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DEVELOPMENT AGREEMENT

BY AND BETWEEN

THE CITY OF HERCULES

and

HERCULES SELF STORAGE, LP

for

WILLOW AVENUE COMMERCIAL CENTER PROJECT

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("**Agreement**") is made and entered into by the City of Hercules ("**City**"), a California municipal corporation, and the Hercules Self Storage, LP, a California limited partnership, the holder of legal or equitable interests in certain land located within the incorporated area of City ("**Owner**"), pursuant to the authority of California Government Code sections 65864 *et seq.* and Chapter 8 of Title 10 of the Hercules Municipal Code. City and Owner are individually referred to herein as a "**Party**" and collectively as the "**Parties**."

RECITALS

This Agreement is made and entered into with regard to the following facts, each of which is acknowledged as true and correct by the Parties to this Agreement.

- A. Owner has a legal or equitable interest in certain real property in City, consisting of approximately 7.1 acres, located on Willow Avenue, which is generally depicted in Exhibit A attached hereto and is legally described in Exhibit B, and commonly referred to by APNs 406-522-001 and -004 ("**Project Site**").
- B. City is a general law city and municipal corporation of the State of California ("**California**") and is duly organized, existing, and authorized to exercise powers under the laws of California and the Hercules Municipal Code ("**Municipal Code**"). City has enacted a development agreement ordinance establishing the procedures and requirements for consideration of development agreements (Chapter 8 of Title 10 of the Municipal Code, Title 10, Section A, commencing with Section 10-8.101; "**Development Agreement Ordinance**"). This Agreement is a statutory Development Agreement and includes conditions and requirements for the development of the Project Site.
- C. To strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic risk of development, the California legislature adopted sections 65864 *et seq.* of the Government Code ("**Development Agreement Statute**"), which authorize a city to enter into an agreement with any person having a legal or equitable interest in real property, providing for the development of such property and establishing certain development rights therein.
- D. On August 6, __ 2018, the Hercules Planning Commission ("**Planning Commission**") held a public hearing and considered an Initial Study/Mitigated Negative Declaration (SCH ("**IS/MND**") that analyzed the potential development of the Project Site, along with this Agreement (#. DA 18-01), a zoning text amendment (ZTA #18-04), Conditional Use Permit (#CUP 18-01), and Design Review Permit (#DRP 18-02) (collectively, "**Project Approvals**"). Owner intends to develop the Project Site substantially consistent with the Project Approvals and with the "**Self-Storage Facility**" (as defined below, also known as "Mini-Storage" in the proposed Zoning Text Amendment #ZTA 18-04) and "**Automotive Service Center**" uses described in the Project Description set forth in Exhibit C attached hereto and site configuration as shown in Exhibit D – Site Plan attached hereto (collectively referred to as the "**Project**") and as more particularly described in the IS/MND.
- E. On August 6 __, 2018, pursuant to Resolution No. 18-14 __, the Planning Commission recommended that the Hercules City Council ("**City Council**") certify the IS/MND. and through the adoption of Resolutions 18-15, 18-16, and 18-17 also recommended

approval of the Zoning Text Amendment #ZTA 18-04, this Development Agreement, and the Conditional Use Permit #CUP 18-01 and Design Review #DRP 18-02 having meet all required Findings referenced therein which are necessary to approve all the Project Approvals once the City Council takes its final action.

F. On _____, 2018, the City Council also held a public hearing on this Agreement and considered the Planning Commission's recommendations and the public testimony and information submitted by City staff, Owner, and members of the public. On ___, 2018, consistent with the California Environmental Quality Act ("**CEQA**") (Cal. Code Pub. Res. § 21000 *et seq.* and 14 Cal. Code Regs. § 15000 *et seq.*) and applicable provisions of the Planning and Zoning Law (Cal. Gov. Code § 65000 *et seq.*), the City Council certified the IS/MND and approved the Project Approvals, including this Agreement, pursuant to Ordinance No. ___ ("**Adopting Ordinance**"), finding that:

- City desires the timely, efficient, orderly, and proper development of the Project;
- This Agreement is consistent with City's General Plan and has been reviewed and evaluated in accordance with the Development Agreement Ordinance;
- City and Owner desire to establish certain conditions and requirements related to review and development of the Project that are or will be the subject of subsequent development applications and land use entitlements for the Project;
- Because of the logistics, expense, and considerable lead time prerequisite to planning and developing the Project, Owner requires assurances that the Project can proceed without disruption caused by a change in City's planning policies and requirements except as provided in this Agreement, which assurance will thereby reduce the actual or perceived risk of planning for and proceeding with development of the Project;
- City has determined that by entering into this Agreement (1) City will promote orderly growth and quality development in accordance with the goals and policies set forth in the General Plan, and (2) City will benefit from increased employment and commercial opportunities created by the Project for residents of City;
- The terms and conditions of this Agreement have undergone review by City staff, its Planning Commission, and its City Council at publicly noticed meetings and have been found to be fair, just, and reasonable, and in conformance with the Hercules General Plan ("**General Plan**") and the Municipal Code, as amended by the Approvals, and, further, the City Council finds that the interests of City's citizens and the public health, safety, and welfare will best be served by entering into this Agreement; and
- City and Owner reached mutual agreement and desire to voluntarily enter into this Agreement to facilitate development of the Project, subject to conditions and requirements set forth herein.

