

OPENCITIES SERVICES AGREEMENT

1. DEFINITIONS. The following capitalized terms will have the following meanings whenever used in this Agreement.

- 1.1. “Acceptable Use Policy” (“AUP”) means, as of any date, the version of OpenCities’ acceptable use policy posted at <http://help.OpenCities.com> as of such date.
- 1.2. “Business Day” means a day other than a Saturday or a Sunday on which banks in the State of California are open for business.
- 1.3. “Core Module” means the individual modules that are included within the Services. From time to time, new Core Modules will be introduced to the Services via Version Updates which are included in the Fees paid by Customer.
- 1.4. “Customer Data” means any and all data and information, including text, graphics, photographs, audio-visual elements, music, illustrations, video or other content, domain names, email, chat room content, bulletin board postings, or any other items or materials of Customer, any user or any other third party provided or permitted by Customer to be made available by or to reside within the Services or Customer’s Website.
- 1.5. “Customer’s Website” means the website(s) created by or on behalf of Customer through use of the Services for Customer’s internal business purposes.
- 1.6. “Customizations” has the meaning ascribed to it in Section 2.2(f).
- 1.7. “Documentation” means OpenCities’ standard user documentation and any other operating, training and reference manuals related to the Services, all of which are contained in the OpenCities Help Center.
- 1.8. “Integrations” means optional enhancements to the Services involving third party products or services, which are offered separately by OpenCities and are available for purchase by Customer via the OpenCities Help Center.
- 1.9. “Intellectual Property Rights” means all intellectual or industrial property, including without limitation any copyright, trade or service mark, patent, moral right, trade secret, logo, know how, rights in relation to inventions, drawings, discoveries, improvements, technical data, formulae, computer programs, know-how, logos, designs, circuit layouts, domain names, business names, software, whether or not now existing, and whether or not registered or unregistered rights, and rights in respect of Confidential Information.
- 1.10. “Malicious Code” means code, files scripts, agents or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses.
- 1.11. “Order” means an OpenCities, or an OpenCities’ authorized reseller, order form or other mutually acceptable document that expressly incorporates this Agreement and is duly executed by Customer and, as applicable, OpenCities or an OpenCities authorized reseller.
- 1.12. “OpenCities Help Center” means the Documentation and the specifications for the Services (the “Specifications”) currently posted at <http://help.OpenCities.com>.

- 1.13. “Privacy Policy” means, as of any date, OpenCities’ privacy policy posted at <http://help.OpenCities.com> as of such date.
- 1.14. “Scheduled Maintenance Window” means the date and time slot identified by OpenCities in a written notice given to Customer via the OpenCities Help Center no later than 5 Business Days prior to the proposed Scheduled Maintenance Window to enable maintenance work and Version Updates to be performed. The Scheduled Maintenance Window will be outside of Customer’s normal business hours and periods of peak demand, whenever reasonably possible.
- 1.15. “Services” means the components of OpenCities’ proprietary content management system set forth in the Order, including, as applicable, data traffic management, website publishing and web hosting services, and any Version Updates and Core Modules released by OpenCities, and all related Specifications and Documentation.
- 1.16. “SLA” or “Service Level Agreement” means, as of any date, OpenCities’ service level agreement, the current version of which is set forth in Schedule A.
- 1.17. “Support Services” means the support and maintenance services provided by OpenCities in accordance with Article 3.
- 1.18. “Term” is defined in Section 12.1 below.
- 1.19. “Version Updates” means updated versions of the Services (indicated by a higher numerical version number) developed by OpenCities with enhancements or additions to the functionality, and/or performance improvements and bug fixes.

2. SCOPE AND USAGE OF SERVICES.

- 2.1. Use of Services. During the Term and upon payment of the applicable Fees set out in the applicable Order, OpenCities shall make the Services available to Customer in accordance with the terms of this Agreement solely for Customer’s internal business purposes. Customer may permit an unlimited number of its employees and its contractors to use the Services provided their use is solely for Customer’s internal business purposes and at all times in compliance with the terms of this Agreement. Customer agrees to be responsible for any breach of this Agreement by its contractors.
- 2.2. Provision of Services. Upon payment of the applicable Fees and subject to the terms of the applicable Order and the other terms and conditions hereof, OpenCities will use commercially reasonable efforts to provide the Services to Customer during the Term and to ensure the Services are available in accordance with the then applicable Service Level Agreement.
- 2.3. Professional Services. Upon payment of the applicable Fees and subject to the terms of the applicable Order and the other terms and conditions hereof, OpenCities may provide certain professional services to Customer, including developer training and custom development services (“Professional Services”). Any Professional Services to be supplied by OpenCities will be provided pursuant to a separate statement of work executed by Customer and OpenCities. Except as otherwise provided in an Order, all such Professional Services will be charged on a time and materials basis at OpenCities then-current rates for the applicable Professional Services.

