

RECORDING REQUESTED BY:
AND WHEN RECORDED MAIL TO:

City of Santa Ana
Clerk of the Council
20 Civic Center Plaza (M-30)
P.O. Box 1988
Santa Ana, California 92702
Attention: Clerk of the Council

*Free Recording pursuant to
Government Code 27383*

DENSITY BONUS HOUSING AGREEMENT

This DENSITY BONUS HOUSING AGREEMENT ("Agreement"), made and entered into this ____ day of August, 2022, by and between the City of Santa Ana, a charter city and municipal corporation of the State of California ("City"), and Brandywine Acquisition Group, LLC ("Developer"). City and Developer are sometimes referred to collectively as the "Parties" and individually as a "Party."

RECITALS

A. Developer entered or is entering into a ground lease with David A Colton Trust ("Property Owner"), pursuant to which the Property Owner is ground leasing to Developer that certain property located within the City of Santa Ana, County of Orange, State of California, commonly known as 1814 & 1818 East First Street, Santa Ana, California, 92705, and legally described as set forth in Exhibit A attached hereto and incorporated herein by this reference as if set forth in full ("Property").

B. Developer is proposing to develop two vacant parcels with 35 single-family attached townhomes, six (6) of which are proposed as Live/Work units, and four (4) as moderate-income affordable units, on the Property, as more particularly set forth in Density Bonus Agreement Application No. 2022-02 ("Project").

C. Santa Ana Municipal Code sections 41-1600, *et seq.* ("City Density Bonus for Affordable Housing"), and California Government Code sections 65915, *et seq.* ("State Density Bonus Law"), set forth a process to provide increased residential densities and incentives, concessions, and waivers to property owners or developers who guarantee that a portion of their residential development will be available to low income, very-low income, or senior (also known as "qualified") households. These regulations are intended to materially assist the housing industry in providing adequate and affordable housing for all economic segments of the community and to provide a balance of housing opportunities for very-low income, low income and senior households throughout the city.

D. The Project is proposing a total number of thirty-five (35) single-family attached townhomes, six (6) of which are proposed as Live/Work units, and four (4) as moderate-income

affordable units. The Project will provide seventy-seven (77) onsite parking spaces. No parking concession is requested or provided.

E. The Project complies with the affordable housing requirements set forth in the State Density Bonus Law and City Density Bonus for Affordable Housing. For purposes of this Agreement, the Project shall be the "housing development" as defined in the State Density Bonus Law.

F. In light of the purpose of the State Density Bonus Law and City Density Bonus for Affordable Housing, and the express provisions of Government Code Section 65915(d)(2)(A), the City has determined to grant Developer's application for one concession.

G. This Agreement, and the exhibits attached hereto and incorporated herein by reference, are intended to set forth the terms and conditions for the implementation of the Project's requirement to provide affordable housing units in exchange for receiving the density bonus concession set forth herein.

NOW, THEREFORE, in consideration of the above recitals, which are incorporated herein by this reference, and of the mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS AND EXHIBITS

1.1 Definitions. In addition to the terms that may be defined elsewhere in this Agreement, the following terms when used in this Agreement shall be defined as follows:

1.1.1 **"Affordability Restrictions"** means, pursuant to California Government Code Section 65915(c)(2)(A)(ii)(III), restrictions on the sale and conveyance of the Property that ensure that the Property will be preserved for lower income housing for at least 45 years for owner-occupied housing units and will be sold or resold only to persons or families of very low, low, or moderate income, as defined in Section 50052.5 of the California Health and Safety Code.

1.1.2 **"Affordable Units"** means four (4) units, which shall be comprised of four (4) three-bedroom units for Moderate-Income Households. Any change to the number or distribution of Affordable Units is subject to City Manager approval.

1.1.3 **"Agreement"** means this Density Bonus Housing Agreement.

1.1.4 **"City"** means the City of Santa Ana, California

1.1.5 **"City Council"** means the City Council of the City of Santa Ana.

1.1.6 **"City Attorney"** means the City Attorney for the City of Santa Ana.

1.1.7 **"City Manager"** means the City Manager for the City of Santa Ana.

1.1.8 **"City's Planning Commission"** means the Planning Commission for the City of Santa Ana.

1.1.9 **"Density Bonus Housing Agreement Term"** means the period during which this Agreement shall be in full force and effect, as provided for in Section 6 below.

1.1.10 **"Developer"** means Brandywine Acquisition Group, LLC and its permitted successors and assigns to all or any part of the Property, Project or this Agreement.

1.1.11 **"Effective Date"** means the date the Developer and the City shall record or cause to be recorded in the Official Records for Orange County, California, an executed original of this Agreement, pursuant to section 4.1 herein.

1.1.12 **"Eligible Household"** means a Household whose income does not exceed the "Moderate-Income" qualifying limit as defined herein.

1.1.13 **"Household"** means all persons residing in a Unit.

1.1.14 **"Moderate-Income"** means persons and families whose income does not exceed the limits provided in California Health and Safety Code Section 50052.5.

1.1.15 **"Project"** means that certain residential development as more particularly described in Recital B and Section 2 of this Agreement.

1.1.16 **"Property"** means that certain real property more particularly described in the legal description in Exhibit A and improvements thereon.

