

**RECORDING REQUESTED BY**

City of Chula Vista

**WHEN RECORDED MAIL THIS DOCUMENT AND TAX STATEMENT TO:**

City of Chula Vista – City Clerk  
276 Fourth Avenue  
Chula Vista CA 91910

APN: xxx-xxx-xx-xx

Space above this line for Recorder’s use only

**AGREEMENT TO DEFER BALANCED COMMUNITIES AFFORDABLE HOUSING OBLIGATION AND TO POST SECURITY  
(Otay Ranch Village Two – Cornerstone Communities)**

This AGREEMENT TO DEFER BALANCED COMMUNITIES AFFORDABLE HOUSING OBLIGATION AND TO POST SECURITY (“**Agreement**”) is made as of this \_\_\_ day of \_\_\_\_\_, 2021, by and between Presidio Cornerstone Estancia 37, LLC, a California Limited Liability Corporation, (“**Developer**”) and the CITY OF CHULA VISTA, a California municipal corporation and charter city (“**City**”) in connection with development of certain parcels of real property (“**Property**”) located in the City of Chula Vista, County of San Diego, California, described in Exhibit “A” attached hereto and incorporated herein by reference. The City and Developer may be referred to herein individually as a “Party” and collectively as the “Parties”.

**RECITALS**

This Agreement is based upon the following Recitals, facts, and understandings of the Parties.

A. The City of Chula Vista Housing Element established Policy 5.1.1 of the City’s Housing Element of the General Plan (“**Balanced Community Policy**”), which requires the occupancy and affordability of ten percent (10%) of each housing development of 50 or more units for low and moderate-income households, with at least one half of those units (5% of project total units) being designated for low-income households (the “**Affordable Housing Obligation**”). The Balanced Community Policy also allows, under specified circumstances, alternative means of compliance.

B. The City and JPB Development, LLC, a California Limited Liability Company, Baldwin & Sons LLC, a California Limited Liability Company, McMillin Otay 233, LLC, a California Limited Liability Company, and Rosina Vista, LP, a California Limited Partnership

entered into a Balanced Communities Affordable Housing Agreement for Otay Ranch Village 2 recorded as Doc No. 2012-0059874 in the County of San Diego Recorder's Office ("**Affordable Housing Agreement**").

C. Developer is the successor in interest in title to the Project (as defined in the Affordable Housing Agreement). In accordance with Section 11(d) (General Provisions, Successors) of the Affordable Housing Agreement, all terms of the Affordable Housing Agreement are binding upon all successors and assigns and, as such, Developer is bound by and subject to the Affordable Housing Agreement and all covenants, reservations and restrictions as set forth therein.

D. In accordance with Balanced Communities Policy and the Affordable Housing Agreement, Developer's Affordable Housing Obligation can be satisfied by either (i) constructing twenty-four (24) affordable units ("**Affordable Units**"), of which twelve (12) units would be for moderate income households and twelve (12) units would be for low income households, or (ii) meeting alternative methods of compliance ("**Alternative Methods of Compliance**") identified in the Affordable Housing Agreement and this Agreement, including payment of an in-lieu housing fee.

E. In accordance with Section 2(a)(2) of the Affordable Housing Agreement, prior to the issuance of the building permit for the residential unit representing 50 percent, or 116 units, of the total units for the Project, Developer shall initiate construction or provision of the initial phase of the low- and moderate-income housing. Additionally, Developer was obligated to commence construction of the remaining low- and moderate-income housing on or before the issuance of the building permit for the residential unit representing 75 percent, or 175 units, of the total units for the Project. Developer surpassed the 75 percent threshold in February 2020 with 176 units either completed or under construction.

F. On or about January 8, 2021, Developer partially satisfied its Affordable Housing Obligation by making payment of an in-lieu housing fee in the amount \$1,863,300, which represents partial satisfaction of its Affordable Housing Obligation as to fifteen (15) of the required twenty-four (24) Affordable Units.

G. As of the date of this Agreement, the City has not released building permits for nine (9) of the 233 total units for the Project.

H. Developer has represented to City that it intends to meet the remaining Affordable Housing Obligation by constructing Affordable Units at the nine (9) parcels for which the City has not issued building permits, or through alternative methods of compliance as provided by Section 5 of Affordable Housing Agreement.

I. Developer has requested that the City agree to defer certain schedule obligations in Section 2(a) of the Affordable Housing Agreement to allow for the release of the remaining nine (9) building permits for the Project in exchange for Developer obtaining a bond, in a form acceptable to the City, to secure performance of the Affordable Housing Obligation.

