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## Regular Council Meeting

2022 AUG 16 P 3:33 August 18, 2022

# FRESNO CITY COUNCIL



## Supplemental Packet

### ITEM(S)

#### 10:00 A.M. File ID 22-1330

Actions pertaining to the Amended and Restated Disposition and Development Agreement between the City of Fresno and Noyan Frazier Capital, L.P., for The Park at South Fulton Street (South Stadium)

1. RESOLUTION-Finding Good Cause and Public Benefit for Extension of the South Fulton Street Mixed Use Residential Rental Project Pursuant to the Fresno Municipal Code Section 4-204 Relating to the disposition of real property (APN 468-282-22T, 468-282-05T, 468-282-23T)(Requires 5 affirmative votes)
2. Consider Request from Noyan Frazier Capital L.P. for a Second Amendment to the Amended and Restated Disposition and Development Agreement

#### Contents of Supplement:

Staff Report, Resolution, and Second Agreement

#### Item(s)

##### **Supplemental Information:**

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2)). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

##### **Americans with Disabilities Act (ADA):**

The meeting room is accessible to the physically disabled, and the services of a translator can be made available. Requests for additional accommodations for the disabled, sign language interpreters, assistive listening devices, or translators should be made one week prior to the meeting. Please call City Clerk's Office at 621-7650. Please keep the doorways,

**REPORT TO THE CITY COUNCIL, City in its Capacity as Housing Successor to the Redevelopment Agency and Fresno Revitalization Corporation**

DATE

FROM: MARLENE MURPHEY, Executive Director

**SUBJECT**

Actions pertaining to the Amended and Restated Disposition and Development Agreement between the City of Fresno and Noyan Frazier Capital, L.P., for The Park at South Fulton Street (South Stadium)

1. RESOLUTION – Finding good cause and public benefit for extension of the South Fulton Street Mixed Use Residential Rental Project pursuant to Fresno Municipal Code Section 4-204 relating to the disposition of real property (APN 468-282-22T, 468-282-05T, 468-282-23T) (Requires 5 affirmative votes)
2. Consider request from Noyan Frazier Capital, L.P., for a Second Amendment to the Amended and Restated Disposition and Development Agreement

**RECOMMENDATION**

Consider the Resolution finding good cause and public benefit for extension of the South Fulton Street mixed use residential project pursuant FMC 4-204 regarding real property disposition and receive and consider the request from Noyan Frazier Capital L.P. (Developer) for Second Amendment to the Amended and Restated Disposition and Development Agreement for The Park at South Fulton Street.

**EXECUTIVE SUMMARY**

The Amended and Restated Disposition and Development Agreement for The Park at South Fulton Street project, as amended, will reach its outside date to close escrow and construction financing on August 31, 2022. Developer is requesting an extension from the City to close escrow and construction financing that would align with its recently approved request for extension from the Strategic Growth Council (SGC) for \$5,738,730 in Affordable Housing Sustainable Community (AHSC) funds awarded to the Project. If approved, the Second Amendment would extend the outside date to close escrow on December 31, 2022, and construction financing to March 31, 2023. The City has also made inquiry to HCD to extend or waive the Surplus Land Act (SLA) deadline of December 31, 2022, for disposition of the Project property.

Pursuant to Fresno Municipal Code (FMC) section 4-204, prior to considering the Developer's deadline extension, Council will need to make specific findings of good cause and public benefit as set forth in the attached resolution.

**BACKGROUND**

*Letter of Request for Extension*

Developer's extension request describes progress made in obtaining conditional approval of the Zone Clearance Application in December 2021 and the additional time needed to redesign the building's ground floor necessary to address flood control issues while avoiding alteration to recent Fulton Street improvements. The revised plans address issues brought forth by the local Flood Control District and are in accordance with terms of the federal infrastructure grant. Developer's request for an extension includes a revised Scope of Development and Basic Design, Budget/Financial Plan, and Performance Schedule.

#### *Proposed Revised Scope of Development and Budget/Financial Plan*

Developer's revised scope and design increases the number of total residential units from 54 to 99 with a proportionate increase in affordable units from 10 to 20 and an increase in market rate units from 44 to 79. Developer's revised budget/financial plan increases the total development cost from \$20,638,409 to \$32,162,588.

#### *Proposed Revised Schedule of Performance*

Developer's revised performance schedule is shown in Attachment 1 and summarized as follows:

- Submission of building permit plans extended nine months from March 1, 2022, to November 30, 2022;
- Outside date for close of escrow extended four months from August 31, 2022, to December 31, 2022;
- Outside date to close construction financing and secure all development entitlements extended seven months from August 31, 2022, to March 31, 2023;
- Start of construction extended seven months from September 30, 2022, to April 30, 2023, and
- Completion of construction extended fourteen months from February 29, 2024, to April 30, 2025.

#### *Surplus Land Act*

The project site of .79 acres consists of three parcels owned by the City, in its capacity as Housing Successor (APN 468-282-05T, 468-282-22T) and the City (APN 468-282-23T) to be sold AS IS to the Developer for \$1.00 each. The SLA provides that properties under contract, including a disposition and development agreement, will become subject to surplus land regulations if not conveyed by December 31, 2022. Extending the close of escrow beyond December 31, 2022, will trigger SLA requirements for disposition the project property. Staff has requested HCD consider an extension to or waiver of the SLA deadline to coincide with Developer's requested extension of the project funding award to March 31, 2023.

