

When Recorded Mail to:

City of Cotati
Community Development Department
201 West Sierra Avenue
Cotati, CA 94931

EXEMPT FROM FILING FEES
GOVERNMENT CODE §§ 6103, 27383

(Space above for Recorder's Use)

DEVELOPMENT IMPACT FEE DEFERRAL AGREEMENT

between

THE CITY OF COTATI,
a California municipal corporation

and

_____ (_____) _____

This Development Impact Fee Deferral Agreement ("**Deferral Agreement**") is entered into effective _____, 20__ ("**Effective Date**") by and between the City of Cotati, a California municipal corporation ("**City**"), and _____ doing business as _____, ("**Owner**"). City and Owner are hereinafter collectively referred to as the "**Parties.**"

RECITALS

A. Owner is the fee simple owner of that certain real property located at _____ in Cotati, California ("**Property**") and more particularly described in Exhibit A attached hereto and incorporated herein by reference.

B. Owner desires to develop a(n) "(_____)" project on the Property, consisting of approximately ____ square feet or ____ units ("**Project**").

C. Owner has applied to the City for those permits and entitlements necessary for construction of the Project.

D. In connection with the granting of such permits and entitlements for the Project, the City has imposed certain development impact fees and charges ("**Impact Fees**").

E. The City has established an Impact Fee Deferral Program ("**Deferral Program**") as identified in Housing Element Program 2-7 and Chapter 4.14 of the Cotati Municipal Code, pursuant to which, subject to compliance with the terms and conditions thereof, the payment of certain Impact Fees in an amount of Ten Thousand Dollars (\$10,000) or more may be deferred until the earlier of (i) final inspection or (ii) the date the City issues the first Certificate of Occupancy for the Project; Provided, however, that such Impact Fees shall not be deferred for more than two (2) years from the date when Impact Fees would otherwise be due and payable.

F. Owner has submitted an application for the Deferral Program ("**Application**") requesting that the City defer the collection of certain Impact Fees imposed on the Project in order to make the Project financially viable.

G. The City has determined that this Project is eligible for the Deferral Program and will generally contribute to the economic and commercial well-being of the City and its residents.

H. The City has agreed, subject to the terms, conditions and limitations of this Deferral Agreement, to defer payment of certain Impact Fees payable with respect to the Project as more particularly set forth in this Deferral Agreement.

I. The City shall cause this Deferral Agreement to be recorded in the Official Records of the County of Sonoma.

AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows.

1. **Deferred and Reduced Fees.**

(a) The City hereby agrees, subject to the terms, conditions and limitations of this Deferral Agreement, to defer payment of the following Impact Fees due for or in connection with development of the Project (“**Deferred Fees**”):

Fee Type	Estimated Amount
Affordable Housing In-Lieu Fees	
Bed Tax	
Downtown Specific Plan (DSP) Recovery	
Linkage Fees	
Park In-Lieu Fees	
Traffic Impact Fees	
Wastewater Capacity Fees	
Water Capacity Fees	
Total	

The Deferred Fees listed above are an estimate based on the Impact Fees in effect as of the Effective Date of this Deferral Agreement. Owner shall be responsible to pay the Impact Fees in effect at the Due Date. At the time of payment, the total Deferred Fees shall be reduced by the City’s Grant Funds (“**Deferred Fees**”).

(b) Owner shall pay the total amount of the Deferred Fees to the City upon the earlier of (i) final inspection, or (ii) the date the City issues the first Certificate of Occupancy for the Project (“**Due Date**”) except Water and/or Wastewater Capacity Fees, which shall be paid upon request for connection to these utilities, installation of a utility meter allowing connection to these utilities or occupancy of the structure is granted, whichever comes first. Owner shall

have the right to prepay the Deferred Fees at any time and from time to time, without penalty or premium. Notwithstanding the foregoing, unless the City agrees otherwise in writing, the total amount of the Deferred Fees shall be due and payable upon the occurrence of any of the following events:

(i) The sale, transfer, conveyance or further encumbrance by Owner of any portion of, or interest in, the Property or Project, or upon a change in direct or indirect majority ownership of Owner or a change in control of Owner; or

(ii) The occurrence of an Event of Default under this Deferral Agreement.

