

## **RESOLUTION NO. 2018-103**

### **A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK AUTHORIZING AND APPROVING AN OFF-SITE PUBLIC IMPROVEMENT AND PUBLIC FACILITIES FEE CREDIT AND TERMINATION AND SUPERSESSION OF DEFERRED IMPROVEMENT AGREEMENT WITH ROHNERT PARK 668 LP FOR THE RESIDENCES AT FIVE CREEK APARTMENT COMPLEX (APN 143-040-137)**

**WHEREAS**, on June 10, 2008, the City Council of the City of Rohnert adopted Resolution No 2008-086 approving the Final Environmental Impact Report (EIR) for the Stadium Area Master Plan (the “EIR”) which included commercial, institutional and high density residential land uses and anticipated, among other things, utility and surface improvements; and

**WHEREAS**, on November 24, 2009, the City Council of the City of Rohnert Park adopted Resolution 2009-128 authorizing, approving and accepting Parcel Map No. 180 Subdivision and Deferred Improvement Agreement For Stadium Lands Area; and

**WHEREAS**, on November 12, 2013, the City Council of the City of Rohnert Park adopted Resolution No. 2013-152 approving a Negative Declaration for changes to the Stadium Area Master Plan to relocate a portion of the institutional land uses intended to serve as a future public safety station but with no changes to the high density residential land uses or requirements for infrastructure construction; and

**WHEREAS**, on January 10, 2017, the City Council of the City of Rohnert Park adopted Resolution No. 2017-008 through 011 approving the following to the Stadium Area Master Plan:

- An Initial Study to change the land use for a portion of the area to high density residential and public;
- A Mitigated Negative Declaration;
- A General Plan Amendment;
- A Final Development Plan for the Five Creek Subdivision;
- A Development Agreement with Stadium RP Development Partners;
- A Tentative Map for the Five Creek Subdivision (Map titled “Residences at Five Creek”); and

**WHEREAS**, on July 25, 2017, the City Council of the City of Rohnert Park adopted Resolution No. 2017-091, approving the Five Creek Subdivision Final Map and executing another Deferred Improvement Agreement for the newly subdivided property; and

**WHEREAS**, the Development Agreement requires, among other things, that the Developer construct off-site utility and surface improvements to serve the Five Creek Subdivision; and

**WHEREAS**, Rohnert Park 668 LP (Developer) will enter an Improvement Agreement for a portion of the overall improvements, consisting of the widening of Carlson Avenue, the installation of Dowdell Avenue sidewalk improvements and offsite water main improvements in Redwood Drive; and

**WHEREAS**, the Developer has submitted plans and specifications for these improvements which have been reviewed by the City Engineer and determined to be technically accurate and in conformance with the Development Agreement and conditions of approval for the project; and

**WHEREAS**, the Developers have posted labor and materials and performance bonds in the amount of \$736,480 to cover the construction of these offsite improvements; and

**WHEREAS**, the City and Developer desire to enter into an Off-Site Public Improvement, Public Facilities Fee Credit Agreement and Termination and Supersession of the Deferred Improvement Agreement (the "Agreement") for the proposed construction to more thoroughly define the terms and conditions of the construction and dedication obligations under the Development Agreement.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Rohnert Park that, based on the evidence presented at the duly noticed public meeting of July 24, 2018, the City Council of the City of Rohnert Park finds that the public improvements and activities were adequately described and mitigated in the Stadium Area Master Plan EIR, and that no other CEQA analysis is warranted.

**BE IT FUTHER RESOLVED** that it does hereby authorize and approve the Agreement with Rohnert Park 668 LP (Exhibit A).

**BE IT FURTHER RESOLVED** that the City Manager is hereby authorized and directed to execute the Agreement with the Rohnert Park 668 LP in substantially similar form to the agreement attached hereto and incorporated by this reference as Exhibit A subject to minor modifications approved by the City Manager or City Attorney.

**DULY AND REGULARLY ADOPTED** this 24th day of July 2018.

**CITY OF ROHNERT PARK**

Pam Stafford  
Pam Stafford, Mayor

**ATTEST:**

Caitlin Saldanha for

JoAnne M. Buergler, City Clerk

Caitlin Saldanha, Assistant City Clerk

Attachment: Exhibit A

AHANOTU: Absent BELFORTE: Aye MACKENZIE: Aye CALLINAN: Aye STAFFORD: Aye  
AYES: ( 4 ) NOES: ( 0 ) ABSENT: ( 1 ) ABSTAIN: ( 0 )

RECORDING REQUESTED BY )  
 AND WHEN RECORDED MAIL TO: )  
 )  
 City of Rohnert Park )  
 130 Avram Avenue )  
 Rohnert Park, California 94928-2486 )  
 Attention: City Clerk )  
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(Space Above This Line for Recorder's Use Only)  
 Exempt from recording fee per Gov. Code § 27383.

**OFF-SITE PUBLIC IMPROVEMENT, PUBLIC FACILITIES FEE CREDIT AGREEMENT  
 AND TERMINATION AND SUPERSESSION OF A DEFERRED IMPROVEMENT  
 AGREEMENT**

**CITY OF ROHNERT PARK**

**Rohnert Park 668 LP**

**Labath Avenue, Carlson Avenue, Dowdell Avenue and Redwood Drive Improvements**

This Off-Site Public Improvement, Public Facilities Fee Credit Agreement and Termination and Supersession of a Deferred Improvement Agreement (the "Agreement") is made and entered into on this \_\_\_\_\_ day of \_\_\_\_\_ 2018 (the "Effective Date") by and between Rohnert Park 668 L.P., a California limited partnership ("Developer"), and the CITY OF ROHNERT PARK, a California municipal corporation ("City"). City and Developer are sometimes referred to hereinafter individually as "Party" and collectively as "Parties".

