

## SECOND K-8 SCHOOL AGREEMENT

This SECOND K-8 SCHOOL AGREEMENT ("**Agreement**") is made this 15th day of November, 2016 ("**Effective Date**"), by and between HERITAGE FIELDS EL TORO, LLC, a Delaware limited liability company ("**Heritage**"), and IRVINE UNIFIED SCHOOL DISTRICT, a political subdivision of the State of California ("**District**").

### RECITALS

A. District is a political subdivision of the State of California, and is fully vested with the power to acquire property by eminent domain.

B. Heritage owns fee title to property within the City of Irvine and the jurisdictional boundaries of the District ("**Heritage Fields Property**"). Heritage is the master developer of a planned community on the Heritage Fields Property which will include residential dwelling units and non-residential development.

C. To mitigate anticipated school impacts from development of the Heritage Fields Property, Heritage and the District have entered into that certain Heritage Fields School Mitigation Agreement dated July 21, 2011 ("**School Mitigation Agreement**"). Heritage and the District are also parties to (1) that certain K-8 School Agreement dated February 1, 2013 ("**First K-8 Agreement**"), concerning construction of the first of the K-8 Schools ("**First K-8 School**"); and (2) that certain Advance Funding Agreement and Amendment to School Agreements dated August 19, 2014 ("**Advance Funding Agreement**").

D. The parties have agreed that the District will be responsible for the construction of the second of the K-8 Schools, which will be sized to accommodate 900 students, with additional peak loading capacity of 100 students ("**K-8 School**"). The parties intend, by this Agreement, to more particularly set forth the terms, covenants and conditions under which Heritage will convey to the District the school site for, and will fund the construction of, the K-8 School by the District. The parties further intend that this Agreement shall constitute the second K-8 Agreement described in Section 2.10 of the School Mitigation Agreement.

### AGREEMENT

NOW, THEREFORE, in view of the foregoing recitals and in consideration of the following terms, conditions and covenants, it is agreed as follows:

#### SECTION 1. SCHOOL SITE

**1.1 School Site Identification and Reservation.** Heritage and the District have identified a K-8 school site ("**K-8 School Site**") within the Heritage Fields Property, with a minimum of 13 Net Usable Acres, depicted on Exhibit A, and have obtained preliminary site approval for this site from the California Department of Education ("**CDE**"). (The legal description of the K-8 School Site is currently being prepared and, upon completion, shall be substituted as Exhibit A). The District acknowledges that Heritage and the City intend to quitclaim to each other the property segments of the shown in red on Exhibit A in order to create the boundary shown as the "Proposed Boundary," which is anticipated to occur in late November or early December 2016. District agrees that if the property segments have not been quitclaimed prior to the Closing, it shall quitclaim to the City the areas marked in red outside the Proposed Boundary

(subject to the City quitclaiming to the District the areas marked in red inside the Proposed Boundary). If the precise configuration of the property described in Exhibit A (“**Originally Identified Site**”) fails to satisfy one or more requirements for a school site set forth in Section 1.2, the parties shall meet and confer for the purpose of reconfiguring the boundaries of the K-8 School Site to the parties’ mutual satisfaction until such reconfiguration has been agreed upon and preliminarily approved by the California Department of Education (“**CDE**”), whereupon the legal description of the reconfigured site shall be substituted for the legal description of the Originally Identified Site, and the reservation of the Originally Identified Site shall be rescinded. The parties have also identified and obtained preliminary CDE site approval for a second potential school site on the Heritage Fields Property for the K-8 School (“**Second Site**”), as depicted in Exhibit B. If the preliminary evaluation or environmental assessment of the Originally Identified Site disclose issues potentially precluding its use as the K-8 School Site, the parties shall conduct further preliminary evaluation and environmental assessment of the Second Site pending a determination of whether the issues potentially precluding use of the Originally Identified Site can be resolved to the parties’ mutual satisfaction. If, after further review, the parties determine that the Originally Identified Site (in its original or reconfigured form) fails to satisfy one or more requirements for a school site set forth in Section 1.2, upon approval of the Second Site by the Board, the Second Site shall be substituted for the Originally Identified Site as the K-8 School Site, the legal description of the Second Site shall be substituted for the legal description of the Originally Identified Site, and the reservation of the Originally Identified Site shall be rescinded. If, following review and evaluation under Section 1.2, the Second Site also fails to satisfy one or more requirements for a school site under Section 1.2, the parties shall jointly identify and agree upon an alternative school site on the Heritage Fields Property, which, upon approval by the Board and receipt of preliminary site approval by the CDE, shall be substituted for the Second Site in the manner described in the preceding sentence, and shall constitute the K-8 School Site. The process of reconfiguring the K-8 School Site or selecting a substitute school site on the Heritage Fields Property described in Sections 1.1 and 1.2 shall be known as the “**Reconfigured/Substituted Site Process**.”

**1.2 State Review.** The parties shall, at Heritage’s sole cost and pursuant to the terms of this Agreement, conduct a Phase 1 environmental site assessment for submittal to the Department of Toxic Substances Control (“**DTSC**”) and conduct other review and assessment of the suitability of the proposed K-8 School Site. Provided the preliminary evaluation and environmental assessment do not disclose issues potentially precluding use of the proposed site, the parties shall conduct the studies, perform the actions and submit the documents required for final school site approval from CDE, DTSC and any other agency whose approval is required (“**Approving Agency**”). The parties shall, at Heritage’s sole cost, take such further actions as are necessary to comply with laws and regulations governing approval and use of school sites (“**School Site Laws**”), including, without limitation, (a) school site approval by District and the CDE (Education Code Sections 17210 *et seq.* and Title 5 of the California Code of Regulations, Sections 14000 *et seq.*); (b) compliance with all environmental requirements applicable to school site acquisitions including without limitation, geological and soil engineering investigations, hazardous waste and hazardous air emissions, and Phase I and Phase II Reports, if applicable (Education Code Sections 17210, 17212, 17212.5, 17213 and 17213.1; Public Resources Code Section 21151.8); (c) compliance with the California Environmental Quality Act (Public Resources Code Sections 21000 *et seq.*); (d) zoning compliance (Government Code Sections 53091, 53094, and 65402; Public Resources Code Section 21151.2); (e) consultation with parks and recreation agencies (Education Code Section 35275); and (f) compliance with any additional

legal requirements of the State, including without limitation, the CDE, DTSC, SAB, and the OPSC. District shall, at all times, have the right to self-perform any work or studies, at Heritage's sole cost, reasonably necessary to obtain such approvals and otherwise comply as noted above.

**1.3 Consultants; Heritage Deposit Account.** In addition to the Architect, Inspector, and District School Consultant, the District has selected PlaceWorks, Inc. to assist in obtaining the State Approvals necessary for development and construction of the K-8 School, as well as C.W. Driver to provide pre-construction services with respect to the K-8 School. Unless otherwise agreed to in writing by the District and Heritage, subject to the right by Heritage to review and reasonably approve the contracts, and any amendments thereto, with the Architect, Inspector, District School Consultant, PlaceWorks, Inc., and C.W. Driver ("**Consultants**"), Heritage shall be responsible for the fees and costs for the services provided by the Consultants with respect to the K-8 School ("**Consultant Costs**") pursuant to budgets mutually approved by Heritage and the District. The District will also incur fees of Approving Agencies in obtaining the approvals described in Section 1.2 ("**Agency Fees**"), for which Heritage will remain financially responsible to repay. Pursuant to that certain Agreement Regarding Payment of Costs dated October 24, 2016, the District was to establish a segregated, interest-bearing account for payments for certain Consultant Costs and Agency Fees ("**Heritage Deposit Account**"), and Heritage was to provide the District with a deposit payment for the Consultant Costs and Agency Fees incurred by the District as of the Effective Date of the Agreement Regarding Payment of Costs (October 24, 2016) and those Consultant Costs and Agency Fees reasonably anticipated to be incurred by the District over the following 60-day period, in the amount of One Million Four Hundred Fifteen Thousand Seven Hundred Seventy Two Dollars (\$1,415,772). This Agreement modifies the terms of the Agreement Regarding Payment of Costs, and this Agreement supersedes the Agreement Regarding Payment of Costs in all respects. The parties agree that, now, the Heritage Deposit Account shall be included in the appropriate District interest-bearing school project fund, but not segregated from other District project funds, and that all funds deposited in the Heritage Deposit Account shall be used by the District solely to pay approved Consultant Costs and Agency Fees, which shall be paid by the District only on the basis of appropriate invoices specifically describing the services performed and dates of performance by the Consultant(s) and/or the nature and amount of the Agency Fees. All funds in the Heritage Deposit Account shall bear interest, which interest shall be calculated as a pro-rated interest calculation based on all funds held in the District's interest-bearing school project fund, within which the Heritage Deposit Account is held. The parties acknowledge that Heritage has provided an initial deposit payment into the Heritage Deposit Account in the amount of Eight Hundred Fifty-Six Thousand Six Hundred Forty-Seven Dollars (\$856,647), and Heritage shall provide payment directly to Architect in the amount of Five Hundred Fifty-Nine Thousand One Hundred and Twenty-Five Dollars (\$559,125) on the day following approval of this Agreement by the Board; therefore, together, these two payments total the initial One Million Four Hundred Fifteen Thousand Seven Hundred Seventy Two Dollars (\$1,415,772) actual and estimated cost figure noted above. Within fifteen (15) days after the Effective Date, and every sixty (60) days thereafter, until such time as the Heritage Deposit Account is merged with the K-8 ICE Account pursuant to Section 4 below, the District shall provide Heritage with a reasonable good faith estimate of the funds required to make timely payments for Consultant Costs and Agency Fees for the 60-day period following the period for which the previous deposit was made. Within forty-five (45) days of receipt of the estimate, Heritage shall provide the District with the amount of the estimate for deposit into the Heritage Deposit Account. The District shall at all times keep, or cause to be kept, books of account and

other records showing the amounts deposited by Heritage into the Heritage Deposit Account and the amounts paid for Consultant Costs and Agency Fees with references to invoice numbers or other appropriate information identifying the invoices for which payments were made. During regular business hours and after not less than twenty-four (24) hours' notice, Heritage or its agents shall have access to and the right to inspect the District's books and records relating to the Heritage Deposit Account. If Heritage so requests, it or its designated agent, can make copies of such books or records, at Heritage's expense, for audit or other examination. It is the intent of the parties to ensure that, at all times, the District has sufficient funds available in the Heritage Deposit Account necessary to make timely payments for Consultant Costs and Agency Fees.

