

FIRST AMENDMENT TO SUBDIVISION AGREEMENT

THIS FIRST AMENDMENT TO AGREEMENT amends that certain Subdivision Agreement made and entered into on May 1, 2006, and this First Amendment is entered into this _____ day of _____, 2008, by and between the CITY OF COSTA MESA, a municipal corporation, hereinafter referred to as "CITY," and *Oxbow 101, LLC*, a *California Limited Liability Company*, hereinafter referred to as a "SUBDIVIDER."

R E C I T A L S :

WHEREAS, SUBDIVIDER is contemplating the construction, development and improvement of certain lands within the CITY; and

WHEREAS, SUBDIVIDER has personally or by and through his officers, agents and employees, designed, prepared, reviewed and considered the subdivision of lands and the plans thereof described herein; and

WHEREAS, SUBDIVIDER has submitted and filed plans for the installation of *off-site and street improvements for 1011-1045 El Camino Drive (consisting of removal of existing improvements, new sidewalk, curb/gutter, cross gutter, spandrel, asphalt paving, storm drain inlet and pipe, and traffic striping and markings)* hereinafter referred to as "PLANS" and incorporated herein by reference on said proposed Tract Map to the CITY for its review and approval; and

WHEREAS, as a condition of CITY approval, SUBDIVIDER agreed to and did execute an agreement to ensure the construction and installation of said improvements, dated on May 1, 2006, which required SUBDIVIDER to commence construction and installation of the improvements set forth in the original Agreement within one hundred and eighty (180) days from the date of approval of said Tract Map by CITY (the "Approval Date"), which date was May 1, 2007, and to complete said work within three hundred sixty-five (365) days from said Approval Date.

WHEREAS, pursuant to the original Agreement, the construction of the improvements should have commenced no later than November 1, 2007 and should have been completed no later than April 30, 2008.

WHEREAS, on December 10, 2007 SUBDIVIDER requested in writing that it be given an additional two year extension to commence and complete the improvements called for in the original Agreement. SUBDIVIDER subsequently verbally modified the request to seek only a one year extension to complete the improvements called for in the original Agreement.

WHEREAS, the City Council, having considered such request at a public meeting on May 20, 2008, and having determined that such request should be granted subject to the conditions agreed to by SUBDIVIDER and adopted in a resolution approving the requested extension and directing execution of a First Amendment to Subdivision Agreement to confirm the agreement of the parties.

NOW, THEREFORE, the parties mutually covenant, promise and agree as follows:

1. DEMOLITION OF EXISTING STRUCTURES

Within five (5) business days of approval of this First Amendment to Subdivision Agreement, SUBDIVIDER shall apply to the CITY for all necessary permits to demolish any and all existing structures on the Property, at its sole cost and expense, and shall complete such demolition within thirty (30) days after receipt of a demolition permit from the CITY, but no later than _____. Within five (5) business days of approval of this Amendment to Subdivision Agreement, SUBDIVIDER shall obtain a performance bond in a form approved by CITY, executed by a corporation authorized to transact surety business within the State of California, for the following purposes and in the sums stated, or furnish a cash deposit or other form of security approved by CITY, in lieu thereof (based upon the estimated cost of demolishing the existing structures):

- a. Faithful Performance Bond: To secure the faithful performance of SUBDIVIDER's obligation to demolish the existing structures on the Property as and in the time provided for herein in the sum of One Hundred Thousand dollars(\$100,000).

2. PLANS AND IMPROVEMENTS

SUBDIVIDER shall, at its sole cost and expense, design, construct and install all of the *offsite improvements* and other works of improvement as shown and delineated on the PLANS for Tract No. 16917 for subsequent acceptance by CITY.

3. SUBDIVIDER warrants that said design, construction and installation will be performed in accordance with said PLANS and in conformity with all ordinances of CITY and other applicable laws and permits granted to SUBDIVIDER herein.

