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CENTEX DEVELOPMENT COMPANY, L.P.

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San Francisco, California 94111

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*Lee A. Branch* Recorder

**FORSTER RANCH DEVELOPMENT AGREEMENT**

By and Between

CITY OF SAN CLEMENTE

and

CENTEX DEVELOPMENT COMPANY, L. P.

5-9274-9

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EXHIBITS

- A Map of the Forster Ranch
- B Legal Description of the Golf Course
- C Land Use Parameters
- D Legal Description of the Property
- D-1 Map of the Property
- E Storm Drain Concept Plan
- F Stipulation for Judgment
- G Draft Forster Ranch Park Site Master Plan
- H Description of Portion of Site Within Which  
Civic Center Site Can Be Located

7/112/062266-0107/003

FORSTER RANCH DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is entered into as of March 31, 1989, by and between the CITY OF SAN CLEMENTE, a municipal corporation ("City"), and CENTEX DEVELOPMENT COMPANY, L. P., a Delaware limited partnership ("CDC").

R E C I T A L S:

A. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Statute. The Development Agreement Statute authorizes City to enter into an agreement with any individual or entity having a legal or equitable interest in real property in order to establish development rights for such property.

B. Pursuant to an Option Agreement dated as of November 3, 1988, CDC has acquired the right to purchase the "Property" (defined below) from "Estrella" (defined below). The Property is part of a larger parcel of land known as the "Forster Ranch" (defined below).

C. In the late 1970's, disputes arose between Estrella and City regarding the intensity and timing of Forster Ranch development, and the nature and extent of the fees,

dedications, improvements, and other conditions required or imposed by City with respect to such development. With reference to these disputes, Estrella filed three separate lawsuits against City and various officials and employees of City. The parties settled these lawsuits, with minor exceptions, pursuant to the "Settlement/Development Agreement" (defined below).

D. The Settlement/Development Agreement permits construction of a total of 3,359 residential dwelling units on the Forster Ranch, establishes prescribed time periods for City action on certain development approval applications, proscribes certain City actions, subject to other terms and conditions of the Settlement/Development Agreement, which actions would render development of the Property "infeasible," and imposes other restrictions on City's exercise of its discretionary authority with respect to development of the Forster Ranch. The Settlement/Development Agreement also sets forth Estrella's obligations with respect to annexation fees, drainage fees and facilities, sewer connection fees, parkland dedication and in-lieu fees, certain street improvements, provision of affordable housing, and other matters pertaining to the development of the Forster Ranch.

E. On October 1, 1986, the City Council of the City of San Clemente adopted its Resolution No. 86-101 amending Specific Plans 80-3 and 80-7 for the "Development Area"

(defined below) and approving Specific Plan 83-1 for the "Planning Area" (defined below) (collectively, the "Forster Ranch Specific Plan"). An environmental impact report for the Forster Ranch Specific Plan (EIR No. 84-01) was prepared in accordance with the provisions of the California Environmental Quality Act ("CEQA") and certified by City as adequate and complete pursuant to Resolution No. 86-99 on October 1, 1986.

F. On April 20, 1988, the City Council adopted its Resolution No. 88-28 approving Tentative Tract Map 12895 and Site Plan Review 87-17, which provide for the subdivision of approximately 99 acres of the Property into 397 lots (including 389 single-family residential lots) and development thereof, subject to the conditions set forth in such resolution.

G. Estrella has filed two lawsuits against City which are now pending and are described as follows:

Estrella Properties, Ltd. v. City of San Clemente,  
Orange County Superior Court Case No. 49-04-07.

Estrella Properties, Ltd. v. City of San Clemente,  
et al., United States District Court Case  
No. CV 86-3345 IH(Kx).

In these lawsuits, Estrella seeks a ruling that "Measure B" (defined below) is either null and void or is not applicable to the Forster Ranch because the Settlement/Development Agreement precedes the adoption of Measure B. CDC has represented to City that Estrella has agreed to

assign all of its interests in these lawsuits to CDC as of the "Closing Date" (defined below).

H. CDC has further represented to City that Estrella has agreed to assign to CDC at the Closing Date all of Estrella's right, title, and interest under those certain agreements relating to the Property to which Estrella and City are parties which are referenced in Article 9 of the November 3, 1988, Option Agreement between Estrella and CDC, including without limitation the Settlement/Development Agreement and the Agreement For Construction Of Wastewater Treatment Facilities dated on or about October 3, 1984.

