



THE CITY OF SAN DIEGO

April 8, 2016

Mr. Ryan Gatchalian, Vice-President
Lennar Communities, Inc.
95 Enterprise, Suite 200
Aliso Viejo, CA 92656

Dear Mr. Gatchalian:

Subject: Assignment and Assumption of the Participation Agreement for the Design and Construction of the Harbor Drive Trunk Sewer Upsizing, Transmittal of Duplicate Original Document H166665-A&A; **Notice to Proceed**

On April 7, 2016, the City of San Diego executed the subject Assignment and Assumption Agreement. This action constitutes the Notice of Award.

A Duplicate Original of the Assignment and Assumption Agreement document is enclosed herein for Lennar Communities' file.

If there are any questions, please contact Leonard Wilson, Senior Civil Engineer, at (619) 466-5421.

Sincerely,

W. Downs Prior
Principal Contract Specialist
Public Works Contracts

Enclosure: Duplicate Original Agreement H166665-A&A

DBP/wdp

cc: Leonard Wilson, Senior Civil Engineer MS 401
PWC file

G:\contract\dbp\P&C NTP - Lennar Comm Participation Agreement Design Constrc Harbor Dr Trunk Swr Upsizing Assign Assumpt

**Public Works Department
Contracts Division**

1010 Second Avenue, Suite 1400, MS 614C • San Diego, CA 92101
(619) 533-3450 • Fax (619) 533-3633





THE CITY OF SAN DIEGO

April 8, 2016

Mr. John Kratzer, President
Ballpark Village, LLC
12250 El Camino Real, Suite 160
San Diego, CA 92123

Dear Mr. Kratzer:

Subject: Assignment and Assumption of the Participation Agreement for the Design and Construction of the Harbor Drive Trunk Sewer Upsizing, Transmittal of Duplicate Original Document H166665-A&A; **Notice to Proceed**

On April 7, 2016, the City of San Diego executed the subject Assignment and Assumption Agreement. This action constitutes the Notice of Award.

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**Public Works Department
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H166665

ORIGINAL

**ASSIGNMENT AND ASSUMPTION OF PARTICIPATION AGREEMENT FOR THE
DESIGN AND CONSTRUCTION OF THE HARBOR DRIVE TRUNK SEWER
UPSIZING**

This Assignment and Assumption of Participation Agreement for the Design and Construction of the Harbor Drive Trunk Sewer Upsizing (this "Assignment") is entered into as of April 7, 2016 by and between BALLPARK VILLAGE LLC, a Delaware limited liability company ("Assignor"), and LENNAR COMMUNITIES, INC., a California corporation ("Assignee"), with reference to the facts set forth below:

RECITALS

A. Assignor and the City of San Diego, a municipal corporation (the "City") entered into that certain Participation Agreement for the Design and Construction of the Harbor Drive Trunk Sewer Upsizing (the "Agreement") executed by the City on January 15, 2016, pursuant to which Assignor and the City: (i) agreed to replace and upsize certain Harbor Drive Trunk Sewer reaches within the Harbor Drive Trunk Sewer drainage basin, in accordance with the terms and conditions of the Agreement and pursuant to Final Plans and specifications as more particularly described therein (the "Project"); (ii) agreed that the City would engage Assignor as the project manager to cause drawings to be prepared for the Project, to solicit bids for the work to construct the Project, and to manage the Project to completion; and (iii) allocated between themselves the cost of the Project, all as more particularly described therein. All capitalized terms used in this Assignment but not otherwise defined herein bear the meanings given such terms in the Agreement.

B. Pursuant to Section 23 of the Agreement, Assignor desires to assign its rights and obligations under the Agreement to Assignee, and the City desires to consent to such assignment.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual obligations of the parties as herein expressed, Assignor and Assignee agree as follows:

AGREEMENT

1. Assignment of Agreement. Assignor hereby assigns, transfers, and conveys to Assignee all of its rights, interests, duties, obligations, and liabilities in and to, or arising under or from the Agreement (collectively, the "Rights and Obligations").

2. Assumption of Agreement. Assignee hereby accepts the assignment of the Rights and Obligations and assumes and agrees to accept sole responsibility for payment and performance of all of the Rights and Obligations as if named as an original party to the Agreement.

3. Effective Date. Assignor and Assignee hereby agree that the Effective Date of Assignor's assignment of the Rights and Obligations, and Assignee's assumption of the Rights and Obligations, is January 20, 2016, notwithstanding the date of this Assignment referenced in the introductory paragraph above.

4. City as Beneficiary. The City is a third-party beneficiary of this Assignment and shall have the right to enforce it. There shall be no other third-party beneficiaries of this Assignment.

5. Binding Effect. Notwithstanding anything to the contrary contained herein, the terms and conditions of this Assignment will inure to the benefit of, and will be binding on, the successors, assigns, personal representatives, heirs, executors, devisees, administrators, trustees and legatees of Assignor and Assignee.

6. Further Acts. Both Assignor and Assignee hereby agree to take such further acts and execute and deliver such further instruments as may reasonably be requested by the other party, or by the intended third-party beneficiary named in Section 4 above, to evidence the assignment of the Rights and Obligations to, and assumption of Rights and Obligations by, Assignee.

7. Miscellaneous. This Assignment (a) may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute one and the same instrument, (b) shall be construed in accordance with and governed by the laws and decisions of the State of California, excluding the conflicts of law provisions thereof, and (c) shall be binding upon Assignor, Assignee and their respective successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Assignment as of the first date above written.

ASSIGNEE:

ASSIGNOR:

LENNAR COMMUNITIES, INC.,
a California corporation

BALLPARK VILLAGE LLC,
a Delaware limited liability company

By: 
Name: Ryan Gatchalian
Its: Vice-President

By: JMIR-Ballpark Village LLC,
a Delaware limited liability company
Its: Managing Member

See Page Attached

By: _____
Name: _____
Its: _____

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6. Further Acts. Both Assignor and Assignee hereby agree to take such further acts and execute and deliver such further instruments as may reasonably be requested by the other party, or by the intended third-party beneficiary named in Section 4 above, to evidence the assignment of the Rights and Obligations to, and assumption of Rights and Obligations by, Assignee.

