

INDEMNIFICATION AGREEMENT

THIS AGREEMENT is entered into this 19th day of June, 2020, by and between the CITY OF FRESNO, a municipal corporation (City), and Edward D. Fanucchi (referred to as Applicant).

RECITALS

WHEREAS, Applicant has applied to City for a Land Use Approval for the Subject Property, described on the attached Legal Description (Exhibit A), in accordance with Vesting Tentative Tract Map No. 6234/UGM, located on the west side of North Hayes Avenue between West Ashlan and West Shields Avenues; and,

WHEREAS, litigation challenging the granting or issuance of land use approvals by governmental bodies is proliferating, and such litigation exposes City to potential liability for damages, costs, and attorney's fees; and,

WHEREAS, in such litigation, the person or entity receiving land use approvals is designated as a real party in interest and is the party that primarily and directly benefits from the granting or issuance of the land use approvals; and,

WHEREAS, the City's Director of Planning and Development, Fresno City Planning Commission and Fresno City Council are objective decision-making bodies, and therefore have no special interest in the approval or denial of land use applications or the outcome of litigation arising from such grant or denial, except as to those which promote public policy; and,

WHEREAS, City incurs great expense in the active defense of such litigation and, if unsuccessful, may also be required to pay the prevailing party's attorney's fees and costs; and,

WHEREAS, fairness and sound fiscal policy require that the person or entity receiving the benefits of a land use approval should also bear the burden of the liability for potential injuries and the expense of such litigation and claims: and,

WHEREAS, Applicant and City mutually desire to enter into this Indemnification Agreement, by which Applicant shall indemnify, (at City's request) defend, save and hold City harmless, in order that City shall bear no fiscal or financial burden whatsoever resulting from any litigation challenging the City's grant or issuance of land use approvals to Applicant as violating provisions of the Housing Crises Act of 2019, set forth in Government Code Section 66300), subject to the provisions of Section 2, below.

1. DEFINITIONS.

(a) "Applicant" means Edward D. Fanucchi.

(b) "Land Use Approval", for purposes of this Agreement, shall mean any benefits arising from any of the following: the approval of Vesting Tentative Tract Map No. 6234/UGM, Plan Amendment Application No. P19-02237, Pre-zone Application No. P1902237, and Annexation Application No. P19-02239. Land Use Approval does not include a ministerial permit.

(c) "City" shall mean the City of Fresno, a municipal corporation.

(d) "Project" shall mean the use of the land authorized by the Land Use Approval.

(e) "Act" means the Housing Crises Act of 2019, set forth in California Government Code Section 66300).

2. HOLD HARMLESS AND INDEMNIFICATION RELATED TO LAND USE APPROVAL.

To the furthest extent allowed by law, Applicant shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents, and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether statutory, in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City in connection with any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses) based on claims that the City violated the Act in connection with any City action in granting, issuing or approving the Land Use Approval. Applicant's obligations under the preceding sentence shall apply regardless of whether City or any of its officers, officials, employees, agents, or volunteers are actively or passively negligent, but shall not apply to any indemnification, loss, liability, fines, penalties forfeitures, costs or damages caused solely by the gross negligence or willful misconduct of the City or any of its officers, officials, employees, agents, or volunteers.

3. INSURANCE REQUIREMENTS

(a) Throughout the life of this Agreement, Applicant shall pay for and maintain in full force and effect all insurance as required herein with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated no less than "A-VII" in the Best's Insurance Rating Guide, or (ii) as may be authorized in writing by City's Risk Manager or designee at any time and in its discretion. The required policies of insurance as stated herein shall maintain limits of liability of not less than those amounts stated therein. However, the insurance limits available to City, its officers, officials, employees, agents, and volunteers as additional insureds, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

(b) If at any time during the life of the Agreement or any extension, Applicant fail to maintain any required insurance in full force and effect, all terms under this Agreement shall be discontinued immediately, and all payments due or that become due to Applicant shall be withheld until notice is received by City that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to City. Any failure to maintain the required insurance shall be sufficient cause for City to terminate this Agreement. No action taken by City pursuant to this section shall in any way relieve Applicant of its responsibilities under this Agreement. The phrase "fail to maintain any required insurance" shall include, without limitation, notification received by City that an insurer has commenced proceedings, or has had proceedings commenced against it, indicating that the insurer is insolvent.

