

## PREDEVELOPMENT LOAN AGREEMENT

THIS PREDEVELOPMENT LOAN AGREEMENT (“**Agreement**”) is entered into effective as of \_\_\_\_\_, 2023 (“**Effective Date**”), by and between the CITY OF CAPITOLA, a California municipal corporation (“**City**”), and MP Rail Trail Associates, L.P., a California limited partnership (“**Borrower**”). The City and the Borrower are referred to herein individually as a “**Party**” and collectively as the “**Parties**.”

### RECITALS

A. Borrower is the owner of approximately 1.97 acres of real property located at 1098 38<sup>th</sup> Avenue, Capitola, California, more particularly described in the legal description attached hereto as Exhibit A and identified as Assessor Parcel Number 034-172-01 (the “**Property**”).

B. Borrower desires to construct and operate a multi-family residential housing development on the Property affordable to households earning 30% to 80% of Area Median Income (“**AMI**”) for Santa Cruz County (“**Project**”). The City desires that the Property be developed to create affordable housing to help provide units affordable to low, very-low and extremely-low income households, consistent with the City’s adopted Housing Element.

C. The Borrower will incur several predevelopment expenses (“**Predevelopment Costs**”) in connection with assessing the Project’s feasibility, designing the Project, and applying for governmental approvals necessary to construct the Project.

D. Borrower has requested funding from the City to pay for a portion of the Predevelopment Costs, and upon satisfaction of the conditions precedent set forth in this Agreement and evidenced by a Predevelopment Note and Predevelopment Deed of Trust (as each are defined below), the City has agreed to use funds in its Low and Moderate Income Housing Asset Fund (“**LMIHAF**”) established pursuant to Health and Safety Code § 34176 (d), and provide a loan to Borrower with a total principal amount not to exceed TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$250,000.00) (the “**Predevelopment Loan**”).

E. Until such time as the Borrower has submitted formal applications to City for all required land use approvals to develop and construct the Project on the Property (e.g. design review, density bonus, etc.) (hereinafter, the “**Land Use Entitlements**”), and received City approval for such Land Use Entitlements and associated environmental review as may be required by the California Environmental Quality Act (“**CEQA**”) and the National Environmental Policy Act (“**NEPA**”) (collectively, the “**Project Approvals**”), which Project Approvals may be granted or denied in the City’s discretion, the City will not be committed to approving the Project.

F. City and Borrower acknowledge that this Agreement addresses funding to pay for predevelopment due diligence, surveys, geotechnical investigation, civil, architectural and design services, and other predevelopment work, and is one of the types of early-stage agreements often entered into before a lead agency decides on the specifics of a project. The Parties further

acknowledge that: (1) considering all the surrounding circumstances, the preliminary nature of this Agreement does not commit City as a practical matter to approve the Land Use Entitlements for the proposed Project; and (2) the specific parameters of the proposed Project are unknown at this stage, and therefore, it is premature to conduct a meaningful analysis and environmental review of the proposed Project under CEQA and/or NEPA, if applicable. The Parties agree that once Borrower submits formal applications to City for the necessary Land Use Entitlements, the environmental review required under CEQA, and NEPA if applicable, will be performed.

**NOW, THEREFORE**, in consideration of the mutual covenants contained herein and good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

## **ARTICLE 1 RECITALS; DEFINITIONS; TERM AND TERMINATION.**

1.1 Incorporation of Recitals. The Parties acknowledge the truth of the foregoing recitals which are hereby incorporated into this Agreement by this reference.

1.2 Definitions. The following terms shall have the meanings set forth below or as indicated in the Sections referenced below whenever used in this Agreement and the Exhibits attached hereto:

“**Agreement**” shall mean this Predevelopment Loan Agreement.

“**AMI**” is defined in Recital B.

“**Applicable Laws**” is defined in Section 10.1.

“**Borrower**” shall mean **MP Rail Trail Associates, L.P., a California limited partnership**.

“**CEQA**” is defined in Recital E.

“**City**” shall mean the City of Capitola, a California municipal corporation.

“**Claims**” is defined in Section 7.2.

“**Effective Date**” shall mean the date set forth in the introductory paragraph of this Agreement.

“**Environmental Laws**” is defined in Section 7.4.

“**Hazardous Materials**” is defined in Section 7.3.

“**Indemnitees**” is defined in Section 7.2.

“**Land Use Entitlements**” is defined in Recital E.

“**LMIHAF**” is defined in Recital D.

“**NEPA**” is defined in Recital E.

“**Official Records**” is defined in Section 3.2.

“**Party**” or “**Parties**” shall mean, respectively, City and Borrower individually or collectively.

“**Predevelopment Costs**” is defined in Recital C and more particularly described in Exhibit B.

“**Predevelopment Deed of Trust**” is defined in Section 3.2 and substantially in the form attached as Exhibit D.

“**Predevelopment Loan**” is defined in Recital D.

“**Predevelopment Loan Documents**” is defined in Section 4.3.2.

“**Predevelopment Loan Proceeds**” is defined in Section 2.1.1.

“**Predevelopment Note**” is defined in Section 3.1 and substantially in the form attached as Exhibit C.

“**Prevailing Wage Laws**” is defined in Section 13.2.

“**Project**” is defined in Recital B.

“**Project Approval Date**” is defined in Section 1.3.1.

“**Project Approvals**” is defined in Recital E.

“**Property**” is defined in Recital A and more particularly described in Exhibit A.

“**Regulatory Agreement**” is defined in Section 4.5.1.

“**Term**” is defined in Section 1.3.1.

“**Transfer**” is defined in Section 5.2.

### 1.3 Term and Termination; Predevelopment Loan Forgiveness.

1.3.1 Term. The term of this Agreement shall begin on the Effective Date and shall expire two (2) years thereafter (“**Term**”), unless extended as provided herein. If, prior to expiration of the Term, the City considers and approves the Project Approvals, then as the date of approval of the Project Approvals (“**Project Approval Date**”), the Term shall automatically be amended and thereafter shall expire two (2) years after the Project Approval Date. In addition to the aforementioned provision providing for an automatic extension of the Term, the Term of this Agreement may be extended either prior to or after the Project Approval Date for up to two additional periods of six (6) months each upon presentation of a written request from the Borrower outlining its efforts to secure the Project Approvals and/or obtain construction and permanent financing to develop and construct the Project, together with a schedule of tasks to be accomplished during the additional period. The City Manager may approve, conditionally approve, or deny the extension(s) request in his or her sole discretion, and any decision to approve or conditionally approve an extension of the Term shall only be effective upon the execution of an amendment to this Agreement. Notwithstanding the foregoing, upon closing of construction financing for the Project, the City and Borrower agree to amend the Predevelopment Loan to: (i) extend the Term to fifty-five (55) years from the date of issuance of a certificate of occupancy for the Project; (ii) modify the Predevelopment Loan repayment terms to include annual residual receipt payments that shall be due and payable on a pro-rata residual receipts basis in accordance with an agreed upon formula, to be set forth in the amended Predevelopment Note; and (iii) if applicable, combine the Predevelopment Loan amount already disbursed with any new funding approved by the City for Project construction.

1.3.2 Termination. City shall have the right to terminate this Agreement during the Term upon Borrower's default under this Agreement and failure to cure within the applicable cure period specified in Section 6.1. If City terminates this Agreement during the Term pursuant to this Section, then the principal balance on the Predevelopment Loan and accrued interest thereon shall be immediately due and payable.

