

**PROPERTY DISPOSITION AGREEMENT
EVERETT RIVERFRONT DEVELOPMENT
CITY OF EVERETT/OLIVERMCMILLAN, LLC**

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EXHIBITS:

- Exhibit A -- Legal Description of City Property
- Exhibit B-1 -- Property Map
- Exhibit B-2 -- FEMA Map
- Exhibit C -- Legal Description of Drywall Parcel
- Exhibit D -- Exceptions Schedule
- Exhibit E-1 -- Animal Shelter Lease
- Exhibit E-2 -- Public Works Yard Lease
- Exhibit F -- Deed
- Exhibit G -- Development Plan
- Exhibit H -- Representative "Lifestyle Tenants"
- Exhibit I -- Public Amenities
- Exhibit J -- Dedication, Easement and Maintenance Agreement Terms
- Exhibit K -- Environmental Indemnification and Landfill Agreement
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PROPERTY DISPOSITION AGREEMENT
EVERETT RIVERFRONT DEVELOPMENT
CITY OF EVERETT/OLIVERMCMILLAN, LLC

This PROPERTY DISPOSITION AGREEMENT (the "**Agreement**") is entered into as of the ____ day of February, 2007 (the "**Effective Date**"), by and between the CITY OF EVERETT, a municipal corporation of the State of Washington (the "**City**"), and OLIVERMCMILLAN, LLC, a California limited liability company ("**OM**"). The City and OM are from time to time jointly referred to herein as the "**Parties**" and individually as a "**Party**."

RECITALS

A. The City is the owner of certain land located within the City of Everett, Snohomish County, Washington, adjacent to the Snohomish River and containing approximately 221 acres, legally described on Exhibit A attached hereto (hereinafter, the "**City Property**"). The City Property is also depicted on the boundary survey and property map attached hereto as Exhibit B-1 (the "**Property Map**"). The City Property is comprised of a former landfill site (the "**Landfill Site**") and two former mill sites (the "**Mill Site**" and the "**Simpson Site**." The Landfill Site, the Mill Site and the Simpson Site are each located as and where shown on the Property Map.

B. The Landfill Site and the Simpson Site have been the subject of detailed environmental characterization and remedial actions under the state's Model Toxics Control Act. The Simpson Site was the subject of a voluntary cleanup in which the Washington Department of Ecology ("**Ecology**") issued a "no further action letter" dated December 5, 1994. The Landfill Site was the subject of a final court-approved Consent Decree entered into between the City and Ecology dated April 2, 2001 (the "**Consent Decree**"), which includes a Restrictive Covenant dated January 14, 2002 ("**Restrictive Covenant**"), and a final Cleanup Action Plan ("**CAP**"). These documents and instruments set forth certain conditions and requirements imposed to protect public health, the environment and the integrity of the remedial actions that have been taken on portions of the City Property.

C. The City Property also contains land that is designated as a wetlands and habitat enhancement area and areas for the potential location of certain public amenities, which are generally described in the August 2005 "Snohomish Riverfront Properties at Bigelow Creek: Final Conceptual Enhancement Program" report.

D. The conceptual plan for redevelopment of the City Property set forth in this Agreement is described in and implements previously approved City plans and programs, including but not limited to the City's Comprehensive Plan, Shoreline Master Program and development regulations.

E. The above-referenced City plans and programs have been the subject of prior State Environmental Policy Act ("**SEPA**") compliance including public and interagency notice

and opportunity to comment, under which all appeals have been resolved and for which all appeal periods have expired.

F. The conceptual plan for development described in this Agreement may result in applications that will in turn be subject to appropriate and subsequent development and site-specific SEPA, land use, shoreline, development, public and other applicable review (“**Development Review**”) including a Rezone Development Agreement prior to the commencement of any construction under this Agreement.

G. On November 15, 2006, the Everett City Council passed Resolution 5834 declaring the entirety of the City Property, as described in this Agreement, to be property not required for City purposes and that its sale will be in the best interests of the City as required by Ordinance 2935-06.

H. On October 16, 2006, the City issued a Determination of Significance/Scoping Notice determining that a SEPA environmental impact statement will be prepared for OM’s proposed redevelopment of the City Property.

I. OM is an experienced developer of commercial, retail and residential properties and is interested in acquiring the City Property for development as a high quality, mixed-use retail and residential development as conceptually described herein. In anticipation of a possible sale and development of the City Property, OM and the City entered an Exclusive Negotiating Agreement with the City dated June 15, 2005 (the “**ENA**”).

J. OM agrees to pursue development of the City Property, in accordance with the above-referenced City plans, programs and development regulations and subject to Development Review, as a high quality, mixed-use residential and retail development (the “**Development**”) that is environmentally sensitive and otherwise compatible with the surrounding environment, and that includes open spaces, recreational opportunities such as pedestrian trails and bike paths, and other public amenities that will result in a community where people live, work, shop and enjoy the amenity improvements along the Snohomish River. Development shall be done in a manner consistent with the City’s prior and ongoing remedial actions and obligations under the Consent Decree, the Restrictive Covenant and CAP, as the same may be amended by a Consent Decree acceptable to the City and OM, and the public works on the City Property contemplated by this Agreement.

K. In connection with the Development or any other subsequent development of the City Property in accordance with the above-referenced City plans, programs and development regulations, the City anticipates the need to undertake certain public works in order to provide, subject to applicable law and any required Development Review, roadways, grading and surcharge, wetland restoration and various public amenities on and around the City Property and to undertake certain work intended to aid in collecting and recovering leachate and methane from the Landfill Site and complying with the City’s obligations under the Consent Decree, the Restrictive Covenant and CAP. The City and OM recognize that such public works will need to occur after the City Property has been conveyed and while development of the City Property is taking place. Such concurrent work will require a high level of cooperation and coordination between OM and the City.

L. On June 26, 2006, the City and OM signed a Memorandum of Understanding setting forth their mutual understanding of certain steps and requirements necessary for the Parties to enter into a definitive agreement describing the terms and conditions related to the City's conveyance of the City Property to OM and the Development.

M. After a significant period of negotiation, the City and OM have prepared this Agreement to evidence the terms of the conveyance of the City Property to OM and the respective obligations of the Parties with respect thereto.

N. By Resolution 5891, adopted on February 21, 2007, the recitals of which are incorporated herein by reference, the Everett City Council found that its existing SEPA review is adequate to enter into this Agreement and that entering into this Agreement is a plan-level decision that does not have an adverse environmental impact and does not limit the choice of reasonable alternatives, and authorized the City to enter into this Agreement, designating the Mayor as the person to have authority to act on behalf of the City with respect to the execution and delivery of this Agreement and all matters relating to the disposition of the City Property pursuant to this Agreement.

AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, OM and the City agree as follows:

1. THE SITE

1.1 City Property

The Parties intend that the Development be developed by OM on the City Property after the City Property has been conveyed by the City to OM pursuant to this Agreement, which development is contingent upon the issuance of certain Key Development Permits (described below) and subject to Development Review. The Parties also acknowledge that the Development may also include, in the discretion of OM, certain other adjacent properties as described below.

1.2 Port Property

In addition to the City Property, the Site may include two parcels of real property owned by the Port of Everett, lying adjacent to the City Property (the "**Port Property**"). The Port Property is identified as such on the Property Map. OM may attempt to negotiate an agreement with the Port of Everett for the purchase of the Port Property. If OM should acquire the Port Property, the City acknowledges that OM also may be interested in the vacation and acquisition of the adjacent right of way property directly south of the Port Property and owned by the City, as shown on the Property Map. The City acknowledges that OM may, in its discretion, include the Port Property, and potentially the adjacent right of way property, as part of the larger Development. However, the City shall have no obligation or responsibilities whatsoever with respect to the Port Property under this Agreement and the City is not and does not make any commitments in this Agreement regarding the possible vacation, surplusage or sale of the adjacent right of way property; provided, however, that the City will assist in making

introductions for OM to Port representatives, assist where appropriate in facilitating communications with representatives of the Port and will review and process Development Permits within its jurisdiction to the extent they include the Port Property consistent with the terms of Section 16.10 below.

1.3 Drywall Parcel and 36th Street Easements

The City also owns an adjacent 1.4-acre parcel of land commonly referred to herein as the “**Drywall Parcel**”), legally described on **Exhibit C**, attached hereto and depicted as such on the Property Map. At some time in the future the Site may include the Drywall Parcel, although the Drywall Parcel is not being sold as part of this Agreement. However, the City acknowledges that due to the proximity of the Drywall Parcel to the City Property, OM has an interest in acquiring the Drywall Parcel if and when it might become available for acquisition. If OM should acquire the Drywall Parcel, the City acknowledges that OM also may be interested in the vacation of the adjacent right of way property if the City should decide to vacate the right of way. If the adjacent right of way is vacated and acquired by OM prior to issuance of the Development Permits, the property will be included as part of the larger Development. If the adjacent right of way is not vacated by the City or acquired by OM for any reason, then at Closing the City shall grant to OM and its successors, tenants, subtenants and other invitees such rights of ingress and egress for access and utilities in the 36th Street right of way as are reasonably necessary for the anticipated use and development of the Development (“**36th Street Easements**”). The City’s only commitment to OM with respect to the Drywall Parcel is set forth in Section 15 below, and the City is not making and does not make any commitments in this Agreement regarding the possible vacation, surplusing or sale of the adjacent right of way property.

1.4 Site

The City Property, together with such other properties as may be acquired and added to the overall Development by OM as described in this Agreement, including the Port Property and the Drywall Parcel, and the adjacent right of way properties, is from time to time collectively referred to herein as the “**Site.**”

2. DISPOSITION OF THE CITY PROPERTY

2.1 Purchase and Sale

2.1.1 Generally

Subject to all of the terms and conditions set forth in this Agreement, the City shall sell to OM, and OM shall purchase from the City, the City’s interest in the City Property, which shall include all building structures, improvements and fixtures constructed and owned by the City located thereon and all rights, privileges, servitudes and appurtenances thereunto belonging or appertaining thereto including, without limitation, all minerals, oil, gas and other hydrocarbon substances on and under the City Property and all rights related thereto.

2.1.2 Access

OM's right to have access to and use the City Property prior to Closing is and shall be governed by that certain Right of Access Agreement dated March 3, 2005 previously entered into by the City and OM, which is hereby amended to extend its term and termination date to the earlier of the Closing Date (defined below) or the date on which this Agreement might be terminated (as amended, the "**Access Agreement**"). The indemnification obligations of OM set forth in the Access Agreement shall survive Closing (the "**Surviving Obligations**").

2.2 Purchase Price

The purchase price to be paid by OM for the City Property shall be Eight Million Dollars (\$8,000,000.00), subject to any adjustments and proration as provided for herein (the "**Purchase Price**"). The Purchase Price shall be paid by OM at the time of Closing by wire transfer or other immediately available funds delivered to Title Company.

3. TITLE AND SURVEY

3.1 Title and Survey

The City has delivered to OM an Amended Third Commitment for Title Insurance dated January 22, 2007 issued by First American Title Insurance Company (the "**Title Company**") for an ALTA owner's extended coverage policy of title insurance on the City Property (the "**Title Commitment**"), and will, within fifteen (15) days after the Effective Date provide an ALTA survey of the City Property (the "**Survey**"). OM has reviewed the Title Commitment and has approved those exceptions to title set forth and described in **Exhibit D** attached hereto (the "**Exceptions Schedule**"). All liens, encroachments and encumbrances appearing on the Survey or as special exceptions on the Title Commitment that are not on the Exceptions Schedule or that do not otherwise constitute Permitted Exceptions shall be removed or otherwise addressed to OM's reasonable satisfaction by the City at or prior to Closing (as described herein).

3.2 Title Policy

Title Company shall deliver to OM at Closing an ALTA Owner's Policy of Title Insurance covering the City Property, subject only to the printed exceptions appearing in an ALTA extended form Owner's Policy of Title Insurance and the Permitted Exceptions, with coverage in an amount equal to the Purchase Price (the "**Title Policy**") or an irrevocable commitment to issue same to OM.

3.3 Title Objection Notices

If prior to Closing any new special exceptions or title encumbrances of a material nature are disclosed by any update or re-issuance of either the Title Commitment or the Survey to which exceptions or encumbrances OM reasonably objects, OM shall notify the City in writing (a "**Title Objection Notice**") within ten (10) days of receiving the update or re-issued Title Commitment or Survey. Without limiting the foregoing, OM agrees not to object to any title matters that do not have a material adverse impact on OM's ability to complete the Development or on the value of the City Property. The Title Objection Notice shall specify the specific

Reasons for OM's objections. If OM fails to deliver a proper Title Objection Notice as provided herein, OM shall be deemed to have approved any and all matters set forth in the updated or re-issued Title Commitment or Survey. If, within ten (10) days following the City's receipt of a Title Objection Notice ("**City's Cure Period**"), the City does not cure or cause the matter described in the Title Objection Notice to be insured against (with costs to be paid by the City) to OM's reasonable satisfaction, then OM shall elect, by written notice to the City and Title Company, within five (5) days of the expiration of the City's Cure Period, to either (A) accept the City Property subject to the matters set forth in the Title Objection Notice, with no reduction in the Purchase Price and the additional exception shall be deemed part of the Permitted Exceptions, or (B) terminate this Agreement, whereupon, without the necessity of further documentation, (i) Title Company shall deliver the Deposit to OM, (ii) this Agreement shall be deemed terminated, and (iii) neither party shall have any further obligation or liability to the other party hereunder other than with respect to the Surviving Obligations. If OM shall fail to give notice of its election to the City within said five (5) day period, OM shall be deemed to have elected to proceed under clause (A) of the preceding sentence and to accept title to the City Property subject to the matters set forth in the Title Objection Notice. The Closing Date shall be extended as necessary to permit the City and OM to exercise their respective rights and perform their obligations within the time periods set forth in this Section 3. Notwithstanding anything to the contrary set forth herein, (1) the City shall not have the right pursuant to this Section 3.3 to elect not to cure any Monetary Encumbrances affecting title to the City Property and hereby covenants to remove all Monetary Encumbrances prior to Closing and (2) OM shall not have the right for the purpose of this Section 3.3 to object to any document of record set forth in the Title Commitment binding on the City Property as an easement, covenant or encumbrance placed on the City Property pursuant to that certain Property Exchange and Track Construction Agreement dated August 15, 2006 (the "**BNSF Agreement**"). The phrase "**Monetary Encumbrances**" as used herein means mortgages, deeds of trust, mechanics' or materialmen's liens, and other consensual liens.

3.4 Permitted Exceptions

The following shall be and are referred to collectively herein as the "**Permitted Exceptions**":

(i) the Restrictive Covenant, the Consent Decree, the CAP, the 2003 settlement agreement between the City and the Tulalip Tribes of Washington and the 2004 settlement agreement between the City and the Pilchuck Audubon Society and Public Employees for Environmental Responsibility;

(ii) the liens of all ad valorem real estate taxes and assessments not yet due and payable as of the date of Closing, subject to adjustment as herein provided, but in any event not including any "rollback" or "recapture" taxes, penalties or interest assessed at Closing as a result of all or any portion of the City Property having been in an open space, agricultural or other similar use classification;

(iii) local, state and federal laws, ordinances or governmental regulations, including but not limited to, building and zoning laws, ordinances and regulations, pertaining to the City Property;

(iv) the Shelter Lease, if required; the Public Works Yard Lease, if required; the City Works Easement; and the 41st Street Overpass Easement;

(v) the Licenses for Use of City Property granted to Atkinson-CH2M Hill and to KLB Construction, Inc. related to the I-5 HOV Project (the "**Contractor Licenses**"), which shall be assigned to OM by the City and assumed by OM at Closing;

(vi) matters appearing as printed form general exceptions on the Title Commitment;

(vii) this Agreement, including any Memoranda of this Agreement recorded pursuant to Section 19.13.

3.5 Animal Shelter

The Parties acknowledge that the City currently operates an animal shelter (the "**Shelter**") on a portion of the City Property as and where generally depicted on the Property Map. The City agrees, conditioned on OM acquiring the City Property at Closing and subject to Development Review, to relocate the Shelter operations, remove its personal property and demolish the shelter and all related structures as soon as reasonably possible, but no later than the first anniversary of the final Closing Date, unless such time period is otherwise extended in writing by OM, all at no cost, expense or liability to OM; provided, however, OM agrees to grant such an extension if access to the Shelter property is not required to satisfy an obligation to a third party, in which event the extension shall continue for a reasonable period of time thereafter but in no event later than the earlier of June 30, 2009 or such time as access to the Shelter property is actually required by OM to comply with a third party obligation. OM agrees to enter into a lease with the City at Closing to permit the City to continue to operate the Shelter, without the payment of rent but with an obligation to pay for all taxes, insurance (which insurance shall include OM, its agents, employees, contractors and consultants as additional insureds), utilities and other operational costs, until the Shelter is relocated by the City as provided herein (the "**Shelter Lease**"). The Shelter Lease will be substantially in the form and pursuant to the terms set forth in **Exhibit E-1** attached hereto.

3.6 Public Works Yard

The Parties acknowledge that the City also currently uses a portion of the City Property as and where generally depicted on the Property Map as a storage and staging area for certain equipment and other personal property items (the "**Public Works Yard**"). If the City has not vacated the Public Works Yard by the Closing Date, the City agrees to relocate the equipment and other personal property items on the Public Works Yard as soon as reasonably possible after Closing, but no later than September 28, 2007, and OM agrees to enter into a lease with the City at Closing to permit the City to continue to use the Public Works Yard, without the payment of rent but with an obligation to pay for all taxes, insurance (which insurance shall include OM, its agents, employees, contractors and consultants as additional insureds), utilities and other operational costs, until the Public Works Yard is vacated by the City as provided herein (the "**Public Works Yard Lease**"). The Public Works Yard Lease will be substantially in the form and pursuant to the terms set forth in **Exhibit E-2** attached hereto.

3.7 City Work Temporary Construction Easement

The Parties acknowledge that the City will require a temporary construction easement (the “**City Work Easement**”) at Closing for the purpose of allowing the construction and installation of the City Work (described below). The City Work Easement shall be in a form that is mutually and reasonably acceptable to OM and the City, and shall allow the City and its agents, representatives, contractors and suppliers to have access to the City Property, following Closing, without charge or fees, for the purposes described herein, and OM shall grant and allow the City Work Easement to be recorded at Closing.

3.8 41st Street Overpass Easement

The Parties also acknowledge that the City has constructed a railroad overcrossing and related improvements on a portion of the City Property as and where generally shown on the Property Map and will require, notwithstanding the description of the City Property in **Exhibit A**, either the retention or reconveyance of the underlying fee interest or an easement (the “**41st Street Overpass Easement**”) at Closing to allow the City to continue to use, maintain and repair the overpass and related improvements. If an Overpass Easement is required, it shall be in a form that is mutually and reasonably acceptable to both OM and the City. The 41st Street Overpass Easement shall allow the public and the City and its agents, representatives, contractors and suppliers to use, repair and maintain the overpass and related improvements, and OM shall grant and allow the 41st Street Overpass Easement to be recorded at Closing.