- G. Consistent with the Project Approvals, the Parties anticipate that during the Term of this Agreement, Owner may seek from City certain approvals and entitlements that are necessary or desirable to implement the Project Approvals. The Subsequent Approvals may include, without limitation, project-level plans, planned development plans (initial, final and/or combined initial and final), design review permits, vesting tentative and final subdivision maps, improvement agreements, development permits, lot line adjustments, use permits, building permits, and amendments to the foregoing ("**Subsequent Approvals**").

NOW, THEREFORE, in consideration of the mutual covenants of the Parties contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

ARTICLE I Effective Date and Term.

Section 1.1. Effective Date; Recordation. The "**Effective Date**" of this Agreement shall be thirty (30) days after adoption of the ordinance approving this Agreement. Not later than ten (10) days after the Effective Date, the City Clerk shall cause this Agreement to be recorded in the Official Records of Contra Costa County.

Section 1.2. Term and Termination. The term of this Agreement shall commence on the Effective Date and extend ten (10) years thereafter unless sooner terminated or extended as herein provided ("**Term**"). The Term shall automatically extend an additional five (5) years if the City Council determines that Owner is in substantial compliance with the terms of this Agreement and has received a Certificate of Occupancy for the Self-Storage Facility prior to the end of the Term. Such extension shall also be deemed part of the Term. Notwithstanding the foregoing, the Term shall expire upon the completion of the Project in accordance with the Project Approvals and City's issuance of all required Certificates of Occupancy and acceptance of all dedications and improvements required under the Project Approvals and this Agreement. Upon the end of the Term, this Agreement shall be of no further force or effect except for the provisions hereof that expressly survive termination, including Section 3.1 below.

ARTICLE II Standards, Laws, and Procedures Governing the Project.

Section 2.1. Vested Right to Develop. Owner shall have a vested right to develop the Project on the Project Site in substantial conformance with the terms and conditions of this Agreement, the Project Approvals, the Subsequent Approvals (as and when issued), the Applicable Law (defined below), and amendments that may, from time to time, be approved pursuant to this Agreement. Owner's vested right to develop the Project shall be subject to compliance with CEQA as it may apply to the Subsequent Approvals, and City's remaining discretion in connection with the Subsequent Approvals, subject to this Agreement.

Owner has expended and will continue to expend substantial amounts of time and money planning and preparing for development of the Project. Owner represents, and City acknowledges, that Owner (1) would not make these expenditures without this Agreement and (2) will be making these expenditures in reasonable reliance upon its vested rights to develop the Project as set forth in this Agreement.

City shall have the right to regulate development and use of the Project Site in accordance with the terms and conditions of this Agreement, the Project Approvals, the Applicable Law, as defined below, and the Subsequent Approvals. City shall not apply new City rules, regulations, or policies that conflict with the Agreement, Project Approvals, or Applicable Law. Notwithstanding anything in this Agreement to the contrary, City shall not be precluded from applying laws, rules, and regulations to the extent that such are generally-applicable City-wide and specifically mandated and required by applicable federal or state law.

Section 2.2. Permitted Uses. The permitted uses of the Project; the density and intensity of use on the Project; the maximum height, bulk, and size of the proposed buildings; provisions for reservation or dedication of land for public purposes and the location of public improvements; the general location of public utilities; and other terms and conditions of development applicable to the Project, shall be as set forth in the Project Approvals and, as and when they are issued (but not in any limitation of any right to develop as set forth in the Project Approvals), the Subsequent Approvals.

Section 2.3. Applicable Law. “**Applicable Law**” shall mean the existing rules, regulations, policies, standards, and specifications, in force and effect and generally-applicable City-wide on the Effective Date, governing permitted uses of the Project Site, governing density, the design, improvements, fees, and construction standards and specifications applicable to the Project, including those set forth in this Agreement and the Project Approvals and those set forth in City’s ordinances and resolutions. Nothing in this Agreement is intended to increase or decrease the amount of any applicable impact fees, connection fees, pass-through fees, processing fees, or any other fees, taxes, or assessments in effect at the time of any Subsequent Approval. Notwithstanding anything in this Agreement to the contrary, City may apply the then-current California Building Standards Code and other uniform construction codes generally-applicable City-wide to any Subsequent Approval. In addition, any tentative map approved for any subdivision of land within the Project Site shall comply with the provisions of Government Code section 66473.7.

