# City of Loma Linda Official Report

Karen Gaio Hansberger, Mayor
Floyd Petersen, Mayor pro tempore
Robert Christman, Councilmember
Stan Brauer, Councilmember
Robert Ziprick, Councilmember

COUNCIL AGENDA: December 13, 2005

TO: City Council

VIA: Dennis R. Halloway, City Manager

FROM: Deborah Woldruff, AICP, Community Development Director

SUBJECT: COUNCIL BILL # O-2005-17 (SECOND READING/ROLL CALL) A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF LOMA LINDA AND LILLIAN V. MILLER, TRUSTEE

## RECOMMENDATION

The recommendation is that the City Council adopt Council Bill # O-2005-17 on roll call vote.

## BACKGROUND

On November 15, 2005, the City Council adopted the Ordinance for the Development Agreement between the City and Lillian V. Miller for the construction of three single-family residences on north side of Cottonwood Road. The Council scheduled the second reading for the meeting on December 13, 2005.

*I:\Project Files\PPD's\PPD 04-11 Cottonwood-TPM 15792\DA CCStaff Report 12-13-05.doc*

ORDINANCE NO.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LOMA LINDA APPROVING AND ADOPTING THE DEVELOPMENT AGREEMENT BETWEEN LILLIAN V. MILLER, TRUSTEE, AND THE CITY OF LOMA LINDA

WHEREAS, Government Code Sections 65864 through 68569.5 provide the statutory authority for development agreements between municipalities and persons owning real property interest in the City; and

WHEREAS, the City has received an application to consider a development agreement and proceedings have been taken in accordance with City's rules and regulations, including, without limitation, a public hearing on the application by the Planning Commission and by the City Council; and

WHEREAS, notice of the City Council's intention to consider adoption of a development agreement has been given as provided by law; and

WHEREAS, in accordance with the California Environmental Quality Act, the project is exempt from CEQA Guidelines Section 15303(a) as a Class 3 Categorical Exemption for the construction of up to four single-family residences; and

WHEREAS, the City has considered all comments and correspondence, and the findings and conclusions made by the City pursuant to this Ordinance are based upon all of the oral and written evidence presented to it and taken as a whole.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF LOMA LINDA DOES ORDAIN AS FOLLOWS:

SECTION 1. FINDINGS. The City Council finds that the provisions of the development agreement are consistent with the General Plan and the Zoning Ordinance of the City of Loma Linda.

SECTION 2. APPROVAL OF DEVELOPMENT AGREEMENT. The City Council hereby approves and adopts the "Development Agreement between Lillian V. Miller, Trustee, and the City of Loma Linda" attached as Exhibit "A" and incorporated by reference. The City Manager and City Clerk of the City of Loma Linda are hereby authorized and directed to execute and attest, respectively, the Agreement on behalf of the City of Loma Linda.

SECTION 3. CEQA. The City hereby finds and ordains that:

A. The project is exempt from CEQA pursuant to Section 15303 (a) Guidelines.

B. There is no substantial evidence in light of the whole record that the approval and implementation of the Development Agreement would have a significant effect on the environment.

C. The City hereby directs staff to Prepare and file a Notice of Exemption with the Clerk of the County of San Bernardino and the Office of Planning and Research pursuant to 14 California Code of Regulations section 15062 (c) (1); and

SECTION 4. RECORDATION. The City Clerk is directed to transmit the development agreement to the County Recorder for recordation no later than ten (10) days after the adoption of this ordinance.

SECTION 5. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 6. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Loma Linda and to cause publication once in The Sun, the official newspaper of the City of Loma Linda, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2005, and adopted as an ordinance of the City of Loma Linda at a regular meeting of the City Council held on _____, 2005 by the following vote:

Ayes:
Noes:
Absent:
Abstain:

_____
Floyd Petersen, Mayor

ATTEST:

_____
Pamela Byrnes-O'Camb, City Clerk

RECORDING REQUEST BY, AND
WHEN RECORDED, MAIL TO:

City Clerk
City of Loma Linda
25541 Barton Road
Loma Linda, CA 92354

EXEMPT FROM FILING FEES. CAL. GOV'T CODE § 6103

(Space above this line for Recorder's use)

# DEVELOPMENT AGREEMENT

**BETWEEN**

**LILLIAN V. MILLER, TRUSTEE**

**AND**

**THE CITY OF LOMA LINDA**

***(Pursuant to California Government Code Sections 65864 – 65869.5 and City of Loma Linda Ordinance No. ____)***

**December 13, 2005**

**Tentative Parcel Map No. 15792-TPM**

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# DEVELOPMENT AGREEMENT

This Development Agreement (hereinafter "**Agreement**") is entered into effective as of the date approved by the City of Loma (hereinafter the "**Effective Date**") by the **CITY OF LOMA LINDA** (hereinafter "**City**"), and **LILLIAN V. MILLER, TRUSTEE OF THE LILLIAN V. MILLER FAMILY TRUST** (hereinafter, **"Owner"**).