#### *Second Amendment*

The Second Amendment proposes to close escrow on the property by the current SLA deadline of December 31, 2022; but extends the date to meet conditions, including approval of all permits and close of construction loan no later than March 31, 2023. If all conditions are not met by March 31, 2023, the property reverts back to the City and Housing Successor. This option leverages the progress that has been made to obtain

Zone Clearance approval; it benefits from design drawings for an increased unit count and will preserve the substantial grant and loan awards that total about \$10,018,894  
Terms provide for:

- Close of Escrow. Property to be sold to Noyan Frazier Capital L.P. AS IS by outside date of December 31, 2022.
- Before close of escrow Developer executes grant deeds to the Property in favor of Housing Successor/City to be held in trust. In the event Developer does not obtain all development entitlement and construction financing on or before March 31, 2023, Grant Deed shall be recorded which shall terminate the estate conveyed to Developer and revert to Housing Successor/ City
- No later than March 31, 2023, Noyan Frazier Capital LP shall have secured all financing including construction loan financing, secured all development entitlements including building permits, and obtained necessary insurance and payment and performance bonds
- Without further action, the current agreement will expire at its Outside Date of August 31, 2022. Commitments to fund the project from state, city and other agencies will terminate and the SLA requirements will be triggered for any future disposition of the properties.

#### **DISPOSITION OF REAL PROPERTY (FMC Section 4-204)**

Pursuant to Fresno Municipal Code (FMC) section 4-204 the Council, by a super majority of at least 5 votes, will need to make findings of good cause and clear and convincing benefits to the public to extend the agreement.

A resolution is attached hereto with the Project's good cause findings and benefits to the public for the Council's consideration which includes the following:

The Project is a mixed-use, mixed income residential development that will provide 99 residential units with twenty units restricted to households earning 50% or less of average medium income (AMI) covenanted for 55 years

The Project will attractively intensify development with 99 units in a four- story building, with on-site parking and 4,500 square feet of ground floor retail fronting the recently reconstructed Fulton Street

The Project benefits the community with Affordable Housing and Sustainable Community loan and grant awards totaling \$5,738,730 for affordable housing and related transportation infrastructure

The Project benefits the community through additional funding and in-kind contributions of \$4,280,164 from various sources including Measure C and the San Joaquin Valley Air Pollution Control District

The Project generates a total commitment of \$10,018,894 obtained through competitive process

The Project has cleared two blighted buildings from the Project site; performed level one and level two environmental assessments and conducted geo-technical soil reports in preparation for construction

Progress has been made to secure conditional Zone Clearance approval in December 2021 and Developer has completed revised entitlement drawings in preparation for construction drawings

Delays were caused by issues raised by flood control district requiring revised entitlement drawings to resolve issues and avoid alteration to the federally funded Fulton Street infrastructure improvements

The Project advances downtown development and helps the community address its housing crisis.

### **ENVIRONMENTAL FINDINGS**

Zone Clearance Application No. P21-04764 originally proposed to construct a four-story, 66-unit multi-family, mixed-use building at the subject property totaling ± 0.78 acres. The California Environmental Quality Act (Public Resource Code Section 21000 et seq.) permits a public agency to determine whether a particular project is exempt from CEQA. Zone Clearance Application No. P21-04764 was approved by the Planning and Development Director on December 22, 2021, and a determination of an Article 18, Statutory Exemptions, Section 15268 of the CEQA Guidelines was made and Environmental Assessment No. P21-04764 was completed for this project on December 22, 2021.

Pursuant to Article 18, Statutory Exemptions, Section 15268 of the State CEQA Guidelines [Public Resources Code 21080(b)(1)], ministerial projects are exempt from the requirements of CEQA. The determination of what is “ministerial” can most appropriately be made by a particular public agency involved based upon its analysis of its own laws, and each public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis. Per Article 49, Planning Authorities, Section 15-4907, Summary of Primary Planning Permits and Actions, of the Fresno Municipal Code (FMC), development of one-single family home, duplex, or qualifying Downtown housing which complies with all provisions of the Fresno Development Code requires a Zone Clearance, which is considered a ministerial permit in the City of Fresno.

Article 51, Zone Clearance, Section 15-5102(D), Downtown Housing, of the FMC establishes criteria for qualifying Downtown housing which shall require a Zone Clearance. Section 15-5102(D) states that:

1. *Downtown projects which meet all of the following criteria shall require a Zone Clearance to confirm that their construction is permitted as a matter of right and that such a project is being proposed in a manner which is compliant with, and without any deviations from, all applicable development standards prior to securing a Building Permit:*
  - a. *Located within a DT District;*

- b. *A minimum of 16 total dwelling units in the project;*
  - c. *A residential density of no less than 20 du/ac;*
  - d. *Residential uses must occupy 50% or more of the total floor area; and*
  - e. *No historic resources or potential historic resources are located on the site.*
2. *Downtown projects which do not meet the threshold for a Zone Clearance shall be required to secure a Development Permit.*

The proposed project now proposes 99 residential units (increase of 33 units). The increase in residential units does not result in changes or increases in overall building height, square footage of the building footprint, or floor area ratio. In addition, the increase in residential units does not result in a reduction in residential density below 20 dwelling units per acre (change increases residential density); nor does it reduce the ratio of residential uses below 50% of the total floor area (change increases residential ratio). As revised, the project still meets the above criteria, is consistent with the general, community, and specific plan designation of Downtown Core planned land use and conforms to all applicable policies, and therefore is considered a ministerial action under the Fresno Municipal Code; thus, the project is Statutorily Exempt under CEQA Guidelines. Therefore, the project as revised (99 total residential units) is not expected to have a significant effect on the environment and no further environmental assessments will be needed. As such, a statutory exemption, as noted above, is appropriate for the 99-unit residential mixed-use project.

#### **LOCAL PREFERENCE**

N/A

#### **FISCAL IMPACT**

The Project leverages state and local funding sources that together represent a significant downtown investment in both affordable and market rate housing with emphasis on intensification and transit-oriented development. The funding stream includes AHSC grant and loan awards totaling \$5,738,730 for affordable housing and related transportation infrastructure. The AHSC awards helped to subsequently leverage an additional \$4,280,164 for a combined total of \$10,018,894 in affordable housing related funds. The additional funds consist of: \$1,889,511 San Joaquin Air Pollution Control District; \$1,159,298 HSA; \$736,085 Measure C; and, \$495,270 City. Other sources contributing to the total Project cost of \$32,162,588 include 4% tax credits (\$694,763); Developer equity (\$1,948,931) and conventional financing (\$19,500,000).

