

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Susie Vasquez, City Clerk
City of San Marcos
1 Civic Center Drive
San Marcos, CA 92078

THE ORIGINAL OF THIS DOCUMENT
WAS RECORDED ON DEC 20, 2012
DOCUMENT NUMBER 2012-0803573
Ernest J. Dronenburg, Jr., COUNTY RECORDER
SAN DIEGO COUNTY RECORDER'S OFFICE
TIME: 4:47 PM

SPACE ABOVE THIS LINE FOR RECORDER'S USE

APNs: 219-162-58 & 59
219-163-38 & 50

**FIRST AMENDMENT TO OWNER PARTICIPATION
AND SUBSTANTIAL CONFORMANCE AGREEMENT
[Commercial Condition]**

THIS FIRST AMENDMENT TO OWNER PARTICIPATION AND SUBSTANTIAL CONFORMANCE AGREEMENT ("FIRST AMENDMENT") is made as of December 11, 2012, by and between the CITY OF SAN MARCOS, a chartered municipal corporation ("City"), and THE PALOMAR STATION OWNER, LLC, a Delaware limited liability company ("Owner"), with respect to the following.

RECITALS

A. Owner is fee owner of approximately 14.3 gross acres of real property in the City of San Marcos, County of San Diego, State of California, more particularly described in the legal description attached hereto as Exhibit A and incorporated herein by this reference ("Property"). Owner plans to develop the Property with approximately 370 dwelling units, on certain lots, and, on a separate lot, a free standing retail building ("New Commercial Lot").

B. City, Owner, and the San Marcos Redevelopment Agency previously executed that certain Owner Participation and Substantial Conformance Agreement dated July 26, 2011 ("OP/SCA").

C. City and Owner have also executed that certain First Implementation Agreement to Substantial Conformance Agreement and Real Property Security and Lien Agreement dated December 11, 2012, which agreement relates to Owner's obligations to design and construct the pedestrian bridge associated with the Property and the application of grant funds secured for such bridge by City.

D. City and Owner now desire to amend specific terms and conditions of Owner's obligations with respect to the satisfaction of the OP/SCA Condition No. 2.2 for the completion of commercial/retail construction on the New Commercial Lot.

NOW, THEREFORE, in consideration of the foregoing Recitals, which are hereby incorporated into the operative provisions of this First Amendment by this reference, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, City and the Owner agree as follows:

1. Term. This First Amendment shall become operative and commence upon the date of mutual execution hereof ("Effective Date") and remain in effect until a Satisfaction Event has occurred ("Term"). Upon the expiration or termination of the Term, this First Amendment shall have no further force and effect. Further, the terms of this First Amendment are conditioned upon either (a) submission of a release from those regulatory agencies responsible for habitat management which provides that if the New Commercial Lot is transferred to the City under this First Amendment, the City will have no liability for Property related habitat management activities or costs, or (b) providing documentation to the satisfaction of the City Manager (defined below) that the City will not bear the burden of Property related habitat management activities or costs in the event of transfer to the City of the New Commercial Lot.

2. Development of the Property. Unless Owner proceeds with development of the Property as evidenced by the issuance of the first building permit for a dwelling unit and commencement of construction of such dwelling unit, Owner is not obligated by the terms of this First Amendment to develop all or any portion of the Property, pay any sums of money, provide any Retail Store Space, dedicate any land, indemnify any party, or to otherwise meet or perform any obligation with respect to the Property. Notwithstanding the foregoing, the OP/SCA will remain in effect and operative with respect to the Property. Further, in the event a building permit for a dwelling unit is issued for the Property, the terms and conditions of this First Amendment shall be deemed triggered and in effect.

3. Recordation of First Amendment, Obligations Run With Land. Upon mutual execution, this First Amendment shall be recorded and shall operate as a restrictive covenant against all parcels comprising the Property and running with the land, relating to Owner's obligation to complete Condition No. 2.2 of the OP/SCA as outlined in the OPA and City's remedies with respect to the same and restricting the development of the New Commercial Lot to commercial/retail.