J. The City and the Developer desire to enter into this Agreement, on the terms and conditions herein, to secure satisfaction of the remainder of Developer's Affordable Housing

Obligation and authorize the release of the final nine (9) building permits for the Project prior to the actual construction, provision, or payment in-lieu of the Affordable Units.

**NOW, THEREFORE**, in consideration of the above Recitals, mutual covenants herein contained and for good and valuable consideration the receipt and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

1. **Affordable Housing Obligation.**

1.1 **Duty To Satisfy Remaining Affordable Housing Obligation.** Developer represents and warrants that it is the successor in interest in title to the Project. Developer further represents and warrants that it is subject to, bound by, and obligated to comply with the Affordable Housing Agreement, including but not limited to the Affordable Housing Obligation, and all covenants, reservations, and restrictions as set forth therein. As Developer has only partially satisfied its Affordable Housing Obligation via payment of an in-lieu housing fee in the amount \$1,863,300, Developer further represents and warrants that it remains obligated to satisfy the remainder of its Affordable Housing Obligation, which currently consists of the construction of nine (9) Affordable Units, or equivalent Alternative Methods of Compliance, and that it agrees to satisfy the remainder of the Affordable Housing Obligation in strict accordance with the Affordable Housing Agreement and Balanced Communities Policy.

1.2 **Alternative Methods of Compliance.** In strict accordance with Balanced Communities Policy and the Affordable Housing Agreement, Developer may satisfy its Affordable Housing Obligation, identified in Section 1.1, through one or more of the following, in combination, Alternative Methods of Compliance:

- a. Construction of any or all of the nine (9) remaining Affordable Units within or outside of the Otay Ranch Village 2 Project, but within that area east of Interstate I-805 of the City of Chula Vista, and under the ownership and control of Developer, subject to City's approval, which shall not be unreasonably withheld.
- b. Payment to the City of an in-lieu fee in the amount of \$124,220 per Affordable Unit ("In-lieu Fee") for those units not constructed or provided, which payment shall be placed in the Inclusionary Housing Fund.
- c. Purchase of available credits resulting from a development of Low or Moderate Income Housing (as defined in the Balanced Communities Policy) provided with financial assistance from the City or the Chula Vista Housing Authority; providing sufficient evidence, to the satisfaction of the City, of purchase of such credits; and authorizing the City to apply the credits to Developer's Affordable Housing Obligation, accordingly.

1.3 **Changes in Unit Count.** In the event that the Developer elects to meet its Affordable Housing Obligation with the use of incentive credits as outlined with the Guidelines to the Balanced Communities Policy, as adopted by City Council Resolution 2012-182, the Affordable Housing Obligation shall be adjusted in the manner identified in the Balanced

Communities Policy. The adjustment to the Affordable Housing Obligation shall be an administrative act and not require an amendment to this Agreement.

1.4 **Satisfaction of Affordable Housing Obligation.** To fully satisfy its Affordable Housing Obligation, Developer shall obtain one or more, in combination, of the following: (i) final inspection for any or all of the Affordable Units, along with a recorded regulatory agreement specifying income occupancy and rent restrictions, inclusive of any such units that may be provided outside of the Project (“off-site”); or (ii) sufficient evidence of satisfaction of approved Alternative Methods of Compliance. .

## 2. **Deferral Terms.**

2.1. **Timing of Deferral.** Developer may defer full satisfaction of its Affordable Housing Obligation until : (i) approval of final inspection of units of the Project or (ii) January 1, 2023, whichever occurs first.

2.2. **Documentation of Satisfaction of Affordable Housing Obligation.** By no later than January 1, 2023, Developer shall provide City, for its review and approval, all documentation that City requires, as determined by City in its discretion, to evidence that Developer has satisfied its Affordable Housing Obligation. Developer may deliver a hard copy or digital submittal with copies of contracts, executed and recorded regulatory agreements or covenants, and other such documents serving as satisfactory evidence of its satisfaction of the Affordable Housing Obligation. If after such documentation has been provided City determines that Developer has not satisfied its Affordable Housing Obligation, Developer shall satisfy its Affordable Housing Obligation by payment of the difference between any Affordable Unit(s) not constructed, or otherwise provided via approved Alternative Methods of Compliance, by payment of a in-lieu fee in the amount as set forth in Section 1.2.

