

DEVELOPMENT AGREEMENT

This Development Agreement ("Agreement") is entered into on this 2nd day of June, 2009, by and between the City of Everett, a municipal corporation under the laws of the State of Washington (the "City"), OM Everett, Inc., a Washington corporation ("OME"), and OMH Transfer Agent, LLC, a Delaware limited liability company ("OMH") (OME and OMH are collectively referred to as "OM") (the City and OM are collectively referred to as the "Parties")

RECITALS

A. For more than a decade, the City has been working on the cleanup, environmental conservation, public shoreline access and redevelopment planning for several properties located along the Snohomish River. These properties are commonly known as the former Everett Landfill Pad, Eclipse Mill Property, and the Simpson Pad, along with other adjacent parcels.

B. The City has taken steps to clean up various industrial pollutants on the properties, and conducted brownfields feasibility studies and performed other work that lead to the issuance of a Consent Decree and Cleanup Action Plan by the Department of Ecology for the Landfill Pad. The City also added fill to portions of the Simpson Pad and the Eclipse Mill Property and established a public shoreline access area and trail between the Simpson Pad and the Snohomish River.

C. The City completed "plan-level" and some specific project level environmental review and land use actions from 2000 to 2005. These included adoption of a Shoreline Public Access Plan, as well as comprehensive updates to the City's Comprehensive Plan and Shoreline Master Program. The Shoreline Master Program and Comprehensive Plan included Vision statements for the riverfront properties that contemplate a high quality, planned, mixed-use development that includes public and private amenities and open space. In addition, the City constructed the 41st Street Bridge overcrossing linking the overall property to 41st Street and reached agreements for Burlington Northern Santa Fe track removal and upgrade/relocation on the riverfront properties.

D. As a result of these planning and preliminary actions, the City Council concluded that it would best implement the Comprehensive Plan and Shoreline Master Program by seeking to have the commercially-developable portions of the properties developed as an integrated project based on a Planned Development Overlay ("PDO") master plan to be reviewed through the City's public land use process. Accordingly, the City conducted a public competitive process, selected OliverMcMillan, LLC, a California limited liability company ("OM, LLC") with experience in development projects similar to this one, to serve as project developer, and entered into a Property Disposition Agreement on February 21, 2007, to sell the developable portions of the City-owned properties to OM subject to certain conditions and requirements, and subsequently entered into three amendments of that agreement (as amended, the "PDA"). The third amendment of the PDA was executed on April 30, 2008 ("PDA Third Amendment"). On May 14, 2008, the property transaction closed and title to the Landfill Pad transferred to OME and title to the Eclipse Mill Property and Simpson Pad transferred to OMH. In addition to the

PDA, at closing OM, LLC and OM also entered into various environmental agreements pertaining to the respective individual properties, easements and other instruments and the City and OME entered into the Landfill Consent Decree and Cleanup Action Plan as amended (collectively herein the "Environmental Agreements").

E. On December 14, 2007, the City issued the Draft Environmental Impact Statement for the Everett Riverfront Redevelopment Project, accepted public comment, and on June 11, 2008, the City issued the Final Environmental Impact Statement (the "EIS"). The EIS describes and considers the potential environmental impacts of the proposed OM commercial/residential development as well as future City actions to develop recreational opportunities and restore the habitat and environmental features of this riverfront area. On November 24, 2008, the City issued Addendum No. 1 to the Final EIS which describes certain Project changes and additional information.

F. The City has the authority to enter into this Agreement pursuant to RCW 36.70B.170 *et seq.* and Titles 15 and 19 EMC.

AGREEMENT

1. Introduction.

Upon approval of the PDO and this Agreement, the provisions of this Agreement, in addition to the provisions of the PDA and the Environmental Agreements, as applicable, shall govern the development of the Riverfront Property described below. The parties recognize that the development, including conformance with the conditions in this Agreement, is subject to third party permits and approvals outside of the control of the City or OM. Nothing in this Agreement is intended to or shall in any way limit, expand, impair or otherwise amend any of the terms, conditions, rights, remedies or obligations of the Parties under the PDA or the Environmental Agreements.

2. Property and Project Description; Proposed Action.

2.1 Property Description. The property that is the subject of this Agreement consists of the following parcels:

- Landfill Pad described at **Attachment A** to this Agreement ("Landfill Pad");
- Simpson Pad described at **Attachment B** to this Agreement ("Simpson Pad");
- and
- Eclipse Mill Property described at **Attachment C** to this Agreement ("Mill Property").