***RECITALS***

A. City previously owned certain real property located west of U.S. Highway 101 and north of the Rohnert Park Expressway in the Stadium Lands Master Plan Area of the City (the "City Property"). The City Property consisted of Lots 1, 2, 3, and 4 and adjoining streets, as shown on Parcel Map 180, recorded on December 11, 2009, in Book 736 of Maps, Pages 30-32, in the Official Records of Sonoma County (the "Parcel Map").

B. On November 29, 2009, the City executed that certain deferred improvement agreement which was recorded on December 11, 2009, as Instrument No. 2009119214 in the Official Records of Sonoma County (the "First Deferred Improvement Agreement"), which applied to and provided for the deferred construction of subdivision improvements for all of the property subject to the Parcel Map – Lots 1, 2, 3, and 4 – without differentiation as to the work required for each lot.

C. The City then subdivided Lot 1 of Parcel Map 180 in order to create Lots 1, 2, 3, 4, and 5 as shown on the "Five Creek Subdivision" Final Map, recorded on August 2, 2017, in Book 787 of Maps, Pages 38-42, in the Official Records of Sonoma County (the "Final Map").

D. On July 25<sup>th</sup>, 2017, the City executed that certain deferred improvement agreement (the "Second Deferred Improvement Agreement"), which is recorded as a Sonoma

County Record Document 2017098871, which applied to and provided for the deferred construction of subdivision improvements for all of the property subject to the Final Map – Lots 1, 2, 3, 4, and 5 – without differentiation as to the work required for each lot.

E. The City has conveyed Lots 2, 3, and 4 of the Final Map to Stadium RP Development Partners, LLC (“Stadium RP”) pursuant to that certain Purchase and Sale/ Closing Agreement between City and 356 Advisors, Inc and MJW Investments, LLC (the “356 & MJW Agreement”).

F. Stadium RP has subsequently conveyed Lot 2 of the Five Creek Subdivision Final Map (the “Apartment Property”) to Rohnert Park Properties 668 LP, including the entitlements to construct a residential apartment project and obligations to construct public improvements required by Tentative Parcel Map approved by City Council Resolution Number 2017-11, the conditions of approval contained in City Council Resolution No. 2017-10 and the Tentative Parcel Map approved by City Council Resolution No. 2017-11, (both adopted January 10, 2017), the Development Agreement approved by Ordinance 903 on January 24, 2017, and the First and Second Deferred Improvement Agreements (the “Deferred Improvement Agreements”).

G. The Apartment Property consists of a 6.00-acre site located at the southeast corner of the intersection of Labath Avenue and Carlson Avenue identified as Assessor’s Parcel Number 143-040-137 and Lot 2 of said Five Creek Subdivision Final Map, which is illustrated in Exhibit A, attached hereto and incorporated by this reference.

H. Developer has submitted plans and specifications for the Off-Site Improvements which generally consist of utility, road, and sidewalk improvements within Carson Avenue, Dowdell Avenue, and Redwood Drive and more particularly described as follows:

- a. *Residences at Five Creek-Public Improvement Carlson Ave., Dowdell Ave., and Redwood Drive*, prepared by Civil Design Consultants Inc., 15 Sheets (Sheets PI 1 through PI 15), dated June 21, 2018 and approved by the City Engineer on the June 21, 2018;
- b. Joint Trench Composite Plans, USA Properties Fund Inc., Residences at Five Creek Rohnert Park, California, prepared by Giacaloni Design Services Inc., 5 Sheets (Sheets JT 1- JT 5), dated \_\_\_\_\_, 2018 and approved by the City Engineer on the \_\_\_\_ day of \_\_\_\_\_, 2018.

I. To fully satisfy the obligations of the First Deferred Improvement Agreement and partially satisfy the obligations under the Second Deferred Improvement Agreement, Developer proposes to design, construct, and install those certain off-site public improvements generally described in Recital H.

J. The obligation to construct the Improvements under this Agreement shall supersede and replace any obligations under the first Deferred Improvement Agreement and, following execution of this Agreement, the First Deferred Improvement Agreement shall terminate and be of no further force as to the Apartments Property.

K. The obligation to construct the Improvements under this Agreement partially supersedes and replaces the obligations under the Second Deferred Improvement Agreement. The Second Deferred Improvement Agreement shall remain in force and effect until the City and Developer enter into a Public Improvement Agreement for the construction of the required public park.

### ***AGREEMENT***

NOW, THEREFORE, in consideration of the faithful performance of the terms and conditions set forth in this Agreement, the parties hereto agree as follows:

1. Incorporation of Recitals. The foregoing Recitals are true and correct and, together with the Project Approvals and the requirements of Chapter 16.16 of the RPMC, are hereby incorporated into and form a material part of this Agreement

2. Termination of Obligations under the First Deferred Improvement Agreement. Upon the execution and recordation of this agreement, the provisions of this Improvement Agreement shall contain all of the obligations of the Apartments Property for the construction, implementation, and financing of on-site or off-site improvements pursuant to this Agreement and the First Deferred Improvement Agreement. The First Deferred Improvement Agreement shall be terminated, superseded, and of no further force and effect as to the Apartments Property. The parties acknowledge and agree that the Improvements, as defined herein, include all of the Deferred Improvements stipulated in the First Deferred Improvement Agreement attributable to the Apartments Property.

