AGENDA ITEM NO. 5.C.

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

Garden Grove City Council
And
Garden Grove Agency for Community Development

To:	Matthew Fertal	From:	Economic Development
Dept:	City Manager/Director	Dept:	
Subject:	FIRST IMPLEMENTATION AGREEMENT WITH RESPECT TO THE FIRST AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT WITH GARDEN GROVE MXD, INC.	Date:	June 28, 2011

OBJECTIVE

The purpose of this report is to request the Garden Grove City Council (the "City Council") and the Garden Grove Agency for Community Development, a public body, corporate and politic (the "Agency") to conduct a joint Public Hearing to consider the approval of the First Implementation Agreement with respect to the First Amended and Restated Disposition and Development Agreement by and between the Agency and Garden Grove MXD, Inc., a Colorado Corporation (the "Developer").

BACKGROUND/DISCUSSION

On May 12, 2009, at a joint meeting of the City Council and the Agency, the Disposition and Development Agreement (the "DDA") between the Agency and the Developer was approved.

The Agency and Developer entered into that certain First Amended and Restated Disposition and Development Agreement dated April 13, 2010 ("DDA") for the construction of approximately six hundred (600) rooms and a water park (the "Water Park Hotel" or "Hotel"), approximately 18,000 square feet of retail, including one or more restaurants, and a parking structure. The Agency is proposing revisions to the Disposition and Development Agreement and the First Amended and Restated Disposition and Development Agreement to provide for the implementation of portions thereof. The salient point of the First Implementation Agreement with respect to the First Amended and Restated Disposition and Development include the following :

1. Section 301.3 of the DDA provides for the Agency (or to request the City to) initiate proceedings to form a CFD and use the proceeds of an issuance of the CFD Bonds to finance the construction of the Parking Structure. The Construction Lender may require that the CFD be formed prior to the Closing.

2. Section 408. Covenant Consideration. In consideration for the granting of the Covenants by the Developer to the Agency and provided Developer is not in Breach and/or Default hereunder or in default with respect to the special tax under the CFD, Agency shall pay to the Developer the all cash sum of Forty-Seven Million Dollars ($47,000,000) ("Covenant Consideration") as follows: (a) Five Million Dollars ($5,000,000) concurrently with the Commencement of Construction of the parking structure ("First Payment Date"), and (b) Forty-Two Million Dollars ($42,000,000) on any date or dates the Agency permits release of such amount, acting in its sole and absolute discretion, but in no event later than the date which is thirty (30) days after the later of the date on which (i) the Hotel Opens for business, and (ii) the Certificate of Occupancy for the Hotel, ("Second Payment Date"). The parties acknowledge that, prior to the commencement of construction, the Agency intends to issue its tax allocation bonds (the "Tax Allocation Bonds") sized to net Forty-Two Million Dollars ($42,000,000). Upon issuance of such Tax Allocation Bonds, the Agency shall hold and use the proceeds thereof pursuant to the bond documents governing the Tax Allocation Bonds.

3. Section 408.1 Termination of Covenant Consideration Obligation. Notwithstanding the foregoing, the obligation of the Agency under Section 408 to pay Covenant Consideration shall be subject to the terms of Section 408.1(d) above if, for any reason, both of the following conditions do not occur by the date that is two (2) years after the date of issuance of the Tax Allocation Bonds: (i) Close of Escrow and (ii) the Developer has the Construction Financing and such Construction Financing shall be funded or ready to fund in accordance with Sections 205.1(f) and 205.2(h) hereof.

ENVIRONMENTAL

On February 8, 2011, the City Council approved the planned unit development NO. PUD-126-10, enacting a new planned unit development and zoning regulations for the site of the water park hotel resort proposed to be located generally on the west side of Harbor Boulevard between Lampson Avenue and Garden Grove Boulevard in the City of Garden Grove. The development and zoning regulations will authorize the establishment of a water park themed hotel resort with ancillary restaurant, retail and meeting space on the approximately 12.2 acre site.

FINANCIAL IMPACT

The financial impact to the Agency is forty-seven million dollars ($47,000,000).

