

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Phillip Scollick, City Clerk
City of San Marcos
1 Civic Center Drive
San Marcos, CA 92078

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**SECOND AMENDMENT TO OWNER PARTICIPATION
AND SUBSTANTIAL CONFORMANCE AGREEMENT
AND
AMENDMENT TO FIRST IMPLEMENTATION AGREEMENT**

THIS SECOND AMENDMENT TO OWNER PARTICIPATION AND SUBSTANTIAL CONFORMANCE AGREEMENT AND AMENDMENT TO FIRST IMPLEMENTATION AGREEMENT ("SECOND AMENDMENT ") is made as of January __, 2015, by and between the CITY OF SAN MARCOS, a chartered municipal corporation ("City"), and INTEGRAL PROJECT OWNER II, LLC, a Delaware limited liability company ("Owner"), with respect to the following.

RECITALS

A. Owner is the successor in interest to The Palomar Station Owner, LLC pursuant to that certain Assignment and Assumption Agreement effective January 15, 2013, and is the 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 is developing a mixed-use project known as "Palomar Station" on the Property consisting of approximately 370 dwelling units on certain lots and, on a separate lot, a free standing retail building ("Project").

B. City, Owner, and the former San Marcos Redevelopment Agency previously executed that certain Owner Participation and Substantial Conformance Agreement dated July 26, 2011 ("OP/SCA"). City and Owner subsequently executed the First Amendment to Owner Participation and Substantial Conformance Agreement dated December 11, 2012 ("First Amendment"), following the dissolution of the former San Marcos Redevelopment Agency, City being the Successor Agency to said former San Marcos Redevelopment Agency and the terms of such First Amendment not affecting provisions relating to redevelopment issues.

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 ("Implementation Agreement"), which agreement relates to Owner's obligations as set forth in the Project's development entitlement conditions, OP/SCA and First Amendment to contribute to the cost of the design and construction of the Pedestrian Bridge associated with the Project ("Pedestrian Bridge") and the application of grant funds secured for such Pedestrian Bridge by City. The OP/SCA, First Amendment and Implementation Agreement may be referenced collectively herein as "the Palomar Agreements," and this Second Amendment amends applicable provisions of each of the Palomar Agreements.

D. In light of (i) updated construction cost estimates for the Pedestrian Bridge based on change in scope resulting from regulatory input from NCTD and the CPUC and detailed design changes made subsequent to execution of the OP/SCA ("Scope Changes"), (ii) Owner's request for an extension of time within which to pull a building permit for the development of the free standing retail component of the Project ("Commercial Lot"), or entering into a lease with a major tenant with respect to the Commercial Lot, and (iii) federal grant requirements mandating that the City shall be the recipient of grant funding for the Pedestrian Bridge, City and Owner now desire to amend specific terms and conditions of Owner's obligations with respect to the satisfaction of the timing and financial contributions associated with the Pedestrian Bridge and the conditions with respect to the Commercial Lot as contained in the Palomar Agreements.

NOW, THEREFORE, in consideration of the foregoing Recitals, which are hereby incorporated into the operative provisions of this Second 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 Second Amendment shall become operative and commence upon the date of mutual execution hereof ("Effective Date") and remain in effect until the later of the following: (i) Owner has satisfied all obligations set forth in the conditions of approval for the Project and the Palomar Agreements, (ii) the City has constructed the Pedestrian Bridge, and (iii) the expiration of any applicable limitations periods associated with each of the same ("Term"). Upon the expiration or termination of the Term, this Second Amendment shall have no further force and effect.

2. Recordation of Second Amendment, Obligations Run With Land. Upon mutual execution, this Second Amendment shall be recorded and shall operate as a restrictive covenant against all parcels comprising the Project and running with the land, relating to Owner's obligations relative to the Pedestrian Bridge as set forth in the Palomar Agreements.

3. Pedestrian Bridge Conditions in Palomar Agreements.

3.1 Section 2.1 of the OP/SCA acknowledged that City had submitted application for grant funding for the Pedestrian Bridge. In the event grant funds for one-half (1/2) or more of the construction costs were awarded, the OP/SCA directed Owner

to build the Pedestrian Bridge within the timing associated with such grant funding and contained other timing requirements.

