

Parcel promptly after Trustor's request at such time as either (a) the In-Lieu Fee has been paid or EV One and/or EV Two posts an irrevocable letter of credit in a form and format acceptable to the Commission in its reasonable discretion and in an amount not less than the amount of the In Lieu Fee attributable to the EV One Parcel, (b) the 24 Affordable Units have been constructed on the EV II Parcel, (c) Trustor obtains a building permit for the construction on the EV One Parcel of a project which does not require compliance with the Inclusionary Ordinance, or (d) EV Two terminates the Affordable Agreement pursuant to Paragraph 22(a) thereof at a time when the last sentence of said Paragraph 22(a) is applicable. Notwithstanding that this In Lieu Agreement may have been cancelled and the Deed of Trust which secures this In Lieu Agreement reconveyed, if any development which is subject to the Inclusionary Ordinance thereafter occurs on the EV One Parcel, EV One (or the then-owner of the EV One Parcel) shall be required to comply with the applicable requirements of the Inclusionary Ordinance.

2. Cross-Default. If (i) the Affordable Agreement is terminated for any reason prior to completion of construction of the twenty-four (24) Affordable Units or (ii) EV Two fails to timely complete construction of the Affordable Units as required by the Affordable Agreement, then within ten (10) days of receiving written notice from the Commission of such termination or breach: (A) EV One shall be required to pay the In Lieu Fee or (B) EV One and/or EV Two shall be required to post an irrevocable letter of credit in a form and format acceptable to the Commission in its reasonable discretion and in an amount not less than the amount of the In Lieu Fee attributable to the EV One Parcel (if such fee is payable with respect to a project for which EV One obtains a building permit). In such event, the amount of the In Lieu Fee will be calculated based on the In Lieu Fee in effect at the time at the time the building permit application for the EV One Parcel was filed, plus interest at the rate of ten percent (10%) from the date of such building permit application. Provided, however, that nothing contained herein or in the Affordable Agreement shall require the In Lieu Fee attributable to the EV One Parcel to be paid more than once, and if the In Lieu Fee attributable to the EV One Parcel has been paid in full by EV Two as provided in the Affordable Agreement, then EV One shall have no further liability with respect to such In Lieu Fee. Furthermore, the EV One Parcel shall be subject to any then-applicable laws and ordinances.

3. Recordation.

(a) Deed of Trust. Upon the execution of this In Lieu Agreement, EV One shall execute, acknowledge and deliver a deed of trust (the "Deed of Trust") securing this In Lieu Agreement to the Commission.

(b) Recordation.

(1) Other Encumbrances of the EV One Parcel. The EV One Parcel is owned by EV One, but is subject to a deed of trust, prior in time and superior to this Agreement and the Deed of Trust. Provided that an unrescinded notice of default under the Deed of Trust does not then appear of record, Commission agrees to execute such documents, in forms acceptable to Commission and its legal

counsel in their reasonable discretion, as are reasonably required to subordinate the Deed of Trust to a deed of trust securing a line of credit in favor of an institutional lender in an amount not to exceed \$_____. The deeds of trust referenced in this Section 3(b)(1), except for the Deed of Trust in favor of the Commission, shall be collectively referred to herein as the “Superior Deeds of Trust.”

(2) Priority of this Agreement. This Agreement shall be recorded as an encumbrance against the entire EV One Parcel in the Office of the County Recorder of the County of San Diego concurrently with and immediately prior to the Deed of Trust, subordinate only to the Superior Deeds of Trust and those items shown as exceptions and exclusions acceptable to the Commission in its reasonable discretion; provided, however, that if the Deed of Trust is concurrently subordinated to a lender’s first priority deed of trust pursuant to the Addendum to the Deed of Trust, then this Agreement shall be recorded immediately prior to such lender’s first priority deed of trust and the Deed of Trust shall be recorded as a second priority deed of trust.

(3) No Building Permits Prior to Clearing Title. EV One hereby covenants and agrees, prior to the start of any actual demolition or construction and prior to, or concurrently with, the closing of any construction loan with respect to the EV One Parcel: (i) to remove the Superior Deeds of Trust; and (ii) that this Agreement and the Deed of Trust shall be subordinate only to those exceptions and exclusions acceptable to the Commission in its reasonable discretion.

(4) Foreclosure of Prior Lien. If at any time this Agreement no longer exists as an encumbrance on all or any part of the EV One Parcel because of the foreclosure of a deed of trust to which this Agreement has been subordinated, then this Agreement shall be terminated and of no further force and effect. In such event both the EV One Parcel and the EV Two Parcel shall be subject to any and all statutes and regulations then in effect, as if this Agreement had not been made.