## **ARTICLE 2 PREDEVELOPMENT LOAN PROVISIONS.**

2.1 Predevelopment Loan. Using funds in the LMIHAF, City agrees to loan Borrower, and Borrower agrees to borrow from and repay to the City, the Predevelopment Loan in the maximum principal amount of TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$250,000.00) according to the terms and conditions set forth in this Agreement:

2.1.1 Predevelopment Loan Proceeds; Interest. The proceeds of the Predevelopment Loan (the "**Predevelopment Loan Proceeds**") shall not be disbursed unless and until Borrower has supplied the City with such documentation as the City deems necessary to substantiate the payment of the Predevelopment Loan for eligible uses, as set forth in Section 2.1.2, below. From the date of initial disbursement of the Predevelopment Loan Proceeds to Borrower, the unpaid principal balance on the Predevelopment Loan shall accrue simple interest at the rate of three percent (3%) per annum. Principal and interest may be prepaid in whole or in part at any time, and from time to time, without notice or penalty.

2.1.2 Funding Disbursement. After Borrower's satisfaction of the conditions set forth in Section 4.3 below, the Predevelopment Loan shall be funded in accordance with the following requirements:

(a) Following satisfaction of the conditions set forth herein, the City shall disburse the Predevelopment Loan Proceeds to Borrower up to the amount of the Predevelopment Loan, for the sole purpose of paying for those Predevelopment Costs set forth in Exhibit B.

(b) The Predevelopment Loan Proceeds will be disbursed to Borrower only upon a request for disbursement by Borrower and upon the City's approval of invoices, contracts and other documentation satisfactory to City delineating Predevelopment Costs satisfactorily performed. Borrower shall submit to the City a written request for disbursement of a specific dollar amount. The City shall review such request and the supporting documentation and, within ten (10) business days from receipt thereof, shall either (i) approve such request and make the requested disbursement, or (ii) disapprove all or a portion of such request, and notify Borrower in writing of the reason for such disapproval, in which case Borrower shall modify its request to correct the stated deficiency and repeat the process outlined above.

(c) Borrower's request(s) for disbursement of Predevelopment Loan Proceeds under this Agreement and actual disbursement by the City shall be completed no later than the expiration of the Term or termination of this Agreement.

(d) Nothing herein shall be deemed to require disbursement of the full amount of the Predevelopment Loan if the requirements above are not satisfied.

### **ARTICLE 3 PREDEVELOPMENT LOAN SECURITY.**

3.1 Predevelopment Note. The Predevelopment Loan shall be evidenced by a promissory note (the "**Predevelopment Note**") executed by Borrower, in favor of the City and substantially in the form attached as Exhibit C. Borrower shall execute and deliver the Predevelopment Note to City concurrently with the execution of this Agreement and the Predevelopment Deed of Trust. The Predevelopment Note shall evidence the repayment obligations by Borrower of the Predevelopment Loan.

Borrower shall have the right to prepay the Predevelopment Note at any time and from time to time, without penalty or premium, provided that any prepayment of principal must be accompanied by interest accrued but unpaid to the date of prepayment. Prepayments shall be applied first to accrued but unpaid interest and then to principal.

Unless City agrees otherwise in writing, the entire unpaid principal balance and all interest and other sums accrued under the Predevelopment Note shall be due and payable upon expiration of the Term of this Agreement or the Transfer (as defined in Section 5.2) absent the prior written consent of City of all or any part of or interest in the Property except for a Transfer permitted under Section 5.3 of this Agreement.

3.2 Predevelopment Deed of Trust. The Predevelopment Note shall be secured by a short form deed of trust (the "**Predevelopment Deed of Trust**") executed by Borrower, in the form attached to this Agreement as Exhibit D. Borrower shall execute, acknowledge, and deliver the Predevelopment Deed of Trust to City concurrently with the execution of this Agreement and the Predevelopment Note. Upon delivery by Borrower of the Predevelopment Deed of Trust to City, City may thereafter record the Predevelopment Deed of Trust against the Property in the Official Records of the Office of the Santa Cruz County Recorder ("**Official Records**").

3.3 Non-Recourse Provisions. Except as expressly provided in this Section 3.3, Borrower shall have no personal liability for payment of the principal of, or interest on the Predevelopment Note, and the sole recourse of City with respect to the payment of the principal of, and interest on the Predevelopment Note shall be to the Property and any improvements thereon and any other collateral held by City as security for the Predevelopment Note; provided however, nothing contained in the foregoing limitation of liability shall: (i) limit or impair the enforcement against all such security for the Predevelopment Note of all the rights and remedies of the City thereunder; (ii) be deemed in any way to impair the right of the City to assert the unpaid principal amount of the Predevelopment Note as demand for money within the meaning and intent of Section 431.70 of the California Code of Civil Procedure or any successor provision thereto; or (iii) be deemed in any way to limit the rights of the City to obtain specific

performance by Borrower of its covenants under this Agreement, other than the covenants to pay the City principal and interest due under the Predevelopment Note.

The foregoing limitation of liability is intended to apply only to the obligation for the repayment of the principal of, and payment of interest on the Predevelopment Note; nothing contained herein is intended to relieve the Borrower of its obligation to indemnify the City under this Agreement, or liability for: (i) fraud or willful misrepresentation by the Borrower; (ii) the failure to pay taxes, assessments or other charges which may create liens on the Property that are payable or applicable prior to any foreclosure under the Predevelopment Deed of Trust (to the full extent of such taxes, assessments or other charges); (iii) the fair market value of any personal property or fixtures removed or disposed of by the Borrower other than in accordance with the Predevelopment Deed of Trust; and/or (iv) the misappropriation of any proceeds by the Borrower under any insurance policies or awards resulting from condemnation or the exercise of the power of eminent domain or by reason of damage, loss or destruction to any portion of the Property and any improvement thereon.

#### **ARTICLE 4 USE AND DISBURSEMENT OF PREDEVELOPMENT LOAN PROCEEDS.**

4.1 Use Requirements. The Predevelopment Loan Proceeds shall be used solely and exclusively for Predevelopment Costs for the Project as set forth in Exhibit B and such other costs related to the Project as the City may approve in writing in its sole discretion. As more particularly described in Exhibit B, Borrower's predevelopment activities shall include preparation of geotechnical reports, architectural and civil engineering plans, and surveys necessary to secure the Project Approvals from City as are required to develop the Project and apply for construction and permanent financing for the Project.

4.2 Change in Predevelopment Costs. Borrower shall notify the City in a timely manner of any changes to the Predevelopment Costs to be performed under this Agreement. A written authorization by the City Manager must be obtained to make any changes to the Predevelopment Costs to be reimbursed under this Agreement.