OpenCities agrees that any custom software developed by OpenCities (“Custom Software”) will be compatible with the then-current version of the Services in accordance with the terms set forth in the applicable statement of work. Customer acknowledges that the support and maintenance services set out in Article 3 will not be provided for any Custom Software and that Custom Software is not covered by the Service Level Agreement. If Customer desires to obtain support for any Custom Software, any support offered by OpenCities will be charged on a time and materials basis at OpenCities’ then-current rates for such support. Any Custom Software developed by OpenCities shall be the property of OpenCities. Effective upon delivery of any such Custom Software to Customer, OpenCities grants Customer a nonexclusive, non-transferable, fully paid license to copy, modify, create derivative works of and use such Custom Software solely as part of Customer’s Website during the Term. All modifications and derivative works of the Services by whomever produced shall be the property of OpenCities.

2.4. Use of Third-Party Service Providers. Customer acknowledges that OpenCities has, and in the future may, retain one or more third party service providers to supply certain aspects of the Services, including certain of the facilities, equipment, products, services and connectivity necessary to offer the Services. Customer acknowledges that OpenCities currently obtains web hosting services from a third party, and that OpenCities has no responsibility or liability for any third-party services.

2.5. Documentation: Customer may reproduce and use the Documentation solely as necessary to support its use of the Services during the Term.

2.6. Users of Customer’s Website. Customer may authorize an unlimited number of users to access and use Customer’s Website. Customer agrees that it is not authorized to, and agrees not to, make any representations or warranties regarding the Services or OpenCities to any user or third party, and further agrees not to otherwise create or purport to create any obligations or liabilities on the part of OpenCities. Customer agrees to indemnify OpenCities for its and any user’s acts and omissions related to Customer’s Website and/or the Services. OpenCities has no obligation to provide support or any other services, or any SLA or other remedies, to such users.

3. MAINTENANCE AND SUPPORT SERVICES.

3.1. Maintenance and Support; SLA. Subject to the other provisions of the Order, this Article 3 and Customer’s payment of all applicable Fees, during the Term:

- (a) OpenCities will provide the remedies listed in the SLA for any defect, error, or failure of the Services or in the Documentation in accordance with the SLA. Such remedies are Customer’s sole remedy for any failure of or defect in the Services or the Documentation, and Customer recognizes and agrees that if the SLA does not list a remedy for a given failure, it has no remedy. Any credits issued pursuant to the SLA for failure to meet the uptime guarantee specified in the SLA will apply to outstanding or future invoices only and are forfeited upon termination of this Agreement. OpenCities is not required to issue refunds or to make payments against such credits under any circumstances, including without limitation after termination of this Agreement.
- (b) OpenCities may revise the SLA or the features and functions of the Services at any time, provided no such revision materially reduces the features or functionality provided to

Customer as set forth herein.

- (c) OpenCities will provide Customer with Version Updates. Customer acknowledges that Version Updates are mandatory and necessary for the proper function and security of the Services. Customer agrees to the implementation of all Version Updates by OpenCities. Implementation will occur during a Scheduled Maintenance Window. Any SaaS downtime or functionality issues arising during a Scheduled Maintenance Window will not be subject to the Service Level Agreement.
- (d) OpenCities grants Customer personnel unlimited access to the OpenCities Help Center to review the Documentation and Specifications. Customer acknowledges and agrees that it does not have an unlimited right to request maintenance and support services through the OpenCities Help Center; requests for maintenance and support must be made in compliance with paragraph (e) hereof.
- (e) OpenCities will make available to Customer an online and telephone help desk service, which will allow 2 designated support representatives of Customer who have received training in the Services to request maintenance and support services in accordance with the Service Level Agreement. Requests from other personnel will not be accepted. The contact details for the online and telephone help desk support services are set out in Schedule A.
- (f) Notwithstanding the provisions of paragraphs (d) and (e) above, where Customer's Website is experiencing a Severity 1 problem, any Customer personnel may contact OpenCities via the telephone help desk to report the Severity 1 problem.

3.2. Scheduled and Emergency Maintenance. OpenCities agrees to use commercially reasonable efforts to conduct all SaaS maintenance within a Scheduled Maintenance Window. However, Customer acknowledges that an unplanned event may occur that will require the need for OpenCities to perform maintenance on the Services on an emergency basis outside of a Scheduled Maintenance Window. OpenCities will use reasonable efforts to give Customer advance notice of emergency maintenance, but it is possible that advance notification of emergency maintenance will not occur. Any SaaS downtime or functionality issues during the Scheduled Maintenance Window or during emergency maintenance will not be subject to the Service Level Agreement.

3.3 Conditions. OpenCities provision of the maintenance and support services set forth in this Article 3 is subject to the following conditions: (a) Customer must document and promptly report all errors or malfunctions of the Services to OpenCities or its assigned agents and representatives; (b) Customer must carry out procedures to rectify errors or malfunctions within a reasonable period after receiving instructions from OpenCities on such procedures; and (c) Customer must provide OpenCities with reasonable access to Customer's personnel, its assigned agents and representatives as required by OpenCities to meet its obligations under this Agreement.