3.2 The First Amendment did not address Pedestrian Bridge timing and construction; rather, it addressed timing and obligations associated with development of the commercial component of the Project.

3.3 The Implementation Agreement acknowledged the award of a federal grant in the amount of \$782,640.00 for the Pedestrian Bridge, and a City maximum in-kind contribution of \$100,000.00, toward a construction cost that was anticipated at the time to be approximately \$2,100,000 as estimated in the grant application. Pursuant to the Implementation Agreement, Owner was to deposit \$100,000.00 as its Design Contribution towards preliminary design and processing costs, and \$700,000.00 as its Initial Construction Contribution. Owner was further obligated to make Owner's Additional Contribution in the amount of any additional funds necessary to complete the Pedestrian Bridge after the application of the federal grant funds, the City's in-kind contribution and Owner's Design Contribution and Initial Construction Contribution.

4. Pedestrian Bridge Contributions and Deposits by Owner. On or about January 7, 2013, City acknowledged receipt of Owner's Design Contribution in the amount of \$100,000.00. On or about September 18, 2014, Owner submitted the Initial Construction Contribution in the amount of \$700,000.00 to City, less the amount of \$430,855 which was credited against the circulation/streets component of the Public Facilities Fees ("PFF Credit") assessed against the Project, contingent on construction of the Pedestrian Bridge.

5. PFF Credit, Financial Contingencies Relating to Pedestrian Bridge. Owner has previously paid its full PFF for the Project including, but not limited to, \$1,546,741.54 for the circulation/streets component of such Public Facilities Fees. In the event the Pedestrian Bridge is not constructed, City will reimburse Owner an amount representing the Initial Construction Contribution plus the Additional Contribution (to the extent paid by the Owner) defined below, less the PFF Credit amount, for a total maximum reimbursement amount of \$519,145. No other reimbursement will be provided.

6. Owner's Additional Contribution Cap, No Reimbursement District. Certificates of Occupancy. In light of Scope Changes, , and the Project's anticipated share of usage of the Pedestrian Bridge, City agrees that an unlimited Owner's Additional Contribution would not represent the Project's fair share of the cost of the facility. City therefore agrees that in addition to the Design Contribution, Initial Construction Contribution and PFF Credit (which, again, is contingent on construction of the Pedestrian Bridge), Owner's obligation to make Owner's Additional Contribution is hereby modified and will be limited to \$250,000.00, which shall be Owner's final obligation towards the design and construction of the Pedestrian Bridge. This payment is to be made within five business days of final approval by the City and full execution of this Agreement. Owner and City agree Owner's only obligations with respect to bridge maintenance are set forth in CFD-98-02 F-zone and the Owner is not relieved of such obligations. In light of

the limitation of Owner's Additional Contribution, the provision in paragraph 7 of the Implementation Agreement, which paragraph allowed Owner to apply for the formation of an additional reimbursement district to recover proportionate shares of the costs and expenses associated with the Pedestrian Bridge from owners of surrounding property who would benefit from the Pedestrian Bridge, is revoked in its entirety and is no longer effective. Upon execution of this Agreement and City's receipt of the Owner's Additional Contribution the Palomar Station Project shall no longer be conditioned to construct the Pedestrian Bridge Project, and issuance of Certificates of Occupancy for the Palomar Station Project shall not be subject to the payment for or construction of said bridge, except as expressly provided in this Second Amendment

7. Timing of Pedestrian Bridge Project, Impact on Construction Contribution. City anticipates that the Pedestrian Bridge project will be completed by or before December 31, 2020. In the event City does not substantially complete the Pedestrian Bridge by or before that date, City will reimburse Owner in the amount of its Initial Construction Contribution, Owner's Additional Construction Contribution and Owner's Additional Contribution (if previously paid), less the amount of the PFF Credit noted in paragraph 5, above.