(c) The fact that insurance is obtained by Applicant shall not be deemed to release or diminish the liability of Applicant, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify City shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by Applicant. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of

Applicant, vendors, suppliers, invitees, contractors, sub-contractors, consultants, or anyone employed directly or indirectly by any of them.

Coverage shall be at least as broad as:

1. The most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01, providing liability coverage arising out of your business operations. The Commercial General Liability policy shall be written on an occurrence form and shall provide coverage for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operations (including the use of owned and non-owned equipment), products and completed operations, and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability not less than those set forth under "Minimum Limits of Insurance."
2. The most current version of ISO *Commercial Auto Coverage Form CA 00 01, providing liability coverage arising out of the ownership, maintenance or use of automobiles in the course of your business operations. The Automobile Policy shall be written on an occurrence form and shall provide coverage for all owned, hired, and non-owned automobiles or other licensed vehicles (Code 1- Any Auto). If personal automobile coverage is used, the City, its officers, officials, employees, agents, and volunteers are to be listed as additional insureds.
3. Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.

MINIMUM LIMITS OF INSURANCE

Applicant shall procure and maintain for the duration of the agreement, insurance with limits of liability not less than those set forth below. However, insurance limits available to City, its officers, officials, employees, agents, and volunteers as additional insureds, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured:

1. **COMMERCIAL GENERAL LIABILITY**
 - (i) \$2,000,000 per occurrence for bodily injury and property damage;
 - (ii) \$2,000,000 per occurrence for personal and advertising injury;
 - (iii) \$4,000,000 aggregate for products and completed operations; and,
 - (iv) \$4,000,000 general aggregate applying separately to the work performed under the Agreement.
1. **COMMERCIAL AUTOMOBILE LIABILITY**

\$1,000,000 per accident for bodily injury and property damage.
2. Workers' Compensation Insurance as required by the State of California with statutory limits and EMPLOYER'S LIABILITY with limits of liability not less than:
 - (i) \$1,000,000 each accident for bodily injury;

- (ii) \$1,000,000 disease each employee; and,
- (iii) \$1,000,000 disease policy limit.

UMBRELLA OR EXCESS INSURANCE

In the event Applicant purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance," this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such Umbrella or Excess insurance policy(ies) shall also apply on a primary and non-contributory basis for the benefit of the City, its officers, officials, employees, agents, and volunteers.

DEDUCTIBLES AND SELF-INSURED RETENTIONS

Applicant shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and Applicant shall also be responsible for payment of any self-insured retentions. Any self-insured retentions must be declared on the Certificate of Insurance, and approved by, the City's Risk Manager or designee. At the option of the City's Risk Manager or designee, either:

- (i) The insurer shall reduce or eliminate such self-insured retentions as respects City, its officers, officials, employees, agents, and volunteers; or
- (ii) Applicant shall provide a financial guarantee, satisfactory to City's Risk Manager or designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall City be responsible for the payment of any deductibles or self-insured retentions.

OTHER INSURANCE PROVISIONS/ENDORSEMENTS

- (i) *All policies of insurance* required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after 30 calendar days' written notice has been given to City, except ten days for nonpayment of premium. Applicant is also responsible for providing written notice to the City under the same terms and conditions. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, Applicant shall furnish City with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for City, Applicant shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than 15 calendar days prior to the expiration date of the expiring policy.
- (ii) The Commercial General and Automobile Liability insurance policies shall be written on an occurrence form.
- (iii) The Commercial General and Automobile Liability insurance policies shall be endorsed to name City, its officers, officials, agents, employees, and volunteers as an additional insured. Applicant shall establish additional insured status for the City and for all ongoing and completed operations

under the Commercial General Liability policy by use of ISO Forms or an executed manuscript insurance company endorsement providing additional insured status. The Commercial General endorsements must be as broad as that contained in ISO Forms: GC 20 10 11 85 or both CG 20 10 & CG 20 37.