3.9 Existing Utility Easements

The Parties acknowledge that the City will require at Closing easements for the existing water sewer and drainage lines that are located on 36th Street and that continue north across the Mill Site together with easements for the monitoring wells, leachate collection system and existing gas collection system on the Landfill Site (the “**Utility Easements**”). The Utility Easements shall include drawings showing the locations of such facilities, shall permit the relocation of such utilities at OM's sole cost and expense provided such relocations do not impair the functionality of the utilities and are otherwise reasonably acceptable to the City and shall otherwise be in a form that is mutually and reasonably acceptable to both OM and the City. The City will reserve or OM shall grant and record the Utility Easements at Closing, without charge or fees, to allow the continued use, maintenance and repair of such facilities and reasonable rights of access thereto.

3.10 Pedestrian Easements

The Parties acknowledge that the City will require at Closing two pedestrian easements, one in the vicinity of 36th Street and the other in the vicinity of Lowell Park (the “**Pedestrian Easements**”). The City will reserve or OM shall grant and record the Pedestrian Easements at Closing, without charge or fees, to allow for the construction, public use, maintenance and repair of the overcross and reasonable rights of access thereto. The Pedestrian Easements shall be in a form that is mutually and reasonably acceptable to both OM and the City.

3.11 BNSF Agreement

OM has received a copy of the BSNF Agreement with BNSF and acknowledges that the City has certain contractual obligations to BNSF under the BSNF Agreement. The City is not aware of any defaults under the BNSF Agreement as of the Effective Date. Neither OM nor the City is aware of anything in the BNSF Agreement that would be inconsistent with the Development as contemplated herein as long as both the City and BNSF perform their respective obligations under the BNSF Agreement on the terms and conditions and by the deadlines set forth therein. Under no circumstance shall OM have the right to require the City to obtain any amendment to or modification of the BNSF Agreement or condition any consent or approval on any such amendment to or modification of the Exchange Agreement, nor shall OM exercise any right to terminate this Agreement because of any term, condition or provision in the BNSF Agreement. Nothing in this Agreement is intended to make OM a party to or a successor to the City under the BNSF Agreement or to otherwise require OM's assumption of any City obligations thereunder.

4. TERMS OF SALE

EXCEPT AS SET FORTH IN THE REPRESENTATIONS OF THE CITY SET FORTH BELOW OR IN ANY DOCUMENTS TO BE EXECUTED AND DELIVERED BY THE CITY AT CLOSING, SPECIFICALLY INCLUDING, WITHOUT LIMITATION, THE DEED AND THE ENVIRONMENTAL INDEMNIFICATION AND LANDFILL AGREEMENT, OM ACKNOWLEDGES, REPRESENTS, WARRANTS, COVENANTS AND AGREES THAT, AS A MATERIAL INDUCEMENT TO THE CITY TO EXECUTE AND ACCEPT THIS AGREEMENT AND IN CONSIDERATION OF THE PERFORMANCE BY THE CITY OF ITS DUTIES AND OBLIGATIONS UNDER THIS AGREEMENT, NEITHER THE CITY NOR ANY EMPLOYEE, ELECTED OFFICIAL, CONSULTANT, AGENT OR REPRESENTATIVE OF THE CITY (COLLECTIVELY, THE "**CITY RELATED PERSONS**") HAS MADE, AND THAT THE CITY AND THE CITY RELATED PERSONS DO NOT MAKE AND SPECIFICALLY NEGATE AND DISCLAIM, ANY STATEMENT, REPRESENTATION, PROMISE OR GUARANTY (WHETHER ORAL OR IN WRITING) OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, PAST, PRESENT, FUTURE OR OTHERWISE, OF, AS TO, CONCERNING OR WITH RESPECT TO THE CITY PROPERTY, INCLUDING, WITHOUT LIMITATION: (1) GEOLOGICAL CONDITIONS, INCLUDING, WITHOUT LIMITATION, SUBSIDENCE, SUBSURFACE CONDITIONS, WATER TABLE, UNDERGROUND WATER RESERVOIRS, LIMITATIONS REGARDING THE WITHDRAWAL OF WATER AND FAULTING; (2) WHETHER OR NOT AND TO THE EXTENT TO WHICH THE PROPERTY OR ANY PORTION THEREOF IS AFFECTED BY ANY STREAM (SURFACE OR UNDERGROUND), BODY OF WATER, FLOOD-PRONE AREA, FLOOD PLAIN, FLOODWAY, SPECIAL FLOOD HAZARD OR NATURAL HAZARD AREA; (3) DRAINAGE; (4) SOIL CONDITIONS, INCLUDING THE EXISTENCE OF INSTABILITY, PAST SOIL REPAIRS, SOIL ADDITIONS OR CONDITIONS OF SOIL FILL, OR SUSCEPTIBILITY TO LANDSLIDES, OR THE SUFFICIENCY OF ANY UNDERSHORING; (5) USAGES OF ADJOINING PROPERTIES; (6) THE VALUE, COMPLIANCE WITH THE PLANS, SIZE, LOCATION, AGE, USE, DESIGN, QUALITY, DESCRIPTION, DURABILITY, STRUCTURAL INTEGRITY, OPERATION, TITLE TO, OR

PHYSICAL OR FINANCIAL CONDITION OF THE CITY PROPERTY OR ANY PORTION THEREOF, OR ANY RIGHTS OR CLAIMS ON OR AFFECTING OR PERTAINING TO THE CITY PROPERTY OR ANY PART THEREOF INCLUDING, WITHOUT LIMITATION, WHETHER OR NOT THE IMPROVEMENTS COMPLY WITH THE REQUIREMENTS OF TITLE III OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. §§ 12181-12183, 12186(B)-12189 AND RELATED REGULATIONS; (7) THE PRESENCE OF HAZARDOUS MATERIALS IN OR ON, UNDER OR IN THE VICINITY OF THE CITY PROPERTY; (8) ANY BUILDABLE AREAS ON OR THE SQUARE FOOTAGE OF THE CITY PROPERTY; (9) IMPROVEMENTS AND INFRASTRUCTURE, IF ANY; (10) DEVELOPMENT RIGHTS AND EXTRACTATIONS; (11) WATER OR WATER RIGHTS; (12) THE DEVELOPMENT POTENTIAL FOR THE PROPERTY; (13) THE ABILITY OF OM TO REZONE THE PROPERTY, CHANGE THE USE OF THE PROPERTY OR DEVELOP THE DEVELOPMENT; (14) THE ABILITY OF OM TO ACQUIRE ADJACENT PROPERTIES; (15) THE EXISTENCE AND POSSIBLE LOCATION OF ANY UNDERGROUND UTILITIES; (16) THE EXISTENCE AND POSSIBLE LOCATION OF ANY ENCROACHMENTS; (17) WHETHER THE IMPROVEMENTS WERE BUILT, IN WHOLE OR IN PART, IN COMPLIANCE WITH APPLICABLE BUILDING CODES OR OTHER LAWS OR WITH THE PLANS; (18) THE CHARACTER OF THE NEIGHBORHOOD IN WHICH THE PROPERTY IS SITUATED; (19) THE CONDITION OR USE OF THE PROPERTY OR COMPLIANCE OF THE PROPERTY OR THE DEVELOPMENT WITH ANY OR ALL PAST, PRESENT OR FUTURE FEDERAL, STATE OR LOCAL ORDINANCES, RULES, REGULATIONS OR LAWS, BUILDING, FIRE OR ZONING ORDINANCES, CODES OR OTHER SIMILAR LAWS; AND (OR) (20) THE MERCHANTABILITY OF THE CITY PROPERTY OR FITNESS OF THE PROPERTY FOR ANY PARTICULAR PURPOSE (OM AFFIRMING THAT OM HAS NOT RELIED ON THE CITY'S SKILL OR JUDGMENT TO SELECT THE PROPERTY FOR ANY PARTICULAR PURPOSE, AND THAT THE CITY MAKES NO WARRANTY THAT THE CITY PROPERTY IS FIT FOR ANY PARTICULAR PURPOSE). WITH LIMITING ANY OF THE REMEDIES EXPRESSLY GRANTED TO OM HEREIN, OM ACKNOWLEDGES AND AGREES THAT OM IS OBLIGATED TO AND SHALL CONDUCT ITS OWN INVESTIGATIONS AND STUDIES OF THE CITY PROPERTY AND THE DEVELOPMENT, AND ALL ASPECTS OF THE CITY PROPERTY AND THE DEVELOPMENT, INCLUDING, WITHOUT LIMITATION, THE CITY PROPERTY'S CHARACTERISTICS, ITS PHYSICAL CONDITION (INCLUDING ANY PATENT OR LATENT DEFECTS THEREIN), ALL LEGAL REQUIREMENTS APPLICABLE THERETO, THE OPERATION AND USE THEREOF, THE ENVIRONMENTAL CONDITION OF THE CITY PROPERTY AND ALL MATTERS DESCRIBED IN THE PRECEDING SENTENCE. OM, BY ITS PAYMENT OF THE PURCHASE PRICE AND ACQUISITION OF THE CITY PROPERTY, WILL BE DEEMED TO ACKNOWLEDGE THAT OM HAS FULLY INSPECTED THE CITY PROPERTY, INCLUDING THE IMPROVEMENTS, AND APPROVED ALL SUCH INVESTIGATIONS AND STUDIES AND THE CITY PROPERTY AND ALL ASPECTS THEREOF, INCLUDING ALL ITEMS DESCRIBED IN THE PRECEDING SENTENCES. OM AGREES THAT OM IS ACQUIRING THE PROPERTY IN ITS PRESENT CONDITION AND STATE OF REPAIR, "AS IS, WHERE IS," WITH ALL DEFECTS, FAULTS AND LIABILITIES, PATENT OR LATENT, EXCEPT AS MAY

OTHERWISE BE SPECIFICALLY SET FORTH HEREIN OR IN THE CLOSING DOCUMENTS.

OM HAS REQUESTED THAT THE CITY FURNISH OM WITH CERTAIN STUDIES, REPORTS AND OTHER INFORMATION IN THE CITY'S POSSESSION WITH RESPECT TO THE CITY PROPERTY, INCLUDING ENVIRONMENTAL STUDIES AND SURVEYS. AS AN ACCOMMODATION TO OM, THE CITY HAS FURNISHED SUCH INFORMATION TO OM. OM HEREBY ACKNOWLEDGES AND AGREES THAT THE CITY IS MAKING ABSOLUTELY NO REPRESENTATION OR WARRANTY WHATSOEVER WITH RESPECT TO ANY SUCH STUDIES, REPORTS OR INFORMATION PROVIDED BY THE CITY TO OM OR ANY OTHER MATERIALS PROVIDED TO OM BY THE CITY. OM ACKNOWLEDGES AND AGREES THAT OM SHALL BE REQUIRED TO VERIFY THE ACCURACY AND DETAILS OF ALL SUCH STUDIES, REPORTS AND INFORMATION SO PROVIDED BY THE CITY TO OM OR ANY OTHER MATERIALS PROVIDED TO OM BY THE CITY IN SUCH MANNER AS OM DEEMS APPROPRIATE. EXCEPT AS MAY OTHERWISE BE SPECIFICALLY SET FORTH HEREIN OR IN THE CLOSING DOCUMENTS, NO REPRESENTATION, WARRANTY, COVENANT OR AGREEMENT, EXPRESS OR IMPLIED, OF THE CITY SHALL SURVIVE THE CONVEYANCE OF TITLE EXCEPT THAT, IF ANY, WHICH IS HEREIN SPECIFICALLY STATED TO SURVIVE CLOSING.

THE ACQUISITION OF THE CITY PROPERTY BY OM SHALL BE CONCLUSIVE EVIDENCE THAT (A) OM HAS FULLY AND COMPLETELY INSPECTED (OR HAS CAUSED TO BE FULLY AND COMPLETELY INSPECTED) THE CITY PROPERTY, AND (B) OM ACCEPTS THE CITY PROPERTY AS BEING IN GOOD AND SATISFACTORY CONDITION AND SUITABLE FOR OM'S PURPOSES SUBJECT TO THE TERMS AND CONDITIONS OF THIS AGREEMENT.

5. PRE-CLOSING COVENANTS OF OM AND THE CITY

From and after the Effective Date until the earlier of (i) Closing or (ii) the termination of this Agreement as herein provided, the City and OM covenant and agree as follows:

5.1 Payments

The City shall make any and all payments due and owing with respect to the City Property, including, without limitation, all real estate taxes or assessments, if any, to the extent due or payable, charges, fees, levies and impositions, insurance premiums, service contracts, management fees and payments for materials and materialmen, prior to the due date for such payment.

5.2 No Change in Physical Condition

The City will not permit any waste with respect the City Property. Without the consent of OM, which consent shall not be unreasonably withheld, the City will not make any material changes to the physical condition of the City Property except as contemplated by this Agreement, the Consent Decree, CAP or as required by applicable law.

5.3 Floodplain Clarification

The City will use reasonably diligent efforts to have the Federal Emergency Management Agency (“**FEMA**”) correct its Flood Insurance Rate Map (the “**Rate Map**”) to reflect the determination by the Flood Insurance Study (effective September 16, 2005) that the area shown on **Exhibit B-2** is not part of the regulatory floodway and is designated on the Rate Map as Zone X, all as set forth in the letter from the City to FEMA dated November 6, 2006.

5.4 Development Expenditures

Within the three (3) month period following the Effective Date, OM shall have spent or incurred at least Four Hundred Thousand Dollars (\$400,000.00) in out-of-pocket third party expenses in furtherance of the permitting or development of the Development (“**Third Party Development Expenditures**”). If by the first day after the three (3) month period following the Effective Date Closing has not occurred, this Agreement has not been terminated and OM has not spent or incurred at least Four Hundred Thousand Dollars (\$400,000.00) in Third Party Development Expenditures, and documented such Third Party Development Expenditures to the reasonable satisfaction of the City, then the difference between what OM has spent or incurred and documented in actual Third Party Development Expenditures and Four Hundred Thousand Dollars (\$400,000.00) (the “**Development Expenditure Shortfall Payment**”) shall be paid to the City and shall thereafter be applicable to the Purchase Price at Closing or, in the event Closing fails to occur, shall be retained by the Party entitled to retention of such amount pursuant to Sections 12 and 13 below.

5.5 Prospective Purchaser Consent Decree Assurances

Upon entering into a final written Environmental Indemnity and Landfill Agreement as described in Section 16.8 below, OM and the City shall seek a Prospective Purchaser Consent Decree or an amendment of the Consent Decree acceptable to OM and the City that is agreed to by Ecology and is entered in court as will be further described in the Environmental Indemnification and Landfill Agreement (a “**Consent Decree Assurance**”). The Parties shall cooperate in good faith with respect to their efforts to obtain a Consent Decree Assurance and shall pursue the request for a Consent Decree Assurance with commercially reasonable diligence.

5.6 Sell or Encumber Property

The City shall not sell, assign or convey any right, title or interest whatever in or to the City Property or create or permit to exist any consensual lien, easement or declaration on the City Property that is not a Permitted Exception and that will not be paid in full at Closing. To the extent that any easements or declarations are proposed that will affect the City Property, the City shall neither execute said easements or declarations nor suffer the execution of same by or on behalf of City without OM’s prior written consent, which shall not be unreasonably withheld. The covenant set forth in this Section 5.6 shall expire on June 30, 2007 if Closing has not occurred by that date, or any extension of that date that may be agreed to in writing by the City.

5.7 Governmental Orders; Compliance With Laws and Agreements

The City shall not violate any lawful order or directive of a governmental agency with respect to the City Property where the violation might have a material adverse impact on the Development or impose an obligation on OM after Closing and thereafter fail to cure any such violation within a reasonable time and shall comply in all material respects with all laws and agreements applicable to the City Property, including but not limited to the Consent Decree, the Restrictive Covenant and CAP.

6. CONDITIONS TO CLOSING

6.1 Conditions to OM's Obligation

The obligation of OM to close on the purchase of the City Property is subject to the fulfillment of the following conditions on or prior to the Closing Date, each of which shall continue as a condition until Closing unless waived by OM.

6.1.1 Representations and Warranties

The representations and warranties of the City contained in this Agreement shall be true and correct in all material respects as of Closing.

6.1.2 Title Policy

Title Company is committed to issuing the Title Policy to OM at Closing, subject only to the Permitted Exceptions, and OM shall be satisfied that there are no third parties in possession of the City Property other than as allowed by a Permitted Exception.

6.1.3 Floodplain/Floodway

Those portions of the City Property described in the City's request to FEMA dated November 6, 2006 as supplemented (Case No 07-10-0093A) and **Exhibit B-2** attached hereto shall be designated by FEMA on the Rate Map as Zone X (the "**Floodplain Contingency**").

6.1.4 Environmental Indemnification and Landfill Agreement and Consent Decree Assurance

OM and the City shall have entered into a final written Environmental Indemnification and Landfill Agreement as contemplated by Section 16.8 below and Ecology shall have provided a Consent Decree Assurance as described in Section 5.5 above consistent with the final written Environmental Indemnification and Landfill Agreement (the "**Environmental Agreement and Consent Decree Assurance Contingency**").

6.1.5 Performance by City

The City shall not be in breach of any provision of this Agreement or the Access Agreement to be performed and/or complied with by City as of the Closing Date.

6.1.6 No Development Moratorium

The City shall not have a development moratorium in effect that would prohibit completion of the Development in accordance with this Agreement.

6.1.7 No BNSF Right to Recovery

BNSF shall not have a right under Section 4.1.3 of the BNSF Agreement to reconvey any portion of the City Property back to the City or to require the conveyance of the BNSF Property (as described therein) back to the City.

6.1.8 Simpson Site Status

If the current No Further Action letter applicable to the Simpson Site should be withdrawn by Ecology prior to Closing, the City shall have obtained from Ecology either a No Further Action letter or a written confirmation that the Simpson Site is not a MTCA site, to the extent Ecology will provide this determination under MTCA or the Voluntary Cleanup Program ("VCP") based on existing available information ("**Simpson Site NFA Contingency**")

6.2 Conditions to City's Obligation

The obligation of the City to close on the sale of the City Property is subject to the fulfillment of the following conditions on or prior to the Closing Date, each of which shall continue as a condition until Closing unless waived by the City.

6.2.1 Title Encumbrances

The City shall have been able to remove from title to the City Property all liens, encumbrances, encroachments and other matters that are not Permitted Exceptions (the "**Title Contingency**").

6.2.2 Environmental Agreement and Consent Decree Assurance Contingency

The Environmental Agreement and Consent Decree Assurance Contingency shall have been satisfied.

6.2.3 Representations and Warranties

The representations and warranties of OM contained in this Agreement shall be true and correct in all material respects as of Closing.

6.2.4 No Breach

Except as provided and permitted by Section 14.1 below, OM shall not have assigned or transferred its interest in this Agreement to any person and shall not otherwise be in breach of any provision of this Agreement or the Access Agreement as of the Closing Date.

CLOSING DELIVERIES

At Closing, the following documents (the “**Closing Documents**”) and items shall be delivered as indicated below:

7.1 City’s Deliveries

The City shall deliver the following items to OM or Title Company, duly executed and acknowledged by the City, as applicable:

7.1.1 Special Warranty Deed

A special warranty deed (the “**Deed**”) in the form attached hereto as **Exhibit F** conveying the City Property to OM, subject only to the Permitted Exceptions. The Deed will include a statement that the grant is made subject to the rights granted to the City in this Agreement.