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IN WITNESS WHEREOF, the parties have executed this Assignment as of the first date above written.

ASSIGNEE:

LENNAR COMMUNITIES, INC.,
a California corporation

By: _____
Name: Ryan Gatchalian
Its: Vice-President

SEE PREVIOUS PAGE

ASSIGNOR:

BALLPARK VILLAGE LLC,
a Delaware limited liability company

By: JMIR-Ballpark Village LLC,
a Delaware limited liability company
Its: Managing Member

By: _____
Name: JOHN C. KRANZ
Its: President

ORIGINAL

CONSENT TO ASSIGNMENT

Except as expressly defined herein, all capitalized terms used herein shall have the meanings ascribed to such terms in the Assignment and Assumption of Participation Agreement for the Design and Construction of the Harbor Drive Trunk Sewer Upsizing ("Assignment and Assumption Agreement") to which this Consent to Assignment is attached.

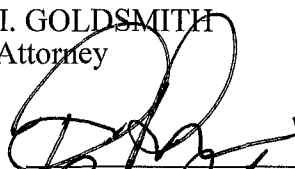
In compliance with Section 23 of the Agreement, the CITY OF SAN DIEGO, a municipal corporation (the "City"), does hereby consent to Assignor's assignment and Assignee's assumption of the Rights and Obligations under the Agreement, as reflected in the attached Assignment and Assumption Agreement.

CITY OF SAN DIEGO, a municipal corporation

By:  4/6/16
W. Downs Prior
Principal Contract Specialist
Public Works Contracts

APPROVED AS TO FORM
ON THIS 7 day of April, 2016

JAN I. GOLDSMITH
City Attorney

By: 
Name: Ray Patrosius
Its: DCA

DUPLICATE ORIGINAL

**PARTICIPATION AGREEMENT
FOR THE DESIGN AND CONSTRUCTION OF
THE HARBOR DRIVE TRUNK SEWER UPSIZING**

H166665

This Participation Agreement for the Design and Construction of the Harbor Drive Trunk Sewer Upsizing ("Agreement") is made by the City of San Diego, a municipal corporation (the "City"), and Ballpark Village LLC, a Delaware limited liability company ("Developer"), with reference to the recitals set forth below. Developer and City may be individually referred to as a "Party" and collectively as the "Parties."

RECITALS

- A. Developer owns certain real property located in the City of San Diego which is commonly known as Ballpark Village and is located on Parcels 7, 8, 10 and 12 of Parcel Map No. 18855 and Parcels 1, 2, 3 and 4 of Parcel Map No. 20943, and which is intended to be developed into a multi-use project consisting of any combination of residential, retail, office and hotel uses (collectively, "Developer's Project").
- B. The City has an existing sewer facility known as the Harbor Drive Trunk Sewer into which Developer's Project and other planned developments will discharge sewage. Such existing facility is insufficient to serve planned construction on Developer's Project and other planned developments.
- C. The City and Developer desire, subject to all of the terms and conditions of this Agreement, to: (i) replace and upsize certain Harbor Drive Trunk Sewer reaches within the Harbor Drive Trunk Sewer drainage basin (the "Drainage Basin"), as shown on Exhibit A attached hereto, in accordance with the terms and conditions of this Agreement and pursuant to the Final Plans and Specifications (as defined in Section 2.2, below) (such replacement and upsizing is referred to as the "Project"), and (ii) engage Developer as the project manager to cause drawings to be prepared for the Project, to solicit bids for the work to construct the Project, and to manage the Project to completion. The reaches to be replaced and upsized are known as Segment A (along Imperial Avenue and Park Boulevard from manhole G23S-591 to manhole G23S-52) and Segment B (along Harbor Drive from manhole G23S-52 to Pump Station 5).
- D. The Parties intend to allocate between themselves the cost of the Project based on each Party's share thereof, as described in this Agreement.
- E. The Parties each acknowledge that replacing and upsizing the Harbor Drive Trunk Sewer benefits both the Developer and the City.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual obligations of the Parties as herein expressed, City and Developer agree as follows:

AGREEMENT

1. City's Responsibilities.

1.1 Harbor Drive Trunk Sewer Pipe Upsizing. The City has established the proposed upsizing for the Harbor Drive Trunk Sewer based upon previous studies, current coordination with Civic San Diego, and information provided by Developer regarding anticipated flows from Developer's Project.

1.2 City Representative. City shall appoint a dedicated representative (the "City Representative") to serve as liaison between the City and Developer to personally manage the City's responsibilities under this Agreement in a diligent and responsive manner. The City Representative shall initially be Leonard Wilson; if the City replaces Mr. Wilson as the City Representative, such replacement shall be a person of equivalent or higher rank and capability.

1.3 City Approvals. Upon the City's Representative's receipt from Developer of any request for approval which can be approved by the City Representative or another authorized City employee, the City Representative shall diligently respond to such request. Both Parties acknowledge and agree that they shall prioritize meeting together in person as much as may be necessary or appropriate to expeditiously reach agreement regarding any such requests.

1.4 City's Fair Share. Subject to Section 5.1, below, City shall pay all Project Costs (as defined in Section 5, below), less the Developer's Fair Share (as defined in Section 5, below). The Parties' respective allocations of Project Costs are shown in Exhibit C attached hereto.

1.5 Project Contamination. In the event that hazardous materials or contaminated soil or ground water requiring remediation, treatment, storage, transfer or disposal is discovered during completion of the Work (as the case may be, "Project Contamination"), the City shall be deemed and named as the generator of such materials, and Developer shall have no financial liability or obligations in connection therewith. Developer shall, however, manage and coordinate any required testing, remediation, treatment, storage, transfer, or disposal of Project Contamination as part of its duties under this Agreement.