4.3 Conditions Precedent to Disbursement of Predevelopment Loan Proceeds. City's obligation to disburse the Predevelopment Loan Proceeds is conditioned upon satisfaction of all the following conditions as determined by City in its sole discretion:

4.3.1 Borrower's representations and warranties set forth in Section 4.5 below remain true and correct in all material respects;

4.3.2 Borrower's execution and delivery to the City of this Agreement, the Predevelopment Note and Predevelopment Deed of Trust (the "**Predevelopment Loan Documents**"), and recording of the Predevelopment Deed of Trust against the Property in the Official Records;

4.3.3 Borrower's delivery to the City for its review and approval of a title report showing fee title to the Property vested in Borrower and copies of all exceptions to title;

4.3.4 Borrower's delivery to the City of evidence of insurance coverage in the form and in such amounts as set forth in Article 8;

4.3.5 Borrower's submission to City of complete applications for the Land Use Entitlements and payment of all application fees required in connection therewith; and

4.3.6 Borrower's delivery to the City of copies of Borrower's articles of incorporation and bylaws.

4.4 No Obligation to Disburse Predevelopment Loan Proceeds Upon Default. Notwithstanding any other provision of this Agreement, the City shall have no obligation to disburse any portion of the Predevelopment Loan Proceeds to Borrower (except for expenses previously approved by City and expended by Borrower) following:

4.4.1 the failure of any of Borrower's representations and warranties set forth in Section 4.5 of this Agreement to be true and correct in all material respects;

4.4.2 the conditions precedent to disbursement of the Predevelopment Loan Proceeds set forth in Section 4.3 have not been satisfied on or before the expiration of the Term, unless an extension thereof is approved by the City Manager in writing pursuant to Section 1.3.1;

4.4.3 expiration or termination of this Agreement in accordance with its terms;

4.4.4 termination of this Agreement by mutual agreement of the Parties; or

4.4.5 the occurrence of an Event of Default under this Agreement or the Predevelopment Loan Documents which remains uncured beyond any applicable cure period.

4.5 Borrower's Representations and Warranties. Borrower represents and warrants to the City that:

4.5.1 Borrower covenants and agrees that if the Project Approvals are approved by City and the Project is constructed by Borrower, for a term of fifty-five (55) years from the date of issuance of a certificate of occupancy for the Project<sup>1</sup>, 5 of the multi-family residential housing units will be made available at rents affordable to and occupied by households earning 30% to 60% of AMI for Santa Cruz County and shall otherwise adhere to the requirements of California Health and Safety Code § 343176.1 (a)(3), and the balance of the multi-family residential housing units will be made available at rents affordable to and occupied by households earning no more than 80% of AMI for Santa Cruz County pursuant to the terms of an Affordable Housing Agreement and Declaration of Restrictive Covenants ("**Regulatory Agreement**"), in a form prepared by and subject to such terms and conditions desired by and/or agreed to by the City Manager and City Attorney and Borrower and to be recorded against the Property in the Official Records in connection with the issuance of a building permit by City for the construction of the Project upon the Property. Furthermore, in the event City provides additional funding in

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<sup>1</sup> The date of issuance of a certificate of occupancy for the Project will be memorialized through the execution and recording in the Official Records of a Certificate of Completion, the form of which will be attached as an exhibit to the Regulatory Agreement.

connection with construction of the Project as mentioned in Section 1.3.1 above, the terms of the Regulatory Agreement shall be modified to address the affordability level of the housing units restricted to rents affordable to households earning no more than 80% of AMI in a manner consistent with requirements applicable to the source of the City's additional funding.

4.5.2 Borrower possesses fee title to the Property and, to the best of Borrower's knowledge after reasonable inquiry, the Property is not subject to any covenant, condition, restriction, or agreement that would hinder or prevent Borrower's performance of its obligations under this Agreement or the Predevelopment Loan Documents. If at any time the foregoing statements become untrue, the City shall have the right to terminate this Agreement upon written notice to Borrower.

4.5.3 All approvals have been obtained in connection with Borrower's execution of this Agreement and the Predevelopment Loan Documents, and all related agreements and documents, to the effect that no breach of or acceleration of performance under any agreement or document to which Borrower is a party will result from such execution;

4.5.4 Predevelopment Loan Proceeds advanced by the City pursuant to this Agreement are advanced wholly for the benefit of Borrower;

4.5.5 Borrower is a duly organized limited partnership, validly existing and in good standing under the laws of the State of California. Borrower has all requisite power and authority to develop, own and operate the proposed Project, to carry on its business as now conducted, and to execute, deliver and perform its obligations under this Agreement and the Predevelopment Loan Documents;

4.5.6 The execution, delivery and performance of this Agreement and the Predevelopment Loan Documents have been duly authorized by Borrower, and this Agreement and the Predevelopment Loan Documents, when duly executed and delivered, will constitute the valid and binding obligations of Borrower enforceable in accordance with their respective terms. Borrower's execution of this Agreement and the Predevelopment Loan Documents and performance thereunder will not result in a breach of or constitute a default under any agreement, indenture or other instrument to which Borrower is a party or by which Borrower may be bound. The persons executing this Agreement and the Predevelopment Loan Documents on behalf of Borrower have been duly authorized to do so;

4.5.7 There are no pending or, to the best of Borrower's knowledge, threatened actions or proceedings before any court or administrative agency which may adversely affect the financial condition or operation of Borrower or any of its members or managers or Borrower's ability to carry out the obligations of Borrower under this Agreement. Borrower is not the subject of any action under federal or state Bankruptcy Law;

4.5.8 Borrower covenants and agrees to use said Predevelopment Loan Proceeds solely to pay for the Predevelopment Costs;

4.5.9 Borrower covenants and agrees to promptly provide all information required and requested by City to process, evaluate, and analyze the Land Use Entitlements and



associated CEQA and NEPA review necessary for the City to consider and take action on the Project Approvals; and

4.5.10 Borrower is responsible for all obligations created by this Agreement and the Predevelopment Loan Documents, including, without limitation, the repayment of all principal and interest, if any, which may become due and payable under this Agreement, the Predevelopment Loan Documents, and any other instruments provided for herein. No creditor or other person shall have any right or action against City on account of any debts, obligations, or liabilities of Borrower.

## **ARTICLE 5 LIMITATIONS ON CHANGE IN OWNERSHIP, MANAGEMENT AND CONTROL OF BORROWER**

5.1 Change Pursuant to this Agreement. Borrower has represented that it possess the necessary expertise, skill and ability to carry out the development of the Project on the Property pursuant to this Agreement. The qualifications, experience, financial capacity and expertise of Borrower is of particular concern to the City. It is because of these qualifications, experience, financial capacity and expertise that the City has entered into this Agreement with Borrower. No voluntary or involuntary successor, assignee or transferee of Borrower shall acquire any rights or powers under this Agreement, except as expressly provided herein.

5.2 Prohibition on Transfer. Prior to the expiration of the Term of this Agreement, Borrower shall not, except as expressly permitted by this Agreement, directly or indirectly, voluntarily, involuntarily or by operation of law make or attempt any total or partial sale, transfer, conveyance, assignment or lease (collectively, “**Transfer**”) of the whole or any part of the Property or this Agreement, without the prior written approval of City. Any such attempt to assign this Agreement without the City’s consent shall be null and void and shall confer no rights or privileges upon the purported assignee. In addition to the foregoing, prior to the expiration of the Term of this Agreement, except as expressly permitted by this Agreement, Borrower shall not undergo any significant change of ownership without the prior written approval of City. For purposes of this Agreement, a “significant change of ownership” shall mean a transfer of the beneficial interest of more than forty-nine percent (49%) in aggregate of the present ownership and /or control of Borrower, taking all transfers into account on a cumulative basis.