## RECITALS

WHEREAS, Owner owns property located on the north side of Cottonwood Road, west of Mt. View Avenue, in the City of Loma Linda, also referred to as A.P.N. 0283-181-35, which property as combined (the "Property") consists of approximately 0.58 acres. The Property is described on **Exhibit "A"** attached and made a part of this Agreement by this reference; and

WHEREAS, Owner proposes to redevelop (or to cause to be redeveloped) the Property as a single family residential subdivision consisting of three (3) houses (the "**Project**"); and

WHEREAS, the Project has received approval for a mitigated negative declaration, general plan amendment, zone change and tentative tract map as well as a conditional use permit, Owner has applied to City for a subdivision map and this Agreement (the "**Entitlements**"); and

WHEREAS, City is authorized to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property, pursuant to Section 65864, et seq., of the Government Code; and

WHEREAS, Owner has requested City to enter into a development agreement and proceedings have been taken in accordance with the rules and regulations of City; and

WHEREAS, by electing to enter into this Agreement, City shall bind future City Councils of City by the obligations specified herein and limit the future exercise of certain governmental and proprietary powers of City; and

WHEREAS, the terms and conditions of this Agreement have undergone extensive review by City staff, the Planning Commission and the City Council and have been found to be fair, just and reasonable; and

WHEREAS, the best interests of the citizens of City and the public health, safety and welfare will be served by entering into this Agreement; and

WHEREAS, all actions taken and approvals given by City have been duly taken or approved in accordance with all applicable legal requirements for notice, public hearings, findings, votes, and other procedural matters; and

WHEREAS, this Agreement will eliminate uncertainty in planning and provide for the orderly development of the property subject to this Agreement, ensure progressive installation of necessary public and private improvements, provide for public services appropriate to the development of Owner's development project, and generally serve the purposes for which development agreements under Sections 65864, et seq. of the Government Code are intended; and

WHEREAS, on November 9, 2005, the Planning Commission of the City of Loma Linda (the "Planning Commission"), after giving notice pursuant to Government Code Sections 65854, 65854.5 and 65856, held a public hearing on Owner's application for this Agreement. On _____, 2005, the City Council of the City of Loma Linda (the "City Council"), after providing public notice as required by law, similarly held a public hearing to consider Owner's application for this Agreement; and

WHEREAS, the Planning Commission and the City Council have found that this Agreement and the Project contemplated hereby are consistent with the General Plan, the approved tentative map, related project approvals and all other applicable plans, rules, regulations and official policies of City; and

WHEREAS, in accordance with the requirements of CEQA (Public Resources Code Sections 21000 et seq., appropriate studies, analyses, reports or documents were prepared and considered by the Planning Commission and the City Council. After the Planning Commission and the City Council made appropriate findings, the City Council certified, by Minute Order No. LL-200_-____ adopted on _____, 200_, a Mitigated Negative Declaration (the "Environmental Clearance") for the Project in compliance with CEQA; and

WHEREAS, on _____, 2005, the City Council adopted Ordinance No. ____ (the "Ordinance") approving this Agreement with Owner.

## COVENANTS

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS.

1.1 Definitions. The following terms when used in this Agreement shall be defined as follows:

1.1.1 "Agency" means the Loma Linda Redevelopment Agency and the City as its successor in interest.

1.1.2 "Agreement" means this Development Agreement.

1.1.3 "City" means the City of Loma Linda, a political subdivision of the State of California.

1.1.4 "City Council" means the City Council of the City of Loma Linda.

1.1.5 "Development" means the improvement of the Property for the purposes of completing the structures, improvements and facilities comprising the Project including, but not limited to: grading; the construction of infrastructure and public facilities related to the Project whether located within or outside the Property; the construction of residential dwelling units, buildings and structures; and the installation of landscaping. "Development" does not include the maintenance, repair, reconstruction or redevelopment of any building, structure, improvement or facility after the construction and completion thereof.

1.1.6 "Development Approvals" means all permits and other entitlements for use subject to approval or issuance by City in connection with development of the Property including, but not limited to:

(a) General plan;

(b) Tentative and final subdivision and parcel maps;

(c) Conditional use permits, variances, site plot plans;

(d) Zoning amendments;

(e) Grading and building permits;

(f) Street and utility improvement permits.

1.1.7 "Development Exaction" means any requirement of City in connection with or pursuant to any Land Use Regulation or Development Approval for the dedication of land, the construction of improvements or public facilities, or the payment of fees in order to lessen, offset, mitigate or compensate for the impacts of development on the environment or other public interests. The term "Development Exaction" or "Exaction" shall not include City administrative, permit processing or other City-wide imposed development fees to cover the estimated or actual costs to City of processing applications for Development Approvals, Subsequent Development Approvals, or costs associated with preparation or implementation of this Development Agreement or for monitoring compliance with any Development Approvals which may be granted or issued pursuant to this Agreement.

1.1.8 "Development Plan" means the Development Approvals and the Land Use Regulations applicable to development of the Property, including but not limited to the Environmental Clearance and Tentative Tract Map No. 15792-TT.

1.1.9 "Effective Date" means the date this Agreement is approved by the City.

1.1.10 "Existing Development Approvals" means all Development Approvals approved or issued prior to the Effective Date and all other Approvals which are a matter of public record on the Effective Date.

1.1.11 "Existing Land Use Regulations" means all Land Use Regulations in effect on the Effective Date and all other Development Regulations which are a matter of public record on the Effective Date.