**1.4 Appraisal.** The parties shall jointly select a certified MAI appraiser ("**Appraiser**") from a list of eight qualified appraisers selected by the District with the reasonable approval of Heritage ("**Approved List**"). The Appraiser shall conduct an appraisal of the K-8 School Site, as of a date mutually agreed to by the parties, according to its highest and best use without regard to its proposed use for school purposes using the Uniform Standards of Professional Appraisal Practice, and in accordance with all applicable requirements for appraisal of property to be acquired for school purposes ("**Appraised Value**"). The K-8 School Site shall be appraised as if it were a clean site, safe from all contaminants in accordance with SFP Regulations, Section 1859.74.1, CDE guidelines, and Title 5, California Code of Regulations. The K-8 School Site shall be appraised in a construction-ready superpad condition, mass-graded and compacted with wet and dry utilities installed and stubbed to the site and curb, gutter, sidewalks and streets (including street lighting) on at least two sides of the K-8 School Site ("**Appraised Condition**"). The Appraiser shall consider the purchase prices of other school sites recently acquired by the District in determining the Appraised Value. All costs of the appraisal shall be borne by Heritage. If close of escrow of the conveyance of the K-8 School does not occur within six (6) months of the date of the appraisal determining the purchase price, the appraisal shall be updated, such that the appraised fair market value of the K-8 School Site shall always be established as of a date not more than six (6) months prior to the date of acquisition of the K-8 School Site by District. The appraisal shall be conducted in accordance with the applicable State requirements related to school site acquisition by school districts to ensure State Funds eligibility, and District and Heritage agree that in no event shall any of the procedures set forth above or in the School Mitigation Agreement operate to circumvent such applicable State requirements, which State requirements shall be followed by District and Heritage in the event of any conflict with the foregoing procedures.

**1.5 Site Work; Utility Easements.** Following receipt of DTSC approval, Heritage shall complete preparation and development of the K-8 School Site to the Appraised Condition described above ("**Site Work**"). The Site Work shall also include: (i) completion of perimeter curbs and gutters, (ii) completion of perimeter street base and pavement including drive approaches, (iii) completion of wet utility system stubbed five (5) feet past District determined property line, (iv) completion of dry utility system stubbed five (5) feet past District determined property line, (v) placement of Irvine Ranch Water District (IRWD) reclaimed water and domestic water vaults (installation of meters is not necessary), (vi) and completion of rough grade including the placement of super pads for buildings. The District acknowledges that (a) some of the existing utility easements that encumber the K8 School Site are held by agencies, including but not limited to, the IRWD and the City of Irvine and will need to be quitclaimed by those respective entities to the District once final service lateral locations have been determined; (b) some of the agency utility easements will remain; and (c) the District will need to grant easements, or the right of access to

existing easements, for installation, maintenance, repair and replacements of utility lines, structures and facilities on or adjacent to the K-8 School Site in the future once the locations of such lines, structures and facilities have been determined. The District agrees to cooperate with IRWD, the City of Irvine, other utility providers and Heritage regarding the grant or quitclaim of the utility easements on the K-8 School Site. The Site Work shall be completed by Heritage in sufficient time to allow for the completion of construction of the K-8 School by the District in a timely manner consistent with the Construction Completion Date described in Section 2.1. In addition to the Site Work, Heritage shall also install, post-Closing, a property line wall adjacent to Cadence Street. The District agrees that Heritage shall reserve, in the Grant Deed, an easement for a wall footing for, and construction, maintenance and repair of, the property line wall. The Site Work to be performed by Heritage constitutes the improvements to the K-8 School Site to be performed by Heritage pursuant to Section 2.5 of the School Mitigation Agreement. Nothing in this Agreement shall require Heritage to commence or complete the Site Work any earlier than necessary in order to complete construction of the K-8 School by the Construction Completion Date.

**1.6 Sale of K-8 School Site.** Upon all of the terms, conditions and covenants of this Agreement and for a purchase price equal to the Appraised Value (“**Purchase Price**”), Heritage agrees to sell the K-8 School Site to District by Grant Deed in the form attached hereto as Exhibit C (the “**Grant Deed**”).

**1.7 Project Schedule.** The parties have met and conferred with each other and have consulted with the Architect, Construction Manager and other consultants and have agreed upon and established a schedule for the pre-construction services, Site Work, post-conveyance Site Improvements, state funding applications, bidding, contract awards and construction of the K-8 School which allows for an opening date commensurate with the first day of school for 2018 (“**Project Schedule**”). A copy of the Project Schedule is attached as Exhibit D. The Project Schedule will be used by the District to track, monitor and enforce all pre-construction and construction milestones and deadlines as necessary to help ensure the timely completion and opening of the K-8 School and to maximize eligibility for and receipt of State Funds.

## **SECTION 2. CONSTRUCTION OF SCHOOL**

**2.1 Commencement and Completion of Construction; Opening of School.** The construction of the K-8 School shall be completed by the District. The District shall use its best efforts to complete construction of the K-8 School and to open the K-8 School on the first day of school for 2018 (“**Construction Completion Date**”). At least 30 days prior to the anticipated Closing Date, the parties shall update and review the most recent projections concerning generation of K-8 Project Students based upon the most recently available information described in Sections 4.1 and 4.2 of the School Mitigation Agreement. If the updated projection shows that there will be fewer than 1,000 K-8 Project Students in the Fall of 2018, unless otherwise agreed by the parties, the construction of the K-8 School (and conveyance of the K-8 School Site) shall not proceed until such time as the most recent projection shows that there will be at least 1,000 K-8 Project Students in the fall of the year in which the K-8 School will be opened. If the updated projection shows that there will be between 1,000 and 1,400 K-8 Project Students in the fall of the year in which the K-8 School will be opened, conveyance of the K-8 School Site and construction of the K-8 School shall proceed; provided, however, under such circumstances, if at the time the

K-8 School is ready for occupancy, fewer than 1,400 K-8 Project Students have actually been generated by the Project, the District and Heritage shall meet to determine the best course of action based upon the number of K-8 Project Students actually generated. It is the intent of the parties that the K-8 School shall be opened if it is reasonably practicable to do so, and the parties shall explore all available options to that end. The parties agree to open the school although fewer than 1,400 K-8 Project Students have been generated, and if the school will be operated with fewer than 500 students, Heritage shall contribute to the District, prior to the first day of school, the amount necessary for the District to adequately pay for administration personnel (i.e., non-teaching staff) for the K-8 School for one (1) year. The total amount contributed for such purposes shall not exceed Five Hundred Fifty Eight Thousand Dollars (\$558,000) and shall be considered part of the Construction Costs associated with the K-8 School for purposes of payment by Heritage only. Furthermore, the parties agree that while District shall use its best efforts to complete construction of the K-8 School as described in this Section 2.1, it may be necessary to complete some portions of the K-8 School, including but not limited to, possibly, the gymnasium and middle school classroom buildings, after the opening of the K-8 School. During the first school year in which K-8 School is open (and in each of the following school years, as applicable), the parties shall explore all available options and shall use best efforts to ensure that, during the following year of operation, the K-8 School will have at least 500 students. If, notwithstanding those efforts, the K-8 School must be operated with fewer than 500 students (and provided the Project has not yet generated at least 1,400 K-8 Project Students), Heritage shall contribute to the District, prior to the first day of school, the amount necessary for the District to adequately pay for administration personnel for the K-8 School for the following school year, which amount shall not exceed Five Hundred Fifty Eight Thousand Dollars (\$558,000).

**2.2 Construction Manager and Contractors.** The District has selected, pursuant to a fair, competitive selection process consistent with Education Code section 17070.50, C.W. Driver as construction manager (“**Construction Manager**”) to provide construction management services for all work necessary for construction of the K-8 School (“**K-8 Project**”). The District shall hire the Construction Manager directly, pursuant to a contract reasonably approved by District and Heritage, and Heritage shall be responsible for all fees and costs of the Construction Manager. The costs for such Construction Manager services and all other consultants hired by the District related to this Agreement shall be paid directly by District from the Heritage Deposit Amount, or the K-8 ICE Account pursuant to Section 4, below.

**2.3 Architect.** PJHM Architects, Inc., has been selected by the parties as the architect for the design and ongoing supervision of construction of the K-8 School (“**Architect**”) pursuant to a qualifications-based, competitive selection process consistent with State law. The District shall hire the Architect directly, pursuant to a contract reasonably approved by District and Heritage, and Heritage shall be responsible for all fees and costs of the Architect. The costs for such Architect services and all other consultants hired by the District related to this Agreement shall be paid directly by District from the Heritage Deposit Amount, or the K-8 ICE Account pursuant to Section 4, below.

## **2.4 Design of K-8 School.**

(a) Design Standards. The parties shall cooperate in good faith to ensure that the design of the K-8 School (i) conforms to the District’s K-8 school educational specifications; (ii) is

generally compatible with the architectural theme of the community in which the K-8 School will be located; and (iii) conforms to the Site Plan and Description of Facilities shown on Exhibit F (collectively, “**K-8 Design Standards**”). The furnishings, fixtures, equipment and education technology provided for the K-8 School shall conform to the District’s educational specifications, subject to modifications for technological advances or energy-saving incentives or requirements that are necessary to achieve cost savings or advance District-wide educational policies for the K-8 School. The costs for such furnishings, fixtures, equipment and education technology, together with library books and materials, shall not exceed the figure set forth in Section 2.7 below. Nothing herein shall be construed to limit the education or design specifications of the K-8 School with respect to any such changes as may have been mandated by State, local or federal law or regulation, which mandated changes shall be included as necessary education or design specifications. The design of the K-8 school shall comply with previously Board-approved CHPs standards policy, and the parties shall meet and confer and work collaboratively during the design process with respect to possible other environmental and solar options and design elements.

(b) Cooperation in Design. Prior to commencement of the design of the K-8 School, the District and Heritage shall meet with the Architect to discuss the K-8 Design Standards and the process of developing and selecting the exterior materials, colors, textures, landscaping and other design elements and features. When preparing the Preliminary Plans, the Architect shall work closely with the District and Heritage and shall consider and incorporate comments and recommendations regarding the plans and value engineering concepts.

**2.5 Plans and Specifications.** The Architect shall prepare preliminary plans and specifications (“**Preliminary Plans**”) for the K-8 School for prior review and approval by the District and Heritage in conformance with the K-8 Design Standards. The Preliminary Plans will designate and include the necessary information for the conceptual design of the K-8 School, including, without limitation, identifying the number of teaching stations and the approximate site location of the buildings and anticipated core facilities and related infrastructure. Following approval of the Preliminary Plans by the parties, the Architect shall prepare final plans and specifications for review and approval of the parties and submittal to the Division of the State Architect (“**DSA**”) and CDE. The District and Heritage shall cooperate in good faith to respond to the comments or concerns of DSA and CDE and secure final approval from both agencies of plans and specifications mutually acceptable to the District and Heritage (“**Approved Plans**”). Neither Heritage nor the District will have authority to order any changes in the Approved Plans or to perform any work inconsistent with the Approved Plans without the prior written consent of both parties (which consent shall not unreasonably be withheld) and, if necessary, DSA.

**2.6 Inspector of Record.** An inspector, licensed by the State of California and selected by, paid for and under contract to the District, shall be retained by the District and shall be instructed to inspect all phases of construction of the K-8 School in the manner specified by Title 24, Part 1 of the California Code of Regulations (“**Inspector**”). The District shall hire the Inspector directly, pursuant to a contract reasonably approved by District and Heritage, and Heritage shall be responsible for all fees and costs of the Inspector. The costs for such Inspector services and all other consultants hired by the District related to this Agreement shall be paid directly by District from the Heritage Deposit Account, or the K-8 ICE Account pursuant to Section 4, below. The Inspector shall act under the direction and control of the District in assuring compliance with the Approved Plans.