RECOMMENDATION

It is recommended that the City Council:

- Conduct a joint Public Hearing;
- Adopt the attached Resolution approving the First Implementation Agreement with respect to the First Amended and Restated Disposition and Development Agreement

It is recommended that the Agency:

- Authorize the Agency Director to execute any pertinent document in order to fully execute the Agreement.

GREG BLODGETT
Senior Project Manager

Attachment 1: Resolution – City
Attachment 2: Resolution - Agency
Attachment 3: First Implementation Agreement

mm(h:Staff/GBl/Garden Grove MXD, Inc sr 062811v2.doc)

Approved for Agenda Listing

Matthew Fertal
Director

RESOLUTION NO. ____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GARDEN GROVE CONSENTING TO THE APPROVAL BY THE GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT OF A FIRST IMPLEMENTATION AGREEMENT WITH RESPECT TO THE FIRST IMPLEMENTATION AGREEMENT AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT BY AND BETWEEN THE AGENCY AND GARDEN GROVE MXD, INC.

WHEREAS, the Garden Grove Agency for Community Development ("Agency") entered into that certain agreement with Garden Grove MXD, Inc. ("Developer") is duly organized under the laws of the State of Colorado entitled Disposition and Development Agreement, dated as of April 13, 2010 ("Original Agreement"), a copy of which is on file with the Agency, under which the Developer was to develop certain property identified therein as the "Site";

WHEREAS, in connection with arranging for financing to implement its development obligations under the Original Agreement, the Developer has received comments from hotel operators, finance and tax advisors and, in connection therewith, has requested that the Agency approve a First Implementation Agreement With Respect To The First Implementation Agreement And Restated Disposition And Development Agreement in the form submitted herewith (the "First Implementation Agreement");

WHEREAS, the Original Agreement, as amended by the First Implementation Agreement, will continue to provide for the development and operation of a water park hotel, restaurants and a parking structure as more fully described in the DDA (the "Project");

WHEREAS, the Agency has duly considered all terms and conditions of the proposed First Implementation Agreement and believes that the First Implementation Agreement is in the best interest of the Agency and the City and the health, safety, and welfare of its residents, and in accord with the public purposes and provisions of applicable State and local laws requirements;

WHEREAS, the Developer has submitted to the Agency and the City Council of the City of Garden Grove ("City Council") copies of the First Implementation Agreement substantially in the form submitted herewith; and

WHEREAS, all actions required by all applicable law with respect to the proposed First Implementation Agreement have been taken in an appropriate and timely manner; and

WHEREAS, the Agency and the City Council have duly considered all the terms and conditions of the proposed First Implementation Agreement and believes that the redevelopment of the Site pursuant to the DDA in the best interests of the City of Garden Grove and the health, safety, and welfare of its residents, and in accord with the public purposes and provisions of applicable state and local laws and requirements.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GARDEN GROVE DOES RESOLVE AS FOLLOWS:

Section 1. The City Council finds and determines that, based upon substantial evidence provided in the record before it, the consideration for the Agency's disposition of the Site, together with the Covenant Consideration and Parking Structure Contribution and other items set forth in the Agreement, present not less than the fair reuse value at the use and with the covenants and conditions and development costs authorized by the Agreement.

Section 2. The City Council hereby finds and determines that the disposition of the Site by the Agency pursuant to the Agreement will eliminate blight within the Project Area by contributing to consolidation of a relatively small parcel with a larger parcel, promoting improvements, and expanding the tourist opportunities available within the community, as well as providing for the proper reuse and redevelopment of a portion of the Project Area which was declared blighted.

Section 3. The City Council hereby finds and determines that the Agreement is consistent with the provisions and goals of the Implementation Plan.

Section 4. The City Council further finds and determines that:

1. The expenditure of Agency funds for the construction of the public improvements is of benefit to the Project Area; and

2. There are no other reasonable means of financing and construction of the public improvements available to the City and the construction of the public improvements would be economically infeasible if the City or Developer were required to bear such costs.

Section 5. The City Council consents that the Executive Director of the Agency (or his designee) is hereby authorized, on behalf of the Agency, to make revisions to the Agreement which do not materially or substantially increase the Agency's obligations thereunder or materially or substantially change the uses or development permitted on the Site, to sign all documents, to make all approvals and take all actions necessary or appropriate to carry out and implement the Agreement and to administer the Agency's obligations, responsibilities and duties to be performed under the Agreement and related documents.

