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WHEN RECORDED RETURN TO:

CITY OF MILPITAS  
455 E. Calaveras Boulevard  
MILPITAS, CA 95035-5411  
ATTN: Engineering Department

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Section 6103

CITY OF MILPITAS, CALIFORNIA

## **IMPROVEMENT AGREEMENT**

**Between**

**CITY OF MILPITAS**

**a California Municipal Corporation**

**and**

**LD Milpitas Property, LLC**

**a Delaware Limited Liability Company**

# **IMPROVEMENT AGREEMENT**

## **I. PARTIES AND DATE.**

This Improvement Agreement (“Agreement”) is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2019 by and between the City of MILPITAS, a California municipal corporation (“City”) and LD Milpitas Property LLC, a Delaware Limited Liability Company with its principal office located at 5314 North River Run Drive, Suite 310, Provo, UT 84604 (“Developer”). City and Developer are sometimes hereinafter individually referred to as “Party” and hereinafter collectively referred to as the “Parties.”

## **II. RECITALS.**

A. On April 13, 2017, Developer submitted to City an application for approval of a Site Development Permit and a conditional use permit (the “Element Hotel Project”) for real property located within City, a legal description of which is attached hereto as Exhibit “A” (“Property”).

B. On April 25, 2018, the MILPITAS PLANNING COMMISSION Adopted Resolution No. 18-010 approving the Site Development Permit No. SD17-0005, Conditional Use Permit No. UP17-0004, Variance No. VA17-0001, and Environmental Assessment No. EA17-0002 for the Element Hotel Project.

C. Developer has not completed all of the work or made all of the public improvements required by Title XI, Chapter 1, Section 8 of City’s municipal code, the conditions of approval for the Element Hotel Project, or other ordinances, resolutions, or policies of City requiring construction of improvements in conjunction with the Element Hotel Project.

D. Pursuant to Title XI, Chapter 1, Section 8 of the City’s municipal code, Developer and City enter into this Agreement for the timely construction and completion of the public improvements and the furnishing of the security therefor, acceptable to the City Engineer and City Attorney, for the Element Hotel Project.

E. Developer’s execution of this Agreement and the provision of the security are made in consideration of City’s approval of the Element Hotel Project.

### **III. TERMS.**

1.0 Effectiveness. This Agreement shall not be effective unless and until both of the following conditions are satisfied: (a) Developer provides City with security of the type and in the amounts required by this Agreement; (b) Developer executes and records this Agreement in the Recorder's Office of the County of SANTA CLARA; If the above described conditions are not satisfied, this Agreement shall automatically terminate without need of further action by either City or Developer.

2.0 Public Improvements. Developer shall construct or have constructed at its own cost, expense, and liability all improvements required by City as part of the approval of the Element Hotel Project, including, but not limited to, all grading, roads, paving, curbs and gutters, pathways, storm drains, sanitary sewers, utilities, drainage facilities, traffic controls, landscaping, street lights, and all other required facilities as shown in detail on the plans, profiles, and specifications which have been prepared by or on behalf of Developer for the Element Hotel Project ("Public Improvements"). The Public Improvements are more specifically described with the Engineer's Cost Estimates in Exhibit "B," which is attached hereto and incorporated herein by this reference, and as shown on City approved Improvement Plan No. E-EN18-0081 and E-EN18-0154 on file with the City. Construction of the Public Improvements shall include any transitions and/or other incidental work deemed necessary for drainage or public safety. Developer further promises and agrees to provide all equipment, tools, materials, labor, tests, design work, and engineering services necessary or required by City to fully and adequately complete the Public Improvements.

2.1 Prior Partial Construction of Public Improvements. Where construction of any Public Improvements has been partially completed prior to this Agreement, Developer agrees to complete such Public Improvements or assure their completion in accordance with this Agreement.

2.2 Permits; Notices; Utility Statements. Prior to commencing any work, Developer shall, at its sole cost, expense, and liability, obtain all necessary permits and licenses and give all necessary and incidental notices required for the lawful construction of the Public Improvements and performance of Developer's obligations under this Agreement. Developer shall conduct the work in full compliance with the regulations, rules, and other requirements contained in any permit or license issued to Developer.

2.3 Pre-approval of Plans and Specifications. Developer is prohibited from commencing work on any Public Improvement until all plans and specifications for such Public Improvement have been submitted to and approved by the City Engineer, or his or her designee. Approval by the City Engineer shall not relieve Developer from ensuring that all Public Improvements conform with all other requirements and standards set forth in this Agreement.

2.4 Quality of Work; Compliance With Laws and Codes. The construction plans and specifications for the Public Improvements shall be prepared in accordance with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements. The Public Improvements shall be completed in accordance with all approved maps, plans, specifications, standard drawings, and special amendments thereto on file with City, as well

as all applicable federal, state, and local laws, ordinances, regulations, codes, standards, and other requirements applicable at the time work is actually commenced.

2.5 Standard of Performance. Developer and its contractors, if any, shall perform all work required to construct the Public Improvements under this Agreement in a skillful and workmanlike manner, and consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. Developer represents and maintains that it or its contractors shall be skilled in the professional calling necessary to perform the work. Developer warrants that all of its employees and contractors shall have sufficient skill and experience to perform the work assigned to them, and that they shall have all licenses, permits, qualifications and approvals of whatever nature that are legally required to perform the work, and that such licenses, permits, qualifications and approvals shall be maintained throughout the term of this Agreement.

2.6 Alterations to Improvements. The Public Improvements as described and as shown on Improvement Plan No. E-EN18-0081 and E-EN18-0154 on file with the City are understood to be only a general designation of the work and improvements to be done, and not a binding description thereof. All work shall be done and improvements made and completed as shown on approved plans and specifications, and any subsequent alterations thereto. If during the course of construction and installation of the Public Improvements it is determined that the public interest requires alterations in the Public Improvements, Developer shall undertake such design and construction changes as may be reasonably required by City. Any and all alterations in the plans and specifications and the Public Improvements to be completed may be accomplished without giving prior notice thereof to Developer's surety for this Agreement.