Section 2.4. Moratorium, Initiatives, and Conflicting Enactments. To the extent consistent with state law (and excepting a declaration of a local emergency or state emergency as defined in Government Code section 68858), if any ordinance, resolution, or other measure is enacted subsequent to the Effective Date, whether by action of City, by initiative, referendum, or otherwise, that imposes a building moratorium, a limit on the rate of development, or a voter-approval requirement that would otherwise create an additional procedural requirement or affect the timely development of the Project on all or any part of the Project Site, City agrees that such ordinance, resolution, or other measure shall not apply to the Project, the Project Site, this Agreement, the Project Approvals, or the Subsequent Approvals, if any, during the Term.

Section 2.5. Life of Project Approvals or Subsequent Approvals. The term of any Project Approval and any Subsequent Approval shall be automatically extended for the longer of the Term or of the term otherwise applicable to such Project Approval or Subsequent Approval if this Agreement is no longer in effect. The Term of this Agreement, any other Project Approval, or any Subsequent Approval shall not include any period of time during which any applicable development or utility moratorium, lawsuit, referendum, or action by any other public agency that regulates or affects land use delays development of the Project Site (“**Enforced Delay**”). In the event of any such Enforced Delay, the Term shall be extended for as many days as the Enforced Delay occurs, as reasonably determined by City’s Planning Director.

Section 2.6. Development Timing. Owner shall be obligated to comply with the terms and conditions of the Project Approvals, Subsequent Approvals, and this Agreement at those times

specified in either the Project Approvals, Subsequent Approvals, or this Agreement. The Parties acknowledge that Owner cannot at this time predict with certainty when or the rate at which phases of the Project Site would be developed. Such decisions depend upon numerous factors that are not all within the control of Owner, such as market orientation and demand, interest rates, competition, and other factors. Because the California Supreme Court held, in *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development controlling the parties' agreement, it is the intent of the Parties to hereby acknowledge and provide for the right of Owner to develop the Project in such order and at such rate and times as Owner deems appropriate within the exercise of its sole and subjective business judgment, subject to the terms, requirements and conditions of the Project Approvals, Subsequent Approvals, and this Agreement. City acknowledges that such a right is consistent with the intent, purpose, and understanding of the Parties to this Agreement, and that without such a right Owner's development of the Project would be subject to the uncertainties sought to be avoided by the Development Agreement Statute, Development Agreement Ordinance, and this Agreement. Owner will use its best efforts, in accordance with Owner's subjective business judgment and taking into consideration market conditions and other economic factors influencing Owner's subjective business decision, to commence or to continue development, and to develop the Project in a regular, progressive, and timely manner in accordance with the provisions and conditions of this Agreement and with the Project Approvals.

ARTICLE III Obligations of Owner.

Section 3.1. Public Benefits. As additional consideration for City's approval and performance of its obligations set forth in this Agreement, Owner shall pay to City, beginning exactly three years following City's issuance of a Certificate of occupancy for the Self-Storage Facility, for so long as any portion of the Project Site is actively used as a Self-Storage Facility, an amount equal to ten percent (10%) of the gross revenue derived from Base Rent (as defined below) actually collected by Owner (or its successor-in-interest with respect to the Project), calculated on a monthly basis ("**Municipal Surcharge**"). "Base Rent" shall mean the primary rent charged by Owner for the monthly use of all of the storage units rented in the Project. Base Rent does not include any other amount that may be charged by Owner related to or arising from the use of a storage unit, including but not limited to administrative fees, late fees, liens, cleaning fees, labor, insurance charges, and other ancillary fees and charges, or other charges of any kind or nature except as expressly provided above.

The Municipal Surcharge constitutes a debt owed to City by the then-current Owner of the Project Site that is extinguished only by payment by such Owner to City. The Municipal Surcharge shall be payable in full monthly, to City's Finance Director, within thirty (30) days after the last day of the calendar month as to which such Municipal Surcharge has been levied, with such payment to be made contemporaneously with delivery to City's Finance Director of a summary sheet showing the amount of Base Rent received in the immediately prior calendar month and the calculation of the Municipal Surcharge to be paid for each reporting period, in a form reasonably approved by City's Finance Director.

The Parties acknowledge and agree that the Municipal Surcharge is not a tax or levy by City but rather is part of the bargained-for consideration of this Agreement.

The provisions set forth in this Section 3.1 shall survive the Term and termination of this Agreement for so long as any portion of the Project Site is used as a Self-Storage Facility and there is no other Self-Storage Facility operating in City not subject to the same or greater Municipal Surcharge, and

shall be binding upon the then-current Owner of the Project. In the event City approves any other Self-Storage Facility and such facility is not subject to the same or greater Municipal Surcharge, then the provisions of this Section 3.1 shall automatically and forever be null and void.