I. City and CDC desire to enter into this Agreement to supersede those provisions of the Settlement/Development Agreement which have been executed or which are no longer needed, to provide CDC with certain assurances with respect to its future development rights concerning the Property, to provide for the development of park and storm drain improvements, to provide City with an option to acquire a portion of the Property for use as a future civic center site, and otherwise to enhance the public health, safety, and welfare of the residents of the City of San Clemente and foster certainty and efficiency in the planning of future development of the Property.

NOW, THEREFORE, the parties agree as follows:



## ARTICLE 1

DEFINED TERMS

1.01 Definitions. The following terms used in this Agreement, unless the context otherwise requires, shall have the meanings set forth in this Section 1.01:

"Affordable Housing" shall mean equal numbers of Low, Moderate I, and Moderate II units as defined in the Housing Element of the General Plan of the City.

"CDC" shall mean Centex Development Company, L.P., a Delaware limited partnership, whose sole general partner is 3333 Development Corporation, a Nevada corporation, and any successors and assigns to the rights or obligations of Centex Development Company, L.P., under this Agreement, as provided herein.

"Closing Date" shall mean the date on which the grant deed or deeds is/are recorded conveying the Property from Estrella to CDC.

"Development Agreement Statute" shall mean Article 2.5 (commencing with Section 65864) of Chapter 4 of Division 1 of Title 7 of the California Government Code, as the same may be amended from time to time.

"District" shall mean the Orange County Flood Control District.

"Effective Date" shall mean the thirtieth day after the City Council adopts an ordinance approving this Agreement.

"Estrella" shall mean Estrella Properties, Ltd., a California limited partnership, and any successors and assigns (other than CDC and successors and assigns of CDC) to the rights of Estrella Properties, Ltd., under the Settlement/Development Agreement or with respect to the Property.

"Forster Ranch" shall mean the approximately 1,774-acre area of the City more particularly depicted in the "Map of the Forster Ranch" attached hereto as Exhibit A. The Forster Ranch consists of the "Development Area" and the "Planning Area," as shown in the Specific Plan described below.

"Golf Course" shall mean the Shorecliffs Golf Course located in the City. A legal description of the Golf Course is attached hereto as Exhibit B.

"Land Use Parameters" shall mean the development parameters governing development of the Property as described in Exhibit C to this Agreement.

"Litigation" shall mean the two lawsuits described in Recital G above.

"Measure B" shall mean that certain growth control initiative adopted by City voters in 1986 and adopted by the City Council on March 5, 1986, as Ordinance No. 922, as amended by Ordinance No. 931 adopted on September 17, 1986, by Ordinance No. 953 adopted on December 17, 1987, by Ordinance No. 991 adopted on February 1, 1989, and as may be further amended from time to time by the City Council

pursuant to Section 10 of Ordinance No. 922, provided that such amendment is not inconsistent with any of the express provisions contained in this Agreement.

"Property" shall mean the real property in the City consisting of an approximately 1,077.2 acre portion of the Forster Ranch, as more particularly described in the legal description attached hereto as Exhibit D. The Property includes the so-called "Planning Area" (1,031 acres, more or less), Lot 25 in Tract 11781, Lot 26 in Tract 11781, and 14 acres, more or less, in Lot 35 of Tract 10417, which are depicted on the "Map of the Property" attached hereto as Exhibit D-1.

"RCFPP" shall mean the Regional Circulation, Financing and Phasing Program of the City which is being processed by City as of the Effective Date of this Agreement, as the same may be amended from time to time, provided that the RCFPP, including any amendments thereto, shall not be applied to the Property to the extent it is not consistent with the express provisions contained in this Agreement.

"Settlement/Development Agreement" shall mean that certain Settlement/Development Agreement by and between Estrella and City dated August 5, 1981, as amended by that certain First Amendment to Settlement/Development Agreement dated December 14, 1983, and that certain Second Amendment to Settlement/Development Agreement by and among Estrella, City,

and Shorecliffs which was approved by the City on July 20, 1988.

"Shorecliffs" shall mean Shorecliffs Golf Course, Inc., a California corporation, and any successor and assign to the right, title, and interest of Shorecliffs Golf Course, Inc., in and to the Golf Course or any portion thereof, excepting only the owner of the Storm Drain and the owner of any easement, license, right-of-way, or similar property interest relating to use of the Golf Course for flood control and storm drain purposes.

"Specific Plan" shall mean the Forster Ranch Specific Plan prepared by Tierra Planning & Design, Inc., dated October 1985 and approved by City on October 1, 1986, including all conditions of approval (and any mitigation measures required pursuant to such conditions).