4. Amendment of Section 2.2. Paragraph 2 of Section 2.2 is deleted and replaced in full with the following:

"If Owner does not timely perform any of its obligation under Condition No. 2.2 of the OP/SCA, upon delivery of a notice of default and a written demand therefore from City, Owner shall thereafter immediately convey the New Commercial Lot to the City by way of a grant deed for City's development and use in its sole discretion at no cost to City. Such New Commercial Lot shall be conveyed to City free of any monetary liens, encumbrances, development obligations, improvement or contribution requirements or other charges or obligations of whatever kind or nature. Conveyance of the New Commercial Lot to City and

Owner's written assumption of the obligation to bear any and all costs, expenses and obligations associated with satisfaction of each and every and any and all Property-related conditions as described herein, including but not limited to. short and long term habitat mitigation and any associated habitat management costs, with the sole exception of on-site improvements associated with development of the New Commercial Lot, shall satisfy Owner's obligations under this First Amendment ("Satisfaction Event")."

5. Conveyance to City Free of Obligations for Project Conditions. In the event Owner does not timely perform any of its obligations under Condition No. 2.2 of the OP/SCA and transfers the New Commercial Lot to City, neither City nor any successor in interest shall be required to satisfy any Property conditions, or contribute to any mitigation or any other requirement of the Property (including but not limited to. short and long term habitat mitigation and any associated habitat management costs), or any component thereof, or pay any share of any infrastructure or improvement requirements associated with development of the Property or any component thereof including the New Commercial Lot, fair share or otherwise. Pursuant to this First Amendment, any and all such obligations are hereafter requirements of the portion of the Property that does not include the New Commercial Lot. Owner understands that its assumption and/or retention of such obligations and requirements otherwise attributable to the New Commercial Lot is consideration for City to enter into this First Amendment and that it would not have agreed to do so absent such assumption and retention.

6. Modification, Amendment, Cancellation or Termination. This First Amendment may not be modified, amended, canceled or terminated, in whole or in part, unless by the written consent of the City and the Owner or their respective successors in interest.

7. Minor Modification. The City Manager shall be authorized to execute minor modifications to this First Amendment and OPA/SC, including extensions of time for the sole purpose of implementing the terms of this First Amendment and OPA/SC as agreed by City and Owner

8. Marketing Efforts for New Commercial Lot. Owner shall use commercially reasonable marketing efforts to secure a commercial tenant for the New Commercial Lot. Within sixty (60) days of execution of this First Amendment, and thereafter on a quarterly basis, Owner shall provide City's Manager ("City Manager") with a written report documenting Owner's marketing efforts, including the names and contact information of potential tenants for the New Commercial Lot. If Owner fails to provide said report in a timely manner, or City Manager reasonably determines that Owner is in default of this marketing condition, City Manager may schedule the default for consideration by the City Council and possible termination of this First Amendment.

9. Notice of Default. If the Owner does not perform its obligations under this Agreement in a timely manner, the City through the City Manager may submit to the Owner a written notice of default identifying with specificity those obligations of the Owner under this First Amendment which have not been timely performed. Upon

receipt of any such written notice of default, the Owner shall promptly commence to cure the identified default(s) at the earliest reasonable time after receipt of any such written notice of default and shall complete the cure of any such default(s) no later than sixty (60) days after receipt of any such written notice of default, or if such default(s) is not capable of being cured within sixty (60) days, no later than one hundred twenty (120) days after receipt of any such written notice of default, provided the Owner commences the cure of any such default(s) within such sixty (60) day period and thereafter diligently pursues such cure at all times until any such default(s) is cured.

10. Lender Protection Provisions.

10.1 Notice of Default. The City shall send a copy of any notice of default sent to the Owner or any of its successors or assigns to any lender that has made a loan then secured by a deed of trust against the Property, or a portion thereof, provided such lender shall have (a) delivered to the City written notice of such lender's election to receive a copy of any such written notice of default and (b) provided to the City a recorded copy of any such deed of trust. Any such lender that makes a loan secured by a deed of trust against the Property, or a portion thereof, and delivers a written notice to the City and provides the City with a recorded copy of any such deed of trust in accordance with the provisions of this Paragraph 10.1 is herein referred to as a "Qualified Lender."