(c) Foreclosure of Prior Lien. If at any time the Deed of Trust no longer exists as an encumbrance on the EV One Parcel because of the foreclosure of a deed of trust to which the Deed of Trust has been subordinated, then the terms of this In Lieu Agreement shall remain enforceable covenants running with the land by injunction, specific performance and/or money damages, but not by foreclosure or forfeiture of title.

(d) Arbitration Provisions of Addendum to Deed of Trust Inapplicable. The Addendum to Deed to Trust provides for arbitration (the “Dispute Resolution Procedure”) of any dispute arising out of subordination of the Deed of Trust or establishing condominiums on the Property only. The Dispute Resolution Procedure does not apply to, and shall have no force or effect with respect to, any portion of this Agreement or the Deed of Trust, except for disputes arising out of subordination of the Deed of Trust or establishing condominiums on the EV Two Parcel only. By agreeing to the Dispute Resolution Procedure contained in the Addendum to Deed of Trust, the parties are not waiving any right to litigate any and all actions, issues or disputes, including actions for declaratory relief, with respect to the Deed of Trust and the Restriction Agreement, except for disputes arising out of subordination of the Deed of Trust or establishing condominiums on the EV One Parcel, as provided in the Addendum to Deed of

In Lieu Agreement. This In Lieu Agreement contains the entire agreement and understanding between the parties as to its subject matter.

(b) Waiver and Amendment. No provision of this In Lieu Agreement, or breach of any provision, can be waived except in writing. Waiver of any provision or breach shall not be deemed to be a waiver of any other provision, or of any subsequent breach of the same or other provision. This In Lieu Agreement may be amended only in writing signed by EV One and the Commission, which amendment shall be duly recorded as an amendment to this In Lieu Agreement.

(c) Time of Essence. Time is expressly declared to be of the essence in this In Lieu Agreement, and of every provision in which time is an element.

(d) Captions. Paragraph titles and captions contained in this In Lieu Agreement are inserted as a matter of convenience and for reference, and are not a substantive part of this In Lieu Agreement.

(e) Additional Documents. The parties each agree to sign any additional documents, which are reasonably necessary to carry out this In Lieu Agreement or to accomplish its intent.

(f) Benefit and Burden. This In Lieu Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives, successors and assigns. This In Lieu Agreement is not intended to benefit any person other than the parties hereto.

(g) Governing Law. This In Lieu Agreement has been entered into in the State of California, and shall be interpreted and enforced under California law.

(h) Attorneys' Fees. The prevailing party in any action, including, but not limited to, arbitration, a petition for writ of mandate, and/or an action for declaratory relief, brought to enforce, interpret or reform the provisions of this In Lieu Agreement shall be entitled to reasonable attorneys' fees and costs (including, but not limited to, experts' fees and costs, and including "costs" regardless of whether recoverable as such under statute) incurred in such action.

(i) Signatures. This In Lieu Agreement (and any amendment hereto) may be signed in duplicate counterparts.

(j) Exhibits and Recitals Incorporated. All exhibits referred to in this In Lieu Agreement are hereby incorporated in this In Lieu Agreement by this reference, regardless of whether or not the exhibits are actually attached to this In Lieu Agreement. The Recitals to this In Lieu Agreement are hereby incorporated in this In Lieu Agreement by this reference.

(k) Notices. All notices given pursuant to this In Lieu Agreement or law shall be written. Notices shall be delivered with all delivery or postal charges prepaid. Notices may be given personally; by facsimile; by United States first-class mail; by United States certified or registered mail; or by other

recognized overnight service. Notices shall be deemed received on the date of personal delivery or facsimile transmission; on the date shown on a signed return receipt or acknowledgment of delivery; or, if delivery is refused or notice is sent by regular mail, seventy-two (72) hours after deposit. Until a party gives notice of a change, notices shall be sent to:

If to the City:	Michael Uberuaga City Manager 202 "C" Street San Diego, CA 92101 Facsimile No.: (619) 236-6067
If to the Commission:	San Diego Housing Commission Attn: Elizabeth Morris, Chief Executive Officer 1625 Newton Avenue San Diego, CA 92113 Facsimile No.: (619) 578-7360
If to EV Two:	EV II, LLC Attn: Bryan Stone 104 So. Division Spokane, WA 99202 Facsimile No.: (509) 838-0933
If to EV One:	EV, LLC Attn: Bryan Stone 104 So. Division Spokane, WA 99202 Facsimile No.: (509) 838-0933

(l) Approval. Each person who signs this In Lieu Agreement on behalf of an entity warrants that he/she has full and complete authority to execute this In Lieu Agreement and to bind such entity.