1.1.12 "Land Use Regulations" means all ordinances, resolutions, codes, rules, regulations and official policies of City governing the development and use of land, including, without limitation, the permitted use of land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement and construction standards and specifications applicable to the development of the Property. "Land Use Regulations" does not include any City ordinance, resolution, code, rule, regulation or official policy, governing:

(a) The conduct of businesses, professions, and occupations;

(b) Taxes and assessments;

(c) The control and abatement of nuisances;

(d) The granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property;

(e) The exercise of the power of eminent domain.

1.1.13 "Owner" means the persons and entities listed as Owner on page 1 of this Agreement and their successors in interest to all or any part of the Property.

1.1.14 "Mortgagee" means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device lender, and their successors and assigns.

1.1.15 "Project" means the development of the Property contemplated by the Development Plan as defined herein as such Plan may be further defined, enhanced or modified pursuant to the provisions of this Agreement.

1.1.16 "Property" means the real property described on **Exhibit "A"** to this Agreement and made a part herein by this reference.

1.1.17 "Subsequent Development Approvals" means all Development Approvals required subsequent to the Effective Date in connection with development of the Property.

1.1.18 "Subsequent Land Use Regulations" means any Land Use Regulations adopted and effective after the Effective Date of this Agreement.

2. GENERAL PROVISIONS.

2.1 Binding Effect of Agreement. The Property is hereby made subject to this Agreement. Development of the Property is hereby authorized and shall be carried out in accordance with the terms of this Agreement.

2.2 Ownership of Property. Owner represents and covenants that it is the Owner of the fee simple title to the Property.

2.3 Term. The term of this Agreement shall commence on the Effective Date and shall continue for a period of seven (7) years thereafter unless this term is modified or extended pursuant to the provisions of this Agreement.

2.4 Assignment.

2.4.1 Right to Assign. Owner shall have the right to sell, transfer or assign the Property in whole or in part (provided that no such partial transfer shall violate the Subdivision Map Act, Government Code Section 66410, et seq.) to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement; provided, however, that any such sale, transfer or assignment shall include the assignment and assumption of the rights, duties and obligations arising under or from this Agreement as applied to the Property in whole or in part and be made in compliance with the following conditions precedent:

(a) No sale, transfer or assignment of any right or interest under this Agreement shall be made unless made together with the sale, transfer or assignment of all or a part of the Property;

(b) Concurrent with any such sale, transfer or assignment, or within fifteen (15) business days thereafter, Owner shall notify City, in writing, of such sale, transfer or assignment and shall provide City with an executed agreement, in a form reasonably acceptable to City, by the purchaser, transferee or assignee and providing therein that the purchaser, transferee or assignee expressly and unconditionally assumes all the duties and obligations of Owner under this Agreement which apply to the Property in whole or in part being sold, transferred or assigned.

2.4.2 Termination of Agreement With Respect to Individual Lots upon Sale to Public and Completion of Construction. The provisions of Subsection 2.4.1 shall not apply to the sale or lease (for a period longer than one year) of any lot which has been finally subdivided and is individually (and not in "bulk") sold or leased to a member of the public or other ultimate user. Notwithstanding any other provisions of this Agreement, this Agreement shall terminate with respect to any lot and such lot shall be released and shall no longer be subject to this Agreement without the execution or recordation of any further document upon satisfaction of all of the following conditions:

(a) The lot has been finally subdivided and individually (and not in "bulk") sold or leased (for a period longer than one year) to a member of the public or other ultimate user; and,

(b) A Certificate of Occupancy has been issued for a building on the lot.

2.5 Amendment or Cancellation of Agreement. This Agreement may be amended or canceled in whole or in part only by written consent of all parties in the manner provided for in Government Code Section 65868.

2.6 Termination. This Agreement shall be deemed terminated and of no further effect upon the occurrence of any of the following events:

(a) Expiration of the stated term of this Agreement as set forth in Section 2.3.

(b) Completion of a referendum proceeding or entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement.

(c) Completion of the Project in accordance with the terms of this Agreement including issuance of all required occupancy permits and acceptance by City or applicable public agency of all required dedications.

Termination of this Agreement shall not constitute termination of any other land use entitlements approved for the Property prior to the Entitlements approved in connection with this Agreement. Upon the termination of this Agreement, no party shall have any further right or obligation hereunder except with respect to any obligation to have been performed prior to such termination or with respect to any default in the performance of the provisions of this Agreement which has occurred prior to such termination.

2.7 Notices.

(a) As used in this Agreement, "notice" includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder.

(b) All notices shall be in writing and shall be considered given either: (i) when delivered in person to the recipient named below, or (ii) on the date of delivery shown on the return receipt, after deposit in the United States mail in a sealed envelope as either registered or certified mail with return receipt requested, postage and postal charges prepaid, and addressed to the recipient named below. All notices shall be addressed as follows:

If to City:

City of Loma Linda
Attn: City Clerk
25541 Barton Road
Loma Linda, CA 92354
Facsimile: (909) 799-2890

With copies to:

Stradling Yocca Carlson & Rauth
Attention: Mark J. Huebsch, Esq.
660 Newport Center Drive, Suite 1600
Newport Beach, CA 92660
Facsimile: (949) 725-4100

and

Director of the Community Development Department
City of Loma Linda
25541 Barton Road
Loma Linda, CA 92354
Facsimile: (909) 799-2890

If to Owner:

Lillian V. Miller, Trustee
c/o University Realty
11156 Anderson Street
P.O. Box 788
Loma Linda, CA 92504
Facsimile: (909) 796-5105
Telephone: (909) 796-0156

(c) Either party may, by notice given at any time, require subsequent notices to be given to another person or entity, whether a party or an officer or representative of a party, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

3. DEVELOPMENT OF THE PROPERTY.

3.1 Right to Develop. Subject to the terms of this Agreement including the Reservations of Authority, Owner shall have a vested right to develop the Property in accordance with, and to the extent of, the Development Plan. The City shall issue all Subsequent Development Approvals required to complete the Project as contemplated by the Development Plan and consistent with the Entitlements. Except as otherwise provided in this Agreement, the permitted uses of the Property, the density and intensity of use, the maximum height and size of proposed buildings, and provisions for reservation of dedication of land for public purposes shall be those set forth in the Development Plan.