Notwithstanding anything to the contrary herein, no Owner of the Project Site shall have any obligation to City with respect to any Municipal Surcharge owing for any period of time as to which such person or entity did not own an interest in the Project Site. The Project and the Project Site shall be deemed to be no longer used as a Self-Storage Facility, and the obligation to make the required payment of the Municipal Surcharge shall terminate and be of no further force or effect, when no portion of the Project Site is used as a Self-Storage Facility for a period of one year, with no Base Rent collected by Owner or its successor in interest for such period of time.

Section 3.2. Bodily Injury and Property Damage Insurance. Prior to the commencement of construction (or any work related thereto) upon the Project Site, Owner shall furnish, or cause to be furnished, to City duplicate originals or appropriate certificates of bodily injury and property damage insurance policies in the amount of at least \$1,000,000 for any person, \$1,000,000 for any occurrence, and \$1,000,000 for property damage, naming City as an additional insured. Such insurance policies shall contain such other and further endorsements, terms, conditions, and coverages as may reasonably be deemed necessary by City. Such insurance policies shall be maintained and kept in force during periods of construction.

ARTICLE IV Obligations of City.

Section 4.1. Processing Subsequent Approvals. Subsequent Approvals will be necessary to implement the Project Approvals. So long as the applications for the Subsequent Approvals substantially comply with this Agreement and Applicable Law and are substantially consistent with the Project Approvals, City shall process and grant the applications for Subsequent Approvals. Upon submission by Owner of any application, City shall promptly commence and diligently complete all steps necessary to review and process the requested Subsequent Approvals. City will review submittals for Subsequent Approvals for consistency with any prior Project Approvals and use good faith efforts to provide comments and make recommendations to Owner within thirty (30) days of City's receipt of such application.

In reviewing and acting upon any application for a Subsequent Approval, except as otherwise set forth in this Agreement, City shall not impose any conditions that preclude the development of the Project for the uses or the density and intensity of use set forth in this Agreement. In reviewing and approving applications for Subsequent Approvals, City may exercise its discretionary review and may attach such conditions and requirements as may be deemed necessary or appropriate to carry out the policies, goals, standards, and objectives of the General Plan and to comply with legal requirements and policies of City pertaining to such Subsequent Approvals, so long as such conditions and requirements do not preclude the uses or the density and intensity of use set forth in this Agreement.

Any City denial of an application under this section shall include a statement of the reasons for such denial. Owner will work collaboratively with City to respond to the concerns raised by such denials of Subsequent Approvals.

Section 4.2. Project Plans. City shall maintain a complete copy of the Project Plans, stamped "Approved" by City, in the Office of the City Clerk, and Owner shall maintain a complete copy of the Project Plans, stamped "Approved" by City, in its offices or at the Project site. The Project Plans to be maintained by City and Owner shall be in a half-size set. Further detailed plans for the

construction of the buildings and improvements, including, without limitation, structural plans and working drawings shall be prepared by Owner subsequent to the Effective Date based upon the Project Plans.

ARTICLE V Modifications to Project.

Section 5.1. Minor Modifications. The Parties acknowledge that refinement and further implementation of the Project may demonstrate that certain minor changes may be appropriate with respect to the details and performance of the Parties under this Agreement. The Parties desire to retain a certain degree of flexibility with respect to the details of the Project and with respect to those items covered in the general terms of this Agreement. If and when the Parties find that clarifications, minor changes, or minor adjustments are necessary or appropriate and do not constitute a Major Modification under Section 5.2, they shall effectuate such clarifications, minor changes, or minor adjustments through a written “**Minor Modification**” approved in writing by Owner and the City Planning Director, without amending this Agreement, provided that the Planning Director finds the Minor Modifications: (i) are substantially consistent with the Project’s approvals as approved by the City Council; (ii) are substantially consistent with the provisions, purposes, and goals of this Agreement; (iii) are not detrimental to the public health, safety, convenience, or general welfare; and (iv) will not significantly or adversely affect the public benefits associated with the Project. Unless otherwise required by law, no such Minor Modification shall require prior notice or hearing, nor shall it constitute an amendment to this Agreement. Any proposed change the Planning Director reasonably denies as not qualifying for a Minor Modification based on the above findings must be processed as a Major Modification. The Planning Director’s determination may be appealed to the City Council.

Section 5.2. Major Modifications. Owner shall not make any “Major Modification” (defined below) to the Project without first amending this Agreement to permit such Major Modification. A “**Major Modification**” means the following:

- (a) Reduction of any minimum ground floor setback of the Project, as depicted on the Project Plans, if by such reduction the applicable setback would be less than is permitted in the applicable zoning district under the Zoning Ordinance in effect on the date such modification is applied for;
- (b) Any change in use not consistent with the permitted uses defined in Section 2.2 above;
- (c) Any decrease in the number of parking spaces shown on the Project Plans below the minimum number of spaces required to serve the uses on the Project Site;
- (d) Any material variation in the design, massing, or building configuration, including but not limited to, floor area and building height, that renders such aspects out of substantial compliance with the Project Plans after Design Review Approval; and
- (e) Any change that would substantially reduce or alter the community benefits or significant project features as set forth in Section 3.1.