5.3 Permitted Transfers. Notwithstanding any contrary provision hereof, the prohibitions set forth in this Article shall not be deemed to prevent: (i) the granting of utility easements or permits to facilitate development of the Property; (ii) the dedication of any property required pursuant to the Project Approvals; (iii) the lease of individual units to tenants for occupancy as their principal residence in accordance with the Regulatory Agreement; (iv) assignments creating security interests for the purpose of financing the acquisition, construction or permanent financing of the Project or the Property, or Transfers directly resulting from the foreclosure of, or granting of a deed in lieu of foreclosure of, such a security interest; or (v) the

admission of limited partners to the Borrower entity in connection with tax credit financing, and any subsequent transfer of such limited partnership interests, including any transfer of stock or equity in the limited partners that does not change management or operational control of the Project.

5.4 Requirements for Proposed Transfers. The City may, in the exercise of its sole discretion, consent to a proposed Transfer of this Agreement, the Property or portion thereof if all of the following requirements are met (provided however, the requirements of this Section 5.4 shall not apply to Transfers described in Section 5.3):

5.4.1 The proposed transferee demonstrates to the City's satisfaction that it has the qualifications, experience and financial resources necessary and adequate as may be reasonably determined by the City to competently develop the Project and to otherwise fulfill the obligations undertaken by the Borrower under this Agreement.

5.4.2 The Borrower and the proposed transferee shall submit for City review and approval all instruments and other legal documents proposed to effect any Transfer of this Agreement, the Property or interest therein together with such documentation of the proposed transferee's qualifications and development capacity as the City may reasonably request.

5.4.3 The proposed transferee shall expressly assume all of the rights and obligations of the Borrower under this Agreement and the Predevelopment Loan Documents arising after the effective date of the Transfer and all obligations of Borrower arising prior to the effective date of the Transfer (unless City expressly agrees that Borrower may remain responsible for such obligations) and shall agree to be subject to and assume all of Borrower's obligations pursuant to this Agreement and the Predevelopment Loan Documents.

5.4.4 The Transfer shall be effectuated pursuant to a written instrument satisfactory to the City in form recordable in the Official Records.

5.4.5 Consent to any proposed Transfer may be given by the City Manager unless the City Manager, in his or her discretion, refers the matter of approval to the City Council. If the City rejects a proposed Transfer, the City, as applicable, shall provide the reasons for such rejection in writing within thirty (30) days following receipt of written request by Borrower, and representatives of the City shall meet with Borrower and the proposed transferee to discuss in good faith the reasons for the rejection and Borrower's and transferee's responses thereto.

5.5 In the absence of specific written agreement by the City, no Transfer by Borrower shall be deemed to relieve the Borrower or any other party from any obligation under this Agreement or the Predevelopment Loan Documents.

5.6 Without limiting any other remedy City may have under this Agreement or the Predevelopment Loan Documents, or under law or equity, this Agreement may be terminated by City if without the prior written approval of the City, Borrower assigns or Transfers this Agreement or the Property. This Section 5.6 shall not apply to Transfers described in Section 5.3.

5.7 Borrower shall reimburse City for all costs, including but not limited to attorneys' fees, incurred in reviewing instruments and other legal documents proposed to affect a Transfer under this Agreement and in reviewing the qualifications and financial resources of a proposed successor, assignee, or transferee within ten days following City's delivery to Borrower of an invoice detailing such costs. This Section 5.7 shall not apply to Transfers described in Section 5.3.

## **ARTICLE 6 SECURITY FINANCING AND RIGHTS OF MORTGAGEES**

6.1 Mortgages and Deeds of Trust for Development. Mortgages and deeds of trust, or any other reasonable security instrument are permitted to be placed upon the Property only for the purpose of securing loans for financing the acquisition of the Property, the design and construction of the Project and other expenditures reasonably necessary for development of the Property. Borrower shall not enter into any conveyance for such financing without the prior written approval of the City Manager or his or her designee. As used herein, the terms "mortgage" and "deed of trust" shall mean any security instrument used in financing real estate acquisition, construction and land development.

6.1.1 Subordination. City agrees that if required by construction and/or permanent lenders, the Predevelopment Deed of Trust will be subordinated to deeds of trust or other security instruments approved by the City.

6.2 Holder Not Obligated to Construct. The holder of any mortgage, deed of trust authorized by this Agreement shall not be obligated to construct or complete the Project or to guarantee such construction or completion.

6.3 Notice of Default and Right to Cure. Whenever City delivers any notice of default hereunder, City shall concurrently deliver a copy of such notice to each holder of record of any mortgage or deed of trust secured by the Property provided that City has been provided with the address for delivery of such notice. City shall have no liability to any such holder for any failure by the City to provide such notice to such holder. Each such holder shall have the right, but not the obligation, at its option, to cure or remedy any such default or breach.

6.4 City Right to Cure Defaults. In the event of a breach or default by Borrower under a mortgage or deed of trust secured by the Property, City may (but has no obligation to) cure the default, without acceleration of the subject loan, following prior notice thereof to the holder of such instrument and Borrower. In such event, Borrower shall be liable for, and City shall be entitled to reimbursement from Borrower for all costs and expenses incurred by City associated with and attributable to the curing of the default or breach and such sum shall constitute a part of the indebtedness secured by the Predevelopment Deed of Trust.

6.5 Holder to be Notified. Borrower, for itself, its successors and assigns hereby warrants and agrees that each term contained herein dealing with security financing and rights of holders shall be either inserted into the relevant deed of trust or mortgage or acknowledged by the holder prior to its creating any security right or interest in the Property.

6.6 Modifications to Agreement. City shall not unreasonably withhold its consent to modifications of this Agreement requested by Project lenders or investors provided such modifications do not alter City's substantive rights and obligations under this Agreement.

6.7 Estoppel Certificates. Any Party shall, at any time, and from time to time, within thirty (30) days after receipt of written request from the other Party, execute and deliver to such Party a written statement certifying that, to the knowledge of the certifying Party: (i) this Agreement is in full force and effect and a binding obligation of the Parties (if such be the case), (ii) this Agreement has not been amended or modified, or if so amended, identifying the amendments, and (iii) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, describing the nature of any such defaults.

## **ARTICLE 7 ENVIRONMENTAL MATTERS**

7.1 No City Liability; Borrower's Covenants. City shall not be responsible for the cost of any soil, groundwater or other environmental remediation or other response activities for any Hazardous Materials, if any, existing or occurring on the Property or any portion thereof, and Borrower shall be solely responsible for all actions and costs associated with any such activities required by any regulatory agency with jurisdiction over the Property and/or required for the development of the Project, the Property, or any portion thereof. Upon receipt of any notice regarding the presence, release or discharge of Hazardous Materials in, on or under the Property, or any portion thereof, Borrower (as long as Borrower owns the property which is the subject of such notice) agrees to timely initiate and diligently pursue and complete all appropriate response, remediation and removal actions for the presence, release or discharge of such Hazardous Materials within such deadlines as specified by applicable Environmental Laws. Borrower hereby covenants and agrees that:

7.1.1 Borrower shall not knowingly permit the Project or the Property or any portion of either to be a site for the use, generation, treatment, manufacture, storage, disposal or transportation of Hazardous Materials or otherwise knowingly permit the presence or release of Hazardous Materials in, on, under, about or from the Project or the Property with the exception of any previously disclosed existing conditions on the Property and cleaning supplies and other materials customarily used in construction, rehabilitation, use or maintenance of residential property and used, stored and disposed of in compliance with Hazardous Materials Laws, and

7.1.2 Borrower shall keep and maintain the Project and the Property and each portion thereof in compliance with, and shall not cause or permit the Project or the Property or any portion of either to be in violation of, any Hazardous Materials Laws.