1.1.17 **"State Density Bonus Law"** means Government Code sections 65915, et seq., as they exist on the Effective Date.

1.1.18 **"Unit"** means a residential dwelling unit within the Project to be constructed or caused to be constructed by Developer pursuant to this Agreement.

1.1.19 **"Unrestricted Units"** means the Units within the Project to be constructed or caused to be constructed by Developer to a Household without restriction.

1.2 Exhibits. The following documents are attached to, and by this reference made a part of, this Agreement:

1.2.1 **Exhibit A** – Legal Description of the Property

1.2.2 **Exhibit B** – Income Verification Form

1.2.3 **Exhibit C** – Notice of Affordability Restrictions on Transfer of Property

2. DEVELOPMENT OF THE PROPERTY

2.1 Project. Developer shall develop or cause the development of the Property as thirty-five (35) single-family attached townhomes, six (6) of which are proposed as Live/Work units, and four (4) as Moderate-Income Affordable Units.

2.2 Density Bonus. The Project Units are allowed under the City's Metro East Mixed Use Zone and General Plan. Therefore, no density bonus is required or provided.

2.3 Development Concessions, Incentives, and Waivers. As set forth in the City entitlements, Developer petitioned for and is hereby granted the following concessions, incentives, and waivers as part of the approval of Density Bonus Application No. 2022-02 for the Project:

2.3.1 Publicly accessible open space shall be reduced from fifteen percent (15%) of total lot area as required by the Metro East Mixed Use (MEMU) Overlay Zone to no less than five percent (5%) of total lot area in accordance with Government Code Section 65915(d)(2)(A).

2.4 No Further Concessions, Incentives, or Waivers. Developer acknowledges and agrees that the concessions, incentives, and waivers set forth in section 2.3 above fully satisfies any duty City may have under the City Density Bonus for Affordable Housing, the Density Bonus Law, or any other law or regulation to provide any density bonus incentive or to waive any building, zoning, or other requirement in connection with a density bonus. By this Agreement, Developer releases any and all claims Developer may have against City in any way relating to or arising from City's obligation to waive requirements of or provide development incentives pursuant to the City Density Bonus for Affordable Housing and the Density Bonus Law applicable to the Project.

2.5 Unrestricted Units. The Project, for purposes of this Agreement, may have no more than thirty-one (31) Unrestricted Units comprised of thirty-one (31) three-bedroom units.

2.6 Affordable Units. The Project, for purposes of this Agreement, shall have no less than thirty-five (35) single-family attached townhomes, six (6) of which are proposed as Live/Work units, and four (4) designated as Moderate-Income Affordable Units pursuant to the terms and conditions of this Agreement. The Affordable Units shall be consistent with all applicable City approvals.

2.7 Minimum Development Standards for Affordable Units. The Affordable Units shall be constructed in accordance with all applicable City approvals.

2.8 Permits and Processing; Compliance with Laws. Developer, at its sole cost and expense, or as otherwise set forth in a separate written agreement, shall secure or cause to be secured any and all permits that may be required for development of the Project by City or any other federal, state, or local governmental entity with jurisdiction over the Property or Project. Upon securing any and all required permits, and all necessary financing and property interests, Developer shall carry out and perform the development of the Project or cause the performance of the development of the Project, in conformity with all applicable federal, state, and local laws and

regulations, and all conditions of approval issued by the City Council and City's Planning Commission for the Project. Any changes to the Project shall be reviewed by the City to determine compliance with this Agreement. If any changes to the Project shall materially alter the ability of Developer to comply with any terms of this Agreement in City's sole determination, then City and Developer shall meet and confer to address amendments and revisions to this Agreement as necessary.

2.9 Relocation Prior to Development of Project. If relocation is required prior to the completion of development of the Project, Developer shall have the sole and exclusive responsibility for providing relocation assistance and paying all relocation costs as may be required to comply with applicable federal and state laws and regulations. In addition to any other indemnity provided by Developer under this Agreement, Developer shall indemnify, defend (with counsel of City's choosing and the consent of Developer, which shall not be unreasonably withheld and which may be joint defense counsel upon City's and Developer's consent), and hold harmless City and all of its officials, officers, employees, representatives, volunteers and agents from any and all alleged or actual claims, causes of action, liabilities, and damages from any third party for relocation assistance, benefits and costs prior to the completion of the development of the Project.

2.10 Local Sourcing Plan. Developer agrees to make a good faith effort to encourage contractors and suppliers to hire and procure locally, to the extent that it is cost effective and does not delay the overall project development schedule. Prior to issuance of a building permit, Developer shall develop and submit or cause the development and submittal to the Community Development Agency (the "CDA") a local sourcing plan for the Project targeting, to the extent commercially reasonable, the hiring of qualified workers, construction contractors, or the purchasing of goods locally within the City of Santa Ana. The plan must be reviewed and approved by the CDA which if not granted or denied within five (5) business days, shall be deemed approved (with such approval not to be unreasonably withheld, conditioned or delayed) and be implemented for the construction of the project prior to issuance of a building permit.