These parcels are referred to collectively as the "Riverfront Property" and are depicted on the drawing at **Attachment D** to this Agreement.

2.2 Project Description. The proposed development project ("Project") that is the subject of this Agreement is a high quality mixed-use commercial/residential development to fulfill the City's vision for the Property as set forth in the City's Comprehensive Plan and

Shoreline Master Program and the PDA. It includes construction of up to 900,000 square feet of mixed commercial use; 200,000 square feet of hotel space; and up to 1,400 residential units (multi- and single-family). The ultimate mix of uses constructed will be determined by the property owner based on market demand and the land use capacity of the Riverfront Property, subject to the minimum development elements and other requirements of the PDA.

Development on the Riverfront Property will not exceed the Total column in Table 2.2-1 in Addendum No. 1 to the Final Environmental Impact Statement (below). Preliminary targets for the project phases are also included in Table 2.2.1.

Table 2.2-1

Preferred Alternative	Total	Simpson Pad	Ramp Triangle (So. part of Landfill Pad)	Landfill Pad	Mill Property
Retail	800,000 sf		20,000sf	760,000sf	20,000sf
Office	100,000 sf		80,000sf	20,000sf	
Hotel	250 Rooms			250 Rooms	
Residential - total	1,400 Units	650 units	200 Units	200 Units	350 Units
Condominium (Multiple Family)	600	Up to 15% of the pad area	200	150	250
Townhouse	475	325 minus the # of Condo. / MF units		50	100
Single-Family	325	325			

2.3 Proposed Action. The proposed action is City approval of a Planned Development Overlay (PDO) zone and this Agreement.

3. Development Plan.

3.1 Development Elements. In the PDA, the City and OM contemplate a development plan for the Riverfront Property and adjacent areas. The plan contemplates, among other things, a development that balances economic diversification, recreational opportunities, environmental protection, and shoreline restoration. The plan includes the following elements, some of which will be accomplished by OM in the Project and others accomplished by the City through separate development activity:

- Economic diversification -- creating a place to live, work, and shop, including: development of a lifestyle center with at least a total of 400,000 rentable square feet of retail space including at least 150,000 rentable square feet of small shop space on the Landfill Pad; at least 100 residential and/or hospitality units on the Landfill Pad; development of a residential component comprised of approximately 1,400 residential units (unless revised per Section 19 of the PDA Third Amendment); and associated roads and utilities.
- Recreational opportunities – creating pedestrian and bike trails, parks, open space, waterfront promenade, and water access, all in a way that will accommodate community events and celebrations.

- Environmental protection and shoreline restoration – restore habitat and environmental features in an area that has been highly modified over a century of urbanization.
- Diverse destination – creating a lifestyle center connected to the broader Everett community and surrounding Riverfront environment.

3.2 Development Schedule. The PDA establishes certain minimum development elements that OM is obligated to construct and provides that these elements must be completed as described in the PDA by the eighth (8th) anniversary of OM obtaining the Key Development Permits for the Project, as defined in the PDA.

3.3 Preliminary and Final Project Development Plans. The Project shall be developed as depicted in the preliminary development plan at **Attachment E** to this Agreement (“Preliminary Development Plan”) or as the Preliminary Development Plan may be modified pursuant to the City's Planned Development Overlay regulations as set forth in Chapter 19.29. OM shall prepare and submit to the City a final development plan within five years after the date of this Agreement (“Final Development Plan”).

3.4 Development Plans by Parcel. It is contemplated that: the commercial development described above, along with some residential uses, will occur on the Landfill Pad; the Simpson Pad will be developed primarily for residential uses; and the Mill Property will be developed primarily for residential uses.

3.5 36th Street Improvements. OM will design and construct 36th Street on the Project site as shown on the Preliminary Development Plan. Without limiting any obligations set forth in the PDA, OM’s obligation to construct the 36th Street improvements shown on the Preliminary Development Plan extends only to the south side of the north curb in those locations where OM does not own the property on the north side of the street. Property owners on the north side of 36th will be responsible for all required improvements, if any, north of the 36th Street north curb.

