporated into this Resolution by this reference.

Section 2. CEQA Compliance. The City of Fontana, as lead agency, previously adopted a Categorical Exemption, pursuant to Section No. 15332 (Class No. 32, Infill Development) dated June 2012, regarding Developer's proposed development of the Project Site in compliance with the California Environmental Quality Act ("CEQA"). The Oversight Board hereby finds and determines that the Easement Agreement will not result in any changes to the proposed development of the Project Site or the circumstances surrounding the proposed development of the Project Site, and there is no new information regarding the proposed development of the Project Site, since adoption of the Categorical Exemption, pursuant to Section 15332 (Class No. 32, Infill Development) dated June 2012, that would require or allow additional environmental review or documentation regarding the proposed development of the Project Site, pursuant to California Code of Regulations, title 14, section 15162. The City Clerk of the City of Fontana, acting ex officio on behalf of the Oversight Board, is authorized and directed to file a Notice of Exemption or Determination, as applicable, under CEQA with the appropriate official of the County of San Bernardino, California, within five (5) days following the date of adoption of this Resolution.

Section 3. Approval of Easement Agreement. The Oversight Board hereby approves the Easement Agreement, in substantially the form attached to this Resolution as Exhibit "A" and authorizes the Successor Agency to enter into the Easement Agreement and perform the obligations of the Successor Agency pursuant to the Easement Agreement.

Section 4. Severability. If any provision of this Resolution or the application of any such provision to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Resolution that can be given effect without the invalid provision or application and, to this end, the provisions of this Resolution are severable. The Oversight Board declares that the Oversight Board would have adopted this Resolution irrespective of the invalidity of any particular portion of this Resolution.

Section 5. Certification. The City Clerk of the City of Fontana, acting ex officio on behalf of the Oversight Board as the Oversight Board's Secretary, shall certify to the adoption of this Resolution.

Section 6. Effective Date. Pursuant to Health and Safety Code section 34179(h), all actions taken by the Oversight Board may be reviewed by the State of California Department of Finance and, therefore, this Resolution shall not be effective for three (3) business days, pending a request for review by the State of California Department of Finance.

APPROVED AND ADOPTED THIS 15th day of June, 2012.

Evelyne Ssenkoloto, Chairperson
Oversight Board of the Successor
Agency to the Fontana Redevelopment
Agency

ATTEST:

Lynne Fischer, Secretary to the Oversight
Board of the Successor Agency to the
Fontana Redevelopment Agency

STATE OF CALIFORNIA)
COUNTY OF SAN BERNARDINO) ss
CITY OF FONTANA)

I, Lynne Fischer, Secretary of the Oversight Board of the Successor Agency to the Fontana Redevelopment Agency, do hereby certify that the foregoing Resolution FOB No. ____ was duly and regularly adopted by the Oversight Board of the Successor Agency to the Fontana Redevelopment Agency at a regular meeting thereof on the 15th day of June, 2012, and that the same was passed and adopted by the following vote, to wit:

AYES:
NOES:
ABSENT:
ABSTAIN:

Lynne Fischer, Secretary to the
Oversight Board of the Successor
Agency to the Fontana Redevelopment
Agency

EXHIBIT A

SHARED DRIVEWAY EASEMENT AGREEMENT (WESTECH COLLEGE)

[Attached behind this cover page]

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

Successor Agency to the Fontana
Redevelopment Agency
8353 Sierra Avenue
Fontana, CA 92335
Attn: City Manager

Space above line for Recorder's use only
Exempt from recording fees per Govt. Code § 27383
Exempt from Documentary Transfer Tax per Govt.
Code § 11922

SHARED DRIVEWAY EASEMENT AGREEMENT

(Westech College)

This SHARED DRIVEWAY EASEMENT AGREEMENT (Westech College) (“**Easement Agreement**”) is made and entered into as of [TO BE DETERMINED] (“**Effective Date**”), by and between the SUCCESSOR AGENCY TO THE FONTANA REDEVELOPMENT AGENCY, a public body, corporate and politic (“**Agency**”) and NYMA PROPERTIES, LLC, a Delaware limited liability company (“**Developer**”). Agency and Developer enter into this Easement Agreement with reference to all of the following recited facts:

RECITALS

A. Agency owns that certain real property located in the City of Fontana, California, and more particularly described on Exhibit “A” attached to this Easement Agreement and incorporated into this Easement Agreement by this reference (“**Agency Property**”);

B. Developer owns that certain real property located in the City of Fontana, California, and more particularly described on Exhibit “B” attached to this Easement Agreement and incorporated into this Easement Agreement by this reference (“**Developer Property**”);

C. Agency and Developer previously entered into that certain Disposition and Development Agreement (Dix Development, Inc.), dated as of April 24, 2012 (“**DDA**”), pursuant to which Developer is obligated to pursue and complete certain commercial development of the Developer Property, including certain Driveway Improvements (as defined in Section 1) to be shared by the Developer Property and the Agency Property for ingress and egress of vehicles and pedestrians between such properties and Sierra Avenue;

D. Agency has determined that the Driveway Improvements will significantly benefit the use and value of the Agency Property;

E. Agency has determined that this Easement Agreement is part of implementation of the goals and objectives of Agency for the development of the Developer Property, increasing business development in the area, alleviating conditions of economic and physical blight in

Agency, and creating additional job opportunities for residents of the City of Fontana;

F. Agency has also determined that the public benefit of this Easement Agreement and development of the Developer Property pursuant to the DDA outweigh any private benefit arising from this Easement Agreement;

G. Agency desires to convey to Developer and Developer desires to obtain from Agency a permanent, non-exclusive easement over that portion of the Agency Property to be improved with the Driveway Improvements for ingress and egress of vehicles and pedestrians between the Developer Property and Sierra Avenue; and

H. Developer desires to convey to Agency and Agency desires to obtain from Developer a permanent, non-exclusive easement over that portion of the Developer Property to be improved with the Driveway for ingress and egress of vehicles and pedestrians between the Agency Property and to Sierra Avenue.

NOW THEREFORE, IN CONSIDERATION OF THE PROMISES, COVENANTS AND AGREEMENTS SET FORTH IN THIS EASEMENT AGREEMENT, AGENCY AND DEVELOPER AGREE AS FOLLOWS:

1. **DEFINITIONS.** As used in this Easement Agreement, the following words, phrases and terms shall have the meaning provided in this Section 1, unless the specific context of usage of a particular word, phrase or term requires a different meaning:

1.1 Agency. Successor Agency to the Fontana Redevelopment Agency, a public body, corporate and politic, and its successors and assigns.

1.2 Agency Parties. Collectively, Agency, its governing body, elected officials, directors, officers, employees, agents and attorneys.

1.3 Agency Party. Individually, Agency, its governing body, elected officials, directors, officers, employees, agents or attorneys.

1.4 Agency Property. Defined in Recital A.

1.5 Automobile Liability Insurance. Insurance coverage against claims of personal injury (including bodily injury and death) and property damage covering all owned and non-owned vehicles used by Developer, with minimum limits for bodily injury and property damage of One Million Dollars (\$1,000,000). Such insurance shall be provided by a business or commercial vehicle policy and may be provided through a combination of primary and excess or umbrella policies, all of which shall be subject to pre-approval by Agency, which pre-approval shall not be unreasonably withheld.

1.6 Casualty. Any damage or destruction of any kind or nature, ordinary or extraordinary, foreseen or unforeseen, affecting all or any portion of the Driveway Area or the Driveway Improvements, whether or not insured or insurable.

1.7 City. The City of Fontana, a municipal corporation.

1.8 Claim. Any claim, loss, cost, damage, expense, liability, lien, action, cause of action (whether in tort, contract, under statute, at law, in equity or otherwise), charge, award, assessment, fine or penalty of any kind (including consultant and expert fees and expenses and investigation costs of whatever kind or nature and, if an Indemnitor improperly fails to provide a defense for an Indemnitee, then Legal Costs of the Indemnitee) or any judgment.

1.9 Condemnation. Any of the following: (a) any temporary or permanent taking of (or of the right to use or occupy) all or any part of the Driveway Area by condemnation, eminent domain, or any similar proceeding; or (b) any action by any Government not resulting in an actual transfer of an interest in (or of the right to use or occupy) all or any part of the Driveway Area, but creating a right to compensation, such as a change in grade of any street upon which the Driveway Area abuts.

1.10 Condemnation Award. Any award(s) paid or payable (whether or not in a separate award) to either a Party, after the Effective Date, because of or as compensation for any Condemnation, including: (a) any award made for any Driveway Improvements that are the subject of the Condemnation; (b) the full amount paid or payable by the condemning authority for the estate or interest that is the subject of the Condemnation, as determined in any Condemnation proceeding; (c) any interest on such award; and (d) any other sums payable on account of such Condemnation.

1.11 Construction. Any alteration, construction, demolition, excavation, fill, grading, development, expansion, reconstruction, removal, replacement, rehabilitation, redevelopment, repair, Restoration or other work affecting either Property, including the Driveway Area.

1.12 Control. Regarding a specified Person, possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person or contractually bind such Person, whether pursuant to ownership of Equity Interests, contract or otherwise.

1.13 County. The County of San Bernardino, California.

1.14 Default. Any Monetary Default, Insurance Maintenance Default or Non-Monetary Default.

1.15 Default Interest. Interest at an annual rate equal to the lesser of: (a) eight percent (8%) per annum; or (b) the Usury Limit.

1.16 Developer. NYMA Properties, LLC, a Delaware limited liability company, and its permitted successors and assigns pursuant to the DDA.

1.17 Developer Parties. Collectively, Developer, its officers, directors, employees, agents, attorneys and any owners of Equity Interests in Developer.

1.18 Developer Party. Individually, Developer, its officers, directors, employees, agents, attorneys or any owner of Equity Interests in Developer.

1.19 Developer Property. Defined in Recital B.

1.20 Driveway Area. The area of the Agency Property and the Developer Property specifically described in Exhibit "C" attached to this Easement Agreement.

1.21 Driveway Improvements. Any and all improvements (including fixtures and equipment) constructed or installed on or within the Driveway Area.

1.22 Easement and Easements. Individually, each easement granted in Section 2.1 or Section 2.2, as applicable and, collectively, both such easements.

1.23 Easement Agreement. This Shared Driveway Easement Agreement (Westech College).

1.24 Effective Date. Defined in the first paragraph of this Easement Agreement.

1.25 Equity Interest. All or any part of any equity or ownership interest(s) (whether stock, partnership interest, beneficial interest in a trust, membership interest, or other interest of an ownership or equity nature) in any Person.

1.26 Event of Default. The occurrence of any one or more of the following:

1.26.1 **Monetary Default**. A Monetary Default that continues for thirty (30) calendar days after Notice from the non-defaulting Party, specifying in reasonable detail the amount of money not paid and the nature and calculation of each such payment.

1.26.2 **Prohibited Liens**. Any failure of Developer to comply with any obligation regarding Prohibited Liens set forth in Section 7 and Developer does not cure such failure within thirty (30) days after Notice of such failure.

1.26.3 **Insurance Maintenance Default**. Agency gives Developer Notice of an Insurance Maintenance Default and Developer does not remedy such Insurance Maintenance Default within thirty (30) days after the date of such Notice.

1.26.4 **Non-Monetary Default**. Any Non-Monetary Default, other than those specifically addressed in Section 1.26.2, occurs and the Party in Default does not cure the Default within thirty (30) days after Notice describing the Non-Monetary Default in reasonable detail, or, in the case of a Non-Monetary Default that cannot with due diligence be cured within thirty (30) days from the date of such Notice, if the Party in Default shall not: (a) within thirty (30) days from the date of such Notice advise the other Party of the intention of the Party in Default to take all reasonable steps to cure such Non-Monetary Default; (b) duly commence such cure; (c) diligently prosecute such cure to completion; and (d) complete such cure within a reasonable time under the circumstances.

1.27 Federal. The federal government of the United States of America.

1.28 Government. Each and every governmental agency, authority, bureau, department, quasi-governmental body, utility, utility service provider or other entity or instrumentality having or claiming jurisdiction over either Property (or any activity this Easement Agreement allows), including the Federal government of the United States of America,

the State and County governments and their subdivisions and municipalities, including the City, any planning commission, building department, zoning board of appeals, design review board or committee and all other applicable governmental agencies, authorities, and subdivisions thereof having or claiming jurisdiction over either Property or any activities on or at either Property.

1.29 Hazardous Substances. Flammable substances, explosives, radioactive materials, asbestos, asbestos-containing materials, polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, medical wastes, toxic substances or related materials, explosives, petroleum, petroleum products, and any “hazardous” or “toxic” material, substance or waste that is defined by those or similar terms or is regulated as such under any Law or becomes, regulated or classified as hazardous or toxic under any Law (or the regulations adopted pursuant to any Law) regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source.

1.30 Hazardous Substance Discharge. Any deposit, discharge, generation, release, or spill of a Hazardous Substance that occurs at, on, under, into or from either Property, or relating to transportation of any Hazardous Substance to, from, across or over either Property (whether on its own or contained in other material or property), or that arises at any time from the use, occupancy, or operation of either Property or any activities conducted at, on, under or in either Property whether or not caused by a Party and whether occurring before, on or after the Effective Date.

1.31 Indemnify. Where this Easement Agreement states that any Indemnitor shall “Indemnify” any Indemnitee from, against, or for a particular Claim, the Indemnitor shall indemnify the Indemnitee and defend and hold the Indemnitee harmless from and against such Claim (alleged or otherwise). “**Indemnified**” shall have the correlative meaning.

1.32 Indemnitee. Any Person entitled to be Indemnified under this Easement Agreement.

1.33 Indemnitor. Any Person that agrees to Indemnify any other Person under this Easement Agreement.

1.34 Insurance Maintenance Default. Developer’s failure to obtain, replace, maintain or pay premiums for (or give Agency evidence of) any insurance, when and as this Easement Agreement requires.

1.35 Law. All laws, ordinances, requirements, orders, proclamations, directives, rule or regulations of any Government affecting either Property, this Easement Agreement, or any Construction in any way, including any development, use, maintenance, taxation, operation, or occupancy of, or environmental conditions affecting, either Property, or relating to any taxes, or otherwise relating to this Easement Agreement or any Party’s rights, obligations or remedies under this Easement Agreement, whether in force on the Effective Date or passed, enacted,

modified, amended or imposed at some later time, subject in all cases, however, to any applicable waiver, variance or exemption.