3.4 Exclusions. OpenCities is under no obligation to provide the maintenance and support services specified in this Article 3 if they are requested as a result of or related to: (a) operation of

the Services with other media and hardware, or services or interfaces not authorized or maintained in accordance with this Agreement or the Documentation; (b) use of the Services that is not in accordance with the Documentation; (c) any modification, alteration or addition or attempted modification, alteration or addition to the Services (unless such modifications were developed by OpenCities or authorized by OpenCities in writing); (d) failure of any data service, internet service, hosting service or any other third-party service, or failure of a telecommunications connection, hardware, software, web services, or third party content, software, or equipment; or (e) any non-reproducible error or defect reported by Customer.

3.5 Abuse of Maintenance Services. In the event Customer abuses the maintenance and support services offered by OpenCities (e.g. by declaring a problem Severity Level 1 when it is only Severity Level 2, 3 or 4, unless such distinction could not reasonably have been determined, or by reporting problems which are not Severity 1 during non-business hours) an "Abuse Incident" will be noted, and OpenCities will inform Customer of such.

4. FEES AND PAYMENT TERMS.

4.1 Subscription Fees. Except as otherwise provided in the Order, Customer will pay OpenCities the annual subscription and other fees set forth in the Order (the "Fees") during the Initial Term and the applicable Fees for each Renewal Term, which Fees are based on the resident population of Customer. Except as otherwise expressly provided in this Agreement, all Fees are non-cancelable and non-refundable. Except as otherwise provided in the Order, the Fees for the first year of the Initial Term are payable within 30 days of execution of this Agreement, and the Fees for each successive year during the Initial Term and each Renewal Term shall be payable net 30 days from the date of OpenCities' invoice.

4.2 Fee Adjustments. Upon expiration of the Initial Term, Fees may be adjusted for each Renewal Term to take into account any increases in the Consumer Price Index for all Items as published by the US Bureau of Labor Statistics. OpenCities shall notify Customer of any Fees adjustments made pursuant to this Section 4.2 at least seventy (70) days prior to the commencement of the applicable Renewal Term.

4.3 Overdue Charges. Except as otherwise provided in the Order, if any invoiced amount is not received by OpenCities by the due date, then without limiting OpenCities' rights or remedies, (a) those charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, and/or (b) OpenCities may condition future subscription renewals on payment terms shorter than those specified herein. Customer will be liable for all costs of collection of any undisputed, overdue amounts including, without limitation, all court costs, legal fees and other costs incurred by OpenCities.

4.4 Taxes. The Fees charged by OpenCities do not include any taxes, levies, duties or similar governmental assessments of any nature, including, value-added, sales, use or withholding taxes, assessable by any jurisdiction whatsoever (collectively, "Taxes"). Customer is responsible for paying all Taxes associated Customer's purchase of the Services. If OpenCities has the legal obligation to pay or collect any Taxes for which Customer is responsible under this Section 4(e), then Customer agrees that OpenCities will invoice Customer that amount unless Customer

provides OpenCities with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, OpenCities is responsible for taxes assessable against it based on its income, property and employees.

4.5 Purchases from Authorized Resellers. Notwithstanding the foregoing, in the event that Customer has purchased Services through an authorized OpenCities reseller pursuant to an Order that incorporates these terms, the payment arrangements and related terms set forth in the Order shall control, such terms shall be exclusively by and between such reseller and Customer, and OpenCities' sole obligation will be to provide the Services set forth in the Order to Customer on the other terms and conditions, and subject to the limitations, set forth in this Agreement.

4.6 Future Functionality. Customer agrees that its purchase is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by OpenCities, or any authorized reseller or other third party regarding future functionality or features.

5. CUSTOMER DATA & SECURITY.

5.1. Customer Rights to Data. Customer retains all right, title and interest (including any Intellectual Property Rights) in and to all data and content supplied by or on behalf of Customer in connection with the Services and Customer's Website, including data uploaded by users thereof (collectively, the "Customer Data"). Customer hereby grants OpenCities a limited, non-exclusive, royalty-free, non-transferable license to host, reproduce, transmit, cache, store, exhibit, publish, display, distribute, perform, and otherwise use the Customer Data solely as necessary to provide the Services for Customer.

5.2. Responsibility for Customer Data. Customer is solely responsible for Customer Data, including the accuracy, quality, appropriateness and legality of all Customer Data and the means by which the Customer Data is acquired, and OpenCities shall have no responsibility or liability therefor. Customer represents and warrants to OpenCities that Customer owns or has the right to use Customer Data, and has the rights necessary to grant OpenCities the licence set forth in Section 5.1, all Customer Data will be "server ready" and otherwise remain fully compatible with OpenCities' SaaS (including all software and operating systems); and Customer has obtained all necessary rights, releases and consents to allow the Customer Data to be collected, used and disclosed in the manner contemplated by this Agreement and to grant OpenCities the rights herein.