4. BONDS AND SECURITY FOR IMPROVEMENTS

SUBDIVIDER shall, at its sole cost and expense, secure and furnish to CITY bonds or extensions of previously issued bonds, if necessary, in a form approved by CITY, executed by a corporation authorized to transact surety business within the State of California, for the following purposes and in the sums stated, or furnish a cash deposit or other form of security approved by CITY, in lieu thereof (based upon the estimated cost of said improvements):

- a. Faithful Performance Bond: To secure the faithful performance of all terms and conditions herein in the sum of *four hundred, eighty-nine thousand, six hundred and seventy two dollars (\$489,672)*;
- b. Labor and Materialmen Bond: To secure payment to the Contractor, subcontractor, engineers, surveyors and to all persons renting equipment or furnishing labor or materials to them or upon such improvements in said

Tract in the sum of *four hundred, eighty-nine thousand, six hundred and seventy two dollars (\$489,672)*;

5. INSPECTIONS AND ACCEPTANCE

CITY shall, upon SUBDIVIDER'S written request to the City Engineer, inspect the work performed by SUBDIVIDER as it progresses and, if found to be in order, approve and accept same. In such case, SUBDIVIDER shall be entitled to partial reduction in Bond sums or refund of cash deposit furnished to secure SUBDIVIDER'S faithful performance herein, in a sum in the same ratio to the total money deposited as work accepted bears to the total work to be done hereunder; provided, that CITY'S Engineer has first certified to the City Council of CITY, the amount of work completed and to be accepted by CITY and the City Council approves said reduction or refund, and further provided, that no reduction or refund in excess of eighty-five (85%) percent of the total amount of the original deposit shall be made until all the work is completed and accepted. CITY, its officers, agents and employees shall not unreasonably withhold or refuse approval or acceptance of the work performed herein but shall require compliance with all applicable laws.

6. INDEMNIFICATION

Except as to the sole and exclusive negligence of CITY, its elected officials, officers, agents and employees, the SUBDIVIDER hereby agrees to protect, defend, indemnify and hold harmless, the CITY, its elected officials, officers, agents and employees from and against any and all claims, demands, suits, actions or proceedings of any kind or nature, including, but not by way of limitation, all civil claims, workers' compensation claims costs, expenses, or damages to property or injuries to or death of any person or persons, including attorney fees and all other claims, whether groundless or not, from or arising out of the acts, errors or omissions of the SUBDIVIDER, his officers, agents, employees, consultants, subcontractors or other persons, companies or other entities, performing labor,

or supplying material for, or designing, constructing or installing the improvements contemplated in this Agreement.

7. TIME FOR PERFORMANCE

SUBDIVIDER shall commence construction and installation of said improvements within three hundred sixty five (365) days from the date of approval of this Amendment to Subdivision Agreement (the “Amendment Approval Date”) and shall complete said work within ninety (90) days from the commencement of construction, but no later than four hundred fifty five (455) days from said Approval Date.

8. The persons executing this Agreement warrant they are authorized to do so on behalf of their respective party.

9. The parties hereto acknowledge and agree that the relationship between CITY and SUBDIVIDER is one of principal and independent subdivider and no other. All personnel to be utilized by SUBDIVIDER in the performance of this Agreement shall be employees of SUBDIVIDER and not employees of the CITY. SUBDIVIDER shall pay all salaries and wages, employer’s social security taxes, unemployment insurance and similar taxes relating to employees and shall be responsible for all applicable withholding taxes. Nothing contained in the Agreement shall create or be construed as creating a partnership, joint venture, employment relations, or any other relationship except as set forth between the parties. The parties specifically acknowledge and agree that SUBDIVIDER is not a partner with CITY, whether general or limited, and no activities of CITY or SUBDIVIDER or statements made by CITY or SUBDIVIDER shall be interpreted by any of the parties

hereto as establishing any type of business relationship other than an independent contractor relationship.

EXECUTED in Costa Mesa, California, on the day and year first above written.

Subdivider: Oxbow 101, LLC

CITY OF COSTA MESA

Eric Cernich
Manager

Ernesto Munoz
City Engineer

ATTEST:

APPROVED AS TO FORM:

City Clerk of the City Council
of the City of Costa Mesa

City Attorney