If a proposed modification does not exceed the Major Modification thresholds established above, then the proposed modification shall be reviewed in accordance with Section 5.1.

ARTICLE VI Periodic Review of Compliance.

Section 6.1. Annual Review. Pursuant to Government Code section 65865.1, on or before December 1 of each year during the Term, City shall annually review this Agreement and all actions taken pursuant to the terms of this Agreement to determine Owner's substantial compliance with this Agreement. On or before October 15 of each year, Owner shall submit to the City Planning Director a report demonstrating the substantial compliance with this Agreement. Failure of City to perform the annual review shall not affect the validity or enforceability of this Agreement.

Section 6.2. Copies of Documents. City shall deliver to Owner a copy of all staff reports and documents to be used or relied upon in conducting the annual review and, to the extent practical, related exhibits concerning Owner's performance hereunder, at least ten (10) days prior to any such annual review by the City Council. Owner shall be permitted during the annual review to respond orally or by a written statement, or both, to City's evaluation of Owner's performance. The annual review shall be limited in scope to substantial compliance with the terms of this Agreement.

Section 6.3. Failure to Conduct Annual Review. In the event City fails to either: (i) conduct the annual review or (ii) notify Owner in writing (following the time during which the review is to be conducted) of City's determination as to compliance or noncompliance with the terms of this Agreement, which includes delivery of a Notice of Default, and such failure remains uncured as of January 1 of each year, such failure shall be deemed a determination by City of Owner's compliance with the terms of this Agreement for that annual review period.

ARTICLE VII Miscellaneous.

Section 7.1. Vested Rights to Subsequent Approvals. Any Subsequent Approval or amendment to a Subsequent Approval shall be, upon approval or issuance, and after all appeal periods have expired or, if an appeal is filed, if the appeal is decided in favor of the approval, automatically vested and incorporated into this Agreement.

Section 7.2. Amendment. Any amendment to this Agreement shall require giving of notice and public hearings before the Planning Commission and City Council. The City Council, in its sole discretion, shall make the final decision on whether to approve, conditionally approve, or deny an amendment.

Section 7.3. Cooperation. Each Party shall cooperate with and provide reasonable assistance to the other Party to the extent consistent with and necessary to implement this Agreement. Upon the request of a Party at any time, the other Party shall promptly execute, with acknowledgement or affidavit if reasonably required, and file or record the required instruments and writings and take any actions as may be reasonably necessary to implement this Agreement or to evidence or consummate the actions contemplated by this Agreement.

Section 7.4. Cooperation in the Event of Third-Party Legal Challenge. In the event of any legal action or proceeding, including but not limited to any initiative or referendum petition, instituted by a third party challenging the validity of any provision of this Agreement or the procedures leading to its adoption or the issuance of any or all of the Project Approvals or Subsequent Approvals, the Parties hereby agree to cooperate in defending such action or proceeding. Owner shall defend any such action or proceeding and shall bear the reasonable litigation expenses of defense, including reasonable attorney's fees.

Section 7.5. Indemnification; Hold Harmless. Except for claims, costs, and liabilities caused by the active negligence or willful misconduct conduct of City, its elected and appointed representatives, officers, agents, and employees, Owner hereby agrees to defend, indemnify, save, and hold City and its elected and appointed representatives, officers, agents, and employees harmless from claims, costs, and liabilities for any personal injury, death, or property damage that arises, directly or indirectly, from operations performed under this Agreement by Owner or its contractors, subcontractors, agents, or employees, whether such operations were performed by Owner or by any of its contractors, subcontractors, by any one or more persons directly or indirectly employed by, or acting as agent for, Owner or any of its contractors or subcontractors. Owner shall defend City and its elected and appointed representatives, officers, agents, and employees from actions for such personal injury, death, or property damage that is caused, or alleged to have been caused, by reason of Owner's activities in connection with the Project.

Section 7.6. Mortgagee Rights and Obligations. This Agreement shall be superior and senior to any lien placed upon the Project Site or any portion thereof after the date of recording this Agreement, including the lien for any deed of trust or mortgage ("**Mortgage**"). This Agreement shall not prevent or limit Owner, in any manner, from encumbering the Project Site, or any portion thereof or any improvements thereon with any Mortgage securing financing with respect to the construction, development, use or operation of the Project. No breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all the terms and conditions contained in this Agreement shall be binding upon and effective against any person or entity, including any deed of trust beneficiary or mortgagee ("**Mortgagee**") who acquires title to the Project Site, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise. Notwithstanding any term or provision in this Agreement to the contrary, no Mortgagee shall be obligated under this Agreement to construct or complete improvements or to guarantee such construction or completion, but shall otherwise be bound by all of the terms and conditions of this Agreement which pertain to the Project Site or such portion thereof in which it holds an interest. If City receives notice from a Mortgagee requesting a copy of any notice of default given Owner hereunder and specifying the address for service thereof, then City shall deliver to such Mortgagee, concurrently with service thereon to Owner, any notice given to Owner with respect to any claim by City that Owner has committed an event of default. Each Mortgagee shall have the right during the same period available to Owner to cure or remedy, or to commence to cure or remedy, the event of default claimed set forth in City's notice. City acknowledges that any Mortgagee may require certain modifications to this Agreement or subordinations, and City shall, upon request, from time to time meet with Owner and/or representatives of any such Mortgagee and shall negotiate in good faith any such request for modification or subordination.