1.36 Legal Costs. For any Person, means all reasonable costs and expenses such Person incurs in any legal proceeding (or other matter for which such Person is entitled to be reimbursed for Legal Costs), including reasonable attorneys' fees, court costs and expenses. All references to Legal Costs shall include the salaries, benefits and costs of in-house or contract general counsel to a Person and the lawyers employed in the office of such general counsel who provide legal services regarding a particular matter, adjusted to or billed at an hourly rate and multiplied by the time spent on such matter rounded to increments of one-tenth of an hour, in addition to costs of outside counsel retained by the Person for such matter.

1.37 Liability Insurance. Commercial general liability insurance against claims for bodily injury, death or property damage occurring upon, in or about the Developer Property or the Driveway Area or adjoining streets or passageways, at least as broad as Insurance Services Office Occurrence Form CG0001, with a minimum liability limit of Two Million Dollars (\$2,000,000) for any one occurrence and Four Million Dollar (\$4,000,000) aggregate (may be provided through a combination of primary and excess or umbrella insurance policies), including contractual liability coverage, for Developer's indemnity obligations under this Easement Agreement. If commercial general liability insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the Developer Property and the Driveway Area or the general aggregate limit shall be twice the required minimum liability limit for any one occurrence.

1.38 Monetary Default. Except to the extent constituting an Insurance Maintenance Default, any failure by a Party to pay or apply, when and as this Easement Agreement requires, any amount of money, whether to the other Party or to a Third Person.

1.39 Non-Monetary Default. The occurrence of any of the following, except to the extent constituting a Monetary Default or an Insurance Maintenance Default: (a) any breach by a Party of such Party's obligations under this Easement Agreement; (b) a Party's failure to comply with any material restriction or prohibition in this Easement Agreement; or (c) any other event or circumstance that, with passage of time or giving of Notice, or both, or neither, would constitute a breach of this Easement Agreement.

1.40 Notice. Any approval, consent, demand, designation, election, notice, or request relating to this Easement Agreement. Notices shall be delivered, and shall become effective, only in accordance with Section 14.2 of this Easement Agreement.

1.41 Notify. Give a Notice.

1.42 Parties. Collectively, Developer and Agency.

1.43 Party. Individually, Developer or Agency, as applicable.

1.44 Person. Any association, corporation, Government, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization, or other entity of any kind.

1.45 Prevailing Wage Determination. Any of the following: (a) any determination by the State Department of Industrial Relations or its successor for enforcement of State prevailing wage laws that prevailing wage rates should have been paid, but were not; (b) any determination by the State Department of Industrial Relations or its successor for enforcement of State prevailing wage laws that higher prevailing wage rates than those paid should have been paid; (c) any administrative or legal action or proceeding arising from any failure to comply with any of California Labor Code Sections 1720 through 1781; or (d) any administrative or legal action or proceeding to recover wage amounts, at law or in equity, including pursuant to California Labor Code Section 1781.

1.46 Prohibited Lien. Any mechanic's, professional's, vendor's, laborer's or material supplier's statutory or equitable lien or other similar lien against Agency's estate or interest in the Agency Property arising from labor, services, equipment or materials supplied or claimed to have been supplied to Developer or Agency (or anyone claiming through Developer or Agency).

1.47 Property. Individually, either the Agency Property or the Developer Property, as applicable.

1.48 Properties. Collectively, the Agency Property and the Developer Property.

1.49 Property Insurance. Commercial property insurance providing coverage for the Developer Property, the Driveway Area and all Driveway Improvements or other property located on the Developer Property or the Driveway Area against loss, damage, or destruction by fire or other hazards encompassed under the broadest form of property insurance coverage then customarily used for like properties in the County from time to time, in an amount equal to one hundred percent (100%) of the replacement value (without deduction for depreciation) of all Driveway Improvements or other property located on the Developer Property or the Driveway Area and in any event sufficient to avoid co-insurance and with no co-insurance penalty provision and with "ordinance or law" coverage. To the extent customary for like properties in the County at the time, such insurance shall include coverage for explosion of steam and pressure boilers and similar apparatus located on the Developer Property or the Driveway Area; coverage for terrorism; an "increased cost of construction" endorsement; and an endorsement covering demolition and cost of debris removal.

1.50 Property Insurance Proceeds. Net proceeds (after reasonable costs of adjustment and collection, including Legal Costs) of Property Insurance, when and as received by Developer or Agency.

1.51 Record, recorded, recording or recordation. Recordation of the referenced document in the official records of the County.

1.52 Restoration. After a Casualty or Condemnation, the alteration, clearing, rebuilding, reconstruction, repair, replacement, restoration, or safeguarding of the damaged Driveway Improvements, substantially equivalent to their condition before the Casualty or Condemnation, subject to any changes in Law that would limit the foregoing.

1.53 Restore. Accomplish a Restoration.

1.54 State. The State of California.

1.55 Third Person. Any Person that is not a Party, Controlled by or under common Control with a Party, or an elected official, director, officer, shareholder, member, principal, partner, manager, owner of an Equity Interest, employee or agent of a Party.

1.56 Usury Limit. The highest rate of interest, if any, that Law allows under the circumstances.

1.57 Waiver of Subrogation. A provision in, or endorsement to, any insurance policy, by which the carrier agrees to waive rights of recovery by way of subrogation against either Party for any loss such insurance policy covers.

1.58 Workers' Compensation Insurance. Both of the following, covering all employees of Developer: (a) workers' compensation insurance complying with the provisions of State law (statutory limits); and (b) an employer's liability insurance policy or endorsement to a liability insurance policy, with a minimum liability limit of One Million Dollars (\$1,000,000) per accident for bodily injury or disease.

2. GRANT OF EASEMENTS.

2.1 Agency Grant. Subject to the terms and conditions of this Easement Agreement, as of the Effective Date, to the extent that all or any portion of the Driveway Area lies upon, within or across the Agency Property, Agency grants to Developer a perpetual, non-exclusive easement within, over, under, above and across such portion of the Agency Property (as specifically designated in Exhibit "C") for the purposes of vehicular, pedestrian and other ingress, egress and access between the Developer Property and Sierra Avenue. The easement granted in this Section 2.1 shall burden the Agency Property and benefit the Developer Property.

2.2 Developer Grant. Subject to the terms and conditions of this Easement Agreement, as of the Effective Date, to the extent that all or any portion of the Driveway Area lies upon, within or across the Developer Property, Developer grants to Agency a perpetual, non-exclusive easement within, over, under, above and across such portion of the Developer Property (as specifically designated in Exhibit "C") for the purposes of vehicular, pedestrian and other ingress, egress and access between the Agency Property and Sierra Avenue. The easement granted in this Section 2.2 shall burden the Developer Property and benefit the Agency Property.

2.3 Easements Appurtenant. Each Easement shall be appurtenant to the respective Property benefited by the Easement. Each Easement shall pass to and bind successive owners of the Property benefited and burdened, respectively, by the Easement, with the fee title to the Property and shall benefit and burden all such successive owners' title to the respective Property.

2.4 Rights and Obligations Run with the Land. All provisions of this Easement Agreement are intended by the Parties to be restrictive covenants running with the land of the Properties pursuant to California Civil Code Section 1468. The rights and obligations set forth in this Easement Agreement shall run with the land of the Properties and shall be binding upon and inure to the benefit of all successive owners of the Properties.

2.5 No Dedication. The provisions of this Easement Agreement are not intended to and shall not constitute a dedication of any Easement or Easements or either Property for public use. The rights and Easements granted in this Easement Agreement are private and only for the benefit of the Parties.

2.6 AS-IS Condition. Developer enters upon the Agency Property pursuant to the Easement granted in Section 2.1 in the Agency Property's AS IS, WHERE IS, SUBJECT TO ALL FAULTS CONDITION, AS OF THE EFFECTIVE DATE, WITHOUT WARRANTY as to character, quality, performance, condition, title, physical condition, soil conditions, the presence or absence of fill, shoring or support, subsurface support, zoning, land use restrictions, the availability or location of utilities or services, the location of any public infrastructure on or off of the Agency Property (active, inactive or abandoned), the suitability of the Agency Property for the Driveway Improvements or other use or the existence or absence of Hazardous Substances affecting the Agency Property and with full knowledge of the physical condition of the Agency Property, the nature of Agency's interest in and use of the Agency Property, all Laws applicable to the Agency Property and any and all conditions, covenants, restrictions, encumbrances and all matters of record relating to the Agency Property. Developer represents and warrants to Agency that Developer has received assurances acceptable to Developer by means independent of Agency or Agency's agents of the truth of all facts material to Developer's entry into this Easement Agreement or Construction, installation, use or operation of the Driveway Improvements and the other planned improvements to the Developer Property pursuant to the DDA. Agency hereby expressly and specifically disclaims any express or implied warranties regarding any condition of the Agency Property or the Driveway Area.

3. CONSTRUCTION OF DRIVEWAY IMPROVEMENTS. Developer shall construct and install the Driveway Improvements on the Properties at Developer's sole cost and expense, in accordance with plans and specifications approved by City, in the time required in the DDA and in accordance with all applicable Laws. In entering upon the Agency Property to construct and install the Driveway Improvements, Developer shall reasonably minimize interference with, impairment of or disruption of the existing or future use, enjoyment, occupancy or operation of the Agency Property.

4. USE RESTRICTIONS. Except upon the express written agreement of all of the Parties, no Party shall place or construct within or upon the Driveway Area, any structure or impediment that will restrict the use of the Driveway Area by the Parties; provided, however, traffic controls reasonably necessary to guide and control the orderly flow of traffic on the Driveway Area or to comply with requirements of Law may be installed within or upon the Driveway Area by a Party, so long as access between the Properties and the Driveway Area is not closed or blocked and traffic circulation in the Driveway Area is not changed or altered by such controls. Except as otherwise set forth in this Easement Agreement, no walls, fences, gates or barriers of any sort or kind shall be constructed or maintained within or upon Driveway Area or anywhere else on any Property that prevents or impairs the use of the Driveway Area contemplated in this Easement Agreement. No parking shall ever be permitted on the designated driveways, fire lanes, entrance ways or exits of the Driveway Area, as improved with the Driveway Improvements.

5. MAINTENANCE COVENANT. Developer, for itself and its successors and assigns, covenants to and agrees with Agency that:

5.1 Maintenance Standard. Developer shall operate and maintain the Driveway Improvements and Driveway Area in a commercially reasonable manner and condition, including maintenance, repair, reconstruction, and replacement of any and all asphalt, concrete, landscaping, utility systems, irrigation systems, drainage facilities or systems, grading, subsidence, retaining walls or similar support structures, foundations, signage, ornamentation, and all other improvements on or to the Driveway Area, now existing or made in the future, as necessary to maintain the appearance and character of the Driveway Area, as improved with the Driveway Improvements, including all of the following, all at Developer's sole cost and expense: (a) maintaining surfaces in a level, smooth and evenly covered condition with the type of surfacing material originally installed or such substitute as shall in all respects be equal in quality, use, and durability; (b) removing all papers, mud, sand, debris, filth and refuse and thoroughly sweeping areas to the extent reasonably necessary to keep areas in a clean and orderly condition; (c) removing or covering graffiti with the type of surface covering originally used on the affected area, (d) placing, keeping in repair and replacing any necessary and appropriate directional signs, markers and lines; (e) installing, operating, keeping in repair and replacing where necessary, such artificial lighting facilities as shall be reasonably required; (f) maintaining, mowing, weeding, trimming and watering all landscaped areas and making such replacements of plants and other landscaping material as necessary to maintain the appearance and character of the landscaping; (g) properly maintaining windows, structural elements and painted exterior surface areas of structures in a clean and presentable manner; and (h) arranging and paying for all fuel, gas, light, power, water, sewage, garbage disposal, telephone and other utility charges and the expenses of installation, maintenance, use and service in connection with all of the foregoing (collectively, "**Maintenance Standard**"). Notwithstanding the foregoing,

the Maintenance Standard shall not apply during any period after a fire or other casualty loss, as long as Developer is diligently taking reasonable steps to obtain available insurance proceeds and repair, restore, or remove any improvements or conditions that violate the Maintenance Standard. Agency shall have absolutely no responsibility for any cost or performance associated with any matter that is the responsibility of Developer pursuant to the Maintenance Standard.

5.2 **Maintenance Deficiency.** If there is an occurrence of an adverse condition within the Driveway Area in contravention of the Maintenance Standard (each such occurrence being a "**Maintenance Deficiency**"), then Agency may Notify Developer of the Maintenance Deficiency. If a Maintenance Deficiency is not cured within thirty (30) calendar days following Notice to Developer of such Maintenance Deficiency, Agency shall have the right, but not the obligation, to perform all acts necessary to cure the Maintenance Deficiency or take any other action at law or in equity that may then be available to Agency to accomplish the abatement of the Maintenance Deficiency. Any amount expended by Agency for the cure or abatement of a Maintenance Deficiency pursuant to this Section 5.2 (including Legal Costs) shall be reimbursed to Agency by Developer within thirty (30) calendar days after Notice to Developer of the amount expended. If any amount becoming due to Agency under this Section 5.2 is not reimbursed to Agency by Developer within thirty (30) calendar days after Notice to Developer of the amount owed, the amount shall accrue Default Interest from the thirtieth (30th) calendar day after Notice of the amount owed until all of the unpaid principal and accrued Default Interest are paid in full. Nothing in this Section 5 is intended to limit or otherwise restrict any right or authority of Agency outside of this Easement Agreement to abate a condition that is or may be a Maintenance Deficiency.

6. **HAZARDOUS SUBSTANCE DISCHARGE.** Neither Party shall cause or permit any Hazardous Substance Discharge. If any Hazardous Substance Discharge occurs, the responsible Party shall immediately remedy, repair and remediate any damage or harm caused by such Hazardous Substance Discharge at such Party's sole cost and expense and shall notify the other Party of such Hazardous Substance Discharge, as soon as possible, but in all circumstances, within fifteen (15) calendar days following the occurrence of such Hazardous Substance Discharge. NOTWITHSTANDING ANY PROVISION OF THIS EASEMENT AGREEMENT TO THE CONTRARY, AGENCY SHALL HAVE NO LIABILITY TO DEVELOPER OR TO DEVELOPER'S SUCCESSORS, ASSIGNS OR OTHER PERSONS WHO USE OR ACQUIRE AN INTEREST IN THE DRIVEWAY AREA FROM OR THROUGH DEVELOPER WITH RESPECT TO THE CURRENT OR FUTURE PRESENCE OF ANY HAZARDOUS SUBSTANCES ON OR AFFECTING THE DRIVEWAY AREA, EXCEPT TO THE EXTENT OF A HAZARDOUS SUBSTANCE DISCHARGE BY AGENCY.

7. **PROHIBITED LIENS.**

7.1 **Developer Covenant.** Following Notice of a Prohibited Lien, Developer shall, within thirty (30) days after receiving such Notice (but in any circumstance, within fifteen (15) days after Developer receives Notice of commencement of foreclosure proceedings regarding any Prohibited Lien), cause such Prohibited Lien to be paid, discharged and cleared from title to the Agency Property.