3.0 Maintenance of Public Improvements and Landscaping. City shall not be responsible or liable for the maintenance or care of the Public Improvements until City approves and accepts them. City shall exercise no control over the Public Improvements until accepted by City. Any use by any person of the Public Improvements, or any portion thereof, shall be at the sole and exclusive risk of the Developer at all times prior to City's acceptance of the Public Improvements. Developer shall maintain all the Public Improvements in a state of good repair until they are completed by Developer and approved and accepted by City, and until the security for the performance of this Agreement is released. Maintenance shall include, but shall not be limited to, repair of pavement, curbs, gutters, sidewalks, signals, parkways, water mains, and sewers; maintaining all landscaping in a vigorous and thriving condition reasonably acceptable to City; removal of debris from sewers and storm drains; and sweeping, repairing, and maintaining in good and safe condition all streets and street improvements. It shall be Developer's responsibility to initiate all maintenance work, but if it shall fail to do so, it shall promptly perform such maintenance work when notified to do so by City. If Developer fails to properly prosecute its maintenance obligation under this section, City may do all work necessary for such maintenance and the cost thereof shall be the responsibility of Developer and its surety under this Agreement. City shall not be responsible or liable for any damages or injury of any nature in any way related to or caused by the Public Improvements or their condition prior to acceptance.

4.0 Construction Schedule. Unless extended pursuant to this Section 4.1 of this Agreement, Developer shall fully and adequately complete or have completed the Public

Improvements within 24 months of the effective date of this Agreement, unless extended pursuant to Section 4.1.

4.1 Extensions. City may, in its sole and absolute discretion, provide Developer with additional time within which to complete the Public Improvements. It is understood that by providing the security required under Section 13.0 et seq. of this Agreement, Developer and its surety consent in advance to any extension of time as may be given by City to Developer, and waives any and all right to notice of such extension(s). Developer's acceptance of an extension of time granted by City shall constitute a waiver by Developer and its surety of all defense of laches, estoppel, statutes of limitations, and other limitations of action in any action or proceeding filed by City following the date on which the Public Improvements were to have been completed hereunder. In addition, as consideration for granting such extension to Developer, City reserves the right to review the provisions of this Agreement, including, but not limited to, the construction standards, the cost estimates established by City, and the sufficiency of the improvement security provided by Developer, and to require adjustments thereto when warranted according to City's reasonable discretion.

4.2 Accrual of Limitations Period. Any limitations period provided by law related to breach of this Agreement or the terms thereof shall not accrue until Developer has provided the City Engineer with written notice of Developer's intent to abandon or otherwise not complete required or agreed upon Public Improvements.

5.0 Grading. Developer agrees that any and all grading done or to be done in conjunction with construction of the Public Improvements shall conform to all federal, state, and local laws, ordinances, regulations, and other requirements, including City's grading regulations. In order to prevent damage to the Public Improvements by improper drainage or other hazards, the grading shall be completed in accordance with the time schedule for completion of the Public Improvements established by this Agreement, and prior to City's approval and acceptance of the Public Improvements and release of the Security as set forth in Section 13.0 et seq. of this Agreement.

6.0 Utilities. Developer shall provide utility services, including water, power, gas, and telephone service to serve each parcel, lot, or unit of land within the Element Hotel Project in accordance with all applicable federal, state, and local laws, rules, and regulations, including, but not limited to, the regulations, schedules and fees of the utilities or agencies providing such services. Except for commercial or industrial properties, Developer shall also provide cable television facilities to serve each parcel, lot, or unit of land in accordance with all applicable federal, state, and local laws, rules, and regulations, including, but not limited to, the requirements of the cable company possessing a valid franchise with City to provide such service within City's jurisdictional limits. All utilities shall be installed underground.

7.0 Fees and Charges. Developer shall, at its sole cost, expense, and liability, pay all fees, charges, and taxes arising out of construction of the Public Improvements, including, but not limited to, all plan check, design review, engineering, inspection, and other service fees, and any impact or connection fees established by City ordinance, resolution, regulation, or policy, or as established by City relative to the Element Hotel Project.

8.0 City Inspection of Public Improvements. Developer shall, at its sole cost, expense, and liability, and at all times during construction of the Public Improvements, maintain reasonable and safe facilities and provide safe access for inspection by City of the Public Improvements and areas where construction of the Public Improvements is occurring or will occur.

9.0 Default; Notice; Remedies.

9.1 Notice. If Developer neglects, refuses, or fails to fulfill or timely complete any obligation, term, or condition of this Agreement, or if City determines there is a violation of any federal, state, or local law, ordinance, regulation, code, standard, or other requirement, City may at any time thereafter declare Developer to be in default or violation of this Agreement and make written demand upon Developer or its surety, or both, to immediately remedy the default or violation ("Notice"). Developer shall substantially commence the work required to remedy the default or violation within ten (10) days of the Notice. If the default or violation constitutes an immediate threat to the public health, safety, or welfare, City may provide the Notice verbally, and Developer shall substantially commence the required work within twenty-four (24) hours thereof. Immediately upon City's issuance of the Notice, Developer and its surety shall be liable to City for all costs of construction and installation of the Public Improvements and all other administrative costs expenses as provided for in Section 10.0 of this Agreement.

9.2 Failure to Remedy; City Action. If the work required to remedy the noticed default or violation is not diligently prosecuted to a completion acceptable to City within the time frame contained in the Notice, City may complete all remaining work, arrange for the completion of all remaining work, and/or conduct such remedial activity as in its sole and absolute discretion it believes is required to remedy the default or violation. All such work or remedial activity shall be at the sole and absolute cost, expense, and liability of Developer and its surety, without the necessity of giving any further notice to Developer or surety. City's right to take such actions shall in no way be limited by the fact that Developer or its surety may have constructed any, or none of the required or agreed upon Public Improvements at the time of City's demand for performance. In the event City elects to complete or arrange for completion of the remaining work and improvements, City may require all work by Developer or its surety to cease in order to allow adequate coordination by City. Notwithstanding the foregoing, if conditions precedent for reversion to acreage can be met and if the interests of City will not be prejudiced thereby, City may also process a reversion to acreage and thereafter recover from Developer or its surety the full cost and expense incurred.

9.3 Other Remedies. No action by City pursuant to Section 9.0 et seq. of this Agreement shall prohibit City from exercising any other right or pursuing any other legal or equitable remedy available under this Agreement or any federal, state, or local law. City may exercise its rights and remedies independently or cumulatively, and City may pursue inconsistent remedies. City may institute an action for damages, injunctive relief, or specific performance.