2. **Conditions to Deferral.** The City shall defer the payment of the Impact Fees upon satisfaction of each of the following conditions:

- (a) The Owner's execution and delivery to the City of this Deferral Agreement, the Note, and the Deed of Trust;
- (b) Recordation of the Deed of Trust in the Official Records of Sonoma County;
- (c) The Owner's delivery to the City of a Preliminary Title Report for the Property evidencing that there are no liens senior to City's Deed of Trust, except for those senior liens approved by the City;
- (d) Owner's delivery to the City of each of the following: (i) certificate of good standing, certified by the Secretary of State indicating that Owner is properly organized and authorized to do business in the State of California, (ii) a certified resolution indicating that Owner has authorized this transaction and that the persons executing the Deferred Fee Documents (defined below) on behalf of Owner have been duly authorized to do so, and (iii) a certified copy of Owner's articles of incorporation and bylaws; and
- (e) No material adverse change as determined by the City in its reasonable judgment shall have occurred in the condition of the Property or in the financial or other condition of Owner since the date of Owner's application for the Program.

3. **Security.** The Owner's obligation to pay the Deferred Fees shall be evidenced by a Promissory Note ("**Note**") that is substantially in the form attached hereto as Exhibit B and secured by a Deed of Trust ("**Deed of Trust**") on the Property that is substantially in the form attached hereto as Exhibit C, both to be dated as of the Effective Date and executed by Owner in favor of the City and delivered to the City, and each of which is incorporated herein by

reference. Owner's Deferral Program Application, this Deferral Agreement, the Note and the Deed of Trust are hereinafter collectively referred to as the "**Deferred Fee Documents.**"

4. **Subordination.** At the Owner's request, the City may subordinate the Deed of Trust to the liens securing loans senior to Owner's obligation to the City ("**Senior Loans**"), but only if all of the following conditions are satisfied:

- (a) All of the proceeds of the Senior Loans, less any transaction costs, must be used to provide acquisition, construction and/or permanent financing for the Project;
- (b) The Owner must demonstrate to the City's satisfaction that subordination of the Deed of Trust is necessary to secure adequate acquisition, construction and/or permanent financing to ensure the viability of the Project;
- (c) The subordination agreement(s) must be structured to minimize the risk that the Deed of Trust would be extinguished as a result of a foreclosure by the holder of any Senior Loan. To satisfy this requirement, the subordination agreement must provide the City with adequate rights to cure any defaults by Owner, including: (i) providing the City with copies of any notices of default at the same time and in the same manner as provided to Owner; and (ii) providing the City with a reasonable period to cure any default;
- (d) The subordination(s) described in this Section may be effective only during the original term of the Senior Loan(s) and any extension of its term approved in writing by the City;
- (e) No subordination may limit the effect of the Deed of Trust before a foreclosure, nor require consent of the holder of the Senior Loan in order for the City to exercise any remedies under any of the documents evidencing the Deferred Fees;
- (f) Upon a determination by the City Manager that the conditions in this Section have been satisfied, the City Manager or his/her designee is authorized to execute a subordination agreement, in a form approved by the City Attorney, without the necessity of any further City Council action or approval.

5. **Representations and Warranties.** Owner makes the following representations, warranties and covenants and acknowledges that the City is relying thereupon in agreeing to defer payment of the Reduced Deferred Fees:

(a) Owner is a limited liability corporation duly organized and in good standing under the laws of the State of California. The person(s) executing this Deferral Agreement on behalf of Owner have been duly authorized to do so. Owner has all requisite power and authority to execute, deliver and perform its obligations under the Deferred Fee Documents. Owner is the fee simple owner of the Property, subject only to liens, encumbrances, easements, restrictions, conditions, and other matters of record or disclosed in writing to the City.