3. Purpose and Effective Date

3.1 Purpose. The purpose of this Agreement is to guarantee completion of the Improvements and ensure satisfactory performance by Developer of Developer's obligations to satisfy the conditions for the Project.

3.2 Effective Date. The Effective Date of this Agreement shall be as set forth above. Upon execution and recordation of this Agreement, City agrees to record a release and satisfaction removing the First Deferred Improvement Agreement against the title of the Apartments Property. City further agrees to issue whatever addition written evidence of termination of the First Deferred Improvement Agreement as to the Apartments Property as may be reasonably required by a title company to insure title to said property free from the lien of the First Deferred Improvement Agreement.

4. Property Subject to Agreement. The property which is the subject of this Agreement is located in the City of Rohnert Park, Sonoma County, California, and is described in Exhibit A, attached hereto.

5. Improvements

5.1 Duty to Install Improvements. Developer will design, construct, install and complete, or cause to be constructed, installed and completed, at the Developer's sole cost and expense, the Improvements, in accordance with the Improvement Plans (defined in Recital H.

above) and to the satisfaction of the City Engineer, in his/ her reasonable discretion. Developer will also supply all labor and materials therefor, all in strict accordance with the terms and conditions of this Agreement. The construction, installation and completion of the Improvements including all labor and materials furnished in connection therewith are hereinafter referred to collectively as the "Work."

City shall not be responsible or liable for the maintenance or care of the Improvements until City formally approves and accepts them in accordance with its policies and procedures. City shall exercise no control over the Improvements until approved and accepted. Any use by any person of the Improvements, or any portion thereof, shall be at the sole and exclusive risk of the Developer at all times prior to City's acceptance of the Improvements. Developer shall maintain all the Improvements in a state of good repair until they are completed by Developer and approved and accepted by City. Maintenance shall include, but shall not be limited to, repair of pavement, curbs, gutters, sidewalks, streetlights, parkways, water mains, and sewers; maintaining all landscaping in a vigorous and thriving condition reasonably acceptable to City; removal of debris from sewers and storm drains; and sweeping, repairing, and maintaining in good and safe condition all streets and street improvements. It shall be Developer's responsibility to initiate all maintenance work, but if it shall fail to do so, it shall promptly perform such maintenance work when notified to do so by City. If Developer fails to properly prosecute its maintenance obligation under this section, City may do all work necessary for such maintenance and the cost thereof shall be the responsibility of Developer and its surety under this Agreement. Prior to undertaking said maintenance work, City agrees to notify Developer in writing of the deficiencies and the actions required to be taken by the Developer to cure the deficiencies. Developer shall have thirty (30) days from the date of the notice within which to correct, remedy or cure the deficiency. If the written notification states that the problem is urgent and relates to the public health and safety, then the Developer shall have twenty-four (24) hours to correct, remedy or cure the deficiency. City shall not be responsible or liable for any damages or injury of any nature in any way related to or caused by the Improvements or their condition prior to acceptance.

5.2. Completion Date. Developer will complete the Work within one year of the Effective Date or as required by its Conditions of Approval, whichever is sooner. All Work will be completed in a good and workmanlike manner in accordance with accepted design and construction practices. This completion date may be extended by the City in its sole and absolute discretion at the request of Developer, which request shall be accompanied by a written assurance acceptable to the City Attorney that the securities required by Section 6 shall remain enforceable throughout the term of the extension.

5.3. Estimated Cost of Work. The estimated cost of the Work is Seven Hundred Thirty Six Thousand Four Hundred Eighty Dollars and No Cents (\$736,480.00). Notwithstanding this estimate, Developer hereby acknowledges and agrees that (a) the actual costs to complete the Work may significantly exceed this estimate, (b) this estimate in no way limits Developer's financial obligation, and (c) that Developer is obligated to complete the Work at its own cost, expense, and liability.

5.4. Modifications to the Plans. Approval of this Agreement by City does not release Developer of its responsibility to correct mistakes, errors or omissions in the

Improvement Plans. If, at any time, in the opinion of the City Engineer, in his/her reasonable discretion, the Improvement Plans are deemed inadequate in any respect Developer agrees to make such modifications, changes or revisions as necessary in order to complete the Work in a good and workmanlike manner in accordance with accepted design and construction standards.

5.5. Foreman or Superintendent. Developer shall give personal attention to the Work. A competent foreman or superintendent, satisfactory to the City Engineer, in his/her reasonable discretion, with authority to act for and on behalf of Developer, shall be named in writing by Developer prior to commencement of the Work, shall be present on the Property during the performance of the Work. Any change in the superintendent will require advance notification to the City Engineer and concurrence of the City Engineer and the Engineer of Record for the Improvement Plans.

5.6. Encroachment Permits. Developer shall obtain, at its sole cost and expense, any encroachment permits required by the City in order to perform the Work.

5.7. Inspection: All of the Improvements shall be constructed and installed to the satisfaction of the City Engineer, in his or her reasonable discretion. City and its authorized agents shall, at all times during the construction of the Improvements, have free access to the Improvements and shall be allowed to examine and inspect the Improvements and all material used and to be used in the Improvements to confirm compliance with City Plans and Specifications.