Section 6. The City Council acknowledges that the governing board of the Agency may authorized the Agency Director of the Agency (or his/her duly authorized representative) on behalf of the Agency, to implement the First Implementation Agreement and make revisions to the First Implementation Agreement which do not materially or substantially increase the Agency's obligations thereunder or materially or substantially change the uses or development permitted on the Site, to sign all documents, to make all approvals and take all actions necessary or appropriate to carry out ant implement the DDA and the administer the Agency's obligations, responsibilities and duties to be performed under the DDA and related documents.

RESOLUTION NO.

A RESOLUTION OF THE GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT APPROVING THE FIRST IMPLEMENTATION AGREEMENT WITH RESPECT TO THE FIRST AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT BETWEEN THE AGENCY AND GARDEN GROVE MXD, INC. AND MAKING CERTAIN OTHER FINDINGS IN CONNECTION THEREWITH

WHEREAS, the Garden Grove Agency for Community Development ("Agency") entered into that certain agreement with Garden Grove MXD, Inc. ("Developer") is duly organized under the laws of the State of Colorado entitled Amended and Restated Disposition and Development Agreement, dated as of April 13, 2010 ("Original Agreement"), a copy of which is on file with the Agency, under which the Developer was to develop certain property identified therein as the "Site";

WHEREAS, in connection with updating its development pro forma and arranging for financing to implement its development obligations under the Original Agreement, the Developer has received comments from finance and tax advisors and, in connection therewith, has requested that the Agency approve a First Implementation Agreement With Respect To The First Amended and Restated Disposition and Development Agreement in the form submitted herewith ("First Implementation Agreement");

WHEREAS, the First Implementation Agreement will continue to provide for the development and operation of a water park hotel, restaurants and a parking structure as more fully described in the DDA (the "Project");

WHEREAS, the Agency has duly considered all terms and conditions of the proposed First Implementation Agreement and believes that the First Implementation Agreement is in the best interest of the Agency and the City and the health, safety, and welfare of its residents, and in accord with the public purposes and provisions of applicable State and local laws requirements;

WHEREAS, the Developer has submitted to the Agency and the City Council of the City of Garden Grove ("City Council") copies of the First Implementation Agreement substantially in the form submitted herewith; and

WHEREAS, all actions required by all applicable law with respect to the proposed First Implementation Agreement have been taken in an appropriate and timely manner; and

WHEREAS, the Agency and the City Council have duly considered all the terms and conditions of the proposed First Implementation Agreement and believes that the redevelopment of the Site pursuant to the First Implementation Agreement in the best interests of the City of Garden Grove and the health, safety, and welfare of its residents, and in accord with the public purposes and provisions of applicable state and local laws and requirements.

WHEREAS, the Agency is a community redevelopment agency duly organized and existing under the California Community Redevelopment Law, Health and Safety Code Section 33000, *et seq.* ("CRL"), and has been authorized to transact business and exercise the power of a redevelopment agency pursuant to action of the City Council ("City Council") of the City of Garden Grove ("City"); and

WHEREAS, the existing Garden Grove Community Project and the boundaries of the Community Project Area ("Project Area") were duly established by various ordinances of the City Council, which ordinances approved a redevelopment plan for the Garden Grove Community Project, as amended ("Redevelopment Plan"); and

WHEREAS, Agency is vested with the power to implement the Redevelopment Plan and to carry out the goals and objectives of the Garden Grove Community Project, including without limitation the goals and objectives adopted by the Agency's implementation plan ("Implementation Plan") pursuant to the CRL; and

WHEREAS, the Agency is authorized and empowered by the CRL to enter into agreements for the acquisition, disposition and development of real property and otherwise to assist in the redevelopment of real property within a redevelopment project area in conformity with a redevelopment plan adopted for such area, to acquire real and personal property in redevelopment project areas, to receive consideration for the provision by the Agency of redevelopment assistance, to make and execute contracts and other instruments necessary or convenient to the exercise of its powers, and to incur indebtedness to finance or refinance redevelopment projects; and