Section 7.7. Estoppel Certificates. Either Party or the Mortgagee or prospective Mortgagee may at any time during the Term of this Agreement deliver written notice to the other Party requesting an estoppel certificate stating: (i) this Agreement is in full force and effect and is a binding obligation of the Parties; (ii) this Agreement has not been amended or modified either orally or in writing or, if so amended, identifying the amendments; (iii) no default exists hereunder, nor would any default exist with the passage of time or the giving of notice, or both, or, if a default or failure does exist, the nature thereof and the actions required to be taken by the non-performing Party to cure the default or prevent the same from occurring; and (iv) any other matter affecting the status of the rights and obligations of the Parties hereunder as to which the requesting Party, or the Mortgagee, may inquire. A Party receiving a request for an estoppel certificate shall provide a signed certificate to the requesting Party, or Mortgagee, within fifteen (15) days after receipt of the request. The City Manager or any person designated by the City Manager may sign estoppel certificates on behalf of City. The managing member, general partner or other authorized representative of Owner may sign on behalf of any Owner. An estoppel certificate may be relied on by the Mortgagee and by

Transferees. If one Party requests an estoppel certificate from the other Party, the requesting Party shall reimburse the other Party for all reasonable and direct costs and fees incurred by such Party with respect thereto.

Section 7.8. Negation of Partnership, Agency, and Joint Venture. The Project is a private development. No Party is acting as the agent of the other in any respect hereunder. Each Party is an independent contracting entity with respect to the terms, covenants, and conditions contained in this Agreement. None of the provisions of this Agreement shall be deemed to create a partnership between or among the Parties in the businesses of Owner, or the affairs of City, or otherwise, nor shall it cause them to be considered joint venturers or members of any joint enterprise.

Section 7.9. No Third Party Beneficiary Rights. This Agreement is made and entered into for the sole protection and benefit of Owner and City and their respective successors and assigns. This Agreement is not intended nor shall it be construed to create any third party beneficiary rights in any person who is not expressly made a party and signatory hereto.

Section 7.10. Default; Termination. Failure or unreasonable delay by either party to perform any obligation under this Agreement for a period of ninety (90) days after written notice thereof from the other Party shall constitute an event of default under this Agreement, subject to extensions of time by mutual consent in writing or discretionary approval of extensions by the City Council. Such notice shall specify the nature of the alleged default and the manner in which such default may be satisfactorily cured. If the nature of the alleged default is such that it cannot reasonably be cured within such ninety (90) day period, the commencement of the cure within such time period and the subsequent diligent prosecution to completion of the cure shall be deemed a cure within such period. Subject to the foregoing, after notice and expiration of the ninety (90) day period without cure, if applicable, the other Party to this Agreement, at its option, may institute legal proceedings pursuant to this Agreement and/or give notice of intent to terminate the Agreement pursuant to Government Code section 65868 and the Agreement Ordinance and consistent with the Municipal Code. Following such notice of intent to terminate, the matter shall be scheduled for consideration and review by the City Council within thirty (30) calendar days in the manner set forth in Government Code sections 65865.1, 65867, and 65868. Following consideration of the evidence presented in such review before the City Council, and a determination by the City Council based on substantial evidence thereon, the Party alleging the default by the other Party may give written notice of termination of this Agreement to the other Party. The waiver by either Party of any event of default under this Agreement shall not operate as a waiver of any subsequent breach of the same or any other provision of this Agreement.

Section 7.11. Legal Actions; Remedies; Attorney's Fees. In addition to any other rights and remedies, either party may institute legal action to cure, correct, enjoin, remedy any default, or enforce any covenant or agreement herein. Neither Party or its officers, agents, or employees shall be liable in monetary damages for any breach or violation of this Agreement; instead, the sole legal or equitable remedy available to either Party for a breach or violation of this Agreement shall be an action in mandamus, specific performance, injunctive or declaratory relief to specifically enforce the provisions of this Agreement. In any such legal action, the Prevailing Party shall be entitled to recover reasonable litigation expenses, including reasonable attorney's fees and court costs. For purposes of this Section 7.11, "**Prevailing Party**" means the Party determined by a court to have most nearly prevailed in a dispute between the Parties, even if such Party did not prevail in all matters, not necessarily the one in whose favor a judgment is rendered. If the court fails or refuses to make a determination of the Prevailing Party, the Party who is awarded costs of suit shall also be deemed the Prevailing Party for purposes of awarding attorneys' fees. The Parties acknowledge that neither City nor Owner would have entered into this Agreement had they been exposed to

damage claims from the other Party for any breach thereof. As such, the Parties agree that in no event shall either Party be entitled to recover damages against the other Party for breach of this Agreement.