5.8. Commencement of Construction and Inspection. Developer and its contractor or subcontractors shall not commence construction of the Improvements until Developer has received written authorization from City to proceed. Written authorization shall be in the form of signed approved plans along with permit issuance, including any encroachment permit required to carry on construction activities in the City's right-of-way as described in Section 5.6. All work performed on the Improvements shall be done in strict compliance with the City approved plans, specifications and the contract documents and in a good and workmanlike manner. All work performed by Developer, its contractor or agents to construct the Improvements shall be subject to inspection by City. All fees and costs to construct the Improvements shall be borne solely by Developer (including the applicable Inspection Fee in accordance with the City's adopted Engineering Fee Schedule). Inspection by City or its employees or agents shall not relieve Developer of its liability for design defects or improper or inadequate workmanship.

5.9. City's Inspection, Administration and Testing Costs. Developer shall pay to City the actual cost for all inspection, administration and testing services furnished by City in connection with this Agreement, including those performed by consultants under contract with the City (the "City Costs"). City agrees not to double charge Developer (through the imposition of both a processing fee and a consultant charge) for any individual monitoring, inspection, testing or evaluation service. In addition, City agrees to limit its use of outside consultants to those reasonably necessary or desirable, as determined by the City Manager or his designee in his reasonable discretion, to accomplish the requisite inspection, administration and monitoring

5.10. No Waiver by City. Inspecting of the work and/or materials, or approval of work and/or materials, or a statement by an officer, agent or employee of the City indicating the work complies with this Agreement, or acceptance of all or any portion of the work and/or materials, or payments thereof, or any combination of all of these acts shall not relieve Developer or its obligation to fulfill this Agreement; nor is the City by these acts prohibited from bringing an action for damages arising from the failure to comply with this Agreement.

5.11. Erosion Control. Pursuant to Rohnert Park Municipal Code Chapter 15.52, Developer shall be responsible for the control of erosion on the Property and shall prevent its entry into the storm drainage system.

5.12. Prevailing Wages. Except for portions of the work eligible for Public Facilities Fee credit, the work of the Improvements do not constitute a "public work" as defined in the California Labor Code, section 1771, *et seq* ("Labor Code Regulations") because the work is not being paid for in whole or in part out of public funds. City and Developer acknowledge that, except for the work eligible for Public Facilities Fee credit, the construction of the Improvements is not subject to the payment of prevailing wages. Further, Developer agrees to defend, indemnify and hold City, its elected officials, officers, employees, and agents free and harmless from any and all claims, damages, suits or actions arising out of or incident to Developer's obligations under this section and the payment of prevailing wages. The Developer must provide documentation that prevailing wages were paid for the portion of the work eligible for Public Facilities Fee credit in order to be eligible for the credit. If the Developer chooses not pursue the Public Facilities Fee credit, prevailing wage requirements would not apply.

5.13. Contractor Licenses. All work performed on the Improvements shall be done only by contractors licensed in the State of California and qualified to perform the type of work required and comply with the City's Business License Ordinance.

5.14. Repair of Work Damaged During Construction. Developer agrees to repair or have repaired in a timely manner at its sole cost and expense all public roads, streets, or other public or private property damaged as a result of or incidental to the Work or in connection with the development of the Property or to pay to the property owner of any damaged road, street or property the full cost of such repair. In addition, Developer shall obtain the written acceptance of such repair or payment from any owner whose private property was repaired by Developer or to whom Developer has paid the full cost of such repair in accordance with this Section 5.14. City shall be under no obligation whatsoever to accept the Work completed under this Agreement until such time as all repairs have been completed or have been paid for and written acceptances have been provided to the City Engineer, except as otherwise provided in section 5.18.1

5.15. Payments. Developer agrees that it will pay, when due, all those furnishing labor or materials in connection with the Work. Developer further agrees that pursuant to Government Code section 66499.7, the Labor and Materials Bond provided by Developer in accordance with Section 6.1.2 of this Agreement shall not be released if any mechanics liens or stop notices are outstanding, unless said liens are released by bond in compliance with Civil Code section 3143.

5.16. Liability for Work Prior to Formal Acceptance. Until the City Council has formally accepted the Improvements, Developer shall be solely responsible for all damage to the work, regardless of cause, and for all damages or injuries to any person or property at the work site, except damage or injury due to the sole negligence of City, or its employees. Developer shall replace or repair any portion of the Improvements that have been destroyed or damaged prior to final acceptance of completed work by the City Council or the City Engineer. Any such repair or replacement shall be to the satisfaction and subject to the approval of the City Engineer. Developer shall repair to the satisfaction of the City Engineer any damage to the utilities systems, concrete work, street paving or other public improvements that may occur in connection with the Improvements work.

5.17. Completion of Work. After Developer (a) completes the Work in accordance with the Improvement Plans and the terms and conditions of this Agreement, (b) repairs any road, street, or private or public property damaged as a result of the Work or pays the full cost of such repair to the owner whose property was damaged and (c) obtains the written acceptance of such repair or payment from any owner whose private property was repaired by Developer or to whom Developer paid the full cost of such repair, Developer will provide City with a written notice of completion, together with copies of all written acceptances.

5.18. Final Acceptance.

5.18.1 Notice of Completion. Within thirty (30) days of receipt of Developer's written notification pursuant to Section 5.17 above, City Engineer shall inspect the Work and repairs and review the written acceptances, if any, and send Developer a written notice stating whether the Work and repair are complete to the satisfaction of the City Engineer, in his/her reasonable discretion, and whether the written acceptances have been provided. If the Work and repair are, in the opinion of the City Engineer, not complete and satisfactory, and/or written acceptances have not been provided, the City Engineer will list the deficiencies that must be corrected to find the Work and repair complete and satisfactory. Upon satisfactory completion of the Work and repair and submittal of written acceptances, the City Engineer will send Developer a written notice of satisfactory completion. The requirement for written acceptances may be waived by the City Engineer, in his/her reasonable discretion, if Developer has made commercially reasonable efforts to obtain such acceptances. City Engineer's failure to respond to Developer's written notification within thirty (30) days will not be deemed a breach or default under this Agreement.