2. Developer's Responsibilities.

2.1 Project Management. Developer shall engage the Design Consultant (as defined in Section 2.2, below) and the Contractor (as defined in Section 4.1, below); shall cause the Design Consultant to prepare drawings to reflect the design of the Project in accordance with specifications provided by the City and approved by Developer; shall obtain or cause the Contractor to obtain permits and governmental approvals required for the Project; and shall manage and monitor the construction of the Project, all in compliance with the plans and specifications prepared and approved pursuant to this Agreement, the Project Schedule (as defined in Section 3.2, below), and the terms and conditions of this Agreement (collectively, the "Developer's Work").

2.2 Design. Developer shall retain a consultant (the "Design Consultant") to prepare the design, engineering, and public improvement drawings for the Project. Construction documents shall: (1) be based on sound engineering judgment, (2) adhere to all applicable engineering standards and the City of San Diego Sewer Guidelines and Standards, and (3) obtain required approvals from the Development Services Department. Developer and/or the Design Consultant shall work with the City Representative to comply with (and the City Representative shall use its best efforts to facilitate and expedite compliance with) the City's requirements and standards for the Project. Developer shall cause the Design Consultant to submit construction documents for the Project at 60% design, 90% design, 100% design and final design for review and approval in both hard copy and electronic format. The final plans and specifications for the Project as prepared by the Design Consultant, approved by the Developer and the City, and as may be amended or supplemented from time to time in accordance with this Agreement, including without limitation, in connection with any Additional Work, are referred to as the "Final Plans and Specifications." A minimum of five (5) sets of hard copies shall be included for each submittal unless instructed otherwise by the City's representative. A separate written contract to construct the Project in strict compliance with the Final Plans and Specifications (such construction referred to as the "Work") shall be entered into by Developer and the Contractor (the "Construction Contract"). Developer shall cause the construction, supervision, and completion of the Work per the approved construction documents. The Work shall meet the approval of the City and all applicable standards and codes.

3. Construction of Project.

3.1 Term. The term of this Agreement shall be four years.

3.2 Time for Completion. The Parties anticipate the completion of the Work in accordance with the schedule (the "Project Schedule") shown on Exhibit B, as such schedule may be tolled pursuant to Section 12, below, or amended pursuant to the Parties' agreement.

3.3 License Requirements. Developer shall select and retain duly licensed and qualified professionals to design and construct the Project. All such professionals shall be licensed in the State of California.

3.4 Standard of Performance. The Work shall be done in a good and workmanlike manner to the satisfaction of the City, lien free and in compliance with the approved plans and specifications, the City of San Diego Sewer Guidelines and Standards, and the *Standard Specifications for Public Works Construction*, current edition, including regional and City supplements thereto (the "Greenbook"). In the event of conflict between this Agreement or the Final Plans and Specifications, on one hand, and the Greenbook, on the other hand, the former will govern. To the extent it is feasible and prudent to do so Developer shall use reasonable efforts to schedule the delivery of materials to the project site to coincide with their installation. Developer shall comply with all laws including, but not limited to: all local, City, county, state, and federal laws, codes and regulations, ordinances, and policies, including but not limited to, Development Services Department permits, hazardous material permits, site safety, etc. In addition, Developer shall comply immediately with all lawful directives issued by the City or its authorized representatives under authority of such laws, statutes, ordinances, rules or regulations.

3.5 Notice of Project Requirements. City shall provide full information to Developer regarding its requirements for the Project when required by the Project Schedule and also promptly upon any request from Developer. If any Party obtains actual knowledge of any fault or defect in the Work or material nonconformance with the Final Plans and Specifications, that Party shall give prompt written notice thereof to the other Party. The services and information required by the above shall be furnished with reasonable promptness. The City shall have no contractual obligation with Developer's designers, contractors or subcontractors.

3.6 Records. Developer shall keep accurate and legible records on a set of as-builts and document all changes of the Work which occur during construction. All information necessary to maintain and/or service any Work shall be noted on the as-built drawings. Records shall be kept up to date with all entries checked by the City's Resident Engineer before any part of the Work is buried or covered up. Prior to acceptance, Developer shall deliver this redline "as-built" information to its design firm, who shall prepare records drawings for submittal and approval by the City. Developer agree that City or its authorized agent's review of documents, plans, and specifications not prepared by the City does not constitute an approval or establish a basis for liability on the part of the City.

3.7 Acceptance of the Work. When Developer considers the Work ready for its intended use, Developer shall notify the City in writing that such phase of the Work is substantially complete. Developer shall attach to this notice a list of all Work items that remain to be completed. Within twenty (20) working days thereafter, the City shall inspect the Work to determine the status of completion. If the City does not consider the Work complete, City will notify Developer within twenty (20) working days.

3.7.1 If the City considers the Work substantially complete, City will prepare and issue a Notice of Substantial Completion formally accepting the Work or a portion of the Work completed. The Notice of Substantial Completion shall fix the date of substantial completion. Attached to the Notice of Substantial Completion will be a tentative list of items to be completed or corrected before final payment can be processed to Developer, if any such items exist.

3.7.2 Neither the acceptance nor any prior inspections or failure to inspect shall constitute a waiver by the City of any defects in the Work.

3.7.3 Abandonment of existing sewer facilities shall only occur upon the operational acceptance of each phase of Work replacing the said existing sewer facility.

4. Bid Opening. Prior to commencing construction, Developer shall solicit bids and award one or more contracts for the construction of the Work in accordance with all public works laws, rules, and regulations set forth in the San Diego Municipal Code and applicable State law. The sealed bids shall be opened by Developer in the presence of the City, not less than ten (10) days after advertising for one day in the official newspaper of the City for sealed proposals for the Work.

4.1 A contract for the construction of the Work shall be awarded to the lowest responsible and reliable bidder (the "Contractor") paying Prevailing Wage, as mutually agreed to by City and Developer.