"Revised Tentative Map 12895" shall mean that certain tentative map revising Tentative Tract Map 12895, an application for which was filed with the City on or about January 17, 1989, as the same may be approved by the City Council of City after City's approval of this Agreement, including all conditions of approval (and any mitigation measures required pursuant to such conditions).

1.02 Additional Defined Terms. To the extent capitalized terms are not defined in Section 1.01, such terms shall have the meaning otherwise ascribed to them in this Agreement.

## ARTICLE 2

DEVELOPMENT OF THE PROPERTY2.01 Development of the Property.

2.01.1 CDC's Right to Develop. During the term of this Agreement, CDC shall have the vested right to develop the Property in accordance with and subject to the terms and conditions set forth or referenced in this Agreement.

2.01.2 Police Power. Except as otherwise expressly provided herein, the City shall have the right to exercise its lawful police power authority to regulate development of the Property, including without limitation the adoption or application to the Property of laws, rules, regulations, and policies in effect at the Effective Date and laws, rules, regulations, and policies adopted or approved after the Effective Date. Without CDC's prior written consent, no City ordinance, resolution, or other rule, regulation, or policy adopted after the Effective Date, whether by action of the City Council, by initiative, or otherwise, shall apply to the Property if and to the extent that the same is inconsistent with any of the express provisions of this Agreement. Nothing contained herein is intended to prevent the City from applying to the Property any subsequently adopted City ordinances, resolutions, or other rules, regulations, or policies which are not inconsistent with the express provisions of this Agreement

(including without limitation Sections 2.01.3 and 2.05 below).

2.01.3 State and Federal Laws. By entering into this Agreement, CDC does not waive the benefit or protection of any rights it may have under applicable state or federal laws or regulations that may apply to the development of the Property from time to time, including without limitation any laws applying the laws in effect at a given time in processing land use applications such as Government Code Sections 66474.2 and 66498.1 through 66498.9, except to the extent that applying such laws and regulations to the Property would be inconsistent with any of the express provisions of this Agreement. In the event that state or federal laws or regulations, enacted after the Effective Date, prevent or preclude compliance with one or more provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations.

2.02 Permitted Uses. The permitted uses of the Property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes shall be as set forth in this Agreement, including without limitation the Land Use Parameters. It is specifically understood that the City reserves the right after the Effective Date to amend the Specific Plan and other City

laws, rules, regulations, and policies applicable to the Property under procedures provided by law and such amendment or amendments shall be binding on the Property except to the extent that the same conflict with the express provisions of this Agreement.

2.03 Density and Intensity of Use. The maximum permitted density and intensity of residential development on the Property will be 1,762 market rate residential units and a number of multi-family Affordable Housing units equal to 174 plus 15% of all market rate residential units constructed on the Property. The City shall not reduce this maximum permitted density without CDC's prior written consent, which CDC may grant or withhold in its sole discretion. In addition, City shall permit commercial, industrial, and/or mixed use development on a minimum of 57 gross acres contained in the Planning Area and commercial development of Lot 25 in Tract 11781.

2.04 Zoning. The zoning of the Property throughout the term of this Agreement shall be kept consistent with the permitted uses of the Property as set forth or referenced in Sections 2.02 and 2.03, including such changes to such permitted uses as are allowed in accordance with this Agreement.

2.05 Revised Tentative Map 12895.

2.05.1 Applicable Law. The City laws, rules, regulations, and official policies governing design,

improvement, development, and construction on the land described in Revised Tentative Map 12895, and all on-site and off-site improvements and appurtenances constructed in connection therewith, shall be those City laws, rules, regulations, and official policies in force on the Effective Date of this Agreement, except as follows:

- (i) Section 2.01.3 shall prevail over this Section 2.05 to the extent of any inconsistency.
- (ii) CDC shall comply with the most recently adopted provisions of the Uniform Building, Plumbing, Mechanical, Electrical, Fire, and other uniform codes (including any generally applicable local amendments thereto) in effect at the time development actually takes place.
- (iii) The City reserves the right to require CDC to comply with all conditions previously imposed on the original tentative tract map for Tract 12895 and accompanying site plan which are applicable to the revised project; provided, however, that CDC reserves the right to argue that Condition 43, which relates to Estrella's performance of certain obligations on the Forster Ranch



off of the Property being acquired by CDC, should not be applied to CDC.