7.2 Protection of Agency. NOTICE IS HEREBY GIVEN THAT AGENCY SHALL NOT BE LIABLE FOR ANY LABOR OR MATERIALS FURNISHED OR TO BE FURNISHED TO DEVELOPER UPON CREDIT AND THAT NO MECHANIC'S OR OTHER LIEN FOR ANY LABOR OR MATERIALS SHALL ATTACH TO OR AFFECT THE AGENCY PROPERTY. NOTHING IN THIS EASEMENT AGREEMENT SHALL BE DEEMED OR CONSTRUED IN ANY WAY TO CONSTITUTE AGENCY'S CONSENT OR REQUEST, EXPRESS OR IMPLIED, BY INFERENCE OR OTHERWISE, TO ANY ARCHITECT, ENGINEER, CONTRACTOR, SUBCONTRACTOR, LABORER, EQUIPMENT OR MATERIAL SUPPLIER OR OTHER PERSON FOR THE PERFORMANCE OF ANY LABOR OR SERVICE OR THE FURNISHING OF ANY MATERIALS OR EQUIPMENT FOR ANY CONSTRUCTION, NOR AS GIVING DEVELOPER ANY RIGHT, POWER OR AUTHORITY TO CONTRACT FOR, OR PERMIT THE RENDERING OF, ANY SERVICES, OR THE FURNISHING OF ANY MATERIALS THAT WOULD GIVE RISE TO THE FILING OF ANY LIENS AGAINST THE AGENCY PROPERTY. DEVELOPER SHALL INDEMNIFY AGENCY AGAINST ANY CONSTRUCTION UNDERTAKEN BY DEVELOPER OR ANYONE CLAIMING THROUGH DEVELOPER, AND AGAINST ALL PROHIBITED LIENS.

7.3 No Liens Against Public Property. DEVELOPER ACKNOWLEDGES AND AGREES THAT THE AGENCY PROPERTY IS OWNED BY AGENCY, WHICH IS A PUBLIC ENTITY, AND THAT THE AGENCY PROPERTY IS NOT SUBJECT TO THE IMPOSITION OF MECHANIC'S LIENS OR ANY OTHER LIENS IN FAVOR OF PROVIDERS OF LABOR, MATERIAL OR SERVICES. DEVELOPER FURTHER AGREES TO INFORM EACH PROVIDER OF LABOR, MATERIAL OR SERVICES ON OR TO THE DRIVEWAY AREA OF SUCH FACT AND THAT NEITHER AGENCY OR THE AGENCY PROPERTY IS RESPONSIBLE FOR PAYMENT OF ANY CLAIMS BY ANY SUCH PROVIDER OF LABOR, MATERIAL OR SERVICES. AGENCY SHALL HAVE THE RIGHT AT ALL REASONABLE TIMES TO POST AND KEEP POSTED ON THE DRIVEWAY AREA ANY NOTICES THAT AGENCY MAY DEEM NECESSARY FOR THE PROTECTION OF AGENCY OR THE AGENCY PROPERTY FROM MECHANIC'S LIENS OR OTHER CLAIMS. DEVELOPER SHALL GIVE AGENCY TEN (10) DAYS PRIOR WRITTEN NOTICE OF THE COMMENCEMENT OF ANY CONSTRUCTION TO BE DONE ON OR WITHIN THE DRIVEWAY AREA TO ENABLE AGENCY TO POST ANY SUCH NOTICES.

8. DEVELOPER INSURANCE.

8.1 Types. Developer shall maintain at the sole cost and expense of Developer, all of the following insurance (or, if unavailable, its then reasonably available equivalent): (a) Liability Insurance; (b) Automobile Liability Insurance; (c) Property Insurance; and (d) Workers Compensation Insurance. All Liability Insurance, Automobile Liability Insurance, Property Insurance and Workers Compensation Insurance policies this Easement Agreement requires shall be issued by carriers that: (a) are listed in the then current "Best's Key Rating Guide—Property/Casualty—United States & Canada" publication (or its equivalent, if such publication ceases to be published) with a minimum financial strength rating of "A-" and a minimum financial size category of "VII" (exception may be made for the State Compensation Insurance Fund when not specifically rated); and (b) are authorized to do business in the State by the State

Department of Insurance. Developer may provide any insurance under a “blanket” or “umbrella” insurance policy, provided that: (i) such policy or a certificate of such policy shall specify the amount(s) of the total insurance allocated to the Developer Property and the Driveway Area, which amount(s) shall equal or exceed the amount(s) required by this Easement Agreement; and (ii) such policy otherwise complies with the requirements of this Easement Agreement regarding such insurance. All insurance obtained and maintained by Developer in satisfaction of the requirements of this Easement Agreement shall be fully paid for and non-assessable.

8.2 Insured. Liability Insurance and Automobile Liability Insurance policies shall name the Agency Parties as “additional insured.” Property Insurance policies shall name Agency as a “loss payee.” The coverage afforded to the Agency Parties shall be at least as broad as that afforded to Developer regarding the Driveway Improvements and the Driveway Area and may not contain any terms, conditions, exclusions, or limitations applicable to the Agency Parties that do not apply to Developer. All Liability Insurance and Automobile Liability Insurance shall provide for separation of insured for Developer and the Agency Parties. Insurance policies obtained in satisfaction of or in accordance with the requirements of this Easement Agreement may provide a cross-suits exclusion for suits between named insured Persons, but shall not exclude suits between named insured Persons and additional insured Persons. Any insurance or self-insurance maintained by the Agency Parties shall be excess of all insurance required to be maintained by Developer under this Easement Agreement and shall not contribute with any insurance required to be maintained by Developer under this Easement Agreement. Developer shall not carry separate or additional insurance concurrent in form or contributing in the event of loss with insurance coverage required by this Easement Agreement, unless the Agency Parties are made additional insured or loss payee, as applicable, under such insurance coverage consistent with the provisions of this Easement Agreement applicable to such form of insurance or insurance covering the same type(s) of loss.

8.3 Deductibles and Self-Insured Retentions. Any and all deductibles or self-insured retentions under insurance policies required to be maintained by Developer under this Easement Agreement shall be declared to and approved by Agency. Developer shall pay all such deductibles or self-insured retentions regarding the Agency Parties. Each insurance policy issued in satisfaction of the requirements of this Easement Agreement shall provide that, to the extent that Developer fails to pay all or any portion of a self-insured retention under such policy regarding an otherwise insured loss, Agency may pay the unpaid portion of such self-insured retention, in Agency’s sole and absolute discretion. All amounts paid by Agency toward self-insured retentions regarding insurance policies covering the Agency Parties pursuant to this Easement Agreement shall be reimbursable to Agency by Developer in the same manner that insurance costs are reimbursable to Agency from Developer pursuant to Section 8.6.

8.4 Deliveries to Agency. Evidence of Developer’s maintenance of all insurance policies required by this Easement Agreement shall be delivered to Agency prior to the Effective Date. No later than three (3) days before any insurance required by this Easement Agreement expires, is cancelled or its liability limits are reduced or exhausted, Developer shall deliver to Agency evidence of Developer’s maintenance of all insurance required by this Easement Agreement. Each insurance policy required by this Easement Agreement shall be endorsed to state that coverage shall not be cancelled, suspended, voided, reduced in coverage or in limits, except after thirty (30) calendar days’ advance written notice of such action has been given to

Agency by certified mail, return receipt requested; provided, however, that only ten (10) days' advance written notice shall be required for any such action arising from non-payment of the premium for the insurance. Phrases such as "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company" shall not be included in the cancellation wording of any certificates or policies of insurance applicable to the Agency Parties pursuant to this Easement Agreement.

8.5 Waiver of Certain Claims. Developer shall cause each insurance carrier providing any Liability Insurance, Property Insurance, Worker's Compensation Insurance or Automobile Liability Insurance coverage under this Easement Agreement to endorse their applicable policy(ies) with a Waiver of Subrogation with respect to the Agency Parties, if not originally in the policy. To the extent that Developer obtains an insurance policy covering both the Developer and the Agency Parties and containing a Waiver of Subrogation, the Parties release each other from any Claims for damage to any Person or property to the extent such Claims are paid pursuant to such insurance policy.

8.6 Agency Option to Obtain Coverage. During the continuance of an Event of Default arising from the failure of Developer to carry any insurance required by this Easement Agreement, Agency may, in Agency's sole and absolute discretion, purchase any such required insurance coverage. Agency shall be entitled to immediate payment from Developer of any premiums and associated reasonable costs paid by Agency to obtain such insurance coverage. Any amount becoming due and payable to Agency under this Section 8.6 that is not paid within fifteen (15) calendar days after written demand from Agency for payment of such amount, with an explanation of the amounts demanded, will accrue Default Interest from the date of the demand, until paid in full. Any election by Agency to purchase or not to purchase insurance coverage otherwise required by the terms of this Easement Agreement to be carried by Developer shall not relieve the Developer of Developer's Default or Developer's obligation to obtain and maintain any insurance coverage required by this Easement Agreement.

9. **TAXES AND ASSESSMENTS.** Developer shall pay, without abatement, deduction or offset, any and all real and personal property taxes, general and special assessments and other charges (including any increase caused by a change in the tax rate or by a change in assessed valuation) of any description levied or assessed by any Government on or against the Driveway Area or personal property located on or in the Driveway Area. Developer acknowledges and agrees that this Easement Agreement may create a possessory interest subject to property taxation and that Developer may be subject to the payment of property taxes levied on such possessory interest. Any such imposition of a possessory interest tax shall be a tax liability of Developer solely and shall be paid for by Developer. Any and all taxes and assessments and installments of taxes and assessments required to be paid by Developer under this Easement Agreement shall be paid by Developer before each such tax, assessment, or installment of tax or assessment becomes delinquent. Developer, at Developer's own cost and expense, shall have the right, at any time, to contest or seek a reduction in the assessed valuation attributable to the Driveway Area, or to contest any taxes or assessments attributable to the Driveway Area or the Easements, provided Developer undertakes all proceedings necessary to prevent the sale of the Developer Property or the Agency Property for such taxes or assessments (including payment of the full contested amount subject to such contest or possible reduction, if required by Law), and promptly upon termination of such proceedings (but in any event prior to the sale of either

Property to satisfy the contested tax or assessment) pays in full the taxes or assessments determined to be due and owing, plus all interest, penalties and other costs with respect to such contest. Developer shall Indemnify Agency regarding any liability, loss or damage resulting from any taxes, assessments or other charges required by this Easement Agreement to be paid by Developer and from all interest, penalties, and other sums imposed thereon and from any sales or other proceedings to enforce collection of any such taxes, assessments, or other charges.

10. INDEMNIFICATION.

10.1 Agency Indemnity. Agency shall Indemnify the Developer Parties against any Claim, to the extent such Claim arises from any wrongful intentional act or negligence of the Agency Parties, but only to the extent that Agency may be held liable under applicable law for such wrongful intentional act or negligence and exclusive of any violation of law (including the State Constitution) relating to Agency's approval, entry into or performance of this Easement Agreement. Nothing in this Easement Agreement is intended nor shall be interpreted to waive any limitation on Agency's liability, any exemption from liability in favor of Agency, any claim presentment requirement for bringing an action regarding any liability of Agency or any limitations period applicable to liability of Agency, all as set forth in Government Code Sections 800, et seq., Sections 900, et seq., or in any other law, or require Agency to Indemnify any Person beyond such limitations on Agency's liability.

10.2 Developer Indemnity. Developer shall Indemnify the Agency Parties against any Claim to the extent such Claim arises from: (a) any wrongful intentional act or negligence of the Developer Parties; (b) any agreements that Developer (or anyone claiming by or through Developer) makes with a Third Person regarding this Easement Agreement, the Developer Property or the Driveway Area; (c) any workers' compensation Claim or determination arising from employees or contractors of the Developer Parties; (d) any Prevailing Wage Determination; or (e) any Hazardous Substance Discharge caused in whole or in part by a Developer Party and occurring on or after the Effective Date.

10.3 Independent Insurance and Indemnity Obligations. The Parties' insurance or indemnification obligations under this Easement Agreement are independent of each other and shall not in any way satisfy restrict, limit or modify the other obligation.

10.4 Survival of Obligation to Indemnify. The obligations of the Parties under this Easement Agreement to Indemnify each other or other Persons shall survive the termination of this Easement Agreement, until any and all actual or prospective Claims regarding any matter subject to such obligation to Indemnify under this Easement Agreement are fully, finally, absolutely and completely barred by applicable statutes of limitations.

11. CASUALTY OR CONDEMNATION. If either Party becomes aware of any Casualty or actual, contemplated or threatened Condemnation, then such Party shall promptly Notify the other Party of such matter. If any Casualty or Condemnation occurs, Developer shall Restore the affected Driveway Improvements with reasonable promptness, regardless of the availability or sufficiency of Property Insurance Proceeds or Condemnation Award for such purpose. Developer shall use all Property Insurance Proceeds or Condemnation Award for Restoration on the terms set forth in this Section 11. First, Developer shall reimburse Developer and Agency

from such Property Insurance Proceeds or Condemnation Award for their actual, necessary and proper costs and expenses in collecting such Property Insurance Proceeds or Condemnation Award. Until Developer has completed and paid for all of the subject Restoration, Developer shall hold all Property Insurance Proceeds or Condemnation Award in trust for the benefit of Agency to be used first to Restore and for no other purpose. If Property Insurance Proceeds or Condemnation Award are insufficient to Restore, then Developer shall nevertheless Restore at Developer's sole cost and expense. In the event of a Condemnation that prevents Restoration, Developer is not required to Restore and the Condemnation Award shall be distributed to Developer and Agency in accordance with their respective interests in the property that is the subject of the Condemnation.

12. REMEDIES.

12.1 Right to Cure Defaults. During the continuance of an Event of Default by the other Party under this Easement Agreement, a Party shall have the right, but not the obligation, following thirty (30) days advance Notice to the Defaulting Party, to cure the subject Default(s). Any sum expended by a Party to cure any Default of the other Party pursuant to this Section 12 shall be reimbursed to the curing Party by the Defaulting Party, within thirty (30) calendar days after Notice to the Defaulting Party of the amount. Any amount expended by a Party to cure any Default of the other Party pursuant to this Section 12 that is not reimbursed to the curing Party by the Defaulting Party within such thirty (30) calendar days after Notice to the Defaulting Party of such amount, shall accrue Default Interest, until paid in full.