4.2 Developer shall provide the City with a copy of the bids and the Construction Contract(s).

5. Advance of Costs. Developer shall pay its fair share ("Developer's Fair Share") of the Project Costs based on the costs and ratios outlined in Exhibit C. Developer's share as set forth in Exhibit C shall not increase without Developer's prior written approval. Except as otherwise set forth in the preceding sentence, Section 5.1, below, or elsewhere in this Agreement, Developer shall pay all costs for the design and construction of the Work (collectively, the "Project Costs"), subject to reimbursement by the City in accordance with this Agreement.

5.1 Environmental Costs. Notwithstanding anything to the contrary in this Agreement, the City shall be responsible, and shall promptly reimburse Developer, for all costs, fees, and expenses associated with, arising out of, or related to any Project Contamination, and Developer shall have no financial obligation or liability in connection therewith. For purposes of clarify, Developer's Fair Share shall not apply toward any costs of Project Contamination, as all such costs shall be the liability and obligation of the City.

6. Maximum Cost. City will reimburse Developer for the City's share of the actual cost of the design and construction of the Work in accordance with Section 8 below. The total Project cost to the City shall not exceed \$13,122,922.00 ("Maximum Cost"), without written amendment to this Agreement.

7. Credits and Fees. Developer will pay all applicable costs and City fees associated with the Work. Developer shall receive reimbursement on all applicable costs, fees and betterments in accordance with Exhibit C.

8. Reimbursement.

8.1 Reimbursement Amount. City will reimburse Developer for the Work completed in accordance with Exhibit C. The City's actual cost of the Work will be based on the lowest responsible bid submitted, the actual design, bidding and construction management costs, any change orders, construction supervision costs in the amount of six percent (6%) of Project hard costs, to be paid to Developer; and a markup of eight percent (8%) of total Project costs for Developer's management and overhead. The Parties understand and agree that the cost estimate attached as Exhibit C reflects a cost estimate for performance of the Work contemplated in this Agreement and that the actual cost of the Work may be greater or less than the estimate set forth on Exhibit C.

8.2 Reimbursement Requests. Developer may submit monthly reimbursement requests with respect to all Work performed for which Developer was not previously paid, not to exceed the Maximum Cost. Developer shall supply, in connection with each payment request, (a) paid invoices, paid receipts or canceled checks showing full payment for all Work covered by the preceding payment request, if any, and (b) as to the current payment request, invoices for the Work covered, an updated spreadsheet or other similar support documentation, and conditional

mechanics' lien releases (if applicable). The City may cause its inspector to verify whether or not the Work for which payment is being requested has been installed and performed as represented in the payment request.

8.3 Reimbursement Payments. Within forty-five (45) days after Developer submits a reimbursement request, City shall reimburse Developer the amount requested under Section 8.2 of this Agreement, provided that City's representative has verified that the Work for which reimbursement is being requested has been performed as represented in the reimbursement request (which verification shall not be unreasonably withheld or delayed), and subject to the retention provided for in Section 9 of this Agreement.

8.4 City Engineering and Field Inspection. The costs for City staff time including engineering review and field inspections by the Resident Engineer shall be included in the total cost of the Work.

9. Retention. Payments by the City applicable to construction (i.e., not payments for design activities, Developer's overhead and profit, construction supervision, or other soft costs) will be subject to a ten percent (10%) retention, which shall be reduced to five percent (5%) after successful completion of half of the construction portion of the Work. The retention shall be released to Developer within 60 days after the completion of the Work, in accordance with Public Contract Code section 7107. Retention shall not be released for outstanding liens recorded against the Work. Retention will not be withheld from payments for design activities.

10. Compliance with Prevailing Wage Requirements. Pursuant to sections 1720 through 1861 of the California Labor Code, the Developer and its subconsultants shall ensure that all workers who perform work under this Agreement are paid not less than the prevailing rate of per diem wages as determined by the Director of the California Department of Industrial Relations (DIR). This includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. Copies of such prevailing rate of per diem wages are on file at the City and are available for inspection to any interested party on request. Copies of the prevailing rate of per diem wages also may be found at <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>. Developer and its subconsultants shall post a copy of the prevailing rate of per diem wages determination at each job site and shall make them available to any interested party upon request.

10.1 Expiration Dates. The wage rates determined by the DIR refer to expiration dates. If the published wage rate does not refer to a predetermined wage rate to be paid after the expiration date, then the published rate of wage shall be in effect for the life of this Agreement. If the published wage rate refers to a predetermined wage rate to become effective upon expiration of the published wage rate and the predetermined wage rate is on file with the DIR, such predetermined wage rate shall become effective on the date following the expiration date and shall apply to this Agreement in the same manner as if it had been published in said publication. If the predetermined wage rate refers to one or more additional expiration dates with additional predetermined wage rates, which expiration dates occur during the life of this Agreement, each successive predetermined wage rate shall apply to this Agreement on the date following the expiration date of the previous wage rate. If the last of such predetermined wage rates expires during the life of this Agreement, such wage rate shall apply to the balance of the Agreement.

10.2 Penalties for Violations. Developer and its subconsultants shall comply with California Labor Code section 1775 in the event a worker is paid less than the prevailing wage rate for the work or craft in which the worker is employed.

10.3 Payroll Records. Developer and its subconsultants shall comply with California Labor Code section 1776, which generally requires keeping accurate payroll records, verifying and certifying payroll records, and making them available for inspection. Developer shall require its subconsultants to also comply with section 1776. Developer and its subconsultants shall submit weekly certified payroll records online via the City's web-based Labor Compliance Program. Developer is responsible for ensuring its subconsultants submit certified payroll records to the City.

10.4 Agreements after 4/1/15. For agreements entered into on or after April 1, 2015, Developer and their subconsultants shall furnish records specified in Labor Code section 1776 directly to the Labor Commissioner in the manner required by Labor Code section 1771.4.

10.5 Apprentices. Developer and its subconsultants shall comply with California Labor Code sections 1777.5, 1777.6 and 1777.7 concerning the employment and wages of apprentices. Developer shall be held responsible for the compliance of their subconsultants with sections 1777.5, 1777.6 and 1777.7.