8. Commercial Lot Delivery Deadline, City Approval of Tenants. Pursuant to the last paragraph of Section 2.2 of the OP/SCA, unless a major tenant lease had been executed, Owner was required to pull a building permit for the free standing retail component of the Project ("Commercial Lot") within two (2) months of the first occupancy of the south side residential, and construction was required to have been commenced on the Commercial Lot within three (3) months of first occupancy of the south side residential. If such deadline was not met, the OP/SCA provided for conveyance of the real property comprising the Commercial Lot to City. Pursuant to the Section 7 of the First Amendment, City's Manager was authorized to execute extensions of time for the purpose of implementing the terms of the First Amendment and OPA/SC. On August 11, 2014, City's Manager Owner granted an extension of time within which building permits for the Commercial Lot were to be pulled to two (2) months within reaching seventy-five (75%) of residential occupancy, which was anticipated to occur by or before July of 2015. Owner has requested a further extension of time with respect to the requirements set forth in this Section 8. City is agreeable to and hereby grants an extension to December 31, 2015, provided that Owner leases to tenants that will use the Commercial Lot consistent with the uses set forth in the Palomar Station Specific Plan No. 05-48 ("Specific Plan").¹ Owner agrees that to harmonize with the

¹ As further clarification of permitted uses in the Specific Plan and Zoning Ordinance, "Personal Services" shall consist of "office-only" professional services limited to attorneys, architects, accountants, financial planning, insurance, real estate, travel agency, or comparable as approved by the City. "Commercial Entertainment" shall be limited to comedy acts, music, or comparable as approved by the City, with the proposed tenant to prove there is sufficient parking. If substantiated, shall be approved under a Director's Permit (DP).

permitted uses for the live-work component of the Project, and in consideration of the City's agreement to extend the time for performance of the Commercial Lot conditions, it agrees that the following uses will be prohibited on the commercial lot in perpetuity: Adult Novelty Products Sales, Cabinet or Furniture Making, Child or Adult Day Care, , Vapor, "Vape", or E-Cigarette Sales or Service, Mobile Device Repair Stores, Gun and Weapon Sales, Living Quarters (first floor work space cannot be converted into a residential unit), Manufacturing / Distributing, and Vehicle Repair. In addition, Owner will keep the City Manager apprised of Owner's leasing efforts with respect to the Commercial Lot on regular intervals. If the City deems it reasonably necessary, Owner and City will reach mutual agreement on a covenant to be recorded against the Project which documents these understandings, which covenant is to be recorded within three (3) months of City's approval of this Second Amendment.

9. Modification, Amendment, Cancellation or Termination. This Second 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.

10. Minor Modification. The City Manager shall be authorized to execute minor modifications to this Second Amendment for the sole purpose of implementing the administrative terms of this Second Amendment as agreed by City and Owner.

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 Second Amendment is contained in the instrument by which such person acquired an interest in the Property.

12. Injunctive Relief. If a violation of any of the foregoing covenants occurs or is attempted, and such occurrence or attempt is uncorrected for a period of ten business (10) days or more after notice of the same is issued, City may institute and prosecute any proceedings at law or in equity to abate, prevent or enjoin any such violation or attempted violation or to compel specific performance by Owner of its obligations hereunder. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of any party entitled to enforce the provisions hereof or to obtain relief against or recover for the continuation or repetition of such breach or violations or any similar breach or violation hereof at any later time.

13. Indemnification. Owner shall defend, indemnify and hold the City, its officers, employees, agents and representatives ("Indemnitees"), harmless from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including without limitation, reasonable attorneys' fees, arising from or in any way connected with City's entry into to this Second Amendment and/or the understandings set forth herein. Notwithstanding any language to the contrary in this section 13, Owner shall have no indemnity obligations to any Indemnitees for claims that arise from or are alleged to arise from the active negligence or willful misconduct of

any Indemnitees. The indemnity obligations herein shall survive the expiration or earlier termination of the Palomar Agreements as amended, the Entitlements and any and all applicable statutes of limitation

14. No Third Party Beneficiaries. This Second 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 Second Amendment.

15. No Damages Against City, Non-liability of City Officials and Employees. Owner's sole and exclusive remedies with respect to this Second 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 Second 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 Second Amendment.