- (iv) To the extent that CDC revises the project from what already has been reviewed and approved by City, City reserves the right to impose additional or modified conditions or requirements to the extent reasonably related to such revisions.
- (v) CDC shall be required to pay all City development and building fees, charges, assessments, and taxes in existence on the Effective Date at the rates in effect at the time such fees, charges, assessments, and taxes become due, including any increases adopted or imposed after the Effective Date.
- (vi) CDC shall be required to pay City's applicable RCFPP fee and beach parking fee for Tract 12895 at the rate in effect at the time such fees become due, notwithstanding that such fees are not in existence as of the Effective Date, but otherwise CDC shall not be obligated to pay any new City fee, charge, assessment, or tax which is not in effect as of the

Effective Date as a condition to CDC's right to develop or build Tract 12895.

2.05.2 Development Allocations. The 155 development allocations issued by the City for residential construction on the tentative map for Tract 12895 approved by the City on April 20, 1988, shall not be reallocated to another developer or otherwise revoked or withdrawn from CDC prior to June 1, 1991, due to any failure of CDC to commence construction before that date.

2.06 Measure B.

2.06.1 Stipulated Judgment. CDC and City agree to enter into a stipulation for Judgment with respect to Orange County Superior Court Case No. 49-04-07 in substantially the form set forth in Exhibit F to this Agreement. Within thirty (30) days following the Closing Date, CDC and City shall present the stipulation to the Court for execution and entry of judgment. In the event the Court requires modifications to the stipulation, the parties agree to cooperate in effectuating such modification provided the same do not materially impair the rights of either party hereunder. Within fifteen (15) days after judgment is entered in Case No. 49-04-07, CDC shall dismiss with prejudice United States District Court Case No. CV 86-3345 IH (Kx). CDC and City agree to bear their respective costs and attorney's fees with respect to the Litigation. Notwithstanding the stipulated judgment and dismissal

referenced herein, in the event Measure B is repealed (by action of the City's voters) or a final, nonappealable judgment is entered by a court of competent jurisdiction (as a result of litigation pursued by a third party) declaring that Measure B is invalid or enjoining its enforcement, Measure B shall not apply to the Property. If for any reason any court determines that the Settlement/ Development Agreement precludes application of Measure B to development of the Property prior to the entry of judgment in Orange County Superior Court Case No. 49-04-07 or United States District Court Case No. CV 86-3345 IH (Kx), CDC shall waive the benefit of such ruling.

CDC agrees that from and after the Effective Date, and except as specifically set forth in the preceding paragraph, it will not participate in, finance, or otherwise promote any litigation which seeks a judicial determination that Measure B is invalid, either on its face or as applied to all or any portion of the Property, or which seeks to enjoin the enforcement of Measure B.

During the term of this Agreement, and without limiting or restricting CDC's rights under Section 2.01 above, City agrees that no amendment to Measure B and no new City ordinance, resolution, rule, regulation, or official policy shall apply to the Property if and to the extent that the same either (i) reduces the number of residential building permits that City can approve or issue in any year

below the number now authorized by Measure B (i.e., 500, as the same may be adjusted in accordance with Section 4.B of Measure B), or (ii) further reduces or restricts the exemptions set forth in Section 2 of Measure B.

In any case, if within two years from the Effective Date Measure B is repealed or declared invalid through the issuance of a final, nonappealable judgment entered by a court of competent jurisdiction, the term of this Agreement shall then change from fifteen years to ten years.

2.06.2 Changes to Measure B. If any change is made to Measure B on or after the Effective Date, other than a change allowed under the above definition of Measure B, such change will not be binding upon the Property without the prior written consent of CDC.

### ARTICLE 3

#### OBLIGATIONS OF CDC

3.01 General. CDC shall construct the public improvements, dedicate the property, and pay the fees set forth in this Article 3.

3.02 Storm Drain.

3.02.1 Construction and Maintenance. CDC shall construct a reinforced concrete enclosed box culvert storm drain (the "Storm Drain") from the downstream side of Calle Nuevo across the Golf Course to the site of the proposed District inlet facility, all as shown on the concept plan

attached hereto as Exhibit E. The Storm Drain shall be designed to meet all standards and criteria of the District for accepting the dedication of the completed facility for full ownership and maintenance purposes.

CDC has represented to City that Estrella has agreed to cause Shorecliffs to enter into an agreement with CDC prior to the Closing Date which agreement will provide, inter alia, that: (i) Shorecliffs will give a nonexclusive easement to CDC for the construction, maintenance, and repair of the Storm Drain on, under, and across the Golf Course; (ii) after CDC's completion of construction of the Storm Drain, Shorecliffs shall restore or landscape the portion of the Golf Course through which the Storm Drain has been constructed; (iii) Shorecliffs shall maintain the Storm Drain until dedication of the Storm Drain is accepted by the District or City; and (iv) Shorecliffs, at its sole expense, shall maintain the Golf Course in a reasonable manner and condition and keep the Golf Course open for public play, both for two years after the date that the Storm Drain has been completed, as provided herein.