10.6 Working Hours. Developer and their subconsultants shall comply with California Labor Code sections 1810 through 1815, including but not limited to: (i) restrict working hours on public works contracts to eight hours a day and forty hours a week, unless all hours worked in excess of 8 hours per day are compensated at not less than 1½ times the basic rate of pay; and (ii) specify penalties to be imposed on design professionals and subcontractors of \$25 per worker per day for each day the worker works more than 8 hours per day and 40 hours per week in violation of California Labor Code sections 1810 through 1815.

10.7 Required Provisions for Subcontracts. Developer shall include at a minimum a copy of the following provisions in any contract they enter into with a subconsultant: California Labor Code sections 1771, 1771.1, 1775, 1776, 1777.5, 1810, 1813, 1815, 1860 and 1861.

10.8 Labor Code Section 1861 Certification. Developer in accordance with California Labor Code section 3700 is required to secure the payment of compensation of its employees and by signing this Agreement, Developer certifies that "I am aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this Agreement."

10.9 Labor Compliance Program. The City has its own Labor Compliance Program authorized in August 2011 by the DIR. The City will withhold contract payments when payroll records are delinquent or deemed inadequate by the City or other governmental entity, or it has been established after an investigation by the City or other governmental entity that underpayment(s) have occurred. For questions or assistance, please contact the City of San Diego's Equal Opportunity Contracting Department at 619-236-6000.

10.10 Contractor and Subcontractor Registration Requirements. This project is subject to compliance monitoring and enforcement by the DIR. As of March 1, 2015, no Developer or subconsultant may be listed on a bid or proposal for a public works project unless registered with the DIR pursuant to Labor Code section 1725.5. As of April 1, 2015, a Developer or subcontractor shall not be qualified to bid on, be listed in a bid or proposal, or enter into any contract for public work, unless currently registered and qualified to perform public work pursuant to Labor Code section 1725.5. By submitting a bid or proposal to the City, Developer is certifying that he or she has verified that all subcontractors used on this public work project are registered with the DIR in compliance with Labor Code sections 1771.1 and 1725.5, and Developer shall provide proof of registration to the City upon request.

10.10.1 A Developer's inadvertent error in listing a subconsultant who is not registered pursuant to Labor Code section 1725.5 in response to a solicitation shall not be grounds for filing a protest or grounds for considering the bid or proposal non-responsive provided that any of the following apply: (1) the subconsultant is registered prior to proposal due date; (2) within twenty-four hours after the proposal due date, the subconsultant is registered and has paid the penalty registration fee specified in Labor Code section 1725.5; or (3) the subconsultant is replaced by another registered subconsultant pursuant to Public Contract Code section 4107.

10.10.2 Living Wage Ordinance requirements as described in San Diego Municipal Code sections 22.4201 et. seq., also applies to this Agreement. Developer must determine which per diem rate is highest for each classification of work (i.e., Prevailing Wage Rates or Living Wage Rates), and pay their employees the highest of the two rates.

11. Changed Conditions. Developer may rely on maps, engineering reports, diagrams, drawings and similar reference data ("Reports") provided by the City or its representatives. However, non-technical data, interpretations, and opinions contained in such Reports are not to be relied on by Developer, and shall not be the basis of changed conditions. If Developer discovers any unknown subsurface or latent physical conditions materially different from what is represented in the Reports that adversely impact the progress of the Work, then Developer shall notify the City in writing upon their discovery and before they are disturbed. If conditions warrant an adjustment in compensation or time, a change order will be processed in accordance with Section 12 of this Agreement.

12. Additional Work. If a change order or change to the scope of Work ("Additional Work") is desired by either party, Developer shall submit to the City's representative a proposal setting forth the desired change, any necessary extension of time for the Work and any adjustment to Project Costs. Developer may proceed with any change requested in the Project scope upon receipt of written approval by the City's representative, provided that the total estimated cost for the Work does not exceed the Maximum Cost. If any change in the Work, as described in any proposal, will result in exceeding the Maximum Cost, then such request for Additional Work will require approval of the San Diego City Council prior to performing the Additional Work, and all dates set forth in Exhibit B shall be tolled, pending the City's pursuit of such approval. Developer shall not be reimbursed for any cost or time resulting from the negligence of Developer or Developer's agents, including but not limited to the Developer's Contractor for the Work, its subcontractors, and Developer's design professionals for the Work.

13. Force Majeure. In the event the Work is delayed due to causes which are outside the control of the Parties and their agents, and could not be avoided by the exercise of due care, which may include, but is not limited to, war, terrorist attack, act of God, government regulations, labor disputes, strikes, fires, floods, adverse weather or elements necessitating cessation of the Work, inability to obtain materials, labor or equipment, required extra Work, or other specific events as may be further described in the specifications, the Parties will be entitled to an extension in time equivalent to the length of delay.

14. Bonds. Developer shall provide, or cause the Contractor to provide, a Performance Bond and a Payment Bond in accordance with Government Code sections 66499.1 and 66499.2, respectively, for each phase of Work prior to commencement of such phase. Each bond shall be in the amount of 100% of the cost of construction of that phase of the Work, to guarantee faithful performance and payment of all Work, in a manner satisfactory to the City, and that all materials and workmanship will be free from original or developed defects. The bonds may be combined into a single document, if desired. If provided by the Contractor, a dual rider type bond shall be provided that names the City as an additional obligee. The Performance and Payment Bonds shall be released in accordance with Government Code sections 66499.7.

15. Guarantees. All materials and equipment shall be new and of industrial quality. Developer shall guarantee, or cause Contractor to guarantee, all Work for a period of one (1) year after the date of issuance of a Notice of Substantial Completion and shall repair and replace any and all Work, together with any other Work which may be displaced in so doing, that may prove defective in workmanship and/or materials within the one (1) year period, without expense whatsoever to the City, ordinary wear and tear and usual abuse or neglect excepted. In the event of failure to comply or making reasonable progress towards complying with the abovementioned conditions within one (1) week after being notified in writing, the City may repair any defects or take other corrective action at the expense of Developer or Contractor who hereby agrees to pay the costs and charge therefore immediately upon demand. Developer or Contractor shall transfer to the City any and all manufacture warranties and provide operating manuals prior to the City's acceptance of the Work.