2.3. **Remedies.** In order to enforce Developer’s Affordable Housing Obligation under the terms of this Agreement, the Affordable Housing Agreement, or the Bond (as defined in Section 3), the City shall be entitled to pursue any and all remedies provided at law or in equity, including, without limitation, any and all remedies provided by contract, at law, or under the Bond. Without limiting the generality of the foregoing, in the event of a default by Developer of its obligations under this Agreement or the Affordable Housing Agreement, after reasonable notice and opportunity to cure such default, the City shall have the right to accelerate the debt owed under the Bond and pursue collection of the value of any and all of the Affordable Housing Obligation directly from the Developer. All such remedies shall be cumulative and non-exclusive.

## 3. **Bonded Security.**

3.1. **Financial Guarantee Bond.** In order to secure satisfaction of the Affordable Housing Obligation, Developer shall provide a financial guarantee bond (or equivalent bond approved by the City), for the benefit of the City, in a form acceptable to City at its sole discretion, as security for Developer’s performance of the its Affordable Housing Obligation (the "Bond"). Developer shall post the Bond with the City concurrent with the execution of this Agreement. The terms of the Bond shall include the following:

- a. The Bond shall be in the amount of \$1,117,980;
- b. The Bond shall be for a term of two (2) years; and Developer shall thereafter extend the Bond until such time as the Developer satisfies all of the obligations under this Agreement and the Affordable Housing Agreement.
- c. The Bond shall be in the form prescribed by the City and by such sureties which are authorized to transact such business in the State of California, listed as approved by the United States Department of Treasury Circular 570, <http://www.fms.treas.gov/c570>, and whose underwriting limitation is sufficient to issue bonds in the amount required by this Agreement, and which also satisfy the requirements stated in Section 995.660 of the Code of Civil Procedure, except as provided otherwise by laws or regulations. All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act. Surety companies must be duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds for the limits so required. The form of the Bond must be satisfactory to the City Attorney and Risk Manager.
- e. The Bond shall be released in full only upon fulfillment of the Affordable Housing Obligation as described in this Agreement and the Affordable Housing Agreement. Developer may request the City to reduce the amount of the Bond requirement based on work completed toward construction of the remaining Affordable Units or other Alternative Methods of Compliance for those Affordable Units. Developer shall make such request in writing and include sufficient evidence, to the satisfaction of the City, that Affordable Units have been constructed and covenants recorded to assure occupancy of such units by low- and moderate-income households or that other Alternative Methods of Compliance have been satisfied. Such request may be granted by the City Manager, or designee, at his or her discretion and shall not be unreasonably withheld;
- f. The Bond shall provide that in the event that the Developer fails to satisfy its obligations under this Agreement or the Affordable Housing Agreement within the timeframes identified therein, the City may, in its sole discretion, require the surety to remit payment of the face amount of the Bond to the City;
- g. The Bond surety shall be subject to approval by the City in its sole discretion;
- h. The Bond shall additionally secure costs and reasonable expenses and fees, including attorneys' fees, which may be incurred by the City in enforcing the Bond obligation; and

- i. The Bond shall comply with all other bonding requirements of the City in effect at the time the Bond is issued.

3.2 **Building Permit Issuance.** Provided the Developer timely posts the Bond which meets all of the requirements of Section 3, the City agrees to process the remaining nine (9) building permit applications for the Project in accordance with all of the ordinances, policies, and regulations of the City in effect at the time of the permit issuance.

4. **Indemnification.**

4.1 **General Requirement.** Developer shall defend, indemnify, protect, and hold harmless the City, its elected and appointed officers, agents, and employees (each a “City Party”, collectively, the “City Parties”), from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of or incident to any alleged or actual acts, omissions, negligence, or willful misconduct of Developer, its officials, officers, employees, agents, contractors, or any third parties for whom the Developer is legally responsible (collectively, “Developer”) arising out of or related to: (i) this Agreement; (ii) the Affordable Housing Agreement; (iii) Developer’s satisfaction of, or failure to satisfy, the Affordable Housing Obligation; or (iv) actual or alleged delays in occupancy for any units within the Project. This indemnity provision does not include any claims, damages, liability, costs and expenses (including without limitations, attorneys’ fees) arising from the sole negligence or willful misconduct of the City, its officers, and employees. Also covered by this indemnity provision is liability arising from, connected with, caused by or claimed to be caused by the active or passive negligent acts or omissions of City or any City Party which may be in combination with the active or passive negligent acts or omissions of the Developer.