#### **ATTACHMENTS:**

Resolution  
Second Amendment

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE COUNCIL OF THE CITY OF FRESNO, CALIFORNIA FINDING GOOD CAUSE AND PUBLIC BENEFIT FOR EXTENSION OF THE SOUTH FULTON STREET MIXED USE RESIDENTIAL RENTAL PROJECT PURSUANT TO THE FRESNO MUNICIPAL CODE SECTION 4-204, RELATING TO THE DISPOSITION OF REAL PROPERTY (APN 468-282-22T, 468-282-05T, 468-282-23T)

WHEREAS, the City of Fresno, a municipal corporation, (City) and Noyan Frazier Capital, LP a California limited partnership (Developer) entered into an Amended and Restated Disposition and Development Agreement (Agreement) effective December 3, 2020; and

WHEREAS, the parties entered into a First Amendment to Agreement effective August 19, 2021, to allow parties to amend the terms of the Agreement and extend deadlines within the performance schedule, including the outside date to close escrow on or before August 31, 2022; and

WHEREAS, the City and Developer agreed to an as-is sale of the .79-acre project site, for a total of \$3, or \$1 per parcel; and

WHEREAS, the four-story project with on-site parking and 4,500 square feet of ground floor retail is fronted by Fulton Street, the former Fresno Mall that was recently reconstructed with the assistance of over twenty-million-dollars in federal, state, and local funds to improve and revitalize the downtown; and

WHEREAS, Developer encountered a challenge requiring revised entitlement drawings to address issues brought forward by the local flood control district in a

Date Adopted:

Date Approved:

Effective Date:

City Attorney Approval:



Resolution No. \_\_\_\_\_

manner that would avoid alteration to the recent and substantial Fulton Street improvements; and

WHEREAS, the Developer obtained conditional Zone Clearance approval in December 2021 and has prepared revised entitlement drawings leading to preparation of construction drawings; and

WHEREAS, the Developer cleared the site of two blighted buildings, performed Phase one and two environmental assessments and conducted geo-technical soil reports; and

WHEREAS, the revised South Stadium Fulton Street Project proposes to construct a mixed use, mixed income 99-unit residential development in which twenty units are restricted to households earning 50% or less of Average Median Income (AMI) for a 55- year covenant period; and

WHEREAS, due to the time required to revise design plans the Developer requests to further amend the terms of the Agreement to extend certain deadlines in the Performance Schedule to align with those requested of the California Housing and Community Department; and

WHEREAS, any extension of the performance schedule deadlines is conditioned upon the California Department of Housing and Community Development's concurrent approval of the requested extension to March 31, 2023, by August 31, 2022, for Developer's Affordable Housing and Sustainable Communities funding and Developer closing on its construction financing on or before March 31, 2023; and

WHEREAS, the California Housing and Community Development's Affordable Housing Sustainable Community Grant and Loan awards provide \$3,269,895 for the



Project's affordable housing and \$2,468,835 for related Sustainable Transportation Infrastructure and related amenities totaling \$5,738,730; and

WHEREAS, additional funding and in-kind contributions committed to the Project total \$4,280,164 from various sources including Measure C and the San Joaquin Valley Air Pollution District; and

WHEREAS, the Project generates a total commitment of \$10,018,894; and

WHEREAS, the increased density enhances the Project's transit-oriented development objectives and benefits the community, and

WHEREAS, the substantial funding, obtained through competitive process and committed to the Project, will construct critically needed affordable and market rate housing and help the community address its housing crisis, and

WHEREAS, the Project will advance the goal for downtown development and benefit the community.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Fresno as follows:

1. The Council hereby makes findings that there is good cause and clear and convincing benefits to the public to deviate from the restriction on extending the Agreement more than once pursuant to FMC Section 4-204(e).

2. The Council hereby makes findings that there is extraordinary good cause to excuse Developer's failure to meet all performance standards, target dates and authorize an extension in excess of 180 days from the date of Council approval pursuant to FMC Section 4-204(d)(2).

3. The Council hereby makes findings that there are substantial community

benefits to justify a sales price less than fair market value pursuant FMC Section 4-204(d)(4).

4. This resolution shall be effective upon final approval.

\*\*\*\*\*

STATE OF CALIFORNIA )  
COUNTY OF FRESNO ) ss.  
CITY OF FRESNO )

I, TODD STERMER, City Clerk of the City of Fresno, certify that the foregoing resolution was adopted by the Council of the City of Fresno, at a regular meeting held on the \_\_\_\_\_ day of \_\_\_\_\_ 2022.

AYES :  
NOES :  
ABSENT :  
ABSTAIN :

TODD STERMER, CMC  
City Clerk

By: \_\_\_\_\_  
Deputy Date

APPROVED AS TO FORM:  
RINA M. GONZALES  
Interim City Attorney

By: \_\_\_\_\_  
Tracy N. Parvanian Date  
Supervising Deputy City Attorney

**RECORDING REQUESTED BY:**

City of Fresno  
No Fee-Gov't. Code Sections  
6103 and 27383

**WHEN RECORDED, MAIL TO:**

City of Fresno as Housing Successor to the  
Redevelopment Agency of the City of Fresno  
848 M Street, Third Floor  
Fresno, CA 93721  
Attention: Executive Director

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

**SECOND AMENDMENT TO AMENDED AND RESTATED DISPOSITION AND  
DEVELOPMENT AGREEMENT**

by and between

CITY OF FRESNO,  
a municipal corporation

and

NOYAN FRAZIER CAPITAL, L.P., a California limited partnership

**SECOND AMENDMENT TO  
AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT  
AGREEMENT**

THIS SECOND AMENDMENT TO AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT (Second Amendment) is entered as of August \_\_\_\_\_, 2022 (Effective Date), between the CITY OF FRESNO, a municipal corporation, (City) and NOYAN FRAZIER CAPITAL, LP, a California limited partnership (Developer).