12.2 All Available Remedies. In addition to the rights and remedies of the Parties under Section 12.1, in the sole and absolute discretion of the non-Defaulting Party, following the occurrence of an Event of Default or Event of Default by the other Party, the non-Defaulting Party may pursue any remedies or proceedings available to the non-Defaulting Party at law or in equity regarding a Default by the other Party, including recovering monetary damages, specific performance or any other remedy provided for at law or in equity.

12.3 Inadequacy of Monetary Damages; Injunctive Relief. Monetary damages for the breach of this Easement Agreement are declared by the Parties to be inadequate and the Parties may be enjoined by any court of competent jurisdiction from commencing or proceeding with any action or inaction that diminishes, in any respect, the possessory or use rights of any of the other Parties regarding the Easements or other rights that are granted or provided in this Easement Agreement.

12.4 Remedies Cumulative. All rights and remedies of the Parties under this Easement Agreement regarding a Default or Event of Default by the other Party shall be cumulative and the exercise of one right or remedy shall not preclude the exercise of another right or remedy for the same or any subsequent Default or Event of Default.

13. NO LIMITATION ON AGENCY AUTHORITY. Nothing in this Easement Agreement shall be deemed to limit, modify or abridge the governmental police power or other legal authority (whether direct or delegated) of Agency under applicable Law regarding the Agency Property, the Developer Property, the Driveway Improvements or Developer.

14. MISCELLANEOUS.

14.1 Intent to Bind Successors. All terms, conditions, covenants, restrictions or agreements set forth in this Easement Agreement shall bind and benefit the respective successors or assigns of Agency or Developer. Neither Party may transfer or convey its rights under this Easement Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld.

14.2 Notices. All Notices shall be in writing and shall be addressed to Developer or Agency as set forth in Section 14.2.1. Notices shall be delivered by Federal Express, United Parcel Service, or other nationally recognized overnight (one business day) delivery service to the address set forth in Section 14.2.1. A Notice shall be deemed delivered on the date of delivery (or when delivery has been attempted twice, as evidenced by the written report of the delivery service) to the address(es) set forth in Section 14.2.1. Either Party may change its address for delivery of Notices by giving Notice in compliance with this Easement Agreement. Any Party giving a Notice may request the recipient to acknowledge delivery of such Notice. The recipient shall promptly comply with any such acknowledgment request, but failure to do so shall not limit the effectiveness of any Notice. Notice given for a Party by any attorney who represents such Party shall constitute Notice by such Party. Any correctly addressed Notice that is refused, unclaimed, or undeliverable because of an act or omission of the Party to be Notified shall be considered to be effective as of the first date that the Notice was refused, unclaimed, or considered undeliverable by the postal authorities, messenger or overnight delivery service.

14.2.1 Addresses. The following are the addresses for delivery of Notices to the Parties, as of the Effective Date.

To Agency: Successor Agency to the Fontana
 Redevelopment Agency
 8353 Sierra Avenue
 Fontana, CA 92335
 Attention: City Manager

To Developer: NYMA Properties, LLC

Attention: _____

14.3 No Third-Party Beneficiaries. No Person shall have any enforceable rights under this Easement Agreement other than the Parties and their respective successors and assigns, notwithstanding any provision of this Easement Agreement that contemplates other Persons

exercising certain privileges (if any) or any references in this Easement Agreement to the public generally. Nothing in this Easement Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Easement Agreement on any Person other than the Parties and their respective successors and assigns. Nothing in this Easement Agreement, express or implied, is intended to relieve or discharge any obligation of any Person who is not a Party to any Party or give any Person who is not a Party any right of subrogation or action over or against any Party.

14.4 No Implied Waiver. No waiver of any Default shall be implied from any omission by the non-defaulting Party to take any action regarding such Default. No express waiver of any Default shall affect any Default or cover any period of time other than the Default and period of time specified in such express waiver. One or more waivers of any Default in the performance of any term, provision or covenant contained in this Easement Agreement shall not be deemed a waiver of any subsequent Default in the performance of the same term, provision or covenant or any other term, provision or covenant contained in this Easement Agreement. The consent or approval by a Party to or of any act or request of the other Party requiring consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent acts or requests.

14.5 Estoppel Certificates. Each Party covenants that upon receipt of written request from the other Party, it shall, within fifteen (15) days after receipt of such request, give to the requesting Party or such other Person specified by the requesting Party, an estoppel certificate stating: (a) whether the Party knows of any Default by the Agency or Developer under this Easement Agreement, and if there are known Defaults, specifying the nature of such Defaults; (b) whether the Party knows of any assignment, modification or amendment of all or any portion of this Easement Agreement (and if so, stating the terms thereof); (c) whether this Easement Agreement, as of the date of the estoppel certificate, is in full force and effect; and (d) any other information reasonably requested by the requesting Party.

14.6 Amendments. All amendments to this Easement Agreement must be in writing, signed by the authorized representative(s) of the Parties and recorded in the official records of the Recorder for the County.

14.7 Mortgagee Protection. Breach of this Easement Agreement shall not defeat nor render invalid the lien of any mortgage or deed of trust made in good faith and for value as to either Property, but all of the terms, provisions, conditions, restrictions, agreements and covenants of this Easement Agreement shall be binding and effective against any owner of either Property whose title to such Property is acquired by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

14.8 Relationship of Parties. The Parties each intend and agree that the Parties are independent contracting entities and do not intend by this Easement Agreement to create any partnership, joint venture or similar business arrangement, relationship or association between them.

14.9 Tax Consequences. The Parties acknowledge and agree that each Party shall bear any and all responsibility, liability, costs or expenses connected in any way with any tax

consequences experienced by such Party related to this Easement Agreement, subject to the provisions of Section 9.

14.10 No Other Representations or Warranties. Except as expressly set forth in this Easement Agreement, no Party makes any representation or warranty material to this Easement Agreement to the other Party.

14.11 Counterparts. This Easement Agreement may be signed by the respective authorized representatives of the Parties in multiple counterpart originals, each of which shall be deemed an original, and all such counterpart originals, when taken together, shall constitute one agreement.

14.12 Entire Agreement. This Easement Agreement and the other documents and exhibits referred to in this Easement Agreement contain the entire agreement of the Parties as to the rights granted in this Easement Agreement and the obligations assumed in this Easement Agreement, and no oral statement or representation regarding such subject matter shall be of any force or effect.

14.13 Severability. Invalidation of any term, agreement, covenant, condition or restriction or any other provision contained in this Easement Agreement or the application of any term, agreement, covenant, condition or restriction or any other provision contained in this Easement Agreement to any Person by judgment or court order shall in no way affect any of the other terms, agreements, covenants, conditions, restrictions or provisions in this Easement Agreement, or the application of any term agreement, covenant, condition or restriction or any other provision contained in this Easement Agreement to any other Person and the same shall remain in full force and effect.

14.14 Headings. The headings of the various sections of this Easement Agreement are for convenience of reference and identification only and shall not be deemed to limit, expand or define the intent, meaning or interpretation of the respective sections of this Easement Agreement.

14.15 Governing Law. The procedural and substantive laws of the State of California shall govern the interpretation and enforcement of this Easement Agreement, without application of conflicts or choice of laws principles or statutes.

14.16 Venue. The Parties acknowledge that this Easement Agreement has been negotiated and entered into in the County. Any legal action brought to interpret or enforce this Easement Agreement shall be brought in a court of competent jurisdiction in the County.

14.17 Attorney's Fees. In the event of any controversy, claim or dispute relating to this Easement Agreement, the prevailing Party shall be entitled to recover Legal Costs from the other Party.

14.18 Principles of Interpretation. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted all or any part of this Easement Agreement. The Parties have participated substantially in the negotiation, drafting, and revision of this Easement Agreement, with advice from legal counsel and other advisers of their own selection. A term

defined in the singular in this Easement Agreement may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which also govern all other language in this Easement Agreement. The words "include" and "including" shall be construed to be followed by the words: "without limitation." Each collective noun in this Easement Agreement shall be interpreted as if followed by the words "(or any part of it)" except where the context clearly requires otherwise. Every reference to any document, including this Easement Agreement, refers to such document as modified from time to time, and includes all exhibits, schedules, and riders to such document. The word "or" includes the word "and." Every reference to a law, statute, regulation, order, form or similar governmental requirement refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time. The use in this Easement Agreement of the neuter gender shall include the masculine and the feminine, and the singular number shall include the plural, whenever the context so requires.

14.19 Additional Documents. To further implement this Easement Agreement, each Party agrees to and shall sign and deliver such other instruments as may be necessary or proper to grant or otherwise establish, confirm or terminate the Easements and the provisions and conditions of this Easement Agreement.

14.20 Recording. The Parties intend that this Easement Agreement be recorded in the official records of the Recorder for the County. Any Party may cause this Easement Agreement to be so recorded. Developer shall pay the entire cost of recording this Easement Agreement in the official records of the Recorder for the County.

[Signatures on following page]

**Signature Page
To
Shared Driveway Easement Agreement
(Westech College)**

IN WITNESS WHEREOF, Developer and Agency sign and enter into this Easement Agreement, by and through the signatures of their respective authorized representatives, as follow:

AGENCY:

SUCCESSOR AGENCY TO THE FONTANA
REDEVELOPMENT AGENCY, a public
body, corporate and politic

By: _____
Kenneth R. Hunt
City Manager, Ex Officio

ATTEST:

By: _____
Tonia Lewis
City Clerk, Ex Officio

APPROVED AS TO FORM:

Best Best & Krieger LLP

By: _____
City Attorney, Ex Officio

DEVELOPER:

NYMA Properties, LLC, a Delaware limited
liability company

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

EXHIBIT "A"
To
Shared Driveway Easement Agreement
(Westech College)

Agency Property Legal Description

[Attached behind this cover page]

Exhibit A

Legal Description

APN: 0193-234-09

Real property in the City of Fontana, County of San Bernardino, State of California described as follows:

S T L AND W CO S B L N 1/2 E 1/2 LOT 704 EX N 165 FT AND
EX W 340 FT MEAS TO ST CEN AND EX ST

EXHIBIT "B"
To
Shared Driveway Easement Agreement
(Westech College)

Developer Property Legal Description

[Attached behind this cover page]

EXHIBIT B

Exhibit B

Legal Description

APN: 0193-234-09

Real property in the City of Fontana, County of San Bernardino, State of California
described as follows:

PARCEL MAP 9118 PARCEL NO 1

EXHIBIT "C"
To
Shared Driveway Easement Agreement
(Westech College)

Driveway Area

[Attached behind this cover page]

**OVERSIGHT BOARD ACTION REPORT
FONTANA REDEVELOPMENT SUCCESSOR AGENCY
JUNE 15, 2012**

FROM: Department of Housing and Business Development

SUBJECT: Utility and Parking Easement Agreement – Westech College

RECOMMENDED ACTION:

Adopt Resolution No. FOB 2012 -____ approving the Utility and Parking Easement Agreement with NYMA properties to facilitate the construction of Westech College and authorize the City Manager to execute said agreement and any other documents necessary to effectuate said approval.

BACKGROUND:

The Mayor and City Council identified development of the property on which the Civic Auditorium is currently located as a “priority project”. To that end, on April 24, 2012, the City Council approved a Disposition and Development Agreement (DDA) with NYMA Properties (i.e. “Dix Development”).

The DDA with Dix Development will facilitate construction of a two-story 20,000 square foot college facility (“Westech College”) on the property located at 9460 Sierra Avenue (the current location of the Civic Auditorium). It is anticipated that between 450 and 500 students will attend classes each semester at the Westech College facility in Fontana. Courses to be offered will include medical assistant and technician training, health insurance, office administration, phlebotomist certification and computer drafting and design.

ISSUES/ANALYSIS:

As part of the construction of Westech College, the City of Fontana and Dix Development have been working on a utility and parking easement for the property located adjacent to, and north of, 9460 Sierra Avenue. That Agreement includes the following provisions:

- Dix Development is constructing a college facility on the property located at 9460 Sierra Avenue. Said property will be transferred to Dix Development prior to the commencement of construction.
- The Successor Agency to the former Fontana Redevelopment Agency (the “Agency”) currently owns the property located adjacent to and south of 9460 Sierra Avenue. Said property consists of approximately .37 acres or 16,000 square feet.

- As part of the construction of Westech College, Dix Development would be permitted to complete certain utility improvements on the property owned by the Agency. Said improvements would include sewers, utilities, communication facilities, gas and other energy facilities and drainage facilities.
- In addition, as part of the construction of Westech College, Dix Development would also be permitted to complete certain parking improvements on the property owned by the Agency. Said improvements would allow for, and include, vehicle parking and pedestrian and vehicular ingress and egress.
- With respect to the Parking Easement, Dix Development would be granted said easement for a period of ten (10) years. Following the ten year period, the parking easement expires and terminates.
- The Agency desires to convey to developer and the developer desires to obtain from the Agency a permanent, non-exclusive easement over the Agency property for construction, installation, use and operation of the Parking Improvements pursuant to the terms and conditions of this Easement Agreement.
- It is important to note that, as a result of the numerous utility easements already affecting and recorded against this property, the requested parking improvements are the only "viable" and practical use for this land. The requested parking will provide public benefit through the commercial development ("Westech College") of the Developer owned property.
- Construction of the requested utility and parking improvements would be the sole and absolute responsibility of Dix Development (including the cost of said improvements).
- Construction of the requested improvements at this location will provide parking which is available for Westech College, and which will also be utilized as part of future developments to be located on the adjacent properties to the west and north (including the City and Agency owned property).
- NYMA Properties would have a "right of first refusal" to purchase the property, should an "offer" be received. This is part of the "property disposition strategy" being implemented for all former RDA properties.

Construction of the Westech College facility is scheduled to commence in late summer. Adoption of the resolution and approval of the Utility and Parking

Agreement with NYMA Properties will facilitate one component of that construction. Westech College is scheduled to open for classes in spring, 2013.

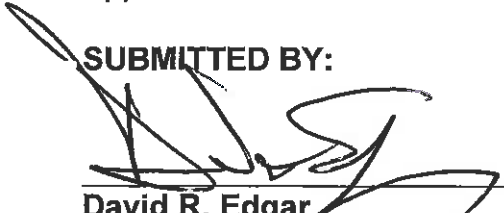
FISCAL IMPACT:

None.

MOTION:

Approve staff's recommendation.