4. Project Changes. The City will consider proposed changes to the Preliminary and Final Development Plans in accordance with Everett Municipal Code ("EMC") 19.29.120 and in accordance with the procedures of Review Process II described in EMC Title 15, Local Project Review Procedures. A development plan change will be presumed to be a “minor” change under EMC 19.29.120 A if it does not exceed the thresholds of subsections A1 – A4. This presumption could be overcome if the Planning Director determines that the change would be a substantial variation from the project approved by the City in the PDO and this Agreement

5. Permitted Uses. The uses permitted on the Riverfront Property shall be those uses that are consistent with the requirements of the PDA and are allowed in the Waterfront Commercial zone as set forth in the Use Tables at Chapter 19.5 Everett Municipal Code (EMC) as they exist at the time of this Agreement, a copy of which is included in **Attachment K** to this Agreement, as modified by the Everett Zoning Standards for Riverfront Planned Development Project described below. Within the jurisdiction of the Shoreline Management Act, Chapter 90.58 RCW, the uses permitted on the Riverfront Property must also be allowed in the Shoreline Overlay District as set forth in the Shoreline Use Table at EMC 19.33D.100 as it exists at the time of this Agreement, a copy of which is included at **Attachment K** to this Agreement.

6. Development Standards.

6.1 Development on the Riverfront Property shall be subject to the development standards set forth in the following documents (the “Development Standards”):

6.1.1 Everett Riverfront District Zoning and Land Division Standards (“Zoning Standards”), a copy of which is included at **Attachment F** to this Agreement;

6.1.2 Mixed Use Development Design Guidelines (“Mixed Use Design Guidelines”), a copy of which is included at **Attachment G** to this Agreement; and

6.1.3 Residential Guidelines (“Residential Guidelines”), a copy of which is included at **Attachment H** to this Agreement.

6.2 In the event of a conflict between the Development Standards specified in this Agreement and the requirements of the EMC, the Development Standards of this Agreement shall prevail. In no event, however, shall any of the Development Standards set forth herein supersede or control over any contrary provision or contractual requirement in the PDA or any of the Environmental Agreements.

6.3 A Planning Director decision to reject a plan or permit based on inconsistency with the Development Standards must be made in writing and supported by findings and conclusions outlining the identified inconsistency.

7. **Modification of Development Standards.** An applicant may propose and the Planning Director, using Review Process II described in EMC Title 15, Local Project Review Procedures, may allow an applicant to deviate from the Development Standards of this Agreement, provided the proposal satisfies the evaluation criteria of this subsection. This process differs from the variance procedure in that rather than approval being based upon unusual circumstances or a physical hardship such as steep slopes, it is based upon the quality of the proposed design. This alternative process is intended to promote well-designed development which does not strictly comply with the Development Standards, but which meets the criteria contained herein. In evaluating such a proposal, the Planning Director, using the criteria herein, shall determine if the alternative design provides superior results to that which would be required by compliance with the Development Standards.

7.1 **What Can Be Modified.** The following standards can be modified using this process: Development Standards of this Agreement other than those that cannot be modified as specified below.

7.2 **What Cannot Be Modified.** The following standards cannot be modified using this process:

7.2.1 Number of off-street parking spaces.

7.2.2 Building height.

7.2.3 Uses permitted by the zone in which the property is located.

- 7.2.4 Regulations for nonconforming uses.
- 7.2.5 Standards of Chapter 37 of the zoning code (Critical Areas).
- 7.2.6 Shoreline regulations, where applicable.
- 7.2.7 Standards adopted as part of "H" historic or "D" design overlay zones.

7.3 Evaluation Criteria for Modification. Any proposal to modify development standards or design guidelines shall not undermine the intent of the Development Standards of this Agreement. The Planning Director shall not approve a request for modification unless the proposal provides architectural and urban design elements equivalent or superior to what would likely result from compliance with the Development Standards and Design Guidelines which are proposed to be modified. The Planning Director shall consider the following criteria in evaluating proposals using this process:

7.3.1 The unique characteristics of the subject property and/or its surroundings and how they will be protected or enhanced by modifying the Development Standards.

7.3.2 The positive characteristics of the proposed development and whether such characteristics could be provided by compliance with the Development Standards proposed to be modified.

7.3.3 The arrangement of buildings and open spaces as they relate to other buildings and/or uses on the subject property and on surrounding properties.

7.3.4 Visual impact to surrounding properties caused by parking facilities in the proposed development and whether such impacts are less than would result from compliance with the Development Standards proposed to be modified.