10.0 Administrative Costs. If Developer fails to construct and install all or any part of the Public Improvements within the time required by this Agreement, or if Developer fails to comply with any other obligation contained herein, Developer and its surety shall be jointly and severally liable to City for all administrative expenses, fees, and costs, including reasonable

attorney's fees and costs, incurred in obtaining compliance with this Agreement or in processing any legal action or for any other remedies permitted by law.

11.0 Acceptance of Improvements; As-Built or Record Drawings. If the Public Improvements are properly completed by Developer and approved by the City Engineer, and if they comply with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements, the City Council shall be authorized to accept the Public Improvements. Upon the total acceptance of the Public Improvements by City, Developer shall file with the Recorder's Office of the County of SANTA CLARA a notice of completion for the accepted Public Improvements in accordance with applicable California laws. Issuance by City of occupancy permits for any buildings or structures located on the Property shall not be construed in any manner to constitute City's acceptance or approval of any Public Improvements. Notwithstanding the foregoing, City may not accept any Public Improvements unless and until Developer provides one (1) set of "as-built" or record drawings or plans to the City Engineer for all such Public Improvements. The drawings shall be certified by the record engineer and shall reflect the condition of the Public Improvements as constructed, with all changes incorporated therein.

12.0 Warranty and Guarantee. Developer hereby warrants and guarantees all Public Improvements against any defective work or labor done, or defective materials furnished in the performance of this Agreement, including the maintenance of all landscaping in a vigorous and thriving condition reasonably acceptable to City, for a period of one (1) year following completion of the work and acceptance by City ("Warranty"). During the Warranty, Developer shall repair, replace, or reconstruct any defective or otherwise unsatisfactory portion of the Public Improvements, in accordance with the current ordinances, resolutions, regulations, codes, standards, or other requirements of City, and to the approval of the City Engineer. All repairs, replacements, or reconstruction during the Warranty shall be at the sole cost, expense, and liability of Developer and its surety. As to any Public Improvements which have been repaired, replaced, or reconstructed during the Warranty, Developer and its surety hereby agree to extend the Warranty for an additional one (1) year period following City's acceptance of the repaired, replaced, or reconstructed Public Improvements. Nothing herein shall relieve Developer from any other liability it may have under federal, state, or local law to repair, replace, or reconstruct any Public Improvement following expiration of the Warranty or any extension thereof. Developer's warranty obligation under this section shall survive the expiration or termination of this Agreement.

13.0 Security; Surety Bonds. Prior to execution of this Agreement, Developer shall provide City with improvement securities in the amounts and under the terms set forth below ("Security"). The amount of the Security shall be based on the City Engineer's approximation of the actual cost to construct the Public Improvements, including the replacement cost for all landscaping ("Estimated Costs"). If City determines, in its sole and absolute discretion, that the Estimated Costs have changed, Developer shall adjust the Security in the amount requested by City. Developer's compliance with this provision (Section 13.0 et seq.) shall in no way limit or modify Developer's indemnification obligation provided in Section 16.0 of this Agreement. The amount of the improvement security shall be adjusted annually based on the Engineering News-Record Construction Price Index for the San Francisco-San Jose area in November of each year, Developer shall have an affirmative obligation to provide the City with evidence of valid security

no later than November 30 of each year until all improvements required by project conditions have been constructed. Developer may provide multiple securities in accordance with construction phases, as approved by the City Engineer with a construction phasing plan. Improvement securities may be reduced/released based upon each of the construction phases.

13.1 Performance Improvement Security. To guarantee the faithful performance of the Public Improvements and all the provisions of this Agreement, to protect City if Developer is in default as set forth in Section 8.0 et seq. of this Agreement, and to secure Developer's guarantee and warranty of the Public Improvements, including the maintenance of all landscaping in a vigorous and thriving condition, Developer shall provide City a faithful performance improvement securities in the total amount of Three Hundred Fifty Three Thousand Four Hundred Thirty Three Dollars (\$353,433), which sum shall be not less than one hundred percent (100%) of the Estimated Costs. The City Council may, in its sole and absolute discretion and upon recommendation of the City Engineer, partially release a portion or portions of the security provided under this section as the Public Improvements are accepted by City, provided that Developer is not in default on any provision of this Agreement or condition of approval for the Element Hotel Project. All security provided under this section shall be reduced to ten percent (10%) based upon the security's annually adjusted value for the Warranty period. All security provided under this section shall be released at the end of the Warranty period, or any extension thereof as provided in Section 12 of this Agreement, provided that Developer is not in default on any provision of this Agreement or condition of approval for the Element Hotel Project.

13.2 Labor & Material Improvement Security. To secure payment to the contractors, subcontractors, laborers, material men, and other persons furnishing labor, materials, or equipment for performance of the Public Improvements and this Agreement, Developer shall provide City a labor and materials improvement security in the total amount of Three Hundred Fifty Three Thousand Four Hundred Thirty Three Dollars (\$353,433), which sum shall not be less than one hundred percent (100%) of the Estimated Costs. The security provided under this section may be released by written authorization of the City Engineer after six (6) months from the date City accepts the final Public Improvements. The amount of such security shall be reduced by the total of all stop notice or mechanic's lien claims of which City is aware, plus an amount equal to twenty percent (20%) of such claims for reimbursement of City's anticipated administrative and legal expenses arising out of such claims.

13.3 Additional Requirements. The surety for any surety bonds provided as Security shall have a current A.M. Best's rating of no less than A:VIII, shall be licensed to do business in California, and shall be satisfactory to City. As part of the obligation secured by the Security and in addition to the face amount of the Security, the Developer or its surety shall secure the costs and reasonable expenses and fees, including reasonable attorney's fees and costs, incurred by City in enforcing the obligations of this Agreement. The Developer and its surety stipulate and agree that no change, extension of time, alteration, or addition to the terms of this Agreement, the Public Improvements, or the plans and specifications for the Public Improvements shall in any way affect its obligation on the Security.

13.4 Evidence and Incorporation of Security. Evidence of the Security shall be provided on the forms set forth in Exhibit "C," unless other forms are deemed acceptable by the



City Engineer and the City Attorney, and when such forms are completed to the satisfaction of City, the forms and evidence of the Security shall be attached hereto as Exhibit “C” and incorporated herein by this reference.