SUBMITTED BY:



David R. Edgar
Deputy City Manager

RECOMMENDED BY:



Kenneth R. Hunt
City Manager

ATTACHMENT:

1. Resolution No. FOB 2012 -____ approving the Utility and Parking Easement Agreement and Easement Agreement.

RESOLUTION FOB NO. _____

**A RESOLUTION OF THE OVERSIGHT BOARD OF THE
SUCCESSOR AGENCY TO THE FONTANA
REDEVELOPMENT AGENCY APPROVING A UTILITY
AND PARKING EASEMENT AGREEMENT (WESTECH
COLLEGE)**

WHEREAS, pursuant to Health and Safety Code section 34173(d), the City of Fontana ("Successor Agency") is the successor agency to the Fontana Redevelopment Agency ("Agency"); and

WHEREAS, pursuant to Health and Safety Code section 34179(a), the Oversight Board is the Successor Agency's oversight board; and

WHEREAS, the Agency and Dix Development, Inc., a California corporation, the predecessor to NYMA Properties, LLC, a Delaware limited liability company ("Developer"), previously entered into that certain Disposition and Development Agreement (Westech College), dated as of April 24, 2011, by and between the Agency and Developer (collectively, the "Agreement"), providing for Developer's development of that certain real property located in the City of Fontana, California, and more particularly described in the Agreement ("Project Site"); and

WHEREAS, Successor Agency owns certain real property adjacent to Project Site in the City of Fontana, California ("Agency Property"); and

WHEREAS, the development of the Project Site contemplated under the Agreement requires Developer to construct certain utility and parking improvements on the Project Site; and

WHEREAS, because of numerous utility easements already in place on the Agency Property, the proposed utility and parking improvements are two of the limited viable uses for the Agency Property; and

WHEREAS, the terms of Developer's use of the Agency Property for the utility and parking improvements are established by that certain Utility and Parking Easement Agreement by and between Agency and Developer ("Easement Agreement") in substantially the form attached to this Resolution as Exhibit A; and

WHEREAS, the Oversight Board has determined that the Easement Agreement will maximize the value of the Agency Property for future disposition.

NOW, THEREFORE, THE OVERSIGHT BOARD OF THE SUCCESSOR AGENCY TO THE FONTANA REDEVELOPMENT AGENCY DOES HEREBY RESOLVE AND FIND AS FOLLOWS:

Section 1. Recitals. The Recitals set forth above are true and correct and are incorporated into this Resolution by this reference.

Section 2. CEQA Compliance. The City of Fontana, as lead agency, previously adopted a Categorical Exemption, pursuant to Section No. 15332 (Class No. 32, Infill Development) dated June 2012, regarding Developers proposed development of the Project Site in compliance with the California Environmental Quality Act ("CEQA"). The Oversight Board hereby finds and determines that the Easement Agreement will not result in any changes to the proposed development of the Project Site or the circumstances surrounding the proposed development of the Project Site, and there is no new information regarding the development of the Project Site, since adoption of the Categorical Exemption, pursuant to Section 15332 (Class No. 32, Infill Development) dated June 2012, that would require or allow additional environmental review or documentation regarding the development of the Project Site, pursuant to California Code of Regulations, title 14, section 15162. The City Clerk of the City of Fontana, acting on ex officio behalf of the Oversight Board, is authorized and directed to file a Notice of Exemption or Determination, as applicable, under CEQA with the appropriate official of the County of San Bernardino, California, within five (5) days following the date of adoption of this Resolution.

Section 3. Approval of Easement Agreement. The Oversight Board hereby approves the Easement Agreement, in substantially the form attached to this Resolution as Exhibit "A" and authorizes the Successor Agency to enter into the Easement Agreement and perform the obligations of the Successor Agency pursuant to the Easement Agreement.

Section 4. Severability. If any provision of this Resolution or the application of any such provision to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Resolution that can be given effect without the invalid provision or application and, to this end, the provisions of this Resolution are severable. The Oversight Board declares that the Oversight Board would have adopted this Resolution irrespective of the invalidity of any particular portion of this Resolution.

Section 5. Certification. The City Clerk of the City of Fontana, acting ex officio on behalf of the Oversight Board as the Oversight Board's Secretary, shall certify to the adoption of this Resolution.

Section 6. Effective Date. Pursuant to Health and Safety Code section 34179(h), all actions taken by the Oversight Board may be reviewed by the State of California Department of Finance and, therefore, this Resolution shall not be effective for three (3) business days, pending a request for review by the State of California Department of Finance.

APPROVED AND ADOPTED THIS 15th day of June, 2012.

Evelyne Ssenkoloto, Chairperson
Oversight Board of the Successor
Agency to the Fontana Redevelopment
Agency

ATTEST:

Lynne Fischer, Secretary to the Oversight
Board of the Successor Agency to the
Fontana Redevelopment Agency

STATE OF CALIFORNIA)
COUNTY OF SAN BERNARDINO) ss
CITY OF FONTANA)

I, Lynne Fischer, Secretary of the Oversight Board of the Successor Agency to the Fontana Redevelopment Agency, do hereby certify that the foregoing Resolution FOB No. _____ was duly and regularly adopted by the Oversight Board of the Successor Agency to the Fontana Redevelopment Agency at a regular meeting thereof on the 15th day of June, 2012, and that the same was passed and adopted by the following vote, to wit:

AYES:
NOES:
ABSENT:
ABSTAIN:

Lynne Fischer, Secretary to the
Oversight Board of the Successor
Agency to the Fontana Redevelopment
Agency

EXHIBIT A

UTILITY AND PARKING EASEMENT AGREEMENT (WESTECH COLLEGE)

[Attached behind this cover page]

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

Successor Agency to the Fontana
Redevelopment Agency
8353 Sierra Avenue
Fontana, CA 92335
Attn: City Manager

Space above line for Recorder's use only
Exempt from recording fees per Govt. Code § 27383
Exempt from Documentary Transfer Tax per Govt.
Code § 11922

UTILITY AND PARKING EASEMENT AGREEMENT

(Westech College)

This UTILITY AND PARKING EASEMENT AGREEMENT (Westech College) ("**Easement Agreement**") is made and entered into as of **[TO BE DETERMINED]** ("**Effective Date**"), by and between the SUCCESSOR AGENCY TO THE FONTANA REDEVELOPMENT AGENCY, a public body, corporate and politic ("**Agency**") and NYMA PROPERTIES, LLC, a Delaware limited liability company ("**Developer**"). Agency and Developer enter into this Easement Agreement with reference to all of the following recited facts:

RECITALS

A. Agency owns that certain real property located in the City of Fontana, California, and more particularly described on Exhibit "A" attached to this Easement Agreement and incorporated into this Easement Agreement by this reference ("**Agency Property**");

B. Developer owns that certain real property located in the City of Fontana, California, and more particularly described on Exhibit "B" attached to this Easement Agreement and incorporated into this Easement Agreement by this reference ("**Developer Property**");

C. Developer has previously entered into that certain Disposition and Development Agreement (Dix Development, Inc.), dated as of April 24, 2012, with the City of Fontana ("**DDA**"), pursuant to which Developer is obligated to pursue and complete certain commercial development of the Developer Property, including certain utility and parking improvements (referred to as "Improvements" in Section 1);

D. Agency has determined that, because of numerous utility easements already affecting the Agency Property, the proposed utility and parking improvements are two of the limited viable uses for the Agency Property and such uses will provide public benefits through the commercial development of the Developer Property pursuant to the DDA;

E. Agency has further determined that this Easement Agreement will maximize the value of the Agency Property for future disposition;

F. Agency has also determined that the public benefit of this Easement Agreement and development of the Developer Property pursuant to the DDA outweigh any private benefit arising from this Easement Agreement;

G. Agency desires to convey to Developer and Developer desires to obtain from Agency a permanent, non-exclusive easement over the Agency Property for construction, installation, use and operation of certain utility improvements pursuant to the terms and conditions of this Easement Agreement; and

H. Agency desires to convey to Developer and Developer desires to obtain from Agency a limited non-exclusive easement over the Agency Property for construction, installation, use and operation of certain parking improvements pursuant to the terms and conditions of this Easement Agreement; and

NOW THEREFORE, IN CONSIDERATION OF THE PROMISES, COVENANTS AND AGREEMENTS SET FORTH IN THIS EASEMENT AGREEMENT, CITY AND DEVELOPER AGREE AS FOLLOWS:

1. **DEFINITIONS.** As used in this Easement Agreement, the following words, phrases and terms shall have the meaning provided in this Section 1, unless the specific context of usage of a particular word, phrase or term requires a different meaning:

1.1 Acceptance Notice. Defined in Section 12.

1.2 Acceptance Period. Defined in Section 12.

1.3 Agency. The Successor Agency to the Fontana Redevelopment Agency, a public body, corporate and politic.

1.4 Agency Parties. Collectively, Agency, its governing body, elected officials, directors, officers, employees, agents and attorneys.

1.5 Agency Property. Defined in Recital A.

1.6 Automobile Liability Insurance. Insurance coverage against claims of personal injury (including bodily injury and death) and property damage covering all owned and non-owned vehicles used by Developer, with minimum limits for bodily injury and property damage of One Million Dollars (\$1,000,000). Such insurance shall be provided by a business or commercial vehicle policy and may be provided through a combination of primary and excess or umbrella policies, all of which shall be subject to pre-approval by Agency, which pre-approval shall not be unreasonably withheld.

1.7 Casualty. Any damage or destruction of any kind or nature, ordinary or extraordinary, foreseen or unforeseen, affecting all or any portion of the Agency Property or the Improvements, whether or not insured or insurable.

1.8 City. The City of Fontana, a municipal corporation.

1.9 Claim. Any claim, loss, cost, damage, expense, liability, lien, action, cause of action (whether in tort, contract, under statute, at law, in equity or otherwise), charge, award, assessment, fine or penalty of any kind (including consultant and expert fees and expenses and investigation costs of whatever kind or nature and, if an Indemnitor improperly fails to provide a defense for an Indemnitee, then Legal Costs of the Indemnitee) or any judgment.

1.10 Condemnation. Any of the following: (a) any temporary or permanent taking of (or of the right to use or occupy) all or any part of the Agency Property by condemnation, eminent domain, or any similar proceeding; or (b) any action by any Government not resulting in an actual transfer of an interest in (or of the right to use or occupy) all or any part of the Agency Property, but creating a right to compensation, such as a change in grade of any street upon which the Agency Property abuts.

1.11 Condemnation Award. Any award(s) paid or payable (whether or not in a separate award) to either Party, after the Effective Date, because of or as compensation for any Condemnation, including: (a) any award made for any Improvements that are the subject of the Condemnation; (b) the full amount paid or payable by the condemning authority for the estate or interest that is the subject of the Condemnation, as determined in any Condemnation proceeding; (c) any interest on such award; and (d) any other sums payable on account of such Condemnation.

1.12 Construction. Any alteration, construction, demolition, excavation, fill, grading, development, expansion, reconstruction, removal, replacement, rehabilitation, redevelopment, repair, Restoration or other work affecting the Agency Property.

1.13 Control. Regarding a specified Person, possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person or contractually bind such Person, whether pursuant to ownership of Equity Interests, contract or otherwise.

1.14 County. The County of San Bernardino, California.

1.15 Default. Any Monetary Default, Insurance Maintenance Default or Non-Monetary Default.

1.16 Default Interest. Interest at an annual rate equal to the lesser of: (a) eight percent (8%) per annum; or (b) the Usury Limit.

1.17 Developer. NYMA Properties, LLC, a Delaware limited liability company, and its successors and assigns.

1.18 Developer Parties. Collectively, Developer, its officers, directors, employees, agents, attorneys and any owners of Equity Interests in Developer.

1.19 Developer Party. Individually, Developer, its officers, directors, employees, agents, attorneys or any owner of Equity Interests in Developer.

1.20 Easement. Individually, the easement granted in Section 2.1 or the easement granted in Section 2.3, respectively.

1.21 Easements. Collectively, the easement granted in Section 2.1 and the easement granted in Section 2.3.

1.22 Easement Agreement. This Utility and Shared Parking Easement Agreement (Westech College).

1.23 Effective Date. Defined in the first paragraph of this Easement Agreement.

1.24 Equity Interest. All or any part of any equity or ownership interest(s) (whether stock, partnership interest, beneficial interest in a trust, membership interest, or other interest of an ownership or equity nature) in any Person.

1.25 Escrow. Defined in Section 12.

1.26 Escrow Holder. Defined in Section 12.

1.27 Event of Default. The occurrence of any one or more of the following:

1.27.1 **Monetary Default**. A Monetary Default that continues for thirty (30) calendar days after Notice from Agency, specifying in reasonable detail the amount of money not paid and the nature and calculation of each such payment.

1.27.2 **Prohibited Liens**. Any failure of Developer to comply with any obligation regarding Prohibited Liens set forth in Section 7 and Developer does not cure such failure within thirty (30) days after Notice of such failure.

1.27.3 **Insurance Maintenance Default**. Agency gives Developer Notice of an Insurance Maintenance Default and Developer does not cure such Insurance Maintenance Default within thirty (30) days after the date of such Notice.

1.27.4 **Non-Monetary Default**. Any Non-Monetary Default, other than those specifically addressed in Section 1.27.2, occurs and Developer does not cure the Default within thirty (30) days after Notice describing the Non-Monetary Default in reasonable detail, or, in the case of a Non-Monetary Default that cannot with due diligence be cured within thirty (30) days from the date of such Notice, if Developer does not: (a) within thirty (30) days from the date of such Notice, advise Agency of the intention of Developer to take all reasonable steps to cure such Non-Monetary Default; (b) duly commence such cure; (c) diligently prosecute such cure to completion; and (d) complete such cure within a reasonable time under the circumstances.

1.28 Federal. The federal government of the United States of America.

1.29 Government. Each and every governmental agency, authority, bureau, department, quasi-governmental body, utility, utility service provider or other entity or instrumentality having or claiming jurisdiction over the Agency Property (or any activity this Easement Agreement allows), including the Federal government of the United States of America,

the State and County governments and their subdivisions and municipalities, including City, any planning commission, building department, zoning board of appeals, design review board or committee and all other applicable governmental agencies, authorities, and subdivisions thereof having or claiming jurisdiction over the Agency Property or any activities on or at the Agency Property.

1.30 Hazardous Substances. Flammable substances, explosives, radioactive materials, asbestos, asbestos-containing materials, polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, medical wastes, toxic substances or related materials, explosives, petroleum, petroleum products, and any “hazardous” or “toxic” material, substance or waste that is defined by those or similar terms or is regulated as such under any Law or becomes, regulated or classified as hazardous or toxic under any Law (or the regulations adopted pursuant to any Law) regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source.

1.31 Hazardous Substance Discharge. Any deposit, discharge, generation, release or spill of a Hazardous Substance that occurs at, on, under, into or from the Agency Property, or relating to transportation of any Hazardous Substance to, from, across or over Property (whether on its own or contained in other material or property), or that arises at any time from the use, occupancy, or operation of the Agency Property or any activities conducted at, on, under or in the Agency Property, whether or not caused by a Party and whether or not occurring before, on or after the Effective Date.