7.2 Environmental Indemnification. Borrower shall indemnify, defend (with counsel approved by City) and hold the City and its elected and appointed officials, officers, agents and employees (collectively, "**Indemnitees**") harmless from and against any and all liability, loss, cost, expense (including without limitation reasonable attorneys' fees and costs of litigation), claim, demand, action, suit, judicial or administrative proceeding, penalty, deficiency, fine, order, and damage (all of the foregoing collectively "**Claims**") including without limitation any expenses associated with the investigation, assessment, monitoring, response, removal,

treatment, abatement or remediation of Hazardous Materials and administrative, enforcement or judicial proceedings resulting, arising, or based directly or indirectly in whole or in part, upon (i) the presence, release, use, generation, discharge, storage or disposal or the alleged presence, release, discharge, storage or disposal of any Hazardous Materials on, under, in or about, or the transportation of any such Hazardous Materials to or from, the Property, or (ii) the failure of Borrower, Borrower's employees, agents, contractors, subcontractors, or any person acting on behalf of any of the foregoing to comply with Hazardous Materials Laws or the covenants set forth in Section 7.1. The foregoing indemnity shall further apply to any residual contamination in, on, under, about or emanating from the Property or affecting any natural resources, and to any contamination of any property or natural resources arising in connection with the generation, use, handling, treatment, storage, transport or disposal of any such Hazardous Materials, and irrespective of whether any of such activities were or will be undertaken in accordance with Hazardous Materials Laws. The provisions of this Section 7.2 shall survive the issuance of a Certificate of Completion for the Project and the expiration or earlier termination of this Agreement. Borrower's indemnification obligation under this Section 7.2 shall not apply to acts described in clause (i) above caused by the gross negligence or willful misconduct of an Indemnitee.

7.2.1 No Limitation. Borrower hereby acknowledges and agrees that Borrower's duties, obligations and liabilities under this Agreement, including, without limitation, under Section 7.2 above, are in no way limited or otherwise affected by any information the City may have concerning the Property and/or the presence in, on, under, about or emanating from the Property of any Hazardous Materials, whether the City obtained such information from the Borrower or from its own investigations. It is further agreed that City does not and shall not waive any rights against Borrower that they may have by reason of this indemnity and hold harmless agreement because of the acceptance by City, or the deposit with City by Borrower, of any of the insurance policies described in this Agreement.

7.3 Hazardous Materials. As used herein, the term "**Hazardous Materials**" means any substance, material or waste which is or becomes regulated by any federal, state or local governmental authority, and includes without limitation (i) petroleum or oil or gas or any direct or indirect product or by-product thereof; (ii) asbestos and any material containing asbestos; (iii) any substance, material or waste regulated by or listed (directly or by reference) as a "hazardous substance", "hazardous material", "hazardous waste", "toxic waste", "toxic pollutant", "toxic substance", "solid waste" or "pollutant or contaminant" in or pursuant to, or similarly identified as hazardous to human health or the environment in or pursuant to, the Toxic Substances Control Act [15 U.S.C. 2601, et seq.]; the Comprehensive Environmental Response, Compensation and Liability Act [42 U.S.C. Section 9601, et seq.], the Hazardous Materials Transportation Authorization Act [49 U.S.C. Section 5101, et seq.], the Resource Conservation and Recovery Act [42 U.S.C. 6901, et seq.], the Federal Water Pollution Control Act [33 U.S.C. Section 1251], the Clean Air Act [42 U.S.C. Section 7401, et seq.], the California Underground Storage of Hazardous Substances Act [California Health and Safety Code Section 25280, et seq.], the California Hazardous Substances Account Act [California Health and Safety Code Section 25300, et seq.], the California Hazardous Waste Act [California Health and Safety Code Section 25100, et seq.], the California Safe Drinking Water and Toxic Enforcement Act [California Health and Safety Code Section 25249.5, et seq.], and the Porter-Cologne Water Quality Control Act [California Water Code Section 13000, et seq.], as they now exist or are hereafter amended,

together with any regulations promulgated thereunder; (iv) any substance, material or waste which is defined as such or regulated by any “Superfund” or “Superlien” law, or any Environmental Law; or (v) any other substance, material, chemical, waste or pollutant identified as hazardous or toxic and regulated under any other federal, state or local environmental law, including without limitation, asbestos, polychlorinated biphenyls, petroleum, natural gas and synthetic fuel products and by-products.

7.4 Environmental Laws. As used herein, the term “**Environmental Laws**” means all federal, state or local statutes, ordinances, rules, regulations, orders, decrees, judgments or common law doctrines, and provisions and conditions of permits, licenses and other operating authorizations regulating, or relating to, or imposing liability or standards of conduct concerning (i) pollution or protection of the environment, including natural resources; (ii) exposure of persons, including employees and agents, to Hazardous Materials (as defined above) or other products, raw materials, chemicals or other substances; (iii) protection of the public health or welfare from the effects of by-products, wastes, emissions, discharges or releases of chemical substances from industrial or commercial activities; (iv) the manufacture, use or introduction into commerce of chemical substances, including without limitation, their manufacture, formulation, labeling, distribution, transportation, handling, storage and disposal; or (v) the use, release or disposal of toxic or hazardous substances or Hazardous Materials or the remediation of air, surface waters, groundwaters or soil, as now or may at any later time be in effect, including but not limited to the Toxic Substances Control Act [15 U.S.C. 2601, et seq.]; the Comprehensive Environmental Response, Compensation and Liability Act [42 U.S.C. Section 9601, et seq.], the Hazardous Materials Transportation Authorization Act [49 U.S.C. Section 5101, et seq.], the Resource Conservation and Recovery Act [42 U.S.C. 6901, et seq.], the Federal Water Pollution Control Act [33 U.S.C. Section 1251], the Clean Air Act [42 U.S.C. Section 7401, et seq.], the California Underground Storage of Hazardous Substances Act [California Health and Safety Code Section 25280, et seq.], the California Hazardous Substances Account Act [California Health and Safety Code Section 25300, et seq.], the California Hazardous Waste Act [California Health and Safety Code Section 25100, et seq.], the California Safe Drinking Water and Toxic Enforcement Act [California Health and Safety Code Section 25249.5, et seq.], and the Porter-Cologne Water Quality Control Act [California Water Code Section 13000, et seq.], as each of the foregoing now exist or are hereafter amended, together with any regulations promulgated thereunder.