5.18.2 Acceptance of Improvements. After sending Developer a written notice of satisfactory completion pursuant to Section 5.18.1, the City Engineer will recommend acceptance of the Improvements, or a portion thereof, to the City Council. In conjunction with such recommendation, the City Engineer will recommend the acceptance of the offers of dedication shown on the final map for the Property. The acceptance of the Improvements, offers of dedication and right-of-way and easements, if any, shall be by resolution. Upon adoption of such resolution, the City Engineer shall record a notice of acceptance, in a form to be approved by the City Attorney, in the Official Records of Sonoma County.

5.19. Warranty Period; Repair and Reconstruction. Without limiting the foregoing, Developer expressly warrants and guarantees all work performed under this

Agreement and all materials used in the Work for a period of one (1) year after the date of recordation of the notice of acceptance of the improvements in accordance with Section 5.18. If, within this one (1) year period, any Improvement or part of any Improvement installed or constructed, or caused to be installed or constructed by Developer, or any of the work done under this Agreement, fails to fulfill any of the requirements of the Improvement Plans or this Agreement, Developer shall, without delay and without cost to City, repair, replace or reconstruct any defective or otherwise unsatisfactory part or parts of the Work or Improvement to the satisfaction of the City Engineer. Should Developer fail to act promptly, by failing to repair, replace or reconstruct work thirty (30) days after notification by City, or in accordance with this requirement, or should the exigencies of the situation require repairs, replacements or reconstruction to be made before Developer can be notified, City may, at its option, make the necessary repairs, replacements or perform the necessary reconstruction and Developer shall pay to the City upon demand the actual cost of such repairs, replacements or reconstruction.

5.20. Record Drawings. Upon completion of the Improvements and prior to final acceptance by the City Council, Developer shall deliver to City one electronic file, in a format specified by the City Engineer, and one mylar copy of "as-built" drawings. These drawings shall be in a form acceptable to the City Engineer, shall be certified by an engineer licensed by the State of California as to accuracy and completeness, and shall reflect the Improvements as actually constructed, with any and all changes incorporated therein. Developer shall be solely responsible and liable for ensuring the completeness and accuracy of the record drawings.

5.21. Ownership of Improvements. From and after acceptance of the Improvements by formal action of the City Council, ownership of the Improvements shall be vested exclusively in City.

## 6. Security.

6.1 Performance, Labor and Materials and Warranty Security. In accordance with Sections 16.16.060 through 16.16.070 of the Rohnert Park Municipal Code, Developer will furnish and deliver to City, within the times set forth below, the following surety bonds, each of which must be issued by a surety company duly and regularly authorized to do general surety business in the State of California, or an irrevocable assignment of funds or letter of credit as may be acceptable to the City Attorney.

6.1.1 Performance Security. Developer shall furnish and deliver performance security in the amount of Seven Hundred Thirty Six Thousand Four Hundred Eighty Dollars and No Cents (\$736,480.00), concurrently with the execution of this Agreement, which must meet the requirements of Government Code Section 66499.1, if applicable, and Rohnert Park Municipal Code Section 16.16.070 and be acceptable to the City Attorney. The security shall be conditioned upon the faithful performance of this Agreement with respect to the Work and shall be released by the City effective upon the date of recordation of the notice of acceptance of the improvements as described in Section 5.18.2 and Developer's delivery of the Warranty Security described in Section 6.1.3.

6.1.2 Labor and Materials Security. Developer shall furnish and deliver labor and materials security in the amount of Seven Hundred Thirty Six Thousand Four Hundred Eighty Dollars and No Cents (\$736,480.00), concurrently with the execution of this Agreement which security must meet the requirements of Government Code Section 66499.2, if applicable, and Rohnert Park Municipal Code Section 16.16.070 and be acceptable to the City Attorney. The security shall secure payment to the contractor(s) and subcontractor(s) performing the Work and to all persons furnishing labor, materials or equipment to them. The City shall retain each security until both (i) the City accepts the Work in accordance with Section 5.18 above and (ii) the statute of limitations to file an action under Civil Code section 3114 *et seq.* has expired. After said date, the security may be reduced by the City Engineer to an amount not less than the total amount claimed by all claimants for whom claims of lien have been recorded and notice given in writing to the City Council. The balance of the security shall be retained until the final settlement of all such claims and obligations. If no such claims have been recorded, the security shall be released in full by the City Engineer.

6.1.3. Warranty Security. Developer shall furnish and deliver warranty security in the amount specified in section 16.16.070 c. of the Rohnert Park Municipal Code. The amount of One Hundred Ten Thousand Four Hundred Seventy Two Dollars and No Cents (\$110,472.00) shall be provided upon acceptance of the Improvements and prior to release of the Performance Security. The security shall be in a form acceptable to the City Attorney and shall guarantee and warranty the Work for a period of one (1) year following the date of recordation of the notice of acceptance of the improvements against any defective work or labor done, or defective materials furnished.

6.2. Additional Security. If either upon execution of this Agreement or during the course of performance the City considers that it is necessary to have Developer post additional security, the City may require either a cash deposit or a surety bond guaranteeing performance in a form and signed by sureties satisfactory to it. The condition of the security shall be that if Developer fails to perform its obligation under this Agreement, the City may in the case of a cash bond act for it using the proceeds or in the case of a surety bond require the sureties to perform the obligations of the Agreement.