In addition, at or prior to the Closing Date, CDC shall exercise best efforts to cause Shorecliffs to agree (i) that the easement granted to CDC pursuant to clause (i) of the preceding sentence shall include all temporary and permanent easements which may reasonably be required by the District (in accordance with the District's standard forms)

for acceptance of the Storm Drain for full ownership and maintenance purposes, that CDC may assign said easements to District, and that CDC may assign said easements to City in the event that the District fails or refuses for any reason to accept said assignment; (ii) to grant the necessary easements or rights-of-way (in accordance with the District's standard forms) to permit the use of portions of the Golf Course as a retention basin or basins in the event of storm water runoff in the Prima Deshecha Drainage Basin exceeding the carrying capacity of the Storm Drain, all without any charge to or liability of the District or City, as the case may be; (iii) if the District does not accept Shorecliffs' offer of dedication of the Storm Drain within ninety (90) days following the satisfactory completion of construction thereof, City shall have the right, but not the obligation, at any time thereafter to accept the same for full ownership and maintenance purposes, provided the following conditions are satisfied:

- a. The Storm Drain has been completed in accord with the plans and specifications described in Section 3.02.2 below;
- b. CDC agrees to indemnify, defend, and hold City harmless from all claims arising from defective design or construction by CDC of the Storm Drain other than defects caused by

City-imposed changes to the plans and specifications; and

c. CDC assigns to City its rights under any agreement it may have with the District relative to the District's obligation to accept the Storm Drain; and

(iv) to make City a third party beneficiary with the right to enforce all of Shorecliffs' obligations referenced in this Section 3.02.1, including the right, if Shorecliffs fails to maintain the Storm Drain prior to the District's or City's acceptance of Shorecliffs' offer of dedication, to declare the Golf Course property a public nuisance, to enter onto the Golf Course to perform the maintenance necessary to abate the nuisance, and to recover the costs of such maintenance in the same manner permitted for recovery of the costs of abating nuisances, including filing and enforcing a lien against the Golf Course, and with City's rights to be memorialized in a document recorded against the Golf Course and running with the land in favor of City, in a form reasonably acceptable to the City Attorney.

Notwithstanding any other provision of this Agreement to the contrary, all of City's obligations under this Agreement shall be conditioned and contingent upon CDC's obtaining such agreement from Shorecliffs. If CDC fails to timely obtain such agreement, City shall have the right to terminate this Agreement upon thirty (30) days' written

notice to CDC; provided, however, that if City notifies CDC of its intent to terminate this Agreement and CDC obtains Shorecliffs' agreement to such matters, this Agreement shall continue in force and effect. In the event this Agreement is terminated pursuant to this Section 3.02.1, neither party shall have any rights or obligations hereunder.

3.02.2 Plans and Specifications. CDC shall prepare and submit to City and the District plans and specifications for all portions of the Storm Drain within ninety (90) working days after CDC receives from the District all criteria it needs to prepare such plans and specifications. CDC will use due diligence to obtain such criteria from the District on or before March 31, 1989. CDC shall cooperate with both City staff and the District and their consultants to provide full information regarding the design and construction of the Storm Drain, and shall exercise reasonable diligence in processing the plans and specifications. City shall cooperate and consult with CDC regarding the processing and approval of the plans and specifications, subject to its rights to independently evaluate engineering design and feasibility.

City shall review and comment upon the proposed plans and specifications and return the same to CDC. Thereafter, CDC shall revise the plans and specifications to conform to the reasonable requirements of City and the District and then resubmit the plans and specifications to



City and the District within thirty (30) days of receipt of comments from each agency. If CDC makes any material change in the plans and specifications after final approval by City or the District, CDC will resubmit the amended plans and specifications in the same manner as outlined above.

City shall review all submissions and re-submissions of the plans and specifications in an expedited manner, and its approval of the same will not be unreasonably withheld or delayed.

To the extent required by law, CDC shall also submit the necessary applications for permits to construct the Storm Drain to the United States Army Corps of Engineers, the California Department of Fish & Game, the California Coastal Commission, and any other governmental agencies with jurisdiction over the project. Such applications shall be filed as soon as practicable after the Closing Date. CDC shall use due diligence in processing such permit applications. City shall provide reasonable assistance to CDC in obtaining such permit approvals, provided CDC shall advance or promptly reimburse City for any out-of-pocket costs (excluding staff time) City incurs in providing such assistance.