2.11 Mechanic's Liens; Indemnification. Developer shall take all actions reasonably necessary to remove any future mechanic's liens or other similar liens (including design professional liens) against the Property or Project, or any part thereof, by reason of work, labor, services, or materials supplied or claimed to have been supplied to Developer or caused by, at the direction of, or on behalf of Developer. Prior to the recording of this Agreement (or memorandum thereof) pursuant to Section 4.1 below, Developer shall provide evidence from the Title Company of any new recordings against the Property or Project. City hereby reserves all rights to post notices of non-responsibility and any other notices as may be appropriate upon a filing of a mechanic's lien. In addition to any other indemnity provided by Developer under this Agreement, Developer shall indemnify, defend (with counsel of City's choosing and the consent of Developer, which shall not be unreasonably withheld - and which may be joint defense counsel upon City's and Developer's consent), and hold harmless City and all of its officials, officers, employees, representatives, volunteers and agents from any and all alleged or actual claims, causes of action, liabilities, and damages from any third party by reason of a mechanic's lien or work, labor, services, or materials supplied or claimed to have been supplied to Developer or caused by, at the direction of, or on behalf of, Developer.

3. AFFORDABILITY

3.1 Total Affordability Term. Pursuant to California Government Code Section 65915(c)(2)(A)(ii)(III), each Affordable Unit shall be restricted to use and occupancy by an Eligible Household for a total period of no less than forty-five (45) years ("Total Affordability Term"). The Total Affordability Term for an Affordable Unit shall commence on the date that the building in which the Affordable Unit is located receives all required occupancy permits from the City.

3.2 Memorializing Commencement of Total Affordability Term. Developer shall keep or cause to be kept detailed records of the commencement date of the Total Affordability Term for each Affordable Unit. City shall have the right to review and verify said records without a fee from City to Developer to ensure that the commencement date specified by Developer for an Affordable Unit coincides with the date that the initial Affordable Unit received all permits from City required for occupancy of the Unit. In the event that a conflict exists between the date specified by Developer for the commencement of the Total Affordability Term for an Affordable Unit and the date specified by City's issuance of all required permits for occupancy of the Unit, the date specified by City's issuance of all required permits for occupancy of the Unit shall control.

3.3 Levels of Affordability.

3.3.1 Moderate-Income Households. Subject to the terms of Section 5, Developer covenants that no less than four (4) Affordable Units in the Project shall at all times during the Density Bonus Housing Agreement Term be sold or conveyed to, or preserved for Moderate-Income Households, and will be sold or resold onto to Moderate-Income Households.

4. OPERATION OF THE PROJECT BY DEVELOPER

4.1 Payment of Density Bonus Setup Fee. Prior to the Effective Date, Developer delivered payment to City of the required density bonus setup fee in the amount of one-eighth (1/8th) of one percent (1%) of the total estimated construction budget for the Project.

4.2 Recording of Documents. No later than issuance of building permits for the Project, Developer and the City shall record or cause to be recorded in the Official Records for Orange County, California, an executed original of this Agreement. City shall cooperate with Developer in promptly executing in recordable form this Agreement. The date of recording of the Agreement shall be the Effective Date of the Agreement. Upon the date of recording, the terms and conditions of this Agreement shall be binding upon and run with the Property and the Project. It is the express intent and agreement between the Parties that this Agreement shall remain binding and enforceable against the Property, the Project, and the Units to ensure compliance with the State Density Bonus Law and City Density Bonus Law, and to ensure the continued supply of Affordable Units in the Project, except as expressly set forth in this Agreement.

4.2 Sale of Units. Upon the completion of construction of the Project and receipt by Developer of all required permits for the occupancy of the Units, Developer shall sell or convey

each Affordable Unit for the Total Affordability Term for such Affordable Unit in accordance with the terms and conditions set forth in this Agreement, which provide among other terms and conditions for the sale or resale of each Affordable Unit to an Eligible Household for the Total Affordability Term.

4.3 Location of Affordable Units. During the Density Bonus Housing Agreement Term, the Affordable Units shall be dispersed throughout the Project in accordance with the terms and conditions set forth in this Agreement.

4.4 Reserved.

4.5 Use of the Property. All uses conducted on the Property by Developer, including, without limitation, all activities undertaken by the Developer pursuant to this Agreement, shall conform to all applicable provisions of the Santa Ana Municipal Code and other applicable federal, state, and local laws, rules, and regulations. The Project shall at all times during the term of this Agreement be used as a mixed-use townhome complex. All of the community facilities and any social programs provided to the Project's residents shall be available on an equal, nondiscriminatory basis to residents of all Units at the Project.

4.6 Maintenance. Developer shall, at all times during the term of this Agreement, cause the Property and the Project to be maintained in a decent, safe and sanitary manner, regardless of cause of the disrepair, to the extent commercially reasonable. City, and any of its employees, agents, contractors or designees shall have the right to enter upon the Property at reasonable times following not less than -forty-eight (48) hours' prior written notice and in a reasonable manner to inspect the Project. If at any time Developer fails to maintain the Project or the Property in accordance with this Agreement and such condition is not corrected within seven (7) days after written notice from City with respect to debris and waste material, or within thirty (30) days after written notice from City with respect to general maintenance, landscaping and building improvements, unless Developer has initiated corrections and City has agreed to a reasonable amount of time to complete corrections, then City, in addition to whatever remedy it may have at law or at equity, shall have the right to enter upon the applicable portion of the Project or the Property and perform all acts and work necessary to protect, maintain, and preserve the Project and the Property, and to attach a lien upon the Property, or to assess the Property, in the amount of the expenditures arising from such acts and work of protection, maintenance, and preservation by City and/or costs of such cure, including a reasonable administrative charge, which amount shall be promptly paid by Developer to City upon demand. Notwithstanding the foregoing, City acknowledges and agrees that the priority of any such lien shall be deemed to be the date such lien is filed, and not the date this Agreement is recorded.