7.1.2 Real Estate Excise Tax Affidavit

A real estate excise tax affidavit as required in connection with the conveyance of the City Property.

7.1.3 FIRPTA Certificate

A certificate of nonforeign status in form required by federal income tax regulations and reasonably acceptable to OM.

7.1.4 Environmental Indemnification and Landfill Agreement

The Environmental Indemnification and Landfill Agreement referenced in Section 16.8 below.

7.1.5 Shelter Lease and Public Works Yard Lease

The Shelter Lease; and, if required, the Public Works Yard Lease.

7.1.6 36th Street Easements

To the extent easements are necessary to provide access and or utilities to the Development across 36th Street, as described in Section 1.3 above, the 36th Street Easements.

7.1.7 Assignment of the Contractor Licenses

An Assignment of the Contractor Licenses in a form reasonably acceptable to OM.

7.1.8 Authority Documents

Duly adopted resolutions by the City Council for the City of Everett or other evidence satisfactory to Title Company of the authorization of the sale of the City Property to OM and of the authority of the person(s) executing and delivering documents at Closing on behalf of City.

7.1.9 City's Certificate

A certificate certifying that each and every warranty and representation made by the City in this Agreement is true and correct in all material respects as of Closing as if made by the City at such time, except as shall have been disclosed to and waived by OM in writing.

7.1.10 Closing Statement

A closing statement setting forth in reasonable detail the financial transaction contemplated by this Agreement, including, without limitation, the Purchase Price, all pro-rations, the allocation of costs specified herein and the source, application and disbursement of all funds (the "Closing Statement").

7.1.11 Miscellaneous

Such other items, documents, affidavits, real City Property instruments and certificates as required by the terms and conditions of Section 6.1 above or as OM otherwise reasonably requires or as may be necessary or desirable to consummate the sale of the City Property and to induce Title Company to issue the Title Policy.

7.2 OM's Deliveries

OM shall deliver the following items to the City or to Title Company, duly executed and acknowledged by City, as applicable:

7.2.1 Real Estate Excise Tax Affidavit

The real estate excise tax affidavit as required in connection with the conveyance of the City Property.

7.2.2 City Work, Utility, 41st Street Overpass and Pedestrian Easements

The City Work Easement, the Utility Easements, the 41st Street Overpass Easement and the Pedestrian Easements, all in form reasonably acceptable to the City.

7.2.3 Environmental Indemnification and Landfill Agreement

The Environmental Indemnification and Landfill Agreement described and referenced in Section 16.8 below.

7.2.4 Shelter Lease and Public Works Yard Lease

The Shelter Lease and, if required, the Public Works Yard Lease.

7.2.5 Assumption of the Contractor Licenses

An Assumption of the Contractor Licenses in a form reasonably acceptable to the City.

7.2.6 Authority Documents

Duly adopted resolutions by the members or governing body of OM, or other evidence satisfactory to Title Company and the City of the authorization of OM to enter into this Agreement and of the authority of the person(s) executing this Agreement and delivering documents at Closing on behalf of OM.

7.2.7 OM's Certificate

A certificate certifying that each and every warranty and representation made by OM in this Agreement is true and correct in all material respects as of Closing as if made by OM at such time, except as shall have been disclosed to and waived by the City in writing.

7.2.8 Closing Statement

The Closing Statement.

7.2.9 Dedication, Easement and Maintenance Agreement

The Dedication, Easement and Maintenance Agreement described below.

7.2.10 Miscellaneous

Such other items, documents, affidavits, real City Property instruments and certificates as the City reasonably requires or as may be necessary or desirable to consummate the purchase of the City Property and to induce Title Company to issue the Title Policy.

8. TIME AND PLACE OF CLOSING

8.1 Closing Date

The closing date for the purchase and sale transaction described herein (the "**Closing**") shall be determined upon satisfaction or waiver of the Floodplain Contingency, Environmental Agreement and Consent Decree Assurance Contingency, Simpson NFA Contingency and Title Contingency (collectively the "**Closing Date Timing Contingencies**") and shall be a date (the "**Closing Date**") selected by OM with not less than ten (10) days' prior notice to the City, but in no event more than twenty (20) days after the date by which all of the Closing Date Timing Contingencies have been satisfied or waived; provided, however, this Agreement shall expire without any further action if all of the Closing Date Timing Contingencies have not been satisfied prior to September 30, 2007. If the Closing does not occur by October 20, 2007, then this Agreement shall terminate; provided, however, the Parties shall retain any rights or remedies they may have hereunder for any nonperformance prior to any such termination and the Surviving Obligations shall remain in effect after any such termination.

8.2 Closing Procedure

Closing shall occur at the office of Title Company. All documents and instruments required for Closing shall be delivered to Closing Agent, or at such other location(s) as Title Company may select, on or before the Closing Date. Funds required for Closing shall be delivered to Closing Agent by 12:00 p.m. on the Closing Date. Each Party agrees to execute and deliver to Closing Agent closing escrow instructions to implement and coordinate Closing in accordance with the terms of this Agreement.

9. APPORTIONMENTS AND CLOSING COSTS

9.1 Proration of Income and Expenses

The following items shall be adjusted or prorated between City and OM at Closing, in the manner set forth herein with the exception of income and expenses for those portions of the City Property subject to the Shelter Lease and the Public Works Yard Lease which shall be the continuing obligation of the City subsequent to Closing as set forth in the Shelter Lease and Public Works Yard Lease, respectively.

9.1.1 Taxes and Assessments

With respect to any real property taxes and any local improvement district assessments, special assessments, and drainage district service charges assessed against the City Property but which are not due and payable as of the day prior to the Closing Date, such taxes and charges shall be prorated as of the day prior to the Closing Date on the basis of the most recent ascertainable taxes and charges, with the City providing OM a credit at Closing for such prorated amount, excluding any "rollback" or "recapture" taxes, penalties or interest due as a result of all or any portion of the City Property having been in an open space, agricultural or other similar use classification which shall be the sole responsibility of the City. In addition, any assessments due and payable before the Closing Date under any documents of record against the City Property, such as covenants, conditions and restrictions, shall be prorated as of the Closing Date. Any taxes arising from events on or after the Closing Date, or assessed after the Closing Date, shall be the sole responsibility of OM.

9.1.2 Income and Operating Expenses

All income and operating expenses for or pertaining to the City Property, including, without limitation, public utility charges, shall be prorated, with City responsible for payment through and including the Closing Date and OM responsible for payment thereafter.

9.2 Post-Closing Adjustments

To the extent items are prorated or adjusted at Closing on the basis of estimates, or are not prorated or adjusted at Closing pending actual receipt of information upon which such prorations and/or adjustments are to be based, OM and the City will, upon a proper accounting, pay to the other such amounts as may be necessary such that the City will pay all expenses of the City Property for the period on and prior to the Closing Date and OM will pay all expenses of the City Property for the period after the Closing Date, except as otherwise provided in any of the

Closing Documents. If either Party receives any bill or invoice that relates to the period for which the other Party is responsible, the receiving Party will refer such bill to the responsible Party and the responsible Party agrees to pay, promptly upon receipt, such portion of the bill or invoice as relates to the period for which it is responsible.

9.3 Closing Costs

The City shall pay the following costs in connection with Closing: (i) all real estate excise taxes; (ii) the premium payable for the standard coverage portion of the Title Policy (excluding, without limitation, any premiums or other charges relating to any extended coverage or endorsements requested by OM); (iii) the cost of the Survey; (iv) recording fees for the Deed, the City Work Easement and the Overpass Easement; (v) all Monetary Encumbrances; and (vi) one-half of Title Company's escrow fee. OM shall pay (A) one-half of Title Company's escrow fee, and (B) the premium payable for the extended coverage portion of the Title Policy and all endorsements to the Title Policy requested by OM, and any premium payable for any mortgagee's policy of title insurance. Each Party shall pay the fees of its own attorneys, accountants and other professionals.

10. CASUALTY LOSS AND CONDEMNATION

10.1 Damage

If, prior to the Closing Date, all or any part of the City Property is substantially damaged by fire, casualty, the elements or any other cause, the City shall immediately give notice to OM of such fact and at OM's option (to be exercised prior to the earlier of thirty (30) days after the City's notice or the Closing Date), this Agreement shall terminate, in which event neither party will have any further obligations under this Agreement, except for those obligations which expressly survive the termination of this Agreement, and the Deposit shall be refunded to OM. If OM fails to timely elect to terminate despite such substantial damage, or if the City Property is damaged but not substantially, there shall be no reduction in the Purchase Price, and the City shall assign to OM at Closing all of the City's right, title and interest in and to the proceeds of all insurance related to such damage. For purposes of this Section 10.1, the words "substantially damaged" mean damage that would cost Five Hundred Thousand Dollars (\$500,000.00) or more to repair.

10.2 Condemnation

If, prior to the Closing Date, eminent domain proceedings are commenced against all or any part of the City Property, the City shall immediately give notice to OM of such fact and at OM's option (to be exercised prior to the earlier of thirty (30) days after the City's notice or the Closing Date), this Agreement shall terminate, in which event neither party will have further obligations under this Agreement, except for those obligations which expressly survive the termination of this Agreement, and the Deposit shall be refunded to OM. If OM fails to timely elect to terminate despite such eminent domain proceedings, there shall be no reduction in the Purchase Price, and the City shall assign to OM at Closing all of the City's right, title and interest in and to any award made or to be made in the eminent domain proceedings.

11. INDEMNITY

11.1 Indemnification by OM

Except as otherwise provided in the Environmental Indemnification and Landfill Agreement, the City Work Easement, the Shelter Lease or the Public Works Yard Lease, the Overpass Easement and any other Closing Document, OM hereby indemnifies and agrees to defend, hold harmless and protect the City and City Related Persons from and against any and all claims (including, without limitation, any claim for damage to property or injury to death of any persons), liens, or encumbrances, (including reasonable attorneys' fees), asserted by any third person against the City or the City Property or any part thereof or any operations thereon to the extent the claim, lien or encumbrance pertains to the period of time after Closing; provided, however, that in the event of the concurrent negligence of OM, its agents, employees, sublessees, invitees, licensees or contractors on the one hand and that of any agent of the City on the other hand, which concurrent negligence results in injury or damage to persons or property and relates to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of the Property, OM's obligation to indemnify the City and any City Related Person as set forth in this Section 11.1 shall be limited to the extent of OM's negligence, and that of its agents, employees, sublessees, invitees, licensees or contractors, including OM's proportional share of costs, and attorneys' fees and expenses incurred in connection with any claim, action or proceeding brought with respect to such injury or damage. The indemnification obligations contained in this Section 11.1 shall not be limited by any workers' compensation, benefits or disability laws, and OM hereby waives any immunity that OM may have under any workers' compensation, benefit or disability laws. The provisions of this Section 11.1 shall survive Closing, if Closing shall occur. Nothing in this Section 11.1 is intended to waive or limit any claim that OM may have for any breach of this Agreement or any violation of any express representation or warranty made by the City in this Agreement.

11.2 Indemnification by the City

Except as otherwise provided in the Environmental Indemnification and Landfill Agreement, the City Work Easement, the Shelter Lease or the Public Works Yard Lease, the Overpass Easement and any other Closing Document, and to the extent permitted by applicable law, the City hereby indemnifies and agrees to defend, hold harmless and protect OM, each member, manager, partner or shareholder, as the case may be, in or of OM, and their respective officers, directors, managers, members, shareholders, partners, employees, agents and consultants (the "**OM Indemnified Parties**"), from and against any and all claims (including, without limitation, any claim for damage to property or injury or death of any persons), liens, or encumbrances, (including reasonable attorneys' fees but excluding any Permitted Exception) that may at any time be asserted by any third person against OM (and/or its successors and/or assigns) or the City Property or any part thereof, to the extent the claim, lien or encumbrance pertains to the period of time prior to Closing but during the period of time the City Property was owned by the City; provided, however, that in the event of the concurrent negligence of the City, its agents, employees, sublessees, invitees, licensees or contractors on the one hand and that of any agent of OM on the other hand, which concurrent negligence results in injury or damage to persons or property and relates to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of the City Property, the City's obligation to indemnify the

OM Indemnified Parties as set forth in this Section 11.2 shall be limited to the extent of the City's negligence, and that of its agents, employees, sublessees, invitees, licensees or contractors, including the City's proportional share of costs, and attorneys' fees and expenses incurred in connection with any claim, action or proceeding brought with respect to such injury or damage. The indemnification obligations contained in this Section 11.2 shall not be limited by any workers' compensation, benefits or disability laws, and City hereby waives any immunity that City may have under any workers' compensation, benefit or disability laws. The provisions of this Section 11.2 shall survive Closing, if Closing shall occur. Nothing in this Section 11.2 is intended to waive or limit any claim that the City may have for any breach of this Agreement or any violation of any express representation or warranty made by OM in this Agreement.

12. CITY'S REMEDY FOR OM'S FAILURE TO CLOSE

IF ALL CONDITIONS TO OM'S OBLIGATIONS TO CLOSE THIS TRANSACTION HAVE BEEN SATISFIED ACCORDING TO THE TERMS OF THIS AGREEMENT AND OM, WITHOUT LEGAL EXCUSE, FAILS TO CLOSE ON ITS ACQUISITION OF THE CITY PROPERTY, THE CITY SHALL GIVE NOTICE TO OM, AND IF OM FAILS TO CLOSE WITHIN TEN (10) DAYS AFTER RECEIPT OF SUCH NOTICE, THE CITY'S SOLE AND EXCLUSIVE REMEDY SHALL BE AS FOLLOWS: (A) RETENTION OF THE DEVELOPMENT EXPENDITURE SHORTFALL PAYMENT (IF ANY), (B) DELIVERY TO THE CITY OF THE OM DELIVERABLES WITHOUT PAYMENT OF ANY KIND BY THE CITY THEREFOR AND WITHOUT REPRESENTATION BY OM IN CONNECTION THEREWITH, AND (C) REIMBURSEMENT FOR THE CITY'S THIRD PARTY EXPENDITURES RELATED TO THIS TRANSACTION, UP TO A MAXIMUM OF TWO MILLION DOLLARS (\$2,000,000.00).

THE PARTIES AGREE THAT IN NO EVENT SHALL THIS LIMITATION ON REMEDIES PROVISION APPLY TO ANY OBLIGATION OF OM WHICH IS TO SURVIVE TERMINATION OR EXPIRATION OF CLOSING. BY INITIALING THIS PROVISION IN THE SPACES BELOW, THE CITY AND OM EACH SPECIFICALLY AFFIRM THEIR RESPECTIVE AGREEMENTS CONTAINED IN THIS SECTION 12.



OM'S INITIALS



THE CITY'S INITIALS

13. OM'S REMEDIES FOR CITY'S FAILURE TO CLOSE

IF ALL CONDITIONS TO THE CITY'S OBLIGATIONS TO CLOSE THIS TRANSACTION HAVE BEEN SATISFIED ACCORDING TO THE TERMS OF THIS AGREEMENT AND THE CITY, WITHOUT LEGAL EXCUSE, FAILS TO SELL THE CITY PROPERTY PURSUANT TO THIS AGREEMENT, OM SHALL GIVE NOTICE TO THE CITY, AND IF THE CITY FAILS TO CLOSE WITHIN TEN (10) DAYS AFTER RECEIPT OF SUCH NOTICE, OM'S SOLE REMEDIES SHALL BE AS FOLLOWS: (A) TO TERMINATE THIS AGREEMENT BY WRITTEN NOTICE DELIVERED TO THE CITY AND TITLE COMPANY AND TO BE REIMBURSED FOR ITS THIRD PARTY DEVELOPMENT EXPENDITURES, UP TO A MAXIMUM OF TWO MILLION DOLLARS (\$2,000,000.00); OR (B) TO SPECIFICALLY ENFORCE (WHICH ACTION FOR SPECIFIC

PERFORMANCE MUST BE FILED AND SERVED UPON THE CITY WITHIN ONE HUNDRED EIGHTY (180) DAYS AFTER THE EXPIRATION OF THE TEN (10) DAY PERIOD DESCRIBED IN THIS SENTENCE) THE CITY'S OBLIGATION TO EXECUTE AND DELIVER THE DEED AND TO CONVEY THE CITY PROPERTY TO OM. EXCEPT AS SET FORTH HEREIN, OM SHALL NOT HAVE THE RIGHT TO RECOVER DAMAGES OF ANY KIND OR TO OBTAIN OTHER EQUITABLE RELIEF, INCLUDING, WITHOUT LIMITATION, ANY EQUITABLE ADJUSTMENT TO THE TERMS OF THE SALE OF THE PROPERTY. IN CONNECTION WITH ANY SUCH ACTION FOR SPECIFIC PERFORMANCE, AS A CONDITION PRECEDENT TO OM'S ELECTION TO PURSUE AN ACTION FOR SPECIFIC PERFORMANCE, OM SHALL HAVE FULLY PERFORMED ALL OF OM'S OBLIGATIONS (EXCEPTING THOSE WHICH CITY'S DEFAULT OR FAILURE TO PERFORM HAVE MADE IMPOSSIBLE FOR OM TO COMPLY WITH) AND MADE ALL DELIVERIES REQUIRED TO BE PERFORMED OR DELIVERED ON OR BEFORE CLOSING, INCLUDING, WITHOUT LIMITATION, DELIVERING TO TITLE COMPANY THE PURCHASE PRICE AND ALL OTHER FUNDS REQUIRED OF OM



OM'S INITIALS



THE CITY'S INITIALS

14. GENERAL TERMS RELATED TO DISPOSITION OF THE CITY PROPERTY

14.1 Assignment of Right to Purchase

Prior to Closing OM may assign its rights to acquire one or more parcels within the City Property under this Agreement, together with any improvements located thereon, to an Affiliated Entity without the prior written consent of the City, provided (i) OM gives the City written notice of any such assignment at least fifteen (15) days before Closing and the consummation of any such transaction, to one or more Affiliated Entities (as defined below), (ii) the assignee is an Affiliated Entity of OM, and (iii) the assignee assumes all of the obligations and liabilities of OM under this Agreement with respect to such conveyance parcel(s). For purposes of this Agreement, an "Affiliated Entity" or the plural "Affiliated Entities" shall mean (A) a corporation, partnership, limited liability company or other entity in which OM has and will retain, until the Minimum Development Elements have been completed and a Certificate of Completion issued, an economic ownership interest that is no less (after distribution to all investors of their capital and return of capital) than that of any other equity owner together with primary management and day-to-day operational control of the Development and the corporation, partnership, limited liability company or other entity, (B) any single asset entity formed by OM to hold and/or manage the Development (or portion thereof) in which Morgan Dene Oliver and James L. McMillan and/or Paul Buss (the "OM Principals") have and will collectively retain, until the Minimum Development Elements have been completed and a Certificate of Completion issued, an economic ownership interest that is no less (after distribution to all investors of their capital and return of capital) than that of any other equity owner (with the interests of any affiliated owners being aggregated for this purpose) together with primary management and day-to-day operational control of the management of the single asset entity and of the Development, or (C) any entity in which the OM Principals have and will collectively retain, until the Minimum Development Elements have been completed and a Certificate of Completion issued, an economic ownership interest that is no less (after

distribution to all investors of their capital and return of capital) than that of any other equity owner (with the interests of any affiliated owners being aggregated for this purpose) together with primary management and day-to-day operational control of such entity and of the Development. Notwithstanding the foregoing, if OM or the OM Principals do not or will not retain voting control of the Affiliated Entity, then no assignment shall be permitted unless the City approves of the owners who will have voting control of the Affiliate Entity; provided, however, the City will not object to Principal Life Insurance Company or another comparable financial institution as an owner with potential voting control of the Affiliate Entity. OM may not otherwise assign its rights under this Agreement without the prior written consent of the City, which consent may be withheld by the City in its sole and absolute discretion. Any assignment, whether or not the consent of the City is required, shall be subject to all the provisions, terms, covenants and conditions of this Agreement, the assignee shall jointly and severally assume in writing the obligations of OM hereunder, OM shall, in any event, continue to be and remain liable under this Agreement, as it may be amended from time to time, without notice to OM, and in all events no such assignment may result in a delay of Closing.