1.32 Indemnify. Where this Easement Agreement states that any Indemnitor shall “Indemnify” any Indemnitee from, against, or for a particular Claim, the Indemnitor shall indemnify the Indemnitee and defend and hold the Indemnitee harmless from and against such Claim (alleged or otherwise), “**Indemnified**” shall have the correlative meaning.

1.33 Indemnitee. Any Person entitled to be Indemnified under this Easement Agreement.

1.34 Indemnitor. Any Person that agrees to Indemnify any other Person under this Easement Agreement.

1.35 Improvements. Any and all improvements (including fixtures, equipment or utility infrastructure) constructed or installed on or within the Agency Property pursuant to this Easement Agreement and plans and specifications approved by City.

1.36 Insurance Maintenance Default. Developer’s failure to obtain, replace, maintain or pay premiums for (or give Agency evidence of) any insurance, when and as this Easement Agreement requires.

1.37 Law. All laws, ordinances, requirements, orders, proclamations, directives, rules or regulations of any Government affecting the Agency Property, this Easement Agreement, or any Construction in any way, including any development, use, maintenance, taxation, operation,

or occupancy of, or environmental conditions affecting, the Agency Property, or relating to any taxes, or otherwise relating to this Easement Agreement or any Party's rights, obligations or remedies under this Easement Agreement, whether in force on the Effective Date or passed, enacted, modified, amended or imposed at some later time, subject in all cases, however, to any applicable waiver, variance or exemption.

1.38 Legal Costs. For any Person, means all reasonable costs and expenses such Person incurs in any legal proceeding (or other matter for which such Person is entitled to be reimbursed for Legal Costs), including reasonable attorneys' fees, court costs and expenses. All references to Legal Costs shall include the salaries, benefits and costs of in-house or contract general counsel to a Person and the lawyers employed in the office of such general counsel who provide legal services regarding a particular matter, adjusted to or billed at an hourly rate and multiplied by the time spent on such matter rounded to increments of one-tenth of an hour, in addition to costs of outside counsel retained by the Person for such matter.

1.39 Liability Insurance. Commercial general liability insurance against claims for bodily injury, death or property damage occurring upon, in or about the Agency Property or adjoining streets or passageways, at least as broad as Insurance Services Office Occurrence Form CG0001, with a minimum liability limit of Two Million Dollars (\$2,000,000) for any one occurrence and Four Million Dollar (\$4,000,000) aggregate (may be provided through a combination of primary and excess or umbrella insurance policies), including contractual liability coverage, for Developer's indemnity obligations under this Easement Agreement. If commercial general liability insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the Agency Property or the general aggregate limit shall be twice the required minimum liability limit for any one occurrence.

1.40 Monetary Default. Except to the extent constituting an Insurance Maintenance Default, any failure by Developer to pay or apply, when and as this Easement Agreement requires, any amount of money, whether to Agency or to a Third Person.

1.41 Non-Monetary Default. The occurrence of any of the following, except to the extent constituting a Monetary Default or an Insurance Maintenance Default: (a) any breach by Developer of Developer's obligations under this Easement Agreement; (b) Developer's failure to comply with any material restriction or prohibition in this Easement Agreement; or (c) any other event or circumstance that, with passage of time or giving of Notice, or both, or neither, would constitute a breach of this Easement Agreement by Developer.

1.42 Notice. Any approval, consent, demand, designation, election, notice, or request relating to this Easement Agreement. Notices shall be delivered, and shall become effective, only in accordance with Section 15.2 of this Easement Agreement.

1.43 Notify. Give a Notice.

1.44 Offer. Defined in Section 12.

1.45 Parties. Collectively, Developer and Agency.

1.46 Party. Individually, Developer or Agency, as applicable.

1.47 Person. Any association, corporation, Government, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization, or other entity of any kind.

1.48 Prevailing Wage Determination. Any of the following: (a) any determination by the State Department of Industrial Relations or its successor for enforcement of State prevailing wage laws that prevailing wage rates should have been paid, but were not; (b) any determination by the State Department of Industrial Relations or its successor for enforcement of State prevailing wage laws that higher prevailing wage rates than those paid should have been paid; (c) any administrative or legal action or proceeding arising from any failure to comply with any of California Labor Code Sections 1720 through 1781; or (d) any administrative or legal action or proceeding to recover wage amounts, at law or in equity, including pursuant to California Labor Code Section 1781.

1.49 Prohibited Lien. Any mechanic's, professional's, vendor's, laborer's or material supplier's statutory or equitable lien or other similar lien against Agency's estate or interest in the Agency Property arising from labor, services, equipment or materials supplied or claimed to have been supplied to Developer or Agency (or anyone claiming through Developer or Agency).

1.50 Property Insurance. Commercial property insurance providing coverage for the Agency Property and all Improvements or other property located on the Agency Property against loss, damage, or destruction by fire or other hazards encompassed under the broadest form of property insurance coverage then customarily used for like properties in the County from time to time, in an amount equal to one hundred percent (100%) of the replacement value (without deduction for depreciation) of all Improvements or other property located on the Agency Property and in any event sufficient to avoid co-insurance and with no co-insurance penalty provision and with "ordinance or law" coverage. To the extent customary for like properties in the County at the time, such insurance shall include coverage for explosion of steam and pressure boilers and similar apparatus located on the Agency Property; coverage for terrorism; an "increased cost of construction" endorsement; and an endorsement covering demolition and cost of debris removal.

1.51 Property Insurance Proceeds. Net proceeds (after reasonable costs of adjustment and collection, including Legal Costs) of Property Insurance, when and as received by Developer or Agency.

1.52 Purchase Agreement. Defined in Section 12.

1.53 Record, recorded, recording or recordation. Recordation of the referenced document in the official records of the County.

1.54 Restoration. After a Casualty or Condemnation, the alteration, clearing, rebuilding, reconstruction, repair, replacement, restoration or safeguarding of the damaged Improvements, substantially equivalent to their condition before the Casualty or Condemnation, subject to any changes in Law that would limit the foregoing.

1.55 Restore. Accomplish a Restoration.

1.56 State. The State of California.

1.57 Third Person. Any Person that is not a Party, Controlled by or under common Control with a Party, or an elected official, director, officer, shareholder, member, principal, partner, manager, owner of an Equity Interest, employee or agent of a Party.

1.58 Usury Limit. The highest rate of interest, if any, that Law allows under the circumstances.

1.59 Waiver of Subrogation. A provision in, or endorsement to, any insurance policy, by which the carrier agrees to waive rights of recovery by way of subrogation against either Party for any loss such insurance policy covers.

1.60 Workers' Compensation Insurance. Both of the following, covering all employees of Developer: (a) workers' compensation insurance complying with the provisions of State law (statutory limits); and (b) an employer's liability insurance policy or endorsement to a liability insurance policy, with a minimum liability limit of One Million Dollars (\$1,000,000) per accident for bodily injury or disease.

2. GRANT OF EASEMENT.

2.1 Utility Easement Grant. Subject to the terms and conditions of this Easement Agreement, as of the Effective Date, Agency grants to Developer a perpetual, non-exclusive easement within, over, under, above and across the Agency Property for the purposes of sewers, utilities, communication facilities, gas and other energy facilities, and drainage facilities, provided that such utility installations comply with Law and do not interfere with the intended primary uses of the Agency Property for the purposes described in Section 2.3 on an overall basis. The easement granted in this Section 2.1 shall burden the Agency Property and benefit the Developer Property.

2.2 Agreement to Provide Other Utility Easements. Agency agrees to grant to any public utility or governmental entity and its successors and assigns easements for sewer, utility communication facilities, gas and other energy facilities or drainage purposes under and through the Agency Property required for the commercial development of the Developer Property pursuant to the DDA, provided that such easements will be limited so that the use of such easements will not unreasonably interfere with the intended primary uses of the Agency Property for the purposes described in clause "(a)" of Section 2.1 on an overall basis. All sewer, utility, drainage and flood control facilities located within the Agency Property shall: (a) be non-exclusive, unless otherwise reasonably required by the utility company or governmental entity; (b) include the right to erect, maintain, operate, repair, remove and replace all necessary lines, facilities, transformers and meters; (c) be below finished ground surface, except as otherwise approved by Agency, in Agency's sole and absolute discretion; and (d) if above finished ground surface, attractively painted or reasonably screened from view by landscaping or fencing.

2.3 Parking Easement Grant. Subject to the terms and conditions of this Easement Agreement, as of the Effective Date, Agency grants to Developer a non-exclusive easement within, over, under, above and across the Agency Property for a period of ten (10) years following the Effective Date for the purposes of vehicle parking, pedestrian and vehicular ingress

and egress, passage, travel and deliveries. The easement granted in this Section 2.1 shall burden the Agency Property and benefit the Developer Property, until the tenth (10th) anniversary of the Effective Date. On the tenth (10th) anniversary of the Effective Date, the Easement granted in this Section 2.3 shall expire and terminate.

2.4 Easements Appurtenant. The Easements shall be appurtenant to the Developer Property and shall pass to and benefit successive owners of the Developer Property with the fee title to the Developer Property.

2.5 Rights and Obligations Run with the Land. All provisions of this Easement Agreement are intended by the Parties to be restrictive covenants running with the land of the both the Agency Property and the Developer Property pursuant to California Civil Code Section 1468. The rights and obligations set forth in this Easement Agreement shall run with the land of both the Agency Property and the Developer Property and shall be binding upon and inure to the benefit of all successive owners of both the Agency Property and the Developer Party.

2.6 No Dedication. The provisions of this Easement Agreement are not intended to and shall not constitute a dedication of the Easements or the Agency Property for public use. The rights and Easements granted in this Easement Agreement are private and only for the benefit of the Parties.

2.7 AS-IS Condition. Developer enters upon the Agency Property pursuant to the Easements in the Agency Property's AS IS, WHERE IS, SUBJECT TO ALL FAULTS CONDITION, AS OF THE EFFECTIVE DATE, WITHOUT WARRANTY as to character, quality, performance, condition, title, physical condition, soil conditions, the presence or absence of fill, shoring or support, subsurface support, zoning, land use restrictions, the availability or location of utilities or services, the location of any public infrastructure on or off of the Agency Property (active, inactive or abandoned), the suitability of the Agency Property for the Improvements or other use or the existence or absence of Hazardous Substances affecting the Agency Property and with full knowledge of the physical condition of the Agency Property, the nature of Agency's interest in and use of the Agency Property, all Laws and any and all conditions, covenants, restrictions, encumbrances and all matters of record relating to the Agency Property. Developer represents and warrants to Agency that Developer has received assurances acceptable to Developer by means independent of Agency or Agency's agents of the truth of all facts material to Developer's entry into this Easement Agreement or construction, installation, use or operation of the Improvements or other improvements on or to the Agency Property pursuant to the Easements. Agency hereby expressly and specifically disclaims any express or implied warranties regarding any condition of the Agency Property.

3. CONSTRUCTION OF IMPROVEMENTS. Developer shall construct and install the Improvements on the Agency Property at Developer's sole cost and expense, in accordance with plans and specifications approved by Agency, in the time required in the DDA and in accordance with all applicable Laws. In entering upon the Agency Property to construct and install the Improvements, Developer shall reasonably minimize interference with, impairment of or disruption of the existing or future use, enjoyment, occupancy or operation of the Agency Property.

4. USE RESTRICTIONS. Except upon the express written agreement of all of the Parties, no Party shall place or construct within or upon the Agency Property, any structure or impediment that will restrict the use of the Agency Property by the Parties for the intended primary uses described in Section 2.1; provided, however, traffic controls reasonably necessary to guide and control the orderly flow of traffic on the Agency Property or to comply with requirements of Law may be installed within or upon the Agency Property by a Party, so long as access to or from the Agency Property is not closed or blocked and traffic circulation in the Agency Property is not changed or altered by such controls. Except as otherwise set forth in this Easement Agreement, no walls, fences, gates or barriers of any sort or kind shall be constructed or maintained within or upon the Agency Property or anywhere on the Developer Property or other property that prevents or impairs the intended primary uses of the Agency Property described in Section 2.1. No parking shall ever be permitted on the designated driveways, fire lanes, entranceways or exits of the Agency Property, as improved with the Improvements.

5. OPERATION AND MAINTENANCE COVENANT. Developer, for itself and its successors and assigns, covenants to and agrees with Agency that:

5.1 Maintenance Standard. Developer shall operate and maintain the Improvements in a commercially reasonable manner and condition, including maintenance, repair, reconstruction and replacement of any and all asphalt, concrete, landscaping, utility systems, irrigation systems, drainage facilities or systems, grading, subsidence, retaining walls or similar support structures, foundations, signage, ornamentation and all other improvements on or to the Agency Property, now existing or made in the future, as necessary to maintain the appearance and character of the Agency Property, as improved with the Improvements, including all of the following, all at Developer's sole cost and expense: (a) maintaining surfaces in a level, smooth and evenly covered condition with the type of surfacing material originally installed or such substitute as shall in all respects be equal in quality, use and durability; (b) removing all papers, mud, sand, debris, filth and refuse and thoroughly sweeping areas to the extent reasonably necessary to keep areas in a clean and orderly condition; (c) removing or covering graffiti with the type of surface covering originally used on the affected area, (d) placing, keeping in repair and replacing any necessary and appropriate directional signs, markers and lines; (e) installing, operating, keeping in repair and replacing where necessary, such artificial lighting facilities as shall be reasonably required; (f) maintaining, mowing, weeding, trimming and watering all landscaped areas and making such replacements of plants and other landscaping material as necessary to maintain the appearance and character of the landscaping; (g) properly maintaining windows, structural elements and painted exterior surface areas of structures in a clean and presentable manner; and (h) arranging and paying for all fuel, gas, light, power, water, sewage, garbage disposal, telephone and other utility charges, and the expenses of installation, maintenance, use and service in connection with all of the foregoing (collectively, "**Maintenance Standard**"). Notwithstanding the foregoing, the Maintenance Standard shall not apply during any period after a fire or other casualty loss, as long as Developer is diligently taking reasonable steps to obtain available insurance proceeds and repair, Restore or remove any improvements or conditions that violate the Maintenance Standard. Agency shall have absolutely no responsibility for any cost or performance associated with any matter that is the responsibility of Developer pursuant to the Maintenance Standard.