7.3.5 Whether the proposed design mitigates the impacts that could be caused by modification of the Development Standards?

7.4 Appeal of Planning Director's Decision. An appeal of the Planning Director's decision using this process shall be reviewed by the hearing examiner in accordance with EMC Title 15, Local Project Review Procedures. Substantial weight shall be given to the decision of the Planning Director in considering any appeal.

8. Environmental Review and Mitigation; General Development Conditions; Phasing.

8.1 SEPA Environmental Review and Mitigation.

8.1.1 The City issued a Final EIS dated June 11, 2008 and an EIS Addendum dated November 24, 2008 regarding the Project and other proposed actions on adjacent properties pursuant to the requirements of the State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW. It is the intent of the parties that this EIS will satisfy the

environmental review requirements of SEPA for full buildout of the Project. Additional SEPA review for Project development will not be imposed unless required by SEPA, as implemented in the state SEPA regulations in effect at the time of City permitting. The general rule, as stated in the state SEPA regulations at WAC 197-11-600, is that a Supplemental Environmental Impact Statement is required only if there are substantial changes so that the proposal is likely to have significant adverse environmental impacts, or there is new information indicating a proposal's probable significant adverse environmental impacts. Upon receiving an application for a permit associated with development of the Project, the City's SEPA Responsible Official shall determine whether supplemental environmental review for the application is required pursuant to WAC 197-11-600.

8.1.2 If OM receives the permits and approvals necessary to develop the Project, it will carry out the SEPA mitigation as set forth in the table of mitigation measures at **Attachment I**.

8.1.3 As stated in the EIS, the City will be completing additional public access and park improvements, and environmental enhancement and restoration actions adjacent to the Riverfront Property. The City may conduct additional SEPA review for these actions in the future.

8.2 General Development Conditions.

8.2.1 OM is responsible for maintaining any in-water structures, including the boat dock and adjacent constructed log jams, which OM constructs or is responsible for as a part of the Project.

8.2.2 Residential development on the portion of the Landfill Pad south of 41st St. (the ramp triangle) and on the Eclipse Mill Site may be impacted by noise from the adjacent rail line. Noise impacts will vary based on distance from the line and whether large buildings are located between the rail line and the residential uses. For any residential units on this property, the applicant must submit a noise study that describes the measures needed to ensure that interior noise levels do not exceed 45 Ldn. Noise levels in required outdoor recreation areas on the site shall not exceed 65 Ldn. The building plans must be signed by an acoustical engineer/expert documenting that the necessary measures are incorporated into the plans.

8.2.3 Construction and site operations must be in compliance with Everett noise regulations in Chapter 20.08 EMC.

8.2.4 Prior to issuance of building permits for structures or associated permanent parking which are within shoreline jurisdiction and within 100 feet of a wetland, a final wetland creation and wetland and buffer enhancement plan must be reviewed and approved by the City. The plan must include grading plans, planting plans, irrigation plans, SEWIP calculations, hydrology anticipated in wetland creation areas, performance standards (including performance standards based on the IVA model for wetland creation), and maintenance requirements. The plans must address measures to deal with beaver activity. Provisions shall be made for contingency measures to take in case the

compensation does not meet performance standards within specified timeframes. Irrigation of all enhanced buffer areas must be provided for at least a 2 year period or less if the enhanced buffer landscaping is established with the need for additional irrigation as determined by a qualified Landscape Architect and approved by the City.

8.2.5 For buffer enhancement, a 5-year set-aside shall be required to cover the costs of monitoring, maintenance, and contingencies, including 50% of the cost of plantings. The applicant's biologist shall submit a letter to the City confirming installation of the buffer enhancement. Monitoring reports shall be submitted at the end of six months and years 1, 3, and 5 following installation. Contingencies must be implemented based upon the findings of the monitoring. The City may release the set-aside sooner than 5 years if the enhancement is determined by the City to be successful.

8.2.6 Wetland mitigation areas must be monitored over a period of 10 years. Monitoring must include post-project assessment of the site using the SEWIP IVA model to determine if the projected increase in the IVA scores for the compensation site(s) has been achieved. Prior to issuance of Certificates of Occupancy for structures or associated permanent parking which are within shoreline jurisdiction and within 100 feet of a wetland, the applicant must submit (1) an as-built signed by the wetland biologist documenting that the wetland mitigation has been constructed per plans; and (2) performance guarantees for monitoring, maintenance, and contingency.