(b) The execution of the Deferred Fee Documents and Owner's performance thereunder do not and will not result in a breach of or constitute a default under any agreement, indenture or other instrument to which Owner is a party or by which Owner may be bound.

(c) The Deferred Fee Documents and the transactions contemplated thereby have each been duly authorized by Owner, and when executed and delivered will each constitute a valid and binding obligation of Owner, enforceable in accordance with the respective terms thereof.

(d) There are no pending, or to Owner's knowledge, threatened, actions or proceedings before any court or administrative agency which may adversely affect the financial condition or operation of Owner or Owner's interest in the Property.

(e) Owner is in compliance in all material respects with all local, state and federal laws, rules, regulations, orders and decrees which are applicable to the Property, the Project or to Owner in relation thereto ("**Applicable Laws**") including without limitation, all environmental, health and safety and employment laws. Owner has received no notice from any governmental authority regarding any threatened or pending zoning, building, fire, or health code violation or violation of other governmental regulations concerning the Property that has not been corrected, and no condition on the Property violates any Applicable Law.

(f) No representation or warranty made by Owner in this Deferral Agreement or in the Deferred Fee Documents contains any untrue statement of a material fact or omits to state any material fact necessary to make the statements therein not misleading. There is no fact known to Owner which has or might reasonably be anticipated to have a material adverse effect on the business, assets, financial condition of Owner which has not been disclosed to the City in writing.

6. **Affirmative Covenants.**

(a) Owner covenants to punctually pay the principal balance of the Note and interest (if any) accrued thereon at the times and place and in the manner specified in the Note.

(b) Owner covenants to comply with all Applicable Laws.

(c) Owner shall maintain and keep in force at Owner's expense, insurance coverage with respect to the Property in accordance with the requirements set forth in Exhibit D attached hereto and incorporated herein.

(d) Owner shall keep the Property and any improvements thereon, and the personal property used in Owner's operations, in good repair and condition, and from time to time make necessary repairs, renewals and replacements thereto so that the Property and improvements shall be preserved and maintained.

(e) Owner shall pay and discharge when due any and all indebtedness, obligations, assessments, taxes, including federal and state payroll and income taxes which are the obligations of Owner in relation to the Property except those that Owner may in good faith contest or as to which a bona fide dispute may arise, provided provision is made to the satisfaction of the City for eventual payment thereof in the event that it is found that the same is an obligation of Owner.

7. **Rights Not Granted Under Deferral Agreement.** This Deferral Agreement is not, and shall not be construed to be, an approval or an agreement to issue permits or a granting of any right or entitlement by the City concerning the construction of the Project, or any other project, development or other construction by Owner within the City. This Deferral Agreement does not, and shall not be construed to, exempt Owner from paying any fees for any permits, licenses or other approvals which may be required by the City, and (other than the Reduced Deferred Fees) at the time required by the City, concerning the construction of the Project, or any other project, development or other construction by Owner within the City. This Deferral Agreement does not, and shall not be construed to, exempt Owner in any way from the requirement to obtain permits and/or other discretionary or non-discretionary approvals as may be necessary for the development, maintenance or operation of the Project, or any other project, development or other construction by Owner within the City. This Deferral Agreement does not, and shall not be construed to, exempt Owner or the Property from the application and/or exercise of the City's power of eminent domain, or its police powers including, but not limited to, the regulation of land uses, and the taking of any actions necessary to protect the health, safety and welfare of its citizenry.