WHEREAS, Garden Grove MXD, Inc. ("Developer") is a limited liability company duly organized under the laws of the State of Colorado and experienced in the acquisition, construction and development of hotel and restaurant facilities; and

WHEREAS, Agency wishes to assist the Developer in the construction of the Project (as hereinafter defined) by conveying to the Developer certain real property ("Site") which is comprised of certain property owned by the Agency ("Agency Property") and certain other property owned by third parties ("Third Party Property"), as shown on the Site Map attached hereto as Exhibit A and incorporated herein by reference which the Agency is currently seeking to acquire for the development of the Project and providing additional financial assistance; and

WHEREAS, Agency desires to enter into that certain First Implementation Agreement with Developer relating to the disposition of the Site and development and operation of a 600 room water park hotel, restaurants and a parking structure as more fully described in the DDA ("Project"); and

WHEREAS, the Agency is authorized to convey an interest in its real property to the Developer pursuant to the CRL; and

WHEREAS, pursuant to the California Environmental Quality Act (Public Resources Code Section 21000, *et seq.*) ("CEQA") and its implementing guidelines (14 California Code of Regulations Section 15000, *et seq.*) ("CEQA Guidelines"), the City approved a PUD-126-10 for the project on February 8, 2011.

WHEREAS, the Agency has adopted an Implementation Plan pursuant to CRL Section 33490, which sets forth the objective of increasing the community's economic base by encouraging new investment in the community, insuring the optimum generation of local revenues by facilitating the redevelopment and reuse of land, maximizing the use of property to achieve the highest and best use and a feasible economic return, and promoting new investment; and

WHEREAS, by providing for the development and operation of the Project on the Site, the First Implementation Agreement will assist the Agency in meeting the development policies and objectives set forth in the Implementation Plan, specifically the goal of reducing blighting economic conditions and increasing employment opportunities by encouraging new investment in the community through facilitating the development and rehabilitation of commercial properties and through the implementation of economic development programs; and

WHEREAS, pursuant to Sections 33430 and 33431 of the CRL, the Agency is authorized, after a duly noticed public hearing, to convey the Site for development pursuant to the Redevelopment Plan; and

WHEREAS, on April 13, 2010, the Agency held a duly noticed public hearing on the proposed First Implementation Agreement in accordance with Health and Safety Code Sections 33430 and 33431, at which time the Agency reviewed and evaluated all of the information, testimony, and evidence presented during the public hearing; and

WHEREAS, notice of the public hearing was published in the Orange County News, and the proposed First Implementation Agreement was available for public inspection prior to the public hearing as stated in the published notice of public hearing; and

WHEREAS, all actions required by all applicable law with respect to the proposed First Implementation Agreement have been taken in an appropriate and timely manner; and

WHEREAS, the City Council has previously determined, in its adoption of the ordinance approving the Redevelopment Plan, that the Site were blighted; and

WHEREAS, the First Implementation Agreement will assist in the elimination of blight by providing for the development and operation of the Project on the Site; and

WHEREAS, the Agency has duly considered all terms and conditions of the proposed First Implementation Agreement and believes that the Project is in the best interests of the City of Garden Grove and the health, safety, and welfare of its residents, and in accord with the public purposes and provisions of applicable state and local laws and requirements; and

NOW, THEREFORE, BE IT RESOLVED by the Garden Grove Agency for Community Development as follows:

1. Each of the foregoing recitals is true and correct.

2. The Agency finds and determines that, based upon substantial evidence provided in the record before it, the consideration for the Agency's conveyance of the Site pursuant to the terms

and conditions of the First Implementation Agreement is not less than the fair reuse value of the Site.

3. The Agency hereby finds and determines that the conveyance of the Site, construction and operation of the Project, and the payment of the Covenant Consideration and Parking Structure Contribution pursuant to the First Implementation Agreement will eliminate blight within the Project Area by providing for the proper reuse and redevelopment of a portion of the Project Area, which was previously declared blighted.

4. The Agency hereby finds and determines that the First Implementation Agreement is consistent with the provisions and goals of the Implementation Plan.