3.2 Subsequent Development Approvals. This Agreement shall not prevent City, in acting on Subsequent Development Approvals, from applying Subsequent Land Use Regulations which do not conflict with the Development Plan, nor shall this Agreement prevent City from denying or conditionally approving any Subsequent Development Approval on the basis of the Existing Land Use Regulations or any Subsequent Land Use Regulations not in conflict with the Development Plan.

3.3 Timing of Development. The parties acknowledge that Owner cannot at this time predict when or the rate at which phases of the Property will be developed. Such decisions depend upon numerous factors which are not within the control of Owner, such as market orientation and demand, interest rates, absorption, completion and other similar factors. Because the California Supreme Court held in Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 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 to prevail over such parties' agreement, it is the parties' intent to cure that deficiency by acknowledging and providing that Owner shall have the right to develop the Property in such order and at such rate and at such time as Owner deems appropriate within the exercise of its subjective business judgment, subject only to any timing or phasing requirements set forth in the Development Plan.

3.4 Changes and Amendments. The parties acknowledge that refinement and further development of the Project may require Subsequent Development Approvals and may demonstrate that changes are appropriate and mutually desirable in the Existing Development Approvals. In the event Owner finds that a change in the Existing Development Approvals is necessary or appropriate,

Owner shall apply for a Subsequent Development Approval to effectuate such change and City shall process and act on such application in accordance with the Existing Land Use Regulations, except as otherwise provided by this Agreement including the Reservations of Authority. Unless otherwise required by law, as determined in City's reasonable discretion, a change to the Existing Development Approvals shall be deemed "minor" and not require an amendment to this Agreement provided such change does not:

(a) Alter the permitted uses of the Property as a whole; or

(b) Increase the density or intensity of use of the Property as a whole; or

(c) Increase the maximum height and size of permitted buildings; or

(d) Delete a requirement for the reservation or dedication of land for public purposes within the Property as a whole; or

(e) Constitute a project requiring a subsequent or environmental impact report pursuant to Section 21166 of the Public Resources Code.

3.5 Fiber Optic Network Installation. If, and to the extent, Owner constructs and/or installs a fiber optic network ("**the Network**") throughout all or a portion of the Project, Owner shall be subject to the following terms and conditions:

(a) The Network shall be installed exclusively in easements dedicated to the City and/or dedicated for public utility compatible uses and purposes. To the extent that Owner installs the Network, or any portion thereof, in locations which have not been dedicated to the City and/or dedicated for public utility compatible uses and purposes, it shall provide a dedicated easement to the City coterminous with the location of the Network.

(b) The property in which the Network, or any portion thereof, is located shall be deemed "public rights-of-way" within the meaning of Section 621 of the Cable Communications Policy Act of 1984, as amended.

(c) Owner shall join Underground Alert and provide proper notification pursuant thereto in the event of any excavation relating to the Network.

(d) Owner shall install, at its sole expense, a separate conduit of no less than three (3) inches in diameter in all locations where the Network is located which separate conduit shall be dedicated to the City for its exclusive use (the "**City Conduit**"). Owner shall, in addition, install and dedicate sufficient connection points, manholes, potholes, and other appurtenances as designated by the City in writing to allow the City to reasonably access and utilize the City Conduit.

(e) Owner shall install and dedicate to the City, at its sole cost, twelve (12) strands of unactivated dark fiber throughout the entirety of the Network for remote water meter reading purposes and other municipal purposes (the "**City Fiber**"). The City Fiber shall be connected to all residential units and business establishments located within the Project and shall be accessible to the City from a central location to be designated by the City in writing.

(f) In the event that the Owner, or any successor or assignee thereof, intends to provide or does provide any form of video services on the Network, it shall apply for and obtain, prior to the provision of such video services a cable television franchise from the City and shall be bound by the City's cable television ordinance in effect at said time. Owner agrees not to provide, or allow to be provided, any form of video services on the Network prior to obtaining a cable television franchise from the City.

(g) In the event that Owner, or any successor or assignee thereof, intends to provide or does provide any services which are not video services on the Network, it shall comply with the City's telecommunications ordinance in effect at said time. Owner, its successors and assigns, agrees to be bound by any current or future telecommunications ordinance and agrees not to provide, or allow to be provided, any form of non-video services upon the Network without complying with the telecommunications ordinance, and the provisions thereof, including but not limited to, the payment of a franchise fee or license fee to the extent required by the telecommunications ordinance.

3.6 Reservations of Authority.

3.6.1 Limitations, Reservations and Exceptions. Notwithstanding any other provision of this Agreement, the following Subsequent Land Use Regulations shall apply to the development of the Property.