14.2 Brokers

The Parties each represent and warrant to the other that no real estate agent or broker was involved in negotiating the transaction contemplated herein. In the event any other claims for real estate commissions, fees or compensation arise in connection with this transaction, the Party so incurring or causing such claims agrees to indemnify, defend and hold harmless the other Party from any loss or damage, including attorneys' fees, that said other Party suffers because of said claims.

14.3 Return of Documents

In the event that this Agreement is terminated or cancelled without OM acquiring the City Property under the circumstances set forth in Section 12, OM shall, within five (5) business days thereafter, deliver to the City without representation or warranty all third party reports, studies, surveys, plans, drawings and other materials obtained by OM from third parties pertaining to the City Property that are in OM's possession or control (the "**OM Deliverables**"). The OM Deliverables shall include, at a minimum, the complete copies of and the right to use the following: all market research reports prepared by CB Richard Ellis on the retail and office markets, including its Retail Segmentation and Demographic Analysis; all residential studies and data on the for-sale housing prepared by NewHomeTrends, including information on product materials and configurations; all apartment development studies and data collection by GVA Kidder Mathew; all conceptual master plans, layouts and models prepared by Gensler; (master plan architect); all conceptual housing plans and models prepared by Mithun; (residential architect); all conceptual landscape plans, schematic drawings and studies prepared by EDAW; all surveys, road layouts, and configurations and traffic studies prepared by Perteet Inc.; all studies, surveys and site plans prepared by GeoEngineers and its subconsultants for the preparation of the Environmental Impact Statement (EIS) including studies on the land and shoreline use, park and recreation facilities; cultural and historic resources, transportation, public services, utilities, geology and soils, air quality, surface water, groundwater, stormwater treatment, plants and animals, energy and natural resources, environmental health, and flood analysis including computer models/simulations and ordinary high water mark delineation, and

all engineering studies, drawings, designs, plans, reports and other materials obtained by OM in connection with the proposed Development and any other third party reports and materials pertaining to the Development. The terms of this Section 14.3 shall survive Closing or the earlier termination of this Agreement.

15. FIRST RIGHT TO NEGOTIATE FOR DRYWALL PARCEL

If at any time prior to the tenth (10th) anniversary of the Effective Date, the City should declare the Drywall Parcel to be property available for sale then, provided (i) OM is in compliance with all material terms of this Agreement, and (ii) nothing in this Section 15 violates any City Code provision or other applicable law, rule or order, the City shall afford OM, for a period of one hundred and twenty (120) days (the "**Negotiation Period**"), with an exclusive opportunity to negotiate in good faith with the City for the purchase by OM of the Drywall Parcel and, during the Negotiation Period, the City will not negotiate with any other prospective purchaser with respect to the potential purchase of the Drywall Parcel or enter into any agreement providing for the sale of the Drywall Parcel. Unless, prior to the expiration of the Negotiation Period, the City and OM have entered into a binding written agreement providing for the sale of the Drywall Parcel, the City shall have no further obligations to OM under this Section 15. OM acknowledges that as a condition to any sale of the Drywall Property to OM that the City may require that the Drywall Property be developed with a use or uses consistent with the Development. The right granted herein shall not be assignable to any person or entity that does not also own and control, at the time of the assignment and the exercise of any rights granted herein, the adjacent retail portions of the Site, without the express prior written consent of the City, which may be withheld in its sole and absolute discretion. The terms of this Section 15 shall survive Closing. If the City sells the Drywall Parcel to a person unaffiliated with OM, then, provided OM is not in breach of this Agreement, the City shall impose a restrictive covenant on the Drywall Parcel prohibiting uses to the extent they are commercially incompatible with the development on the Landfill Site and shall grant to OM the right to enforce the covenant as a third party beneficiary.

16. DEVELOPMENT PLAN; MINIMUM DEVELOPMENT AND RETAIL ELEMENTS; CITY COMMITMENTS

16.1 The Development Plan and Schedule

It is a condition to and requirement of the disposition of the City Property that OM use commercially reasonable and diligent efforts to develop the City Property as a high quality planned, mixed-use development that includes residential and retail uses, and public and private amenities and open spaces, as generally described in **Exhibit G** attached hereto (the "**Development Plan**"), and OM hereby covenants to use such efforts to develop the City Property in a manner that is consistent in all material respects with the Development Plan, contingent on OM obtaining the Key Development Permits and subject to Development Review. After Closing and upon obtaining the Development Permits, OM shall promptly begin and thereafter use commercially reasonable and diligent efforts to prosecute to completion the construction of the Development (excepting the work to be performed by the City and comprising the City Work as described in this Agreement) according to the Development Plan,

which is in furtherance of the City's vision for the City Property as expressed in the City's Comprehensive Plan and Shoreline Master Program.

16.2 Minimum Elements, Schedule and Deadlines

16.2.1 Minimum Development Elements Required for Completion

The Development Plan includes certain elements (the "**Minimum Development Elements**") that are regarded as essential to the Development Plan and to the City's willingness to sell the City Property to OM. The Minimum Development Elements include the following:

(A) An area comprised of least 400,000 rentable square feet of retail space has been constructed (excluding tenant improvements) on the Landfill Site (the "**Designated Retail Element**") with at least fifty percent (50%) of the Designated Retail Element leased to tenants (excluding for purposes of the foregoing calculation any retail space in the Designated Retail Element that is leased to an Existing Prospective Tenant as defined below) who are New to the Everett Market Area and no more than fifteen percent (15%) of the Designated Retail Element (excluding for purposes of the foregoing calculation any retail space leased to an Existing Prospective Tenant) is occupied by Off-Price Tenants. For the avoidance of doubt, OM may include Off-Price Tenants exceeding fifteen percent (15%) of the total retail space on the Landfill Site, but the Designated Retail Element portion of the retail space must comply with the foregoing requirements.

(B) At least 150,000 rentable square feet of Small Shop Space has been constructed (excluding tenant improvements) on the Landfill Site.

(C) At least 100 residential and/or hospitality units have been constructed on the Landfill Site.

(D) The Development has obtained a LEED Neighborhood Development (LEED-ND) certification level of at least Silver from the U.S. Green Building Council based on the LEED-ND rating system as and to the extent required by Section 16.5 below; provided, however, if OM has otherwise satisfied all of the other requirements of this Section 16.2.1 but a Silver LEED certification has not yet been obtained then the requirement for a Silver LEED certification, or the exhaustion of all best efforts, as applicable, shall not be a prerequisite for the issuance of a Final Certificate of Completion but the delivery of a Final Certificate of Completion shall not release or relieve OM of its obligation under Section 16.5 unless OM has paid, after the Final Completion Date, the liquidated damages described in Section 17.2 or, if the City has not demanded payment of the liquidated damages described in Section 17.2, OM's receipt of the Silver LEED certification for the Development or the exhaustion of all best efforts, as applicable.

(E) A road (the "**Main Road**") and the associated Wet Utilities have been constructed as and to the required by Section 16.4 below.

(F) An electrical backbone 12 kv distribution system, as designed by the Snohomish County PUD to accommodate all of the Minimum Retail Elements, has been installed.

(G) The dedications and easements to be granted pursuant to the Dedication, Easement and Maintenance Agreement described in Section 16.6 below have all been completed.

16.2.2 Final Completion Date

Subject to Force Majeure delays, the Minimum Development Elements must be substantially completed by the eighth (8th) anniversary of OM obtaining the Key Development Permits (the "Final Completion Date").

16.2.3 Partial and Final Certificates of Completion

(a) Generally

Upon substantial completion of all of the Minimum Development Elements in accordance with this Agreement, or upon substantial completion of all of the Minimum Development Elements that pertain to a particular phase of the Development or a discrete portion of the City Property, and upon receiving a written request therefore from OM, the City shall promptly furnish either a Final Certificate of Completion or Partial Certificate of Completion, as appropriate, to OM in a form suitable for recording. "Substantial Completion," as used in this Section 16.2.3 means that all of the improvements that are required to be constructed by OM for the Development or a recognized phase of the Development or a discrete portion of the City Property, as appropriate, are sufficiently complete that it may be used and occupied for their intended purpose and that only minor work remains that does not impair the safety or functionality of the improvements. In the event of Substantial Completion with some minor items of work remaining, the City may condition its issuance of a Final or Partial Certificate of Completion upon the posting of a bond or other adequate security to assure the timely completion of the remaining items (in an amount not less than 125% of the cost of completing the remaining work) or impose such other condition as may be reasonable and necessary. The City may also condition its issuance of a Final or Partial Certificate of Completion upon OM's satisfactory compliance with all of the terms of this Agreement as of the date of issuance. OM shall submit sufficient information to justify the issuance of the Final or Partial Certificate of Completion in order to confirm OM's compliance with this Agreement and to thereby release the relevant portions of the City Property from the rights retained by the City under Section 17.1; provided that if the City believes that OM has failed to submit sufficient information, it shall promptly notify OM in writing with specifics as to that information it reasonably believes is necessary to make the OM submittal complete. Promptly upon substantial completion of all of the Minimum Development Elements in accordance with this Agreement and allowing adequate time for review, the City shall furnish OM with a Final Certificate of Completion confirming substantial completion of all Minimum Development Elements in a form suitable for recording, together with such other documents as may be reasonably requested by OM in order to evidence the City's release of its rights retained under Section 17.1 from such relevant portion of the City Property. Until a Final Certificate of Completion is issued, all of the terms of this Agreement remain enforceable against OM and all of the City Property not previously released pursuant to a Partial Certificate of Compliance, and the City retains all its rights contained within this Agreement. The City shall not withhold a Certificate of Completion in violation of this Agreement. If the City denies a request by OM for a Certificate of Completion for all or any phase of the Development after receiving a written request from OM, the City shall promptly

furnish OM with a written statement of the reasons the City has refused or failed to furnish such a Certificate of Completion. Except to the extent the City issues a Final Certificate of Completion without the Development having obtained a Silver LEED certification as described in Section 16.2.1(D) above and Section 17.2, a Partial or Final Certificate of Completion shall constitute evidence of OM's compliance with all of the terms of this Agreement as they relate to the requirements set forth herein for the issuance of the Partial or Final Certificate, but shall not constitute evidence of compliance with any regulatory requirement or other requirement of applicable law, or satisfaction of any obligation of OM to any holder of a mortgage or any insurer of a mortgage securing money loaned to finance the improvements or any part thereof. A Partial or Final Certificate of Completion is not a notice of completion as referred to under any laws of the State of Washington or the Code, rule, regulation or requirement of the City of Everett. A Partial or Final Certificate of Completion shall serve to release the portion of the City Property Described therein from the application of the remedies set forth in Section 17.1 below, subject to the limitation described in Section 16.2.1(D) above and Section 17.2. A Partial Certificate of Completion shall not extend beyond the specific property comprising the relevant development phase for which the Certificate is being requested and OM and the City recognize and acknowledge that boundary line adjustments may be necessary to have the portion of the City Property described in the Certificate of Completion correspond to the dimensions of the relevant development phase.

(b) Certificates of Partial Completion for the Simpson Site

When (i) OM imposes design guidelines and requirements, a development plan or other covenants on the Simpson Site that are otherwise consistent with the Development Plan, which guidelines are reasonably acceptable to the City and may not be materially changed without the consent of the City, which will not be unreasonably withheld, and (ii) provided OM is in compliance with this Agreement, then the City will provide a Partial Certificate of Completion to OM for the portion of the Simpson Site comprising the initial residential phase, which phase shall not exceed half of the buildable area of the Simpson Site (the “**Initial Residential Phase**”). In addition, when and if (x) OM constructs or provides assurances reasonably acceptable to the City for the construction of the Main Road and the associated Wet and Gas Utilities as provided for in Section 16.4 below, and (y) provided OM has imposed the design guidelines and requirements on the Simpson Site described in the preceding sentence and OM is in compliance with this Agreement, then the City will provide a Partial Certificate of Completion to OM for the remainder of the Simpson Site. Such Partial Certificates of Completion for the Simpson Site shall release the relevant portions of the Simpson Site from the remedies set forth in Section 17.1 below.

(c) Certificate of Partial Completion for the Landfill Site

When (i) OM imposes design guidelines and requirements, a development plan or other covenants on the Landfill Site that are otherwise consistent with the Development Plan, which guidelines are reasonably acceptable to the City and may not be materially changed without the consent of the City, which will not be unreasonably withheld, (ii) a Minimum Retail Element proposal has been approved by the City, and (iii) OM is in compliance with this Agreement, then the City will provide a Partial Certificate of Completion to OM for the portion of the Landfill Site that is the subject of the approved Minimum Retail Element, reserving from the Partial

Certificate of Completion property sufficient to allow the completion of the Minimum Development Elements. Such a Partial Certificates of Completion for the Landfill Site shall release the relevant portions of the Landfill Site from the remedies set forth in Section 17.1 below.

(d) Certificate of Partial Completion for the Mill Site

When (i) OM imposes design guidelines and requirements, a development plan or other covenants on the Mill Site that are otherwise consistent with the Development Plan, which guidelines are reasonably acceptable to the City and may not be materially changed without the consent of the City, which will not be unreasonably withheld, (ii) a development proposal has been approved by the City (a "**Mill Site Development Proposal**"), which shall include at a minimum (A) a schematic design for the proposed development on the Mill Site; (B) a deadline date by which development will be substantially completed; and (C) assurances reasonably acceptable to the City that OM has or will have financing resources sufficient to complete the proposed development, and (iii) OM is in compliance with this Agreement, then the City will provide a Partial Certificate of Completion to OM for the portion of the Mill Site that is the subject of the approved Mill Site Development Proposal. Partial Certificates of Completion for the Mill Site shall release the relevant portions of the Mill Site from the remedies set forth in Section 17.1 below.

16.3 Minimum Retail Elements for Commencement of Construction on the Landfill and Mill Sites

16.3.1 Minimum Retail Elements

Except as otherwise provided by Section 16.4 below, OM shall not implement the Development Plan with respect to construction of the retail elements on City Property (including but not limited to the construction of any buildings or parking facilities) unless and until (i) OM imposes design guidelines and requirements that are consistent with the Development Plan, which design guidelines are reasonably acceptable to the City and may not be materially changed without the consent to the City, and (ii) OM submits a retail development proposal to the City, and the City approves such proposal for purposes of this Agreement. Any such proposal shall contain, at a minimum, the following requirements ("**Minimum Retail Elements**"):

(A) (i) a schematic design for the proposed retail development on the Landfill Site, which design includes a design for a "central gathering place" of at least 1.5 acres; (ii) a written commitment from at least one (1) Anchor tenant who is not then operating in the Everett Market Area to operate a retail store on the Landfill Site; (iii) plans for one or more retail buildings (excluding tenant improvements) containing at least 100,000 rentable square feet of retail space for Small Shop tenants on the Landfill Site (the "Small Shop Space"), together with reasonable indications that such tenants are interested in leasing the Small Shop Space, for a total, with the Anchor, Small Shop Space and other retail tenants, of at least 250,000 rentable square feet; (iv) reasonable assurances that at least fifty percent (50%) of the total retail space (excluding for purposes of the foregoing calculation any retail space to be leased to an Existing Prospective Tenant) will be leased to tenants who are New to the Everett Market Area and that no more than ten percent (10%) of the retail space (excluding for purposes of the foregoing

calculation any retail space to be leased to an Existing Prospective Tenant) will be occupied by Off-Price Tenants; (v) a deadline date by which the central gathering place shall have been completed and the Anchor tenant will be open and operating and the Small Shop Space and other retail spaces will be completed; and (vi) assurances reasonably acceptable to the City that OM has or will have financing resources sufficient to complete the proposed retail development (excluding tenant improvements); or

(B) (i) a schematic design for the proposed retail development on the Landfill Site, which design includes a design for a "central gathering place" of at least 1.5 acres; (ii) written commitments from at least seven (7) Lifestyle Center tenants to operate retail stores on the Landfill Site; (iii) plans for at least 100,000 rentable square feet of Small Shop retail space on the Landfill Site, together with reasonable indications that such tenants are interested in leasing the Small Shop Space, for a total, with the Lifestyle Tenants, Small Shop Space and other retail tenants, of at least 250,000 rentable square feet; (iv) reasonable assurances that at least fifty percent (50%) of the total retail space (excluding for purposes of the foregoing calculation any retail space to be leased to an Existing Prospective Tenant) will be leased to tenants who are New to the Everett Market Area and that no more than ten percent (10%) of the retail space (excluding for purposes of the foregoing calculation any retail space to be leased to an Existing Prospective Tenant) will be occupied by Off-Price Tenants; (v) a deadline date by which the central gathering place shall have been completed and a certain minimum number of Lifestyle, Small Shop and other retail spaces tenants shall be open and operating; and (vi) assurances reasonably acceptable to the City that OM has or will have financing resources sufficient to complete the proposed retail development (excluding tenant improvements).

For the avoidance of doubt, if OM submits a retail development proposal with more than 250,000 rentable square feet then OM may include Off-Price Tenants exceeding fifteen percent (15%) of the total retail space on the Landfill Site provided the portion of the retail development proposal intended to qualify under this provision must comply with the foregoing requirements.

16.3.2 Defined Terms

As used herein (including all Exhibits attached hereto): (A) an "**Anchor**" shall mean and refer to (i) a single retail tenant and user operating under a single trade mark occupying at least 40,000 contiguous square feet of rentable area, or (ii) a collection of not less than three (3) "Mini-anchor" retail tenants and users each operating under a single trademark occupying not less than 15,000 square feet of rentable area; (B) a "**Small Shop Tenant**" shall mean and refer to a retail or restaurant tenant and user operating under a single trademark occupying no more than 15,000 contiguous square feet of rentable area; (C) "**Lifestyle Tenants**" shall mean and refer to tenants typically recognized as such (including, by way of example, those retailers identified in **Exhibit H** attached hereto) and that are new to the Everett Market Area; (D) "**New to the Everett Market Area**" shall mean and refer to fact that a proposed tenant, or an affiliate or franchisee, is not at the time constructing or operating a store using substantially the same trade name within the city limits of the City of Everett; (E) "**Off-Price Tenant**" shall mean and include any retailer generally regarded as being an off price retailer (such as T.J. Maxx, Linens 'n Things, Marshalls, Ross, Burlington Coat Factory, The Men's Wearhouse, although, without limiting the foregoing, because of the status of current negotiations an Off-Price Tenant for purposes of this Agreement would NOT include an Existing Prospective Tenant), or any factory

outlet type retailer, or any lower end retailer commonly found in so-called "power centers" (such as Big Lots, 99 Cents Only or Anna's Linens) and (F) "**Existing Prospective Tenant**" shall mean a retailer, if any, operating a store in the City of Everett of more than 50,000 square feet with whom OM is in active negotiations for the purchase or leasing of space in the Development as of the Effective Date; provided, however, OM may not claim more than one such retailer as an Existing Prospective Tenant for purposes of this Agreement.