3.02.3 Construction. CDC shall commence construction of the Storm Drain as soon as weather permits after the plans and specifications are approved and all required governmental permits are issued, and thereafter CDC

shall diligently prosecute such construction to completion. The phrase "as weather permits" means that construction shall commence within thirty (30) days after the plans and specifications are approved and all required governmental permits are issued, provided that CDC shall not be required to commence construction earlier than April 1 nor later than July 1, and if construction cannot be commenced prior to July 1, the commencement date shall be no later than the following April 1. CDC shall complete construction of the Storm Drain within six (6) months following commencement, subject to Section 6.02.2 herein. CDC shall construct the Storm Drain in a manner that minimizes interference with the on-going operation of the Golf Course to the extent reasonably practicable.

3.02.4 Funding. Except as provided below, CDC shall have the sole obligation to fund the planning, design, engineering, construction, supervision, inspection, and all other costs associated with the design and construction of the Storm Drain.

(a) Letters of credit. As security for its obligation to plan, design, engineer, construct, supervise, and inspect the Storm Drain, CDC, no later than the Closing Date, shall deliver to City an irrevocable direct-pay letter of credit in favor of City, in a form acceptable to the City Attorney, and drawn on a financial institution acceptable to City, in the amount of \$1,500,000. Upon receipt of such

letter of credit, City shall return to Estrella its \$1,500,000 letter of credit which was submitted to City pursuant to Section 3.c.(i) of the Second Amendment to the Settlement/ Development Agreement. Further, prior to CDC obtaining any building permit regarding the Property, it shall post a new irrevocable direct-pay letter of credit ("Box Culvert Letter of Credit") in favor of City, in a form acceptable to the City Attorney, and issued by a financial institution acceptable to City, in an amount equal to the difference between the "City Funds" (defined below) and the estimated cost of the box culvert as reasonably determined by an engineering firm engaged by CDC and approved by City ("Estimated Cost").

Upon delivery to City of the Box Culvert Letter of Credit, City shall immediately return to CDC its \$1,500,000 letter of credit.

The \$1,500,000 Letter of Credit and the Box Culvert Letter of Credit shall provide for direct payment to the City upon the receipt by the issuing bank of a written statement from the City Manager or designee that CDC has defaulted under this Agreement by failing to timely commence, proceed with, or complete construction of the Storm Drain pursuant to this Agreement and that the amount of the City's demand on the letter of credit has been determined by the City to be the amount necessary to complete the work. City will deliver to CDC a copy of any such written notice to the

issuing bank five working days prior to presenting such notice to the issuing bank. Upon written request by CDC to City (not more frequently than monthly) accompanied by such documentation as may be reasonably required by the City Engineer which proves that portions of the Storm Drain construction work have been satisfactorily completed and subcontractors have been paid therefor, City shall permit a reduction of the Box Culvert Letter of Credit or, at CDC's option, the substitution of a smaller letter of credit (otherwise in the same form), provided that the remaining balance secured by the reduced or substituted letter of credit shall be not less than 125% of the then-estimated cost to complete the project less the then-unexpended balance of the "City Funds" referenced in paragraph (b) below. In the event the funds obtained by City from either letter of credit (less the amount of the City Funds) are insufficient to enable City to complete construction of the Storm Drain project as provided herein, as reasonably determined by City, CDC shall pay the additional amount required by City for such purpose within ten (10) days after City provides written notice to CDC with documentation itemizing the need for the additional funds. Within five (5) days after construction is completed and accepted and the period for filing any lien claims with respect to the Storm Drain construction has expired (or, if any claims are filed, within five (5) days after CDC posts a bond with the District or City, as

applicable, in an amount sufficient to satisfy such claims), City shall promptly refund to CDC any funds advanced or paid by CDC for the Storm Drain which are not needed for this purpose and/or release or return the letter of credit to the extent that there is any balance thereon.

(b) Construction funding. Simultaneously with the delivery of the Box Culvert Letter of Credit by CDC to City, City shall contribute to the cost of constructing the Storm Drain by depositing into a mutually agreeable escrow account the sum of \$887,830.34 (the amount previously collected by the City from storm drain fees and deposited into the Master Plan Drainage Account for the Prima Deshecha Canada, including interest thereon through July 1, 1987, which amount was previously committed to the Storm Drain project under Section 3.c.(ii) of the Second Amendment to the Settlement/Development Agreement), plus all interest accumulated on such amount from July 1, 1987, to the date such funds are deposited into the escrow account (the "City Funds"). The escrow account shall be administered pursuant to escrow instructions letter which shall incorporate the following terms and conditions and otherwise be reasonably acceptable as to form by both parties.