- (iv) The Commercial General and Automobile Liability insurance shall contain, or be endorsed to contain, that the Applicants' insurance shall be primary to and require no contribution from the City. The Commercial General policy is required to include primary and non-contributory coverage in favor of the City for both the ongoing and completed operations coverage. These coverages shall contain no special limitations on the scope of protection afforded to City, its officers, officials, employees, agents, and volunteers. If Applicant maintains higher limits of liability than the minimums shown above, City requires and shall be entitled to coverage for the higher limits of liability maintained by Applicant.
- (v) Should any of these policies provide that the defense costs are paid within the Limits of Liability, thereby reducing the available limits by defense costs, then the requirement for the Limits of Liability of these policies will be twice the above stated limits.
- (vi) For any claims related to this Agreement, Applicant's insurance coverage shall be primary insurance with respect to the City, its officers, officials, agents, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, agents, employees, and volunteers shall be excess of the Applicant's insurance and shall not contribute with it.
- (vii) The Workers' Compensation insurance policy shall contain, or be endorsed to contain, a waiver of subrogation as to City, its officers, officials, agents, employees, and volunteers.
- (viii) The Commercial General and Automobile Liability insurance policies shall contain, or be endorsed to contain, a waiver of subrogation as to City, its officers, officials, agents, employees, and volunteers.

PROVIDING OF DOCUMENTS - Applicant shall furnish City with all certificate(s) and applicable endorsements effecting coverage required herein. **All certificates and applicable endorsements are to be received and approved by the City's Risk Manager or designee prior to City's execution of the Agreement and before work commences.** All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. Upon request of City, Applicant shall immediately furnish City with a complete copy of any insurance policy required under this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement. All sub-applicants working under the direction of Applicant shall also be required to provide all documents noted herein.

CLAIMS-MADE POLICIES - If any coverage required is written on a claims-made coverage form:

- (i) The retroactive date must be shown, and must be before the effective date of the Agreement or the commencement of work by Applicant.
- (ii) Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the work or termination of the Agreement, whichever first occurs.
- (iii) If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the effective date of the Agreement, or work commencement date, Applicant must purchase "extended reporting" period coverage for a minimum of five years after completion of the work or termination of the Agreement, whichever first occurs.
- (iv) A copy of the claims reporting requirements must be submitted to City for review.
- (v) These requirements shall survive expiration or termination of the Agreement.

1. NOTIFICATIONS AND COOPERATION BY CITY.

City shall notify Applicant within a reasonable period of time of its receipt of any demand, claim, action, proceeding, or litigation in which City is to be indemnified and held harmless by Applicant. If City requests that Applicant defend City, it shall notify Applicant in writing within a reasonable period of time of its receipt of any such demand, claim, action, proceeding, or litigation and City shall cooperate fully in such defense.

City shall have the right to select the attorney or attorneys who will defend the City. In selecting defense counsel, City should consider the prevailing local rates for attorneys with the requisite skills. City should further consider whether a joint defense arrangement utilizing counsel for Applicant will suffice in lieu of separate counsel. City reserves its rights at all times to retain separate defense counsel subject to the provisions of this paragraph, and Applicant agrees to accept such selection. City and Applicant shall at all times cooperate with respect to the retention of counsel. Applicant further agrees to be fully responsible for any and all costs and attorney's fees generated by said attorney(s) in the defense of City in any claim, demand, action, proceeding, or litigation arising out of the Project.

2. CITY'S PARTICIPATING IN DEFENSE.

Nothing contained herein shall prohibit City, in its sole discretion, from participating in the defense of any demand, claim, action, proceeding, or litigation over and above representation by outside counsel, or from participating in the defense of any demand, claim, action, proceeding, or litigation. If City elects to also defend, it shall do so in good faith. In no event shall City's participation in the defense of any demand claim, action, proceeding, or litigation affect the obligations imposed upon Applicant in section 2 of this Agreement.

3. REIMBURSEMENT OF CITY'S COSTS RE: ADMINISTRATIVE RECORD.

Without limiting the City's right to recover its costs from Applicant under paragraph 2 herein above, Applicant agrees to reimburse the City for its actual cost incurred, including, but not limited to, City staff and attorney time expended for certifying and/or preparing the administrative record in connection with any proceedings related to the subject matter of this Indemnification Agreement. Applicant and City agree to work cooperatively with respect to preparation of the administrative record, and Applicant shall ensure that City is fully reimbursed for the costs of preparation before receiving such administrative record. To the extent administrative record reimbursement and related costs are recovered in any litigation by the City, Applicant shall be reimbursed to the extent any such recovery is made as cost recovery items.