Section 7.12. Governing Law; Interpretation of Agreement; Venue. This Agreement shall be governed by and interpreted in accordance with the laws of California and City. Any action at law or in equity arising under this Agreement or brought by any Party for the purpose of enforcing, construing, or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Contra Costa or the United States District Court for the Northern District of California. The Parties waive all provisions of law providing for the removal or change of venue to any other court.

Section 7.13. Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the Parties.

Section 7.14. Right to Assign. Owner shall have the right to sell, assign, or transfer this Agreement, and all of its rights, duties, and obligations hereunder, to any person at any time during the Term, subject to the prior written approval of the City Council, which shall not be unreasonably withheld, conditioned, or delayed. Such approval shall be granted where the buyer, assignee, or transferee has reasonably demonstrated the experience, qualifications, and financial resources to complete the Project, or applicable portions thereof, to the reasonable satisfaction of City. In connection with such a proposed transfer, Owner shall first submit to City information regarding such proposed transfer, including the proposed documents to effectuate the Transfer, and such other information as would assist City in considering the proposed transfer, including where applicable, the proposed transferee's experience, qualifications, and financial resources to complete the Project. Such determination shall be made by the City Manager in consultation with the City Attorney, and may be appealed by Owner to the City Council. Failure by City to approve or disapprove within fifteen (15) days to any written request made by Developer for such consent shall be deemed to be City's approval of the transfer or assignment in question. Notwithstanding the foregoing, provided notice is given as specified above, no City approval shall be required for any transfer, sale, or assignment of this Agreement to: 1) any entity which is an affiliate or subsidiary of Owner; 2) any Mortgagee; or 3) any transferee of a Mortgagee. Notice of any such approved sale, transfer or assignment (which includes a description of all rights, interests and obligations that have been transferred and those which have been retained by Owner) shall be recorded in the official records of Contra Costa County, in a form acceptable to the City Manager, concurrently with such sale, transfer or assignment. No City consent shall be required with respect to any transfers of any interest in or to the Project or Project Site after the expiration of the Term of this Agreement.

Section 7.15. Release Upon Transfer. Upon the sale, transfer or assignment in whole or in part of Owner's rights and interests under this Agreement, Owner shall be released from its obligations under this Agreement with respect to the portion of the Project so transferred; provided, however, that (i) Owner is not then in default under this Agreement; (ii) Owner has provided written notice of such transfer to City and City has approved the transfer in writing (if such approval is required pursuant to the terms of this Agreement). The transfer shall be effective only as to that portion of the Project Site owned by such transferee or assignee. The transferee shall be responsible for the reporting and annual review requirements relating to the portion of the Project Site owned by such transferee or assignee, and any amendment to this Agreement between City and a transferee or

assignee shall only affect the portion of the Project Site owned by such transferee or assignee. Any default by a transferee shall affect only that portion of the Project Site owned by such transferee.

Section 7.16. Subsequent Laws. If any federal or state law made or enacted after the Effective Date of this Agreement prevents or precludes compliance with one or more provisions of this Agreement, then the provisions of this Agreement shall, to the extent feasible, be modified, extended, or suspended as may be necessary to comply with such new law.

Section 7.17. Covenants Running with the Land. All of the provisions contained in this Agreement shall be binding upon the Parties and their respective heirs, successors, and assigns, representatives, lessees, and all other persons acquiring all or a portion of the Project Site, or any interest therein, whether by operation of law or in any manner whatsoever. All of the provisions contained in this Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to California law including, without limitation, California Civil Code section 1468.

Section 7.18. Force Majeure. Neither Party shall be deemed to be in Default where failure or delay in performance of any of its obligations under this Agreement is caused, through no fault of the Party whose performance is prevented or delayed, by floods, earthquakes, other acts of God, fires, wars, riots or similar hostilities, strikes or other labor difficulties, state or federal regulations, or court actions. Except as specified above, nonperformance shall not be excused because of the act or omission of a third person.

Section 7.19. Neutral Interpretation. This Agreement has been drafted after extensive negotiation and revision. Both City and Owner are sophisticated parties who were represented by independent counsel throughout the negotiations. City and Owner each agree and acknowledge that the terms of this Agreement are fair and reasonable, taking into account their respective purposes, terms, and conditions. This Agreement shall therefore be construed as a whole consistent with its fair meaning, and no principle or presumption of contract construction or interpretation shall be used to construe the whole or any part of this Agreement in favor of or against either Party.