14.0 Monument Security. Not applicable.

15.0 Lien. To secure the timely performance of Developer’s obligations under this Agreement, including those obligations for which security has been provided pursuant to Sections 13 et seq. and 14 of this Agreement, Developer hereby creates in favor of City a lien against all portions of the Property not dedicated to City or some other governmental agency for a public purpose. As to Developer’s default on those obligations for which security has been provided pursuant to Sections 13 et seq. and 14 of this Agreement, City shall first attempt to collect against such security prior to exercising its rights as a contract lienholder under this section.

16.0 Indemnification. Developer shall defend, indemnify, and hold harmless City, its elected officials, officers, employees, and agents from any and all actual or alleged claims, demands, causes of action, liability, loss, damage, or injury, to property or persons, including wrongful death, whether imposed by a court of law or by administrative action of any federal, state, or local governmental body or agency, arising out of or incident to any acts, omissions, negligence, or willful misconduct of Developer, its personnel, employees, agents, or contractors in connection with or arising out of construction or maintenance of the Public Improvements, or performance of this Agreement. This indemnification includes, without limitation, the payment of all penalties, fines, judgments, awards, decrees, attorneys’ fees, and related costs or expenses, and the reimbursement of City, its elected officials, officers, employees, and/or agents for all legal expenses and costs incurred by each of them. This indemnification excludes only such portion of any claim, demand, cause of action, liability, loss, damage, penalty, fine, or injury, to property or persons, including wrongful death, which is caused solely and exclusively by the negligence or willful misconduct of Agency as determined by a court or administrative body of competent jurisdiction. Developer’s obligation to indemnify shall survive the expiration or termination of this Agreement, and shall not be restricted to insurance proceeds, if any, received by City, its elected officials, officers, employees, or agents.

16.1 Public Works Determination. Developer has been alerted to the requirements of California Labor Code section 1770 et seq., including, without limitation S.B. 975, which require the payment of prevailing wage rates and the performance of other requirements if it is determined that this Agreement constitutes a public works contract. It shall be the sole responsibility of Developer to determine whether to pay prevailing wages for any or all work required by this Agreement. As a material part of this Agreement, Developer agrees to assume all risk of liability arising from any decision not to pay prevailing wages for work required by this Agreement.

17.0 Insurance.

17.1 Types; Amounts. Developer shall procure and maintain, and shall require its contractors to procure and maintain, during construction of any Public Improvement pursuant to this Agreement, insurance of the types and in the amounts described below (“Required Insurance”). If any of the Required Insurance contains a general aggregate limit, such insurance

shall apply separately to this Agreement or be no less than two times the specified occurrence limit.

17.1.1 General Liability. Developer and its contractors shall procure and maintain occurrence version general liability insurance, or equivalent form, with a combined single limit of not less than \$1,000,000 per occurrence for bodily injury, personal injury, and property damage.

17.1.2 Business Automobile Liability. Developer and its contractors shall procure and maintain business automobile liability insurance, or equivalent form, with a combined single limit of not less than \$1,000,000 per occurrence. Such insurance shall include coverage for the ownership, operation, maintenance, use, loading, or unloading of any vehicle owned, leased, hired, or borrowed by the insured or for which the insured is responsible.

17.1.3 Workers' Compensation. Developer and its contractors shall procure and maintain workers' compensation insurance with limits as required by the Labor Code of the State of California and employers' liability insurance with limits of not less than \$1,000,000 per occurrence, at all times during which insured retains employees.

17.1.4 Professional Liability. For any consultant or other professional who will engineer or design the Public Improvements, liability insurance for errors and omissions with limits not less than \$1,000,000 per occurrence, shall be procured and maintained for a period of five (5) years following completion of the Public Improvements. Such insurance shall be endorsed to include contractual liability.

17.2 Deductibles. Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either: (a) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its elected officials, officers, employees, agents, and volunteers; or (b) Developer and its contractors shall provide a financial guarantee satisfactory to City guaranteeing payment of losses and related investigation costs, claims, and administrative and defense expenses.

17.3 Additional Insured; Separation of Insureds. The Required Insurance shall name City, its elected officials, officers, employees, agents, and volunteers as additional insureds with respect to work performed by or on behalf of Developer or its contractors, including materials, parts, or equipment furnished in connection therewith. The Required Insurance shall contain standard separation of insureds provisions, and shall contain no special limitations on the scope of its protection to City, its elected officials, officers, employees, agents, and volunteers.

17.4 Primary Insurance; Waiver of Subrogation. The Required Insurance shall be primary with respect to any insurance or self-insurance programs covering City, its elected officials, officers, employees, agents, and volunteers. All policies for the Required Insurance shall provide that the insurance company waives all right of recovery by way of subrogation against City in connection with any damage or harm covered by such policy.

17.5 Certificates; Verification. Developer and its contractors shall furnish City with original certificates of insurance and endorsements effecting coverage for the Required

Insurance. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements must be received and approved by City before work pursuant to this Agreement can begin. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

17.6 Term; Cancellation Notice. Developer and its contractors shall maintain the Required Insurance for the term of this Agreement and shall replace any certificate, policy, or endorsement which will expire prior to that date. All policies shall be endorsed to provide that the Required Insurance shall not be suspended, voided, reduced, canceled, or allowed to expire except on 30 days prior written notice to City.

17.7 Insurer Rating. Unless approved in writing by City, all Required Insurance shall be placed with insurers licensed to do business in the State of California and with a current A.M. Best rating of at least A:VIII.

18.0 Signs and Advertising. Developer understands and agrees to City's ordinances, regulations, and requirements governing signs and advertising structures. Developer hereby agrees with and consents to the removal by City of all signs or other advertising structures erected, placed, or situated in violation of any City ordinance, regulation, or other requirement. Removal shall be at the expense of Developer and its surety. Developer and its surety shall indemnify and hold City free and harmless from any claim or demand arising out of or incident to signs, advertising structures, or their removal.

19.0 Relationship Between the Parties. The Parties hereby mutually agree that neither this Agreement, nor any other related entitlement, permit, or approval issued by City for the Property shall operate to create the relationship of partnership, joint venture, or agency between City and Developer. Developer's contractors and subcontractors are exclusively and solely under the control and dominion of Developer. Nothing herein shall be deemed to make Developer or its contractors an agent or contractor of City.