16.3.3 City Discretion and Statement of Purpose

The City shall have the right, for purposes of this Agreement, to approve or disapprove a Minimum Retail Element proposal for compliance with this Agreement in its reasonable discretion. OM shall not pull any building permits for the retail component of the Development unless and until OM shall have obtained approval from the City for its Minimum Retail Element proposal as set forth herein. The purpose and intention behind the requirement for an approved Minimum Retail Element proposal prior to authorizing the start of construction on the Landfill Site is to provide the City with assurances that a certain minimum synergistic collection of desirable retail tenants will be present on the Landfill Site in accordance with the overall objectives for the Development and the development of the City Property. The City's Authorized Representative shall have the authority to make all decisions for and on behalf of the City related to approval or disapproval of the Minimum Retail Elements.

16.4 Main Road

OM's right to construct residential housing lots or units on the City Property beyond an initial phase that does not exceed half of the buildable area of the Simpson Site (the "**Initial Residential Phase**") shall be subject to the following requirement: OM shall have constructed, at OM's sole cost and expense, or otherwise provided the City with assurance devices reasonably acceptable to the City that ensures construction of, the Main Road through the Landfill Site commencing, at the south, at its intersection with 41st Street and continuing to a point ending at the northern most property line of the Port Property together with certain utilities all within a schedule reasonably acceptable to the City. The Main Road shall include City standard streetlights, pedestrian bulbs at intersections and mid-block crossings, 6-foot wide sidewalks on both sides and a storm water collection, treatment and outfall system. The utilities under the Main Road (the "**Wet Utilities**") shall include (i) a 12" water main with domestic and fire services extended to the back of the sidewalks to accommodate the Minimum Retail Elements, and (ii) a sewer main with adequate side sewers sized to accommodate flows from the Minimum Retail Elements. The Main Road shall be constructed so as to be capable of including gas utilities, as designed by Puget Sound Energy, to accommodate the Minimum Development Elements. OM shall not construct or allow to be constructed residential housing beyond the Initial Residential Phase without construction of the Main Road and Wet Utilities having been completed, or the City having agreed to accept in lieu thereof assurance devices ensuring their construction and dedication.

16.5 Environmental Quality and Other Design Standards

The Development is intended to be a model for economically sustainable "green" development. OM shall design and construct the Development so as to meet the LEED

Neighborhood Development (LEED-ND) Silver certification level requirements and criteria proposed by the U.S. Green Building Council dated September 6, 2005, a copy of which is attached hereto as **Exhibit M** (the "**Current LEED Rating System**"). OM will use its best efforts to obtain the LEED Silver certification as soon as reasonably possible under the Current LEED-ND Rating System. OM's failure to incorporate the elements necessary to meet the Silver level certification requirements and criteria under the Current LEED Rating System shall be deemed to be a reasonable basis for the City to withhold any consent or approval required by this Agreement or under any Development Permit to the extent the City reasonably believes that the consent, approval or permit as proposed by OM fails to include necessary LEED-ND elements and criteria as contemplated under this Agreement. Any disagreement as to whether a consent, approval or permit has been appropriately withheld by the City because of an alleged failure to include LEED-ND elements shall be promptly considered by the Steering Committee pursuant to Section 19.11 below and shall be subject to mandatory mediation pursuant to Section 19.12 below. In addition to the foregoing, OM shall require and cause all new electrical distribution lines within the Development to be placed underground. The foregoing shall not require that the high power lines supported by the existing towers be placed underground.

16.6 Dedication, Use and Maintenance of Public Amenities

At Closing, OM will dedicate to the City certain areas within the City Property as depicted in **Exhibit I** for the construction use and maintenance of approximately 2.3 miles of public trails, a parcel of land for the City's future development of a public gathering space that includes a minimum of three (3) acres that is useable for as an active park, and other related uses and improvements and will grant certain wetland conservation easements to the City intended to protect and preserve the wetland areas on the City Property. Fee ownership wetland areas may be subsequently reconveyed to the City by OM when and if the conveyance can be accomplished in compliance with applicable laws. The City and OM will also enter into a Dedication, Easement and Maintenance Agreement in substantially the form attached hereto as **Exhibit J** to describe and provide for such conveyances and the related improvement, maintenance and repair obligations consistent with this Agreement. OM will also agree in the Dedication, Easement and Maintenance Agreement to, among other things, (i) cooperate with, and accommodate, the planned street car or public transportation connection system anticipated by the City to link the Development with the CBD and waterfront areas; (ii) allow public use of the parking areas on the Landfill Site in area(s) reasonably acceptable to OM and the City for persons using and visiting the adjacent wetland and riverfront areas, trails and other public amenities and improvements; and (iii) dedicate the Main Road, and the related Wet and Gas Utilities to the City. The City, for its part, will agree, among other things, to (i) maintain and repair the trail system within the Development except for those portions of the trail located in the areas immediately adjacent to the retail areas on the Landfill Site, which shall be maintained by OM or its designee, and (ii) maintain and repair the Main Road back of curb to back of curb. The Dedication, Easement and Maintenance Agreement will be recorded with the real property records for Snohomish County. The City may condition its issuance of any consent or approval required under this Agreement on OM having complied with the Dedication, Easement and Maintenance Agreement. All persons holding liens against the City Property at the time of its recording must agree to subordinate their interests to the Dedication, Easement and Maintenance Agreement. The Dedication, Easement and Maintenance Agreement is not intended to limit any of the mitigation requirements that may be required in connection with Development Review.

16.7 City and Other Governmental Agency Permits/Approvals

16.7.1 Generally

The Parties anticipate that in order for OM to develop the City Property as required by this Agreement it will be necessary for OM to obtain, in connection with Development Review, the approvals and permits identified in **Exhibit L** attached hereto (hereinafter "**Development Permits**"). The cost of applying for, prosecuting, obtaining, and implementing the conditions of the Development Permits shall be paid by OM. The Parties acknowledge that the Development Permits identified in this Agreement are not all of the permits and approvals that may be required for the Development in connection with Development Review. Certain Development Permits identified in **Exhibit L** are identified as being essential to the Development and are characterized as being "**Key Development Permits**." Notwithstanding anything to the contrary set forth herein, the Parties agree and acknowledge that City shall be solely responsible for any and all costs and expense of applying for, prosecuting, obtaining, and implementing the conditions of any permits required in connection with the City Work.

16.7.2 OM's Rescission Right

(a) On or before the earlier of (1) the third anniversary of the Effective Date or (2) the latter of (A) the date upon which the last of the Key Development Permits is issued; (B) the date upon which all applicable appeal periods regarding such Key Development Permits have expired; or, (C) the date upon which any and all appeals of the Key Development Permits are fully and finally resolved, OM shall have the right, for a period of sixty (60) days thereafter (the "**Rescission Election Period**") to cause the transaction described in Section 2 above to be rescinded if a Key Development Permit is denied or the terms and conditions of a Key Development Permit is not reasonably acceptable to OM. To rescind the transaction, OM must provide the City with a written notice of rescission on or before the expiration of the Rescission Election Period (a "**Rescission Notice**"). If OM provides a timely Rescission Notice to the City then any and all remaining obligations of the Parties with respect to the Development Plan, Minimum Development Elements and City Work shall be terminated and, at OM's cost, title to the City Property shall be reconveyed back to the City pursuant to a special warranty claim deed, without any additional consideration or conditions, free and clear of any and all liens and encumbrances other than the Permitted Exceptions, any latecomer or other development agreements entered into with the City and any liens or encumbrances placed on the City Property by the City or as a result of the City's actions. Upon receipt of such title to the City Property (A) the City shall deliver to OM an amount equal to the net Purchase Price less any amounts required to remove any liens or financing encumbrances, and (B) OM's rights in and to any Development Permits, together with the OM Deliverables, shall be assigned to the City without any representation or warranty. Except as otherwise provided herein, a rescission of the Agreement pursuant to this Section 16.7.2 shall not release or relieve either Party of any obligations or liability arising out of any Surviving Obligations or any breach of this Agreement arising or occurring prior to the rescission.

(b) If OM delivers a timely Rescission Notice as provided in Section 16.7.2(a) above then, provided the denial or objectionable condition was not the result of a failure by OM to prosecute the Permits with reasonable diligence and OM complies with the requirements of

Section 16.7.2(a), the City will pay OM Three Million Dollars (\$3,000,000.00) as compensation in full for the OM Deliverables and a full, final and complete release of any and all claims by OM, which the Parties acknowledge to be the then-fair and reasonably equivalent market value of such items, information and rights to the City.

16.7.3 City Option

If OM elects in writing not to exercise its rescission rights or otherwise fails to provide the City with a timely Rescission Notice, then, for a period of six (6) months thereafter (the “**City Option Election Period**”), the City shall have the right to re-purchase the City Property from OM. To re-purchase the City Property, the City must provide OM with a written notice on or before expiration of the City Option Election Period (a “**City Option Notice**”). Unless the failure to obtain the PDO and other Key Development Permits in form and substance reasonably acceptable to OM was caused by the failure or refusal of OM to file and prosecute such permits with reasonable diligence, the purchase price for the City Property shall be its then fair market value as determined by an MAI Appraiser reasonably acceptable to the City and OM, but in no event less than Eleven Million Dollars (\$11,000,000.00). The fair market value of the City Property shall be determined without the benefit of any value attributable to any City Work or obligation on the part of the City to complete the City Work and without any offset arising from any burden to the City Property created by the required Minimum Development Elements. If the failure to obtain the PDO and other Key Development Permits in form and substance reasonably acceptable to OM was caused by the failure or refusal of OM to file and prosecute the Key Development Permits with reasonable diligence, the purchase price for the City Property shall be the lesser of Eleven Million Dollars (\$11,000,000) or the City Property’s fair market value (determined in the same basis as set forth in the immediately preceding sentence) but with the Landfill Site and Mill Site together having a combined value of no more than \$50,000. If OM and the City are unable to agree upon an MAI Appraiser within one (1) month after the date of the City Option Notice, then an appraiser shall be appointed by a judge in the Superior Court of Snohomish County. The closing of a re-purchase under this Section 16.7.3 shall be on a date selected by the City upon not less than ten (10) days’ notice to OM but in no event more than six (6) months after the expiration of the City Option Election Period and, if it is necessary to have a judge select an MAI Appraiser, such additional time as the judge may consider appropriate. At Closing title to the City Property shall be reconveyed back to the City, at OM’s cost, pursuant to a special warranty claim deed but free and clear of any and all liens and encumbrances other than the Permitted Exceptions and any liens or encumbrances placed on the City Property by the City or as a result of the City’s actions. The City shall be entitled to deduct from the purchase price to be paid at closing the cost of removing any monetary or other liens or encumbrances placed on the City Property by OM or during OM’s period of ownership. OM shall also provide all of OM’s Deliverables to the City at Closing at no additional cost to the City and without any representation or warranty by OM.

16.7.4 OM's Retention of the City Property

If OM is unable to obtain the Key Development Permits by the third anniversary of the Effective Date on the terms set forth under Section 16.7.2 above without having breached its obligations under this Agreement, and does not elect to rescind the transaction pursuant to Section 16.7.2 above and the City thereafter does not elect to exercise the City option described

in Section 16.7.3 above, then OM shall no longer be obligated under this Agreement to develop the City Property in accordance with the requirements of this Agreement and the City shall no longer be obligated under this Agreement to undertake or complete any of the City Work and both Parties agree, at the request of either Party, to execute and deliver a recordable document evidencing the termination of such obligations which document may be recorded with the real property records of Snohomish County, Washington.

16.8 Environmental Matters

Prior to Closing the Parties anticipate entering into a written agreement addressing, among other things, their respective rights, obligations and plans pertaining to the management of hazardous substances and potential environmental liabilities ("**Environmental Matters**") related to the design, construction, operation and maintenance of a landfill gas system for the Landfill Site and generally with respect to any existing hazardous materials on or about the City Property (the "**Environmental Indemnification and Landfill Agreement**"). The Environmental Indemnification and Landfill Agreement shall be consistent with the basic structure and terms described in the outline attached hereto as **Exhibit K**. Without limiting the foregoing, the Environmental Indemnification and Landfill Agreement shall include, among other things, the definitions of terms relating to Environmental Matters; the allocation of responsibilities and right of access during development; the long-term operation and maintenance responsibilities of the City and OM; the responsibilities of OM and the City arising under the Consent Decree, CAP and Restrictive Covenant; and certain indemnifications obligations for Environmental Matters related to the City Property. The Parties shall act in good faith and with reasonable diligence in attempting to reach an agreement on the final Environmental Indemnification and Landfill Agreement. When the final Environmental Indemnification and Landfill Agreement is entered into by the City and OM it shall be recorded or a memorandum thereof recorded with the real property records in Snohomish County at Closing immediately after the recording of the Deed. OM shall not engage in or initiate any substantive discussions with the Washington Department of Ecology pertaining to the City Property or the Development unless and until the Parties have entered into a final Environmental Indemnification and Landfill Agreement.

16.9 OM Commitments and Covenants

OM shall use commercially reasonable and diligent efforts to prepare and prosecute all of the Development Permits identified in **Exhibit L** attached hereto (excepting permits for the work to be performed by the City or otherwise comprising the City Work as described in this Agreement). OM specifically agrees to prepare and file with the City, no later than August 1, 2007, a complete application for the Key Development Permits. After Closing and until the City and OM enter into a Rezone Development Agreement and OM acknowledges in writing that all Key Development Permits have been obtained with conditions acceptable to OM, OM covenants that it will not: (i) consent to any liens, other than liens for taxes not yet due and payable, on the City Property except as permitted by Section 19.2 below; (ii) transfer, sell, encumber or grant any unconditional leasehold interests on the City Property, except as permitted by Section 19.2 below; provided, however, this covenant shall not prohibit the granting of easements or dedications required by this Agreement, the Development Permits, the Dedication, Use and Maintenance Agreement or otherwise necessary to facilitate the development of the City

Property in accordance with the Development Plan or to prohibit or restrict the leasing of any part or parts of the buildings or structure when said improvements are completed or to prohibit or restrict the preleasing of any part or parts of the structures so long as the lessee shall obtain no rights under this Agreement and that any right to occupy the structures prior to the City having approved of a Minimum Retail Element proposal shall be terminable by the City; and (iii) take any action with respect to the adjustment or consolidation of any property lines without the prior consent of the City, which consent will not be unreasonably withheld. Nothing herein contained shall be deemed to prohibit OM from contesting the validity of any or amounts of any tax, assessment, encumbrance or lien, nor to limit the remedies available to OM in respect thereto; provided, however, that prior to commencing any such contest the City, in its reasonable discretion, may require OM to post bond in an amount sufficient to cover the tax, assessment, encumbrance or lien, or such portion thereof to be contested. OM covenants not to commence construction of any residential structures on the City Property unless and until OM imposes design guidelines and requirements on the City Property that reflect the high quality urban environmentally sensitive nature of the Development and are otherwise consistent with the Development Plan, which guidelines are reasonably acceptable to the City and may not be materially changed without the consent of the City.

16.10 City Commitments and Covenants

The City shall undertake the timely review of the Development Permits within its jurisdiction upon receipt of complete applications from OM and will update OM on the status of its review of all such Development Permits, all in accordance with the City's normal and established procedures, practices and policies. Where submittal of permits or applications by OM to the City or any other agency require the assistance of the City or supply of information from the City concerning the City Property, the City shall use reasonable and diligent best efforts to assist OM. If the City approves OM's proposal for a Planned Development Overlay Master Plan rezone ("PDO"), then the City and OM shall promptly enter into a written agreement (the "**Rezoning Development Agreement**") consistent with Chapter 29 of the Everett Zoning Code and Chapter 36.70B RCW addressing, among other things, the vesting of the Development to the regulations and development standards then in effect. Without limiting any of the foregoing, and in addition to the covenants of the City set forth elsewhere in this Agreement, the City specifically agrees:

- (i) The City shall act as "lead agency" in those instances where it is required to do so.
- (ii) The City shall assist in obtaining any necessary amendments or modifications to the Consent Decree as provided in the Environmental Indemnification and Landfill Agreement, including assistance in obtaining a Consent Decree Assurance for OM as contemplated in the Environmental Indemnification and Landfill Agreement, and to otherwise assist OM in discussions with the Department of Ecology regarding pile alternatives in connection with development of the City Property.
- (iii) The City shall cooperate with and assist OM in community outreach and relations in connection with the development of the City Property.

(iv) The City shall dedicate planning staff/public works personnel as appropriate to facilitate the timely processing of the Development Permit applications filed with the City, which shall include, at a minimum, assigning the City's Engineering/Public Services Director to serve as a liaison with City staff and departments engaged in Development review.

(v) The City shall assist and participate, at OM's request, in any discussions concerning the Tribe Agreement and Pilchuck/Audubon Agreement and/or the concerns of such groups related to development of the City Property.

(vi) The City shall promptly consider and process any Certificate of Completion request upon substantial completion of any portion of the Development consistent with the terms of this Agreement.

(vii) The City shall comply, at its cost, with its obligations under the BNSF Agreement. OM shall reasonably cooperate (at no expense or liability to OM) with the City with respect to the City's efforts to comply with the BNSF Agreement.

(viii) The City shall cooperate with OM's efforts to obtain New Market Tax Credits, Local Infrastructure Financing and other similar financing grants, credits and programs; provided, however, such cooperation shall not require any revisions to this Agreement or result in any additional costs to or material burdens on the City and the City has not and does not provide any representations or other assurances to OM regarding OM's ability to obtain or qualify for any such grants, credits or programs.

16.11 City/OM Cooperation

Subject to any and all restrictions imposed by applicable law, including but not limited to Chapter 42.36 RCW, during all stages of the permitting and development of the Development as described herein, the Parties shall hold regular progress meetings to discuss the status of the various Development Permits and the status of development on the City Property. Notwithstanding the foregoing, nothing in this Agreement shall be deemed to circumvent the normal procedures and processes of the City with respect to its land use, planning, environmental, and building review and approval. Until the Final Certificate of Completion for the Minimum Development Elements has been issued, OM shall submit to the City on a quarterly basis a written progress report on the status of the Development Plan. The report shall be in such form and detail as may reasonably be required by the City. Such reports shall describe the progress made to date and the anticipated dates of completion for the various components of the Development Plan, including, without limitation, the Minimum Development Elements. OM shall use its best efforts to promptly submit such reports as required.