16. Notice. Any notice to be given or other document to be delivered by any Party to the other hereunder, may be delivered in person, or may be deposited in the United States mail in the State of California, duly certified or registered, return receipt requested, with postage prepaid, or by Federal Express or other similar overnight delivery service or by e-mail and addressed to the party for whom intended, as follows:

If to City, to:

Public Utilities Director
9192 Topaz Way
San Diego, CA 92123

If to Developer, to:

Ballpark Village, LLC
12250 El Camino Real, Suite 160
San Diego CA 92130
Attention: Jim Chatfield
Email: jchatfield@jmirealty.com

17. Examination of Records. During the Term, Developer shall preserve and maintain the following records, and allow the City to inspect and copy such records upon reasonable notice:

17.1 Plans and Specifications. Developer shall keep accurate and legible records on a set of Project blue-line prints of all changes to the Work which may have occurred during Project construction. All information necessary to maintain and/or service any concealed Work shall be noted on the record drawings. Prior to final payment, Developer shall deliver the "as-built" information to the City for the Work.

17.2 Costs. Developer shall keep an accurate record of the actual cost of the Work in accordance with generally accepted accounting procedures, including without limitation, all negotiated offers, proposals and invoices. Cost records and backup documentation shall be kept by Developer for one year after the completion of the entirety of the Work.

18. Hold Harmless and Indemnity. Developer agrees to defend, indemnify, protect and hold City and its agents, officers and employees harmless from and against any and all claims asserted or liability for personal injury or property damage arising from or connected with or are caused or claimed to be caused by the acts or omissions of Developer's, their agents, officers, or employees in performing the Work herein, and all expenses of investigating and defending against same, but only to the extent occurring prior to the completion of the Work. Developer's duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of the City, its agents, officers or employees. Developer, in their sole discretion, will select defense counsel to defend the City and its agents, officers, and employees. The City may select its own defense counsel, but must do so at its own expense.

18.1 Indemnity for Design Professional Services. With respect to any design professional services provided under this Agreement, except as otherwise provided by Civil Code section 2782.8, Developer shall, or shall cause the Design Consultant, to indemnify and hold harmless the City, its officers and employees, from all claims, demands or liability that arise out of, pertain to or relate to the negligence, recklessness, or willful misconduct of the design professional, its officers or employees.

19. Attorney's Fees and Costs. Each Party shall be responsible for its own attorney's fees and costs. Attorney's fees and costs incurred pursuant to mediation under this Agreement are not recoverable.

20. Liability Insurance. At all times during the term of this Agreement, Developer shall maintain insurance coverage as required by Exhibit D hereby incorporated by reference, at Developer's sole cost and expense. Developer shall require the contractors to maintain the same insurance coverage. Before performing any work, Developer shall provide the City with copies of all Certificates of Insurance accompanied by all endorsements. Developer shall be responsible for the payment of all deductibles and self-insured retentions. Developer shall notify the City thirty (30) days prior to any material change to the policies of insurance.

21. Mediation.

21.1 Mandatory Mediation. If a dispute arises out of, or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled through normal contract negotiations, the Parties agree to first endeavor to settle the dispute in an amicable manner, using mandatory non-binding mediation under the Construction Industry Mediation Rules of the American Arbitration Association or any other neutral organization agreed upon before having recourse in a court of law.

21.2 Expenses. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator, and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the Parties, unless they agree otherwise.

21.3 Mediation Results. Any resultant agreements from mediation shall be documented in writing. All mediation results and documentation, by themselves, shall be "non-binding" and inadmissible for any purpose in any legal proceeding, unless such admission is otherwise agreed upon, in writing, by all parties. Mediators shall not be subject to any subpoena or liability and their actions shall not be subject to discovery.

21.4 Judicial Reference. Should mediation described above not be successful in resolving any dispute, such dispute shall be resolved by general judicial reference pursuant to Code of Civil Procedure Sections 638 and 641 through 645.1, or any successor statutes thereto, and as modified or as otherwise provided in this Section. The referee shall have the authority to try all issues, whether of fact or law, and to report a statement of decision to the court. The referee shall be the only trier of fact or law in the reference proceeding, and shall have no authority to further refer any issues of fact or law to any other party, without the consent of all parties. The referee shall be a retired judge with experience in relevant real estate matters. The parties to the dispute shall meet to select the referee within 10 days after service of the initial complaint on all defendants. Any dispute regarding the selection of the referee shall be promptly resolved by the judge to whom the matter is assigned, or if none, to the presiding judge of the Superior Court of San Diego County who shall select the referee. The referee shall have the power to hear and dispose of motions in the same manner as a trial court judge, provided that if, prior to the selection of the referee, any provisional remedies are sought by the parties, such relief may be sought in the Superior Court of San Diego County.

22. Equal Employment Opportunities and Equal Opportunity Contracting. Developer's Contractor shall comply with sections 22.1 through 22.5 below, if applicable under Government Code sections 65864 *et. seq.* and the Subdivision Map Act's vesting tentative map regulations.

22.1 Drug-Free Workplace. The Contractor agrees to comply with the City's Drug-Free Workplace requirements set forth in Council Policy 100-17, adopted by San Diego Resolution R-277952 and incorporated into this Agreement by this reference.

22.2 ADA Certification. The Contractor hereby certifies that it agrees to comply with the City's Americans With Disabilities Act Compliance/City Contracts requirements set forth in Council Policy 100-04, adopted by San Diego Resolution R-282153 and incorporated into this Agreement by this reference.

22.3 Compliance with the City's Equal Opportunity Contracting Program. The Contractor shall comply with the City's Equal Opportunity Contracting Program Contractor Requirements. The Contractor shall not discriminate against any employee or applicant for employment on any basis prohibited by law. The Contractor shall provide equal opportunity in all employment practices. The Contractor shall ensure that its Subcontractors comply with the City's Equal Opportunity Contracting Program Contractor Requirements. Nothing in this Section shall be interpreted to hold the Contractor liable for any discriminatory practice of its Subcontractors.