5. The First Implementation Agreement is within the scope of the project covered by the Environmental Impact Reports. The Agency is not required to prepare a subsequent or supplemental environmental impact report by Section 15162 or 15163 of the CEQA Guidelines.

6. The Agency hereby finds and determines the following regarding the First Implementation Agreement and the Project:

(a) The Project does not involve substantial changes in the Redevelopment Plan which will require major revisions of the Environmental Impact Reports due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(b) No substantial changes have occurred with respect to the circumstances under which the Redevelopment Plan is being implemented which will require major revisions of the Environmental Impact Reports due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(c) No new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the Environmental Impact Reports were certified as complete, shows any of the following:

(i) The Project will have one or more significant effects not discussed in the Environmental Impact Reports;

(ii) Significant effects previously examined will be substantially more severe than shown in the Environmental Impact Reports;

(iii) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the Redevelopment Plan; or

(iv) Mitigation measures or alternatives, which are considerably different from those analyzed in the Environmental Impact Reports, would substantially reduce one or more significant effects on the environment.

7. The Agency hereby approves the First Implementation Agreement between the Agency and Developer, in the form of the First Implementation Agreement, which has been submitted herewith.

8. The Agency Director and the Agency Secretary are hereby authorized to execute and attest the First Implementation Agreement, including any related attachments, on behalf of the Agency. Copies of the final form of the First Implementation Agreement, when duly executed and attested, shall be placed on file in the office of the City Clerk.

9. The Agency Director (or his/her duly authorized representative) is further authorized to implement the First Implementation Agreement and take all further actions and execute all documents referenced therein and/or necessary and appropriate to carry out the First Implementation Agreement. The Agency Director (or his/her duly authorized representative) is hereby authorized to the extent necessary during the implementation of the First Implementation Agreement to make technical or minor changes thereto after execution, as necessary to properly implement and carry out the First Implementation Agreement, provided the changes shall not in any manner materially affect the rights and obligations of the Agency.

FIRST IMPLEMENTATION AGREEMENT WITH RESPECT TO THE FIRST AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT

This **FIRST IMPLEMENTATION AGREEMENT WITH RESPECT TO THE FIRST AMENDED AND RESTATED DISPOSITION AND DEVELOPMENT AGREEMENT** (this "First Implementation Agreement") dated for purposes of identification only as of _____, 2011 (the "Date of this First Implementation Agreement"), is entered into by and between the **GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT**, a public body, corporate and politic (the "Agency"), and **GARDEN GROVE MXD, INC.**, a Colorado corporation (the "Developer").

RECITALS

A. The Agency and Developer entered into that certain First Amended and Restated Disposition and Development Agreement dated April 13, 2010 ("DDA") and now wish to provide for the implementation of portions thereof.

B. Section 301.3 of the DDA provides for the Agency (or to request the City to) initiate proceedings to form a CFD and use the proceeds of an issuance of bonds of the CFD (the "CFD Bonds") to finance the construction of the Parking Structure and/or other related public improvements. The Developer has requested that the CFD be formed prior to the Closing.

C. Section 408 of the DDA provides, in part, that the Agency and Developer are to attempt to reach agreement with respect to the Agency's obligation to issue Tax Allocation Bonds to fund its obligations under Section 408 to pay the Covenant Consideration.

D. The parties now desire by this First Implementation Agreement to provide for the early formation of the CFD, and to implement the terms of Section 408 with respect to the payment to the Covenant Consideration as set forth herein.

NOW, THEREFORE, the Agency and the Developer hereby agree as follows:

1. The following subparagraph (c) is hereby added to Section 301.3.

> (c) In anticipation of the Closing and preparing a full financing package for the Project, the Developer has requested and the Agency has agreed and will, as soon as practicable, request that the City work with the Developer and the Agency to form the CFD. Since the Agency will be the owner of the real property to be within the boundaries of the CFD at the time of formation, the Agency will, pursuant to the California Government Code, and hereby does, agree to be subject to taxation on its real property located within the CFD pursuant to the rate and method of apportionment adopted for the CFD.