## 7 Indemnity and Insurance.

7.1 Indemnification. Developer agrees to indemnify, defend and hold the City, its elective and appointed boards, commissions, officers, agents, employees and consultants, harmless from and against any and all claims, liabilities, losses, damages or injuries of any kind (collectively, "Claims") arising out of Developer's, or Developer's contractors', subcontractors', agents' or employees', acts, omissions, or operations under this Agreement, including, but not limited to, the performance of the Work, whether such acts, omissions, or operations are by Developer or any of Developer's contractors, subcontractors, agents or employees, except to the extent such Claims are caused by the sole negligence or willful misconduct of the City. This indemnification includes, without limitation, the payment of all penalties, fines, judgments, awards, decrees, attorneys' fees, and related costs or expenses, and the reimbursement of City, its elected officials, officers, employees, and/or agents for all legal expenses and costs incurred by each of them.

The aforementioned indemnity shall apply regardless of whether or not City has prepared, supplied or approved plans and/or specifications for the Work or Improvements and regardless of whether any insurance required under this Agreement is applicable to any Claims. The City does not and shall not waive any of its rights under this indemnity provision because of its acceptance of the bonds or insurance required under the provisions of this Agreement. Developer's obligation to indemnify City shall survive the expiration or termination of this Agreement.

7.2. Insurance. Developer shall maintain Commercial General Liability Insurance protecting the City from incidents as to bodily injury liability and property damage liability that may occur as a result of the Work and additional repairs. Developer shall provide certificate(s) of insurance and endorsements to City before any Work commences. The insurance policy shall contain, or be endorsed to contain, the following provisions:

- (1) The City, its officers, elected officials, employees, consultants, agents and volunteers are to be covered as additional insured's as respects to liability arising out of activities performed by or on behalf of Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, elected officials, employees, consultants, agents and volunteers.
- (2) The amounts of public liability and property damage coverage shall not be less than \$3,000,000 (Three Million Dollars) per occurrence for bodily injury, personal injury and property damage.
- (3) The insurance shall be maintained in full force until the work has been completed to the satisfaction of the City Engineer.
- (4) The insurance policy shall provide for 30 days' notice of cancellation to the City. The policy shall not be cancelled earlier than nor the amount of coverage be reduced earlier than 30 days after the City receives notice from the insurer of the intent of cancellation or reduction.
- (5) Any failure to comply with the reporting provisions of the policy shall not affect the coverage provided to the City, its officers, elected officials, employees, consultants, agents and volunteers.
- (6) Developer's insurance coverage shall be primary insurance as respects the City, its officers, elected officials, employees, consultants, agents and volunteers. Any insurance or self-insurance maintained by the City, its officers, elected officials, employees, consultants, agents and volunteers shall be in excess of Developer's insurance and shall not contribute to it.
- (7) Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either: (a) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its elected officials, officers, employees, agents, and volunteers; or (b) Developer and its contractors shall provide a financial guarantee

satisfactory to City guaranteeing payment of losses and related investigation costs, claims, and administrative and defense expenses.

- (8) Developer and Developer's insurance company agree to waive all rights of subrogation against City, its officers, elected officials, employees, agents and volunteers for losses paid under Developer's workers' compensation insurance policy which arise from the work performed by Developer.

In the event that Developer's insurance is cancelled, Developer shall provide replacement coverage or all work must cease as of the cancellation date until replacement insurance coverage is provided.

7.3. Workers' Compensation Insurance. Developer shall provide, or cause to be provided, Workers' Compensation insurance as required by law, and shall cause its contractors and their subcontractors, agents and representatives to also maintain Workers' Compensation insurance as required by law. No Work shall commence until such Workers' Compensation insurance is obtained and in full force and effect.

7.4. Other Insurance Requirements. Developer shall:

- (1) Prior to taking any actions under this Agreement, furnish City with properly executed certificates of insurance which shall clearly evidence all insurance required in this section and provide that such insurance shall not be canceled, allowed to expire or be materially reduced in coverage except on thirty (30) days prior written notice to City.
- (2) Provide to City certified copies of endorsements and policies if requested by City, and properly executed certificates of insurance evidencing the insurance required herein.
- (3) Replace or require the replacement of certificates, policies and endorsements for any insurance required herein expiring prior to completion and acceptance of the Improvements.
- (4) Maintain all insurance required herein from the time of execution of this Agreement until the acceptance of the Improvements.
- (5) Place all insurance required herein with insurers licensed to do business in California.

## 8. Breach of Agreement; Opportunity to Cure; Remedies.

8.1. Notice of Breach and Default. The occurrence of any of the following constitutes a breach and default of this Agreement:

- (1) Developer refuses or fails to complete the Work within the time set forth herein or abandons the Work.

- (2) Developer assigns the Agreement without the prior written consent of City.
- (3) Developer is adjudged bankrupt or makes a general assignment for the benefit of creditors, or a receiver is appointed in the event of Developer's insolvency.
- (4) Developer or Developer's contractors, subcontractors, agents or employees, fail to comply with any terms or conditions of this Agreement.
- (5) Any delay in the construction of any portion of the Work or repairs, which in the reasonable opinion of the City Engineer, endangers public or private property.

The City may serve written notice of breach and default upon Developer and the financial institution holding the security.