16.12 Fill Material

To the extent OM requires fill material and the City has such material available to sell to OM, the City shall offer to OM and OM shall purchase from the City fill material at a cost of \$17 per cubic yard (bcy); provided, however, in no event shall OM be obligated to purchase fill material from the City in excess of 59,000 bcy for the Simpson Site and 186,000 for the Mill Site. All fill material purchased by OM pursuant to this Section 16.12 must be reasonably

acceptable engineered material and will be provided to a 95% compaction standard; provided, however, the 95% compaction standard shall only apply to the Simpson Site if the underlying subgrade is compacted to a 95% standard at the time the fill is provided by the City. In the event the subgrade on the sites is determined by OM to require compaction work, OM may purchase acceptable dry engineered material which can achieve 95% compaction from the City at a cost of \$11 per cubic yard (bcy). The City will place the material on the site in coordination with OM's compaction activities but will not perform compaction activities.

17. CITY'S RIGHTS AND REMEDIES FOR OM'S NONPERFORMANCE

17.1 Generally

17.1.1 Right to Repurchase

In addition to the other rights granted in this Agreement, the City shall have and retain the right (the "**Repurchase Right**"), at the City's option, to repurchase all or any portion of the City Property identified by the City that has not been released from the City's Repurchase Right by a Partial Certificate of Completion (the "**Designated Repurchase Property**"), and all improvements thereon, and OM will reconvey the Designated Repurchase Property to the City pursuant to a special warranty deed if, after Closing and prior to the issuance of a Final Certificate of Completion for the Minimum Development Elements, OM is in breach of this Agreement, subject to any extension allowed under Section 20.2, following written notice from the City because OM:

(1) receives approval from the City to commence construction of a Minimum Retail Element, as provided for in Section 16.3 (an "**Approved Minimum Retail Program**"), but then fails to develop and complete the Approved Minimum Retail Element as and within the time period approved by the City for the Approved Minimum Retail Element;

(2) abandons or substantially suspends all material work on the Development for a period of twelve (12) consecutive months after written notice of such abandonment or suspension from the City;

(3) fails to complete all of the Minimum Development Elements by the Final Completion Date; or

(4) assigns, transfers or suffers any involuntary transfer of the City Property or any part thereof or any rights under this Agreement in violation of this Agreement.

Notwithstanding anything to the contrary contained herein, the Repurchase Right shall not be applicable to any portion of the City Property for which the City has issued a partial Certificate of Completion.

The Repurchase Right shall be subordinate and subject to and be limited by and shall not defeat, render invalid, or limit:

(1) any mortgage, deed of trust, or other security instrument or sale and leaseback or other conveyance for financing permitted by this Agreement; or

(2) any rights or interests provided in this Agreement for the protection of the holder of such mortgages, deeds of trust, or other security instruments, the lessor under a sale and leaseback, or the grantee under such other conveyance for financing.

To exercise the Repurchase Right the City shall pay to OM in cash an amount equal to:

(1) the fair market value of the Designated Repurchase Property, as determined by an MAI Appraiser selected by the City in accordance with professional appraisal standards, specifically including the Code of Professional Ethics of the Appraisal Institute and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, excluding any value attributable to any City Work and any property or interests dedicated or conveyed, or required to be dedicated or conveyed, to the City, including, without limitation, the Main Road; less

(2) any amounts paid by the City to remove any liens or other encumbrances placed on the City Property by or as a result of the actions or omissions of OM; less

(3) any income withdrawn or made by OM from the designated Repurchase Property or the improvements thereon; and less

(4) any costs incurred by the City in enforcing the Repurchase Right and causing the reconveyance of the Designated Repurchase Property by OM to the City.

The Deed shall contain appropriate reference and provision to give effect to the City's right, as set forth in this Section 17.1.1.

17.1.2 Option to Repurchase

In addition to the other rights granted in this Agreement, the City shall have and retain the fully and unconditionally assignable right, at the City's option (the "**Repurchase Option**"), to repurchase, reenter, and take possession of the City Property, or all or any portion of the City Property identified by the City that has not been released from the City's Option to Repurchase by a Partial Certificate of Completion (the "**Designated Option to Repurchase Property**"), with all improvements thereon, if, after Closing and prior to the issuance of a Final Certificate of Completion for the Minimum Development Elements, OM is in breach of this Agreement, subject to any extension allowed under Section 20.2, following written notice from the City because OM:

(1) receives approval from the City to commence construction of an Approved Minimum Retail Program, but then fails to develop and complete the Approved Minimum Retail Element as and within the time period approved by the City for the Approved Minimum Retail Element;

(2) abandons or substantially suspends all material work on the Development for a period of twelve (12) months after written notice of such abandonment or suspension from the City;

(3) fails to complete all of the Minimum Development Elements by the Final Completion Date; or

(4) assigns, transfers or suffers any involuntary transfer of the City Property or any part thereof or any rights under this Agreement in violation of this Agreement.

Notwithstanding anything to the contrary contained herein, (i) the Repurchase Option shall not be applicable to any portion of the City Property for which the City has issued a partial Certificate of Completion, and (ii) the City shall not assign the Repurchase Option unless OM has failed to cure a breach of this Agreement within sixty (60) days following written notice from the City.

The Repurchase Option shall be subordinate and subject to and be limited by and shall not defeat, render invalid, or limit:

(1) any mortgage, deed of trust, or other security instrument or sale and leaseback or other conveyance for financing permitted by this Agreement; or

(2) any rights or interests provided in this Agreement for the protection of the holder of such mortgages, deeds of trust, or other security instruments, the lessor under a sale and leaseback, or the grantee under such other conveyance for financing.

To exercise the Repurchase Option, the City, or the holder of the Repurchase Option at the time of its exercise, shall pay to OM in cash an amount equal to:

(1) the fair market value of the Designated Option to Repurchase Property, as determined by an MAI Appraiser selected by the City in accordance with professional appraisal standards, specifically including the Code of Professional Ethics of the Appraisal Institute and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, excluding any value attributable to any City Work and any property or interests dedicated or conveyed, or required to be dedicated or conveyed, to the City, including, without limitation, the Main Road; less

(2) any amounts paid by the City, or any assignee of the Option to Repurchase, to remove any liens or other encumbrances placed on the City Property by or as a result of the actions or omissions of OM; less

(3) any income withdrawn or made by OM from the Designated Option to Repurchase Property subject to the Repurchase Option or the improvements thereon; and less

(4) any costs incurred by the City in enforcing the Repurchase Option and causing the reconveyance of the Designated Option to Repurchase Property by OM to the City.

The Deed shall contain appropriate reference and provision to give effect to the Repurchase Option.

17.1.3 Right of Reverter

In addition to the other rights granted under this Agreement, the City shall have and retain the right (the "**Reverter Right**") to reenter and take possession of all or any portion of the City Property identified by the City that has not been released from the City's Repurchase Right by a Partial Certificate of Completion (the "**Designated Repurchase Property**"), with all improvements thereon, and the ownership thereof shall automatically revert in the City if, after Closing and prior to the issuance of a Final Certificate of Completion for the Minimum Development Elements, OM is in breach of this Agreement because OM:

(1) receives approval from the City to commence construction of an Approved Minimum Retail Program, but then fails to develop and complete the Approved Minimum Retail Element as and within the time period approved by the City for the Approved Minimum Retail Element;

(2) abandons or substantially suspends all material work on the Development for a period of twelve (12) months after written notice of such abandonment or suspension from the City;

(3) fails to complete all of the Minimum Development Elements by the Final Completion Date; or

(4) assigns, transfers or suffers any involuntary transfer of the City Property or any part thereof or any rights under this Agreement in violation of this Agreement.

Notwithstanding anything to the contrary contained herein, the Reverter Right shall not be applicable to any portion of the City Property for which the City has issued a Partial Certificate of Completion.

The Reverter Right shall be subordinate and subject to and be limited by and shall not defeat, render invalid, or limit:

(1) any mortgage, deed of trust, or other security instrument or sale and leaseback or other conveyance for financing permitted by this Agreement; or

(2) any rights or interest provided in this Agreement for the protection of the holder of such mortgages, deeds of trust, or other security instruments, the lessor under a sale and leaseback, or the grantee under such other conveyance for financing.

Furthermore, the City agrees to provide commercially reasonable accommodations to OM's permitted secured lenders with respect to the City's reversionary interest, including without limitation consenting to commercially reasonable liens on the reversionary interest and estoppel assurances.

The City, or the holder of the Reverter Right at the time of its exercise, shall pay to OM in cash an amount equal to:

- (1) the fair market value of the Designated Option to Repurchase Property, as determined by an MAI Appraiser selected by the City in accordance with professional appraisal standards, specifically including the Code of Professional Ethics of the Appraisal Institute and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, excluding any value attributable to any City Work and any property or interests dedicated or conveyed, or required to be dedicated or conveyed, to the City, including, without limitation, the Main Road; less
- (2) any amounts paid by the City, or any assignee of the Option to Repurchase, to remove any liens or other encumbrances placed on the City Property by or as a result of the actions or omissions of OM; less
- (3) any income withdrawn or made by OM from the portion of the City Property subject to the Reverter Right or the improvements thereon; and less
- (4) any costs incurred by the City in enforcing the Reverter Right and causing the reconveyance of the City Property by OM to the City.

The Deed shall contain appropriate reference and provision to give effect to the Reverter Right.

17.2 Liquidated Damages for Failure to Satisfy LEED

The City shall have the right to receive, and OM shall pay to the City, One Million Dollars (\$1,000,000) as liquidated damages if (i) OM fails, by the Final Completion Date, to obtain the Leadership in Energy and Environmental Design for Neighborhood Development Certification from the U.S. Green Building Council at a Rating of at least Silver based on the Current LEED Rating System or (ii), if the LEED-ND requirements for a Silver certification as finally adopted are amended so as to be materially more burdensome than the Current LEED Rating System a "**Material LEED Rating Change**"), OM fails to use its best efforts to either (A) obtain at least a Silver rating under the amended LEED-ND requirements (the "**Amended LEED Rating System**") or (B) to comply with the Current LEED Rating System criteria. For purposes of clause (ii) in the preceding sentence, "best efforts": shall mean and obligate OM to include all of the elements and features that OM would have included in the Development to obtain a Silver rating under the Current LEED Rating System had a Material LEED Rating Change not occurred and either prosecute a request to the U.S. Green Building Council for a written confirmation (a "**LEED Council Confirmation**") that the Development would have received at least a Silver rating had the Current LEED Rating System criteria been adopted or file and prosecute an application for a rating of Silver under the Amended LEED Rating Change. Notwithstanding the foregoing, the liquidated damages described herein shall not be owed if OM fails to obtain the required LEED certification because the City has failed to incorporate the applicable elements of the Current LEED Rating System in the City Work or, if there is a Material LEED Rating Change, and OM is unable, despite the use of all best efforts to obtain a rating of at least Silver under the Amended LEED Rating System or a LEED Council

Confirmation under the Current LEED Rating System. THE PARTIES ACKNOWLEDGE THAT THE ACTUAL DAMAGE TO THE CITY FOR THE ABOVE DESCRIBED FAILURE WILL BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN. FURTHERMORE, OM ACKNOWLEDGES THAT THE CITY HAD OTHER OPPORTUNITIES TO SELL THE PROPERTY AND RELIED UPON THE REPRESENTATIONS OF OM THAT IT WOULD PERFORM AS DESCRIBED IN SECTION 16.5 ABOVE. OM DESIRES TO LIMIT THE AMOUNT OF DAMAGES FOR WHICH OM MIGHT BE LIABLE SHOULD OM BREACH OR DEFAULT UNDER SECTION 16.5 ABOVE. OM AND THE CITY WISH TO AVOID THE COSTS AND LENGTHY DELAYS WHICH WOULD RESULT IF THE CITY FILED A LAWSUIT TO COLLECT ITS DAMAGES FOR A BREACH OF OR DEFAULT UNDER SECTION 16.5. THEREFORE, THE AMOUNTS SET FORTH ABOVE SHALL BE DEEMED TO CONSTITUTE A REASONABLE ESTIMATE OF THE CITY'S DAMAGES FOR OM'S FAILURE TO SATISFY SECTION 16.5 ABOVE AND SHALL STAND FOR LIQUIDATED DAMAGES FOR OM'S FAILURE TO SATISFY SECTION 16.5 ABOVE AND THE CITY'S SOLE AND EXCLUSIVE REMEDY IN THE EVENT OF OM'S FAILURE TO SATISFY SECTION 16.5 ABOVE. OM HAS REVIEWED THE EFFECT OF THIS PROVISION WITH LEGAL COUNSEL AND HAS AGREED THAT SUCH DAMAGES ARE A REASONABLE AND FAIR ESTIMATE OF THE DAMAGES THE CITY WILL SUSTAIN. BY INITIALING THIS PROVISION IN THE SPACES BELOW, THE CITY AND OM EACH SPECIFICALLY AFFIRM THEIR RESPECTIVE AGREEMENTS CONTAINED IN THIS SECTION 17.2.



OM'S INITIALS



THE CITY'S INITIALS

18. CITY WORK

18.1 City Work

The City and OM anticipate that, in conjunction with development of the City Property, the City will concurrently undertake certain public works (the "City Work") in order to provide roadways, conduct certain grading and surcharging, wetland restoration, and various public amenities on and around the City Property, aid in collecting and recovering leachate and methane from the Landfill Site and comply with the City's obligations under the Consent Decree, CAP and Restrictive Covenant. The scope of the City Work and the time frames for substantial completion of each task are as follows:

(a) The City will use its best efforts to cause BNSF to relocate its track pursuant to the BNSF Agreement so as to allow for construction of a bridge to the Simpson Site or to otherwise provide OM with a crossing to allow access to the Simpson Site across the BNSF tracks by December 31, 2007.

(b) The City will use its best efforts to cause BNSF to complete the all remaining relocation of the BNSF tracks from the City Property pursuant to the BNSF Agreement by December 31, 2008.

(c) The City will construct a two (2) lane roundabout (including curb, gutter, sidewalk, streetlights and storm drainage improvements) on 41st Street east of the 41st

Street/BNSF overcrossing (the "**Roundabout**") and extend 41st Street to the northwest corner of the Simpson Site (the "**41st Street Extension**") with a roadway that includes curb, gutter, pedestrian and bicycle way, streetlights and storm drainage improvements. By November 15, 2007, the City will provide a proposed design to OM for the Roundabout and 41st Street Extension. If OM accepts the City's proposed design by December 1, 2007, the City shall use its best efforts to substantially complete the Roundabout and 41st Street Extension by August 11, 2008, but in any event no later than December 31, 2008. The City will provide OM with temporary construction access to the Landfill and Simpson site from January 31, 2008 until the Roundabout and 41st Street Extension are completed.

(d) The City will construct an extension of the roadway from Pacific Avenue to the northern terminus of the Main Road (the "**Main Road Extension**"). Substantial completion of the Main Road Extension will occur within twelve (12) months of the relocation of the BNSF tracks. The City will provide OM with temporary construction road in the event the Main Road Extension is not completed within 12 months.

(e) Grade, fill and surcharge the Main Area (which area is defined and described in the Environmental Indemnification and Landfill Agreement) of the Landfill Site, including the Main Road surcharge ("Phase 1") as well as grade and fill the remainder of the Landfill Site north of 41st Street ("Phase 2"). Grading for both Phases will include but not be limited to: removal/replacement of cap and balance soils across site, two (2) feet of fill over entire site for drainage and grade with the City providing temporary erosion and sediment control plan for entire site per City of Everett Standards. Surcharge of Phase 2 will be conducted in one phase. Preload is estimated to be fifteen (15) feet high and for a 9 month duration. Surplus material from Phase 1 may be used for Phase 2. Substantial completion of Phase 1 will occur within twelve (12) months after OM obtains the site grading plan, which may include provisions for grading activity restrictions. Substantial completion of Phase 2 will occur within twenty-four (24) months after OM obtains the site grading plan which may include provisions for grading activity restrictions. The City shall be entitled to use the fill received from the Contractor Licenses to fulfill its obligations described herein. Any fill material shall be compacted to a 95% compaction standard, including surcharge materials that remain on the Main Area following the surcharge activities.

(f) Complete fill of the Mill Site pursuant to the specifications in the City's Lease with KLB Construction and grade the Mill Site (the "**Mill Site Grading**"). Grading shall include but not be limited to grading, grubbing and balance of soils across the Mill Site. The City shall provide and implement a temporary erosion and sediment control plan for the Mill Site per City of Everett standards. Fill must be acceptable engineered material and be compacted to a 95% standard. Substantial completion of the Mill Site Grading will occur within six (6) months after OM obtains the site grading plan, and the relocation of the existing BNSF mainline railroad tracks.

(g) Reconstruct the leachate collection system to accommodate the transmission of sanitary sewer and 6 month storm water from the retail development on the Landfill Site ("**Leachate System Reconstruction**"). Substantial completion of the

Leachate System Reconstruction shall occur within five (5) months after completion and removal of the Phase 1 surcharge soils from the Main Area.

(h) On the properties conveyed, dedicated or subject to easements granted by OM, design and install the improvements shown on **Exhibit I** attached hereto. Substantial completion of the major elements shall occur within thirty-six (36) months after the City has obtained the required non-City governmental approvals, which the City agrees to reasonably diligent efforts to obtain.

(i) Restore the wetland area studied to the standards set forth in the *Snohomish Riverfront Properties at Bigelow Creek: Conceptual Enhancement Program* study (the "**Wetland Restoration**"). Substantial completion of the major elements of the Wetland Restoration shall occur within thirty-six (36) months after the City obtains the required non-City governmental permits and approvals, which the City agrees to reasonably diligent efforts to obtain.

(j) Complete the work to be performed by the City pursuant to the Environmental Indemnification and Landfill Agreement (the "**City's Environmental Work**"). Substantial completion of the City's Environmental Work shall occur by the deadlines set forth in the Environmental Indemnification and Landfill Agreement.

The particular specifications and requirements for the City Work will be determined in connection with Development Review (including but not limited to environmental review undertaken pursuant to Chapter 43.21C RCW). The City will as a matter of contract require that all work will conform to all applicable local, state and federal requirements. Subject to and in accordance with such further review and analysis, the City agrees to use reasonable efforts to complete the City Work in a timely manner and in substantial accordance with the requirements of this Agreement. The construction of the City Work shall be performed in a good and workmanlike manner by responsible design professions, engineers and contractors selected by the City in accordance with its selection process.

Notwithstanding anything herein to the contrary, the City shall have no obligation to undertake or perform the City Work if OM does not obtain the PDO and all other Key Development Permits, including, without limitation, entering into a Rezone Development Agreement with the City.

If despite the City's best efforts, BNSF fails to remove or relocate the tracks as and by the dates referenced in Sections 18.1(b) and 18.1(c) above, then the City agrees, at its sole cost and expense, to promptly exercise all available legal rights and remedies, including but not limited to self help remedies to the extent legally permissible, to complete the removal or relocation of the tracks or to compel BNSF to complete such removal and relocation as soon as possible and shall keep OM apprised on a timely basis of all such efforts to remove or relocate the tracks an/or to legally compel BSNF's full performance under the BNSF Agreement.