20.0 General Provisions.

20.1 Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party.

20.2 Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate, or convenient to attain the purposes of this Agreement.

20.3 Construction; References; Captions. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days. All references to Developer include all personnel, employees, agents, and subcontractors of Developer, except as otherwise specified in this Agreement. All references to City include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of

reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

20.4 Notices. All notices, demands, invoices, and written communications shall be in writing and delivered to the following addresses or such other addresses as the Parties may designate by written notice:

**CITY OF MILPITAS**

455 E. Calaveras Boulevard  
Milpitas, Ca 92236  
Attn: Steve Erickson, PE  
Director of Engineering/City Engineer

**DEVELOPER:**

LD Milpitas Property LLC  
5314 North River Run Drive, Suite 310  
Provo, UT 84604  
Attn: Trevor Edwards

Depending upon the method of transmittal, notice shall be deemed received as follows: by facsimile, as of the date and time sent; by messenger, as of the date delivered; and by U.S. Mail first class postage prepaid, as of 72 hours after deposit in the U.S. Mail.

20.5 Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

20.6 Waiver. City's failure to insist upon strict compliance with any provision of this Agreement or to exercise any right or privilege provided herein, or City's waiver of any breach of this Agreement, shall not relieve Developer of any of its obligations under this Agreement, whether of the same or similar type. The foregoing shall be true whether City's actions are intentional or unintentional. Developer agrees to waive, as a defense, counterclaim or set off, any and all defects, irregularities or deficiencies in the authorization, execution or performance of the Public Improvements or this Agreement, as well as the laws, rules, regulations, ordinances or resolutions of City with regards to the authorization, execution or performance of the Public Improvements or this Agreement.

20.7 Assignment or Transfer of Agreement. Developer shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without prior written consent of City. Any attempt to do so shall be null and void, and any assignee, hypothecatee, or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation, or transfer. Unless specifically stated to the contrary in City's written consent, any assignment, hypothecation, or transfer shall not release or discharge Developer from any duty or responsibility under this Agreement.

20.8 Binding Effect. Each and all of the covenants and conditions shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns. This section shall not be construed as an authorization for any Party to assign any right or obligation.

20.9 No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

20.10 Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

20.11 Consent to Jurisdiction and Venue. This Agreement shall be construed in accordance with and governed by the laws of the State of California. Any legal action or proceeding brought to interpret or enforce this Agreement, or which in any way arises out of the Parties' activities undertaken pursuant to this Agreement, shall be filed and prosecuted in the appropriate California State Court in the County of SANTA CLARA, California. Each Party waives the benefit of any provision of state or federal law providing for a change of venue to any other court or jurisdiction including, without limitation, a change of venue based on the fact that a governmental entity is a party to the action or proceeding, or that a federal right or question is involved or alleged to be involved in the action or proceeding. Without limiting the generality of the foregoing waiver, Developer expressly waives any right to have venue transferred pursuant to California Code of Civil Procedure Section 394.

20.12 Attorneys' Fees and Costs. If any arbitration, lawsuit, or other legal action or proceeding is brought by one Party against the other Party in connection with this Agreement or the Property, the prevailing party, whether by final judgment or arbitration award, shall be entitled to and recover from the other party all costs and expenses incurred by the prevailing party, including actual attorneys' fees ("Costs"). Any judgment, order, or award entered in such legal action or proceeding shall contain a specific provision providing for the recovery of Costs, which shall include, without limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (a) post judgment motions and appeals, (b) contempt proceedings, (c) garnishment, levy, and debtor and third party examination, (d) discovery, and (e) bankruptcy litigation. This section shall survive the termination or expiration of this Agreement.

20.13 Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the day and year first above written.

**CITY OF MILPITAS**

By: \_\_\_\_\_  
(signature)  
Steve McHarris  
\_\_\_\_\_  
(print name)  
Interim City Manager  
City of MILPITAS

**LD MILPITAS PROPERTY, LLC**

By: \_\_\_\_\_  
(signature)  
\_\_\_\_\_  
Cory Turner  
\_\_\_\_\_  
President

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
(signature)  
Christopher Diaz  
\_\_\_\_\_  
(print name)  
City Attorney  
City of MILPITAS

**APPROVED AS TO CONTENT:**

By: \_\_\_\_\_  
(signature)  
Walter C. Rossmann  
\_\_\_\_\_  
(print name)  
Director of Finance Services  
City of MILPITAS

**APPROVED AS TO SUFFICIENCY:**

By: \_\_\_\_\_  
(signature)  
Steve Erickson, PE  
\_\_\_\_\_  
(print name)  
Director of Engineering/City Engineer  
City of MILPITAS

**NOTE: DEVELOPER'S SIGNATURES SHALL BE DULY NOTARIZED, AND APPROPRIATE ATTESTATIONS SHALL BE INCLUDED AS MAY BE REQUIRED BY THE BYLAWS, ARTICLES OF INCORPORATION, OR OTHER RULES OR REGULATIONS APPLICABLE TO DEVELOPER'S BUSINESS ENTITY.**

## EXAMPLE ACKNOWLEDGMENT

**CAPACITY CLAIMED BY SIGNER:**

~ Individual(s)  
~ Corporate \_\_\_\_\_  
    Officer(s) \_\_\_\_\_  
~ Partner(s)  
~ Attorney-in-Fact  
~ Trustee(s)  
~ Subscribing Witness  
~ Guardian/Conservator  
~ Other \_\_\_\_\_

**SIGNER IS REPRESENTING:**

NAME OF PERSON(S) OR ENTITY(IES)

STATE OF CALIFORNIA                    }  
  }  
COUNTY OF \_\_\_\_\_ }

On \_\_\_\_\_, 2018, before me,  
\_\_\_\_\_, the undersigned notary public, personally  
appeared \_\_\_\_\_, ~ personally known  
to me OR ~ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the  
same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the  
instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Signature of Notary



**EXAMPLE**

**CAPACITY CLAIMED BY SIGNER:**

~ Individual(s)  
~ Corporate \_\_\_\_\_  
    Officer(s) \_\_\_\_\_  
~ Partner(s)  
~ Attorney-in-Fact  
~ Trustee(s)  
~ Subscribing Witness  
~ Guardian/Conservator  
~ Other \_\_\_\_\_