**2.7 Furniture, Equipment, Books, Materials and Technology.** For the K-8 School, Heritage shall contribute to the District the amounts necessary for District to acquire any and all furniture, fixtures and equipment, library books and materials, and technology equipment, supplies, and materials (collectively, “**Furnishings, Equipment and Materials**”) for the K-8 School, as set forth in Section 2.4(a) above; provided, however that the total amount contributed for such purposes shall not exceed Two Million Two Hundred Thousand Dollars (\$2,200,000), which amount shall be adjusted for inflation pursuant to the Core CPI (CPI-U for All Items Less Food & Energy) as published by the Bureau of Labor Statistics beginning on June 1, 2017 and annually thereafter.

### **SECTION 3. FEDERAL, STATE AND LOCAL FUNDS; AUDIT.**

#### **3.1 Federal, State and Local Funding.**

(a) Maximizing Public Funding. The parties shall cooperate and use their best efforts to maximize receipt of all federal, state and local funds available to fund the school site acquisition, site development and construction costs described in this Agreement (collectively, “**Public Funding**”). Without limiting the generality of the preceding sentence, the parties shall take all of the actions set forth in this Section 3.1.

(b) Coordinated Submittals for State Funds. The District, in cooperation with a District-selected school facilities consultant (“**District School Consultant**”), and a separate consultant retained by Heritage (“**Heritage School Consultant**”), (collectively “**School Consultants**”), shall, in good faith, use its best efforts to establish the District’s eligibility for and obtain an apportionment from the State Allocation Board (SAB) of the maximum allowable amount of State Funds available for site acquisition, site development and new construction with respect to the K-8 School Site and K-8 School (including, without limitation, new construction grants based on the number of students applicable at that time -- maximizing state funding based on loading all teaching stations, including the portables -- grants for site acquisition, site utilities, off-site improvements, joint use facilities, service site development costs and other supplemental grants and/or enhancements, such as grants for energy efficiency, fire code requirements, labor compliance program, DTSC costs and special education) for the school facilities described in this Agreement; provided, however, that nothing in this Section 3.1(b) shall require the District to change or compromise the District’s education policies and practices (such as grade configuration) in effect as of the Effective Date. In so doing, the District’s obligation, in coordination with the School Consultants, shall include, but not be limited to, promptly submitting to the CDE, OPSC, SAB, and any other state or local agency as may be desirable or necessary, any and all properly completed forms, documents, reports, studies or information of any kind that may be required or advisable during the term of this Agreement for apportionment and release of State Funds to the District. The District and Heritage agree to work together in good faith to complete the necessary forms and documents necessary to establish eligibility for and obtain the maximum allowable State Funds. State Funds obtained for site acquisition, site development and construction of the K-8 School shall be reimbursed to Heritage pursuant to Section 3(d), below.

(c) District School Consultant Contract. The District shall select and hire the District School Consultant pursuant to a contract reasonably approved by District and Heritage, and shall pay the District School Consultant from the Heritage Deposit Account, or the K-8 ICE Account

pursuant to Section 4, below. The District School Consultant shall act under the direction and control of the District.

(d) Site Acquisition, Site Development and Construction Reimbursements. For purposes of reimbursement, the cost of the K-8 School Site shall be deemed to be that amount as set forth in the appraisal for such School Site, prepared in accordance with Section 1.3 of which the State will fund 50% (“**Site Acquisition Reimbursement**”), if applicable, or the maximum percentage of funding provided by the State funding program at the time of such payment, if any. Immediately upon receipt by the District, the Site Acquisition Reimbursement for the K-8 School Site shall be deposited with Escrow Holder and held in an interest-bearing account and, except for as provided in this Section below, paid to Heritage for the K-8 School Site at Close of Escrow if such funds have been received by the District as of the Closing Date; otherwise, should the District receive the Site Acquisition Reimbursement post-closing for the K-8 School Site, the Site Acquisition Reimbursement shall be, except for as provided in this Section below, paid to Heritage immediately after receipt thereof by the District. For purposes of reimbursement, the cost to prepare the K-8 School Site shall be the allowable costs incurred and reported by the District to the State on SAB Form 50-04 or other applicable form, consistent with School Facilities Act and SFP Regulations or the State funding regulations in effect at the time, of which the State will fund 50% (“**Site Development Reimbursement**”), if applicable, or the maximum percentage of funding provided by the State funding program at the time of such payment, if any. The Site Development Reimbursement for the K-8 School shall, except for as provided in this Section below, be paid to Heritage within thirty (30) days of receipt of any State Funds received by the District for such Site Development Reimbursement. The District shall also, except for as provided in this Section below, pay to Heritage, within thirty (30) days of receipt thereof, all State Funds received by the District with respect to Site Improvements for and construction of the K-8 School including, without limitation, funding for design, construction of buildings, education technology, tests, inspections and Furnishings, Equipment and Materials. The District shall also pay, except for as provided in this Section below, to Heritage, within thirty (30) days of receipt thereof, any other State Funds received by the District for site acquisition, site development/improvement and/or construction costs of the K-8 School, including, without limitation, miscellaneous or supplemental grants and/or enhancements, such as grants for energy efficiency, fire code requirements, labor compliance program, DTSC costs and special education. Payment by District to Heritage of any State Funds pursuant to this Section 3.1(d), or otherwise in this Agreement, shall only be made after the District has been repaid by Heritage for all K-8 Costs associated with the First K-8 School, as provided by Section 4.2 of the Advance Funding Agreement; provided, however, that any amount of State Funds received by District in excess of the K-8 Costs associated with the First K-8 School shall be disbursed to Heritage in accordance with the School Mitigation Agreement pursuant to Section 4.2 of the Advance Funding Agreement.

**3.2 Other Public Funding.** Provided Heritage has complied with the terms and conditions of this Agreement and the School Mitigation Agreement, in addition to State Funds, the District shall pay to Heritage the aggregate amount of any Public Funding actually received by the District for site acquisition, site development/improvement and/or construction costs of the K-8 School promptly after receipt thereof by the District.

**3.3 Audit.** The parties acknowledge that the expenditure of State Funds for the K-8 School Site and K-8 School may be audited by the OPSC, pursuant to Title 2, Section 1859.106

of the California Code of Regulations, to ensure that the expenditures incurred by the District were consistent with the regulations governing new construction projects and that the District complied with site acquisition guidelines contained in Sections 1859.74 *et seq.*, of the California Code of Regulations (“**Audit**”). Upon receipt of notice that the OPSC intends to conduct an Audit, the District shall immediately notify Heritage, whereupon the parties, and their Audit Consultants (if any) shall cooperate with and assist each other with the intention of fully preserving all of the terms of this Agreement and the benefits and obligations secured thereby. Heritage shall assist the District in connection with the Audit. In the event the OPSC, after auditing the project, concludes that the project was not eligible for any or all of the State Funds and either demands reimbursement or reduces the amount of a future apportionment, Heritage shall pay to District the amount of such reimbursement or reduction of future apportionment within sixty (60) days of receipt of a written demand for payment by District, unless the time frame mandated by OPSC warrants a shorter time period, in which event, Heritage shall pay in a manner sufficient to comply with OPSC’s request; provided, however, that in no event shall Heritage’s obligation for payment of such reimbursement or reduction exceed the amount of State Funds actually received by Heritage in connection with the project subject to the audit. The District and Heritage shall each have the right, at its sole cost, to hire a consultant to assist it with the Audit (each, an “**Audit Consultant**”).

**3.4 Conveyance in Lieu; State Funds or Other Public Funding.** This Agreement implements the provisions of the School Mitigation Agreement relating to the second K-8 School. The intent of this Agreement, together with the School Mitigation Agreement, is that, in lieu of payment of fees or other mitigation funds or compliance with other School Mitigation Requirements with respect to K-8 students, Heritage shall provide land for and shall fund school facilities sufficient to accommodate all K-8 students generated by the Project, and shall be reimbursed any State Funds or other Public Funding received by the District for such land and school facilities, pursuant to the terms of this Agreement. The parties acknowledge and agree that, with respect to the K-8 School, if Heritage were providing mitigation in the form of a mitigation payment, such payment would be in the amount necessary to fund the costs of site development and acquisition of the K-8 School Site (based on appraised value at highest and best use) and the cost of construction of the K-8 School and that the District would reimburse to Heritage any State Funds or other Public Funding received for such land and improvements, such that Heritage’s mitigation obligation did not exceed the District’s local match obligation under the School Facility Program. Consistent with the foregoing, in lieu of payment by Heritage to the District of a mitigation payment equal to the Purchase Price, and payment of the Purchase Price to Heritage through escrow, the transaction is structured such that (a) Heritage’s and the District’s respective mitigation and Purchase Price payment obligations concerning the K-8 School Site shall be deemed to have been fulfilled as of the date of Close of Escrow, and no funds shall change hands (except for State Funds or other Public Funding received as of the Closing Date by the District for costs of acquisition of the K-8 School Site, as provided above); and (b) Heritage shall be entitled to any State Funds or other Public Funding received by the District for the K-8 School Site after the Closing Date, pursuant to the terms of this Agreement. Heritage acknowledges that it shall be entitled only to State Funds or other Public Funding actually received by the District and bears the risk that no such State Funds or other Public Funding will be received by the District, either before or after Close of Escrow, despite the best efforts of both parties to secure such funds. The parties acknowledge and agree that this Agreement shall be used by the District as evidence that it has secured funding for the 50% local matching funds for site development and acquisition of the K-8 School Site and construction of the K-8 School required under the School Facility Program and

as part of the certification to the SAB that the District will fund its local match share of the cost of acquisition, site development and construction of the K-8 School.

#### **SECTION 4. SITE IMPROVEMENT AND CONSTRUCTION COSTS**

##### **4.1 Site Improvement and Construction Cost Escrow Account.**

(a) K-8 ICE Account. Within thirty (30) days after the Effective Date, the District shall establish the appropriate District interest-bearing school project fund, but not segregated from other District project funds, denominated the "Heritage K-8 Site Improvement and Construction Escrow Account" ("**K-8 ICE Account**") solely for the purpose of receiving, holding and disbursing funds deposited by Heritage for Site Improvement Costs, Construction Costs and Furnishings, Equipment and Materials for the K-8 School in accordance with this Section 4. Additionally, upon the first payment by Heritage of any amount into the K-8 ICE Account, the Heritage Deposit Account shall be merged by District into the K-8 ICE Account so that all payments to be made by Heritage into the Heritage Deposit Account, and all payments by District to be made out of the Heritage Deposit Account will thereafter be made to and from the K-8 ICE Account. All funds deposited by Heritage into the K-8 ICE Account shall bear interest, which interest shall be calculated as a pro-rated interest calculation based on all funds held in the District's interest-bearing school project fund, within which the K-8 ICE Account is held. It is the intent of the parties to ensure that, at all times, the District has sufficient funds available in the K-8 ICE Account necessary to cover all amounts, in advance of execution of contracts, for which District has contracted with any entity providing for, and to otherwise make timely payments for, all Site Improvement Costs, Construction Costs and Furnishings, Equipment and Materials as they become due. Furthermore, it is the intent of the parties to ensure that, at all times, the District has sufficient funds available in the K-8 ICE Account (once the Heritage Deposit Account is merged into the K-8 ICE Account) necessary to cover all amounts needed to make timely payments for Consultant Costs and Agency Fees; therefore, the parties agree that any remaining amounts to be paid based upon executed contracts in place at the time of the merger of the Heritage Deposit Account into the K-8 ICE Account will be deposited by Heritage into the K-8 ICE Account upon written notice by District of such remaining amount. Upon such payment by Heritage, District shall no longer provide the reasonable good faith estimates required by Section 1.3 above, and Heritage shall remain responsible for all final actual costs associated with the Consultant Costs and Agency Fees.