5.2 Maintenance Deficiency. If there is an occurrence of an adverse condition within the Agency Property in contravention of the Maintenance Standard (each such occurrence being a "**Maintenance Deficiency**"), then Agency may Notify Developer of the Maintenance Deficiency. If a Maintenance Deficiency is not cured within thirty (30) calendar days following Notice to Developer of such Maintenance Deficiency, Agency shall have the right, but not the obligation, to perform all acts necessary to cure the Maintenance Deficiency or take any other action at law or in equity that may then be available to Agency to accomplish the abatement of the Maintenance Deficiency. Any amount expended by Agency for the cure or abatement of a Maintenance Deficiency pursuant to this Section 5.2 (including Legal Costs) shall be reimbursed to Agency by Developer within thirty (30) calendar days after Notice to Developer of the amount expended. If any amount becoming due to Agency under this Section 5.2 is not reimbursed to Agency by Developer within thirty (30) calendar days after Notice to Developer of the amount owed, the amount shall accrue Default Interest from the thirtieth (30th) calendar day after Notice of the amount owed until all of the unpaid principal and accrued Default Interest are paid in full. Nothing in this Section 5 is intended to limit or otherwise restrict any right or authority of Agency outside of this Easement Agreement to abate a condition that is or may be a Maintenance Deficiency.

6. **HAZARDOUS SUBSTANCE DISCHARGE**. Neither Party shall cause or permit any Hazardous Substance Discharge. If any Hazardous Substance Discharge occurs, the responsible Party shall immediately remedy, repair and remediate any damage or harm caused by such Hazardous Substance Discharge at such Party's sole cost and expense and shall notify the other Party of such Hazardous Substance Discharge, as soon as possible, but in all circumstances, within fifteen (15) calendar days following the occurrence of such Hazardous Substance Discharge. NOTWITHSTANDING ANY PROVISION OF THIS EASEMENT AGREEMENT TO THE CONTRARY, CITY SHALL HAVE NO LIABILITY TO DEVELOPER OR TO DEVELOPER'S SUCCESSORS, ASSIGNS OR OTHER PERSONS WHO USE OR ACQUIRE AN INTEREST IN THE AGENCY PROPERTY FROM OR THROUGH DEVELOPER WITH RESPECT TO THE CURRENT OR FUTURE PRESENCE OF ANY HAZARDOUS SUBSTANCES ON OR AFFECTING THE AGENCY PROPERTY, EXCEPT TO THE EXTENT OF A HAZARDOUS SUBSTANCE DISCHARGE BY CITY.

7. **PROHIBITED LIENS.**

7.1 Developer Covenant. Following Notice of a Prohibited Lien, Developer shall, within thirty (30) days after receiving such Notice (but in any circumstance, within fifteen (15) days after Developer receives Notice of commencement of foreclosure proceedings regarding any Prohibited Lien), cause such Prohibited Lien to be paid, discharged and cleared from title to the Agency Property.

7.2 Protection of Agency. NOTICE IS HEREBY GIVEN THAT AGENCY SHALL NOT BE LIABLE FOR ANY LABOR OR MATERIALS FURNISHED OR TO BE FURNISHED TO DEVELOPER UPON CREDIT AND THAT NO MECHANIC'S OR OTHER LIEN FOR ANY LABOR OR MATERIALS SHALL ATTACH TO OR AFFECT THE AGENCY PROPERTY. NOTHING IN THIS EASEMENT AGREEMENT SHALL BE DEEMED OR CONSTRUED IN ANY WAY TO CONSTITUTE AGENCY'S CONSENT OR REQUEST, EXPRESS OR IMPLIED, BY INFERENCE OR OTHERWISE, TO ANY

ARCHITECT, ENGINEER, CONTRACTOR, SUBCONTRACTOR, LABORER, EQUIPMENT OR MATERIAL SUPPLIER OR OTHER PERSON FOR THE PERFORMANCE OF ANY LABOR OR SERVICE OR THE FURNISHING OF ANY MATERIALS OR EQUIPMENT FOR ANY CONSTRUCTION, NOR AS GIVING DEVELOPER ANY RIGHT, POWER OR AUTHORITY TO CONTRACT FOR, OR PERMIT THE RENDERING OF, ANY SERVICES, OR THE FURNISHING OF ANY MATERIALS THAT WOULD GIVE RISE TO THE FILING OF ANY LIENS AGAINST THE AGENCY PROPERTY. DEVELOPER SHALL INDEMNIFY AGENCY AGAINST ANY CONSTRUCTION UNDERTAKEN BY DEVELOPER OR ANYONE CLAIMING THROUGH DEVELOPER, AND AGAINST ALL PROHIBITED LIENS.

7.3 No Liens Against Public Property. DEVELOPER ACKNOWLEDGES AND AGREES THAT THE AGENCY PROPERTY IS OWNED BY AGENCY, WHICH IS A PUBLIC ENTITY, AND THAT THE AGENCY PROPERTY IS NOT SUBJECT TO THE IMPOSITION OF MECHANIC'S LIENS OR ANY OTHER LIENS IN FAVOR OF PROVIDERS OF LABOR, MATERIAL OR SERVICES. DEVELOPER FURTHER AGREES TO INFORM EACH PROVIDER OF LABOR, MATERIAL OR SERVICES ON OR TO THE AGENCY PROPERTY OF SUCH FACT AND THAT NEITHER AGENCY OR THE AGENCY PROPERTY IS RESPONSIBLE FOR PAYMENT OF ANY CLAIMS BY ANY SUCH PROVIDER OF LABOR, MATERIAL OR SERVICES. AGENCY SHALL HAVE THE RIGHT AT ALL REASONABLE TIMES TO POST AND KEEP POSTED ON THE AGENCY PROPERTY ANY NOTICES THAT AGENCY MAY DEEM NECESSARY FOR THE PROTECTION OF AGENCY OR THE AGENCY PROPERTY FROM MECHANIC'S LIENS OR OTHER CLAIMS. DEVELOPER SHALL GIVE AGENCY TEN (10) DAYS PRIOR WRITTEN NOTICE OF THE COMMENCEMENT OF ANY CONSTRUCTION TO BE DONE ON OR WITHIN THE AGENCY PROPERTY TO ENABLE AGENCY TO POST ANY SUCH NOTICES.

8. DEVELOPER INSURANCE.

8.1 Types. Developer shall maintain at the sole cost and expense of Developer, all of the following insurance (or, if unavailable, its then reasonably available equivalent): (a) Liability Insurance; (b) Automobile Liability Insurance; (c) Property Insurance; and (d) Workers Compensation Insurance. All Liability Insurance, Automobile Liability Insurance, Property Insurance and Workers Compensation Insurance policies this Easement Agreement requires shall be issued by carriers that: (a) are listed in the then current "Best's Key Rating Guide—Property/Casualty—United States & Canada" publication (or its equivalent, if such publication ceases to be published) with a minimum financial strength rating of "A-" and a minimum financial size category of "VII" (exception may be made for the State Compensation Insurance Fund, when not specifically rated); and (b) are authorized to do business in the State by the State Department of Insurance. Developer may provide any insurance under a "blanket" or "umbrella" insurance policy, provided that: (i) such policy or a certificate of such policy shall specify the amount(s) of the total insurance allocated to the Agency Property, which amount(s) shall equal or exceed the amount(s) required by this Easement Agreement; and (ii) such policy otherwise complies with the requirements of this Easement Agreement regarding such insurance. All insurance obtained and maintained by Developer in satisfaction of the requirements of this Easement Agreement shall be fully paid for and non-assessable.

8.2 Insured. Liability Insurance and Automobile Liability Insurance policies shall name the Agency Parties as “additional insured.” Property Insurance policies shall name Agency as a “loss payee.” The coverage afforded to the Agency Parties shall be at least as broad as that afforded to Developer regarding the Improvements and the Agency Property and may not contain any terms, conditions, exclusions, or limitations applicable to the Agency Parties that do not apply to Developer. All Liability Insurance and Automobile Liability Insurance shall provide for separation of insured for Developer and the Agency Parties. Insurance policies obtained in satisfaction of or in accordance with the requirements of this Easement Agreement may provide a cross-suits exclusion for suits between named insured Persons, but shall not exclude suits between named insured Persons and additional insured Persons. Any insurance or self-insurance maintained by the Agency Parties shall be excess of all insurance required to be maintained by Developer under this Easement Agreement and shall not contribute with any insurance required to be maintained by Developer under this Easement Agreement. Developer shall not carry separate or additional insurance concurrent in form or contributing in the event of loss with insurance coverage required by this Easement Agreement, unless the Agency Parties are made additional insured or loss payee, as applicable, under such insurance coverage, consistent with the provisions of this Easement Agreement applicable to such form of insurance or insurance covering the same type(s) of loss.

8.3 Deductibles and Self-Insured Retentions. Any and all deductibles or self-insured retentions under insurance policies required to be maintained by Developer under this Easement Agreement shall be declared to and approved by Agency. Developer shall pay all such deductibles or self-insured retentions regarding the Agency Parties. Each insurance policy issued in satisfaction of the requirements of this Easement Agreement shall provide that, to the extent that Developer fails to pay all or any portion of a self-insured retention under such policy regarding an otherwise insured loss, Agency may pay the unpaid portion of such self-insured retention, in Agency’s sole and absolute discretion. All amounts paid by Agency toward self-insured retentions regarding insurance policies covering the Agency Parties pursuant to this Easement Agreement shall be reimbursable to Agency by Developer in the same manner that insurance costs are reimbursable to Agency from Developer pursuant to Section 8.6.

8.4 Deliveries to Agency. Evidence of Developer’s maintenance of all insurance policies required by this Easement Agreement shall be delivered to Agency prior to the Effective Date. No later than three (3) days before any insurance required by this Easement Agreement expires, is cancelled or its liability limits are reduced or exhausted, Developer shall deliver to Agency evidence of Developer’s maintenance of all insurance required by this Easement Agreement. Each insurance policy required by this Easement Agreement shall be endorsed to state that coverage shall not be cancelled, suspended, voided, reduced in coverage or in limits, except after thirty (30) calendar days’ advance written notice of such action has been given to Agency by certified mail, return receipt requested; provided, however, that only ten (10) days’ advance written notice shall be required for any such action arising from non-payment of the premium for the insurance. Phrases such as “endeavor to” and “but failure to mail such notice shall impose no obligation or liability of any kind upon the company” shall not be included in the cancellation wording of any certificates or policies of insurance applicable to the Agency Parties pursuant to this Easement Agreement.

8.5 Waiver of Certain Claims. Developer shall cause each insurance carrier providing any Liability Insurance, Property Insurance, Worker's Compensation Insurance or Automobile Liability Insurance coverage under this Easement Agreement to endorse their applicable policy(ies) with a Waiver of Subrogation with respect to the Agency Parties, if not originally in the policy. To the extent that Developer obtains an insurance policy covering both the Developer and the Agency Parties and containing a Waiver of Subrogation, the Parties release each other from any Claims for damage to any Person or property to the extent such Claims are paid pursuant to such insurance policy.

8.6 Agency Option to Obtain Coverage. During the continuance of an Event of Default arising from the failure of Developer to carry any insurance required by this Easement Agreement, Agency may, in Agency's sole and absolute discretion, purchase any such required insurance coverage. Agency shall be entitled to immediate payment from Developer of any premiums and associated reasonable costs paid by Agency to obtain such insurance coverage. Any amount becoming due and payable to Agency under this Section 8.6 that is not paid within fifteen (15) calendar days after written demand from Agency for payment of such amount, with an explanation of the amounts demanded, will accrue Default Interest from the date of the demand, until paid in full. Any election by Agency to purchase or not to purchase insurance coverage otherwise required by the terms of this Easement Agreement to be carried by Developer shall not relieve the Developer of Developer's Default or Developer's obligation to obtain and maintain any insurance coverage required by this Easement Agreement.

9. TAXES AND ASSESSMENTS. Developer shall pay, without abatement, deduction or offset, any and all real and personal property taxes, general and special assessments and other charges (including any increase caused by a change in the tax rate or by a change in assessed valuation) of any description levied or assessed by any Government on or against the Agency Property or personal property located on or in the Agency Property. Developer acknowledges and agrees that this Easement Agreement may create a possessory interest subject to property taxation and that Developer may be subject to the payment of property taxes levied on such possessory interest. Any such imposition of a possessory interest tax shall be a tax liability of Developer solely and shall be paid for by Developer. Any and all taxes and assessments and installments of taxes and assessments required to be paid by Developer under this Easement Agreement shall be paid by Developer before each such tax, assessment or installment of tax or assessment becomes delinquent. Developer, at Developer's own cost and expense, shall have the right, at any time, to contest or seek a reduction in the assessed valuation attributable to the Agency Property, or to contest any taxes or assessments attributable to the Agency Property or the Easements, provided Developer undertakes all proceedings necessary to prevent the sale of the Agency Property for such taxes or assessments (including payment of the full contested amount subject to such contest or possible reduction, if required by applicable law), and promptly upon termination of such proceedings (but in any event prior to the sale of the Agency Property to satisfy the contested tax or assessment) pays in full the taxes or assessments determined to be due and owing, plus all interest, penalties and other costs with respect to such contest. Developer shall Indemnify Agency regarding any liability, loss or damage resulting from any taxes, assessments or other charges required by this Easement Agreement to be paid by Developer and from all interest, penalties, and other sums imposed thereon and from any sales or other proceedings to enforce collection of any such taxes, assessments, or other charges.

10. INDEMNIFICATION.

10.1 Developer Indemnity. Developer shall Indemnify the Agency Parties against any Claim to the extent such Claim arises from: (a) any wrongful intentional act or negligence of the Developer Parties; (b) any agreements that Developer (or anyone claiming by or through Developer) makes with a Third Person regarding this Easement Agreement, the Easements, the Improvements or the Agency Property; (c) any workers' compensation Claim or determination arising from employees or contractors of the Developer Parties; (d) any Prevailing Wage Determination; or (e) any Hazardous Substance Discharge caused in whole or in part by a Developer Party and occurring on or after the Effective Date.

10.2 Independent Insurance and Indemnity Obligations. Developer's insurance or indemnification obligations under this Easement Agreement are independent of each other and shall not in any way satisfy, restrict, limit or modify the other obligation.

10.3 Survival of Obligation to Indemnify. The obligation of Developer to Indemnify the Agency Parties pursuant to this Easement Agreement shall survive the termination of this Easement Agreement, until any and all actual or prospective Claims regarding any matter subject to such obligation to Indemnify the Agency Parties pursuant to this Easement Agreement are fully, finally, absolutely and completely barred by applicable statutes of limitations.