**SIGNER IS REPRESENTING:**

NAME OF PERSON(S) OR ENTITY(IES)

STATE OF CALIFORNIA                    }  
   }  
COUNTY OF \_\_\_\_\_ }

On \_\_\_\_\_, 2018, before me,  
\_\_\_\_\_, the undersigned notary public, personally  
appeared \_\_\_\_\_, ~ personally known  
to me OR ~ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the  
same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the  
instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Signature of Notary

**EXHIBIT “A”**

**LEGAL DESCRIPTION OF PROPERTY**

**EXHIBIT "A"**  
Legal Description

**For APN/Parcel ID(s): 086-02-086**

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THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF MILPITAS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA AND IS DESCRIBED AS FOLLOWS:

ALL OF THAT CERTAIN PROPERTY SITUATED IN THE CITY OF MILPITAS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND BEING A PORTION OF THOSE LANDS DESCRIBED IN THAT CERTAIN GRANT DEED RECORDED FEBRUARY 24, 1999 AS DOCUMENT 14670107, OFFICIAL RECORDS OF SANTA CLARA COUNTY, CALIFORNIA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF BARBER LANE (60.00 FEET WIDE), SAID POINT ALSO BEING THE SOUTHEASTERLY TERMINUS OF THAT COURSE SHOWN AS BEARING NORTH 24° 35' 11" WEST, 1114.76 FEET AS SAID LANE AND COURSE ARE SHOWN ON THAT CERTAIN PARCEL MAP FILED IN BOOK 535 OF MAPS, PAGES 3-4, RECORDS OF SANTA CLARA COUNTY, CALIFORNIA, THENCE NORTHWESTERLY ALONG SAID SOUTHWESTERLY LINE OF BARBER LANE AND ALONG SAID COURSE THE FOLLOWING TWO (2) DESCRIBED COURSES: 1) NORTH 24° 35' 04" WEST 31.00 FEET TO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION; 2) CONTINUING NORTH 24° 35' 04" WEST 329.68 FEET TO THE SOUTHERLY LINE OF TASMAN DRIVE AS SAID DRIVE IS DESCRIBED AS EXHIBIT "A" IN THAT CERTAIN GRANT DEED RECORDED IN BOOK M803, PAGE 226, OFFICIAL RECORDS OF SANTA CLARA COUNTY; THENCE LEAVING SAID SOUTHWESTERLY LINE OF BARBER LANE AND PROCEEDING WESTERLY ALONG SAID SOUTHERLY LINE OF TASMAN DRIVE THE FOLLOWING TWO (2) DESCRIBED COURSES: 1) SOUTH 75° 18' 51" WEST 238.30 FEET TO THE BEGINNING OF A CURVE CONCAVE SOUTHEASTERLY WITH A RADIUS OF 850.00 FEET; 2) SOUTHWESTERLY ALONG SAID CURVE (WITH RADIUS OF 850.00 FEET) THROUGH A CENTRAL ANGLE OF 14° 24' 40" AND AN ARC LENGTH OF 213.79 FEET; THENCE LEAVING SAID SOUTHERLY LINE OF TASMAN DRIVE SOUTH 45° 59' 17" EAST 450.75 FEET TO THE NORTHWESTERLY LINE OF THAT CERTAIN PARCEL OF LAND DESCRIBED IN THAT CERTAIN GRANT DEED RECORDED AS DOCUMENT NUMBER 14068148 IN THE OFFICIAL RECORDS OF SANTA CLARA COUNTY; THENCE NORTHEASTERLY ALONG SAID NORTHWESTERLY LINE OF THE LAST SAID PARCEL (RECORDED AS DOCUMENT NUMBER 14068148) THE FOLLOWING FOUR (4) DESCRIBED COURSES: 1) NORTH 65° 24' 56" EAST 244.25 FEET TO THE BEGINNING OF A CURVE CONCAVE NORTHWESTERLY WITH A RADIUS OF 39.00 FEET 2) NORTHEASTERLY ALONG THE LAST SAID CURVE (WITH A RADIUS 39.00 FEET) THROUGH A CENTRAL ANGLE OF 11° 32' 40" AND AN ARC LENGTH OF 7.86 FEET; 3) NORTH 20° 21' 04" EAST 43.07 FEET TO THE BEGINNING OF A NONTANGENT CURVE CONCAVE SOUTHWESTERLY WITH A RADIUS OF 39.00 FEET; 4) FROM A TANGENT BEARING OF NORTH 13° 10' 09" WEST ALONG THE LAST SAID CURVE (WITH RADIUS 39.00 FEET) THROUGH A CENTRAL ANGLE OF 11° 24' 55" AND AN ARC LENGTH OF 7.77 FEET TO THE TRUE POINT OF BEGINNING.

**EXHIBIT “B”**  
**ENGINEER’S COST ESTIMATE**

Date: 5-Jun-19

Project #: 616015  
Project: Milpitas Element Hotel  
Prepared By: NQA



**SANDIS**

CIVIL ENGINEERS  
SURVEYORS  
PLANNERS

**Engineering Opinion of Probable Construction Costs for Encroachment Permit**

**DEMOLITION**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
1	Concrete Sidewalk	SF	1,215	\$1.00	\$1,215.00
2	AC Paving	SF	2,500	\$0.50	\$1,250.00
3	Curb and Gutter	LF	180	\$3.00	\$540.00
4	Sawcut	LF	1,410	\$7.00	\$9,870.00
5	Remove Existing Hydrant	EA	1	\$2,500.00	\$2,500.00
6	Clear and Grub	SF	2,900	\$1.00	\$2,900.00
				<b>TOTAL</b>	<b>\$18,275</b>

**PAVING**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
7	2" Grind & Overlay	SF	17,710	\$2.50	\$44,275
8	Concrete Paving - Sidewalk	SF	5,350	\$7.00	\$37,450
9	AC Deeplift	SF	1,820	\$5.00	\$9,100
10	Concrete Driveway including sidewalk and gutter	EA	2	\$7,000.00	\$14,000
				<b>TOTAL</b>	<b>\$104,825</b>

**CURB AND GUTTER**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
11	6" Curb and Gutter	LF	175	\$45.00	\$7,875
				<b>TOTAL</b>	<b>\$7,875</b>