10.2 Right of a Qualified Lender to Cure a Default. The City shall send a written notice of any Owner default to each Qualified Lender. From and after receipt of any such written notice of default, each Qualified Lender shall have the right to cure any such default within the same cure periods as provided to the Owner hereunder. If the nature of any such default is such that a Qualified Lender cannot reasonably cure any such default without being the fee owner of the Property, or the applicable portion thereof, (as reasonably determined by the City), then so long as the Qualified Lender(s) is (are) diligently proceeding (as reasonably determined by the City) to foreclose the lien of its deed of trust against the fee owner of the Property, or the applicable portion thereof, and after completing any such foreclosure promptly commences the cure of any such default and thereafter diligently pursues the cure of such default to completion, then such Qualified Lender shall have an additional sixty (60) days following such foreclosure to cure any such default.

11. Constructive Notice and Acceptance. Every person or entity who now or hereafter owns or acquires any right, title or interest in or to any portion of the Property is, and shall be, conclusively deemed to have consented and agreed to every provision contained herein, whether or not any reference to this First Amendment is contained in the instrument by which such person acquired an interest in the Property.

12. No Third Party Beneficiaries. This First Amendment is made and entered into for the sole protection and benefit of City, Owner, and their respective successors and assigns. No other person or entity shall have any right of action based upon any provision of this First Amendment.

13. No Damages Against City, Non-liability of City Officials and Employees. Owner's sole and exclusive remedies with respect to this First Amendment are specific performance or declaratory or injunctive relief. City shall have the right to pursue damages for Owner's defaults but, except as specifically set forth herein, in no event shall Owner be entitled to damages of any kind from City, including, but not limited to, damages for economic loss, lost profits, or any other economic or consequential damages of any kind or nature. The parties acknowledge that City would not have entered into this First Amendment had it been exposed to damage claims from Owner for any breach thereof. No member, official or employee of City shall be personally liable to Owner or to any successor in interest in the event of any default or breach by City, or for any amount which may become due to Owner or successor, or on any obligation under the terms of this First Amendment.

14. Scope of Amendment. Except as expressly set forth in this First Amendment, all terms and conditions of the OP/SCA and the Property conditions as set forth in the development entitlements approved by City shall remain in full force and effect.

IN WITNESS WHEREOF, City and Owner have each executed this First Amendment as of the date first written above.

CITY:

CITY OF SAN MARCOS,
a chartered municipal corporation

By: _____

Jack Griffin, City Manager

ATTEST:

Susie Vasquez, City Clerk

OWNER:

THE PALOMAR STATION OWNER, LLC,
a Delaware limited liability company

By: Palomar Station Communities Manager,
LLC, a California limited liability company

By: KPMW Integral, LLC, a California limited
liability company

By: _____

Lance M. Waite, Principal

Approved As To Form:

Helen Holmes Peak, City Attorney


NOTARY ACKNOWLEDGEMENT:

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.

On December 19, 2012, before me, Susie Vasquez, Notary Public, personally appeared **LANCE MICHAEL WAITE**, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

I certify under Penalty of Perjury under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Susie Vasquez, Notary Public

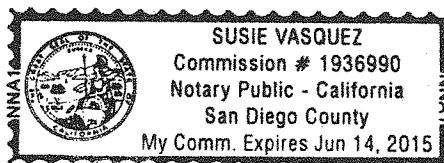


EXHIBIT A

(Legal Description)

PARCEL A: (APN'S: 219-162-58 AND 59)

PARCEL 2 & 3 OF PARCEL MAP NO. 19263 IN THE CITY OF SAN MARCOS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY ON JUNE 26, 2003.