(a) Processing fees and charges imposed by City to cover the estimated actual costs to City of processing applications for Development Approvals or for monitoring compliance with any Development Approvals granted or issued.

(b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure.

(c) Regulations governing construction standards and specifications including, without limitation, the Uniform Building, Plumbing, Mechanical, Electrical, and Fire Codes as adopted and amended by the City of Loma Linda.

(d) Regulations which may be in conflict with the Development Plan but which are reasonably necessary to protect the public health and safety. To the extent possible, any such regulations shall be applied and construed so as to provide Owner with the rights and assurances provided under this Agreement.

(e) Regulations which are not in conflict with the Development Plan. Any regulation, whether adopted by initiative or otherwise, imposing a development moratorium or limiting the rate or timing of development of the Property shall be deemed to conflict with the Development Plan and shall therefore not be applicable to the Development of the Property.

3.6.2 Modification or Suspension by State or Federal Law. In the event that State or Federal laws or regulations, enacted after the Effective Date of this Agreement, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal

laws or regulations, provided, however, that this Agreement shall remain in full force and effect to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

3.7 Referenda and Moratorium. It is the express intent of City and Owner that as of the date of this Agreement, this Agreement is a legally binding contract which shall, to the extent permitted by law, prevail over the provisions of any subsequently enacted moratorium, statute, ordinance, limitation or other measure, whether or not enacted by City, or by voter initiative or referendum, and whether or not such initiative, moratorium, referendum, statute, ordinance, limitation or other measure relates, in whole or in part, to the rate, timing, sequencing or phasing of the development or construction of all or part of the Project or the Development Plan or affects Development Approvals which are issued by City.

In the event any initiative, moratorium, referendum, statute, ordinance, limitation or other measure is enacted subsequent to the Effective Date that would otherwise modify the development rights vested pursuant to this Agreement, Owner reserves the right to challenge any such enactment in a court of law should it become necessary to protect the development rights vested in Owner pursuant to the terms and conditions of this Agreement. Should any initiative or referendum be enacted which would preclude or make not feasible construction of all or any part of the Project, and should such enactment be determined by a court of competent jurisdiction to invalidate or prevail over all or any part of this Agreement, Owner shall have no recourse against City for any damage Owner might sustain as a result thereof so long as the City did not participate in nor support any such initiative or referendum, except City shall provide for and timely implement an equitable program to reimburse Owner for unused fees and for an equitable reimbursement for Public Improvements or fees theretofore made but not required by the extent of development as of the date of the enactment.

3.8 Exactions. All further applications for Development Approvals contemplated by this Agreement, or made in connection with the development, construction, use or operation of the Project hereunder, shall be processed in accordance with the Existing Rules and the standards, terms and conditions of this Agreement, except that (a) City shall not impose thereunder any further Exactions other than those called for under the Existing Approvals and/or as permitted under the provisions of this Agreement, and (b) such applications and Development Approvals thereunder shall not result in the imposition upon Owner of any additional requirements, other than those already imposed pursuant to the Development Approvals, or otherwise permitted under the provisions of this Agreement.

3.9 Tentative Subdivision Map Extension. Tentative subdivision map(s), heretofore or hereafter approved in connection with development of the Property, shall be granted an extension of time for up to the seven (7) year term of this Agreement.

3.10 City Fees.

3.10.1 Payment of Fees. Owner shall pay all City administrative, permit processing and other city-wide imposed development fees in accordance with the master City Fees Schedule in effect at the time fees are paid.

4. PUBLIC BENEFITS.

4.1 Intent. The parties acknowledge and agree that development of the Property will result in substantial public needs which will not be fully met by the Development Plan and further acknowledge and agree that this Agreement confers substantial private benefits on Owner which should be balanced by commensurate public benefits. Accordingly, the parties intend to provide consideration to the public to balance that private benefit conferred on Owner by providing more fully for the satisfaction of the public needs resulting from the Project.

4.2 Development Agreement Fee. Owner agrees to pay to City the corresponding amounts as set forth in **Exhibit "C,"** including escalation, as a Development Agreement Fee; Exhibit "C" is attached and made a part of this Agreement by this reference ("Development Agreement Fee Schedule"). The Development Agreement Fee shall be paid within two (2) business days after the first final building inspection at the Property on any dwelling unit or if certificate(s) of occupancy are issued, then not later than the issuance of such certificate(s).

4.3 Street Names. All streets and public facilities located in the Development shall require approval by the City Department of Community Development.

5. REVIEW FOR COMPLIANCE.

5.1 Periodic Review. The Director of the Community Development Department shall review this Agreement on or before the first anniversary of the Effective Date, in order to ascertain the good faith compliance by Owner with the terms of the Agreement. Owner shall submit a Monitoring Report, in a form acceptable to the Director of the Community Development Department, within thirty (30) days after written notice from the Director of the Community Development Department.

5.2 Procedure.

(a) During either a periodic review or a special review, Owner shall be required to demonstrate good faith compliance with the terms of the Agreement. The burden of proof on this issue shall be on Owner.

(b) Upon completion of a periodic review, the Director of the Community Development Department shall submit a report to the City Council setting forth the evidence concerning good faith compliance by Owner with the terms of this Agreement and his or her recommended finding on that issue.

(c) If the City Council finds on the basis of substantial evidence that Owner has complied in good faith with the terms and conditions of this Agreement, the review shall be concluded.