RECITALS

A. WHEREAS, the parties entered into an Amended and Restated Disposition and Development Agreement (the Agreement) effective December 3, 2020, and recorded on December 7, 2020, as Document Number 2020-0175619 in the Office of the Fresno County Recorder; and

B. WHEREAS, the parties entered into a First Amendment to Amended and Restated Disposition and Development Agreement effective August 19, 2021, as Document Number 2021-0138658 in the Office of the Fresno County Recorder (First Amendment) to allow the parties to amend the terms of the Agreement and extend deadlines within the performance schedule; and

C. WHEREAS, the parties wish to further amend the terms of the Agreement, as amended, to modify the scope of the project, revise the budget, and extend certain deadlines in the performance schedule; and

D. WHEREAS, any extension on the performance schedule deadlines is conditioned upon California Department of Housing and Community Development's concurrent approval of the requested extension to March 31, 2023, for Developer's Affordable Housing and Sustainable Communities funding and Developer closing on its construction financing on or before the March 31, 2023.

NOW, THEREFORE, BE IT RESOLVED, that the parties hereby amend the terms of the Agreement as follows:

1. The Scope of Development and Basic Design (Exhibit B to the Agreement) is hereby deleted in its entirety and replaced with the "Revised Exhibit B – Second Amendment" attached to this Second Amendment.

2. The Budget/Financial Plan (Exhibit C to the Agreement) is hereby deleted in its entirety and replaced with the "Revised Exhibit C – Second Amendment" attached to this Second Amendment.

3. The Performance Schedule (Revised Exhibit D attached to the First Amendment) is hereby deleted in its entirety and replaced with the "Revised Exhibit D – Second Amendment" attached to this Second Amendment.

4. The Regulatory Agreement and Declaration of Covenants and Restrictions (Exhibit G to the Agreement) is hereby deleted in its entirety and replaced with "Revised Exhibit G – Second Amendment" attached to this Second Amendment.

5. In Section 1.18, the "Outside Date" shall be December 31, 2022.

6. Section 2.2 (Escrow) shall be revised so that Escrow will be opened no later than November 30, 2022.

7. Section 2.3.1 (City and Agency Conditions Precedent to Closing Escrow) of the Agreement is deleted in its entirety and replaced as follows:

“2.3.1 City and Agency Conditions. The Closing is subject to the fulfillment of each of the conditions precedent described below, which are solely for the benefit of City, and which shall be fulfilled consistent with the Exhibit D Performance Schedule, or waived prior to close of escrow:

A. Developer has delivered to City, and City has approved the form and content of, certificates of insurance for all insurance that this Agreement requires Developer to obtain and maintain. However, Developer shall have no obligation to effectuate the policies of insurance required herein until the date of Closing.

B. Notice of Accepting Property Condition. Developer has given written notice to City that it has inspected the Property and accepts the Property in AS IS condition. If the Developer, after its inspection of the Property and review of any environmental reports, disapproves the Property's environmental or other condition, and City is either unwilling or unable to cure the condition to which the Developer objects, then the Developer or City may terminate this Agreement by written notice to the other party and without liability for breach or otherwise.

C. Developer is not in default of this Agreement and all representations and warranties of Developer contained herein are true and correct in all material respects.

D. California Department of Housing and Community Development's (HCD) concurrent approval of Developer's requested extension to March 31, 2023, for its Affordable Housing and Sustainable Communities (AHSC) funding on the Project.

E. Developer's execution of one or more Grant Deeds to the Property(ies), in favor of the City, in its capacity as Housing Successor, or the City, in the manner it was originally conveyed to Developer, that shall be held in trust by the City. In the event Developer does not close on its construction financing on or before March 31, 2023, City shall immediately record the Developer's Grant Deed which shall terminate the estate conveyed to Developer and revest the estate in the City. If Developer timely closes the entirety of its construction financing on or before March 31, 2023, City shall immediately return the Developer's Grant Deed to the Property.”

8. Section 3.3 shall be deleted in its entirety and replaced as follows:

“3.3 Housing Successor Assistance. In addition to the donation of land valued at \$100,000 set forth in Section 2.1.1 and 2.1.2, the City, in its capacity as Housing Successor agrees to provide a grant in the amount of \$659,298 in Low Moderate Income Housing Asset Funds (“Housing Grant”) to developer twenty affordable

residential units that will be restricted to household income levels no greater than 50% of AMI for a period of 55 year. The Housing Grant shall be payable to Developer upon recording of the Certificate of Completion.”

9. Section 5.2.9 shall be added as follows:

“5.2.9. Insurance from Close of Escrow and Prior to Construction. Upon close of escrow, Developer is required to meet the following requirements prior to start of construction:

**Commercial General Liability Insurance.** Commercial general liability Insurance, which shall be at least as broad as the most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01 and shall include insurance 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, contractual liability (including indemnity obligations under this Agreement), with limits of liability of not less than \$3,000,000 per occurrence for bodily injury and property damage, \$1,000,000 per occurrence for personal and advertising injury and \$3,000,000 aggregate for products and completed operations, and \$6,000,000 general aggregate.

**Commercial Automobile Liability Insurance.** Commercial automobile liability insurance, which shall be at least as broad as the most current version of Insurance Services Office (ISO) Business Auto Coverage Form CA 00 01 (Section 1, subsection A.1 entitled "Any Auto"), with combined single limits of liability of not less than \$3,000,000 per accident for bodily injury and property damage.

**Workers' Compensation Insurance.** Worker's Compensation insurance, as required under the California Labor Code.

**Employer's Liability.** Employer's liability coverage with minimum limits of liability of not less than \$1,000,000 each accident, \$1,000,000 disease policy limit and \$1,000,000 disease each employee.

The above-described policies of insurance shall be endorsed to provide an unrestricted thirty-(30) calendar day written notice in favor of the City, of policy cancellation, change or reduction of coverage, except the Workers' Compensation policy that shall provide a ten (10)-calendar day written notice of such cancellation, change or reduction of coverage. If any policy is due to expire during the term of this Agreement, Developer shall provide a new certificate evidencing policy renewal not less than fifteen (15) calendar days before the expiration date of the policy. When an insurer, broker, or agent issues a notice of cancellation, change or reduction in coverage, Developer shall immediately obtain and file a certified copy of a new or renewal policy and certificates for such policy with the City.