The terms and conditions of the escrow shall be as follows:

- (i) CDC shall be responsible for paying all fees and expenses of the escrow agent.

- (ii) CDC shall be entitled to all interest generated on the funds in the escrow account from the time of deposit until the funds in the account have been disbursed.
- (iii) Periodically during the course of constructing the Storm Drain, CDC shall be entitled to submit written statements to City and the escrow agent requesting progress payments upon the satisfactory completion of portions of the work. CDC will not submit more than one statement in any thirty day period. Each such statement shall be accompanied by a certified statement signed by a mutually agreed upon consulting engineer retained by CDC to verify the extent of the work performed and the compliance of the work with the approved plans. City shall request the District to verify whether the certified statement submitted by CDC's consulting engineer is acceptable and, if it is, shall so notify the escrow agent. If the District declines to assume this responsibility, the City Engineer shall do so. The approval of

the City Engineer shall not be unreasonably withheld or delayed. If the City Engineer is responsible for reviewing such statements, approvals or disapprovals shall be given within fifteen (15) working days after delivery of each certified statement from CDC's consulting engineer, together with whatever supporting information may be reasonably requested by the City Engineer, and if the written request for approval contains a bold-face warning on the first page that if no reply is received within fifteen (15) working days after approval, approval will be deemed to have been given, and if no response from the City Engineer is received by CDC within such time, approval will be deemed to have been given. Upon approval either by the District or City, the City Engineer shall promptly so notify the escrow agent. Any disapproval of the City Engineer shall be in writing and shall state the reasons therefor in detail. No approval shall be deemed a waiver by the City (or the District) of

any claims or rights against CDC if it is later discovered that the work has not in fact been completed according to the approved plans or in a workmanlike manner.

- (iv) Upon receipt of notice from the District or the City Engineer, as applicable, that the work described in the request for payment has been satisfactorily completed, the escrow agent shall make a progress payment to CDC from the City Funds in an amount equal to a percentage of the estimated cost of that portion of the work which has been certified and approved as substantially complete less a retention of 10%. The percentage will be determined by dividing the amount of the City Funds by the amount of Estimated Cost, as the Estimated Cost may be adjusted from time to time. The escrow agent shall be instructed to pay to CDC the balance of the funds in the escrow account, including the 10% retention, five (5) days after all three of the following conditions have been satisfied:
- (a) a notice of completion has been



recorded for the entire Storm Drain, (b) the District (or the City, if applicable) has certified in writing that the Storm Drain has been satisfactorily completed, and (c) the time for filing lien claims or stop notices has expired (or a sufficient sum is withheld or a bond is posted by CDC with the District or City, as applicable, to satisfy any claims that are pending).

3.02.5 Waiver of Fees. City shall waive all fees and charges which would otherwise be imposed on CDC in connection with its construction of the Storm Drain, but CDC shall reimburse City for all out-of-pocket costs incurred by City in reviewing plans and inspecting the work performed by CDC.

3.02.6 Master Plan Facilities Reimbursement Agreement. CDC shall cause Estrella to assign to CDC at the Closing Date all of Estrella's right, title, and interest under the Master Plan Facilities Reimbursement Agreement between Estrella and City dated December 21, 1983, and the provisions of paragraph 1 of said agreement (which relate in part to the Storm Drain) shall be terminated at such time.

3.03 Traffic Improvements. CDC shall dedicate land, construct improvements, and/or pay fees as required to comply with the RCFPP, and shall otherwise be bound by the same.

CDC shall have the right to construct the traffic improvements located on the Property which are subject to the RCFPP, subject to City's reasonable approval which shall not be unreasonably withheld. If City desires to have any of such improvements constructed prior to the time that CDC is prepared to proceed, City shall have the right to do so.

3.04 Affordable Housing. CDC shall construct multi-family Affordable Housing units in an amount equal to the sum of 174 plus 15% times the number of market rate residential units constructed on the Property. The City will not require a mix of rental units and for-sale units on the same Affordable Housing site.

3.05 Park Improvements. As of the Effective Date, City is processing a Master Plan for the approximately 22-acre City park site which is located adjacent to the elementary school and proposed intermediate school site in the "Development Area" of the Forster Ranch (as defined in the Specific Plan) (hereinafter the "Forster Ranch Park Site"). A copy of the draft Master Plan as recommended for approval by the City's Parks and Recreation Commission is attached hereto as Exhibit G. City shall exercise reasonable diligence to complete and approve the Forster Ranch Park Site Master Plan as soon as possible after the Effective Date.