18.2 No Warranties Regarding City Work

The City does not and will not provide any express or implied warranties to OM regarding the City Work, including, without limitation, the absences of any defects in the design

or construction of the City Work; provided, however, the foregoing does not and shall not limit the City's obligation under this Agreement to construct and complete the City Work as provided in this Agreement or any right of remedy on the part of OM for any breach of this Agreement by OM with respect to the City Work. Notwithstanding the foregoing, to the extent the City receives assignable warranties from third party contractors with respect to any City Work for which OM has or will have repair and maintenance responsibilities, the City will assign such warranties to OM. In addition, the City shall use its best efforts to require that the contracts with the firms retained by the City to design and construct the City Work include the warranties and other assurances that OM and the City separately acknowledged to be appropriate and acceptable prior to entering into this Agreement.

18.3 Coordination With OM Work

The City will coordinate the City Work with the work being performed by OM and OM's contractors as required by this Agreement. OM will be given an opportunity to review and comment on the proposed plans and specifications for the City Work at preliminary and final document phases. OM recognizes that the City Work is subject to and will require compliance with applicable law, including but not limited to Chapter 39.04 RCW and such similar requirements.

18.4 Liability of City; City's Failure to Timely Perform

Notwithstanding anything to the contrary contained herein subject to obtaining all necessary permits and approvals for the City Work in accordance with Development Review and subject to force majeure, if, after the scope of the City Work has been determined and permits have been issued in accordance with Development Review, and after receiving a written notice from OM of the City's nonperformance and a reasonable period of time within which to cure the nonperformance, the City fails to timely perform the City Work as and when required by this Agreement, then, as OM's sole and exclusive remedy: (i) OM shall be entitled to receive from the City damages in an amount equal to OM's actual reasonable costs incurred to complete the City Work (or to otherwise cause the City Work to be completed) as set forth in this Agreement (plus an administrative overhead amount of 15% of such actual costs); provided, however, that in no circumstance shall the City be liable for any consequential damages, including, without limitation, any lost profits; and (ii) the City shall consent to OM having access to any portion of the City Property subject to an easement held by the City for the purpose of completing the portion of the City Work that the City has failed or refused to construct.

18.5 No Liens for City Work

If the City Work is not a public work project, or if liens are filed on the City Property owned by OM as a result of the City Work and the City does not cause the liens to be removed within five (5) business days, then OM shall have the right to remove such liens by posting appropriate bonds and the City shall reimburse OM for all costs reasonably incurred in removing such liens (plus an administrative overhead amount of 15% of the premium cost of any such bond obtained by OM).

18.6 Insurance

Any outside design professions performing City Work shall carry professional errors and omissions insurance in an amount not less than \$3,000,000.00; provided, however, coverage of only \$1,000,000.00 shall be required for minor consultants and design professionals (not including general civil and soil engineers) and exceptions otherwise granted upon the approval of OM, not to be unreasonably withheld. The general contractors performing the City Work shall carry customary commercial general liability and "builder's risk" insurance in the amount of \$3,000,000.00 provided, however, coverage of only \$1,000,000.00 shall be required for minor contractors and exceptions otherwise granted upon the approval of OM, not to be unreasonably withheld. The commercial general liability policy shall name OM and OM's contractor(s) as additional insureds. All policies shall contain a waiver of subrogation with respect to City Property loss or damage and a mutual waiver of recovery to the extent of City Property loss or damage covered or required to be covered by insurance. OM agrees to carry the same types and minimum coverages with respect to any work caused to be performed that is or will be dedicated to the City.

19. SPECIAL PROVISIONS

19.1 Insurance

19.1.1 Property Insurance

From and after Closing and thereafter continuing until the issuance of a Final Certificate of Completion, OM shall continuously obtain and maintain, with no coinsurance penalty, insurance for the benefit of itself and the City in the following amounts and with the following deductibles:

(a) on all real property in the Development owned by OM, including but not limited to all of the structural and nonstructural components, foundations, cores, shells and roofs of all improvements in the Development (the "**Development Improvements**") against "all risks," including earthquake (unless owners of other similar developments are no longer purchasing such coverage because the premium cost is no longer available at commercially reasonable rates and OM's secured lenders are not requiring such coverage) and flood, for the full replacement value of the Development Improvements and at premium levels reasonably attainable based upon prevailing insurance market conditions but shall contain an Inflation Guard Endorsement (or equivalent); and

(b) against such other risks that, at the time, are commonly insured against by the owners of properties used for similar development ("**Comparable Properties**"), with due regard to the then-existing circumstances and to the type, construction, design, use and occupancy of the components of the Development.

"**Full replacement value**" means the cost of repairing, replacing, or reinstating, including demolishing, any of the insured real property, with materials of like kind and quality in compliance with (and without an exclusion pertaining to application of), any governmental requirement regulating repair or construction at the time of loss and without deduction for physical, accounting, or any other depreciation, in an amount sufficient to meet the requirements

of any applicable co-insurance clause and to prevent OM from being a co-insurer; provided, however, any policy for earthquake may be subject to a deductible not exceeding ten percent (10%) of the full replacement value of the insured property, for flood not exceeding \$100,000.00, and for all other perils not exceeding \$100,000.00.

19.1.2 Insurance Ratings and Provisions

The carriers of all insurance policies provided by OM shall be rated no less than A-VIII in the most recent "Best's" insurance guide and shall be licensed in the State of Washington. All insurance policies provided for shall include

- (a) OM as a party and the City as an additional insured by endorsement;
- (b) where appropriate or required by any mortgagee, endorsement(s) in favor of mortgagees, as their interests may appear;
- (c) where appropriate, the insurer's mutual waiver of subrogation rights against and between OM and the City; and
- (d) a requirement that the insurer provide to the City at least thirty (30) days' prior written notice of cancellation or material change in the terms and provisions of the applicable policy and ten (10) days' prior written notice of cancellation for non-payment of premiums.

19.1.3 Evidence of Insurance

OM shall file binders or certificates of insurance in the records of OM evidencing that the applicable insurance requirements of this Agreement have been satisfied. OM shall also maintain a file of copies of the binders or certificates of all insurance policies then being maintained that relate to the Development. Upon written request, OM shall furnish to the City a schedule of OM's insurance, listing the policy numbers of the insurance obtained, the names of the companies issuing such policies, the names of the Persons insured, the amounts of coverage, the expiration date or dates of such policies, and the risks covered thereby.

19.1.4 Review of Insurance

From time to time the City shall review all of OM's insurance policy limits and coverages to determine their suitability in view of exposures reasonably anticipated over the ensuing three (3) years, changing practices in the insurance industry, and changes in local law and custom. OM shall cause its tenants and owners within the Development to comply with any other insurance requirements the City reasonably requests in order to protect the Development and the interests of the City and a certificate of insurance evidencing the required coverage to include an endorsement of the City as additional insured.

19.1.5 Liability Insurance

From and after Closing and thereafter continuing until the issuance of a Final Certificate of Completion, OM, at OM's cost and expense, shall maintain (a) commercial general liability

insurance, including products and completed operations, bodily injury and property damage liability, contractual liability, independent contractors' liability, personal and advertising injury liability, and, as appropriate, liquor liability, innkeepers' liability, and garage keepers' liability, against claims occurring on, in, or about the Development and the adjoining streets thereof; (b) umbrella and excess liability insurance, which schedules coverage for commercial general liability, garage liability, employer's liability and automobile liability and is in excess of all liability insurance required hereunder; (c) business automobile liability insurance, including coverage for the operation of owned, leased, hired and non-owned vehicles; (d) appropriate workers' compensation and employer's liability insurance as required by the laws of the State of Washington; and (e) such other insurance (including fidelity/crime coverage and employment practices liability) against other insurable risks which, at the time, are commonly insured against by owners of Comparable Properties, with due regard given to the then-existing circumstances and to the type, construction, design, use and occupancy of the units within the Development. The following is a summary of the minimum liability insurance amount requirements:

- (i) Commercial General Liability/Garage Liability:
 - \$1,000,000 per occurrence
 - \$1,000,000 personal & advertising injury
 - \$2,000,000 general aggregate per location
 - \$2,000,000 products – completed operations aggregate
- (ii) Automobile Liability:
 - \$1,000,000 per accident (bodily injury and property damage combined single limit)
 - \$1,000,000 uninsured/underinsured motorist
- (iii) Umbrella & Excess Liability:
 - \$10,000,000 per occurrence & aggregate per location, which shall apply in excess of the underlying insurance described in Section 19.1.5(i), (ii), (iv) and (v).
- (iv) Workers' Compensation:
 - Statutory – State of Washington
 - Employer's Liability
 - \$100,000 each accident – bodily injury by accident
 - \$100,000 – bodily injury by disease
 - \$100,000 each employee – bodily injury by disease

- (v) Fidelity/Crime and Employment Practices Liability:

[Limits and coverages as commonly carried by owners of Comparable Properties.]

- (vi) Professional Liability Insurance:

\$1,000,000 each claim and annual aggregate

19.1.6 Failure to Maintain Insurance

If OM fails to initially obtain or, thereafter, maintain any required insurance pursuant to the requirements herein, the City may (but shall not be obligated to) purchase such insurance for the protection of the City as the City may consider necessary or appropriate and the cost thereof shall be paid by OM plus fifteen percent (15%) of the premium cost.

19.1.7 Notice of Change

All policies of insurance shall contain a provision that the company writing such policy will give to all insureds and additional insureds, including the City in all situations, at least thirty (30) days' notice in writing in advance of any cancellation or lapse or the effective date of any reduction in the amount of or other material change of insurance.

19.1.8 Waivers of Claims and Subrogation

Solely by being subject to the terms of this Agreement, OM and the City, for themselves and for their respective officers, board members, members, partners and shareholders, waive and release all claims for defense or damages and all rights of subrogation for any loss or liability sustained in connection with any act or occurrence to the extent the same are covered by the proceeds of any property insurance policy payable to the waiving Person; provided, however, this Section 19.1.8 shall not have the effect of abrogating or impairing any insurance policy and to the extent it would do so shall automatically be inapplicable.

19.2 No Encumbrances Except Mortgages, Deeds of Trust, Sales and Leasebacks, or Other Financing for Development

Notwithstanding Section 16.9 above, mortgages, deeds of trust, sales and leasebacks or any other form of conveyance secured by the City Property and required for any reasonable method of financing are permitted with respect to any portion of the City Property at any time before issuance of a Certificate of Completion for the Minimum Development Elements, but only for the purpose of securing loans of funds to be used for financing the acquisition of the City Property, the construction of improvements as part of the Development Plan, and any other expenditures necessary and appropriate to develop the City Property in accordance with the Development Plan; provided, however, until the City and OM have entered into a Rezone Development Agreement and OM acknowledges in writing that all Key Development Permits have been obtained with conditions acceptable to OM, no such mortgage, deed of trust, sale and leaseback, or method of financing that individually or collectively could not be released by a payment from the City of an amount less than Ten Million Dollars (\$10,000,000.00) and the use

of all proceeds from any loan secured by any such mortgage, deed of trust, sale or leaseback shall not be used for any purpose other than payment of the Purchase Price, Development permitting expenses and other costs directly related to the Development Plan. Notwithstanding the foregoing, prior to the City and OM entering into a Rezone Development Agreement and OM's acknowledgment in writing that all Key Development Permits have been obtained with conditions acceptable to OM, the City will consent to OM placing encumbrances on the City Property that, collectively, would require the payment of amounts in excess of Ten Million Dollars (\$10,000,000.00) if OM provides financial assurance devices including but not limited to unconditional guaranties that are reasonably acceptable to the City. The cost of reviewing any proposed financing, including reasonable outside legal counsel fees and costs, shall be paid for by OM. OM shall notify the City prior to granting any mortgage, deed of trust, sale and leaseback, or other form of conveyance for financing secured by the City Property. The words "mortgage" and "deed of trust," as used herein, include all other appropriate modes of financing real estate acquisition, construction, and land development.

19.3 Holder Not Obligated to Construct Improvements

The holder of any mortgage, deed of trust, or other security interest and the lessor under a leaseback or grantee under any other conveyance for financing authorized by this Agreement shall in no way be obligated by the provisions of this Agreement to construct or complete the Minimum Development Elements or any other improvements on the City Property or to guarantee such construction or completion. Nor shall any covenant or any other provision in the grant deed or deed for the City Property be construed so to obligate such holder. Provided, however, any bidder at any foreclosure shall take the City Property subject to this Agreement. Nothing in this Agreement shall be deemed to construe, permit, or authorize any such holder to devote the Site to any uses or to construct any improvements thereon other than those uses or improvements that are described as part of the Development Permits.

19.4 Notice of Default to Mortgage or Deed of Trust or Other Security Interest Holders; Right to Cure

Whenever the City shall deliver any notice or demand to OM with respect to any breach or default by OM in completion of construction of the improvements, the City shall, at the same time, deliver a copy of such notice or demand to each holder of record of any mortgage, deed of trust, or other security interest and to the lessor under a leaseback or to the grantee under any other conveyance for financing authorized by this Agreement, who has previously made a written request to the City therefore. Each such holder shall (but only insofar as the rights of the City are concerned) have the right, at the holder's option, after the receipt of the notice to cure or remedy or commence to cure or remedy any such default to cure or remedy any such default and to add the cost thereof to the security interest debt and the lien on its security interest or to the obligations of the lessee under any leaseback or of the grantor under any other conveyance for financing. In the event there is more than one such holder, the right to cure or remedy a breach or default of OM under this Section 19.4 shall be exercised by the holder first in priority or as the holders may otherwise agree among themselves, but there shall be only one exercise of such right to cure and remedy a breach or default of OM under this Section 19.4. Nothing contained in this Agreement shall be deemed to permit or authorize such holder to undertake or continue the construction or completion of the improvements (beyond the extent necessary to conserve or

protect the improvements or construction already made) without first having expressly assumed OM's obligations to the City with respect to the portion of the City Property that is subject to the interest of the holder by written agreement satisfactory to the City. The holder in that event must agree to complete, in the manner provided in this Agreement, the improvements related to the portion of the Development to which the lien or title of such holder relates and submit evidence satisfactory to the City that it has the qualifications and financial responsibility necessary to perform such obligations. Any such holder properly completing such improvements shall be entitled, upon written request made to the City, to a Certificate of Completion from the City.

19.5 Right of City to Cure Mortgage, Deed of Trust, or Other Security Interest Default

In the event of a default or breach by OM of a mortgage, deed of trust, or other security interest or of a leaseback or of obligations to the grantee under any other conveyance for financing with respect to any portion of the City Property prior to the issuance of a Certificate of Completion and where the holder has not exercised the holder's option to complete the development of the Minimum Development Elements for such property, the City may cure the default prior to completion of any foreclosure, termination of lease, or completion of proceedings by which such other security interest is retained or granted back provided that OM is given at least thirty (30) days' prior written notice of the City's intention to cure such default and, if foreclosure proceedings are initiated, the City's cure right shall not extend beyond any period of time when a borrower would be prohibited from curing a default as a matter of applicable law. The City shall also be entitled to a lien upon the City Property to the extent of such costs and disbursements. Any such lien shall be subordinate to mortgages, deeds of trust, or other security interests or the interests of lessors under any leasebacks or the interests of grantees under any other conveyances for financing executed for the sole purpose of obtaining funds to purchase and develop the Site as authorized herein.

19.6 Right of City to Satisfy Other Liens on the Site After Closing

Subject to the rights granted to OM pursuant to Section 16.9 above, after Closing and prior to the issuance of a Certificate of Completion for the Minimum Development Elements for a particular portion of the Development, and after OM has had a reasonable time to challenge, cure, or satisfy any liens or encumbrances on such portion of the City Property (not to exceed six (6) months), the City shall have the right to satisfy any such liens or encumbrances.

19.7 City's Representations, Warranties and Covenants

The City represents, warrants and covenants to OM:

19.7.1 Power and Authority

The City is a municipal corporation of the State of Washington. The City has taken all necessary legislative actions and met all necessary statutory and other requirements to enter into this Agreement and, subject to the City Property being declared surplus by the City, to consummate the transaction provided for herein. The person executing this Agreement on behalf of City has been duly authorized to do so.

19.7.2 Actions

The City has received no written notice of any action, litigation, condemnation or proceeding of any kind pending or threatened against any portion of the City Property that would prevent its compliance with this Agreement or have a material adverse effect upon development of any portion of the City Property as contemplated by the Development Plan.

19.7.3 Notice of Breach

The City has not received a written notice that it is in violation of the Consent Decree CAP, Restrictive Covenant or the Tribes of Pilchuck Agreement or of any other governmental requirement, ordinance or regulation in respect of the City Property.

19.7.4 Work

No work has been performed or is in progress at the direction of the City, and no materials have been furnished to the City Property at the request of the City that could result in a lien being asserted against the City Property and that have not been paid for or will not be paid for in full by the City prior to Closing.

19.7.5 Notice Prior to Closing

The City shall promptly notify OM if the City learns that any of the representations or warranties cease to be true in any material respect at any time prior to Closing.

19.7.6 Leases; Other

To the actual current knowledge of Mike Palacios, Real Property Manager at the City, there are no agreements granting to any third party any possessory or other right in or to the City Property or that would otherwise be binding on OM after Closing by virtue of OM acquiring title to the City Property that have not been provided to OM, that are not reflected in the Title Commitment or that would not be covered by title insurance at Closing. The foregoing shall be limited to the extent any OM has any information or materials to the contrary.

19.7.7 Mill Site

The City, as part of its lease agreement with KLB Construction Company dated October 7, 2005 shall place engineered fill material on the Mill Site sufficient to raise the elevation of an areas of at least 12 acres outside of any wetlands, wetland buffers or critical area setbacks on the Mill Site (the "**Mill Site Development Area**") above the 100 year floodplain elevation established by FEMA. Following such fill placement, the City shall file and prosecute, using reasonable and diligent efforts, an application with FEMA to have FEMA amend the applicable Flood Insurance Rate Map to re-designate the Mill Site Development Area as within Zone X. In prosecuting the FEMA application, the City will pay for any and all third party studies or reports required for the application but shall not be obligated to obtain, and makes no representations regarding its ability to obtain, the FEMA Flood Insurance Rate Map amendment described herein. OM shall cooperate with the City and FEMA in all matters related to the amendment application and its prosecution, including without limitation signing all application materials and

any required consents or other related documents. This fill work to be provided by the City, as described in this Section 19.7.7 shall be in addition to the fill placed on the Mill Site pursuant to Section 16.12 above. Following such fill work by the City, the City shall deliver evidence reasonably satisfactory to OM that the Mill Site Development Area has sufficient toe and bank protection, as certified by a geotechnical engineer, to prevent the migration of materials caused by river flow, including flooding events.

19.7.8 Archaeology/Paleontology

To the actual current knowledge of David Davis, the Director of Engineering at the City, he is not aware of any archaeological or ethnographic sites or historic structures on the City Property. The foregoing shall be limited to the extent any OM has any information or materials to the contrary.

19.8 OM's Representations, Warranties and Covenants

OM represents, warrants and covenants to the City:

19.8.1 Power and Authority

OM is a limited liability company duly formed and validly existing under the laws of the State of California. OM has the authority and power to enter into this Agreement and to consummate the transaction provided for herein. This Agreement and all other documents executed and delivered by OM constitute legal, valid, binding and enforceable obligations of OM, and there are no claims or defenses, personal or otherwise, or offsets whatsoever to the enforceability or validity of this Agreement. The person executing this Agreement on behalf of OM has been duly authorized to do so.