(a) Disbursement of Funds. The District shall disburse funds from the K-8 ICE Account only on the basis of (i) appropriate invoices specifically describing the Site Improvement Costs or Construction Costs incurred (which shall include, without limitation, all site improvement costs and construction costs of labor, materials, change orders to contract prices, tools, equipment, supervision, coordination, management, and administration services), which shall be reviewed by the Construction Manager and Architect to verify that they properly reflect the cost of all services performed, work performed and/or materials supplied during the relevant period; (ii) invoices describing the Furnishings, Equipment and Materials acquired by the District for the K-8 School, and (iii) any Consultant Costs and Agency Fees not previously paid for by the Heritage Deposit Account.

(b) Accounting; Audit. The District shall at all times keep, or cause to be kept, books of account and other records showing the amounts deposited by Heritage into the K-8 ICE Account and the amounts paid for Site Improvement Costs, Construction Costs and Furnishings, Equipment and Materials with reference to invoice numbers or other appropriate information identifying the invoices, draw requests or other documents upon which disbursements from the ICE Account were based. District shall send monthly statements to Heritage showing the total amounts expended by the District during the previous month and the balance remaining in the K-8 ICE Account. During regular business hours and after not less than twenty-four (24) hours' notice, Heritage or its agents shall have access to and the right to inspect the District's books and records relating to the K-8 ICE Account. If Heritage so requests, it or its designated agent, can make copies of such books or records, at Heritage's expense, for audit or other examination. Interest accruing on funds deposited in the K-8 ICE Account shall be for the benefit of Heritage. Any funds remaining in the K-8 ICE Account as of the date of approval by the Board of the Notice of Completion for the K-8 School (other than retainages or holdbacks payable to contractors or consultants) shall be disbursed to Heritage together with all accrued interest within sixty (60) days thereafter.

**4.2 Site Improvement Costs.** The costs incurred by the District following conveyance of the K-8 School Site for general site development work to improve the site to a condition suitable for construction of the K-8 School (including, without limitation, finish grading, landscaping, paving, site drainage, driveways, walks, parking, curbs and gutters, and playfields) ("**Site Improvements**") shall be known as the "**Site Improvement Costs.**" The District shall provide Heritage with ten (10) business days advance written notice of the Board Meeting date for anticipated consideration and approval by the Board of contracts, or change orders to previous contract prices, for Site Improvements, including the contract price or change order amount(s) for any such previous contract(s). Within five (5) business days prior to such Board approval of each such contract or change order, Heritage shall provide the District, for deposit into the K-8 ICE Account, funds equal to the amount of the proposed contract price (which shall include a four percent 4% change order contingency amount to avoid the frequency upon which District must ask for, and Heritage must deposit, separate change order amounts during the course of the K-8 School Project), or change order amount which is subject to Board approval. Failure by Heritage to make timely deposit of the proposed contract price or change order amount which is subject to Board approval shall result in such proposed contract or change order not being approved by the Board. Furthermore, should any such proposed contract or change order not be approved by the Board for any other reason, despite the timely deposit by Heritage of the proposed contract price or change order amount which is subject to Board approval, then the amount of such contract price or change order amount shall be returned by District to Heritage within ten (10) days, unless otherwise agreed to in writing by the parties.

**4.3 Construction Costs.** The costs of construction of the K-8 School shall be the costs of all work in connection with the construction, installation and other activities necessary to construct the K-8 School in accordance with the Approved Plans ("**Construction Costs**"). The District shall provide Heritage with ten (10) business days advance written notice of the Board Meeting date for anticipated consideration and approval by the Board of contracts, or change orders to previous contract prices, for Construction Costs, including the contract price, or change order amount(s) for any such previous contract(s). Within five (5) business days prior to such Board approval of each such contract or change order, Heritage shall provide the District, for deposit into the K-8 ICE Account, funds equal to the amount of the proposed contract price (which

shall include a four percent 4% change order contingency amount to avoid the frequency upon which District must ask for, and Heritage must deposit, separate change order amounts during the course of the K-8 School Project), or change order amount which is subject to Board approval. Failure by Heritage to make timely deposit of the proposed contract price or change order amount which is subject to Board approval shall result in such proposed contract or change order not being approved by the Board. Furthermore, should any such proposed contract or change order not be approved by the Board for any other reason, despite the timely deposit by Heritage of the proposed contract price or change order amount which is subject to Board approval, then the amount of such contract price or change order amount shall be returned by District to Heritage within ten (10) days, unless otherwise agreed to in writing by the parties.

**4.4 Furnishings, Equipment and Materials.** Upon written request by the District, Heritage shall pay, no later than ninety days (90) days prior to the anticipated Construction Completion Date, funds in the amount specified in Section 2.7 for deposit into the K-8 ICE Account for Furnishings, Equipment and Materials for the K-8 School; provided, however, that the District may provide notice of, and Heritage shall pay prior to such ninety (90) day period, amounts necessary to procure certain Furnishings, Equipment and Materials for which the District determines there will be cost savings based on an earlier purchase date or which the District reasonably determines to be necessary for the K-8 School prior to such ninety (90) day period.

**4.5 Administration Fee.** Heritage shall also pay the District an total fee of Five Hundred Thirty Thousand Dollars (\$530,000) for the administration by the District of the construction of the K-8 School (“**Administration Fee Payment**”) through the Construction Completion Date, which Administration Fee Payment shall be considered part of the Construction Costs associated with the K-8 School for purposes of payment by Heritage only. The Administration Fee Payment shall be payable (in arrears) in quarterly installments of (\$132,500) at the end of each applicable quarter, and shall be prorated for any partial quarter. Upon completion of the K-8 School, the District shall provide Heritage with either a final invoice or refund of a partial Administrative Fee Payment, as applicable, in order for the Administrative Fee Payment to be paid and prorated based upon the actual days of construction of the K-8 School project during the applicable final quarter.

**4.6 Satisfaction of Construction Obligation.** While in no way limiting any other funding, property conveyance, or other performance obligation of Heritage set forth in this Agreement or the School Mitigation Agreement, District acknowledges and agrees that Heritage’s funding of the Site Improvement Costs, Construction Costs and Furnishings, Equipment and Materials for the K-8 School in accordance with this Section 4 shall fully satisfy and extinguish Heritage’s obligations with respect to construction of the second K-8 School described in the School Mitigation Agreement. Furthermore, Heritage acknowledges that should Heritage fail to make timely payment of any of the Site Improvement Costs, Construction Costs and Furnishings, Equipment and Materials for the K-8 School, as well as any other funding requirement by Heritage or performance of any and all Heritage obligations set forth in this Agreement, the Project Schedule will be impacted and the Construction Completion Date and opening of the K-8 School may be greatly impacted.

## SECTION 5. K-8 SCHOOL SITE CLOSING CONDITIONS.

**5.1 District's Contingencies.** The District's obligation to consummate the purchase of the K-8 School Site is contingent upon satisfaction of the following conditions:

(a) Heritage shall not be in material default of any term or condition of this Agreement or those provisions of the School Mitigation Agreement solely with respect to the conveyance of the K-8 School Site;

(b) Heritage shall have deposited with Escrow Holder all documents required to be delivered by Heritage under this Agreement solely with respect to the conveyance of the K-8 School Site;

(c) All representations and warranties as made by Heritage in this Agreement (subject to the provisions of Section 6.2 below) shall continue to be true and correct in all material respects as of the Close of Escrow as though made at that time;

(d) District shall have approved the physical condition of the K-8 School Site as provided in this Section 5.1(d), which approval may be withheld in District's sole and absolute discretion. Provided that District is not in breach of this Agreement, District shall be entitled to enter upon the K-8 School Site, at reasonable times and upon reasonable notice during the Feasibility Period (defined below), for the purposes of conducting its evaluation of the physical condition of the K-8 School Site, including investigation and evaluation of soil, subsurface soils, drainage, seismic and other geological and topographical matters, location of asbestos, toxic substances, hazardous materials or wastes, if any, and performing any environmental, soils and other engineering tests so as to ensure that the K-8 School Site complies with all School Site Laws described in Section 5.1(f); provided that no intrusive drilling, boring, testing and/or changes shall be made in the condition of the K-8 School Site without the express prior written approval of Heritage, which approval shall not be unreasonably withheld, conditioned or delayed, and District shall indemnify, protect, defend and hold harmless Heritage and its owners, trustees, agents, officers, directors, partners, shareholders, subsidiaries, affiliates and employees from and against any claims, demands, liabilities, damages, losses, costs or expenses (including, without limitation, reasonable attorneys' and experts' fees and other costs) arising out of or in connection with any activities on the K-8 School Site by District and/or District's agents or representatives. District shall be deemed to have approved the physical condition of the K-8 School Site unless District has delivered to Heritage, not later than the State Approval Date (as defined below), written notice disapproving the physical condition of the K-8 School Site. The period between the Effective Date and the State Approval Date shall be the known as the "**Feasibility Period.**" If District delivers written notice to Heritage of District's disapproval of a matter relating to the physical condition of the K-8 School Site, Heritage shall have a period of ten (10) days after receipt of such notice to elect to cure any such disapproved matter (and failure by Heritage to elect in writing to cure any such matter within such ten (10) day period shall be deemed Heritage's election not to cure such disapproved matter). If Heritage elects to cure a disapproved matter relating to the physical condition of the K-8 School Site, then it shall be a condition to District's obligation to purchase the K-8 School Site that such matter be cured prior to the Close of Escrow. If Heritage elects or is deemed to have elected not to cure any matter disapproved by District as provided above, the parties shall meet and confer to determine whether the disapproved matter can be remedied by

reconfiguring the boundaries of the K-8 School Site pursuant to the Reconfigured/Substituted Site Process and, if so, the parties shall agree upon the appropriate reconfiguration of the boundaries of the K-8 School Site. In the event the failure of condition cannot be remedied by reconfiguration of the boundaries, then the parties shall select the Second Site as the K-8 School Site in accordance with the Reconfigured/Substituted Site Process (and should the Second Site also fail to satisfy one or more requirements for a school site under Section 1.2, the parties shall jointly identify and agree upon an alternative school site);