5.3. OpenCities' Use of Customer Data. Unless it receives Customer's prior written consent, OpenCities: (a) will not access, process, or otherwise use Customer Data other than as necessary to facilitate the Services; and (b) will not intentionally grant any third party access to Customer Data, except subcontractors that are subject to a reasonable nondisclosure agreement. Notwithstanding the foregoing, OpenCities may disclose Customer Data, including, without limitation, user profile information (i.e. name, e-mail address, etc.), IP addressing and traffic information, and usage history, as required by applicable law or by proper legal or governmental authority. OpenCities will give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise to contest such required disclosure, at Customer's expense.

5.4. Protection of Customer Data. OpenCities will use commercially reasonable, industry standard administrative, physical and technical safeguards for the protection of the security, confidentiality and integrity of the Customer Data, including implementation of measures designed to prevent unauthorized access, use, modification, disclosure and loss of the Customer Data. OpenCities will archive Customer Data on a regular basis during the Term by performing 6 daily and 8 weekly backups for the purposes of disaster recovery. In the event of equipment failure or data corruption, OpenCities will restore from the most recent uncorrupted archive. In the event of corruption of all of OpenCities' archives, or in the event that an old archive is used to restore data, Customer will have the responsibility of uploading new Customer Data to Customer's Website. OpenCities will not be liable for incomplete, out-of-date, corrupt or otherwise deficient Customer Data recovered from OpenCities' backups.

5.5. No Obligation to Monitor; Right to Remove. OpenCities may, but has no obligation to, monitor, review or edit Customer Data. In all cases, OpenCities reserves the right to remove, delete or disable access to any Customer Data that OpenCities determines, in the exercise of its sole discretion, violates this Agreement (including the Acceptable Use Policy) or is illegal, damaging, problematic, objectionable or otherwise inappropriate. OpenCities may take such action without prior notification of Customer.

5.6. Privacy Policy. The Privacy Policy applies only to the Services and does not apply to any third-party website or service linked to the Services or recommended or referred to through the Services or by OpenCities staff.

5.7. Risk of Exposure. Customer recognizes and agrees that hosting data online involves risks of unauthorized disclosure or exposure and that Customer, by accessing and using the Services, assumes such risks. OpenCities offers no representation, warranty, or guarantee that Customer Data will not be exposed or disclosed through errors or the actions of third parties.

5.8. Aggregate Data. Notwithstanding the provisions of this Article 5, OpenCities may use, reproduce, sell, publicize, or otherwise exploit Aggregate Data in any way, in its sole discretion. ("Aggregate Data" refers to Customer Data with the following removed: personally identifiable information and the names and addresses of Customer and any of its users.)

6. CUSTOMER'S OBLIGATIONS & RESTRICTIONS.

6.1 Acceptable Use. Customer will comply with OpenCities' AUP as in effect from time to time. Customer will not: (a) sell, resell, license, sublicense, distribute, make available, rent or lease the Services or use the Services for service bureau or time-sharing purposes or in any other way allow third parties to exploit or access the Services, except users accessing Customer's Website as specifically authorized by this Agreement; (b) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights; (c) use the Services to store or transmit Malicious Code; (d) share non-public SaaS features or content with any third party; (e) frame or mirror any part of the Services other than framing on Customer's own intranets or otherwise for Customer's internal business purposes; (f) reverse engineer any portion of the Services, or (g) access the Services in order to build a competitive product or service, to build a product using similar ideas, features,

functions or graphics of the Services, or to copy any ideas, parts, features, functions or graphics of the Services. In the event that it suspects any breach of the requirements of this Section 6.1, including without limitation by Customer's users, OpenCities may suspend or terminate Customer's access to the Services without advance notice, in addition to such other remedies as OpenCities may have. Neither this Agreement nor the AUP requires that OpenCities take any action against Customer or any user or other third party for violating the AUP, this Section 6.1, or this Agreement, but OpenCities is free to take any such action it sees fit. Any breach of the AUP or any of the provisions of this Article 6 will entitle OpenCities to elect to terminate this Agreement immediately upon written notice to Customer.

6.2 Unauthorized Access; Security. Customer will take reasonable steps to prevent unauthorized access to the Services and the network, including without limitation by protecting its passwords and other log-in information. Customer will notify OpenCities immediately of any known or suspected unauthorized access to or use of the Services or breach of its security and will use best efforts to stop said breach. Customer shall not:

- (a) interfere with or disrupt the integrity or performance of the Services or attempt to gain unauthorized access to the Services, or OpenCities' or its suppliers' related systems and networks;
- (b) commit, cause or allow any breach (or do anything which might put us in breach) of any applicable law, regulation, government direction or industry standard or code;
- (c) attempt to or actually access the Services by any means other than through the portals or interfaces provided by OpenCities;
- (d) attempt to or actually override any security component included in or underlying the Services; or
- (e) attempt or engage in any action that directly or indirectly interferes with the proper working of or place an unreasonable load on OpenCities' infrastructure.

6.3 Customer Data. Customer agrees that (a) the Customer Data and its use will not violate, misappropriate or infringe any Intellectual Property Rights or any other personal, privacy or moral right arising under the laws of any jurisdiction, nor will same constitute a libel or defamation of any person or entity; and (b) the Customer Data will not contain any harmful components, including, but not limited to, viruses, trap doors, hidden sequences, hot keys, or time bombs.