The General Liability and Automobile Liability insurance policies shall be written on an occurrence form and shall name the City and the officers, officials, agents and employees as an additional insured. Each policy shall be endorsed so that Developer's insurance is primary and no contribution is required of the City. Any

Workers' Compensation insurance policy shall contain a waiver of subrogation as to City, its officers, officials, agents, employees and volunteers. Developer shall furnish the City with copies of the actual policies upon the request of its designee, or the City's Risk Manager.

The fact that insurance is obtained by Developer or its subcontractors shall not be deemed to release or diminish the liability of Developer or its subcontractors including without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify the City, and their officers, officials, agents, employees and volunteers, 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 Developer or its subcontractors. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of Developer, its principals, officers, agents, employees, persons under the supervision of Developer, vendors, suppliers, invitees, subcontractors, consultants or anyone employed directly or indirectly by any of them."

10. Section 7.3.1 (Construction of Affordable Housing) shall be deleted in its entirety and replaced as follows:

"7.3.1 Construction of Affordable Housing. The Developer covenants and agrees to construct a total of ninety-nine (99) units, in conformity with the Scope of Development. Twenty (20) of the Restricted Units shall be restricted to a rental at an Affordable Rent to Very Low or Lower Income Households, shown as 50% of AMI in Exhibit G. All restricted Units shall be subject to and shall be leased in compliance with the Tenant Selection Criteria attached hereto."

11. Section 9.5 (Right of Re-entry (Power of Termination) and Reverter) shall be deleted in its entirety and replaced as follows:

"9.5 Right of Re-entry (Power of Termination) and Reverter. City shall reenter and take possession of the Property, or part of it, and all improvements on it, terminate the estate conveyed to Developer by the Grant Deed and revert the estate in City if, after the Closing, but before recording a Certificate of Completion, any of the following occurs:

- A. Developer does not begin and complete construction of the Project within the time specified in the Performance Schedule or this Agreement unless otherwise extended by the terms herein; or
- B. Developer abandons or substantially suspends construction of the Project for 30 days after City gives written notice of the abandonment or suspension; or
- C. Developer assigns or transfers, or suffers an involuntary transfer of, any rights or obligations under this Agreement, or in the Property, in violation of the assignment provision of this Agreement.
- D. On or before March 31, 2023, Developer fails to enter into or provide City copies of agreements with any and all funding sources and the general contractor for the Project. All such funding source agreements shall contain



a provision whereby the party(ies) to each such agreement, other than Developer, agree to make reasonable efforts to (i) notify City immediately of any event of default by Developer under such agreement; (ii) notify City immediately of termination or cancellation of such agreement; and (iii) provide City, upon City's request, an estoppel certificate certifying that such agreement is in full force and effect and Developer is not in default under such agreement.

E. On or before March 31, 2023, Developer fails to submit evidence that all necessary development entitlements have been issued and combined monies from the funding sources are not less than the greater of the total development cost of \$32,162,588 or the amount which the City determines is necessary to complete the Project, and such funds are deposited into escrow and escrow is in a position to close. The Project has secured the following sources of funds: (A) Affordable Housing and Sustainable Communities funding (AHSC funding award), administered by the California Department of Housing and Community Development in the amount of \$1,945,352 for Housing Related Infrastructure, \$2,345,836 for Sustainable Transportation Infrastructure, \$122,999 for Transportation Related Amenities and \$1,324,543 for the Affordable Housing Development in the form of a loan; (B) Measure C TOD funds of \$711,085 and \$25,000 in Measure C Bikeways; and (C) San Joaquin Valley Air Pollution Control District Public Benefits Grants Program in the amount of \$1,889,511. Additionally, Developer intends to apply for 4% tax credits projected at \$694,763, or equivalent developer equity. The remaining funds will come from developer equity and permanent financing. If City determines that funds in escrow are not sufficient to complete the Project, Developer may satisfy this condition as agreed to by Developer and City in writing. Developer's inability to secure tax credits or provide a letter of commitment for alternative funding to fully finance the project in lieu of tax credits will automatically terminate this Agreement.

F. On or before March 31, 2023, Developer fails to obtain a performance and payment bond, acceptable to City, in the amount of 110% of the estimated Project costs as further described in Section 5.2.8, herein.

G. On or before March 31, 2023, Developer fails to close on its construction financing.

H. On or before March 31, 2023, Developer fails to deliver to City, or City has not approved the form and content of, certificates of insurance for all insurance that this Agreement requires Developer to obtain and maintain.

I. Developer is in default of this Agreement or any representations and warranties of Developer contained herein are not true and correct in all material respects.

12. The parties covenant and agree that the Agreement shall automatically and immediately terminate if California Department of Housing and Community Development does not approve Developer's requested extension to March 31, 2023, for its Affordable

Housing and Sustainable Communities funding by August 31, 2022.

13. The parties covenant and agree that City shall not be required to provide any notice of default or provide any cure periods to Developer as set forth in Section 9.4 prior to recording the Grant Deed as set forth in Section 2.3.1(F) above.

14. Capitalized terms used herein and not otherwise defined shall have the meaning given to such terms in the Agreement.

15. Except as expressly set forth herein, the terms and conditions of the Agreement shall remain in full force and effect.

16. In the event of a conflict between this Second Amendment and the Agreement, the terms of this Second Amendment shall control.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, City and Developer have signed this Second Amendment effective as of the date first above written.