4.2 **Costs of Defense and Award.** Included in the obligations in Section 4.1, above, is Developer's obligation to defend, at Developer's own cost, expense and risk, any and all suits, actions or other legal proceedings, that may be brought or instituted against the City or any City Party. Developer shall pay and satisfy any judgment, award or decree that may be rendered against City or any City Party, for any and all related legal expenses and costs incurred by each of them.

4.3 **Insurance Proceeds.** Developer's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by the City, its directors, officials, officers, employees, agents, and/or volunteers.

4.4 **Declarations.** Developer's obligations under this Section 4 shall not be limited by any prior or subsequent declaration by the City or Developer.

4.5 **Enforcement Costs.** Developer agrees to pay any and all costs City incurs enforcing the indemnity and defense provisions set forth in Section 4.

4.6 **Survival.** Developer's obligations under Section 4 shall survive the termination of this Agreement.

5. **Limitation of Liability.** In no event shall City be liable under this Agreement to Developer or any third party for any direct, consequential, indirect, incidental, special, exemplary, punitive, or enhanced damages, lost profits or revenues, or diminution in value, arising out of, relating to, or in connection with any breach of this Agreement or the Affordable Housing Agreement regardless of (a) whether such damages were foreseeable, (b) whether or not Developer was advised of the possibility of such damages, or (c) the legal or equitable theory (contract, tort or otherwise) upon which the claim is based.

6. **Notice and Communications.**

6.1 **Notices.** Any and all notices submitted by any Party to any other Party pursuant to or as required by this Agreement shall be proper, if in writing and transmitted to the address of the Party set forth in Section 6.2 by one or more of the following methods: (a) messenger for immediate personal delivery, (b) a nationally recognized overnight (one business day) delivery service (i.e., Federal Express, United Parcel Service, etc.) or (c) registered or certified United States mail, postage prepaid, return receipt requested. Such notices may be sent in the same manner to such other addresses as either Party may designate, from time to time, by notice. Any notice shall be deemed to be received by the addressee, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, on the day that it is delivered by personal delivery, on the date of delivery by a nationally recognized overnight courier service (or when delivery has been attempted twice, as evidenced by the written report of the courier service) or four (4) calendar days after it is deposited with the United States Postal Service for delivery, as provided in this Section 6.1. Rejection, other refusal to accept, the inability to deliver a notice because of a changed address of which no notice was given, or other action by a person to whom notice is sent, shall be deemed receipt of the notice by such person. Delivery of a notice to any courtesy copy recipient shall not be a prerequisite to the validity or effectiveness of any Notice.

6.2 **Addresses.** The following are the authorized addresses for the submission of notices to the Parties, as of the Effective Date:

To the City:                   Housing Manager  
  City of Chula Vista  
  276 Fourth Avenue  
  Chula Vista, California 91910

To the Developer:       Michael J. Sabourin, President & COO  
  Cornerstone Communities  
  4365 Executive Drive, Suite 600  
  San Diego, CA 92121

7. **General Provisions**

7.1 **Headings.** All article headings are for convenience only and shall not affect the interpretation of this Agreement.

7.2 **Gender and Number.** Whenever the context requires, the use herein of (i) the neuter gender includes the masculine and the feminine genders and (ii) the singular number includes the plural number.

7.3 **Reference to Paragraphs.** Each reference in this Agreement to a section refers, unless otherwise stated, to a section of this Agreement.

7.4 **Incorporation of Recitals.** All recitals herein are incorporated into this Agreement and are made a part hereof.

7.5 **Covenants and Conditions.** All provisions of this Agreement expressed as either covenants or conditions on the part of the City or Developer, shall be deemed to be both covenants and conditions.

7.6 **Integration.** No change, alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid, unless made in the form of a written change agreed to in writing by both Parties or as an amendment to this Agreement executed by both Parties.

7.7 **Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.

7.8 **Drafting Ambiguities.** The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and the decision of whether or not to seek advice of counsel with respect to this Agreement is a decision that is the sole responsibility of each Party. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.

7.9 **Conflicts Between Terms.** If an apparent conflict or inconsistency exists between the main body of this Agreement and the Exhibits, the main body of this Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Agreement, the law, rule, regulation, order, or code shall control.

Except as expressly amended or modified by this Agreement, all other terms and conditions of the Affordable Housing Agreement shall remain in full force and effect. If an apparent conflict or inconsistency exists between the main body of this Agreement and the Affordable Housing Agreement, the main body of this Agreement shall control.