6.4 Compliance with Laws. In its use of the Services, Customer will comply with all applicable laws, including without limitation export control, decency, privacy and intellectual property laws, laws governing the protection of personally identifiable information and other laws applicable to the protection of Customer Data.

6.5 Responsibility for Users; Access to Services. Customer is responsible and liable for: (a) its own and its users use of the Services, including without limitation for any unauthorized user conduct and any user conduct that would violate the AUP or the requirements of this Agreement applicable to Customer; and (b) any use of the Services through Customer's account, whether

authorized or unauthorized. Customer agrees to indemnify OpenCities against any loss or damage that OpenCities suffers as a result of any unauthorized access to OpenCities' SaaS or network or those of OpenCities' suppliers.

6.6 Required Third Party Services.

- (a) Customer will establish and maintain, at its own expense, all telecommunications equipment and access lines necessary to gain access to the Services.
- (b) In order for OpenCities to provide some of the Services under this Agreement, Customer may at times, be required to give OpenCities access to or provide login information and password information for accounts or services Customer may have with third party providers. When Customer provides OpenCities with this information or provides OpenCities with access to these third-party accounts, Customer warrants that it has all the necessary contractual and legal rights to give OpenCities such access, login information and passwords.
- (c) Customer acknowledges that OpenCities will not have any responsibility or liability with regard to any third party services used by the Customer on or through the Services, as part of Customer's Website or otherwise, such as payment and e-commerce services, and any use of such third party services will be at Customer's own risk. Customer further acknowledges that the technical ability to link to such third-party services (such as the possibility of a 'PayPal' button), is provided only as part of the Services but will not be deemed to create any liability or responsibility on behalf of OpenCities.
- (d) Where any third-party software or services integration to the Services is found to cause performance, stability or security issues, OpenCities reserves the right to disable or remove such software or services in order to restore the Services to acceptable levels.

6.7 Customer Representative. Customer will appoint a designated representative who will be authorized to act as the primary point of contact for Customer in dealing with OpenCities with respect to each party's obligations under this Agreement and on a timely basis.

7. OPENCITIES IP & FEEDBACK.

7.1 IP Rights in the Services. OpenCities retains all Intellectual Property Rights and all other right title and interest in the Services, the Documentation, the Support Services, the Professional Services, the Custom Software and the Aggregate Data, including without limitation all software used to provide the Services, all graphics, user interfaces, logos, and trademarks reproduced through the Services, and all work product and derivative works thereof by whomever produced. This Agreement does not grant Customer any intellectual property license or rights in or to the Services or any of its components or any Documentation. Customer recognizes that the Services and its components and the Documentation are protected by copyright and other laws.

7.2 Feedback. OpenCities has not agreed to and does not agree to treat as confidential any Feedback (as defined below) that Customer or other users provide, and nothing in this Agreement or in the parties' dealings arising out of or related to this Agreement will restrict OpenCities's right

to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback, without compensating or crediting Customer or the user in question. Customer hereby grants OpenCities a perpetual, irrevocable right and license to exploit Feedback in any and every way. (“Feedback” refers to any suggestion or idea for improving or otherwise modifying any of OpenCities’s products or services.)

8. CONFIDENTIAL INFORMATION.

8.1 “Confidential Information” refers to the following items: (a) any document either party marks “Confidential”; (b) any information either party orally designates as “Confidential” at the time of disclosure, provided the disclosing party confirms such designation in writing within ten (10) Business Days; (c) any OpenCities software and all Documentation and other information in the OpenCities Help Center, whether or not marked or designated confidential; and (d) any other nonpublic, sensitive information the receiving party should reasonably consider a trade secret or otherwise confidential. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in the receiving party’s possession at the time of disclosure; (ii) is independently developed by the receiving party without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of the receiving party’s improper action or inaction; or (iv) is approved for release in writing by the disclosing party.

8.2 Nondisclosure. Neither OpenCities nor Customer will use Confidential Information for any purpose other than in performance of this Agreement (the “Purpose”). Each of OpenCities and Customer agrees that it: (a) will not disclose Confidential Information to any of its employees or contractors unless such persons need access in order to facilitate the Purpose and, in the case of a contractor, such contractor executes a nondisclosure agreement with the appropriate party with terms no less restrictive than those of this Article 8; and (b) will not disclose Confidential Information to any other third party without the disclosing party’s prior written consent. Without limiting the generality of the foregoing, each party will protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. Each party agrees that it will promptly notify the other party of any misuse or misappropriation of the other party’s Confidential Information that comes to its attention. Notwithstanding the foregoing, each party may disclose Confidential Information as required by applicable law or by proper legal or governmental authority, provided such party gives the other party prompt notice of any such legal or governmental demand and reasonably cooperates with the other party in any effort to seek a protective order or otherwise to contest such required disclosure, at the other party’s expense.

8.3 Injunction. The parties agree that breach of this Article 8 would cause the disclosing party irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, and that the disclosing party will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.