22.4 Non-Discrimination Ordinance. The Contractor shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of Subcontractors, vendors or suppliers. The Contractor shall provide equal opportunity for Subcontractors to participate in subcontracting opportunities. The Contractor understands and agrees that violation of this clause shall be considered a material breach of the Construction Contract and may result in contract termination, debarment, and other sanctions. This language shall be in contracts between the Contractor and any Subcontractors, vendors and suppliers.

22.5 Compliance Investigations. Upon the City's request, the Contractor agrees to provide to the City, within sixty calendar days, a truthful and complete list of the names of all Subcontractors, vendors, and suppliers that the Contractor has used in the past five years on any of its contracts that were undertaken within San Diego County, including the total dollar amount paid by the Contractor for each subcontract or supply contract. The Contractor further agrees to fully cooperate in any investigation conducted by the City pursuant to the City's Nondiscrimination in Contracting Ordinance [San Diego Municipal Code sections 22.3501-22.3517]. The Contractor understands and agrees that violation of this clause shall be considered a material breach of the Construction Contract and may result in remedies being ordered against the Contractor up to and including contract termination, debarment, and other sanctions. The Contractor further understands and agrees that the procedures, remedies and sanctions provided for in the Nondiscrimination Ordinance apply only to violations of said Nondiscrimination Ordinance.

23. Assignment. Developer may transfer or assign its rights and obligations under this Agreement, in whole or in part, to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement with the prior written consent of the City, which will not be unreasonably withheld or delayed, and if the transfer or assignment of the rights under this Agreement includes in writing the assumption of Developer's duties, obligations, and liabilities arising under or from this Agreement.

24. Successors-In-Interest. This Agreement and all rights and obligations contained herein shall be in effect whether or not any or all parties to this Agreement have been succeeded by another entity, and all rights and obligations of the Parties signatory to this Agreement shall be vested and binding on their successors-in-interest.

25. Effective Date of Agreement. This Agreement shall become effective upon execution by all Parties.

26. Governing Law. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California. Venue from actions arising out of the Agreement shall be in the County and City of San Diego, California.

27. Entire Agreement. This Agreement contains the entire understanding between all the Parties relating to the transaction contemplated hereby, and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged herein and shall be of no further force or effect. No provision of this Agreement may be amended, waived, or added except by an instrument in writing signed by the Parties hereto.

28. Incorporation of Exhibits and Recitals. All exhibits referenced in this Agreement and all recitals are incorporated herein by reference.

29. Counterparts. This Agreement may be executed in counterparts, which when taken together, shall constitute a single signed original as though all parties had executed the same page.

IN WITNESS WHEREOF, the Agreement is executed by the City of San Diego, acting by and through its Mayor or his designee, pursuant to Resolution R- 310108 authorizing such execution, and by Developer through its authorized officer.

DEVELOPER:

CITY:

Ballpark Village LLC,
a Delaware limited liability company

City of San Diego,
a municipal corporation

By: JMIR-Ballpark Village LLC,
A Delaware limited liability company
Its: Managing Member:

By: [Signature]
James Nagelvoort
Director, Public Works Department

By: [Signature]
Name: JOHN C. KRAEGER
Its: PRESIDENT

Date: 1/15/16

I HEREBY APPROVE the form of the
foregoing Agreement this 20th day of
January, 2016.

JAN GOLDSMITH, City Attorney

By: [Signature]
Raymond Palmucci
Deputy City Attorney

EXHIBIT A

Map Depicting the Work

EXHIBIT B

Schedule for Design and Construction of the Project

EXHIBIT C

Cost Loaded Schedule

EXHIBIT D

Insurance Requirements

Harbor Drive Trunk Sewer Participation Agreement						
Exhibit C: Cost-loaded Schedule						
Project Cost Allocation						
Item #	Item	Total Cost	Developer Share Segment A	Developer Share Segment B	Developer Share Total	City Share Total
1	Design, Permit, Bond, Plancheck, Inspections	\$ 600,000	\$ 27,185	\$ 64,267	\$ 91,452	\$ 508,548
2	Construction & Closeout	\$ 10,217,343	\$ 462,937	\$ 1,094,394	\$ 1,557,331	\$ 8,660,011
3	Construction Supervision @ 6%	\$ 675,310	\$ 30,598	\$ 72,333	\$ 102,931	\$ 572,379
4	Hazardous Materials	\$ 1,037,825	\$ -	\$ -	\$ -	\$ 1,037,825
5	Facility Subtotal	\$ 12,530,478	\$ 520,720	\$ 1,230,994	\$ 1,751,715	\$ 10,778,763
6	Management & Overhead @ 8%	\$ 1,002,438	\$ 45,419	\$ 107,373	\$ 152,792	\$ 849,646
7	Field Order Allowance @ 5%	\$ 562,758	\$ 25,498	\$ 60,278	\$ 85,776	\$ 476,983
8	Contingency @ 10%	\$ 1,200,512	\$ 54,394	\$ 128,589	\$ 182,983	\$ 1,017,530
9	Total	\$ 15,296,187	\$ 646,032	\$ 1,527,233	\$ 2,173,265	\$ 13,122,922
Cash Flow						
		FY 2016	FY 2017	FY 2018	FY 2019	Total
1	Design, Permit, Bond, Plancheck, Inspections	\$ 251,674	\$ 348,326	\$ -		\$ 600,000
2	Construction & Closeout	\$ -	\$ 2,043,469	\$ 6,130,406	\$ 2,043,469	\$ 10,217,343
3	Construction Supervision @ 6%	\$ -	\$ 141,768	\$ 410,934	\$ 122,608	\$ 675,310
4	Hazardous Materials	\$ -	\$ 319,331	\$ 718,494	\$ -	\$ 1,037,825
5	Facility Subtotal	\$ 251,674	\$ 2,852,893	\$ 7,259,834	\$ 2,166,077	\$ 12,530,478
6	Management & Overhead @ 8%	\$ 20,134	\$ 228,231	\$ 580,787	\$ 173,286	\$ 1,002,438
7	Field Order Allowance @ 5%	\$ -	\$ 118,140	\$ 342,445	\$ 102,173	\$ 562,758
8	Contingency @ 10%	\$ 23,150	\$ 272,478	\$ 696,942	\$ 207,943	\$ 1,200,512
9	Total	\$ 294,958	\$ 3,471,742	\$ 8,880,008	\$ 2,649,479	\$ 15,296,187
	Cash Flow by Fiscal Year, Developer	\$ 44,958	\$ 480,492	\$ 1,243,981	\$ 403,835	\$ 2,173,265
	Cash Flow by Fiscal Year, City	\$ 250,000	\$ 2,991,250	\$ 7,636,027	\$ 2,245,644	\$ 13,122,922