4. NOT USED.

5. COVENANT NOT TO SUE.

(a) Applicant on behalf of itself, and its successors, and assigns, hereby fully releases City, its successors, and all other persons and associations, known or unknown, from all claims and causes of action by reason of any damage which has been sustained, or may be sustained, as a result of the above-described Land Use Approval and covenants not to sue relating to such claims, excluding gross negligence or willful misconduct of City, as set forth in Section 2, above.

(b) Applicant acknowledges and agrees that this release applies to all claims that Applicant may have against City arising out of the above-described Land Use Approval for injuries, damages, or losses to Applicant's person and property, real or personal, whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent.

(c) Applicant certifies that Applicant has read section 1542 of the Civil Code, set out below:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

(d) Applicant hereby waives application of section 1542 of the Civil Code.

(e) Applicant understands and acknowledges that the significance and consequence of this waiver of section 1542 of the Civil Code is that even if Applicant should eventually suffer additional damages arising out of the above described Land Use Approval, Applicant will not be permitted to make any claim for those damages. Furthermore, Applicant acknowledges that Applicant intends these consequences even as to claims for damages that may exist as of the date of this release but which Applicant does not know exist, and which, if known, would materially affect Applicant's decision to execute this release, regardless of whether Applicant's lack of knowledge is the result of ignorance, oversight, error, negligence or any other cause.

(f) Applicant warrants and represents that in executing this release, Applicant has relied on legal advice from the attorney of Applicant's choice that the terms of this

release and its consequences have been completely read and explained to Applicant by that attorney, and that Applicant fully understands the terms of this release.

(g) Applicant acknowledges and warrants that Applicant's execution of this release is free and voluntary.

(h) This release pertains to a disputed claim and does not constitute an admission of liability by City for the above-described Land Use Approval.

(i) The provisions of paragraph 10 herein below shall not apply to this covenant not to sue.

1. TERM OF AGREEMENT.

This Indemnification Agreement continue for an initial term of five (5) calendar years after the Land Use Approvals are approved. Notwithstanding the foregoing, if a legal action challenging the Land Use Approvals as violating the Act is brought before the expiration of the initial term, then the term of this Indemnification Agreement shall continue until the earlier of a final nonreviewable judgment having been entered by a court of relevant jurisdiction, or a dismissal of such legal action is obtained.

2. ATTORNEY'S FEES.

If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses. For the purposes of this agreement, "attorneys' fees" and "legal expenses" include, without limitation, paralegals' fees and expenses, attorneys, consultants fees and expenses, expert witness fees and expenses, and all other expenses incurred by the prevailing party's attorneys in the course of the representation of the prevailing party in anticipation of and/or during the course of litigation, whether or not otherwise recoverable as "attorneys' fees" or as "costs" under California law, and the same may be sought and awarded in accordance with California procedure as pertaining to an award of contractual attorneys' fees.

3. SEVERABILITY.

If any provision of this Agreement is determined to be invalid in a final judgment by a court of competent jurisdiction, each and every other provision hereof shall remain in full force and effect.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

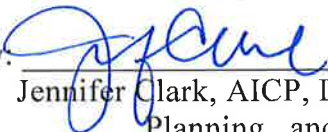
4. CONSTRUCTION OF CONTRACT.

The parties hereby acknowledge that they and their respective counsel have cooperated in the drafting and preparation of this agreement, for which reason this agreement shall not be construed against any party as the drafter thereof.

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, on the day and year first above written.

CITY:

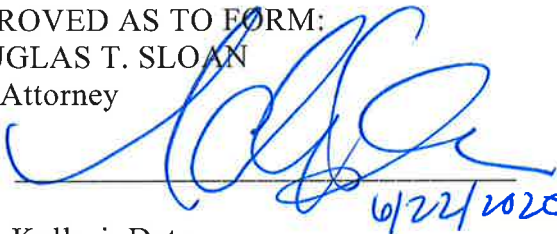
CITY OF FRESNO,
A California municipal corporation

By: 
Jennifer Clark, AICP, Director
Planning and Development
Department

APPLICANT:

By: 
Edward D. Fanucchi

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By: 
Talia Kolluri Date 6/22/2020
Supervising Deputy City Attorney

ATTEST:
YVONNE SPENCE, CRM MMC
City Clerk

By: _____

Deputy

Attachment: Exhibit A

EXHIBIT A

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE UNINCORPORATED AREA IN THE COUNTY OF FRESNO, STATE OF CALIFORNIA AND IS DESCRIBED AS FOLLOWS:

PARCEL 1:

PARCEL 1 OF PARCEL MAP NO. 2846, ACCORDING TO THE MAP THEREOF RECORDED DECEMBER 19, 1975 IN BOOK 18, PAGE 68 OF PARCEL MAPS, FRESNO COUNTY RECORDS.