**ELECTRIC/TELECOM/GAS**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
12	Tie into Existing Electrical Conduit - PG&E	EA	1	N/A	N/A
13	Tie into Existing Telecom Conduit	EA	2	\$2,500.00	\$5,000
14	Telecommunication Box	EA	1	\$5,000.00	\$5,000
				<b>TOTAL</b>	<b>\$10,000</b>

**SANITARY SEWER**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
15	8" PVC (~15' Deep)	LF	100	\$250.00	\$25,000
16	Sanitary Sewer Connection w/ Manhole	EA	2	\$10,000.00	\$20,000
				<b>TOTAL</b>	<b>\$45,000</b>

**WATER**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
17	4" Water Line	LF	150	\$45.00	\$6,750
18	6" Fire Water Line (to Hydrants)	LF	100	\$97.50	\$9,750
19	8" Fire Water Line	LF	150	\$110.00	\$16,500
20	Water Meter Box (Meter installed by City)	EA	2	\$1,500.00	\$3,000
21	Irrigation Meter Box and Connection	EA	2	\$2,500.00	\$5,000
22	Fire Hydrant	EA	2	\$2,500.00	\$5,000
				<b>TOTAL</b>	<b>\$46,000</b>

**STORM DRAINAGE**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
23	Storm Drain Manhole > 6' Deep & connection	EA	1	\$10,000.00	\$10,000
24	Storm Drain Curb Inlet	EA	1	\$4,500.00	\$4,500
25	Trench Drains on Sidewalk at Tasman Overpass	EA	3	\$1,500.00	\$4,500
26	18" SDR 35	LF	65	\$120.00	\$7,800
				<b>TOTAL</b>	<b>\$26,800</b>

Item	Description	Unit	Quantity	Unit Price	Bid Amount
27	Landscaping	SF	2,280	\$2.50	\$5,700
				<b>TOTAL</b>	<b>\$5,700</b>

Item	Description	Unit	Quantity	Unit Price	Bid Amount
28	No Parking Signs	EA	4	\$500.00	\$2,000
29	Striping Replacement	LF	3100	\$1.00	\$3,100
30	Thermoplastic Markers	EA	10	\$250.00	\$2,500
31	Curb Ramp	LS	1	\$4,500.00	\$4,500
				<b>TOTAL</b>	<b>\$12,100</b>

<b>TOTAL</b>	<b>\$304,233</b>
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1. This Preliminary opinion or probable construction costs should be used only as a guide. There is no responsibility assumed for fluctuations in cost or quantity of material, labor or components.



06/10/2019

Date: 27-Jul-18

Project #: 616015  
 Project: Milpitas Element Hotel - Alder & Tasman Intersection Improvements  
 Prepared By: JC



**Engineering Opinion of Probable Construction Costs**

**DEMOLITION**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
1	6" Median Curb	LF	230	\$5.00	\$1,150
				<b>TOTAL</b>	<b>\$1,150</b>

**PAVING**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
2	4" AC over 16" class II AB	SF	2220	\$7.14	\$15,851
				<b>TOTAL</b>	<b>\$15,851</b>

**CURB AND GUTTER**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
3	6" Median Curb	LF	230	\$16.10	\$3,703
				<b>TOTAL</b>	<b>\$3,703</b>

**MISCELLANEOUS**

Item	Description	Unit	Quantity	Unit Price	Bid Amount
4	Mobilization	LS	1	\$10,000.00	\$10,000
5	Traffic control	LS	1	\$5,000.00	\$5,000
6	Road Marking (Arrow)	EA	4	\$350.00	\$1,400
7	Road Marking (Bike)	EA	2	\$350.00	\$700
8	Road thermoplastic striping	LF	1095	\$2.00	\$2,190
9	Edge thermoplastic striping	LF	250	\$2.00	\$500
				<b>TOTAL</b>	<b>\$19,790</b>

		<b>Sub Total</b>	<b>\$40,494</b>
<b>General Conditions = 15%</b>	no. of years	%	
	N/A	15	<b>\$6,074</b>
<b>Design Contingency = 3.5%</b>	N/A	3.5	<b>\$1,417</b>
<b>Escalation = 3% per year</b>	1	3	<b>\$1,215</b>

<b>TOTAL</b>	<b>\$49,200</b>
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06/10/2019

**EXHIBT “C”**

**IMPROVEMENT SECURITIES (SURETY BONDS)**

As evidence of understanding the provisions contained in this Agreement, and of the Developer’s intent to comply with same, the Developer has submitted the below described security in the amounts required by this Agreement, and has affixed the appropriate signatures thereto:

**PERFORMANCE BOND PRINCIPAL AMOUNT: \$353,433**

Surety: \_\_\_\_\_

Attorney-in-fact: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**MATERIAL AND LABOR BOND PRINCIPAL AMOUNT: \$353,433**

Surety: \_\_\_\_\_

Attorney-in-fact: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**MONUMENT SECURITY (CD): N/A**



BOND NO. \_\_\_\_\_  
INITIAL PREMIUM: \_\_\_\_\_  
SUBJECT TO RENEWAL

**CITY OF MILPITAS**  
**ELEMENT HOTEL PROJECT PUBLIC IMPROVEMENTS**  
**FAITHFUL PERFORMANCE BOND**

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS the City of MILPITAS, California (“City”) and \_\_\_\_\_ (“Principal”), have executed an agreement for work consisting of, but not limited to, the furnishing all labor, materials, tools, equipment, services, and incidentals for all grading, roads, paving, curbs and gutters, sidewalks, storm drains, sanitary sewers, utilities, drainage facilities, traffic controls, landscaping, street lights, and all other required facilities for the Element Hotel Project (“Public Improvements”);

WHEREAS, the Public Improvements to be performed by Principal are more particularly set forth in that certain Agreement for Completion of Pubic Improvements dated \_\_\_\_\_, 2019 (“Improvement Agreement”);

WHEREAS, the Improvement Agreement is hereby referred to and incorporated herein by reference; and

WHEREAS, Principal is required by the Improvement Agreement to provide a good and sufficient bond for performance of the Improvement Agreement, and to guarantee and warranty the Public Improvements constructed thereunder.