8. **Default.**

(a) **Events of Default.** Each of the following events shall constitute an event of default hereunder ("**Event of Default**"):

(i) Owner fails to pay when due any principal payment or other sum due under this Deferral Agreement or the Note;

(ii) Any representation or warranty contained in the Application, this Deferral Agreement, the Note, the Deed of Trust or any document furnished in connection with the foregoing proves to have been false or misleading in any material adverse respect when made;

(iii) A default has been declared by a lender under any loan secured by a deed of trust on the Project;

(iv) Pursuant to or within the meaning of the United States Bankruptcy Code or any other federal or state law relating to insolvency or relief of debtors (a Bankruptcy Law): (1) Owner (i) commences a voluntary case or proceeding, (ii) consents to the entry of an order for relief against it in an involuntary case, (iii) applies for or consents to the appointment of a trustee, receiver, assignee, liquidator or similar official, (iv) makes an assignment for the benefit of its creditors, or (v) admits in writing its inability to pay its debts as they become due; or (2) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that (i) is for relief against Owner in an involuntary case, (ii) appoints a trustee, receiver, assignee, liquidator or similar official for Owner or substantially all of Owner's assets, (iii) orders the liquidation of Owner, or (iv) issues or levies a judgment, writ, warrant of attachment or similar process against the Property or any other property of Owner, and in each case the order or decree is not released, vacated, dismissed or fully bonded within sixty (60) days after its issuance;

(v) An Event of Default is declared under the Note or the Deed of Trust, subject to the expiration of any applicable cure period set forth in such documents;

(vi) Owner defaults in the performance of any term, provision, covenant or agreement (other than an obligation enumerated in this Section 6) contained in this Deferral Agreement or unless a shorter cure period for such default is specified herein, the default continues for ten (10) days in the event of a monetary default or thirty (30) days in the event of a nonmonetary default after the date upon which the City shall have given written notice of the default to Owner (or such longer time as the City may agree upon in writing), provided that in each case Owner commences to cure the default within thirty (30) days and thereafter prosecutes the curing of such default with due diligence and in good faith; or,

(vii) Owner allows or permits occupancy or resale for the purpose of occupancy without payment of the Deferred Fees.

(b) Rights Upon Event of Default. Upon the occurrence of an Event of Default, the City shall have all remedies available to it under law or equity, including, but not limited to the following, and the City may, at its election, without notice to or demand upon Owner, except for notices or demands required by law or expressly required pursuant to this Deferral Agreement, exercise one or more of the following remedies:

- (i) Seek specific performance to enforce the terms of this Deferral Agreement;
- (ii) Accelerate and declare the balance of the Note and interest (if any) accrued thereon immediately due and payable;
- (iii) Foreclose on the Property pursuant to the Deed of Trust; and
- (iv) Pursue any and all other remedies available under law to enforce the terms of this Deferral Agreement and the City's rights hereunder.

(c) Cumulative Remedies. Each of the remedies provided herein is cumulative and not exclusive of, and shall not prejudice any other remedy provided herein. The City may exercise from time to time any rights and remedies available to it under applicable law, in addition to, and not in lieu of, any rights and remedies expressly granted in this Deferral Agreement or in any other instrument or notice.

9. Indemnification. Owner shall indemnify, defend (with counsel approved by the City), and hold harmless the City and its elected and appointed officers, agents, employees, consultants and contractors (collectively, the **Indemnitees**"), from and against, and shall pay on demand, any and all losses, liabilities, damages, costs, claims, demands, penalties, deficiencies, fines, orders, judgments, actions, suits, judicial or administrative proceedings, injunctive or other relief, expenses and charges (including attorneys' fees and court costs) (collectively "**Claims**") arising directly or indirectly in any manner in connection with or as a result of (a) any breach of Owner's covenants under the Deferred Fee Documents, (b) any failure of Owner's representations and warranties to be true and correct in all material respects when made, (c) injury or death to persons or damage to property or other loss occurring on the Property, whether caused by the negligence or any other act or omission of Owner or any other person or by negligent, faulty, inadequate or defective design, building, construction or maintenance or any other condition or otherwise, or (d) any claim, demand or cause of action, or any action or other proceeding, whether meritorious or not, brought or asserted against any Indemnitee which relates to or arises out of the Property, the Project, the Deferred Fees, the Deferred Fee Documents, or any transaction contemplated thereby, or any failure of Owner to comply with all Applicable Laws in connection with the Property and the Project, provided that no Indemnitee shall be entitled to indemnification under this Section for matters caused by such Indemnitee's gross negligence or willful misconduct. The obligations of Owner under this Section shall survive the expiration or termination of this Deferral Agreement and the making and repayment of the Deferred Fees.