City of Fresno, a municipal corporation

Noyan Frazier Capital, LP.,  
a California limited liability company

By: \_\_\_\_\_  
Georgeanne A. White  
City Manager

By: \_\_\_\_\_  
Mehmet Noyan, Managing Member

(Attach notary certificate of acknowledgment)

City in its capacity as Housing Successor

By: \_\_\_\_\_  
Terance Frazier, Managing Member

By: \_\_\_\_\_  
Marlene Murphey  
Executive Director

(Attach notary certificate of acknowledgment)

(Attach notary certificate of acknowledgment)

APPROVED AS TO FORM:  
RINA M. GONZALES  
Interim City Attorney

By: \_\_\_\_\_  
Tracy N. Parvanian                      Date  
Supervising Deputy City Attorney

ATTEST:  
TODD STERMER, CMC  
City Clerk

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

- Attachments:
- Revised Exhibit "B" Second Amendment – Scope of Development and Basic Design
  - Revised Exhibit "C" Second Amendment – Budget/Financial Plan
  - Revised Exhibit "D" Second Amendment – Schedule of Performance
  - Revised Exhibit "G" Second Amendment – Regulatory Agreement

**REVISED EXHIBIT "B"**  
Scope of Development and Basic Design

## **EXHIBIT B**

### **SCOPE OF DEVELOPMENT**

The Park at South Fulton will cover .79 acres of property located on the northwest corner of Fulton and Inyo Streets, and proposes up to a four-story mixed-use building that includes: (1.) 99 multi-family residential units comprised of 79 market rate units and 20 affordable housing units at 50% of AMI; (2.) Up to 4,500 square feet of ground floor retail and project amenities – inclusive in this ground floor area is 6,500 square feet from the two (2) demolished vacant buildings; and (3.) Outdoor/sidewalk dining may be a part of this project.

Remove unutilized existing driveway approach from Inyo Street and replace with new curb and gutter and add a street tree to match existing. No other off-site improvements required.

**Revised Exhibit "C"**  
**Budget/Financial Plan**

**EXHIBIT C  
BUDGET/ FINANCIAL PLAN**

<b>Sources</b>	<b>Amount</b>
Land + Acquisition Costs	\$500,000
AHSC Grant	\$1,945,352
AHSC Loan	\$1,324,543
Housing Successor Assistance Grant	\$659,298
4% Tax Credit Equity	\$694,763
Impact Fee Waiver	\$495,270
Developer Equity	\$1,948,931
Air Pollution Control District Grant	\$1,889,511
<i>Subtotal</i>	<i>\$9,457,668</i>
Perm Loan	\$19,500,000
<b>Total Sources</b>	<b>\$28,957,668</b>

<b>Uses</b>	<b>Amount</b>
Land + Acquisition Costs	\$500,000
Soft Costs	\$1,574,000
Hard Costs	\$24,185,110
Developer Fee	\$1,013,558
Financing Costs	\$1,685,000
<b>Total Uses</b>	<b>\$28,957,668</b>

<b>Muni ADH and Transportation Infrastructure</b>	<b>Amount</b>
Measure C TOD	\$711,085
Measure Bikeways	\$25,000
AHSC - Sustainable Transportation Transportation Infrastructure	\$2,345,836
AHSC - Transportation Related Amenities	\$122,999
<b>Total Uses</b>	<b>\$3,204,920</b>

**Revised Exhibit "D"**  
Schedule of Performance



**Option for Extension**  
**EXHIBIT "D" – SECOND AMENDMENT**  
**SCHEDULE OF PERFORMANCE**

<u>Items to be Completed</u>	<u>Time for Performance</u>	<u>Outside Date</u>
City approves Amended and Restated Disposition and Development Agreement (DDA) with Developer for Project	February 25, 2016	
City executes Agreement.	Within 15 days after approval of this Agreement by City Council	
Developer submits complete plans for the Project suitable for plan check and building permits		November 30, 2022
Escrow opens		November 30, 2022
Escrow closes: Developer's Satisfaction of Section 2.3.1 (A) Insurance,(B) Accepts As-Is, (C) Not in default, (D) HCD Concurs, (E) Executed Deed to revest		December 31, 2022
No later than March 31, 2023 Section 9.5 (D) Secured all financing sources, (E) Secured all Development Entitlements, (F), Bond, (G) Close Construction Financing Loan, (H) Insurance,		March 31, 2023
Commencement of Construction of Developer's Improvements	Within 120 days of Close of Escrow	April 30, 2023
Completion of Construction of Developer's Improvements. The Developer shall complete construction of the improvements to be constructed on the Project Site.	Within 24 months after commencement of construction	April 30, 2025
Issuance – Certificate of Completion. City shall furnish the Developer with a Certificate of Completion on the Project.	Promptly after completion of all construction and upon written request thereof by the Developer	May 30, 2025

**Revised Exhibit "G"**  
Regulatory Agreement and Declaration of Covenants and Restrictions

**EXHIBIT G**

**REGULATORY AGREEMENT AND  
DECLARATION OF COVENANTS AND RESTRICTIONS**

FREE RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

CITY OF FRESNO, HOUSING SUCCESSOR  
848 M Street  
Fresno, CA 93721  
Attn: Executive Director

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(Space Above This Line for Recorder's Office Use Only)

**REGULATORY AGREEMENT AND  
DECLARATION OF COVENANTS AND RESTRICTIONS**

THIS REGULATORY AGREEMENT AND DECLARATION OF COVENANTS AND RESTRICTIONS (Agreement) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between the CITY OF FRESNO in its capacity as Housing Successor, a public body, corporate and politic (City), and NOYAN FRAZIER CAPTAL, L.P., a California limited partnership (Owner).

**RECITALS:**

A. Pursuant to the Amended and Restated Disposition and Development Agreement by and between City and Owner dated December 3, 2020 as amended (the DDA), City, in its capacity as Housing Successor, has provided to Owner financial assistance in the amount of approximately \$100,000 in in-kind assistance and housing funds in the amount of \$659,298 (the Housing Successor Assistance), for the purpose of assisting Owner in developing 20 affordable residential rental units that will be restricted to household income levels no granter than 50% of AMI or below, on that certain real property located in the City of Fresno, County of Fresno, State of California, more particularly described in Exhibit "1" attached hereto and incorporated herein by reference (the Property).

B. Pursuant to the DDA, Owner has agreed to construct and maintain a rental apartment housing project consisting of ninety-nine (99) total residential units (hereinafter referred to collectively as the Project) on the Property. The Project is also referred to in the DDA as the "Project," and is further described in the Scope of Development and Project Design attached to the DDA.