Varying degrees of stringency among the main body of this Agreement, the Exhibits hereto, the Affordable Housing Agreement, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.



7.10 **Prompt Performance.** Time is of the essence of each covenant and condition set forth in this Agreement.

7.11 **Good Faith Performance.** The Parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Agreement.

7.12 **Further Assurances.** City and Developer each agree to execute and deliver such additional documents as may be required to effectuate the purposes of this Agreement.

7.13 **Controlling Law.** The Parties acknowledge and agree that this Agreement is entered into, is to be fully performed in and relates to real property located in the City of Chula Vista, County of San Diego, State of California. The laws of the State of California shall govern and control the terms and conditions of this Agreement.

7.14 **Term.** Unless terminated earlier in accordance with this Agreement, this Agreement and the Affordable Housing Agreement shall remain in effect until, but shall automatically terminate upon, satisfaction of the Affordable Housing Obligation per the terms of this Agreement.

7.15 **Jurisdiction Venue and Attorney Fees.** To the extent permitted by law, the venue for any suit or proceeding concerning this Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the Superior Court of the County of San Diego, State of California or in the United States District Court with jurisdiction in the County. The prevailing Party in any such suit or proceeding shall be entitled to a reasonable award of attorney fees in addition to any other award made in such suit or proceeding.

7.16 **Agency/Municipal Powers.** Nothing contained in this Agreement shall be construed as a limitation upon the powers of the City as a chartered city of the State of California.

7.17 **Relationship of Parties.** The Parties each intend and agree that the City and Developer are independent contracting entities and do not intend by this Agreement to create any partnership, joint venture, or similar business arrangement, relationship or association among or between them.

7.18 **Third Party Relationships.** Nothing in this Agreement shall create a contractual relationship between City and any third party.

7.19 **Successors in Interest.** This Agreement and all rights and obligations created by this Agreement shall be in force and effect whether or not any Parties to the Agreement have been succeeded by another entity, and all rights and obligations created, by this Agreement shall be vested and binding on any Party's successor in interest.

7.20 **No Waiver.** No failure of either the City to insist upon the strict performance by the other of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of

this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.

7.21 **Administrative Claims Requirements.** No suit or arbitration shall be brought arising out of this Agreement, against the City unless a claim has first been presented in writing and filed with the City and acted upon by the City in accordance with the procedures set forth in Chapter 1.34 of the Chula Vista Municipal Code, as same may from time to time be amended, the provisions of which are incorporated by this reference as if fully set forth herein, and such policies and procedures used by the City in the implementation of same.

7.22 **Non-liability of Officials, Employees and Agents.** No elected official, officer, director, employee or agent of the City, shall be personally liable to Developer, or any successor-in-interest of Developer, in the event of any or default breach by the City under this Agreement.

7.23 **Execution in Counterparts.** This Agreement may be executed in multiple counterpart originals, each of which shall be deemed to be an original, but all of which together shall constitute one and the same document.

7.24 **Signing Authority.** The representative for each Party signing on behalf of such Party hereby declares that authority has been obtained to sign on behalf of the City and/or the Developer, as applicable and agrees to hold the other Party or Parties hereto harmless, if it is later determined that such authority does not exist.

[END OF PAGE -Next Page is Signature Page]

**SIGNATURE PAGE TO  
AGREEMENT TO DEFER BALANCED COMMUNITIES AFFORDABLE HOUSING  
OBLIGATION AND TO POST SECURITY**

The Parties have signed this Agreement by and through the signatures of their authorized representatives, as set forth below:

**CITY**

**DEVELOPER**

CITY OF CHULA VISTA, a California  
municipal corporation and charter city

PRESIDIO CORNERSTONE ESTANCIA 37,  
LLC  
a California limited liability company

\_\_\_\_\_  
By: Maria Kachadoorian,  
City Manager

\_\_\_\_\_  
By: Cornerstone Communities, LLC, a  
California limited liability company,  
Its Operating Manager

Dated: \_\_\_\_\_

\_\_\_\_\_  
By: Ure Kretowicz  
Manager

Dated: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA }ss:  
COUNTY OF SAN DIEGO

On \_\_\_\_\_ before me, \_\_\_\_\_, a Notary Public, personally  
(here insert name and title of the officer)

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

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

**EXHIBIT A**

**Legal Description of Subject Property**

**[INSERT LEGAL DESCRIPTIONS]**

**[APN: xxx]**