8.2.7 Building heights on the site will be restricted to height zones as depicted in the drawing entitled PDO Site Plan – Basic Height Limits at **Attachment E**. Measurement of building heights will be determined at the time of the building pre-application conference with the City by an onsite verified method acceptable to the City. The Planning Director shall review all building plans to verify that the height of the building, rooftop appurtenances, and rooftop gardens comply with the terms of this Agreement and the Zoning Standards.

8.2.8 The Planning Director shall have the sole authority to determine if site layout and building designs proposed in each phase of implementation of the Project, including but not limited to shoreline permits, SEPA reviews, building permits, binding site plans, or other permits required by the EMC or State law, are consistent with the character and quality represented in the Preliminary or Final Development Plan and Development Standards.

8.2.9 The Planning Director is directed to reject any plan that does not provide the level of detail, architectural quality, and character represented by the Preliminary or Final Development Plan and Development Standards. A decision to reject a plan or permit based on inconsistency with the Preliminary or Final Development Plan or Development Standards must be made in writing and supported by findings and outlining the identified inconsistency.

8.2.10 In reviewing plans for individual phases of development and individual buildings, the Planning Director shall have the authority, if he deems it necessary to determine consistency with the character and quality represented in the Preliminary or

Final Development Plan and the Development Standards to retain the services of an independent architect with appropriate expertise as an independent third party. The selection of the architect shall be mutually agreed upon by the City and the applicant.

8.2.11 The Central Gathering Place on the Landfill Pad, the public parking on the Simpson Pad, and the public trails that OM is obligated to build pursuant to this Agreement and the PDA, shall be substantially provided as conceptually depicted in the Preliminary or Final Development Plan.

8.2.12 All exterior lighting, including lighting of signs, shall be directed downward onto the site and away from other shoreline properties, nearby neighborhoods, or critical areas and their buffers. Exterior lighting fixtures and plans will be approved by the Planning Director.

8.2.13 The parking requirements in the Zoning Standards are intended to accommodate the public for normal weekend and peak season activities. OM shall not be required to provide parking on-site to accommodate anticipated special events with an extraordinary parking demand, but shall provide for alternative means of accommodating anticipated public access such as transit or shuttle service from off-site parking facilities as needed for special events.

8.2.14 Soil stability, seismic, load bearing tests and flood protection regulations and other requirements of law shall apply, including testing and studies where applicable.

8.2.15 OM agrees that “provision for public access” means the earliest possible linkage that can practically be provided in a reasonably safe manner for the public benefit between the Simpson pad, the Landfill sites north and south of 41st Street, and the Eclipse Mill site and the street / pedestrian system. This provision will be provided even if some portions of the connections are temporary in nature.

8.3 Phasing.

8.3.1 The order of construction of individual components of the Project will depend on market demand. OM will provide an overall phasing plan for the Project when the building permits for the first phase of development are submitted. The City will issue approvals and permits in a timely manner, subject to compliance with applicable City policies, regulations, and the Development Standards.

8.3.2 Each phase of the development must construct the high quality improvements necessary to comply with Development Standards and other provisions found herein for that phase including but not limited to the parking, utilities, fire access, landscaping, signage, streets and sidewalks, signage, public open spaces, etc.

9. **Impact Fees.** If OM receives the permits and approvals necessary to develop the Project, it will pay the following impact fees:

9.1 **Transportation Impact Fees.** Chapter 18.40 EMC requires project applicants to prepare a traffic analysis that studies the amount of traffic to be generated by the project, the potential transportation effects of the project, and measures to avoid or otherwise mitigate adverse transportation effects. The code requires that traffic impact fees be collected for projects that generate more than 50 peak hour trips. A traffic analysis is included in the EIS for the Project which shows that the Project will generate more than 50 peak hour trips. OM will pay the traffic impact fees required by Ch. 18.40 EMC. In 2009 or 2010, the City may revise its transportation impact fees in Ch. 18.40 EMC. If it does, OM will pay the 2009/2010-revised fees for each new building prior to issuance of a building permit for each structure. The 2009/2010-revised fees shall apply to the Project for eight years from the date of this Agreement. If the City does not revise its transportation impact fees in Ch. 18.40 EMC in 2009 or 2010, OM will pay the fees in Ch. 18.40 EMC in effect on the date of this Agreement and these fees shall apply to the Project for eight years from the date of this Agreement.