C. City and Owner now desire to place restrictions upon the use and operation of the Project, in order to ensure that the Project shall be operated continuously as a rental apartment housing project with at least twenty (20) of the units available for rental by low-income persons for the term of this Agreement.

**AGREEMENT:**

NOW, THEREFORE, the Owner and City declare, covenant and agree, by and for

themselves, their heirs, executors, administrators and assigns, and all persons claiming under or through them, that the Property shall be held, transferred, encumbered, used, sold, conveyed, leased and occupied, subject to the covenants and restrictions hereinafter set forth, all of which are declared to be in furtherance of a common plan for the improvement and sale of the Property, and are established expressly and exclusively for the use and benefit of the City, the residents of the City of Fresno, and every person renting a dwelling unit on the Property.

#### AFFORDABILITY RESTRICTIONS RUNNING WITH LAND

In addition to the covenants and conditions contained in the DDA, the following California Community Redevelopment Law (California Health & Safety Code Section 33000 et seq.) affordability requirements shall be imposed upon the twenty (20) Affordable Units on the Property funded under the Agreement and shall bind the Owner and all purchasers of the Property and their successors until the date that is fifty-five (55) years following recordation of the City's Certificate of Completion as defined in the DDA.

The Affordable Units on the Property are held and will be held, transferred, encumbered, used, sold, conveyed and occupied subject to the covenants, restrictions, and limitations set forth in this Agreement, all of which are in furtherance of the Project, the Community Redevelopment Law including City's obligations set forth at California Health & Safety Code respect to Low-and Moderate-Income Housing Asset Funds. All of the restrictions, covenants and limitations will run with the land and will be binding on all parties having or acquiring any right, title or interest in the Affordable Units upon the Property or any part thereof, will inure to the benefit of the City, and will be enforceable by it. Any purchaser under a contract of sale or other transferee of an interest covering any right, title or interest in any part of the Affordable Units upon the Property, by accepting a deed or a contract of sale or agreement of purchase, accepts the document subject to, and agrees to be bound by, any and all restrictions, covenants, and limitations set forth in this Agreement until the date that is fifty-five (55) years following recordation of the City's Certificate of Completion.

1. Restrictions. The following covenants and restrictions ("Restrictions") on the use and enjoyment of the Affordable Units upon the Property shall be in addition to any other covenants and restrictions affecting the Property, and all such covenants and restrictions are for the benefit and protection of the City and shall run with the Affordable Units upon the Property and be binding on any future owners of the Property and inure to the benefit of and be enforceable by City. These covenants and restrictions are as follows:

a. From the date of recordation of this Agreement until the expiration of the Affordability Period, the twenty (20) Affordable Units funded under the DDA are to be used as Low Income Affordable Rental Housing and affordable replacement dwellings as provided for in the DDA and this Agreement. Owner agrees to file a recordable document setting forth the Project Completion Date and the Affordability Period as and when determined by the City. Unless otherwise provided in the Agreement, the term "Affordable Rental Housing" shall include without limitation compliance with the following requirements:

Nondiscrimination. There shall be no discrimination against nor segregation of any person or group of persons on account of race, color,

creed, religion, sex, marital status, national origin, ancestry, or handicap in the sale, transfer, use, occupancy, tenure, or enjoyment of any of the Property, nor shall Owner or any person claiming under the Owner, establish or permit any practice of discrimination or segregation with reference to the selection, location, number, use or occupancy of owners or vendees of the Property.

Principal Residence. Each of the Affordable Units upon the Property shall be leased only to natural persons, who shall occupy such as a principal residence.

Income Requirements. The twenty (20) Affordable Units constituting Low Income Affordable Rental Housing upon the Property may be leased only to (a) natural person(s) whose annual household income at the time of initial occupancy is not greater than fifty percent (50%) of the most recent annual median income calculated and published by HUD for the Fresno Metropolitan Statistical Area applicable to such household's size, and at an affordable rent for very low income households, consistent with the applicable California Redevelopment Law, including California Health & Safety Code Section 50053(b). The income requirements referenced in this paragraph shall be referred to collectively as the "Low-Income Requirements."

Injunctive Relief and Recapture. Should any of the twenty (20) Affordable Units constituting Low Income Affordable Rental Housing upon the Property not continue, at the time of initial occupancy, to satisfy the Low-Income Requirements, then, during the Affordability Period, such Unit(s) shall be made available for subsequent lease only to Households that qualify as a required Extremely Low, Very Low-, Lower, or Moderate-Income Household, as defined in California Health & Safety Code Sections 50106, 50105, and 50079.5 for use as the Household's principal residence.

2. Enforcement of Restrictions. Without waiver or limitation, the City shall be entitled to injunctive or other equitable relief against any violation or attempted violation of this Agreement, including the Restrictions, and shall, in addition, be entitled to damages for any injuries or losses resulting from any violations thereof.

3. Income Computation and Certification Reporting Requirements. Prior to each Household's occupancy of an Affordable Unit, Owner shall comply with all of the following requirements:

a. Income Computation. Immediately prior to a Household's occupancy of an Affordable Unit, Owner shall obtain and maintain on file an Income Computation and Certification form, attached hereto as Exhibit "2," from each such Household dated immediately prior to the date of initial occupancy in the Project by such Household. In addition, the Owner will provide such further information as may be required in the future by the City. Owner shall use its best efforts to verify that the income provided by an applicant is accurate by taking the following steps as a part of the verification process: (i) obtain three (3) pay stubs for the most recent pay

periods; (ii) obtain a written verification of income and employment from applicant's current employer; (iii) obtain an income verification form from the Social Security Administration and/or California Department of Social Services if the applicant receives assistance from either agency; (iv) if an applicant is unemployed or did not file a tax return for the previous calendar year, obtain other verification of such applicant's income as is satisfactory to the City; and (v) obtain such other information as may be requested by the City. A copy of each such completed Income Computation and Certification form shall be filed with the City prior to the occupancy of an Affordable Unit by a Household whenever possible, but in no event more than thirty (30) days after initial occupancy by said Household.