## **ARTICLE 8 INDEMNITY AND INSURANCE.**

8.1 Indemnity. Borrower shall indemnify, defend (with counsel approved by City in its sole discretion) and hold Indemnitees harmless from and against any and all Claims, including without limitation, Claims arising directly or indirectly, in whole or in part, as a result of or in connection with Borrower’s or Borrower’s contractors, subcontractors, agents, consultants or employees development, construction, improvement, operation, ownership or maintenance of the Project or the Property, or any part thereof or otherwise arising out of or in connection with Borrower’s performance under this Agreement. Borrower’s indemnification obligations under this Section 8.1 shall not extend to Claims resulting from the gross negligence or willful misconduct of Indemnitees. The provisions of this Section 8.1 shall survive the issuance of a Certificate of Completion for the Project and the expiration or earlier termination of this

Agreement. It is further agreed that City does not and shall not waive any rights against Borrower that they may have by reason of this indemnity and hold harmless agreement because of the acceptance by City, or the deposit with City by Borrower, of any of the insurance policies described in this Agreement.

8.2 Insurance Coverage. The Borrower shall maintain or cause to be maintained the following insurance coverage throughout the Term and provide evidence satisfactory to the City of such coverage:

8.2.1 Borrower and any contractor or subcontractor who performs work on the Property shall secure worker's compensation insurance to the extent required by law, including Employer's Liability coverage, with limits not less than One Million Dollars (\$1,000,000) each accident.

8.2.2 Borrower and any contractor or subcontractor who performs work on the Property shall maintain Comprehensive General Liability insurance with limits not less than Two Million Dollars (\$2,000,000) each occurrence combined single limit for Bodily Injury and Property Damage, including coverage for Contractual Liability, Person Injury, Broad form Property Damage, Products and Completed Operations to cover any claims arising out of Borrower's performance under this Agreement. Such policy or policies shall be written on an occurrence basis and shall name the Indemnitees as additional insureds.

8.2.3 Borrower and any contractor or subcontractor who performs work on the Property shall maintain Comprehensive Automobile Liability insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence combined single limit for Bodily Injury and Property Damage, including coverage for owned, non-owned and hired vehicles, as applicable. Such policy or policies shall be written on an occurrence basis and shall name the Indemnitees as additional insureds.

8.2.4 Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance shall be placed with insurers with a current A.M. Best's rating of no less than A-VIII.

8.2.5 Prior to disbursement of the Predevelopment Loan Proceeds, Borrower shall furnish City with certificates of insurance in form acceptable to City evidencing the required insurance coverage and duly executed endorsements evidencing such additional insured status. The certificates shall contain a statement of obligation on the part of the carrier to notify City of any material adverse change, cancellation, termination or non-renewal of the coverage at least thirty (30) days in advance of the effective date of any such material adverse change, cancellation, termination or non-renewal.

8.2.6 If any insurance policy or coverage required hereunder is canceled or reduced, Borrower shall, within fifteen (15) calendar days after receipt of notice of such cancellation or reduction in coverage, but in no event later than the effective date of cancellation or reduction, file with City a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies. Upon failure to so file such certificate, City may, without further notice and at its option, procure such insurance coverage at

Borrower's expense, and Borrower shall promptly reimburse City for such expense upon receipt of billing from City

8.2.7 Coverage provided by Borrower and any contractor or subcontractor shall be primary insurance and shall not be contributing with any insurance, or self-insurance maintained by City, and the policies shall so provide. The insurance policies shall contain a waiver of subrogation for the benefit of the City. Borrower shall furnish the required certificates and endorsements to City prior to the commencement of construction of the Project and shall provide City with certified copies of the required insurance policies upon request of City.

## **ARTICLE 9 DEFAULT AND REMEDIES.**

9.1 Borrower Default. The occurrence of one or more of the following events shall constitute a default under this Agreement, and City shall thereupon be entitled, at its option, to declare all indebtedness referred to in this Agreement immediately due and payable and City shall be entitled to all legal recourse against Borrower and to pursue and enforce, either successively or concurrently, all rights and remedies set forth in this Agreement or any collateral instrument held by City or accruing to City by law, and such other rights and remedies as a lender may have, default being:

9.1.1 Failure of Borrower to perform any of the covenants or agreements on its part contained in this Agreement or in any collateral instrument made by Borrower in favor of City with respect to the Predevelopment Loan as evidenced by this Agreement or the Predevelopment Loan Documents; or the intentional or unintentional misrepresentation of any statement or warranty made by Borrower in connection with this Agreement or the Predevelopment Loan Documents; or

9.1.2 The filing of a complaint for receivership against Borrower, or the filing of a voluntary or involuntary petition for bankruptcy or for re-organization by the Borrower (unless such complaint or petition be released, discharged or stayed within forty five (45) days of such filing); or if Borrower shall become insolvent or make a general assignment for the benefit of creditors or consent to the appointment of a receiver of all or any of its assets, or voluntarily suspends its usual business.

City shall advise Borrower in writing of any default under this Section and may deliver notices of default to Borrower personally, by certified mail or by registered mail. Borrower shall have thirty (30) days from the date of the receipt of the notice to cure such default, except in a case where a default is not susceptible to cure within thirty (30) days, and the Borrower initiates cure within the thirty (30) day period and diligently pursues the cure proceedings. In this event, Borrower shall have such additional time as is reasonably necessary to complete cure of the default, but in no event longer than one hundred fifty (150) days.

9.2 Default by City.

9.2.1 The failure of City to perform any of its obligations under this Agreement or the Predevelopment Loan Documents shall entitle Borrower to pursue an action for specific



performance only. Borrower shall have no other remedy or recourse at law or in equity and hereby waives any and all claims and legal recourse against the City for damages of any nature and description.

9.2.2 Borrower shall advise the City in writing of any default under this Section and the Borrower may deliver notices of default to the City personally or by certified or registered mail. The City shall have thirty (30) days from the date of receipt of the notice to cure the default, except in a case where a default is not susceptible to cure within thirty (30) days, and the City initiates cure within the thirty (30) day period and diligently pursues the cure proceedings. In this event, the City shall have such additional time as Borrower determines is reasonably necessary to complete cure of the default.

## **ARTICLE 10 MISCELLANEOUS PROVISIONS**

10.1 Conformity with Law and Safety. Borrower shall carry out and shall cause its consultants and contractors to carry out its obligations under this Agreement and the construction of the Project in conformity with all applicable federal, state and local laws, rules, ordinances and regulations, including without limitation, all applicable federal and state labor laws and standards, including Prevailing Wage Laws and Environmental Laws, applicable provisions of the California Public Contracts Code, the City zoning and development standards, building, plumbing, mechanical and electrical codes, all other provisions of the City's Municipal Code, and all applicable disabled and handicapped access requirements, including without limitation, the Americans with Disabilities Act, 42 U.S.C. Section 12101, *et seq.*, Government Code Section 4450, *et seq.*, Government Code Section 11135, *et seq.*, and the Unruh Civil Rights Act, Civil Code Section 51, *et seq.* (collectively, the “**Applicable Laws**”). Borrower agrees to defend, indemnify and hold the Indemnitees harmless from any and all Claims arising out of any non-compliance with, or violations of, such Applicable Laws by Borrower.

10.2 Prevailing Wage Requirements. If required by applicable federal or state law, Borrower and its contractors, subcontractors and agents shall comply with California Labor Code Section 1720 *et seq.* and the regulations adopted pursuant thereto (and if required by applicable federal law, the Davis Bacon Act and implementing regulations) (all of the foregoing, “**Prevailing Wage Laws**”), and shall be responsible for carrying out the requirements of such provisions to the extent applicable. If applicable, Borrower shall submit to City a plan for monitoring payment of prevailing wages and at Borrower’s expense shall implement such plan and comply with all applicable reporting and recordkeeping requirements.