(e) District shall have determined, in its sole and absolute discretion, that the K-8 School Site is not in violation of any federal, state, or local law, ordinance, or regulation relating to Hazardous Materials, industrial hygiene, or to the environmental conditions on, under, or about the K-8 School Site, or any portion thereof, including, but not limited to, soil and groundwater conditions (“**Environmental Laws**”). The term “**Hazardous Materials**” when used in this Agreement shall mean any hazardous waste, hazardous substance, hazardous materials or toxic substances as defined, as of the Close of Escrow, in any federal, state, or local statute, ordinance, rule, or regulation applicable to the K-8 School Site, including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (Title 42 United States Code sections 9601-9675), the Resource Conservation and Recovery Act (Title 42 United States Code sections 6901-6992k), the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health and Safety Code sections 25300-25395), Hazardous Waste Control Law (Health and Safety Code sections 25100-25250.25), the Hazardous Materials Transportation Act, as amended (Title 49 United States Code Sections 1801-1819), and any substance defined as “hazardous waste” in Health and Safety Code Section 25117 or as a “hazardous substance” in Health and Safety Code Section 25316, and in the regulations adopted and publications promulgated under these laws. “**Hazardous Materials**” shall also include asbestos or asbestos-containing materials, radon gas, and petroleum or petroleum fractions, whether or not defined as a hazardous waste or hazardous substance in any such statute, ordinance, rule, or regulation as of the Close of Escrow. District shall be deemed to have determined that the K-8 School Site is not in violation of any Environmental Laws unless District gives Heritage written notice to the contrary prior to the State Approval Date. Once District has determined or is deemed to have determined that the K-8 School Site is not in violation of any Environmental Laws, it shall be a condition to District’s obligation to purchase the K-8 School Site that no event shall thereafter occur prior to the Close of Escrow which would cause the K-8 School Site to be in violation of any Environmental Laws;

(f) District shall have determined, in its sole and absolute discretion, that its acquisition of the K-8 School Site is in compliance with all applicable California laws and regulations relating to school site acquisition (“**School Site Laws**”), including without limitation the following:

(1) Requirements for school site approval by the CDE (Education Code Section 17210 *et seq.* and Title 5 of the California Code of Regulations Section 14000 *et seq.*);

(2) All environmental requirements applicable to school site acquisition, including without limitation, geological and soil engineering investigations, hazardous waste and hazardous air emissions, and Phase I and Phase II Reports and Preliminary Endangerment Assessments, if applicable (Education Code Sections 17210, 17212, 17212.5, 17213 and 17213.1; Public Resources Code Section 21151.8);

(3) California Environmental Quality Act (Public Resources Code Section 21000 *et seq.*);

(4) Zoning compliance (Government Code Sections 53091, 53094 and 65402; Public Resources Code Section 21151.2);

(5) Any additional requirements of the State of California, including without limitation, CDE, DTSC, the State Allocation Board and the Office of Public School Construction.

District shall be deemed to have determined that its acquisition of the K-8 School Site is in compliance with School Site Laws unless District shall have delivered written notice to the contrary prior to the State Approval Date. Once District has determined or is deemed to have determined that the K-8 School Site is in compliance with School Site Laws, it shall be a condition to District's obligation to purchase the K-8 School Site that no event shall thereafter occur prior to the Close of Escrow which would cause the K-8 School Site to not be in compliance with all School Site Laws;

(g) District shall have approved its review of due diligence materials that it obtains on its own or that are provided by or through Heritage, which approval may be withheld in District's reasonable discretion. District shall be deemed to have approved all such materials unless District shall have delivered written notice to the contrary prior to the State Approval Date;

(h) District shall have approved the condition of title as provided in this paragraph. Within thirty (30) days after the Effective Date, Heritage shall provide District with a First American Title Insurance Company Preliminary Title Report (the "**Preliminary Title Report**") offering to insure title to the K-8 School Site in the amount of Purchase Price subject to the exceptions and exclusions shown thereon. Heritage makes no representation or warranty whatsoever in connection with the accuracy or completeness of any matter shown on the Preliminary Title Report. District shall take title to the K-8 School Site subject to all items shown on said Preliminary Title Report except only such matters as District expressly disapproves in writing to Heritage, which approval may be withheld in District's sole and absolute discretion, on or before the State Approval Date. Should District fail to disapprove any matter affecting the condition of title or constituting an exception to coverage under the Title Policy as set forth below, such matter and/or exception shall be deemed approved by District. If District delivers written notice to Heritage of District's disapproval of an item reflected in the Preliminary Title Report, Heritage shall have a period of ten (10) days after receipt of such notice to elect to remove any such disapproved item (and failure by Heritage to elect in writing to remove any such item within such ten (10) day period shall be deemed Heritage's election not to remove such disapproved item). If Heritage elects to remove a disapproved item, then it shall be a condition to District's obligation to purchase the K-8 School Site that such item be removed as an exception in the Title Policy. If Heritage elects or is deemed to have elected not to remove any title item disapproved by District as provided above, then District may within ten (10) days after such election or deemed election by Heritage elect in writing to waive its previous disapproval of such item (and failure by District to waive such prior disapproval shall be deemed District's election not to waive such prior disapproval). In the event the Title Policy requires an ALTA survey (which shall be at District's sole cost and expense), District shall take title subject to matters disclosed by such ALTA survey except only such matters as District expressly disapproves (which approval may be withheld in

District's reasonable discretion) by that date specified above for approval of the original Preliminary Title Report. District acknowledges that the K-8 School Site may be encumbered by a variety of utility or other easements, that Heritage has made absolutely no representations about the effect of any such easements on District's intended use of the K-8 School Site or the possibility of removal or modification of such easements, and that District shall be solely responsible for evaluating such easements as part of District's title review under this Section 5.1. Upon the issuance of any amendment or supplement to the Preliminary Title Report which adds additional exceptions or adds any new requirement, the foregoing right of review and approval shall also apply to said amendment or supplement; provided, however, that District's period of review and approval or disapproval of any such additional exceptions shall be limited to ten (10) business days following District's receipt of the amendment or supplement and a copy of any new exception referred to therein.

(i) First American Title Insurance Company ("**Title Company**") shall be committed to issue to District an ALTA extended coverage owner's policy (the "**Title Policy**"), with liability in the amount of the Purchase Price, insuring fee title to the K-8 School Site vested in the District, subject only to those matters or exceptions set forth in Section 5.1(h) of this Agreement.

(j) The CDE shall have approved the acquisition of the K-8 School Site by District;  
and

(k) If and to the extent required by applicable law, the DTSC shall have approved the condition of the K-8 School Site.

(l) If eligible for State Funds, the District shall have filed and shall be actively processing an application with the State Allocation Board ("**SAB**") for State Funds for the K-8 School Site.

That date upon which District determines it is in compliance with the School Site Laws pursuant to subsection (f) of this Section 5.1 and receives the approval or determination from CDE and DTSC described in subsections (j) and (k) of this Section 5.1 shall be referred to herein as the "**State Approval Date.**" The approvals by CDE, DTSC, OPSC and SAB shall be referred to herein as the "**State Approvals.**"

**5.2 Heritage's Contingencies.** Heritage's obligation to consummate the sale of the K-8 School Site to District is contingent upon satisfaction of the following conditions:

(1) District shall not be in material default of any term or condition of this Agreement or those provisions of the School Mitigation Agreement solely with respect to the conveyance of the K-8 School Site;

(2) District shall have deposited with Escrow Holder all documents required to be delivered by District under this Agreement solely with respect to conveyance of the K-8 School Site;

(3) All representations and warranties as made by District in this Agreement (subject to the provisions of Section 6.1 below) shall continue to be true and correct in all material respects as of the Close of Escrow as though made at that time;

(4) The State Approvals shall have been received.

**5.3 Waiver of Conditions.** District or Heritage, respectively, may at any time or times, at its election, waive any of the conditions set forth in Sections 5.1 or 5.2 to its obligation to purchase or sell the K-8 School Site, but any such waiver shall be effective only if contained in a writing signed by the party waiving the condition and delivered to the other party.

**5.4 Failure of Conditions.** In the event there is a failure of any condition to either party's obligation as set forth in Sections 5.1 or 5.2, unless such failure is waived by the party for whose benefit the condition exists as set forth in Section 5.3, then the parties shall meet and confer to determine whether the failure of condition can be remedied by reconfiguring the boundaries of the K-8 School Site pursuant to the Reconfigured/Substituted Site Process and, if so, the parties shall agree upon the appropriate reconfiguration of the boundaries of the K-8 School Site. In the event the failure of condition cannot be remedied by reconfiguration of the boundaries, then the parties shall select the Second Site as the K-8 School Site in accordance with the Reconfigured/Substituted Site Process (and should the Second Site also fail to satisfy one or more requirements for a school site under Sections 1.2, the parties shall jointly identify and agree upon an alternative school site). Either party may at any time after the failure of a condition to the other party's obligations as set forth in as set forth in Sections 5.1 or 5.2 give the other party written notice (a "**Demand Notice**") demanding that the other party either waive the failed condition (or, if applicable, participate in the Reconfigured/Substituted Site Process), and the other party's failure to waive the failed condition in writing within ten (10) business days after receipt of the Demand Notice (or such longer period as may be established by the party giving such Demand Notice) shall be deemed the other party's consent to initiate the Reconfigured/Substituted Site Process. With the exception of the State Approvals condition, if escrow closes and the K-8 School Site is conveyed under this Agreement, both parties shall be deemed to have waived any condition set forth in Sections 5.1 or 5.2 which has failed, and if such failed condition required approval by either party, such deemed waiver of the condition shall also be deemed an approval of the previously disapproved item.

## **SECTION 6. REPRESENTATIONS AND WARRANTIES; DISCLOSURES**

**6.1 District's Representations and Warranties.** District represents and warrants to Heritage as follows:

(a) District will make such independent investigations as it deems necessary or appropriate concerning the use, sale, development or suitability for development of the K-8 School Site, including but not limited to: any desired investigations or analysis of the economic value of the K-8 School Site; the size, dimensions, location or topography of the K-8 School Site; the availability or adequacy of access to the K-8 School Site, or of water, sewage or any other utilities serving the K-8 School Site; the presence or adequacy of infrastructure or other improvements on, near or concerning the K-8 School Site; any surface, soil, subsoil or other physical conditions of or affecting the K-8 School Site, such as climate, drainage, air, water or minerals; the amount, nature, condition or compaction of soil or subsoil; the extent or condition of title to the K-8 School Site; then-current governmental laws, statutes, rules, regulations, ordinances, limitations, restrictions or requirements concerning the use, density, location or suitability of the K-8 School Site or any existing or proposed development or condition thereof (collectively "**Regulations**"),

including but not limited to zoning, subdivision, environmental or other such Regulations; the necessity of availability of any general or specific plan amendments, rezoning, zone variances, conditional use permits, environmental impact reports, parcel or subdivision maps, public reports or waivers by the California Department of Real Estate under the Subdivided Lands Act, or any other governmental permits, approvals or acts (collectively, the “**Permits**”); the necessity or existence of any dedications, fees, charges, costs or assessments that may be imposed in connection with any Regulations or the obtaining of any required Permits; and all other matters concerning the condition, use, development or sale of the K-8 School Site.

(b) Except as expressly set forth herein, District is relying solely upon its own inspection, investigation and analysis of the foregoing matters in acquiring the K-8 School Site and is not relying in any way upon any representations, statements, agreements, warranties, studies, reports, descriptions, guidelines or other information or material furnished by Heritage or its representatives, whether oral or written, express or implied, of any nature whatsoever regarding any of the foregoing matters.