9.2 **School Impact Fees.** OM and the Everett School District No. 2 (the "School District") have entered into three agreements regarding the amount of school impact mitigation fees related to the residential development in the Project, copies of which are included in **Attachment J** to this Agreement. The school impact fees shall be paid to the School District for each residential structure prior to City issuance of a building permit for each residential structure as set forth in **Attachment J**.

10. **Vesting of Development Standards.**

10.1 **Vesting.** Pursuant to RCW 36.70B.170 et seq., the Development Standards and other provisions of this Agreement, and the Development Regulations specified in Section 10.3 below, shall apply to and govern and vest the development, use, and mitigation of development on the Riverfront Property for a period of twenty years from the date of this Agreement (the "Vesting Period"). During the Vesting Period, the City shall not modify or impose new or additional development standards beyond those set forth in this Agreement except as stated below. To the extent this Agreement does not establish Development Standards or provisions addressing a certain subject, element or condition of the Project, then the Project shall be governed by the City's Development Regulations specified in Section 10.3 below. To the extent that neither (a) this Agreement's Development Standards or other provisions nor (b) the City's Development Regulations specified in Section 10.3 below address a certain subject, element or condition of the Project, then the Project shall be governed by the City's then-existing development regulations.

10.2 **Modification.** After the date of this Agreement, the City may adopt new or modified laws and regulations relating to a particular subject matter specified in this Agreement or under the presently-existing development regulations specified below, but these new or modified standards will not apply to the Project unless OM so chooses, except for new laws and regulations which the City determines must be applied to development of the Riverfront Property to avoid a serious threat to public health and safety. If, in adopting the new laws and regulations, the City elects to make them available for development of the Riverfront Property, OM may,

through written request to and upon approval of the City, develop the Riverfront Property in accordance with the new laws and regulations. If OM proposes a major change to the Project that requires City Council approval, the City may elect to make the amended portions of the Project subject to the laws and regulations in effect at the time of the City's approval of such modification.

10.3 Existing Development Regulations. Except as specified otherwise, the existing City development regulations that govern development of the Riverfront Property in the absence of an applicable Development Standard or provision of this Agreement include and are limited to the following (collectively, the "Development Regulations"):

- Environmental Policy, Chapter 20.04 EMC
- The following Zoning Code Chapters, Title 19 EMC:
 - Chapter 4 – Zoning Code Definitions
 - Chapter 5 – Use Tables
 - Chapter 22 – B-3 Zone Regulations
 - Chapter 29 – Planned Development Overlay Zone
 - Chapter 33D – Shoreline Overlay District until 2018
 - Chapter 33G – Core Residential Development and Design Standards
 - Chapter 34 – Off-street Parking – Loading
 - Chapter 35 – Landscaping and Screening Requirements
 - Chapter 36 – Signs
 - Chapter 37 – Critical Areas until 2018
- Chapter 18.04 through 18.36 of Land Division, Title 18 EMC.

Copies of the Development Regulations are set forth in **Attachment K** to this Agreement.

11. Water and Sewer Service.

11.1 Water. The City will provide water capacity that will accommodate the Project's preferred alternative described in the EIS. Water mains will be provided to the base of the 41st St. easterly pier (the pier immediately east of BNSF's mainline) and within 36th St. and Eclipse Mill Roads. OM will be responsible for the distribution of water from the water main to the various development sites in the Project.

11.2 Sanitary Sewer. The City will provide a sanitary sewer collection system that will accommodate the Project's preferred alternative described in the EIS and in accordance with Section 22(g) of the PDA Third Amendment.

11.3 Storm Sewer. The City will provide a storm water sewer system that will accommodate the Project's preferred alternative described in the EIS for the Landfill Pad and in accordance with Section 22(h) of the PDA Third Amendment.

11.4 Certificates of Availability. If required as part of the permit and approval process for improvements on the Riverfront Property, the City will issue OM water and sewer availability certificates for all OM development contemplated by the PDA and this Agreement.

12. Adjacent Property Owners' Payment of Infrastructure Costs. The Parties acknowledge that Chapters 35.72 and 35.91 RCW and Chapter 14.36 EMC provide authority for certain latecomer agreements and OM will apply to the City to establish a latecomer agreement for recovery of a pro rata share of the cost of constructing certain streets and utilities from adjacent property owners that will later derive a benefit from those streets and utilities. The City will consider OM's application for a latecomer agreement and process it in the normal manner.