Exhibit D
Insurance Requirements

D-1 Required Insurance: Developer and/or Contractor shall obtain, and maintain in full force throughout the duration of the Work, insurance as called for below, with insurance carriers acceptable to the City and shall furnish certificate(s) of insurance to the City prior to commencing the Work. As a minimum requirement of acceptability, the insurance carrier shall be duly authorized by the California Insurance Commissioner to transact the business of insurance in the State of California. Except for the State Compensation Insurance Fund, insurance coverage must be from an insurance carrier licensed in the State of California and rated "A-" and "VI" or better by the A.M. Best Key Rating Guide. The required insurance policies and the certificate(s) of insurance shall contain the endorsements listed in Paragraph D-2 below.

D-1.1 Workers' Compensation and Employer's Liability Insurance.

D-1.1.1 Workers' Compensation in compliance with the applicable state and federal laws.

D-1.1.2 Employer's Liability:

Bodily Injury by Accident	\$1,000,000 each accident
Bodily Injury by Disease	\$1,000,000 each employee
Bodily Injury by Disease	\$1,000,000 policy limit

Developer will provide a Worker's Compensation certificate of insurance that states: "Workers' Compensation applies to enrolled parties of Developer's Wrap-Up Insurance Program and does extend to employees of Developer."

D-1.2 If Developer and/or Contractor procures project specific liability coverage: Commercial General Liability Insurance written on ISO Occurrence form CG 00 01 07 98, or an equivalent form providing coverage at least as broad, which shall cover liability arising from premises and operations, XCU (explosion, underground, and collapse), independent contractors, products/completed operations, personal injury and advertising injury, and liability assumed under an insured's contract (including the tort liability of another assumed in a business contract). There shall be no endorsement or modification of the CGL Insurance limiting the scope of coverage for either "insured vs. insured" claims or contractual liability. All policy coverage shall be on an occurrence basis and in amounts not less than the following limits of liability:

General Annual Aggregate Limit

(Other than Products/Completed Operations)	\$2,000,000
Products/Completed Operations Aggregate Limit	\$2,000,000
Personal Injury Limit	\$1,000,000

Each Occurrence

\$1,000,000

D-1.3 Contractor shall provide at its expense a policy or policies of Commercial Automobile Liability Insurance written on an ISO form CA 00 01 12 90, or a later version of this form or equivalent form, providing coverage at least as broad in the amount of \$1,000,000 combined single limit per accident, covering bodily injury and property damage for owned, non-owned and hired automobiles.

D-2 Required Endorsements: The following endorsements shall be included in the insurance policies and certificates of insurance called for in Paragraph D-1 above, as indicated below.

D-2.1 Workers' Compensation and Employer's Liability insurance endorsements:

D-2.1.1 Cancellation. Except as provided for under California law, the policy or policies must be endorsed to provide that the City is entitled to thirty (30) days prior written notice ten (10) days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies.

D-2.1.2 Waiver of Subrogation. The policy or policies must be endorsed to provide that the insurer will waive all rights of subrogation against the City, and its respective elected officials, officers, employees, agents, and representatives for losses paid under the terms of this policy or these policies which arise from work performed by the Named Insured.

D-2.2 Commercial General Liability Insurance Endorsements:

D-2.2.1 Additional Insureds. The policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents, and representatives with respect to liability arising out of: (a) Ongoing operations performed by you or on your behalf, (b) Your products, (c) Your work, including but not limited to your completed operations performed by you or on your behalf, or (d) premises owned, leased, controlled, or used by you.

D-2.2.2 Primary and Non-Contributory Coverage. The policy or policies must be endorsed to provide that the insurance afforded by the Commercial General Liability policy or policies is primary to any insurance or self-insurance of the City of San Diego and its elected officials, officers, employees, agents and representatives as respects operations of the Named Insured. Any insurance maintained by the City of San Diego and its elected officials,

officers, employees, agents and representatives shall be in excess of Developer's insurance and shall not contribute to it.

D-2.2.3 Cancellation. Except as provided for under California law, the policy or policies must be endorsed to provide that the City is entitled to thirty (30) days prior written notice ten (10) days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies.

D-2.2.4 Severability of Interest. The policy or policies must be endorsed to provide that Developer's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

D-2.3 Automobile Liability Insurance Endorsements:

D-2.3.1 Additional Insureds. The policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents, and representatives with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of Developer.

D-2.3.2 Cancellation. Except as provided for under California law, the policy or policies must be endorsed to provide that the City is entitled to thirty (30) days prior written notice ten (10) days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies.

D-2.3.3 Severability of Interest. The policy or policies must be endorsed to provide that Developer's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

D-3 Surplus Lines. A policy by a Surplus Lines insurer is presumptively invalid unless the insurer is on the List of Eligible Surplus Line Insurers [LESLI List] maintained by the California Department of Insurance. The LESLI List may be found at:

<http://www.insurance.ca.gov/FAD/Surplusl.htm>

All policies of insurance carried by non-admitted carriers shall be subject to all of the requirements for policies of insurance provided by admitted carriers described herein.