(c) Except as set forth in this Section 6, District is acquiring the land portion of the K-8 School Site “AS IS,” in its condition at the close of escrow, without representation by Heritage or its representatives as to any matter, unless as expressly provided herein. No patent or latent condition affecting the land portion of the K-8 School Site in any way, whether or not known or discoverable or hereafter discovered, shall affect District’s obligations to accept transfer of the land portion of the K-8 School Site or otherwise contained in this Agreement, nor shall give rise to any right of damages, rescission or otherwise against Heritage.

(d) District is a duly organized and existing public entity by virtue of the laws of the State of California, and it has full right, power and authority to carry on its activities and to execute, deliver and perform, comply with and consummate this Agreement, subject to the State Approvals.

(e) The execution of this Agreement by District, its delivery to Heritage and the performance by District of its obligations under this Agreement have been duly authorized by its Board of Education.

(f) The execution, delivery, performance of and compliance with this Agreement has not resulted and will not result in any violation of, or be in conflict with, or result in the creation of, or constitute a default under, any mortgage, indenture, contract, agreement, instrument, franchise, permit, judgment, decree, order, ordinance, statute, rule or regulation applicable to District.

(g) To District’s knowledge, having disclosed the fact that the availability of current or future State Funds, or any funding, for the K-8 School Site or K-8 School is uncertain and without warranting anything to the contrary, there is no suit, action, or legal, administrative, arbitration or other proceedings or investigation pending or, to the knowledge of District, threatened which affects its ability to perform any obligations hereunder or which materially adversely affects their respective businesses and affairs.

If District becomes aware of any act or circumstance which would change or render incorrect, in whole or in part, any representation or warranty made by District hereunder, whether

as of the Effective Date or any time thereafter through the Close of Escrow, District will give immediate written notice of such changed fact or circumstance to Heritage, but such notice shall not release District of any liabilities or obligations with respect thereto.

The words “**District’s knowledge**” as used herein shall mean the present, actual knowledge of IUSD staff of the District as of the Effective Date of this Agreement, without any duty of inquiry or investigation and without any individual liability of either such person for any matters disclosed or not disclosed, and Heritage expressly waives any claims for damages or other relief against those individuals arising out of or relating to any matters disclosed or not disclosed by them pursuant to this Agreement.

**6.2 Heritage’s Representations and Warranties.** Heritage represents and warrants to District that, except as may have been disclosed on or in due diligence materials provided by Heritage to District, to Heritage’s knowledge:

(a) Heritage has not received any written notice currently in effect that a condition on the K-8 School Site violates any federal, state or local law, ordinance or regulation related to environmental conditions on or under the K-8 School Site.

(b) There are no conditions on the K-8 School Site which violate any federal, state or local law, ordinance or regulation related to the condition of the K-8 School Site as of the date hereof.

(c) There are no pending or threatened, actions, suits, writs, injunctions, decrees, legal proceedings or governmental investigations against or affecting the K-8 School Site or title to, the condition of, or the right to use and develop the K-8 School Site.

(d) Except as may be shown on the Preliminary Title Report, there are no leases, licenses or other agreements relating to the possession or occupancy of the K-8 School Site which would be binding upon District after the Close of Escrow.

(e) Heritage has not caused or knowingly permitted any contamination by Hazardous Materials to occur on or within the K-8 School Site, or any portion thereof, or otherwise knows of any such contamination of Hazardous Materials on or within the K-8 School Site, or any portion thereof.

If Heritage becomes aware of any act or circumstance which would change or render incorrect, in whole or in part, any representation or warranty made by Heritage hereunder, whether as of the Effective Date or any time thereafter through the Close of Escrow, Heritage will give immediate written notice of such changed fact or circumstance to District, but such notice shall not release Heritage of any liabilities or obligations with respect thereto.

The words “**Heritage’s knowledge**” as used herein shall mean the present, actual knowledge of Lynn Jochim and Richard Leigh, of Heritage’s development manager (Five Point Communities Management, Inc. (“**Five Point**”)), as of the Effective Date of this Agreement without any duty of inquiry or investigation and without any individual liability of either such person or of Five Point for any matters disclosed or not disclosed, and District expressly waives any claims for damages or other relief against those individuals and Five Point arising out of or relating to any matters disclosed or not disclosed by them pursuant to this Agreement.

**6.3 Natural Hazard Disclosure.** District and Heritage acknowledge that Heritage is required to disclose if any of the K-8 School Site lies within the following natural hazard areas or zones: (i) a special flood hazard area designated by the Federal Emergency Management Agency; (ii) an area of potential flooding; (iii) a very high fire hazard severity zone; (iv) a wild land area that may contain substantial forest fire risks and hazards; (v) an earthquake fault or special studies zone; or (vi) a seismic hazard zone. District and Heritage acknowledge that Heritage has employed the services of GeoLogic or another company selected by Heritage (“**Natural Hazard Expert**”) to examine the maps and other information specifically made available to the public by government agencies for the purposes of enabling Heritage to fulfill its disclosure obligations with respect to the natural hazards referred to above and to report the results of its examination to District and Heritage in writing. The written report prepared by the Natural Hazard Expert regarding the results of its examination (the “**Natural Hazard Disclosure Report**”) to be provided to District by Heritage fully and completely discharges Heritage from its disclosure obligations referred to herein, and, for the purposes of this Agreement, the provisions of Civil Code Section 1103.4 regarding the non-liability of Heritage for errors and/or omissions not within its personal knowledge shall be deemed to apply, and the Natural Hazard Expert shall be deemed to be an expert dealing with matters within the scope of its expertise with respect to the examination and written report regarding the natural hazards referred to above.

**6.4 Mello-Roos District.**

(a) CFD Proceedings. District acknowledges that Heritage has authorized the following (collectively, referred to herein as the “**CFD Proceedings**”): (i) formation of City of Irvine Community Facilities District No. 2013-3 (Great Park) (the “**CFD**”), a Mello-Roos community facilities district formed pursuant to the Mello-Roos Community Facilities Act of 1982, commencing with California Government Code Section 53311 (the “**Mello-Roos Act**”), over the Heritage Fields Property, including the K-8 School Site and any potential substitute site selected pursuant to the Reconfigured/Substituted Site Process (“**Potential School Site**”); (ii) the designation of several improvement areas (each an “**Improvement Area**”) within the CFD, including Improvement Area No. 6 which includes the K-8 School Site and another of which will include the Potential School Site; (iii) the levy of special taxes for each Improvement Area pursuant to a separate rate and method of apportionment of special tax (each an “**RMA**”); (iv) the issuance of one or more series of bonds for each Improvement Area secured by the levy of special taxes within an Improvement Area (the “**Bonds**”); and (v) the amendment of or annexation to the CFD, an Improvement Area, the RMA, and/or the authorization of Bonds pursuant to the Mello-Roos Act.

(b) Approval of Title Exception; Exempt Property. Notwithstanding Section 5.1(h) and the ability of the District to object to an encumbrance on the K-8 School Site or the Potential School Site, the District does hereby approve as an exception to title to the K-8 School Site and the Potential School Site (whether it appears on the Preliminary Title Report or any supplement thereto) the lien of the CFD on the K-8 School Site and the Potential School Site so long as the K-8 School Site and the Potential School Site, upon acquisition and continued ownership by the District, may be classified as public property exempt from the payment of any special tax under the RMA (herein, the “**CFD Exemption Provision**”).

(c) Cooperation. The District acknowledges that the CFD is an integral part of Heritage's development of the Heritage Fields Property. Accordingly, so long as the CFD Exemption Provision is included in the RMA, the District agrees as follows: (i) to cooperate with Heritage and all participating governmental agencies forming the CFD or governmental agencies considering the execution of a joint community facilities agreement with the CFD (collectively, the "**Governmental Agencies**") as necessary and to execute any necessary documents required by Heritage or the Governmental Agencies signifying District's approval of and consent to the CFD Proceedings; (ii) to not, under any circumstances, file any written or oral protest or opposition of any kind to the CFD Proceedings; (iii) to not contest, protest or otherwise challenge the formation of the CFD, the designation of any Improvement Area, the authorization, amendment and/or levy of the special taxes, or the issuance of any Bonds; (iv) to not take any action that would in any way interfere with the CFD Proceedings or the Bond financing relating thereto, including, without limitation, the timing of commencement of special taxes, the amount of special taxes, the apportionment of special taxes, and the use of the special taxes so collected by the CFD or the proceeds of the Bonds; and (v) to not interfere with or impede the issuance of any series of Bonds issued by or in connection with the CFD or any Improvement Area.

(d) Survival of Covenants. The covenants and provisions contained in this Section 6.4 will survive the Close of Escrow for the Potential School Site.

## **SECTION 7. ESCROW, TITLE AND CLOSING**

**7.1 Escrow.** Heritage and District shall open escrow with First American Title Insurance Company, Attn: Jo Anne Erro, Sr. Escrow Officer, Manager, VP, 2100 S.E. Main St, Suite 450, Irvine, CA 92614 ("**Escrow Holder**") to consummate the purchase and sale transaction described in this Agreement, and shall provide Escrow Holder with a copy of this Agreement, which shall constitute joint escrow instructions of the parties. Escrow Holder is hereby authorized and instructed to implement the terms of this Agreement and, upon satisfaction or waiver of all closing conditions, to record, at Close of Escrow, the Grant Deed and the Declaration of Special Land Use Restrictions.

**7.2 Title.** Heritage shall transfer the K-8 School Site to District in a condition which is insurable under the Title Policy showing and insuring title to the K-8 School Site vested in District subject to the following:

(a) Conditions, covenants, restrictions, easements, reservations, rights, rights-of-way, dedications, offers of dedication and other matters of record shown the Preliminary Title Report and approved or deemed approved by District as provided in Section 5.1(h) above;

(b) All matters set forth on the Grant Deed in the form attached hereto as Exhibit C;

(c) The covenants, conditions, restrictions and reservations set forth in the Declaration of Special Land Use Restrictions, in the form attached hereto as Exhibit E, which is to be recorded as to the K-8 School Site immediately after the Grant Deed;

(d) Title Company's usual and customary printed exceptions to ALTA extended coverage title insurance;

(e) All matters caused by District or its agents or representatives, including but not limited to liens for materials supplied to or services performed for District and relating to the K-8 School Site; and

(f) All other matters approved in writing by District.

**7.3 Closing Costs.** Notwithstanding anything herein to the contrary, (a) Heritage shall pay for the cost of a CLTA standard coverage title policy in a coverage amount equal to fifty percent (50%) of the Purchase Price, and District shall be responsible for the incremental cost of the Title Policy as well as the cost associated with any ALTA survey; (b) District shall pay any documentary transfer taxes and recording fees and all costs of any extended coverage, lender's or other title policy, and of any riders and endorsements to the owner's policy of title insurance and of any land surveys and all necessary zoning, subdivision or other permits costs, if any, as may be required for District's acquisition and use of the K-8 School Site, and (c) each party shall pay one half (1/2) of the escrow fees and shall bear its own respective legal and accounting costs.