10. Successors and Assigns. Owner may not assign this Deferral Agreement, in whole or in part, without the prior written consent of the City, and any attempt to make such assignment shall be null and void. This Deferral Agreement shall be binding on any and all successors and permitted assigns of the Parties.

11. **Governing Laws.** This Deferral Agreement shall in all respects be construed and enforced in accordance with laws of the State of California without regard to principles of conflicts of laws. The Parties consent to the jurisdiction of any federal or state court in the jurisdiction in which the Property is located (the “**Property Jurisdiction**”). Owner agrees that any controversy arising under or in relation to this Deferral Agreement or any other Deferred Fee Document shall be litigated exclusively in courts having jurisdiction in the Property Jurisdiction. Owner irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise.

12. **Notices.** All notices required to be delivered under this Deferral Agreement or applicable law shall be delivered by personal delivery, express mail or by United States mail, certified, postage prepaid. Notices personally delivered or delivered by express mail shall be deemed received upon receipt. Notices delivered by certified mail shall be deemed received the earlier of three (3) days following deposit of such notice with the United States Postal Service or actual receipt. Notices shall be sent as follows:

To City: City of Cotati
 201 West Sierra Avenue
 Cotati, CA 94931
 Attn: Community Development Director

To Owner: _____

 Attn: _____

13. **Attorneys' Fees and Costs.** In the event any legal action is commenced to interpret or to enforce the terms of this Deferral Agreement or to collect damages as a result of any breach thereof, the Party prevailing in any such action shall be entitled to recover against the other Party all reasonable attorneys' fees and costs incurred in such action.

14. **Entire Agreement.** This Deferral Agreement, together with Exhibits A-D, which are incorporated herein by reference, constitutes the entire agreement of the City and Owner and supersedes all previous agreements, oral or written, on the subject matter of this Deferral Agreement.

15. **Modification.** This Deferral Agreement shall be amended or modified only by an agreement in writing signed by each of the Parties.

16. **Further Acts.** The Parties agree to execute such additional documents and to take such further actions as are reasonably necessary to accomplish the objectives and intent of this Deferral Agreement.

17. **Severability.** If any provision or clause of this Deferral Agreement or any application of it to any person, firm, organization, partnership or corporation is held invalid, such invalidity shall not affect any other provision of this Deferral Agreement, and the Deferral Agreement shall be construed as if such provisions or clauses did not exist.

18. **Captions; Interpretation; Time.** The captions of the Sections of this Deferral Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions herein contained. The language of this Deferral Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any Party. Time is of the essence in the performance of this Deferral Agreement.

19. **Counterparts.** This Deferral Agreement may be executed in multiple counterparts each of which shall be an original and all of which taken together shall constitute one and the same instrument.

20. **No Third Party Beneficiary.** This Deferral Agreement and the performance of the City's and the Owner's obligations hereunder are for the sole and exclusive benefit of the City and the Owner. No person or entity who or which is not a signatory to this Deferral Agreement shall be deemed to be benefited or intended to be benefited by any provision hereof, and no such person or entity shall acquire any rights or causes of action against either the City or the Owner hereunder as a result of the City's or the Owner's performance or nonperformance of their respective obligations under this Deferral Agreement.

21. **Assignment.** This Deferral Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns. Notwithstanding the foregoing, the City's obligation to enter into this Deferral Agreement is personal to Owner, and shall not be assignable by Owner by operation of law or otherwise absent the express written consent of the City, and any such assignment by operation of law or otherwise shall be void.