4.6.1 Property Maintenance Agreement. Subject to review and applicability by the Planning and Building Agency (the "PBA"), the CDA, the Public Works Agency (the "PWA"), and the City Attorney to ensure that the Property and all improvements located thereupon are properly maintained, Developer shall execute a maintenance agreement with the City of Santa Ana, prior to occupancy which shall be recorded against the Property and which shall be in a form reasonably satisfactory to the City Attorney. The maintenance agreement shall contain covenants, conditions and restrictions relating to the following:

(a) Compliance with operational conditions applicable during any period(s) of construction or major repair (e.g., proper screening and securing of the construction site; implementation of proper erosion control, dust control and noise mitigation measure; adherence to approved project phasing etc.);

(b) Compliance with ongoing operational conditions, requirement and restrictions as applicable, the proper storage and disposal of trash and debris, and/or restrictions on certain uses;

(c) Ongoing compliance with approved design and construction parameters, signage parameters and restrictions as well as landscape designs, as applicable;

(d) Ongoing maintenance, repair and upkeep of the Property and all improvements located thereupon (including but not limited to controls on the proliferation of trash and debris about the Property; the proper and timely removal of graffiti; the timely maintenance, repair and upkeep of damaged, vandalized and/or weathered buildings, structures and/or improvements; the timely maintenance, repair and upkeep of exterior paint, parking striping, lighting and irrigation fixtures, walls and fencing, publicly accessible bathrooms and bathroom fixtures, landscaping and related landscape improvements and the like, as applicable);

(e) If Developer and the owner of the Property are different (e.g., if the applicant is a tenant or licensee of the Property or any portion thereof), both the applicant and the owner of the Property shall be signatories to the maintenance agreement and both shall be jointly and severally liable for compliance with its terms;

(f) The maintenance agreement shall further provide that any party responsible for complying with its terms shall not assign its ownership interest in the Property or any interest in any lease, sublease, license or sublicense, except as set forth herein or unless the prospective assignee agrees in writing to assume all of the duties and obligations and responsibilities set forth under the maintenance agreement;

(g) The maintenance agreement shall contain provisions relating to the enforcement of its conditions by the City and shall also contain provisions authorizing the City to recover costs and expenses which the City may incur arising out of any enforcement and/or remediation efforts which the City may undertake in order to cure any deficiency in maintenance, repair or upkeep or to enforce any restrictions or conditions upon the use of the Property. The maintenance agreement shall further provide that any unreimbursed costs and/or expenses incurred by the City to cure a deficiency in maintenance or to enforce use restrictions shall become a lien upon the Property in an amount equivalent to the actual costs and/or expense incurred by the City (provided, however, that City acknowledges and agrees that the priority of any such lien shall be deemed to be the date such lien is filed, and not the date this Agreement is recorded); and,

(h) The execution and recordation of the maintenance agreement shall be a condition precedent to the issuance of the Certification of Occupancy.

4.7 Management Plan. Prior to Certificate of Occupancy, Developer shall submit for the reasonable approval of City a “Management Plan” which sets forth in detail the property management duties, a purchaser selection process in accordance with this Agreement, a security system (comprised of security cameras with audio voice down capability) and crime prevention program, the rules and regulations for the Property and manner of enforcement, an operating budget, the identity and emergency contact information of the professional property management company to be contracted with to provide onsite property management services at the Property (“Property Manager”), and other matters relevant to the management of the Property. The Management Plan shall require Developer to adhere to a fair sale and grievance procedure. The management of the Property shall be in compliance with the Management Plan as approved by City.

If City determines that the performance of the Property Manager is deficient based upon the standards set forth in the approved Management Plan and in this Agreement, City shall provide written notice to Developer of such deficiencies and Developer shall use commercially reasonable efforts to correct such deficiencies. In the event that such deficiencies have not been cured within thirty (30) days, or, if cure is not reasonably possible within 30 days, then unless actions to commence a cure are taken within 30 days and continued thereafter with diligence, City shall have the right to require Developer to immediately remove and replace the Property Manager with another property manager or property management company which is reasonably acceptable to the City Manager, which is not related to or affiliated with Developer, and which has not less than five (5) years’ experience in property management, including significant experience managing housing facilities of the size, quality and scope of the Project. Developer agrees to give City notice of the proposed replacement Property Manager. Such proposed replacement Property Manager shall be subject to the City’s approval (with such approval not to be unreasonably withheld, conditioned or delayed).

4.8 Reserved.

4.9 Selection of Purchasers.

4.9.1 Developer shall review the selection of purchasers for the Affordable Units in compliance with lawful and reasonable criteria and the requirements of this Agreement. Each Affordable Unit shall be sold to Eligible Households.