10.3 Indemnity. To the greatest extent allowed by law, Borrower shall indemnify, defend (with counsel approved by City in its sole discretion) and hold the Indemnitees harmless from and against all Claims which directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, relate to, or are alleged to be caused by, arise in connection with, or relate to, the payment or requirement of payment of prevailing wages (including without limitation, all claims that may be made by contractors, subcontractors or other third party claimants pursuant to Labor Code Sections 1726 and 1781) or the requirement of competitive bidding in connection with the Project, the failure to comply with any applicable state or federal labor laws, regulations or standards in connection with this Agreement, including but not limited

to the Prevailing Wage Laws, or any act or omission of Borrower related to this Agreement with respect to the payment or requirement of payment of prevailing wages or the requirement of competitive bidding, whether or not any insurance policies shall have been determined to be applicable to any such Claims. The provisions of this Section shall survive the expiration or earlier termination of this Agreement. The Borrower's indemnification obligations set forth in this Section shall not apply to Claims to the extent arising from the gross negligence or willful misconduct of the Indemnitees.

10.4 Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other Parties in accordance with this Section. All such notices shall be sent by: (i) personal delivery, in which case notice is effective upon delivery; (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt; or (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service.

**CITY:** City of Capitola  
420 Capitola Avenue  
Capitola, CA 95010  
Attn: Jamie Goldstein, City Manager

With a copy to: Burke, Williams & Sorensen, LLP  
1 California Street, Suite 3050  
San Francisco, CA 94111-5432  
Attn: Samantha W. Zutler

**BORROWER:** **MP Rail Trail Associates, L.P.**  
c/o MidPen Housing Corporation  
303 Vintage Park Drive, Suite 250  
Foster City, CA 94404  
Attn: Director of Real Estate Development

With a copy to: [ ]

10.5 Waivers; Modification. No waiver of any breach of any covenant or provision of this Agreement shall be deemed a waiver of any other covenant or provision hereof, and no waiver shall be valid unless in writing and executed by the waiving Party. An extension of time for performance of any obligation or act shall not be deemed an extension of the time for performance of any other obligation or act, and no extension shall be valid unless in writing and executed by the Party granting the extension. This Agreement may be amended or modified only by a written instrument executed by the Parties.

10.6 Survival. All representations made by Borrower hereunder and Borrower's obligations specifically identified to survive shall survive the expiration or termination of this Agreement.

10.7 Headings; Interpretation; Statutory References. The section headings and captions used herein are solely for convenience and shall not be used to interpret this Agreement. The Parties acknowledge that this Agreement is the product of negotiation and compromise on the part of both Parties, and the Parties agree, that since both Parties have participated in the negotiation and drafting of this Agreement, this Agreement shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if both Parties had prepared it.

10.8 Action or Approval. Whenever action and/or approval by City is required under this Agreement, the City's Authorized Representative or his or her designee may act on and/or approve such matter unless specifically provided otherwise, or unless the City's Authorized Representative determines in his or her discretion that such action or approval requires referral to City Council for consideration.

10.9 Entire Agreement. This Agreement, including Exhibits A through D attached hereto and incorporated herein by this reference, together with the Predevelopment Note contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior written or oral agreements, understandings, representations or statements between the Parties with respect to the subject matter hereof. If the Exhibits to this Agreement are inconsistent with this Agreement, the more restrictive requirements shall control, as determined by the City Manager. In the event of a conflict between this Agreement and the Predevelopment Note, the more restrictive requirements shall control, as determined by the City Manager.

10.10 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which taken together shall constitute one instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto having additional signature pages executed by the other Party. Any executed counterpart of this Agreement may be delivered to the other Party by facsimile and shall be deemed as binding as if an originally signed counterpart was delivered.

10.11 Severability. If any term, provision, or condition of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect unless an essential purpose of this Agreement is defeated by such invalidity or unenforceability.

10.12 No Third Party Beneficiaries. Except as expressly set forth herein, nothing contained in this Agreement is intended to or shall be deemed to confer upon any person, other than the Parties and their respective successors and assigns, any rights or remedies hereunder.

10.13 Time of the Essence; Calculation of Time Periods. Time is of the essence for each condition, term, obligation and provision of this Agreement. Unless otherwise specified, in

computing any period of time described in this Agreement, the day of the act or event after which the designated period of time begins to run is not to be included and the last day of the period so computed is to be included, unless such last day is not a business day, in which event the period shall run until the next business day. The final day of any such period shall be deemed to end at 5:00 p.m., local time at the Property. For purposes of this Agreement, a “business day” means a day that is not a Saturday, Sunday, a federal holiday or a state holiday under the laws of the State of California.

10.14 No Partnership or Joint Venture. The relationship between the City and Borrower created by this Predevelopment Loan Agreement shall not be one of partnership or joint venture, but rather shall be one of lender and borrower.

10.15 Usury. If a court of competent jurisdiction determines, by way of final, unappealable order or judgment, that the interest rate charged under the Note is usurious, then such rate shall automatically and retroactively be reduced to the maximum rate allowed under applicable law.

10.16 Conflict of Interest Prohibited. Neither Borrower nor an employee, officer, director, partner or member of Borrower, or immediate family member of any preceding, shall have served as an elected officer, an employee, or a City or City board, committee or commission member, who has directly or indirectly influenced the making of this Agreement.

In accordance with Government Code Section 1090 and the Political Reform Act, Government Code section 87100 et seq., no person who is a director, officer, partner, trustee or employee or consultant of the Borrower, or immediate family member of any of the preceding, shall make or participate in a decision, made by the City, the City or a City or City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Borrower.

Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 et seq., its implementing regulations manual and codes.

10.17 Audit. The City may conduct an audit of Borrower's financial, performance and compliance records maintained in connection with Borrower's obligations under this Agreement and the Note. In the event of such audit, Borrower's employees shall make all such financial, performance and compliance records available to the City. City agrees to provide Borrower an opportunity to discuss and respond to any findings before a final audit report is filed.

10.18 Non-Discrimination. Borrower hereby agrees to take steps to ensure that the Borrower, as well as any person who contracts with the Borrower, shall not, on the basis of race, color, religion, ancestry, national origin, age, sex, pregnancy, marital status, disability, sexual orientation, or AIDS be excluded from participation in the development, leasing and/or sale of the Property or the Project.

10.19 Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of California without regard to principles of conflicts of

laws. Any action to enforce or interpret this Agreement shall be filed and heard in the Superior Court of Santa Cruz County, California.

10.20 Exhibits. The following Exhibits are attached to this Agreement and incorporated by this reference:

- A Legal Description of the City Property
- B Approved Predevelopment Costs
- C Form of Predevelopment Promissory Note
- D Form of Predevelopment Deed of Trust – Short Form

*SIGNATURES ON FOLLOWING PAGE(S).*

IN WITNESS WHEREOF, the Parties have entered into this Agreement effective as of the date first written above.