8.4 Termination & Return. With respect to each item of Confidential Information, the obligations of Section 8.1 above will terminate five (5) years after the date of disclosure; provided that such obligations related to Confidential Information of a party constituting trade secrets will continue so long as such information remains subject to trade secret protection pursuant to

applicable law. Upon termination of this Agreement, each party will return all copies of the other party's Confidential Information to the other party or certify, in writing, the destruction thereof.

8.5 Retention of Rights. This Agreement does not transfer ownership of Confidential Information or grant a license thereto. Each party will retain all right, title, and interest in and to all of its Confidential Information.

9. WARRANTY DISCLAIMER.

9.1 Warranty Disclaimers. THE SERVICES ARE PROVIDED "AS IS" AND AS AVAILABLE, WITHOUT REPRESENTATION OR WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND QUIET ENJOYMENT, AND ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE, AND OPENCITIES DISCLAIMS SUCH WARRANTIES TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING: (a) OPENCITIES DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM WILL PERFORM WITHOUT INTERRUPTION OR ERROR OR IN A TIMELY FASHION; AND (b) OPENCITIES DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM IS SECURE FROM HACKING OR OTHER UNAUTHORIZED INTRUSION OR THAT CUSTOMER DATA WILL REMAIN PRIVATE OR SECURE. OPENCITIES DISCLAIMS ALL LIABILITY AND INDEMNIFICATION OBLIGATIONS FOR ANY HARM OR DAMAGES CAUSED BY ANY THIRD-PARTY HOSTING PROVIDERS.

10. INDEMNIFICATION.

10.1 Indemnification of Customer. Subject to the other provisions of this Section 10.1, OpenCities will defend Customer and Customer's Associates (as defined below in Section 10.3) against any third party claim, suit, or proceeding alleging that the Services or the permitted use thereof infringes any U.S. trademark, patent, copyright, or trade secret right of a third party (collectively, "Customer Indemnified Claims") and will indemnify Customer and Customer's Associates from any damages, attorney's fees and costs finally awarded against Customer and Customer's Associates for any Customer Indemnified Claim, or, as applicable, for amounts paid by Customer and Customer's Associates in a settlement approved by OpenCities in writing of a Customer Indemnified Claim.

- (a) If in OpenCities reasonable judgment any Customer Indemnified Claim, or threat of any such Claim, materially interferes with Customer's use of the Services, OpenCities will, after consultation with Customer, at OpenCities' option and in its sole discretion, either (i) substitute functionally equivalent non-infringing Services or Documentation; (ii) modify the Services to make them non-infringing, (iii) obtain for Customer at OpenCities' expense the right to continue using the infringing Services; or, (iv) if OpenCities determines that it cannot achieve any of the foregoing on a reasonable commercial basis, it may, by written notice, require Customer to cease using the Services, in which case OpenCities, or, as applicable, its authorized reseller, shall refund Customer a pro-rata portion of the Fees paid for the Services for such period of

time for which Customer was unable to use the Services.

- (b) OpenCities' obligations set forth in this Section 10.1 do not apply to the extent that a Customer Indemnified Claim arises out of: (a) Customer's breach of this Agreement; (b) revisions or modifications to the Services or any components thereof made by a party other than OpenCities if such infringement would not have occurred but for such revisions or modifications; (c) Customer's failure to incorporate or use any Version Updates, or any other updates or upgrades that would have avoided the alleged infringement; (d) inclusion of the Customer Data; (e) the use of the Services other than for its intended purposes or contrary to OpenCities' Specifications; or (f) the combination, operation or use of the Services with equipment, programs, hardware or software not provided by OpenCities if in OpenCities reasonable judgment such infringement is caused thereby.
- (c) The provisions of this Section 10.1 state OpenCities entire liability and Customer's sole and exclusive remedy in the event of any Customer Indemnified Claim.

10.2 Indemnification of OpenCities. Customer will indemnify and defend OpenCities and OpenCities' Associates (as defined below in Section 10.3) against any and all claims, liabilities, losses, damages, costs and expenses (including attorneys fees and costs) (a) arising out of or related to Customer's or its users' alleged or actual use or misuse of, or failure to use the Services, including without limitation: (b) claims by Customer's users or by Customer's employees or agents; (c) claims related to unauthorized disclosure or exposure of personally identifiable information or other private Confidential Information, including Customer Data; (d) claims related to infringement or violation of a copyright, trademark, trade secret, or privacy or confidentiality right by any Customer Data; and (e) claims that use of the Services harasses, defames, or defrauds a third party or violates the CAN-Spam Act of 2003 or any other law or restriction on electronic advertising (collectively, "OpenCities Indemnified Claims").

10.3 Litigation & Additional Terms. The obligations of the indemnifying party ("Indemnitor") pursuant to Section 10.1 or 0 above will be excused to the extent that the indemnified parties (the "Indemnified Parties") or any Indemnified Party's Associates fails to provide prompt written notice to the Indemnitor of the applicable claim or to reasonably cooperate with the Indemnitor if such failure or lack of cooperation materially prejudices the defense. Indemnitor will control the defense of any Indemnified Claim, including appeals, negotiations, and any settlement or compromise thereof; provided that the Indemnified Party will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations. (A party's "Associates" are its officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.)