b. **Income Recertification.** Immediately prior to the first anniversary date of the occupancy of an Affordable Unit by a Household and on each anniversary date thereafter, Owner shall recertify the income of such Household by obtaining a completed Income Computation and Certification form based upon the current income of each occupant of the Affordable Unit. In the event the recertification demonstrates that such Household's income exceeds the income at which such Household would qualify to rent the Affordable Unit, such Household will no longer qualify for Affordable Rent. Owner shall provide the City with a copy of each such completed recertification with the next submission of Certificate of Continuing Program Compliance, as specified herein.

c. **Certificate of Continuing Program Compliance.** Upon the issuance of the Certificate of Completion and annually by October 31 of each year, or at any time upon the written request of City, Owner shall advise the City of the occupancy of the Project by delivering a Certificate of Continuing Program Compliance, attached hereto as Exhibit "3," certifying: (i) the number of Affordable Units of the Project which were occupied or deemed occupied pursuant to this Agreement by a Household during such period; and (ii) to the knowledge of Owner either: (a) no unremedied default has occurred under this Agreement; or (b) a default has occurred, in which event the Certificate of Continuing Program Compliance shall describe the nature of the default and set forth the measures being taken by the Owner to remedy such default.

d. **Maintenance of Records.** Owner shall maintain complete and accurate records pertaining to the Affordable Units and shall permit any duly authorized representative of the City to inspect the books and records of Owner pertaining to the Project including, but not limited to, those records pertaining to the occupancy of the Affordable Units.

e. **Reliance on Tenant Representations.** Each lease between Owner and a Household shall contain a provision to the effect that Owner has relied on the income certification and supporting information supplied by the Household in determining qualification for occupancy of the Affordable Unit, and that any material misstatement in such certification (whether or not intentional) will be cause for immediate termination of such lease.

4. Acceptance and Ratification. All present and future owners of the Property and other persons claiming by, through, or under them shall be subject to and shall comply with the above Restrictions. The acceptance of a deed of conveyance to the Property shall constitute an agreement that the Restrictions, as such may be amended or supplemented from time to time, is accepted and ratified by such future owners, tenant or occupant, and such Restrictions shall be a covenant running with the land and shall bind any person having at any time any interest or estate in the Property, all as though such Restrictions were recited and stipulated at length in each and every deed, conveyance, mortgage or lease thereof.

5. Benefit. This Agreement and the Restrictions herein shall run with and bind the Property for a term commencing on the date this Agreement is recorded in the Office of the Recorder of the County of Fresno, State of California, and expiring upon the expiration of the Affordability Period. The failure or delay at any time of City and/or any other person entitled to enforce these Restrictions shall in no event be deemed a waiver of the same, or of the right to enforce the same at any time or from time to time thereafter, or an estoppel against the enforcement thereof.

6. Costs and Attorney's Fees. In any proceeding arising because of failure of Owner or any future owner of the Property to comply with the Restrictions required by this Agreement, as may be amended from time to time, City shall be entitled to recover its respective costs and reasonable attorney's fees incurred in connection with such default or failure.

7. Waiver. Neither Owner nor any future owner of the Property may exempt itself from liability for failure to comply with the Restrictions required in this Agreement.

8. Severability. The invalidity of the Restrictions or any other covenant, restriction, condition, limitation, or other provision of this Agreement shall not impair or affect in any manner the validity, enforceability, or effect of the rest of this Agreement and each shall be enforceable to the greatest extent permitted by law.

9. Pronouns. Any reference in this Agreement and the Restrictions herein to the masculine, feminine, or neuter gender herein shall, unless the context clearly requires the contrary, be deemed to refer to and include all genders. Words in the singular shall include and refer to the plural, and vice versa, as appropriate.

10. Interpretation. The captions and titles of the various articles, sections, subsections, paragraphs, and subparagraphs of this Agreement are inserted herein for ease and convenience of reference only and shall not be used as an aid in interpreting or construing this Agreement or any provision hereof.

11. Capitalized Terms. All capitalized terms used in this Agreement, unless otherwise defined herein, shall have the meanings assigned to such terms in the DDA.

12. Amendments. This Agreement shall be amended only by a written instrument executed by the parties hereto or their successors in title, and duly recorded in the real property records of the County of Fresno.

13. Notice. Any notice required to be given hereunder shall be made in writing and shall be given by personal delivery, or by certified or registered mail, postage prepaid,

return receipt requested, at the addresses specified below, or at such other addresses as may be specified in writing by the parties hereto:

City: City of Fresno as Housing Successor  
848 M Street, 3rd Floor  
Fresno, CA 93721  
Attn: Executive Director

Copy to: City Manager  
Fresno City Hall  
2600 Fresno Street  
Fresno, CA 93721

Copy to: City Attorney  
Fresno City Hall  
2600 Fresno Street  
Fresno, CA 93721

Owner: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The notice shall be deemed given three (3) business days after the date of mailing, or, if personally delivered, when received.

14. GOVERNING LAW. This Agreement shall be governed by the laws of the State of California.

15. COUNTERPARTS. This Agreement may be executed in any number of counterparts, each of which shall constitute one original and all of which shall be one and the same instrument.

16. FURTHER ASSURANCES. The parties will execute such other and further documents, and will take any other steps, necessary, helpful, or appropriate to carry out the provisions of this Agreement.

[SIGNATURES ON NEXT PAGE]



IN WITNESS WHEREOF, the City and Owner have executed this Regulatory Agreement and Declaration of Covenants and Restrictions by duly authorized representatives on the date first written hereinabove.

CITY OF FRESNO,  
a municipal corporation in its capacity as  
Housing Successor to the Redevelopment  
Agency of the City of Fresno

By: \_\_\_\_\_  
Marlene Murphey  
Executive Director

NOYAN FRAZIER CAPITAL, L.P., a  
California limited partnership

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

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

APPROVED AS TO FORM:  
RINA M. GONZALES  
Interim City Attorney

By: \_\_\_\_\_  
Tracy N. Parvanian                      Date  
Supervising Deputy City Attorney

ATTEST:  
TODD STERMER, CMC  
CITY CLERK

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