**7.4 Taxes.** District is exempt from ad valorem taxes and shall file any necessary application to cancel such taxes for the period after Close of Escrow. Provided that the K-8 School Site is acquired by District hereunder prior to commencement of the fiscal year for which the current taxes are a lien on the K-8 School Site, neither District nor Heritage shall be liable for the payment of such taxes for such following fiscal year. If the K-8 School Site is acquired by District hereunder after the beginning of the fiscal year for which the current taxes are a lien on the K-8 School Site, then the following procedures shall apply:

(a) If the K-8 School Site is to be acquired after July 1 of the fiscal year for which the current taxes are a lien on the K-8 School Site, Heritage shall cause that portion of such current taxes, together with any allocable penalties and costs thereon, which are properly allocable to that part of the fiscal year which ends on the day before the date of acquisition of the K-8 School Site to either (A) be paid by Heritage prior to the date of acquisition, or (B) if unpaid for any reason, be transferred to the unsecured roll pursuant to Revenue and Taxation Code Section 2921.5 and be collectible solely from Heritage.

(b) The portion of such taxes, together with any penalties and costs thereon, which are allocable to that part of the fiscal year which begins on the date of acquisition of the K-8 School Site, shall be cancelled and shall not be collectible either from Heritage or from District. District shall request the county tax collector to cancel such taxes.

(c) For the purposes of this paragraph, the date of acquisition shall be the date that the Grant Deed is recorded in the name of District or on the date of actual possession by District of the parcel covered by such Grant Deed, whichever is earlier.

(d) If taxes have been paid on the K-8 School Site by Heritage after July 1 of the fiscal year for which the current taxes are a lien on the K-8 School Site, the portion of such taxes which are allocable to the part of the fiscal year which begins on the date of acquisition and made uncollectible if unpaid by virtue of this paragraph and Revenue and Taxation Code Section 4986 shall be deemed between the parties to be erroneously collected pursuant to Revenue and Taxation Code Sections 5086 and 5096.7 and Heritage shall have the right, after the date of acquisition, to

apply to the Orange County Auditor, Tax Collector, or Treasurer for refund of such taxes which may be due Heritage pursuant to Revenue and Taxation Code Section 5096.7.

(e) Any application for a tax refund pursuant to subparagraph (d) above shall be the sole responsibility of Heritage.

(f) All real property taxes and assessments for prior fiscal years, together with any penalties and costs thereon, shall be paid by Heritage.

**7.5 Close of Escrow.** The consummation of the purchase and sale transaction described in this Agreement shall be referred to as the “**Close of Escrow**” or “**Closing**.” Unless otherwise agreed by the parties, and subject to satisfaction or waiver of all closing conditions in Section 5, the Close of Escrow shall occur no later than ten (10) business days after completion by Heritage of the Site Work for the K-8 School Site. The date of Close of Escrow shall be referred to as the “**Closing Date**.”

**7.6 Deliveries at Closing.** On or before the Closing Date (i) the parties shall deliver to Escrow Holder the Grant Deed, executed and acknowledged on behalf of Heritage as grantor and the District as grantee, and the Declaration of Special Land Use Restrictions executed and acknowledged on behalf of Heritage and the District; (ii) Heritage shall deliver to the Escrow Holder funds sufficient to pay its share of the closing costs and such other documents and instructions as may be required by this Agreement in order to consummate the Closing; and (iii) District shall deliver to the Escrow Holder all State Funds received to date for the K-8 School Site that are payable to Heritage under the terms of the School Mitigation Agreement (“**Site Funds**”); funds sufficient to pay its share of the closing costs; and such other documents and instructions as may be required by this Agreement in order to consummate the Closing. If no Site Funds have been received as of the Closing Date, this shall not delay the Closing, and any Site Funds received after the Closing Date (if any) shall be paid to Heritage within thirty (30) days of receipt by the District of such Site Funds.

(a) Closing and Recordation. On the Closing Date, the following shall occur, all of which shall be deemed concurrent conditions:

(1) Escrow Holder shall record the Grant Deed and the Declaration of Special Land Use Restrictions, in that order, in the Official Records of Orange County;

(2) Escrow Holder shall pay all Site Funds held in Escrow, along with all such interest as is earned thereon while in Escrow, to Heritage; and

(3) The Title Company shall issue the Title Policy.

## **SECTION 8. GENERAL PROVISIONS**

**8.1 Dispute Resolution.** If a dispute arises relating to the interpretation of, enforcement of or compliance with the terms of this Agreement, Heritage and District shall first attempt to resolve such dispute through informal discussions or negotiations. Any party may convene such discussions by written notice to the other, and shall reasonably accommodate the other party with respect to scheduling. If the dispute is not resolved in this manner within thirty

(30) days following the written notice, it may be referred to non-binding mediation with the consent of all parties, which non-binding mediation shall be completed within ninety (90) days after the date of the written demand for mediation. Such written demand for non-binding mediation must be made within thirty (30) days following written notice convening informal discussions. The costs of such proceeding shall be borne equally by District and Heritage. Nothing herein shall be construed to limit the parties' ability to agree to binding arbitration as an alternative to, or upon completion of, the non-binding mediation provided by this Section 8.1 and as an alternative to judicial review, should the parties mutually consent, in writing, to binding arbitration and the conditions of such binding arbitration. The parties agree to use reasonable efforts to expedite resolution of any disputes related to this Agreement.

## **8.2 Default; Specific Performance.**

(a) Breach, Default and Cure. Before either party may declare a Default and take any action based thereon (including, without limitation, commencing any administrative or judicial proceeding), the procedures in this Section 8.2 must be followed. The party asserting a Default ("**Non-Defaulting Party**") may elect to do so by providing written notice to the party alleged to be in Default ("**Defaulting Party**") specifying the nature of the Default and the actions, if any, to be taken by the Defaulting Party to cure or remedy the Default ("**Default Notice**"). The Defaulting Party shall have thirty (30) days from receipt of the Default Notice within which to cure the Default (the "**Cure Period**") and, if it fails to do so within that period, it shall be deemed in Default, and the Non-Defaulting Party may exercise any rights or remedies available under this Agreement, in equity (including the right to specifically enforce this Agreement pursuant to Section 8.2(b)) or by law; provided, however, that if the nature of the Default is such that it cannot reasonably be cured within thirty (30) days, the Defaulting Party shall be afforded reasonable additional time so long as it commences such cure within the Cure Period and diligently pursues such cure to completion.

(b) Specific Performance. If the Default under this Agreement is in the conveyance of the K-8 School Site as and when required under this Agreement ("**Conveyance Obligation**") or in the commencement, diligent pursuit or completion of construction of the K-8 School ("**School Construction Obligation**"), in the event an additional sixty (60) days have elapsed following expiration of the applicable Cure Period under Section 8.2(a), the District, in the case of the Conveyance Obligation, and Heritage, in the case of the Construction Obligation (provided Heritage has met its obligations to fund the Site Improvement Costs and Construction Costs, and performed any other material obligations that have become due under Agreement as of that date), shall have the right, in its sole and absolute discretion, to seek specific performance of the obligation as to which the Default exists, provided that the parties have first met to determine the most efficient and cost-effective manner in which to cure the Default but have been unable to agree upon the appropriate process. As to a Default in the School Conveyance Obligation or School Construction Obligation meeting the foregoing requirements, the parties (i) agree to waive, in any action for specific performance, the defense of adequacy of a remedy at law and (ii) shall be entitled, in addition to any other remedy to which they may be entitled at law or in equity, to compel specific performance of this Agreement.

**8.3 Survivability.** All covenants which are expressly intended hereunder to be performed in whole or in part after the recordation of the Grant Deed and all representations, warranties and indemnities by any party to any other, shall survive the recordation of the Grant Deed and be binding upon and inure to the benefit of the respective successors and permitted

assigns. Any agreements, understandings, warranties or representations not expressly contained herein shall in no way bind any party. Each party expressly waives any right of rescission and all claims for damage by reason by any statement, representation, warranty, promise and/or agreement, if any, not contained in or attached to this Agreement.

**8.4 Broker's Commission.** Each party represents to the other that to the best of its knowledge, no brokerage commission, finder's fee or other compensation of any kind is due or owing to any person or entity in connection with the transactions covered by this Agreement. Each party agrees to and does hereby indemnify, defend and hold harmless the other from and against any and all costs, liabilities, losses, damages, claims, causes of action or proceedings which may result from any broker, agent or finder, licensed or otherwise, claiming through, under or by reason of the conduct of the indemnifying party in connection with this transaction.

**8.5 Waiver, Consent and Remedies.** Any party may specifically and expressly waive in writing any portion of this Agreement or any breach thereof as to it, but no such waiver shall constitute a further or continuing waiver of any preceding or succeeding breach of the same or any other provision. A waiving party may at any time thereafter require future compliance by the other party with any breach or provision so waived. The consent by one party to any act by any other for which such consent was required shall not be deemed to imply consent or waiver of the necessity of obtaining such consent for the same or any similar acts in the future. No waiver or consent shall be implied from silence or any failure of a party to act, except as otherwise specified in this Agreement. All rights, remedies, undertakings, obligations, options, covenants, conditions and agreements contained in this Agreement shall be cumulative and no one of them shall be exclusive of any other. Except as otherwise specified herein, the parties may pursue any one or more of its rights, options or remedies hereunder or may seek damages or specific performance in the event of a breach hereunder, or may pursue any other remedy by law or equity, whether or not stated in this Agreement.

**8.6 Attorneys' Fees.** In the event of any action or proceeding instituted between any parties hereto in connection with this Agreement, the prevailing party shall be entitled to recover from the losing party all of its costs and expenses, including court costs, expert fees and reasonable attorneys' fees.

**8.7 Notices.** Any notice, request, demand, consent, approval or other communication required or permitted hereunder or by law shall be validly given or made only if in writing and delivered in person to the designated representatives identified below or deposited in the United States mail, duly certified or registered (return receipt requested), postage prepaid, and addressed to the party for whom intended, as follows:

TO DISTRICT:

Irvine Unified School District  
5050 Barranca Parkway  
Irvine, CA 92604-4652  
Attn: Superintendent

With a copy to:

Atkinson, Andelson, Loya, Ruud & Romo  
12800 Center Court Drive, Suite 300  
Cerritos, CA 90703  
Attn: Andreas Chialtas

TO HERITAGE:

Heritage Fields El Toro, LLC  
25 Enterprise, Suite 300  
Aliso Viejo, CA 92656  
Attn: Lynn Jochim and Mike Alvarado

With copies to:

Heritage Fields El Toro, LLC  
25 Enterprise, Suite 300  
Aliso Viejo, CA 92656  
Attn: Legal Notices

Perkins Coie, LLP  
505 Howard Street, 10th Floor  
San Francisco, CA 94105  
Attn: Geoffrey Robinson

Any party may from time to time, by written notice to the other, designate a different address which shall be substituted for that specified above. If any notice or other document is sent by mail as aforesaid, the same shall be deemed fully delivered and received forty-eight (48) hours after mailing as provided above.

**8.8 Gender and Number.** In this Agreement (unless the context requires otherwise), the masculine, feminine and neuter genders and the singular and the plural shall be deemed to include one another, as appropriate.