**CITY:**

**CITY OF CAPITOLA,  
a California municipal corporation**

By: \_\_\_\_\_  
Jamie Goldstein, City Manager

**ATTEST:**

\_\_\_\_\_  
\_\_\_\_\_, City Clerk

**APPROVED AS TO FORM:**

**BURKE, WILLIAMS, & SORENSON, LLP**

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Samantha Zutler, City Attorney

**BORROWER:**

MP Rail Trail Associates, L.P.  
a California limited partnership

By: MP Rail Trail LLC,  
a California limited liability company,  
its general partner

By: Mid-Peninsula San Carlos Corporation,  
a California nonprofit public benefit corporation,  
its sole member/manager

By: \_\_\_\_\_  
Matthew O. Franklin, President/CEO

Exhibit A

**LEGAL DESCRIPTION OF THE PROPERTY**

The land referred to is situated at 1098 38<sup>th</sup> Avenue, in the City of Capitola, County of Santa Cruz, State of California, and legally described as follows:

Exhibit B

**APPROVED PREDEVELOPMENT COSTS**

Architectural Design Services	\$200,000.00
Civil Engineering, Design & Surveying	\$ 30,200.00
Geotechnical Investigation & Analysis	\$ 19,800.00



Exhibit C

**FORM OF PREDEVELOPMENT PROMISSORY NOTE**

\$250,000.00

Capitola, California  
\_\_\_\_\_, 2023

FOR VALUE RECEIVED, MP Rail Trail Associates, L.P., a California limited partnership (“**Borrower**”) hereby promises to pay to the order of the City of Capitola, a California municipal corporation (the “**City**”), Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000.00) (or so much as has been advanced), plus interest thereon as set forth below.

1. Borrower's Obligation. This promissory note (the “**Predevelopment Note**”) evidences Borrower's obligation to pay City the principal sum of Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000.00) (“**Predevelopment Loan**”) plus interest thereon for the funds loaned to Borrower by City to finance certain predevelopment costs associated with the development of the Project pursuant to the Predevelopment Loan Agreement (the “**Agreement**”) between Borrower and City of approximately even date herewith. All capitalized terms not otherwise defined in this Predevelopment Note shall have the meanings set forth in the Agreement.

2. Interest. The Predevelopment Loan shall bear simple interest at the rate of three percent (3%) simple interest per annum from the date of initial disbursement.

3. Term and Repayment Requirements. The term of this Predevelopment Note (the “**Term**”), shall commence as of the Effective Date of the Agreement and shall expire in accordance with Section 1.3.1 of the Agreement. This Predevelopment Note may be prepaid in whole or in part at any time, and from time to time, without notice or penalty. This Predevelopment Note shall be due and payable as set forth in Section 1.3.2 and Section 3.1 of the Agreement.

4. No Assumption. This Predevelopment Note shall not be assumable by the successors and assigns of Borrower without the prior written consent of City.

5. Terms of Payment.

(a) All payments due under this Predevelopment Note shall be paid in currency of the United States of America, which at the time of payment is lawful for the payment of public and private debts.

(b) All payments on this Predevelopment Note shall be paid to City at: City of Capitola, 420 Capitola Avenue, Capitola, CA 95010, attention: Finance Department or to such other person or place as City may from time to time designate.

(c) All payments on this Predevelopment Note shall be without expense to City, and Borrower agrees to pay all costs and expenses, including re-conveyance fees and reasonable attorney's fees of City, incurred in connection with the payment of this Predevelopment Note and the release of any security hereof.

(d) Notwithstanding any other provision of this Predevelopment Note, or any instrument securing the obligations of Borrower under this Predevelopment Note, if, for any reason whatsoever, the payment of any sums by Borrower pursuant to the terms of this Predevelopment Note would result in the payment of interest which would exceed the amount that City may legally charge under the laws of the State of California, then the amount by which payments exceeds the lawful interest rate shall automatically be deducted from the principal balance owing on this Predevelopment Note, so that in no event shall Borrower be obligated under the terms of this Predevelopment Note to pay any interest which would exceed the lawful rate.

(e) This Predevelopment Note shall be nonrecourse against Borrower, as further set forth in Section 3.3 of the Agreement.

6. Default.

(a) Any of the following shall constitute an event of default under this Predevelopment Note:

(i) Any failure to pay, in full, any payment required under this Predevelopment Note within ten (10) calendar days of written notice that such payment is due;

(ii) Any failure in the performance by Borrower of any term, condition, provision or covenant set forth in this Predevelopment Note subject to the notice and cure period set forth in the Agreement;

(iii) The occurrence of any event of default under the Agreement or any other instrument securing the obligations of Borrower under this Predevelopment Note or under any other promissory notes hereafter issued by Borrower to City pursuant to the Agreement, subject to notice and cure periods, if any, set forth therein.

(b) Upon the occurrence of such an event of default, the entire unpaid principal balance, together with all interest thereon, and together with all other sums then payable under this Predevelopment Note shall at the option of City become immediately due and payable upon written notice by City to Borrower without further demand.

(c) The failure to exercise the remedy set forth in Subsection 6(b) above or any other remedy provided by law upon the occurrence of one or more of the foregoing events of default shall not constitute a waiver of the right to exercise any remedy at any subsequent time in respect to the same or any other default. The acceptance by City

hereof of any payment which is less than the total of all amounts due and payable at the time of such payment shall not constitute a waiver of the right to exercise any of the foregoing remedies or options at that time or at any subsequent time or nullify any prior exercise of any such remedy or option, without the express consent of City, except as and to the extent otherwise provided by law.

7. Waivers.

(a) Borrower hereby waives diligence, presentment, protest, and demand, and notice of protest, notice of demand, notice of dishonor and notice of non-payment of this Predevelopment Note. Borrower expressly agrees that this Predevelopment Note or any payment hereunder may be extended from time to time, and that City may accept further security or release any security for this Predevelopment Note, all without in any way affecting the liability of Borrower.

(b) No extension of time for payment of this Predevelopment Note or any installment hereof made by agreement by City with any person now or hereafter liable for payment of this note shall operate to release, discharge, modify, change or affect the original liability of Borrower under this Predevelopment Note, either in whole or in part.

(c) The obligations of Borrower under this Predevelopment Note shall be absolute and Borrower waives any and all rights to offset, deduct or withhold any payments or charges due under this Predevelopment Note for any reason whatsoever.

8. Miscellaneous Provisions.

(a) All notices to City or Borrower shall be given in the manner and at the addresses set forth in the Agreement, or to such addresses as City and Borrower may hereinafter designate.

(b) Borrower promises to pay all costs and expenses, including reasonable attorney's fees, incurred by City in the enforcement of the provision of this Predevelopment Note, regardless of whether suit is filed to seek enforcement.

(c) This Predevelopment Note may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

(d) This Predevelopment Note shall be governed by and construed in accordance with the laws of the State of California.

(e) The times for the performance of any obligations hereunder shall be strictly construed, time being of the essence.

*SIGNATURES ON FOLLOWING PAGE(S).*

This document, together with the Agreement and Predevelopment Deed of Trust, contains the entire agreement between the Parties as to the Predevelopment Loan. It may not be modified except upon written consent of the Parties.

**BORROWER:**

MP Rail Trail Associates, L.P.  
a California limited partnership

By: MP Rail Trail LLC,  
a California limited liability company,  
its general partner

By: Mid-Peninsula San Carlos Corporation,  
a California nonprofit public benefit corporation,  
its sole member/manager

By: \_\_\_\_\_  
Matthew O. Franklin, President/CEO

Exhibit D

**FORM OF PREDEVELOPMENT DEED OF TRUST – SHORT FORM**

[see attached]