(d) If the City Council makes a preliminary finding that Owner has not complied in good faith with the terms and conditions of this Agreement, the City Council may modify or terminate this Agreement as provided in Section 5.3 and Section 5.4. Notice of default as provided under Section 6.3(b) of this Agreement shall be given to Owner prior to or concurrent with, proceedings under Section 5.3 and Section 5.4 or Section 6.5.

5.3 Proceedings Upon Modifications or Termination. If, upon a finding under Section 6.2, City determines to proceed with modification or termination of this Agreement, City shall give written notice to Owner of its intention so to do. The notice shall be given at least ten (10) calendar days prior to the scheduled hearing and shall contain:

(a) The time and place of the hearing; and

(b) A statement as to whether or not City proposes to terminate or to modify the Agreement; and

(c) Such other information as is reasonably necessary to inform Owner of the nature of the proceeding.

5.4 Hearing on Modification or Termination. At the time and place set for the hearing on modification or termination, Owner shall be given an opportunity to be heard. Owner shall be required to demonstrate good faith compliance with the terms and conditions of this Agreement. If the City Council finds, based upon substantial evidence, that Owner has not complied in good faith with the terms or conditions of the Agreement, the City Council may terminate this Agreement or modify this Agreement and impose such conditions as are reasonably necessary to protect the interests of the City. The decision of the City Council shall be final, subject only to judicial review pursuant to Section 1094.5 of the California Code of Civil Procedure.

5.5 Certificate of Agreement Compliance. If, at the conclusion of a Periodic Review, Owner is found to be in compliance with this Agreement, City shall, upon request by Owner, issue a Certificate of Agreement Compliance ("Certificate") to Owner stating that after the most recent Periodic Review and based upon the information known or made to the Director of the Community Development Department and the City Council that (1) this Agreement remains in effect and (2) Owner is not in default. The Certificate shall be in recordable form, shall contain information necessary to communicate constructive record notice of the finding of compliance. Owner may record the Certificate with the County Recorder.

## 6. DEFAULT AND REMEDIES.

6.1 Enforcement. Unless amended or canceled as herein provided, this Agreement is enforceable by any party to it notwithstanding a change in the applicable general or specific plan, zoning, subdivision, or building regulations adopted by the City which otherwise would alter or amend the rules, regulations, or policies governing permitted uses of the Property, density, design, improvement, and construction standards and specifications applicable to the Development Plan.

6.2 Events of Default. A party to this Agreement is in default under this Agreement upon the happening of one or more of the following events or conditions:

(a) If a warranty, representation or statement made or furnished by Owner to City or City to Owner is false or proves to have been false in any material respect when it was made;

(b) A finding and determination by City or Owner that upon the basis of substantial evidence the City or Owner has not complied in good faith with one or more of the terms or conditions of this Agreement.

6.3 Procedure Upon Default.

(a) Upon the occurrence of an event of default, the non-defaulting party may terminate or modify this Agreement in accordance with the procedures set fort in Subsection 6.3(b) below.

(b) The party claiming default shall provide written notice to the other party specifying the event of default and the steps the other party must take to cure the default. If, within thirty (30) days after the effective date of such notice, the other party does not commence all steps reasonably necessary to bring itself into compliance as required and thereafter diligently pursue such steps to completion, then the other party shall be deemed to be in default under the terms of this Agreement.

(c) All other remedies at law or in equity which are not otherwise provided for in this Agreement or in City's regulations governing development agreements are available to the parties to pursue in the event there is a breach.

6.4 Owner's Default. In the event of any default by Owner, in addition to any other remedies which may be available to City, whether legal or equitable, City shall be entitled to retain any fees, grants, dedications or improvements to public property which it may have received prior to Owner's default without recourse from Owner or its successors or assigns.

6.5 Indemnity. Owner shall indemnify and hold City, its officers, agents and employees and independent contractors free and harmless from any claims or liability based or asserted upon any act or omission of Owner, its officers, agents, employees, subcontractors and independent contractors for property damage, bodily injury, or death (Owner's employees included) or any other element or damage of any kind or nature, relating to or in any way connected with or arising from the activities provided in this Agreement. Owner shall defend, at its expense, including payment of attorneys' fees, City, its officers, agents, employees and independent contractors in any legal action based upon such alleged acts or omissions. City may in its discretion participate in the defense of any such legal action.

6.6 Environmental Indemnity. Owner shall defend, indemnify and hold City, its officers, agents, employees, and independent contractors free and harmless from any claims or liability based upon or arising from the presence of any Hazardous Substance on any of the Property located in the Project. As used herein, "Hazardous Substance" shall mean any "hazardous substances," "toxic substance," "hazardous waste," or "hazardous material" as defined in one or more Environmental Laws, whether now in existence or hereinafter enacted; provided, however, that "Hazardous Substance" shall (i) include petroleum and petroleum products (other than naturally occurring crude oil and gas) and (ii) include radioactive substances which are not naturally occurring, and (iii) include any friable or non-friable asbestos or asbestos-containing material contained in or affixed to a structure existing on the Property or otherwise located in, on or about the Property as of the date of this Agreement. As used herein, "Environmental Laws" shall mean any and all federal, state, municipal and local laws, statutes, ordinances, rules, and regulations which are in effect as of the date of this Agreement, or any and all federal, or state laws, statutes, rules and regulations which may hereafter be enacted and which apply to the Property or any part thereof, pertaining to the use, generation, storage, disposal, release, treatment or removal of any Hazardous Substances, including without limitation, the Comprehensive Environmental Response Compensation Liability Act of 1980, 42 U.S.C. Sections 9601, et seq., the Resource Conservation and Recovery Act of 1976, 42