11. LIMITATION OF LIABILITY.

11.1 LIMITATION OF LIABILITY. THE TOTAL LIABILITY OF OPENCITIES AND ITS AFFILIATES FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE ACTUAL FEES RECEIVED BY OPENCITIES DIRECTLY OR INDIRECTLY FROM CUSTOMER DURING THE TWELVE-MONTH PERIOD LEADING UP TO THE APPLICABLE CLAIM.

11.2 Exclusion of Consequential Damages. IN NO EVENT WILL OPENCITIES OR ITS AFFILIATES BE LIABLE TO CUSTOMER FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES, INCLUDING ANY DAMAGES FOR LOSS OF REVENUES OR GOODWILL, BUSINESS INTERRUPTION, LOSS OR INACCURACY OF DATA, COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY, OR LOST PROFITS, ARISING OUT OF OR RELATED TO THIS AGREEMENT.

11.3 Clarifications & Disclaimers. THE LIABILITIES LIMITED BY THIS ARTICLE 11 APPLY (a) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE, (b) EVEN IF OPENCITIES IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (c) EVEN IF CUSTOMER'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. NOTWITHSTANDING THE FOREGOING, THE LIABILITIES LIMITED BY THIS ARTICLE 11 SHALL NOT INCLUDE LIABILITY (i) UNDER THE INDEMNITY PROVIDED IN SECTION 10.1, (ii) FOR DEATH OR PERSONAL INJURY RESULTING FROM NEGLIGENCE, (iii) FOR DAMAGE TO TANGIBLE PERSONAL PROPERTY, OR (iv) FOR FRAUD OR WILLFUL MISCONDUCT. If applicable law limits the application of the provisions of this Article 11, OpenCities' liability will be limited to the maximum extent permissible. For the avoidance of doubt, OpenCities' liability limits and other rights set forth in this Article 11 apply likewise to OpenCities' affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.

12. TERM & TERMINATION.

12.1 Term. The initial term of this Agreement (the "Initial Term") will commence on the Effective Date and continue for the period set forth in the Order. Thereafter, the Agreement will automatically renew for successive one-year periods (each such period, a "Renewal Term"), unless either party notifies the other party in writing of its decision not to renew the Agreement at least 60 or more days before the applicable renewal date. The Initial Term and all Renewal Terms are herein referred to as the "Term".

12.2 Termination for Cause. Either party may terminate this Agreement for the other's material breach by written notice, effective in 30 days unless the other party first cures such breach, or immediately upon written notice if the other party becomes subject to any insolvency, bankruptcy or similar proceeding, whether voluntary or involuntary. Without limiting OpenCities' other rights and remedies, OpenCities may suspend or terminate any user's access to the Services at any time, without advance notice, if OpenCities reasonably concludes such user has conducted him, her or itself in a way that is not consistent with the requirements of the AUP or the other requirements of this Agreement or in a way that subjects OpenCities to potential liability.

12.3 Effects of Termination. Upon termination of this Agreement, Customer will cease all use of the Services and delete, destroy, or return all copies of the Documentation in its possession or control, and Customer will have the right to access the Services for 30 days following termination of this Agreement to download Customer Data. If requested by Customer in writing, at the Customer's expense on a time-and-materials basis, OpenCities will provide Customer an export of the Customer Data in an industry standard format. Upon the expiration of the thirty-day period following termination of this Agreement, all Customer Data in the Services will no longer be

available, and OpenCities shall have the right to delete and/or destroy all such Customer Data (including all data supplied by third parties), unless otherwise agreed by the parties in writing.

12.4 The following provisions will survive termination or expiration of this Agreement: (a) any obligation of Customer to pay Fees incurred before termination; (b) Article 1, Sections 2.3 and 6.5, and Articles 7, 8, 9, 10, 11 and 12; and (c) any other provision of this Agreement that must survive to fulfill its essential purpose.

13. MISCELLANEOUS.

13.1 Independent Contractors. The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other, and neither may make commitments on the other's behalf. The parties agree that no OpenCities employee or contractor is or will be considered an employee of Customer.

13.2 Notices. OpenCities may send notices pursuant to this Agreement to Customer's email address provided by Customer, and such notices will be deemed received 24 hours after they are sent. Customer may send notices pursuant to this Agreement to the person identified in the Order at the email address provided for such person, and such notices will be deemed received 72 hours after they are sent.

13.3 Force Majeure. No delay, failure, or default, other than a failure to pay fees when due, will constitute a breach of this Agreement to the extent caused by acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, or other causes beyond the performing party's reasonable control.

13.4 Assignment & Successors. Customer may not assign this Agreement or any of its rights or obligations hereunder without OpenCities' express written consent. Except to the extent forbidden in this Section 13.4, this Agreement will be binding upon and inure to the benefit of the parties' respective successors and assigns.