EXCEPTING FROM SAID LAND LYING WITHIN THE DEPOT GROUNDS ALL MINERALS CONTAINED IN THE ABOVE-DESCRIBED LAND, INCLUDING, WITHOUT LIMITING THE GENERALITY THEREOF, OIL, GAS AND OTHER HYDROCARBON SUBSTANCES, AS WELL AS METALLIC OR OTHER SOLID MINERALS, LYING NOT LESS THAN FIVE HUNDRED (500) FEET BELOW THE SURFACE THEREOF, PROVIDED THAT SANTA FE SHALL NOT HAVE THE RIGHT TO GO UPON OR USE THE SURFACE OF SAID LAND, OR ANY PART THEREOF, FOR THE PURPOSE OF DRILLING FOR, MINING, OR OTHERWISE REMOVING, ANY OF SAID MINERALS. ALSO EXCEPTING THE RIGHT TO, REMOVE ANY OF SAID MINERALS FROM SAID LAND BY MEANS OF WELLS, SHAFTS, TUNNELS, OR OTHER MEANS OF ACCESS TO SAID MINERALS WHICH MAY BE CONSTRUCTED, DRILLED OR DUG FROM OTHER LAND, PROVIDED THAT THE EXERCISE OF SUCH RIGHTS SHALL IN NO WAY INTERFERE WITH OR IMPAIR THE USE OF THE SURFACE OF THE LAND HEREBY CONVEYED OR OF ANY IMPROVEMENTS THEREON, AS RESERVED IN THE DEED FROM THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY RECORDED SEPTEMBER 19, 1986 AS FILE NO. 86-412539, OFFICIAL RECORDS.

PARCEL B:

PARCEL 1: (APN: 219-163-50)

LOT 4 IN BLOCK 85 OF RANCHO LOS VALLECITOS DE SAN MARCOS, IN THE CITY OF SAN MARCOS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 806, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY.

EXCEPTING THE SOUTHWESTERLY 242.11 FEET OF LOT 4.

ALSO EXCEPTING THEREFROM THAT PROPERTY CONVEYED TO THE CITY OF SAN MARCOS BY DEED RECORDED DECEMBER 29, 1997 AS FILE NO. 1997-0663733 OF OFFICIAL RECORDS AND DESCRIBED AS FOLLOWS:

THAT PORTION OF LOT 4 IN BLOCK 85 OF RANCHO LOS VALLECITOS DE SAN MARCOS, IN THE CITY OF SAN MARCOS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 806, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID LOT 4, BEING ALSO THE TRUE POINT OF BEGINNING; THENCE, SOUTH 67°49'07" EAST ALONG THE SOUTHERLY LINE OF ARMORLITE DRIVE A DISTANCE OF 27.00 FEET; THENCE SOUTH 23°30'03" WEST A DISTANCE OF 285.73 FEET TO THE BEGINNING OF A TANGENT 25.00 FOOT RADIUS CURVE

CONCAVE EASTERLY; THENCE SOUTHEASTERLY ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 89°56'14" A DISTANCE OF 39.24 FEET; THENCE, SOUTH 66°26'11" EAST A DISTANCE OF 182.88 FEET TO THE BEGINNING OF A TANGENT 67.00 FOOT RADIUS CURVE CONCAVE SOUTHWESTERLY; THENCE, ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 89°40'04" A DISTANCE OF 104.86 FEET; THENCE, SOUTH 23°13'53" WEST A DISTANCE OF 161.25 FEET TO A POINT ON THE SOUTHERLY LINE OF THAT CERTAIN PROPERTY AS CONVEYED BY GRANT DEED TO THE COCA-COLA BOTTLING COMPANY AND RECORDED IN THE OFFICE OF THE SAN DIEGO COUNTY RECORDER ON DECEMBER 8, 1988 AS DOCUMENT NO. 88-632817 OF OFFICIAL RECORDS; THENCE NORTH 66°26'57" WEST ALONG SAID SOUTHERLY PROPERTY LINE A DISTANCE OF 299.48 FEET TO A POINT ON THE EASTERLY LINE OF LAS POSAS ROAD; THENCE, NORTH 23°13'53" EAST ALONG SAID EASTERLY LINE OF LAS POSAS ROAD A DISTANCE OF 537.99 FEET TO THE TRUE POINT OF BEGINNING.

PARCEL 2: (APN: 219-163-38)

THE NORTHWESTERLY 361.56 FEET OF LOT 5 IN BLOCK 85 OF RANCHO LOS VALLECITOS DE SAN MARCOS, IN THE CITY OF SAN MARCOS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 806, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY.

EXCEPTING THE SOUTHWESTERLY 242.11 FEET OF LOT 5.