PARCEL 2:

TOGETHER WITH AN ACCESS EASEMENT OVER THE NORTH 60 FEET OF PARCEL 2 OF PARCEL MAP NO. 2846, ACCORDING TO THE MAP THEREOF RECORDED DECEMBER 19, 1975 IN BOOK 18 PAGE 68, PARCEL MAPS, FRESNO COUNTY RECORDS.

PARCEL 3:

THE EAST 800 FEET OF LOT 12 OF DUNCAN TRACT, IN THE COUNTY OF FRESNO, STATE OF CALIFORNIA, ACCORDING TO THE MAP THEREOF RECORDED IN BOOK 3 PAGE 38 OF RECORD OF SURVEYS, FRESNO COUNTY RECORDS

PARCEL 4:

A RIGHT OF WAY FOR ROAD PURPOSES OVER THE NORTH 30 FEET AND THE SOUTH 30 FEET OF LOT 12 OF DUNCAN TRACT, IN THE COUNTY OF FRESNO, ACCORDING TO THE MAP THEREOF RECORDED IN BOOK 3 PAGE 38 OF RECORD OF SURVEYS, FRESNO COUNTY RECORDS. EXCEPTING THEREFROM THE EASE 800 FEET. NOTE: A RECORD OF SURVEY OF SAID LOT 12 WAS RECORDED IN BOOK 16 PAGE 90 OF A RECORD OF SURVEY OF SAID LOT 12 WAS RECORDED IN BOOK 16 PAGE 90 OF RECORD OF SURVEYS.

PARCEL 5:

LOT 5 OF DUNCAN TRACT, IN THE COUNTY OF FRESNO, STATE OF CALIFORNIA, ACCORDING TO THE MAP THEREOF RECORDED OF SAID TRACT NOW OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF FRESNO COUNTY, SAID DUNCAN TRACT BEING A SUBDIVISION OF SECTION 21, TOWNSHIP 13 SOUTH, RANGE 19 EAST, MOUNT DIABLO BASE AND MERIDIAN, AS RECORDED IN BOOK 3, PAGE 38 OF RECORD OF SURVEYS, FRESNO COUNTY RECORDS.

PARCEL 6:

LOT 4 OF DUNCAN TRACT, IN THE COUNTY OF FRESNO, STATE OF CALIFORNIA, ACCORDING TO THE MAP THEREOF RECORDED OF SAID TRACT NOW OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF FRESNO COUNTY, SAID DUNCAN TRACT BEING A SUBDIVISION OF SECTION 21, TOWNSHIP 13 SOUTH, RANGE 19 EAST, MOUNT DIABLO BASE AND MERIDIAN, AS RECORDED IN BOOK 3, PAGE 38 OF RECORD OF SURVEYS, FRESNO COUNTY RECORDS.

PARCEL 7:

PARCEL 3 OF PARCEL MAP NO. 3438, IN THE COUNTY OF FRESNO, STATE OF CALIFORNIA, ACCORDING TO THE MAP THEREOF RECORDED DECEMBER 17, 1976 IN BOOK 22 PAGE 84 OF PARCEL MAPS, FRESNO COUNTY RECORDS.

EXCEPTING THEREFROM THE NORTH 171.10 FEET OF THE WEST 509.20 FEET OF SAID PARCEL 3.

PURSUANT TO PROPERTY LINE ADJUSTMENT NO. 04-31

PARCEL 8:

LOT 3 OF DUNCAN TRACT, IN THE UNINCORPORATED AREA, COUNTY OF FRESNO, STATE OF CALIFORNIA, ACCORDING TO THE MAP THEREOF RECORDED IN BOOK 3, PAGE 38 OF RECORD OF SURVEYS, FRESNO COUNTY RECORDS.