16. Scope of Amendment, Entire Agreement. Except as expressly set forth in this Second Amendment, all terms and conditions of the OP/SCA, the First Amendment and the Implementation Agreement, and the Project conditions as set forth in the development entitlements approved by City, shall remain in full force and effect. This Agreement constitutes the entire understanding between City and Owner with respect to the subject matter hereof, and supersedes any prior negotiations, representations, agreements and/or understandings concerning the same.

17. Notices. Unless otherwise specifically permitted by this Second Amendment, all notices or other communications required or permitted under this Second Amendment shall be in writing, and shall be personally delivered or sent by registered or certified mail, postage prepaid, return receipt requested, or sent by telecopy, provided that the telecopy cover sheet contain a notation of the date and time of transmission, and shall be deemed received: (i) if personally delivered, upon the date of delivery to the address of the person to receive such notice, (ii) if mailed in accordance with the provisions of this paragraph, two (2) business days after the date placed in the United States mail, (iii) if mailed other than in accordance with the provisions of this paragraph or mailed from outside the United States, upon the date of delivery to the address of the person to receive such notice, or (iv) if given by telecopier during business hours when delivered can be confirmed, when delivered. Notices shall be given at the following addresses, which the parties may modify by providing notice to the other parties:

If to City:

City of San Marcos
Attn: City Manager

1 Civic Center Drive
San Marcos, CA 92069
Telecopier: (760) 744-9520

If to Owner:

INTEGRAL PROJECT OWNER II, LLC
Attn: Frank T. Suryan, Jr.
4901 Birch Street
Newport Beach, CA 92660
Telecopier: 949-252-9202

18. No Partnership. Nothing contained in this Second Amendment shall be deemed or construed to create a partnership, joint venture or any other similar relationship between the parties hereto or cause City to be responsible in any way for the obligations of Owner, or of any other person or entity.

19. Authority to Sign. Owner and City hereby each represent and warrant that the persons executing this Agreement on their behalf have full authority to do so and to bind them to perform pursuant to the terms and conditions of this Agreement. Concurrently with Owner's submission of this Agreement to the City for execution, Owner will submit to City a copy of documents evidencing the due formation and nature of Owner and the signatory's authority to sign on behalf of Owner.

20. Counterparts. This Second Amendment may be signed in multiple counterparts with the same force and effect as if all original signatures appeared on one copy; and in the event this Second Amendment is signed in counterparts, each counterpart shall be deemed an original and all of the counterparts shall be deemed to be one agreement.

21. Severability. If any portion of this Second Amendment shall be held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions shall remain enforceable to the fullest extent permitted by law if enforcement would not frustrate the overall intent of the parties (as such intent is manifested by all provisions of the Second Amendment, including such invalid, void or otherwise unenforceable portion).

22. Applicable Law, Venue. This Second Amendment shall be construed in accordance with, and governed by, the laws of the State of California. Venue shall be had in the Superior Court of the State of California, San Diego County, North County Branch, or the nearest applicable District Court.

23. Headings. The headings in this Second Amendment are inserted only as a matter of convenience, and in no way define, limit, extend or interpret the scope of this Agreement or of any particular provision hereof.

Signature page follows

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

CITY:

CITY OF SAN MARCOS,
a chartered municipal corporation

By: _____
Jack Griffin, City Manager

ATTEST:

Phillip Scollick, City Clerk

Approved As To Form:

Helen Holmes Peak, City Attorney

OWNER:

INTEGRAL PROJECT OWNER II, LLC,
a Delaware limited liability company

By: The New Palomar Station Owner, LLC,
a Delaware limited liability company, its
Managing Member

By: Lyon Housing (Palomar Station)
LLC, a Delaware limited liability
company, its Managing Member

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

**[SIGNATURES ON BEHALF OF OWNER MUST BE NOTARIZED;
SIGNATURE BLOCK REQUIRES SIGNATURES OF TWO PERSONS HOLDING
SEPARATE OFFICES]**

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

That certain real property located in the City of San Marcos, County of San Diego, State of California, more particularly described as follows:

[to be inserted]