CDC agrees to contribute the sum of Three Million Dollars (\$3,000,000), calculated as of the Effective Date of this Agreement and to be increased as provided hereinbelow,

to the cost of planning, designing, and constructing improvements to the Forster Ranch Park Site in accordance with the City's approved Master Plan, as the same may be revised by City (after consulting with CDC) from time to time consistent with this Agreement. If the Capistrano Unified School District ("CUSD") acquires the approximately 14-acre parcel adjacent to the elementary school site which is a portion of Lot 35 of Tract 10417 (the "Intermediate School Site"), City may elect to require that a portion of CDC's contribution be expended on said property for the construction of the "Baseball Park" (as defined below), as shown on Exhibit G hereto; otherwise, the Baseball Park shall be constructed on the Forster Ranch Park Site.

The unexpended portion of CDC's \$3 million contribution shall be increased on each January 1 after the Effective Date during the term of this Agreement until the funds are actually expended or paid to the City in accordance with increases during the preceding year in the California Construction Cost Index published by the California Department of Transportation ("CalTrans") (or, in the event such index or publication is discontinued, another comparable index to be agreed upon by the parties); provided, however, that in no event shall the inflation factor for any calendar year commencing in 1990 and continuing through the term of this Agreement exceed the percentage derived by dividing the number of building permits for market-rate residential units

issued for the Property in the preceding year by 1762 (the maximum number of market-rate residential units permitted hereunder).

The plans and specifications for each improvement to be funded by CDC shall be prepared by a licensed and qualified landscape (or other qualified) architect selected and retained by CDC after consultation with the City and subject to City's reasonable approval with regard to (i) the identity of the architect, (ii) the scope of work, (iii) the schedule of performance, and (iv) the contract price. The architect shall be required to coordinate the preparation of the plans and specifications with City staff at all times to assure compliance with all City standards.

CDC shall construct or cause to be constructed each of the park improvements through a licensed and responsible contractor selected and retained by CDC after consultation with City and subject to City's reasonable approval with regard to (i) the identity of the contractor and any subcontractors, (ii) the plans and specifications, (iii) the schedule of performance, (iv) the contract price, and (v) all change orders above a cumulative amount in excess of ten percent (10%) of the original approved contract price.

It is understood and agreed that CDC may enter into contracts with contractors performing other work for CDC beyond the scope of this Section 3.05. In such event, CDC shall require each proposed contractor to separately bid the

portion of its work within the scope of this Section 3.05 from the portion of its work outside the scope of this Section 3.05, and City shall have the right to approve a fair and reasonable allocation of costs. In all circumstances, CDC agrees to act reasonably to have any work performed for CDC within the scope of this Section 3.05 completed at a reasonable cost, subject to the parties' mutual objective of having such work performed by contractors with a reputation for high quality, experience, and reliability. In no event shall CDC receive credit toward its financial contribution under this Section 3.05 for any management or developer's fee, overhead, staff time, or profit, by whatever name called.

During the course of CDC's expenditure of funds eligible to be credited toward its financial contribution under this Section 3.05, but not more frequently than quarterly, CDC shall submit to the City Manager (or the City Manager's designee) an itemized statement, with such supporting information as the City Manager or his/her designee may reasonably require, documenting all of CDC's costs eligible to be credited under this Section 3.05.

In lieu of any other obligations hereunder, CDC shall have the option to pay to City the funds required to be expended by CDC on or before the dates such expenditures are otherwise required to be made and, in such event, City agrees to deposit said funds in an interest-bearing special fund,

with interest earned to be credited to the fund and to exercise reasonable diligence to expend such funds solely for the planning, design, and construction of improvements to the Forster Ranch Park Site (and, if the Baseball Park is constructed on the adjacent 14-acre CUSD site, that property) in accordance with the approved Master Plan.

CDC shall make its financial contribution to the Forster Ranch Park Site park improvements at the following times:

- (i) Baseball Park and Phase 1 Park Improvements. CDC shall commence construction of the Baseball Park and "Phase 1 Park Improvements" (as defined below) no later than six (6) months after CDC commences grading in the area included in the first final map under Revised Tentative Map 12895, provided that if CUSD has not acquired the Intermediate School Site by that time, or CUSD has not approved the construction of the Baseball Park on the Intermediate School Site, or CUSD and City have not entered into a joint use agreement for the Baseball Park, City may elect either to have CDC defer construction of the Baseball Park until such conditions are satisfied or to amend the Forster Ranch