8.2. Breach of Agreement; Performance by City. If the City gives Developer notice, under Section 8.1, of breach and default of this Agreement, the City may proceed to complete the Work by contract or other method the City considers advisable, at the sole expense of Developer. Developer, immediately upon demand, shall pay the costs and charges related to the Work and any subsequent repairs. City, without liability for doing so, may take possession of and utilize in completing the Work and repairs, if any, such materials and other property belonging to Developer as may be on or about the Property and necessary for completion of the work. In the event of default, the financial institution holding the security shall be liable to City to pay the face amount of the bonds, as specified under Section 6.

8.3. Remedies. City may bring legal action to compel performance of this Agreement and recover the costs of completing the Work and/or repairs, if any, including City's administrative and legal costs. Developer agrees that if legal action is brought by City under this section of the Agreement, Developer shall pay all of the costs of suit; reasonable attorney fees, arbitration costs and such other costs as may be determined by the court or arbitrator. No failure on the part of City to exercise any right or remedy hereunder shall operate as a waiver of any other right or remedy that City may have hereunder.

## 9. Public Facilities Fee Credit.

9.1. Eligible Improvements. The Improvements eligible to receive the Public Facilities Fee Credit described in this Section 9 are the Dowdell Avenue sidewalk improvements.

9.2. Source and Method of Credit. Subject to the limitations set forth in Section 9.6, City shall credit Developer for the costs associated with the construction and installation of the Dowdell Avenue sidewalk improvements as outlined in Exhibit B. The Public Facilities Fee Credit represents reimbursement to the Developer for the costs of the Dowdell Avenue sidewalk improvements that are covered by the Public Facilities Fee, but which Developer has agreed to incur. The total credit amount is indicated in Exhibit B "Public Facilities Fee Credit Calculation" attached hereto, and shall be afforded to Developer in the form of a credit against the Public Facilities Fee that would otherwise be applicable to the Project.

9.3. Implementation of Public Facilities Fee Credit. Developer shall be entitled to receive the Public Facilities Fee Credit at the time of issuance of building permits for the Project. Such credit shall be personal to the Developer and shall not run to successors and assigns unless expressly authorized to so run, in writing by the Developer.

9.4. Fee Obligation. Developer's obligation to pay the full amount of the Public Facilities Fee for any development on the Apartment Property shall remain a debt and obligation of Developer until completion by Developer and acceptance of the Improvements by City. In the event that the Improvements are not completed by a date two (2) years from the Effective Date of this Agreement, any Public Facilities Fee previously credited pursuant to this Agreement shall be immediately due and payable. If such fees are not paid as required, City may provide written notice to Developer of its default. If such default is not corrected within 30 days from the date of written notice, Developer agrees that the amount of any unpaid Public Facilities Fees may be placed upon the Apartment Property as a lien and special assessment. The assessment shall continue until it is paid, together with interest at the legal maximum rate computed from the date of confirmation of the statement until payment. The assessment shall be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and procedure and sale in case of delinquency as is provided for ordinary municipal taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the special assessment. In addition, City may use any other available legal means to collect the unpaid Public Facilities Fee and the choice of one remedy does not affect City's ability to use alternative remedies.

9.5. Expiration of Credit Obligation. The Public Facilities Fee Credit shall be granted to Developer at the time Developer obtains building permit(s) for the Project. City's obligation to extend Developer a credit as described herein shall continue for a total of two (2) years from the date the Developer begins construction of the Dowdell Avenue sidewalk improvements unless the obligation is sooner satisfied. If Developer fails to complete the Improvements within the two-year time frame, City may seek payment of the Public Facilities Fee from Developer as provided in Section 9.4, above.

9.6. Maximum Credit. The total amount of the Public Facilities Fee Credit obligation for the Improvements shall be as determined by City in accordance with the City of Rohnert Park 2011 Update to the Public Facilities Finance Plan. The Parties acknowledge and agree that the maximum credit amount for the Dowdell Avenue sidewalk improvements is Thirty Two Thousand Sixty Dollars and No Cents (\$32,060.00) as more fully described in Exhibit B.

9.7. Areas and Quantities. The areas and quantities used to develop this Public Facilities Fee Credit agreement are based on the information and plans available at this time. The actual areas and quantities may change at the time of dedication to the City and/or construction by the Developer. If it is determined by the City Engineer that the areas and quantities have changed, the credit amount may be adjusted

#### 10. Miscellaneous.

10.1 Compliance with Laws. Developer shall fully comply with all federal, state and local laws, ordinances and regulations in the performance of this Agreement.

Developer shall, at its own cost and expense, obtain all necessary permits and licenses for the Work, give all necessary notices, pay all fees and taxes required by law and make any and all deposits legally required by those public utilities that will serve the development on the Property. Copies and/or proof of payment of said permits, licenses, notices, fee and tax payments and deposits shall be furnished to the City Engineer upon request.

10.2. Notices. Formal written notices, demands, correspondence and communications between City and Developer shall be sufficiently given if: (a) personally delivered; or (b) dispatched by next day delivery by a reputable carrier such as Federal Express to the offices of City and Developer indicated below, provided that a receipt for delivery is provided; or (c) if dispatched by first class mail, postage prepaid, to the offices of City and Developer indicated below. Such written notices, demands, correspondence and communications may be sent in the same manner to such persons and addresses as either party may from time-to-time designate by next day delivery or by mail as provided in this section.

City: City of Rohnert Park  
130 Avram Avenue  
Rohnert Park, CA 94928  
Attn: City Manager

with a copy to: City of Rohnert Park  
130 Avram Avenue  
Rohnert Park, CA 94928  
Attn: City Attorney

Developer: Rohnert Park 668 L.P.  
6200 Douglas Blvd, Suite 200  
Roseville, CA 95661  
Attn: Geoffrey C. Brown

Notices delivered by deposit in the United States mail as provided above shall be deemed to have been served two (2) business days after the date of deposit if addressed to an address within the State of California, and three (3) business days if addressed to an address within the United States but outside the State of California.