22. **Survival.** All representations made by Owner herein and the provisions of Section 9 hereof shall survive the expiration or earlier termination of this Deferral Agreement. The representations of Owner made herein have been or will be relied upon by the City, notwithstanding any investigation made by the City or on its behalf.

***[SIGNATURES ON FOLLOWING PAGE; SIGNATURES OF CITY AND
OWNER MUST BE NOTARIZED.]***

IN WITNESS WHEREOF, the Parties have each caused this Deferral Agreement to be duly executed as of the date first written above.

OWNER

By: _____

Its: _____

CITY OF COTATI

a California municipal corporation

By: _____
Damien O’Bid, City Manager

ATTEST:

Kevin Patterson, Deputy City Clerk

APPROVED AS TO FORM:

By: _____
John Bakker, City Attorney

EXHIBIT A

PROPERTY

(attach legal description)

EXHIBIT B

NOTE

EXHIBIT C
DEED OF TRUST

EXHIBIT D

INSURANCE REQUIREMENTS

(a) Owner and all contractors working on behalf of Borrower on the Project shall maintain a commercial general liability policy in the amount of One Million Dollars (\$1,000,000) each occurrence, Two Million Dollars (\$2,000,000) annual aggregate, or such other policy limits as the City may require in its reasonable discretion, including coverage for bodily injury, property damage, products, completed operations and contractual liability coverage. Such policy or policies shall be written on an occurrence basis and shall name the Indemnitees as additional insureds.

(b) Owner and all contractors working on behalf of Owner shall maintain a comprehensive automobile liability coverage in the amount of One Million Dollars (\$1,000,000), combined single limit including coverage for owned and non-owned vehicles and shall furnish or cause to be furnished to the City evidence satisfactory to the City that Owner and any contractor with whom Owner has contracted for the performance of work on the Property or otherwise pursuant to this Deferral Agreement carries workers' compensation insurance as required by law. Automobile liability policies shall name the Indemnitees as additional insureds.

(c) Upon commencement of construction work and continuing until issuance of a Certificate of Completion, Owner and all contractors working on behalf of Owner shall maintain a policy of builder's all-risk insurance in an amount not less than the full insurable cost of the Project on a replacement cost basis naming the City as loss payee.

(d) Borrower shall maintain property insurance covering all risks of loss (other than earthquake), including flood (if required) for one hundred percent (100%) of the replacement value of the Project with deductible, if any, in an amount acceptable to the City, naming the City as loss payee.

(e) Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance shall be placed with insurers with a current A.M. Best's rating of no less than A: VII. The Commercial General Liability and comprehensive automobile policies required hereunder shall name the Indemnitees as additional insureds. Builder's Risk and property insurance shall name the City as a loss payees as its interests may appear.

(f) Prior to commencement of construction work, Owner shall furnish the City with certificates of insurance in form acceptable to the City, evidencing the required insurance coverage and duly executed endorsements evidencing such additional insured status. The certificates shall contain a statement of obligation on the part of the carrier to notify the City of any material adverse change, cancellation, termination or non-renewal of the coverage at least thirty (30) days in advance of the effective date of any such material adverse change, cancellation, termination or non-renewal.

(g) If any insurance policy or coverage required hereunder is canceled or reduced, Owner shall, within fifteen (15) days after receipt of notice of such cancellation or reduction in coverage, but in no event later than the effective date of cancellation or reduction, file with the City a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies. Upon failure to so file such certificate, the City may, without further notice and at its option, procure such insurance coverage at Owner's expense, and Owner shall promptly reimburse the City for such expense upon receipt of billing from the City.

(h) Coverage provided by Owner shall be primary insurance and shall not be contributing with any insurance, or self-insurance maintained by the City, and the policies shall so provide. The insurance policies shall contain a waiver of subrogation for the benefit of the City. Owner shall furnish the required certificates and endorsements to the City prior to the commencement of construction of the Project, and shall provide the City with certified copies of the required insurance policies upon request of the City.