U.S.C. Sections 6901, et seq., ("RCRA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Clean Water Act, 33 U.S.C. Section 1251, et seq., and California Health and Safety Code Section 25100, et seq. Owner acquired the Property pursuant to a real property purchase and sales agreement entered into with Craig R. Miller (the "**Purchase Agreement**"). To the extent that Owner is or may be entitled to defense or indemnification from one or more of the Prior Owners in connection with the presence of any such Hazardous Substances on the Property as provided in one or more of the Purchase Agreement, Owner shall assert any such defenses or indemnification rights on behalf of City, its officers, agents, employees, and independent contractors, or assign such rights to City, at City's option. However, Owner's obligation to defend, indemnify and hold harmless City and its officers, employees, agents or independent contractors from any claims or liability in connection with or arising from the presence of any Hazardous Substance on the Property or any portion thereof shall not be in any way limited or eliminated by the terms of the Purchase Agreement, and Owner's obligation hereunder shall survive the termination of this Development Agreement, no matter how caused. Notwithstanding anything herein to the contrary, Owner shall have no obligation to indemnify the City as herein provided with respect to any Hazardous Substances which are proven by Owner to have been first brought onto the Property subsequent to the sale by the Owner of the Property, or the affected portions thereof.

7. MORTGAGEE PROTECTION.

The parties hereto agree that this Agreement shall not prevent or limit Owner, in any manner, at Owner's sole discretion, from encumbering the Property or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Property. City acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with Owner with representatives of such lenders to negotiate in good faith any such request for interpretation or modification. City will not unreasonably withhold its consent to any such requested interpretation or modification provided such interpretation or modification is consistent with the intent and purposes of this Agreement. Any mortgagee of the Property shall be entitled to the following rights and privileges:

(a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Property made in good faith and for value, unless otherwise required by law.

(b) The Mortgagee of any mortgage or deed of trust encumbering the Property, or any part thereof, which Mortgagee has submitted a request in writing to the City in the manner specified herein for giving notices, shall be entitled to receive written notification from City or any default by Owner in the performance of Owner's obligations under this Agreement.

(c) If City timely receives a request from a Mortgagee requesting a copy of any notice of default given to Owner under the terms of this Agreement, City shall provide a copy of that notice to the Mortgagee within ten (10) days of sending the notice of default to Owner. The Mortgagee shall have the right, but not the obligation, to cure the default during the remaining cure period allowed such party under this Agreement.

(d) Any Mortgagee who comes into possession of the Property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such

foreclosure, shall take the Property, or part thereof, subject to the terms of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, no Mortgagee shall have any obligation or duty under this Agreement to perform any of Owner's obligations or other affirmative covenants of Owner hereunder, or to guarantee such performance; provided, however, that to the extent that any covenant to be performed by Owner is a condition precedent to the performance of a covenant by City, the performance thereof shall continue to be a condition precedent to City's performance hereunder, and further provided that any sale, transfer or assignment by any Mortgagee in possession shall be subject to the provisions of Section 2.4 of this Agreement.

8. MISCELLANEOUS PROVISIONS.

8.1 Recordation of Agreement. This Agreement and any amendment or cancellation thereof shall be recorded with the County Recorder by the City Clerk within the period required by Section 65868.5 of the Government Code.

8.2 Entire Agreement. This Agreement sets forth and contains the entire understanding and agreement of the parties, and there are no oral or written representations, understandings, or ancillary covenants, undertakings or agreements which are not contained or expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.

8.3 Severability. If any terms, provisions, covenants or conditions of this Agreement shall be determined invalid, void or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Agreement. Notwithstanding the foregoing, the provisions of Development of the Property set forth in Section 3 and the Public Benefits set forth in Section 4 of this Agreement, including the payment of the fees set forth therein, are essential elements of this Agreement and City and Owner would not have entered into this Agreement but for such provisions and if determined to be invalid, void or unenforceable, this entire Agreement shall be null and void and of no force and effect whatsoever.

8.4 Interpretation and Governing Law. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed by interpreting this Agreement, all parties having been represented by counsel in the negotiation and preparation hereof.

8.5 Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

8.6 Singular and Plural. As used herein, the singular of any word includes the plural.

8.7 Time of Essence. Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.

8.8 Waiver. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

8.9 No Third Party Beneficiaries Other Than Agency. The Agency shall be a third party beneficiary of this Agreement. Excepting for the Agency, there shall be no third party beneficiaries of this Agreement. No person other than the parties and the Agency shall have any right of action based upon any provision of this Agreement.

8.10 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 by floods, earthquakes, other Acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond the party's control (including the party's employment force), government regulations, court actions (such as restraining orders or injunctions), or other causes beyond the party's control. If any such events shall occur, the term of this Agreement and the time for performance by either party of any of its obligations hereunder may be extended by the written agreement of the parties for the period of time that such events prevented such performance, provided that the terms of this Agreement shall not be extended tinder any circumstances for more than two (2) years as a result of any such force majeure event.

8.11 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed by such benefited party.