11. CASUALTY OR CONDEMNATION. If either Party becomes aware of any Casualty or actual, contemplated or threatened Condemnation, then such Party shall promptly Notify the other Party of such matter. If any Casualty or Condemnation occurs, Developer shall Restore the affected Parking Improvements with reasonable promptness, regardless of the availability or sufficiency of Property Insurance Proceeds or Condemnation Award for such purpose. Developer shall use all Property Insurance Proceeds or Condemnation Award for Restoration on the terms set forth in this Section 11. First, Developer shall reimburse Developer and Agency from such Property Insurance Proceeds or Condemnation Award for their actual, necessary and proper costs and expenses in collecting such Property Insurance Proceeds or Condemnation Award. Until Developer has completed and paid for all of the subject Restoration, Developer shall hold all Property Insurance Proceeds or Condemnation Award in trust for the benefit of Agency to be used first to Restore and for no other purpose. If Property Insurance Proceeds or Condemnation Award are insufficient to Restore, then Developer shall nevertheless Restore at Developer's sole cost and expense. In the event of a Condemnation that prevents Restoration, Developer is not required to Restore and the Condemnation Award shall be distributed to Developer and Agency in accordance with their respective interests in the property that is the subject of the Condemnation.

12. DEVELOPER RIGHT OF FIRST REFUSAL ON SALE OF PROPERTY. Agency shall only sell the Property after compliance with the provisions of this Section 12. Any sale of the Property shall be pursuant to a written offer ("**Offer**") from a bona fide Third Person purchaser setting forth the terms and conditions of the proposed purchase, provided that such terms and conditions must provide for a closing date of not less than sixty (60) calendar days after acceptance of the Offer. If Agency receives an Offer that Agency is willing to accept, Agency shall give Developer a copy of the Offer. Developer shall have thirty (30) calendar days following the date of delivery of a copy of the Offer to Developer ("**Acceptance Period**") within

which to Notify Agency of Developer's election to purchase the Property under the terms and conditions specified in the Offer ("**Acceptance Notice**"). Within fifteen (15) business days following Agency's receipt of the Acceptance Notice, the Parties shall proceed to open an escrow for the purchase and sale of the Property ("**Escrow**") with an escrow company reasonably selected by Agency ("**Escrow Holder**") by delivering a fully executed copy of a definitive purchase and sale agreement and joint escrow instructions ("**Purchase Agreement**") to Escrow Holder based on the terms and conditions of the Offer and containing other reasonable and standard terms and conditions. This Easement Agreement shall remain in full force and effect until the close of Escrow. If the Acceptance Notice is not delivered to Agency by Developer before the expiration of the Acceptance Period, then Agency may proceed to sell the Property any time within one hundred eighty (180) calendar days after the expiration of the Acceptance Period, on the terms and conditions set forth in the Offer, free and clear of any rights of Developer under this Section 12 (Developer shall not have any right of first refusal regarding subsequent sales of the Property by the purchaser from Agency or such purchaser's successors in interest). Any sale or proposed sale on any terms and conditions that are substantially different from those in the Offer or after expiration of such one hundred eighty (180) calendar day time period shall be a new sale subject to all of the rights of Developer under this Section 12. Developer shall only be entitled to exercise Developer's rights under this Section 12, if no breach or Default by Developer under this Easement Agreement exists at the time Agency receives the Offer. Developer's rights under this Section 12 are personal to Developer, may only be exercised by Developer and may not be assigned or transferred by Developer. Notwithstanding anything to the contrary contained in this Easement Agreement, Developer's rights under this Section 12 shall not apply to any transfer of the Property resulting from any foreclosure, deed in lieu of foreclosure or exercise of power of sale by a lender with a lien on the Property or any subsequent transfer by such foreclosing lender. Upon any such foreclosure, deed in lieu of foreclosure or exercise of power of sale, Developer's rights under this Section 12 shall terminate and be of no further force or effect.

13. REMEDIES.

13.1 Right to Cure Defaults. During the continuance of an Event of Default under this Easement Agreement, Agency shall have the right, but not the obligation, following thirty (30) days advance Notice to Developer, to cure the subject Default(s). Any sum expended by Agency to cure any Default of Developer pursuant to this Section 13 shall be reimbursed to Agency by Developer, within thirty (30) calendar days after Notice to Developer of the amount. Any amount expended by Agency to cure any Default of Developer pursuant to this Section 13 that is not reimbursed to Agency by Developer within such thirty (30) calendar days after Notice to Developer of such amount, shall accrue Default Interest, until paid in full.

13.2 Termination. During the continuance of an Event of Default under this Easement Agreement, Agency shall have the right, in Agency's sole and absolute discretion, with thirty (30) calendar days advance Notice to Developer, to terminate this Easement Agreement. Within twenty (20) calendar days following Notice of termination of this Easement Agreement, Developer shall cause Developer's authorized representative(s) to sign (and have such signature(s) notary acknowledged by a State notary) one or more quitclaim deeds or other documents or instruments reasonably requested by Agency to evidence, confirm or provide record or other notice of the termination of Developer's interest in the Agency Property pursuant

to this Easement Agreement. Developer's obligations under this Section 13.2 shall survive termination of this Easement Agreement.

13.3 All Available Remedies. In addition to the rights and remedies of Agency under Section 13.1 or Section 13.2, in the sole and absolute discretion of Agency, following the occurrence of an Event of Default or Event of Default, Agency may pursue any remedies or proceedings available to Agency at law or in equity regarding a Default by the other Party, including recovering monetary damages, specific performance or any other remedy provided for at law or in equity.

13.4 Inadequacy of Monetary Damages; Injunctive Relief. Monetary damages for the breach of this Easement Agreement are declared by the Parties to be inadequate and the Parties may be enjoined by any court of competent jurisdiction from commencing or proceeding with any action or inaction that diminishes, in any respect, the possessory or use rights of the other Party regarding the Easements or other rights granted or provided in this Easement Agreement.

13.5 Remedies Cumulative. All rights and remedies of Agency under this Easement Agreement regarding a Default or Event of Default Agency shall be cumulative and the exercise of one right or remedy shall not preclude the exercise of another right or remedy for the same or any subsequent Default or Event of Default.

14. NO LIMITATION ON CITY AUTHORITY. Nothing in this Easement Agreement shall be deemed to limit, modify or abridge the governmental police power or other legal authority (whether direct or delegated) of City or Agency under applicable Law regarding the Agency Property, the Developer Property or Developer.

15. MISCELLANEOUS.

15.1 Intent to Bind Successors. All terms, conditions, covenants, restrictions or agreements set forth in this Easement Agreement shall bind and benefit the respective successors or assigns of Agency or Developer. Neither Party may transfer or convey its rights under this Easement Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld.

15.2 Notices. All Notices shall be in writing and shall be addressed to Developer or Agency as set forth in Section 15.2.1. Notices shall be delivered by Federal Express, United Parcel Service, or other nationally recognized overnight (one business day) delivery service to the address set forth in Section 15.2.1. A Notice shall be deemed delivered on the date of delivery (or when delivery has been attempted twice, as evidenced by the written report of the delivery service) to the address(es) set forth in Section 15.2.1. Either Party may change its address for delivery of Notices by giving Notice in compliance with this Easement Agreement. Any Party giving a Notice may request the recipient to acknowledge delivery of such Notice. The recipient shall promptly comply with any such acknowledgment request, but failure to do so shall not limit the effectiveness of any Notice. Notice given for a Party by any attorney who represents such Party shall constitute Notice by such Party. Any correctly addressed Notice that is refused, unclaimed or undeliverable because of an act or omission of the Party to be Notified

shall be considered to be effective as of the first date that the Notice was refused, unclaimed or considered undeliverable by the postal authorities, messenger or overnight delivery service.

15.2.1 Addresses. The following are the addresses for delivery of Notices to the Parties, as of the Effective Date.

To Agency: Successor Agency to the Fontana Redevelopment Agency
 8353 Sierra Avenue
 Fontana, CA 92335
 Attention: City Manager

To Developer: NYMA Properties, LLC

Attention: _____

15.3 No Third-Party Beneficiaries. No Person shall have any enforceable rights under this Easement Agreement other than the Parties and their respective successors and assigns, notwithstanding any provision of this Easement Agreement that contemplates other Persons exercising certain privileges (if any) or any references in this Easement Agreement to the public generally. Nothing in this Easement Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Easement Agreement on any Person other than the Parties and their respective successors and assigns. Nothing in this Easement Agreement, express or implied, is intended to relieve or discharge any obligation of any Person who is not a Party to any Party or give any Person who is not a Party any right of subrogation or action over or against any Party.

15.4 No Implied Waiver. No waiver of any Default shall be implied from any omission by the non-defaulting Party to take any action regarding such Default. No express waiver of any Default shall affect any Default or cover any period of time other than the Default and period of time specified in such express waiver. One or more waivers of any Default in the performance of any term, provision or covenant contained in this Easement Agreement shall not be deemed a waiver of any subsequent Default in the performance of the same term, provision or covenant or any other term, provision or covenant contained in this Easement Agreement. The consent or approval by a Party to or of any act or request of the other Party requiring consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent acts or requests.

15.5 Estoppel Certificates. Each Party covenants that upon receipt of written request from the other Party, it shall, within fifteen (15) days after receipt of such request, give to the requesting Party or such other Person specified by the requesting Party, an estoppel certificate stating: (a) whether the Party knows of any Default by Agency or Developer under this Easement Agreement, and if there are known Defaults, specifying the nature of such Defaults; (b) whether the Party knows of any assignment, modification or amendment of all or any portion of this Easement Agreement (and if so, stating the terms thereof); (c) whether this Easement Agreement, as of the date of the estoppel certificate, is in full force and effect; and (d) any other information reasonably requested by the requesting Party.

15.6 Amendments. All amendments to this Easement Agreement must be in writing, signed by the authorized representative(s) of the Parties and recorded in the official records of the Recorder for the County.

15.7 Mortgagee Protection. Breach of this Easement Agreement shall not defeat nor render invalid the lien of any mortgage or deed of trust made in good faith and for value as to the Agency Property, but all of the terms, provisions, conditions, restrictions, agreements and covenants of this Easement Agreement shall be binding and effective against any owner of the Agency Property whose title to the Agency Property is acquired by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

15.8 Relationship of Parties. The Parties each intend and agree that the Parties are independent contracting entities and do not intend by this Easement Agreement to create any partnership, joint venture or similar business arrangement, relationship or association between them.

15.9 Tax Consequences. Developer acknowledge and agree that Developer shall bear any and all responsibility, liability, costs or expenses connected in any way with any tax consequences experienced by Developer related to this Easement Agreement, subject to the provisions of Section 9.

15.10 No Other Representations or Warranties. Except as expressly set forth in this Easement Agreement, no Party makes any representation or warranty material to this Easement Agreement to the other Party.

15.11 Counterparts. This Easement Agreement may be signed by the respective authorized representatives of the Parties in multiple counterpart originals, each of which shall be deemed an original, and all such counterpart originals, when taken together, shall constitute one agreement.

15.12 Entire Agreement. This Easement Agreement and the other documents and exhibits referred to in this Easement Agreement contain the entire agreement of the Parties as to the rights granted in this Easement Agreement and the obligations assumed in this Easement Agreement, and no oral statement or representation regarding such subject matter shall be of any force or effect.

15.13 Severability. Invalidation of any term, agreement, covenant, condition or restriction or any other provision contained in this Easement Agreement or the application of any term, agreement, covenant, condition or restriction or any other provision contained in this Easement Agreement to any Person by judgment or court order shall in no way affect any of the other terms, agreements, covenants, conditions, restrictions or provisions in this Easement Agreement, or the application of any term agreement, covenant, condition or restriction or any other provision contained in this Easement Agreement to any other Person and the same shall remain in full force and effect.

15.14 Headings. The headings of the various sections of this Easement Agreement are for convenience of reference and identification only and shall not be deemed to limit, expand or

define the intent, meaning or interpretation of the respective sections of this Easement Agreement.

15.15 Governing Law. The procedural and substantive laws of the State of California shall govern the interpretation and enforcement of this Easement Agreement, without application of conflicts or choice of laws principles or statutes.

15.16 Venue. The Parties acknowledge that this Easement Agreement has been negotiated and entered into in the County. Any legal action brought to interpret or enforce this Easement Agreement shall be brought in a court of competent jurisdiction in the County.

15.17 Attorney's Fees. In the event of any controversy, claim or dispute relating to this Easement Agreement, the prevailing Party shall be entitled to recover Legal Costs from the other Party.

15.18 Principles of Interpretation. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted all or any part of this Easement Agreement. The Parties have participated substantially in the negotiation, drafting, and revision of this Easement Agreement, with advice from legal counsel and other advisers of their own selection. A term defined in the singular in this Easement Agreement may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which also govern all other language in this Easement Agreement. The words "include" and "including" shall be construed to be followed by the words: "without limitation." Each collective noun in this Easement Agreement shall be interpreted as if followed by the words "(or any part of it)" except where the context clearly requires otherwise. Every reference to any document, including this Easement Agreement, refers to such document as modified from time to time, and includes all exhibits, schedules and riders to such document. The word "or" includes the word "and." Every reference to a law, statute, regulation, order, form or similar governmental requirement refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time. The use in this Easement Agreement of the neuter gender shall include the masculine and the feminine, and the singular number shall include the plural, whenever the context so requires.

15.19 Additional Documents. To further implement this Easement Agreement, each Party agrees to sign and deliver such other instruments as may be necessary or proper to grant or otherwise establish, confirm or terminate the Easements and the provisions and conditions of this Easement Agreement.

15.20 Recording. The Parties intend that this Easement Agreement be recorded in the official records of the Recorder for the County. Any Party may cause this Easement Agreement to be so recorded. Developer shall pay the entire cost of recording this Easement Agreement in the official records of the Recorder for the County.

[Signatures on following page]

**Signature Page
To
Utility and Parking Easement Agreement
(Westech College)**

IN WITNESS WHEREOF, Developer and Agency sign and enter into this Easement Agreement, by and through the signatures of their respective authorized representatives, as follow:

AGENCY:

SUCCESSOR AGENCY TO THE FONTANA
REDEVELOPMENT AGENCY, a public
body, corporate and politic

By: _____

Kenneth R. Hunt
City Manager, Ex Officio

DEVELOPER:

NYMA Properties, LLC, a Delaware limited
liability company

By: _____

Name: _____

Title: _____

ATTEST:

By: _____

Tonia Lewis
City Clerk, Ex Officio

By: _____

Name: _____

Title: _____

APPROVED AS TO FORM:

Best Best & Krieger LLP

By: _____

City Attorney, Ex Officio

EXHIBIT "A"
To
Utility and Parking Easement Agreement
(Westech College)

Agency Property Legal Description

[Attached behind this cover page]

Exhibit A

Legal Description

APN: 0193-234-12

Real property in the City of Fontana, County of San Bernardino, State of California
described as follows:

PARCEL MAP 9118 PARCEL NO 2

EXHIBIT "B"
To
Utility and Parking Easement Agreement
(Westech College)

Developer Property Legal Description

[Attached behind this cover page]

Exhibit B

Legal Description

APN: 0193-234-12

Real property in the City of Fontana, County of San Bernardino, State of California
described as follows:

PARCEL MAP 9118 PARCEL NO 2