10.3 Attorney Fees. Should any legal action or arbitration be brought by either party because of breach of this Agreement or to enforce any provision of this Agreement, the prevailing party shall be entitled to all costs of suit; reasonable attorney fees, arbitration costs and such other costs as may be determined by the court or arbitrator.

10.4. Entire Agreement. The terms and conditions of this Agreement constitute the entire agreement between City and Developer with respect to the matters addressed in this Agreement. This Agreement may not be altered, amended or modified without the written consent of both parties hereto.

10.5. Runs with the Land; Recordation. This Agreement pertains to and shall run with the Property. Upon execution, this Agreement shall be recorded in the Official Records of Sonoma County.

10.6. Transfers; Assignments. Developer may assign its obligations under this Agreement to successor owner(s) of the Site with the prior written approval of the City. In connection with any such assignment, Developer and its assignee shall execute and deliver to City a written assignment and assumption agreement in a form acceptable to the City Attorney.

10.7. Time is of the Essence. Time is of the essence of this Agreement and of each and every term and condition hereof.

10.8. Severability. If any provision of this Agreement is held, to any extent, invalid, the remainder of this Agreement shall not be affected, except as necessarily required by the invalid provision, and shall remain in full force and effect.

10.9. Waiver or Modification. Any waiver or modification of the provisions of this Agreement must be in writing and signed by the authorized representative(s) of each Party.

10.10. Relationship of the Parties. Neither Developer nor Developer's contractors, subcontractors, agents, officers, or employees are agents, partners, joint venturers or employees of City and the Developer's relationship to the City, if any, arising herefrom is strictly that of an independent contractor. Developer's contractors and subcontractors are exclusively and solely under the control and dominion of Developer. Further, there are no intended third-party beneficiaries of any right or obligation assumed by the Parties.

10.11. Binding Upon Heirs, Successors and Assigns. The terms, covenants and conditions of this Agreement shall be binding upon all heirs, successors and assigns of the parties hereto; provided, however, that this Agreement shall not be binding upon a purchaser or transferee of any portion of the Property unless this Agreement has been assigned pursuant to Section 9.6, in which event this Agreement shall remain binding upon Developer.

10.12. Governing Law; Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of California, without reference to choice of law provisions. Any legal actions under this Agreement shall be brought only in the Superior Court of the County of Sonoma, State of California.

10.14. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original.

10.15. Interpretation. This Agreement shall be construed according to its fair meaning, and not strictly for or against any party. No presumptions or rules of interpretation based upon the identity of the party preparing or drafting the Agreement, or any part thereof, shall apply to the interpretation of this Agreement.

10.16. Headings. Section headings in this Agreement are for convenience only and are not intended to be used in interpreting or construing the terms, covenants or conditions contained in this Agreement.

10.17. Authority. Each party executing this Agreement on behalf of a party represents and warrants that such person is duly and validly authorized to do so on behalf of the

entity it purports to bind and if such party is a partnership, corporation or trustee, that such partnership, corporation or trustee has full right and authority to enter into this Agreement and perform all of its obligations hereunder.

IN WITNESS WHEREOF, City and Developer have executed this Agreement as of the Effective Date.

"CITY"

CITY OF ROHNERT PARK, a California  
municipal corporation

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Darrin Jenkins City Manager

*Per Resolution No. 2018-\_\_\_\_ adopted by the Rohnert  
Park City Council at its meeting of July 10, 2018.*

***Signature Must Be Notarized***

ATTEST:

\_\_\_\_\_  
JoAnne Buergler, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Michelle Marchetta Kenyon, City Attorney

"DEVELOPER"

Rohnert Park 668, L.P., a California limited  
partnership

Dated: \_\_\_\_\_

By:

\_\_\_\_\_  
Name: Geoffrey C. Brown

Title: President

*Signature Must Be Notarized*

**Exhibit B****Residences at Five Creek Apartment Complex - Public Facilities Fee Credit****Source: 2011 Public Facilities Finance Plan - Appendix B Roadway Segment 5 Estimate**

Median & Frontage Costs	Quantity	Unit	Unit Cost	Item Total Cost	Contingency &		Total Cost
					Soft Costs		
Mobilization	10	%		\$ 2,010.10	\$ 904.50	\$	2,914.60
Curb & Gutter	-	LF	\$ 26.50	\$ -	\$ -	\$	-
Median Curb	-	LF	\$ 6.14	\$ -	\$ -	\$	-
PCC Sidewalk (5' wide)	3,274	SF	\$ 6.14	\$ 20,101.00	\$ 9,045.00	\$	29,146.00
Streetlighting	-	EA	\$ 5,000.00	\$ -	\$ -	\$	-
Landscape (Bioretention Bed)	-	SF	\$ 6.50	\$ -	\$ -	\$	-
Underground Utilities (Joint Trench)	-	LF	\$ 127.42	\$ -	\$ -	\$	-
<b>Totals</b>				<b>\$ 22,111.10</b>	<b>\$ 9,949.50</b>	<b>\$</b>	<b>32,060.60</b>
<b>Totals to nearest ten dollars</b>						<b>\$</b>	<b>32,060.00</b>

Sidewalk quantity is based on 654.75 linear feet of 5-foot sidewalk.

Contingency and soft costs are 45%

ck \$ 32,060.60