8.12 Successors in Interest. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the parties to this Agreement. All provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do or refrain from doing some act hereunder with regard to development of the Property: (a) is for the benefit of and is a burden upon every portion of the Property; (b) runs with the Property and each portion thereof; and, (c) is binding upon each party and each successor in interest during ownership of the Property or any portion thereof.

8.13 Counterparts. This Agreement may be executed by the parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the parties had executed the same instrument.

8.14 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by a party hereto 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 San Bernardino, State of California, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

8.15 Project as a Private Undertaking. It is specifically understood and agreed by and between the parties hereto that the development of the Project is a private development, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this

Agreement. The only relationship between City and Owner is that of a government entity regulating the development of private property and the Owner of such property.

8.16 Further Actions and Instruments. Each of the parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. Upon the request of either party at any time, the other party shall promptly execute, with acknowledgment or affidavit if reasonably required, and file or record such required instruments and writings and take any actions as may be reasonably necessary under the terms of this Agreement to carry out the intent and to fulfill the provisions of this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

8.17 Authority to Execute. The person(s) executing this Agreement on behalf of Owner warrants and represents that he, she or they has/have the authority to execute this Agreement on behalf of his, her or their corporation, partnership or business entity and warrants and represents that he, she or they has/have the authority to bind Owner to the performance of its obligations hereunder.

8.18 Cooperation. City agrees that it shall accept for processing and promptly take action on all applications, provided they are in a proper form and acceptable for required processing, for discretionary permits, tract or parcel maps, or other land use entitlements for development of the Project in accordance with the provisions of this Agreement. City shall cooperate with Owner in providing expeditious review of any such applications, permits or land use entitlements and, upon request and payment of any costs and/or extra fees associated therewith by Owner, City shall assign such review to Project planner(s), building inspector(s), other staff personnel and/or contract planning or engineering consultants as required to insure the expeditious review, processing and completion of the Project.

*[Signature page follows]*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date as described above.

**"CITY"**

THE CITY OF LOMA LINDA, a municipal corporation of the State of California

By: _____
Mayor

ATTEST:

_____
Pamela Byrnes-O'Camb, City Clerk

APPROVED AS TO FORM:

_____
Stradling Yocca Carlson & Rauth
By: Mark J. Huebsch, Esq.

**"OWNER"**

LILLIAN V. MILLER, TRUSTEE OF THE LILLIAN V. MILLER FAMILY TRUST

By: Lillian V. Miller
Lillian V. Miller
Its: Trustee

*ALL SIGNATURES ARE TO BE ACKNOWLEDGED BEFORE A NOTARY PUBLIC*

STATE OF CALIFORNIA )
) ss.
COUNTY OF San Bernardino )

On Sept. 22, 2005, before me, Sarah Marie Ricco, Notary Public,
(Print Name of Notary Public)

personally appeared Lillian N. Miller

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

TCC1 SARAH MARIE RICCO
COMM. #1403234
NOTARY PUBLIC - CALIFORNIA
SAN BERNARDINO COUNTY
MY COMM. EXPIRES MARCH 2, 2007 TCC1

WITNESS my hand and official seal.

Sarah Marie Ricco
Signature Of Notary

**OPTIONAL**

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

**CAPACITY CLAIMED BY SIGNER**

☐ Individual
☐ Corporate Officer

Title(s)

☐ Partner(s) ☐ Limited ☐ General
☐ Attorney-In-Fact
☐ Trustee(s)
☐ Guardian/Conservator
☐ Other: _____

Signer is representing:
Name Of Person(s) Or Entity(ies)

**DESCRIPTION OF ATTACHED DOCUMENT**

Title Or Type Of Document

Number Of Pages

Date Of Documents

Signer(s) Other Than Named Above

STATE OF CALIFORNIA )
) ss.
COUNTY OF _____ )

On _____ , before me, _____ , Notary Public,
(Print Name of Notary Public)

personally appeared _____

☐ personally known to me

**-or-**

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

WITNESS my hand and official seal.

_____
Signature Of Notary

## OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

### CAPACITY CLAIMED BY SIGNER

☐ Individual
☐ Corporate Officer

_____
Title(s)

☐ Partner(s) ☐ Limited
☐ General
☐ Attorney-In-Fact
☐ Trustee(s)
☐ Guardian/Conservator
☐ Other: _____

Signer is representing:
Name Of Person(s) Or Entity(ies)

_____

_____

### DESCRIPTION OF ATTACHED DOCUMENT

_____
Title Or Type Of Document

_____
Number Of Pages

_____
Date Of Documents

_____
Signer(s) Other Than Named Above

# EXHIBIT "A"

## DESCRIPTION OF PROPERTY

[To Come]

Assessor's Parcel No.: 0283-181-35.

# EXHIBIT "B"

## LAND USE MAP

## EXHIBIT "C"

## DEVELOPMENT AGREEMENT FEE SCHEDULE[1]

A. $2,677 per unit (multiplied by three units) .....$8,031.00[1,2]

[1] All amounts set forth shall increase three percent (3%) as of the first anniversary of the Effective Date and each anniversary thereafter.

[2] Amounts shown are based upon a 3-unit development with each house (or parcel) to have four (4) or fewer bedrooms. If the number of units or the number of bedrooms is modified, higher per unit fees may apply based upon a schedule maintained by the City on file with the City Clerk.