2. Section 408 and Section 408.1 are hereby deleted and restated as follows:

> **408. Covenant Consideration.** In consideration for the granting of the Covenants by the Developer to the Agency and provided Developer is

not in Breach and/or Default hereunder or in default with respect to the special tax under the CFD, Agency shall pay to the Developer the all cash sum of Forty-Seven Million Dollars ($47,000,000) ("Covenant Consideration") as follows: (a) Five Million Dollars ($5,000,000) concurrently with the Commencement of Construction of the parking structure, and (b) Forty-Two Million Dollars ($42,000,000) on any date or dates the Agency permits release of such amount, acting in its sole and absolute discretion, but in no event later than the date which is thirty (30) days after the later of the date on which (i) the Hotel Opens for business, and (ii) the Certificate of Occupancy for the Hotel, . The parties acknowledge that, prior to the commencement of construction, the Agency intends to issue its tax allocation bonds (the "Tax Allocation Bonds") sized to net up to Forty-Seven Million Dollars ($47,000,000), but not less than Forty-Two Million Dollars ($42,000,000). Upon issuance of such Tax Allocation Bonds, the Agency shall hold and use the proceeds thereof pursuant to the bond documents governing the Tax Allocation Bonds.

In addition, if and only if Developer imposes a Resort Fee and (i) the City imposes a Qualified BID Assessment and/or (ii) the City increases its TOT Rate so that the effect of either (i) and/or (ii) is to decrease the 2008-2009 Differential, then the Agency will pay to the Developer each year, commencing with the year the Developer receives the Covenant Consideration, and so long as, and to the extent such TOT Differential remains an amount equal to the total room revenues for each such year multiplied by the difference between the 2008-2009 Differential and the TOT Differential for such year, (the "Applicable Differential"). If and to the extent the Applicable Differential becomes less than two percent (2%) either by virtue of changes in TOT Rates by the City of Anaheim and/or the City or the Qualifying BID Assessment is reduced or terminates, payment hereunder shall be adjusted accordingly. Notwithstanding the above, the Covenants Consideration shall be based on the TOT Rate of thirteen percent (13%). Anything to the contrary herein notwithstanding the Agency's obligations hereunder are unsecured and no agency obligation hereunder are or shall be secured in whole or in part by a pledge of tax revenues allocated to the Agency pursuant to the Redevelopment Law.

408.1 Further Assurances Regarding Tax Allocation Bonds. To provide Developer further assurance that the Agency will maximize its ability to issue the Tax Allocation Bonds described in Section 408, the Agency covenants and agrees that as long as the Developer is not in Default hereunder and until the Agency issues its Tax Allocation Bonds:

> **(a) Limitation on Superior Debt; Compliance with Plan Limitations.** The Agency shall not issue any bonds, notes or other obligations, enter into any agreement or otherwise incur any indebtedness, which is in any case secured by a lien on all or any part of the tax increment revenues for the Project Area which is or will be superior to or on a parity with the lien to be established for the Tax Allocation Bonds, excepting only (i) bonds, notes or other obligations

secured by tax increment revenues chargeable to the Agency's Low and Moderate Income Housing Fund, and (ii) any obligations issued for the principal purpose of refinancing the Agency's obligations with Union Bank of California in the current principal amount of Thirty-Two Million Dollars ($32,000,000) (inclusive of costs of issuance, and required reserves, etc.). In addition, the Agency shall take no action, including but not limited to the issuance of its bonds, notes or other obligations, which causes or which, with the passage of time would cause, any of the Agency's plan limitations to be exceeded or violated, as such limitations relate to the maximum amount of tax increment to be allocated to the Agency for the Project Area, or the bonded indebtedness limit for the Project Area.

(b) **SERAF Obligation**. The Agency shall comply with California Health and Safety Code Sections 33690 and 33690.5 (the "SERAF Statute") in full and at such time as the Agency is required to do so under applicable law so as to not be subject to any of the penalties associated with such statute under Health & Safety Code Section 33691, if such penalties would materially adversely affect the Agency's ability to issue the Tax Allocation Bonds. In addition, to the extent permitted by law, the Agency will take such steps as may be legally required to cause the SERAF Statute payment obligation to be junior and subordinate to the Tax Allocation Bonds, provided nothing in this covenant shall require the Agency to engage in litigation or issue Tax Allocation Bonds earlier than the date the Covenant Consideration is due.