4.9.2 Prior to the sale of an Affordable Unit, Developer shall require the purchaser or cause for the purchaser to be required to complete an Income Verification Form (in substantially the form attached hereto as Exhibit B) certifying that the purchaser buying the Affordable Unit is an Eligible Household and otherwise meet(s) the eligibility requirements established for the Affordable Unit. Developer shall verify the income of the purchaser as set forth herein. Developer and City shall be entitled to rely on the Income Verification Form and supporting documentation provided by purchaser unless Developer or City has knowledge of, or a reasonable basis for belief as to, the inaccuracy or falsehood of any of the supporting documentation.

4.10 Income Verification and Certification.

Developer shall be entitled to rely on the Income Verification Form and supporting documentation provided by purchasers unless Developer has knowledge of, or a reasonable basis for belief as to, the inaccuracy or falsehood of any of the supporting documentation. Developer shall make reasonable efforts to verify or cause to be verified that the income and asset statement provided by an applicant in an income certification is accurate by taking, at a minimum, at least one of the following steps as a part of the verification process: (1) obtain three months consecutive pay stubs for the most recent pay period, (2) obtain an income tax return for the most recent tax year, (3) obtain an income verification form from the purchasers current employer, (4) obtain an income verification form from the Social Security Administration and/or the California Department of Social Services if the applicant receives assistance from either of such agencies, or (5) if the applicant is unemployed and has no such tax return, obtain another form of independent verification.

4.10.1 Gross Household Income. Gross household income means all income from whatever source from all adult Household members, which is anticipated to be received during the 12-month period following the date of the determination of Gross Household Income. The applicable sources of income are defined in California Code of Regulations Title 25 Housing and Community Development Section 6914.

4.11 Reserved.

4.12 Notice of Affordability Restrictions on Transfer of Property. In the event of the sale or resale of an Affordable Unit during the Total Affordability Term, the City and the transferor shall execute and deposit into escrow, or record against the Affordable Unit, a Notice of Affordability Restrictions on Transfer of the Property as contained herein (Exhibit C). The sale or transfer of the Property, shall not be effective unless and until the City and the transferee execute the documents necessary to transfer the Density Bonus Agreement obligations from the transferor to the transferee.

4.13 Reserved.

4.14 Alternative Transportation and Energy Source, Resource Conservation, and LEED Certification. While not a condition of the Project's Density Bonus, in recognition of the City's desire to optimize the energy efficiency of the Project, Developer agrees to consult with the project design team, a CABEC certified 2016 Certified Energy Analyst, a LEED AP Homes (low-rise and mid-rise), LEED AP BD+C (high rise), National Green Building Standard (NGBS) Green Verifier, or GreenPoint Rater (*one person may meet both of these latter qualifications*) early in the Project design process to evaluate a building energy model analysis and identify and consider energy efficiency or generation measures. Prior to the meeting, the energy analyst shall complete an initial energy model based on either current T24 standards or, if the Project is eligible, the California Utility Allowance Calculator using best available information on the Project. To the extent

financially feasible for the Project, Developer agrees to incorporate and optimize energy efficient building materials, methods, and amenities.

4.15 Reserved.

4.16 Emergency Evacuation Plan. Developer shall submit and obtain approval of an Emergency Evacuation Plan (the EEP) from City Police and Fire Protection agencies prior to issuance of a Certificate of Occupancy. The approved EEP shall be kept onsite and also be submitted to the following City agencies:

- (a) Police Department
- (b) Fire Department
- (c) Planning and Building Agency

4.17 Reserved.

4.18 Onsite Parking Management Plan. Developer has agreed to provide seventy-seven (77) onsite parking stalls for residents and visitors of the Project and actively monitor the parking demand of the Project site. Developer shall continually monitor and take commercially reasonable measures to manage the parking demand of the Project site - to mitigate the use of offsite parking spaces on private or public properties and/or right-of-way. Prior to issuance of the Certificate of Occupancy or finalizing of building permits, Developer shall submit and obtain approval from the Planning and Building Agency of a Parking Management Plan (the "PMP") as per conditions of approval in Site Plan Review No. 2022-03 and Tentative Tract Map No. 2022-02 to address the parking demands of the Project. The approved PMP shall be adhered to and be enforced by the Project at all times.

4.19 Marketing and Resident Selection Plan. Each Affordable Unit shall be sold to Eligible Households selected by Developer who meet all of the requirements provided herein. Prior to Certificate of Occupancy, Developer shall prepare and obtain City's approval of a marketing program and purchaser selection plan for the sale of the Affordable Units at the Project ("Marketing Program"). The sale of the Affordable Units shall thereafter be marketed in accordance with the Marketing Program as the same may be amended from time to time with City's prior written approval. Upon request, Developer shall provide City with periodic reports with respect to the sale of the Affordable Units.

4.19.1 The Marketing Program shall include, but is not limited to, marketing and community outreach activities, proposed purchaser selection criteria, income requirements, timeline and details for outreach and marketing. All requirements set forth herein shall be incorporated in the Marketing Program.

5. RESERVED

6. TERM OF THIS AGREEMENT

The term of this Agreement ("Density Bonus Housing Agreement Term") shall commence on the Effective Date and shall continue until the date that is forty-five (45) years after the City

issues the last certificate of occupancy for the building in which the Affordable Units are located, pursuant to California Government Code Section 65915(c)(2)(A)(ii)(III).