13. General Provisions.

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

To City: City of Everett
2930 Wetmore Avenue, Suite 10-A
Everett, WA 98201
Attention: City Clerk
Facsimile: 425-257-8729

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

To OM: OliverMcMillan
773 8th Avenue
San Diego, CA 92101
Attention: Paul Buss, President
Facsimile: 619-321-1234

With a copy to: Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Attention: Thomas M. Walsh
Facsimile: 206-447-9700

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

13.2 Recording; Binding on Successors and Assigns. Either party may arrange for the recording of a memorandum of this Agreement with the Snohomish County Auditor's office, as necessary to disclose this Agreement on title documents for the property. This Agreement shall run with the land as binding on the parties and their successors and assigns but shall be subordinate in all respects to the PDA and Environmental Agreements. It is mutually agreed that the terms of the Agreement touch and concern the land and shall be covenants running with the land. The parties acknowledge that development of the Riverfront Property likely will involve sale and assignment of respective portions of the Riverfront Property to other persons who will, subject to this Agreement, own, develop and/or occupy portions of the Riverfront Property and buildings thereon. Upon such assignment, where the assignee agrees to assume obligations hereunder pertaining to the property transferred or assigned, the assignee shall be entitled to all interests and rights and be subject to all obligations under this Agreement pertaining to the property transferred or assigned, and OM shall be released of liability under this Agreement for the property transferred or assigned, but shall retain liability for any breach which occurred prior to the transfer or assignment of rights to another party and for those portions of the Riverfront Property still owned by OM; provided, however, that OM may freely assign its rights hereunder to any institutional lender for security purposes in connection with a loan, the proceeds of which shall be used in connection with development of the Riverfront Property, and no such assignment shall require the assignee for security purposes to assume OM's obligations hereunder (although any purchaser at a foreclosure sale or any person acquiring OM's obligations in a transaction in lieu of foreclosure shall assume OM's obligations hereunder).

13.3 Amendments. No amendment, change or modification of any provision of this Agreement shall be valid unless in writing and executed by the Parties.

13.4 Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. Venue shall be in Snohomish County, Washington.

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

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

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

13.8 Attachments. Attachments A through K are incorporated herein by this reference as if set forth in full herein.

13.9 No Third Party. This Agreement is made and entered into for the sole protection and benefit of the parties hereto and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

13.10 Dispute Resolution. In any dispute arising out of or related to this Agreement, the Parties may utilize the committee structure set forth in Section 19.11 of the PDA in an effort to resolve the dispute. Any claim arising out of or related to this Agreement, except those waived, shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party, pursuant to Section 19.12 of the PDA.

13.11 Term. Unless sooner terminated by the City re-acquiring title to the Riverfront Property, the term of this Agreement shall continue for the twenty-year Vesting Period. Notwithstanding anything herein to the contrary, if the City should re-acquire title to the Riverfront Property pursuant to any provision of the PDA, this Agreement shall be deemed null and void. This Agreement shall continue after the Vesting Period unless and until the City gives a notice of termination.

AGREED as of the date first set forth above.

CITY OF EVERETT, a Washington municipal corporation

By Ray Stephanson
Ray Stephanson, Mayor

ATTEST:


By Sharon Marks
Sharon Marks, City Clerk

APPROVED AS TO FORM


By James D. Des
James D. Des, City Attorney

[Signatures continued on following page]

OMH TRANSFER AGENT, LLC, a Delaware limited liability company

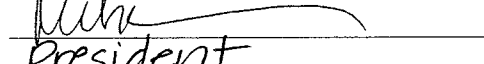
By: 
Name: William Persky
Title: CFO/Secretary

OM EVERETT, INC., a Washington corporation

By: 
Name: William Persky
Its: CFO/Secretary

OliverMcMillan, LLC, a California limited liability company ("OM, LLC") and a Party to the PDA hereby acknowledges this Agreement. OM, LLC has no objection to this Agreement and acknowledges that it is the development agreement referenced in the PDA. OM, LLC agrees that nothing in this Agreement in any way limits, expands, impairs or otherwise amends any of the terms, conditions, rights, remedies or obligations of the PDA and Environmental Agreements. OM also hereby represents that the OM entities each are and remains an affiliate of OM, LLC.

OLIVERMCMILLAN, LLC., a California limited liability company

By: 
Its: President
Name: CFO/Secretary