NOW, THEREFORE, Principal and \_\_\_\_\_ (“Surety”), a corporation organized and existing under the laws of the State of \_\_\_\_\_, and duly authorized to transact business under the laws of the State of California, are held and firmly bound unto City in the sum of Three Hundred Fifty Three Thousand Four Hundred Thirty Three Dollars (**\$353,433**), said sum being not less than one hundred percent (100%) of the total cost of the Public Improvements as set forth in the Improvement Agreement, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION is such, that if Principal, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions, agreements, guarantees, and warranties in the Improvement Agreement and any alteration thereof made as therein provided, to be kept and performed at the time and in the manner therein specified and in all respects according to their intent and meaning, and to indemnify and save harmless City, its officers, employees, and agents,

as stipulated in the Improvement Agreement, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As part of the obligation secured hereby, and in addition to the face amount specified therefor, there shall be included costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the Improvement Agreement, or to any plans, profiles, and specifications related thereto, or to the Public Improvements to be constructed thereunder, shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration, or addition.

This bond is executed and filed to comply with Section 66499 et seq. of the Government Code of California as security for performance of the Improvement Agreement and security for the one-year guarantee and warranty of the Public Improvements.

IN WITNESS WHEREOF, the seal and signature of the Principal is hereto affixed, and the corporate seal and the name of the Surety is hereto affixed and attested by its duly authorized Attorney-in-Fact at \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Principal

\_\_\_\_\_  
Surety

By: \_\_\_\_\_

\_\_\_\_\_  
President

\_\_\_\_\_  
(print name)

By: \_\_\_\_\_

\_\_\_\_\_  
Attorney-in-Fact

\_\_\_\_\_  
(print name)

**NOTE: APPROPRIATE NOTARIAL ACKNOWLEDGMENTS OF EXECUTION BY PRINCIPAL AND SURETY, AND A COPY OF THE POWER OF ATTORNEY TO LOCAL REPRESENTATIVES OF THE BONDING COMPANY MUST BE ATTACHED TO THIS BOND.**

BOND NO. \_\_\_\_\_  
INITIAL PREMIUM: \_\_\_\_\_  
SUBJECT TO RENEWAL

**CITY OF MILPITAS**  
**ELEMENT HOTEL PROJECT PUBLIC IMPROVEMENTS**  
**LABOR AND MATERIAL BOND**

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS the City of MILPITAS, California (“City”) and \_\_\_\_\_ (“Principal”), have executed an agreement for work consisting of, but not limited to, the furnishing all labor, materials, tools, equipment, services, and incidentals for all grading, roads, paving, curbs and gutters, sidewalks, storm drains, sanitary sewers, utilities, drainage facilities, traffic controls, landscaping, street lights, and all other required facilities for the Element Hotel Project (“Public Improvements”);

WHEREAS, the Public Improvements to be performed by Principal are more particularly set forth in that certain Agreement for Completion of Pubic Improvements dated \_\_\_\_\_, 2019 (“Improvement Agreement”);

WHEREAS, the Improvement Agreement is hereby referred to and incorporated herein by reference; and

WHEREAS, Principal is required to furnish a bond in connection with the Improvement Agreement providing that if Principal or any of its subcontractors shall fail to pay for any materials, provisions, or other supplies, or terms used in, upon, for, or about the performance of the Public Improvements, or for any work or labor done thereon of any kind, or for amounts due under the provisions of Title 3 (commencing with section 9000) of Part 6 of Division 4 of the California Civil Code, with respect to such work or labor, that the Surety on this bond will pay the same together with a reasonable attorney’s fee in case suit is brought on the bond.

NOW, THEREFORE, Principal and \_\_\_\_\_ (“Surety”), a corporation organized and existing under the laws of the State of \_\_\_\_\_, and duly authorized to transact business under the laws of the State of California, are held and firmly bound unto City and to any and all material men, persons, companies or corporations furnishing materials, provisions, and other supplies used in, upon, for or about the performance of the Public Improvements, and all persons, companies or corporations renting or hiring teams, or implements or machinery, for or contributing to the Public Improvements to be done, and all persons performing work or labor upon the same and all persons supplying both work and materials as aforesaid excepting the Principal, the sum of Three Hundred Fifty Three Thousand Four Hundred

Thirty Three Dollars (**\$353,433**), said sum being not less than 100% of the total cost of the Public Improvements under the terms of the Improvement Agreement, we bind ourselves, our heirs, executors and administrators, successors and assigns jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal, his or its subcontractors, heirs, executors, administrators, successors, or assigns, shall fail to pay for any materials, provisions, or other supplies or machinery used in, upon, for or about the performance of the Public Improvements, or for work or labor thereon of any kind, or fail to pay any of the persons named in applicable California laws, or amounts due under the Unemployment Insurance Code with respect to work or labor performed by any such claimant, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the contractor and his subcontractors pursuant to Section 13020 of the Unemployment Insurance Code with respect to such work and labor, and all other applicable laws of the State of California and rules and regulations of its agencies, then said Surety will pay the same in or to an amount not exceeding the sum specified herein.

As part of the obligation secured hereby, and in addition to the face amount specified therefor, there shall be included costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

This bond is executed and filed to comply with Section 66499 et seq. of the California Government Code as security for payment to contractors, subcontractors, and persons furnishing labor, materials, or equipment for construction of the Public Improvements or performance of the Improvement Agreement. It is hereby expressly stipulated and agreed that this bond shall inure to the benefit of any and all persons, companies, and corporations entitled to file claims under Title 3 (commencing with Section 9000) of Part 6 of Division 4 of the California Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond.

Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the Improvement Agreement, or to any plans, profiles, and specifications related thereto, or to the Public Improvements to be constructed thereunder, shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration, or addition.

IN WITNESS WHEREOF, the seal and signature of the Principal is hereto affixed, and the corporate seal and the name of the Surety is hereto affixed and attested by its duly authorized Attorney-in-Fact at \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Principal

\_\_\_\_\_  
Surety

By: \_\_\_\_\_  
President

By: \_\_\_\_\_  
Attorney-in-Fact

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
(print name)

**NOTE:      APPROPRIATE NOTARIAL ACKNOWLEDGMENTS OF EXECUTION  
BY PRINCIPAL AND SURETY, AND A COPY OF THE POWER OF  
ATTORNEY TO LOCAL REPRESENTATIVES OF THE BONDING  
COMPANY MUST BE ATTACHED TO THIS BOND.**