(c) **Tax Sharing Payments**. To the extent the Agency is liable for tax sharing payments pursuant to Health and Safety Code Sections 33607.5 and 33607.7 (or any successor statutes) the Agency will, to the extent permitted by law and reasonably necessary to facilitate the issuance of the Tax Allocation Bonds, request subordination of the obligations to Taxing Entities to the Agency's obligations under the Tax Allocation Bonds; provided, the Agency shall be under no obligation to contest any objection to such subordination submitted by any Taxing Entity in response to such a request for subordination.

(d) **Issuance of Tax Allocation Bonds**. The Agency is in the process of issuing Tax Allocation Bonds and anticipates the issuance of such Bonds on or before July 30, 2011. Upon the issuance of Tax Allocation Bonds, whether the net proceeds are sufficient to pay the Covenant Consideration or not, the obligations of the Agency to issue Tax Allocation Bonds will be deemed fulfilled and, thereafter, the Agency's obligation to pay Covenant Consideration shall be controlled by this Section 408.1(d) and Section 408.1(e). If at any time during or prior to such date the Agency determines that it will not be able to issue Tax Allocation Bonds in amounts sufficient to pay the Covenant Consideration when due, the

Agency will nonetheless issue Tax Allocation Bonds to the extent legally permissible in such amounts as it determines are feasible taking into account the factors described in Section 408.1. Provided that Covenant Consideration is due under Section 408 and this 408.1, the Agency shall pay the balance, if any, of the Covenant Consideration not paid from the proceeds of the Tax Allocation Bonds, plus interest at a rate equal to the yield of the Tax Allocation Bonds (the "Unpaid Portion of the Covenant Consideration") and shall enter into such further arrangements with the Developer or its assigns as would be reasonably required to document the obligation to pay the Covenant Consideration.

(e) Termination of Covenant Consideration Obligation. Notwithstanding the foregoing, the obligation of the Agency under Section 408 to pay Covenant Consideration shall be subject to the terms of Section 408.1(d) ___ above if, for any reason, both of the following conditions do not occur by the date that is two (2) years after the date of issuance of the Tax Allocation Bonds: (i) Close of Escrow and (ii) the Developer has the Construction Financing and such Construction Financing shall be funded or ready to fund in accordance with Sections 205.1(f) and 205.2(h) hereof.

3. Except as set forth herein, the DDA is in full force and effect in accordance with the terms.

[*SIGNATURES ON NEXT PAGE*]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the respective dates set forth below.

AGENCY:

GARDEN GROVE AGENCY FOR COMMUNITY DEVELOPMENT, a public body, corporate and politic

Dated: _____, 20___

By: _____
Agency Director

ATTEST:

_____
Agency Secretary

APPROVED AS TO FORM:

_____
Thomas P. Clark, Jr.
Agency General Counsel

DEVELOPER:

GARDEN GROVE MXD, INC. a Colorado corporation

By: McWhinney Real Estate Services, Inc., a Colorado corporation, Manager

Dated: _____, 20___

By: _____
Douglas L. Hill
Chief Operating Officer

STATE OF COLORADO)
) ss.
COUNTY OF LARIMER)

The foregoing instrument was acknowledged before me this _____ day of _____, 20___, by DOUGLAS L. HILL, as Chief Operating Officer of MCWHINNEY REAL ESTATE SERVICES, INC., a Colorado corporation, as Manager of GARDEN GROVE MXD, INC, a Colorado limited liability company.

Witness my hand and official seal.

My Commission Expires: _____

_____
Notary Public

STATE OF CALIFORNIA)
) ss.
COUNTY OF _____)

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

personally appeared _____

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

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____
Signature of Notary Public

OPTIONAL

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

CAPACITY CLAIMED BY SIGNER

Individual
Corporate Officer

_____
Title(s)

Partner(s) Limited
General

Attorney-In-Fact
Trustee(s)
Guardian/Conservator
Other: _____

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

_____

_____

DESCRIPTION OF ATTACHED DOCUMENT

_____
Title Or Type Of Document

_____
Number Of Pages

_____
Date Of Documents

_____
Signer(s) Other Than Named Above