13.5 Severability. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.

13.6 No Waiver. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.

13.7 Choice of Law; Venue. This Agreement will be governed by laws of the State of California. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of San Francisco, California. This Section 13.7 governs all claims arising out of or related to this Agreement, including without limitation tort claims. The United Nations Convention for the International Sale of Goods does not apply to this Agreement.

13.8 Dispute Resolution. If at any time a dispute arises out of or in connection with this Agreement, the parties will have their respective designated representatives meet in good faith with a view to resolving the dispute within a period of 15 Business Days from the issue of a written notice of dispute by one party to the other party. Should the parties not be able to resolve the dispute within the 15 Business Days, then both parties will refer the matter to their own appropriate level of senior executive management respectively for resolution. If the relevant senior executive management are unable to resolve the dispute within a further 10 Business Days, then the parties agree that the dispute must then be referred to mediation. The parties will agree on a suitable person to act as mediator having industry knowledge and expertise to facilitate resolution. Failing agreement on such appointment, either party may apply to JAMS to appoint a mediator. The dispute for mediation must be heard within 20 Business Days of a mediator being appointed. Nothing in this clause is intended to preclude a party from seeking equitable or injunctive relief. Neither party shall have the right to initiate litigation until 30 Business Days after the second mediation conference held by the parties, unless the other party has materially breached its obligation to mediate.

13.9 Construction. The parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.

13.10 Technology Export. Customer will not: (a) permit any third party to access or use the Services in violation of any U.S. or foreign law or regulation; or (b) export any software provided by OpenCities or otherwise remove it from the United States or Canada except in compliance with all applicable laws and regulations. Without limiting the generality of the foregoing, Customer will not permit any third party to access or use the Services in, or export such software to, a country subject to an applicable embargo.

13.11 Entire Agreement. This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to its subject matter. Neither party has relied upon any such prior or contemporaneous communications.

13.12 Modifications. OpenCities may modify the terms of this Agreement, the Privacy Policy, AUP and SLA at any time and from time to time by posting a revised version on OpenCities' website. The modified terms will become effective upon posting. By continuing to use the Services after the effective date of any modification to the terms of this Agreement, Customer agrees to be bound by the modified terms. It is Customer's responsibility to check OpenCities' website regularly for such modifications. OpenCities last modified the terms of this Agreement and the applicable Policies and SLA on the dates listed at the tops of the applicable documents on OpenCities' website.

13.13 Marketing. Customer agrees to permit OpenCities to make reasonable reference to the Customer's status as a user of the Services, including captioned quotations in product literature or advertisements, websites, articles, press releases, marketing literature, presentations and the like, and occasional use as a reference for potential new users.

SCHEDULE A – SERVICE LEVEL AGREEMENT

Subject to the terms and conditions of the Agreement, OpenCities provides a guarantee of 99.9% uptime availability, calculated monthly. In a typical 30 day/730 hour month, this equates to no more than 1 hour of downtime per month (not inclusive of Scheduled and emergency Maintenance).

For confirmed downtime during any month during the Term, Open Cities will credit Customer 1% of Customer’s pro-rata monthly Base Subscription Fee for every hour of Customer’s public facing website downtime over and above the 99.9% uptime guarantee, up to a maximum of 100% of the pro rata monthly Base Subscription Fee for that month.

Issue Severity Level and Measure/Guide	Resolution Process and Contact Information	Resolution Target
Priority 1 – Downtime (Your public facing website or critical intranet is experiencing Downtime)	<ul style="list-style-type: none"> • Reportable 24 x 7 via Telephone – (877-466-7756 – Extension 3) • Acknowledgement and assignment of the problem for resolution within an hour. 	Within 4 hours.
Priority 2 – Urgent (Important publishing functionality fails to work as intended, and there is no work-around available - you cannot publish content to the site).	<ul style="list-style-type: none"> • Reportable 24 x 7 via Online helpdesk, or • Telephone during business hours (7x6 PT). (877-466-7756 – Extension 2) • Acknowledgement and assignment of the problem for resolution within one business day. 	Provide a workaround to the problem or release a Version Update to fix the problem by close of next business day.
Priority 3 – High (Important publishing functionality fails to work as intended, but workarounds are available)	<ul style="list-style-type: none"> • Reportable 24 x 7 via Online helpdesk. • Acknowledgement and assignment of the problem for resolution within one business day. 	Scheduled or next Version Update.
Priority 4 – Normal (Functionality is not working as intended)	<ul style="list-style-type: none"> • Reportable 24 x 7 via Online helpdesk. • Acknowledgement and assignment of the problem for resolution within 3 business days 	Within specified Version Update.

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement.

Town of Los Gatos by:

Consultant By:

Laurel Prevetti Town Manager

Aaton Haggarty, Chief Legal Officer
Accela, Inc.

Recommended by:

Joel Paulson, Community Development
Director

Luke Norris, Sr Vice President,
Government Relations & Growth
OpenCities

Approved as to Form:

Robert Schultz, Town Attorney

Attest:

Shelley Neis, MMC, CPMC, Town Clerk

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