9. Lender Protection. No breach or default under this In Lieu Agreement shall defeat or render invalid the lien of any deed of trust (which term includes a mortgage) made in good faith and for value. If the Commission receives notice from the holder of any deed of trust, to which the Deed of Trust which secures this In Lieu Agreement has been subordinated, of the existence of such deed of trust and requesting notice pursuant to this section and specifying an address for notices, then from and after such date (a) the Commission shall concurrently give to such holder copies of all notices which are given to EV One pursuant to this In Lieu Agreement and such holder shall have the right (but not the obligation) to cure any default by EV One within the same time as is provided to EV One under this In Lieu Agreement (or, if no time is specified, a reasonable time) and (b) this In Lieu Agreement shall not thereafter be amended without the written consent of such holder. In the event any deed of trust which

encumbers the EV One Parcel (or any part thereof) is foreclosed (which term includes a deed in lieu of foreclosure), the party who acquires title by such foreclosure shall not be liable for any breach of this In Lieu Agreement which occurred prior to such foreclosure, but shall be subject to all of the terms of this In Lieu Agreement from and after the foreclosure. Notwithstanding anything to the contrary contained herein or in the Deed of Trust, the Commission will not agree to subordinate the Deed of Trust which secures this In Lieu Agreement to any other deed of trust, unless the Commission is entitled to cure any and all defaults, in a manner acceptable to the Commission in its reasonable discretion, of such other deed of trust and to cure any and all defaults under any loan, promissory note or any other agreement or document secured by such other deed of trust.

10. Estoppels. At any time and from time to time, the Commission agrees to execute and deliver to EV One within fifteen (15) days after receipt of a written request therefor an estoppel certificate which may be relied on by any holder of a deed of trust encumbering all or part of the EV One Parcel and by any purchaser of all or any part of the EV One Parcel, stating (1) whether this In Lieu Agreement has been amended (and if so, stating the terms of such amendment), (2) whether EV One is in default under this In Lieu Agreement (and if so, specifying the default) and (3) any other information regarding the status of this In Lieu Agreement as may be reasonably requested.

11. Effective Date. This In Lieu Agreement shall be effective upon the date on which the last of the following has occurred: (i) this In Lieu Agreement has been duly executed by all parties hereto; (ii) this In Lieu Agreement has been formally approved by resolution of the Commission's board, including Commission's General Counsel; (iii) this In Lieu Agreement has been formally approved by the City Manager of the City of San Diego and by the San Diego City Attorney; and (iv) this In Lieu Agreement has been formally approved by resolution of the San Diego City Council, if in the opinion of the City Manager of the City of San Diego and/or the San Diego City Attorney, a resolution of the San Diego City Council is needed to make this In Lieu Agreement effective. The City Manager of the City of San Diego and the San Diego City Attorney by executing this In Lieu Agreement shall be deemed to be either (a) conclusive evidence that the City Manager of the City of San Diego and the San Diego City Attorney have determined that a resolution of the San Diego City Council is unnecessary to approve this In Lieu Agreement or (b) that the City Council has in fact passed a resolution formally approving this In Lieu Agreement, and in either case this In Lieu Agreement shall be effective upon satisfaction of items (i) and (ii) of this Section 11. Under no circumstances will this In Lieu Agreement be effective before all of the preceding have occurred.

IN WITNESS WHEREOF, the parties hereto have caused this In Lieu Agreement to be executed as of the date first written above.

“EV ONE”

EV, LLC, a Washington limited liability company

By: _____
Print Name: _____
Its: _____

By: _____
Print Name: _____
Its: _____

“CITY”

THE CITY OF SAN DIEGO,
a charter city

Approved as to form and Legality:
Casey Gwinn, City Attorney

By: _____
Michael Uberuaga, City Manager

By: _____
Prescilla Dugard, Deputy General Attorney

“COMMISSION”

SAN DIEGO HOUSING COMMISSION,
a public agency

Approved as to form and Legality:
Christensen Schwerdtfeger & Spath LLP

By: _____
Elizabeth C. Morris, Chief Executive Officer

By: _____
Charles B. Christensen, General Counsel
San Diego Housing Commission

EXHIBIT "A"

Legal Description of the EV One Parcel

EXHIBIT "B"

Legal Description of the EV Two Parcel

ACKNOWLEDGMENT

State of California)
)
County of San Diego)

On _____, 200____, before me, _____ personally appeared, _____ personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument INCLUSIONARY HOUSING IN LIEU FEE AGREEMENT 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 on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

(Seal)

ACKNOWLEDGMENT

State of California)
)
County of San Diego)

On _____, 200____, before me, _____ personally appeared, _____ personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument INCLUSIONARY HOUSING IN LIEU FEE AGREEMENT 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 on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

(Seal)

ACKNOWLEDGMENT

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)
County of San Diego)

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WITNESS my hand and official seal.

Signature _____

(Seal)

ACKNOWLEDGMENT

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County of San Diego)

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WITNESS my hand and official seal.

Signature _____

(Seal)