19.8.2 Notice Prior to Closing

OM shall promptly notify the City if OM learns that any of the representations or warranties cease to be true in any material respect at any time prior to Closing.

19.9 Survival

All of the representations, warranties and covenants of City and OM contained in this Agreement shall be true and correct as of the date of this Agreement and shall, as a condition to Closing, be true and correct in all material respects as of the Closing Date. The Parties' rights to enforce such representations, warranties and covenants shall survive Closing and such rights to enforce shall not be merged into any documents delivered at Closing.

19.10 ENA

The Parties acknowledge that the obligations set forth in the ENA have been fully satisfied and the ENA is hereby terminated.

19.11 Committee Structure

19.11.1 Authorized Representatives

Each Party shall have a designated individual authorized to represent such Party in the administration of this Agreement. The individual designated by the City as the City's initial Authorized Representative is James Iles and the individual designated by OM as OM's initial Authorized Representative is Paul Buss. Either Party may change the designation of its Authorized Representative by giving the other Party written notice of the change (including but not limited to the name, address and telephone number of the individual designated as such Party's new Authorized Representative); provided, however, that each Party shall consult with the other Party prior to changing the designation of its Authorized Representative and the appointee shall be at a responsibility level reasonably consistent with the replaced individual.

19.11.2 Operating Committee

The Parties shall appoint an operating committee (the "**Operating Committee**") to:

- (a) review the performance of the Parties' respective obligations under this Agreement and any documents entered into at Closing;
- (b) meet periodically to review progress reports and to discuss opportunities to better satisfy the requirements and objectives of this Agreement;
- (c) attempt to resolve any disputes between the Parties (including, without limitation, any disputes arising out of the alleged failure of either Party to perform in compliance with this Agreement); and
- (d) perform such other duties and responsibilities as may be delegated from time to time to the Operating Committee by the Steering Committee or otherwise by the Parties.

Each Party shall appoint an equal number of individuals to serve on the Operating Committee. Unless otherwise agreed by the Parties, the Operating Committee shall consist of two (2) individuals. The initial Operating Committee shall consist of the following individuals:

Appointed by the City: Dave Davis

Appointed by OM: Charles Hickcox

Either Party may change any of its appointments to the Operating Committee by giving the other Party written notice of the change (including but not limited to the name, address and telephone number of any individual appointed by such Party); provided, however, that each Party shall consult with the other prior to changing any of its appointments to the Operating Committee and the appointee shall be at a responsibility level reasonably consistent with the replaced individual.

Unless otherwise agreed by the Parties:

(a) the Operating Committee shall meet at least once each month or at such other intervals as the Parties shall agree;

(b) any member of the Operating Committee may call a meeting of the Operating Committee upon five (5) business days' notice by providing each member written notice of the meeting including the date, time, place and agenda for any such meeting; provided that the members of each Party shall not call a meeting under this paragraph more frequently than once in any thirty (30) day period;

(c) meetings with the Operating Committee shall be held at locations selected by the Operating Committee; and

(d) the Operating Committee shall be disbanded upon issuance of the Final Certificate of Completion for the Minimum Development Elements.

19.11.3 Steering Committee

The Parties shall appoint a steering committee to:

(a) review the performance of the Parties' respective obligations under this Agreement and any documents entered into at Closing;

(b) review any actions taken or determinations made by the Operating Committee;

(c) attempt to resolve any disputes between the Parties (including, without limitation, any disputes arising out of the alleged failure of either Party to perform in compliance with this Agreement or any document entered into at Closing); and

(d) perform such other duties and responsibilities as may be delegated from time to time by the Parties to the Steering Committee.

Each Party shall appoint an equal number of individuals to serve on the Steering Committee. Unless otherwise agreed by the Parties, the Steering Committee shall consist of two (2) individuals. The initial Steering Committee shall consist of the following individuals:

The Chief Administrative Assistant for the City; and

Paul Buss for OM.

Either Party may change any of its appointments to the Steering Committee by giving the other Party written notice of the change (including but not limited to the name, address and telephone number of any individual appointed by such Party); provided, however, that each Party shall consult with the other prior to changing any of its appointments to the Steering Committee.

Unless otherwise agreed by the Parties:

(a) the Steering Committee shall meet at least once every six (6) months or at such other intervals as the Parties shall agree;

(b) any member of the Steering Committee may call a meeting of the Steering Committee upon five (5) business days' notice by providing each member written notice of the meeting including the date, time, place and agenda for any such meeting; provided that the members of each Party shall not call a meeting under this paragraph more frequently than once in any thirty (30) day period; and

(c) unless otherwise indicated, Steering Committee meetings shall be held at locations selected by the Steering Committee.

19.12 Mediation

Any claim arising out of or related to this Agreement, except those waived, shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party. This requirement cannot be waived except by an explicit written waiver signed by both Parties. The parties shall endeavor to resolve their claims by good-faith mediation. A request for mediation shall be filed in writing with the other Party to this Agreement, and the Party shall promptly attempt to mutually agree upon a mediator. If the Parties have not reached agreement on a mediator within thirty (30) days of the request, either Party may file the request with the American Arbitration Association or such other alternative dispute resolution service to which the Party agrees, with a copy to the other Party, and the mediation shall be in accordance with the Mediation Rules of the American Arbitration Association (or other agreed service) currently in effect. Mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation, unless stayed for a longer period by agreement of the parties or court order. The Parties to the mediation shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Development is located unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. Representatives of the City and OM must attend the mediation session with authority to settle the claim. To the extent there are other parties in interest, their representatives, also with authority to settle the claim, shall also attend the mediation session. Unless the Parties mutually agree in writing otherwise, all unresolved claims shall be considered at a single mediation session that shall occur prior to completion of the Development Plan. The Parties shall diligently carry on the work required by this Agreement during any dispute resolution proceedings.

19.13 Agreement Not Recordable

This Agreement is and shall be a publicly available document. However, neither this Agreement nor any notice thereof shall be recorded with the real property records by any party hereto or any agent of same. OM agrees that it will not attempt to record this Agreement or any notice thereof and that any attempt to record this Agreement or any notice thereof shall constitute a noncurable default on the part of OM hereunder. Notwithstanding the foregoing, the parties may record a mutually acceptable memorandum of this Agreement.

19.14 Rights and Remedies Are Cumulative

Except as otherwise expressly limited herein, the rights and remedies of the Parties are cumulative, and the exercise by a Party of one or more of such rights or remedies shall not preclude the exercise, at the same time or different times, of any other rights or remedies for the same default or any other default by the other Party.

19.15 Post Closing Sales and Transfers

19.15.1 Sales and Transfers of Residential Property

Subject to the requirements set forth in this Section 19.16, OM shall have the right to freely convey or otherwise alienate all or any of the residential portions or phases of the City Property in the normal course of OM's development of the City Property when the City and OM have entered into a Rezone Development Agreement, OM has acknowledged in writing that all Key Development permits have been obtained with conditions acceptable to OM, and the City has provided to OM a Partial Certificate of Completion for the Simpson Site or Mill Site, as the case may be, and any such conveyance shall be free of the City's Repurchase Right and any other obligation of OM to the City pursuant to this Agreement; provided, however, that no such conveyance or alienation shall be made by OM of any such residential portions or phases of the City Property and the City shall not be obligated to provide a Partial Certificate of Completion releasing the appropriate portions of the Simpson Site or Mill Site, as the case may be, from the remedies set forth in Section 17.1 above unless and until the requirements for a Partial Certificate of Completion for the property being conveyed or alienated, as set forth in Section 16.2.3 above, have been satisfied.

19.15.2 Sales and Transfers of Retail Property Within the Landfill and Mill Sites

In addition, subject to the requirements set forth in this Section 19.16, OM shall have the right to freely convey or otherwise alienate any retail property within the Landfill and Mill Sites to any builder, tenant, user or occupant of improvements located or to be located on such property when the City and OM have entered into a Rezone Development Agreement, OM has acknowledged in writing that all Key Development permits have been obtained with conditions acceptable to OM and the City has provided to OM a Partial Certificate of Completion pertaining to the retail property being conveyed or otherwise alienated to the builder, tenant, user or occupant. Notwithstanding anything herein to the contrary, the City shall not be obligated to provide a Partial Certificate of Completion releasing any property on the Landfill or Mill Site from the remedies set forth in Section 17.1 above unless (i) the property to which the Partial Certificate of Completion pertains is consistent with the property that is the subject of the Approved Minimum Retail Element and the sale or alienation is consistent with the Approved Minimum Retail Element and (ii) the requirements for the issuance of the Partial Certificate of Completion for the property being conveyed or alienated, as set forth in Section 16.2.3 above, have been satisfied.

19.16 Protective Documents

If, after Closing and prior to issuance of a Final Certificate of Completion for the Minimum Development Elements, OM or any subsequent owner of all or any portion of the City Property (“**Owner**”) sells, conveys or otherwise disposes of all or any portion of the Property to a third party that provides Owner any legal or equitable protection in connection with a potential or actual conversion of all or any portion of the City Property (whether before or after such sale, conveyance or other disposition) to a condominium, time share, interval ownership or other form of ownership which allows one or more persons to have ownership interests therein, which protection may include, but not be limited, to wrap insurance, other insurance, indemnities, deposits or other security, guaranties or releases (the “**Protective Documents**”), then Owner shall name the City, or cause the City to be named, as an additional benefited party under or pursuant to such Protective Documents if such coverage is available at commercially reasonable rates at such time. Owner shall promptly advise the City thereof and deliver to the City a copy of any such Protective Documents. The obligations of OM contained in this Section 19.17 shall survive Closing.

19.17 Notice of Breach and Cure Right

Except as expressly provided for otherwise in this Agreement, neither OM nor the City shall take any affirmative action to enforce any rights or remedies against the other for an alleged breach of any obligation under this Agreement without having delivered a written notice to the Party alleged to have violated this Agreement identifying the alleged violation and, other than with respect to the breaches described in Section 17.1 or a breach that creates a need for immediate corrective action, a reasonable period of time within which to cure the alleged violation, not to exceed three (3) business days; provided, however, the foregoing shall not in any way limit or condition the rights or interests described in Section 17.1.3.

20. GENERAL PROVISIONS

20.1 Notices

All notices, demands, consents, approvals and other communications (each, a “**Notice**”) that are required or desired to be given by either Party to the other under this Agreement shall be in writing and shall be (a) hand delivered, (b) sent by U.S. registered or certified mail, postage prepaid, return receipt requested, or (c) sent by reputable overnight courier service, addressed to the appropriate Party at its address set forth below, or at such other address as such Party shall have last designated by Notice to the other. Notices shall be deemed given when delivered; provided, however, that if any Notice shall also be sent by telecopy or fax machine, such Notice shall be deemed given at the time and on the date of machine transmittal if the sending Party receives a written send verification on its machines and forwards a copy thereof with its mailed or courier-delivered Notice. Rejection or other refusal by the addressee to accept a Notice or the inability to deliver the Notice because of a changed address of which no Notice was given shall be deemed to be receipt of the Notice sent. Notice addresses for the Parties are as follows:

To City: City of Everett
2930 Wetmore Avenue, Suite 10-A
Everett, WA 98201
Attention: James D. Iles, Chief Administrative Assistant
Facsimile: 425 257-8729

With a copy to: City of Everett
2930 Wetmore Avenue, Suite 10-A
Everett, WA 98201
Attention: Ned Johnston, City Attorney
Facsimile: 425 257-8729

With a copy to: Perkins Coie LLP
10885 N.E. 4th Street, Suite 700
Bellevue, WA 98004
Attention: Craig H. Shrontz
Facsimile: 425 635-1404

To OM: OliverMcMillan
773 8th Avenue
San Diego, CA 92101
Attention: Morgan Dene Oliver, Chief Executive Officer
Facsimile: 619 321-1234

With a copy to: Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Attention: Beth A. Clark
Facsimile: 206 447-1916

Notice may be given by counsel for the Parties, and such Notice shall be deemed given by City or OM, as the case may be, for all purposes under this Agreement.

20.2 Force Majeure

Whenever a period of time is prescribed for the taking of an action by either Party (other than with respect to the payment of any deposit or money), the period of time for the performance of such action shall be extended by the number of days that the performance is actually delayed due to general strikes, acts of God, war, terrorist acts, civil disturbances, floods, earthquakes, fires, other causes beyond the reasonable control of the performing party, and, with respect to OM's performance, any delays incurred by OM as a result of the nonperformance or delay by the City of any of its obligations hereunder, including without limitation any failure by the City not caused by OM to substantially complete any component of the City Work within the applicable deadlines set forth in Section 18.1 above, and, with respect to City's performance, any delays incurred by City as a result of the nonperformance or delay by OM of any of its obligations hereunder ("**Force Majeure**"). Without limiting the foregoing, Force Majeure shall also include delays caused by the failure to complete the relocation and removal of the BNSF

tracks and materials associated with the BNSF tracks as required by terms of this Agreement or the Environmental and Landfill Agreement to the extent any such delay is not caused by OM, and the presence of any archaeological or paleontologic remains on the City Property to the extent they are discovered on the City Property after Closing. Any Party claiming a right to a Force Majeure extension shall notify the other party immediately of the claimed right to an extension and the specific claimed basis for the extension.

20.3 Entire Agreement; No Oral Modifications

This Agreement and the exhibits hereto constitute the final and complete agreement between the Parties with respect to the transaction contemplated herein and supersede all prior correspondence, memoranda and agreements (oral or written) between the Parties relating to the subject matter hereof. This Agreement cannot be changed or modified other than by a written agreement executed by both Parties.

20.4 Successors Bound

Subject to the restrictions on assignment contained in Section 20.5 below, the provisions of this Agreement shall extend to, bind and inure to the benefit of the Parties and their respective personal representatives, heirs, successors and assigns.

20.5 Assignment After Closing

Except as otherwise provided herein, the City shall not have the right to assign or transfer this Agreement or any of its rights or obligations hereunder. After Closing, OM shall not have the right to assign or transfer this Agreement or any of its rights or obligations hereunder without the express prior written consent of City, which may be withheld in its sole and absolute discretion; provided, however, that OM, notwithstanding the foregoing, shall have the right, upon written notice to City at least fifteen (15) days before the consummation of any such transaction (but without any requirement for prior consent), to assign its rights under this Agreement to an Affiliated Entity so long as the Affiliated Entity assumes in writing all of the obligations and liabilities of OM under this Agreement. OM shall also have the right, notwithstanding the foregoing, to assign its rights to a recognized financial institution for security purposes in connection with a loan the proceeds of which will be used exclusively for the Development; provided, however, the lender or trustee in any such assignment shall not be released or relieved of the obligation to obtain the City's prior written consent to any subsequent sale, assignment or conveyance of such rights, whether through a foreclosure or otherwise and no right under any such assignment shall be exercised unless and until the holder of the rights assumes in writing the obligations of OM hereunder. Any assignment, whether or not the consent of the City is required, shall be subject to all the provisions, terms, covenants and conditions of this Agreement; the assignee shall jointly and severally assume in writing the obligations of OM hereunder unless the assignment is only for security purposes; OM shall, in any event, continue to be and remain liable under this Agreement, as it may be amended from time to time, without notice to OM.

20.6 Applicable Law; Regulatory Compliance

This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. Any City obligation described in this Agreement relating to any site-specific development is subject to the local Development Review process. Any City obligation relating to any site-specific development is expressly conditioned upon completion of SEPA review for any proposed development. It is expressly understood by the Parties that this Agreement memorializes a transaction involving the disposition of the City Property. This Agreement does not, by its express terms or by implication, constitute (in whole or part) any grant, issuance, decision, order, permit, finding, conclusion, holding, recommendation, approval, determination or other form of governmental action as to any matter whatsoever. OM expressly acknowledges and agrees, and shall require any and all of OM's approved assignees to expressly acknowledge and agree, that City hereby gives no express or implied assurances or guarantees of any kind as to the outcome of any request for City development approval. No public or municipal services are provided to OM (or any OM assignee) by City pursuant to this Agreement, nor shall this Agreement in any way affect the provision of any such services by City in any capacity by which City may extend such services to the general public and in accordance with applicable law.

20.7 Venue and Jurisdiction

OM shall not commence or prosecute any suit, proceeding or claim to enforce the provisions of this Agreement or otherwise arising under or by reason of this Agreement other than in the state courts located in Snohomish County, Washington, or in federal court in the Western District of Washington. OM hereby irrevocably consents to the jurisdiction and venue of such courts.

20.8 Counterparts; Facsimile Signatures

This Agreement may be executed in more than one counterpart, each of which shall be deemed an original, and all of which shall constitute one and the same instrument. Facsimile signatures on this Agreement shall constitute original signatures of the Parties.

20.9 Attorneys' Fees

In the event that either of the Parties to this Agreement brings an action or proceeding for a declaration of the rights of the Parties under this Agreement, for injunctive relief or for an alleged breach or default, or in any other action arising out of this Agreement or the transactions contemplated hereby, the predominantly prevailing party in any such action shall be entitled to an award of reasonable attorneys' fees and any court costs incurred in such action or proceeding, in addition to any other damages or relief awarded, regardless of whether such action proceeds to final judgment.

20.10 Captions

The captions of this Agreement are inserted solely for the convenience of reference only and do not define, describe or limit the scope or intent of this Agreement or any term hereof.

20.11 Waiver

No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by OM or the City of the breach of any obligation under this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant, term or condition of this Agreement.

20.12 Further Assurances

If at any time either of the Parties reasonably determines that any further assignments, conveyances, assurances or instruments are reasonably necessary or desirable to carry out the provisions hereof and the transactions contemplated herein, the appropriate Party shall execute and deliver, or cause to be executed and delivered, any and all proper assignments and assurances and to do, or cause to be done, all things reasonably necessary or proper to carry out fully the provisions hereof, provided that such things shall be at no additional material cost, expense or liability (beyond that set forth in this Agreement) to such Party.

20.13 No Third Party Beneficiaries

This Agreement is intended for the benefit of OM and the City, and except as otherwise provided with regard to the Surviving Obligations and with respect to the City and OM Indemnified Parties, no other person or entity shall be entitled to rely on this Agreement, receive any benefit from it or enforce any provisions of it against OM or the City.

20.14 Time

The Parties agree that time is of the essence in the performance of the provisions of this Agreement.

20.15 Consent and Approval Standard

During the term of this Agreement, except as may be expressly stated otherwise, OM and the City agree to act reasonably and in good faith, use commercially reasonable standards and exercise reasonable judgment with respect to all matters described in this Agreement that pertain to a required approval or consent and not to act arbitrarily or capriciously. Any dispute regarding any denied approval or consent maybe considered by the Steering Committee and shall be subject to the mediation requirement set forth in Section 19.13 above.

BY:

CITY OF EVERETT, a Washington municipal corporation

By Ray Stephanson
Ray Stephanson, Mayor

ATTEST:

By Sharon Marks
Sharon Marks, City Clerk

APPROVED AS TO FORM:

By [Signature]
Elmer E. "Ned" Johnston, City Attorney

OM:

OLIVERMCMILLAN, LLC

By: [Signature]
Name: RICHARD PAUL BUSS
Title: PRESIDENT
Date: 2/21/07