7. DEFAULT AND TERMINATION; INDEMNIFICATION

7.1 Default. Failure or delay by any Party to perform any term or provision of this Agreement, which is not cured within thirty (30) days after receipt of notice from the other Party specifying the default (or such other period specifically provided herein), constitutes a default under this Agreement; provided, however, if such default is of the nature reasonably requiring more than thirty (30) days to cure, the defaulting Party shall avoid default hereunder by commencing to cure within such thirty (30) day period, and thereafter diligently pursuing such cure to completion. Except as required to protect against further damages, the injured Party may not institute proceedings against the Party in default until the time for cure has expired. Failure or delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default.

7.2 Rights and Remedies Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of its rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party. Notwithstanding anything to the contrary contained in this Agreement, in no event shall either Party be liable for speculative, consequential, punitive or other indirect damages, and each Party waives any right to collect speculative, consequential, punitive or other indirect damages against the other Party.

7.3 Indemnification. In addition to any other indemnity specifically provided in this Agreement, Developer agrees to defend (with counsel of City's choosing and the consent of Developer, which shall not be unreasonably withheld, conditioned or delayed and which may be joint defense counsel upon City's and Developer's consent) indemnify and hold harmless City and its respective officers, officials, agents, employees, representatives, and volunteers (collectively, "Indemnitees") from and against any loss, liability, claim, or judgment arising from any act or omission of Developer in connection with its obligations under this Agreement, except to the extent caused by the negligence or willful misconduct of any of the Indemnitees.

8. ASSIGNMENT; COVENANTS RUN WITH THE LAND

8.1 Assignment by Developer.

8.1.1 Prohibited Transfers or Assignments. Except as authorized in this Section or Section 8.1.2 below, Developer shall not sell, transfer, or assign the Property or Project in whole or in part, or transfer or assign Developer's rights and obligations in this Agreement, in whole or in part, without City's prior written approval, which shall not be unreasonably withheld, conditioned or delayed ("Permitted Transfer"); provided, however, Developer shall have the right without City's prior written approval to transfer or assign the Property, Project and/or Developer's rights and obligations in this Agreement to any entity that is controlled by, or is under common

control with, Developer or Developer's managing general partner, and Developer shall thereafter be released from any future obligations under this Agreement. In connection with Permitted Transfer, Developer shall: (i) notify City in writing of the sale, transfer, or assignment of all or any portion of the Property, and (ii) deliver to City an assignment and assumption agreement (or other agreement) in a form approved by City in its reasonable discretion and executed by Developer and its transferee/assignee pursuant to which Developer's transferee/assignee assumes all of Developer's covenants and obligations set forth herein with respect to the Property or the portion thereof so transferred. Any request for transfer or assignment of the Agreement by Developer shall require the payment of fees or a deposit to pay for the City's actual, documented expenses to review the request. Upon the delivery of the assignment and assumption agreement as provided for above for a Permitted Transfer, or in the event of a sale of the Property/Project as provided for in this Section 8.1.1, Developer shall be released from any future obligations under this Agreement.

8.1.2 Sale of Property. Developer agrees and declares that the Property and the Project shall be sold, used, occupied, operated, and approved subject to all obligations set forth or incorporated in this Agreement, all of which are for the purpose of enhancing and protecting the value and attractiveness of the Property and the Project. All of the obligations set forth or incorporated in this Agreement shall constitute covenants which run with the land and shall be binding on Developer and its successors and assigns, and all parties having or acquiring any right, title or interest in, or to any part of the Property or Project. Developer further understands and agrees that the Density Bonus permit approvals received for this Project have been made on the condition that Developer and all subsequent owners, or other successors and assigns of the Property and/or Project purchase the Affordable Units in accordance with the terms and conditions stipulated in Sections 4, 5 and 6 of this Agreement for a term of forty-five (45) consecutive years commencing upon the date of issuance of the last certificate of occupancy for the Project.

8.1.3 Subsequent Assignment. As used in this Agreement, the term "Developer" shall be deemed to include any such transferee or assignee after the date such sale, transfer, or assignment occurs in compliance with this Agreement.

8.1.4 Unpermitted Assignments Void. Any sale, transfer, or assignment made in violation of this Agreement shall be null and void, and City shall have the right to pursue any right or remedy at law or in equity to enforce the provisions of the restriction against unpermitted sales, transfers, or assignments.

8.2 Covenants Run with the Land. The Property shall be used, occupied and improved subject to the covenants, conditions, and restrictions set forth herein. The covenants, conditions, restrictions, reservations, equitable servitudes, liens and charges set forth in this Agreement shall run with the Property and shall be binding upon Developer and all persons having any right, title or interest in the Property, or any part thereof, their heirs, and successive owners and assigns, shall inure to the benefit of City and its successors and assigns, and may be enforced by City and its successors and assigns. The covenants established in this Agreement shall, without regard to technical classification and designation, be binding for the benefit and in favor of City and its successors and assigns, and the parties hereto expressly agree that this Agreement and the covenants herein shall run in favor of City. Furthermore, all of the covenants, conditions, and

restrictions contained herein shall also constitute easements in gross running in favor of City. City is deemed the beneficiary of the terms and provisions of this Agreement and of the covenants running with the land, for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit this Agreement and the covenants running with the land have been provided. Developer hereby declares its understanding and intent that the burden of the covenants set forth herein touch and concern the land and that the Developer's interest in the Property is rendered less valuable thereby. Developer hereby further declares its understanding and intent that the benefit of such covenants touch and concern the land by enhancing and increasing the enjoyment and use of the Property by the citizens of City and by furthering the health, safety, and welfare of the residents of City.