Section 7.20. Rules of Construction. The singular includes the plural; the masculine and neuter include the feminine; "shall" is mandatory; and "may" is permissive.

Section 7.21. Further Documents. Each Party shall execute and deliver such further documents as may be reasonably necessary to achieve the objectives of this Agreement.

Section 7.22. Time. Time is of the essence regarding each provision of this Agreement as to which time is an element.

Section 7.23. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be identical and may be introduced in evidence or used for any other purpose without any other counterpart, but all of which together shall constitute one and the same document.

Section 7.24. Notices. Any notice or communication required hereunder between City and Owner must be in writing, and may be given personally, by facsimile (with original forwarded by regular U.S. Mail), by registered or certified mail (return receipt requested), or by a reputable courier promising overnight delivery to the respective addresses specified by each Party. Any Party hereto may at any time, by giving ten (10) days' written notice to the other Party hereto, designate any other address in substitution of the address to which such notice or communication shall be given.

Notices shall be given to the parties at their addresses set forth below:

If to City:

City of Hercules

Attn: Lori Martin, City Clerk
111 Civic Drive
Hercules, California 94547
Telephone: (510) 799-8215
Facsimile: (510) 799-2521
Email: lmartin@ci.hercules.ca.us

With a copy to:

City of Hercules
Attn: J. Patrick Tang, City Attorney
492 Ninth Street, Suite 310
Oakland, CA 94607
Telephone: (510) 332-5001
Facsimile: (510) 238-1404
Email: patricktang@jarvisfay.com

If to Owner:

Hercules Self Storage, LP
Attn: Arthur L. Lorenzini, Jr.
380 Civic Drive, Ste. 200-C
Pleasant Hill, CA 94523
Telephone: (925) 332-7281
Facsimile: (925) 332-7947
Email: alorenzini@claremonthomes.net

With copy to:

Miller Starr Regalia
Attn: Bryan W. Wenter, Esq.
1331 North California Boulevard
Walnut Creek, CA 94596
Telephone: (925) 935-9400
Facsimile: (925) 933-4126
Email: bryan.wenter@msrlegal.com

Any party may change its mailing address or contact person(s) at any time by giving written notice of such change to the other parties in the manner provided herein at least ten (10) days prior to the date such change is effective.

Section 7.25. Recordation. The City Clerk shall record this Agreement and any amendment, modification, or cancellation of this Agreement in the Office of the County Recorder of the County of Contra Costa within the period required by Government Code section 65868.5 and Municipal Code section 10-8.501. The date of recordation of this Agreement shall not modify or amend the Effective Date or the date of termination of this Agreement.

Section 7.26. Exhibits. The following exhibits are attached to this Agreement and incorporated herein for all purposes:

EXHIBIT A - Map of the Project Site.

EXHIBIT B - Legal Description of the Project Site.

EXHIBIT C - Project Description.

EXHIBIT D - Site Plan

IN WITNESS WHEREOF, this Agreement has been entered into by and between Owner and City as of the Effective Date.

CITY:

City of Hercules,
a California municipal corporation

OWNER:

Hercules Self Storage, LP, a California limited
partnership

By: _____
Its: _____

By: _____
Its: _____

ASSessor's MAP
BOOK 406 PAGE 52
CONTRA COSTA COUNTY, CALIF.

EXHIBIT B

Legal Description of the Project Site

The land referred to is situated in the County of Contra Costa, City of Hercules, State of California, and is described as follows:

Parcel A, as shown on that certain Parcel Map 476-87 in the City of Hercules, filed on November 02, 1987, in Book 130 of Parcel Maps Page 30, Contra Costa County Record.

EXCEPTING THEREFROM that portion thereof conveyed in the deed to the City of Hercules, a California Municipal Corporation, recorded February 1, 1995, as Document No. 95-016401, Official Records.

APN's: 406-522-001
406-522-004

EXHIBIT C

Project Description

As more fully described in the IS/MND, the Project proposes the development of a commercial center consisting of an approximately 130,730 square-foot self-storage facility, consisting of individual, small, self-contained units or areas within a building that are rented individually for storing household goods, business records or supplies ("**Self-Storage Facility**", aka Mini Storage under the Zoning Text Amendment #ZTA 18-04), and an approximately 17,861 square-foot automotive service center ("**Automotive Service Center**"). The Self-Storage Facility would consist of a leasing office with apartment above and four self-storage buildings on APN 406-522-004 along with an area for a U-Haul truck rental. The Automotive Service Center would consist of three buildings on APN 406- 522-001. The total floor area of these eight buildings would be approximately 148,591 square feet. The Project also would include a total of approximately 83 parking spaces, most of them at the Automotive Service Center. The Self-Storage Facility and Automotive Service Center would operate independently of each other and be separated by a security fence or a wall. A stormwater basin would be located in the southwestern corner of the project site and serve both land uses. Access to the project site would be via one median-divided driveway off Willow Avenue.

EXHIBIT D - Site Plan