9. MISCELLANEOUS

9.1 Entire Agreement. This Agreement and all of its exhibits and attachments set forth and contain the entire understanding and agreement of the parties with respect to the density bonus incentive and concession provided to the Project, and there are no oral or written representations, understandings or ancillary covenants, undertakings or agreements which are not contained or expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.

9.2 Amendment. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each instance approved by the City Council, or through the City Manager as detailed herein, and signed on behalf of each Party. The City Manager shall have the authority to make approvals, issue interpretations, execute documents, waive provisions, and/or enter into amendments of this Agreement on behalf of City, including but not limited to amendments to this Agreement for consistency with other Project agreements. Any requested alteration, change or modification of the Agreement by Developer shall require the payment of fees or deposit by Developer to City, as applicable, to pay for City's actual, documented expenses to review the request. Each alteration, change, or modification to this Agreement shall be recorded against the Property in the Official Records of Orange County, California.

9.3 Notices.

9.3.1 Delivery. As used in this Agreement, "notice" includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder. All notices shall be in writing and shall be considered given either: (i) when delivered in person to the recipient named below; or (ii) on the date of delivery shown on the return receipt, after deposit in the United States mail in a sealed envelope as either registered or certified mail with return receipt requested, and postage and postal charges prepaid, and addressed to the recipient named below; or (iii) two (2) days after deposit in the United States mail in a sealed envelope, first class mail and postage prepaid, and addressed to the recipient named below; or (iv) one (1) day after deposit with a known and reliable next-day document delivery service (such as Federal Express), charges prepaid and delivery scheduled next-day to the recipient named below, provided that the sending

party receives a confirmation of delivery from the delivery service provider. All notices shall be addressed as follows:

If to City:	City of Santa Ana Community Development Agency 20 Civic Center Plaza (M-26) P.O. Box 1988 Santa Ana, California 92702 Attention: Housing Manager
With a copy to:	Office of the City Attorney City of Santa Ana 20 Civic Center Plaza, 7th Floor (M-29) Santa Ana, California 92702
If to Developer:	During construction: Brandywine Acquisition Group, LLC 16580 Aston Irvine, CA 92606 Attention: Angela Meyer Following construction: Brandywine Acquisition Group, LLC 16580 Aston Irvine, CA 92606 Attention: Angela Meyer
With copies to:	Withee Malcom Architects, LLP 2251 West 190 th Street Torrance, CA 90504 Attention: Dirk Thelen
And to:	David A Colton Trust 515 Cabrillo Park Drive #305 Santa Ana, CA 92706 Attention: David Colton

9.3.2 Change of Address. Either Party may, by notice given at any time, require subsequent notices to be given to another person or entity, whether a party or an officer or representative of a Party, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

9.4 Severability. If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, the remainder of this Agreement shall not be affected

thereby to the extent such remaining provisions are not rendered impractical to perform, taking into consideration the purposes of this Agreement.

9.5 Interpretation and Governing Law. This Agreement and any dispute hereunder shall be governed and interpreted in accordance with the laws of the State of California without regard to conflict of law principles. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not be employed in interpreting this Agreement, all Parties having been represented by counsel in the negotiation and preparation hereof.

9.6 Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

9.7 Singular and Plural. As used herein, the singular of any word includes the plural, and vice versa, as context so dictates. Masculine, feminine, and neuter forms of any word include the other as context so dictates.

9.8 Reserved.

9.9 Time of Essence. Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.

9.10 Computation of Days. Unless otherwise specified in this Agreement or any Exhibit attached hereto, use of the term "days" shall mean calendar days. For purposes of this Agreement and all Exhibits attached hereto, "business days" shall mean every day of the week except Saturdays, Sundays, official State holidays as recognized in Government Code Section 19853(a) or successor statute, and any days in which Santa Ana City Hall is closed for business.

9.11 Waiver. Failure by a Party to insist upon the strict performance of any of the provisions of this Agreement by the other Party, or the failure by a Party to exercise its rights upon the default of the other Party, shall not constitute a waiver of such Party's right to insist and demand strict compliance by the other Party with the terms of this Agreement thereafter.

9.12 Non-Discrimination. In performing its obligations under this Agreement, Developer shall not discriminate because of race, color, creed, religion, sex, marital status, sexual orientation, age, national origin, ancestry, or disability, as defined and prohibited by applicable law, in the recruitment, selection, training, utilization, promotion, termination or other related activities. Developer affirms that it is an equal opportunity employer and shall comply with all applicable federal, state and local laws and regulations.

9.13 Third Party Beneficiaries. No person or entity, other than City and Developer shall have any right of action based upon any provision of this Agreement.

9.14 Force Majeure. Neither Party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by floods,

earthquakes, other Acts of God, fires, epidemics or pandemics as declared by federal, state, or local emergency resolution, wars, riots or similar hostilities, strikes and other labor difficulties beyond the Party's control (including the Party's employment force), court actions (such as restraining orders or injunctions), or other causes reasonably beyond the Party's control, including delays by any governmental entity (although the City may not benefit from this provision for a delay that results from City's failure to perform its obligations under this Agreement), or an insurance company of either party. If any such events shall occur, the term of this Agreement and the time for performance by either Party of any of its obligations hereunder may be extended by the written agreement of the Parties for the period of time that such events prevented such performance.

9.15 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the Party benefited thereby of the covenants to be performed hereunder by such benefited Party.

9.16 Successors in Interest. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all permitted successors in interest to the Parties to this Agreement. All provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do or refrain from doing some act hereunder with regard to development of the Property: (a) is for the benefit of and is a burden upon every portion of the Property; (b) runs with the Property and each portion thereof; and (c) is binding upon each Party and each successor in interest approved pursuant to this Agreement during ownership of the Property or any portion thereof.

9.17 Counterparts. This Agreement may be executed by the Parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the Parties had executed the same instrument.

9.18 Jurisdiction and Venue. Any action at law or in equity under this Agreement or brought by a Party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Orange, State of California, and the Parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

9.19 Project as a Private Undertaking. It is specifically understood and agreed by and between the Parties hereto that the development of the Project is a private development, that neither Party is acting as the agent of the other in any respect hereunder, and that each Party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement. The only relationship between City and Developer is that of a government entity regulating the development of private property and the Developer of such property.

9.20 Further Actions and Instruments. Each of the Parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and in the satisfaction of the Project and conditions of this Agreement. Upon the request of either Party at any time, the other Party shall promptly execute, with acknowledgment or affidavit if reasonably required, and file or record such required

instruments and writings and take any actions as may be reasonably necessary under the terms of this Agreement to carry out the intent and to fulfill the provisions of this Agreement or the Project or to evidence or consummate the transactions contemplated by this Agreement. City hereby authorizes City Manager to take such other actions and negotiate and execute any additional agreements or amendments to this agreement as may be reasonably necessary or proper to fulfill the City's obligations under this Agreement. The City Manager may delegate her or his powers and duties under this Agreement to an authorized management level employee of the City.

9.21 Estoppel Certificate. Within ten (10) business days following a written request by any of the Parties, the other Party shall execute and deliver to the requesting Party a statement certifying that (i) either this Agreement is unmodified and in full force and effect or there have been specified (date and nature) modifications to the Agreement, but it remains in full force and effect as modified; and (ii) either there are no known current uncured defaults under this Agreement or that the responding Party alleges that specified (date and nature) defaults exist. The statement shall also provide any other reasonable information requested. The failure to timely deliver this statement shall constitute a conclusive presumption that this Agreement is in full force and effect without modification, except as may be represented by the requesting Party, and that there are no uncured defaults in the performance of the requesting Party, except as may be represented by the requesting Party.

9.22 No Subordination; Mortgagee Protection; Covenants Do Not Impair Liens. City's approval of the necessary land use entitlements that authorize Developer to develop, operate, and maintain the Project or to cause the development of the Project was based upon Developer's obligation to provide the Affordable Units pursuant to the State Density Bonus Law, City Density Bonus for Affordable Housing, and the terms and conditions of this Agreement. For the Term of the Density Bonus Housing Agreement, this Agreement shall have priority over any and all mortgages, deeds of trust, and other similar forms of secured financing recorded against the Property or any portion thereof. Developer expressly understands and acknowledges that state law requires preservation of affordability covenants in connection with the approval of this density bonus project. This Agreement shall not prevent or limit Developer, in Developer's reasonable discretion, from encumbering the Property or any portion thereof of or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Property or Project and such action shall not constitute an assignment of this Agreement. No violation or breach of covenants, conditions, restrictions, provisions, or limitations contained in this Agreement shall defeat or render invalid or diminish or in any way impair the lien or charge of any mortgage or deed of trust or security instrument.

9.23 Attorneys' Fees and Costs. If either Party to this Agreement commences an action against the other Party to this Agreement arising out of or in connection with this Agreement, the prevailing Party shall be entitled to recover reasonable attorneys' fees, expert witness fees, costs of investigation, and costs of suit from the losing Party.

9.24 Authority to Execute. The person or persons executing this Agreement on behalf of each Party warrants and represents that he or she/they have the authority to execute this Agreement on behalf of his or her/their corporation, partnership or business entity and warrants

and represents that he or she/they has/have the authority to bind the Party to the performance of its obligations hereunder.

{Signatures on following page}

IN WITNESS WHEREOF, the parties hereto have caused this Density Bonus Housing Agreement to be executed on the date set forth at the beginning of this Agreement.

ATTEST:

CITY OF SANTA ANA

Daisy Gomez
Clerk of the Council

Kristine Ridge
City Manager

APPROVED AS TO FORM

Sonia R. Carvalho
City Attorney

By: Ryan O. Hodge
Assistant City Attorney

RECOMMENDED FOR APPROVAL:

**BRANDYWINE ACQUISITION GROUP,
LLC**

Steven A. Mendoza
Executive Director
Community Development Agency

By execution below, Property Owner consents to the recordation of this Agreement against its fee interest in the Property:

Brandywine Acquisition Group, LLC

By: _____

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

EXHIBIT B

INCOME VERIFICATION FORM

EXHIBIT C

NOTICE OF AFFORDABILITY RESTRICTIONS ON TRANSFER OF PROPERTY