**8.9 Entire Agreement.** This Agreement is intended to be read and interpreted in conjunction with the School Mitigation Agreement. Subject to the foregoing, this Agreement and its exhibits (all of which are incorporated herein by this reference) constitute the entire agreement between the parties hereto pertaining to the subject matter hereof, and the final, complete and exclusive expression of the terms and conditions thereof. With the sole exception of the School Mitigation Agreement, all prior agreements, representations, negotiations and understandings of the parties hereto, oral or written, express or implied, are hereby superseded and merged herein. In the event of an apparent inconsistency or conflict between the provisions of the School Mitigation Agreement and the provisions of this Agreement, the parties shall use their best efforts to harmonize the provisions of the two agreements consistent with their purpose and intent and in a manner that preserves, to the maximum extent possible, all material consideration to both parties. If, notwithstanding such efforts to harmonize the provisions of the two agreements, there remains an inconsistency or conflict between those provisions, the provisions of this Agreement shall control.

**8.10 Captions.** The captions used herein are for convenience only and are not a part of this Agreement and do not in any way limit or amplify the terms and provisions hereof.

**8.11 Governing Law; Venue.** This Agreement and the exhibits attached hereto have been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California, with a venue for all disputes in Orange County, California.

**8.12 Invalidity of Provision.** If any provision of this Agreement as applied to any party or to any circumstance shall be adjudged by a court of competent jurisdiction to be void and unenforceable for any reason, the same shall in no way affect (to the maximum extent permissible by law) any other provision of this Agreement, the application of any such provision under circumstances different from those adjudicated by the court, or the validity of enforceability of the Agreement as a whole.

**8.13 Amendments.** No addition to or modification of any provisions contained in this Agreement shall be effective unless fully set forth in writing signed by all parties.

**8.14 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

**8.15 Authority to Execute.** Each party warrants that the individual executing this Agreement is duly authorized to execute and deliver this Agreement on behalf of that party in accordance with its requirements therefor.

**8.16 Assignment by District.** District's rights under this Agreement may not be assigned or transferred, in whole or in part, to any other party.

**8.17 Time of the Essence.** Time is of the essence of each and every obligation of the parties under this Agreement.

**8.18 Independent Contractors.** Each party is an independent contractor and shall be solely responsible for the employment, acts, omissions, control and directing of its employees. Except as expressly set forth herein, nothing contained in this Agreement shall authorize or empower a party to assume or create any obligation or responsibility whatsoever, express or implied, on behalf of or in the name of the other party or to bind the other party or make any representation, warranty or commitment on behalf of any other party.

**8.19 Force Majeure.** The obligations of any party under this Agreement, and all deadlines by which any party's obligations hereunder must be performed, shall be excused or extended for a period of time equal to any prevention, delay or stoppage in performance which is attributable to any strike, lock-out or other labor or industrial disturbance, regulatory delay, civil disturbance, act of a public enemy, war, riot, sabotage, blockade, embargo, lightning, earthquake, fire, storm, hurricane, tornado, flood, explosion or other delays not reasonably within the control of the party performing the subject obligation ("**Force Majeure**"). Any party relying on a Force Majeure shall give the other party reasonable notice thereof and the parties shall use their reasonable, good faith efforts to minimize potential adverse effects from such Force Majeure.

**8.20 No Joint Venture.** Nothing in this Agreement shall be deemed to create any form of business organization between the parties, including, without limitation, a joint venture or partnership.

**8.21 Rules of Construction.** As used in this Agreement, “shall” is mandatory, and “may” is permissive. “Party” or “parties” means the parties to this Agreement. “Years” means calendar years. “Days” mean calendar days (January 1 through December 31), unless specified as “business days” herein, which means Monday through Friday of each week except for federal or California state holidays. The parties acknowledge and agree that each of the parties and each of the parties’ attorneys have participated fully in the negotiation and drafting of this Agreement. In cases of uncertainty as to the meaning, intent or interpretation of any provision of this Agreement, the Agreement shall be construed without regard to which of the parties caused, or may have caused, the uncertainty to exist. No presumption shall arise from the fact that particular provisions were or may have been drafted by a specific party, and prior versions or drafts of this Agreement shall not be used to interpret the meaning or intent of this Agreement or any provision hereof.

**8.22 Costs of Agreements.** As an extension of, and necessary part of implementing the terms of this Agreement, Heritage agrees that it will pay District reasonably in advance, and otherwise reimburse District, for all actual costs and fees associated with District’s legal counsel and consultants fees attributable to the negotiation, drafting and approval of this Agreement, and all documents related thereto and required to be negotiated, drafted and approved hereunder.

**8.23 Successors and Assigns.** Subject to the conditions and limitations set forth in this Section 8.23, all of the covenants, stipulations, promises, and agreements contained in this Agreement by or on behalf of, or for the benefit of, any of the parties hereto, shall bind or inure to the benefit of the successors and assigns of the respective parties. Heritage shall not transfer or delegate Heritage’s obligations under this Agreement with respect to the conveyance of the K-8 School Site (“**Conveyance Obligation**”) or any of Heritage’s obligations related to funding of the Site Improvement Costs, Construction Costs and Furnishings, Equipment and Materials for the K-8 School, or performance of any other material obligations of Heritage set forth in this Agreement, without the prior written consent of District, which consent shall not unreasonably be withheld, conditioned or delayed (“**Permitted Delegation**”). Upon the effective date of such Permitted Delegation, the Conveyance Obligation described in the instrument of transfer (and/or the Heritage funding obligations described in the preceding sentence), shall be transferred to and assumed by the transferee and Heritage shall be relieved of the Conveyance Obligation or such funding obligations. Heritage (and Heritage successor(s)) may assign this Agreement, or any or all of such party’s rights or obligations under this Agreement, to a Heritage Affiliate (or to a lender who has advanced funds for the Project, as additional security), without the need to obtain any consent of District (except to the extent to which such assignment relieves Heritage of its Conveyance Obligation or binding obligations under this Agreement, for which the consent of the District shall be required, which consent shall not unreasonably be withheld, conditioned or delayed), but Heritage shall still provide District with written notice following such assignment, within five (5) business days. The conveyance or transfer of portions of the Heritage Fields Property to merchant builders or to non-residential owners, users or developers shall not operate to transfer to or impose any of the obligations under this Agreement on any such merchant builder or non-residential owner, user or developer, which may only occur pursuant to an express Permitted Delegation.

**8.24 Further Action; Approvals.** Each party agrees to take all further actions reasonably necessary to implement this Agreement. Where this Agreement requires any party or all parties to approve, consent, or determine any matter, such approval, consent or determination shall not be unreasonably withheld, conditioned or delayed.

## **SECTION 9. DEFINITIONS.**

**“Administration Fee Payment.”** See Section 4.5.

**“Advanced Funding Agreement.”** See Recital C.

**“Agency Fees.”** See Section 1.3.

**“Agreement”** means this K-8 Agreement.

**“Appraised Condition.”** See Section 1.4.

**“Appraised Value.”** See Section 1.4.

**“Appraiser.”** See Section 1.4.

**“Approved List.”** See Section 1.4.

**“Approved Plans.”** See Section 2.5.

**“Approving Agency.”** See Section 1.2.

**“Architect.”** See Section 2.3.

**“Audit.”** See Section 3.3.

**“Board”** means the Board of Education of the District.

**“Bonds.”** See Section 6.4(a).

**“CDE”** means California Department of Education. See 1.1.

**“CFD.”** See Section 6.4(a).

**“CFD Exemption Provision.”** See Section 6.4(b).

**“CFD Proceedings.”** See 6.4(a).

**“Close of Escrow.”** See Section 7.5.

**“Closing.”** See Section 7.5.

**“Closing Date.”** See Section 7.5.

**“Construction Completion Date.”** See Section 2.1.

**“Conveyance Obligations.”** See Section 8.23(b).

**“Construction Costs.”** See Section 4.3.

**“Construction Manager.”** See Section 2.2.

**“Consultant Costs.”** See Section 1.3.

**“Consultants.”** See 1.3.

**“Cure Period.”** See Section 8.2(a).

**“Default”** means any material or substantial failure by a party to perform its obligations or responsibilities under this Agreement. Minor or technical breaches or deviations from the terms of the Agreement that do not materially affect the rights or obligations of the parties shall not constitute a Default. A Default shall not exist until expiration of the applicable notice and cure period under Section 8.2.

**“Default Notice.”** See Section 8.2(a).

**“Defaulting Party.”** See Section 8.2(a).

**“Demand Notice.”** See Section 5.4.

**“District”** means the Irvine Unified School District.

**“District’s Knowledge.”** See Section 6.1(g).

**“District School Consultant.”** See Section 3.1(b).

**“DSA.”** See Section 2.5.

**“DTSC”** means Department of Toxic Substances Control. See Section 1.2.

**“Effective Date”** means the date in the first paragraph of this Agreement.

**“Environmental Laws.”** See Section 5.1(e).

**“Escrow Holder.”** See Section 7.1.

**“Feasibility Period.”** See Section 5.1(d).

**“First K-8 Agreement.”** See Recital C.

**“First K-8 School.”** See Recital C.

**“Five Point”** means Five Point Communities Management, Inc., a Delaware corporation. See Section 6.2(e).

**“Force Majeure.”** See Section 8.19.

**“Furnishings, Equipment and Materials.”** See Section 2.7.

**“Governmental Agencies.”** See Section 6.4(c).

**“Grant Deed.”** See Section 1.6.

**“Hazardous Materials.”** See Section 5.1(e).

**“Heritage”** means Heritage Fields El Toro, LLC, a Delaware limited liability company.

**“Heritage Deposit Account.”** See Section 1.3.

**“Heritage Fields Property”** means the property described in Attachment B to Exhibit E.

**“Heritage’s Knowledge.”** See Section 6.2(e).

**“Heritage School Consultant.”** See Section 3.1(b).

**“Improvement Area.”** See Section 6.4(a).

**“Inspector.”** See Section 2.6.

**“K-8 Design Standards.”** See Section 2.4.

**“K-8 ICE Account.”** See Section 4.1(a).

**“K-8 Project.”** See Section 2.2.

**“K-8 School.”** See Recital D. Except where the context indicates otherwise, references to the K-8 School include the K-8 School Site.

**“K-8 School Site.”** See Section 1.1.

**“Mello-Roos Act.”** See Section 6.4(a).

**“Natural Hazard Disclosure Report.”** See Section 6.3.

**“Natural Hazard Expert.”** See Section 6.3.

**“Non-Defaulting Party.”** See Section 8.2(a).

**“Originally Identified Site.”** See Section 1.1.

**“Permits.”** See Section 6.1(a).

**“Permitted Delegation.”** See Section 8.23.

**“Potential School Site.”** See Section 6.4(a).

**“Preliminary Plans.”** See Section 2.5.

**“Preliminary Title Report.”** See Section 5.1(h).

**“Project”** means the Heritage development project described in the School Mitigation Agreement.

**“Project Schedule.”** See Section 1.7.

**“Public Funding”** means Federal Funds, State Funds and Local Funds available to fund the school site acquisition, site development and construction costs described in this Agreement. See Section 3.1(a).

**“Purchase Price.”** See Section 1.6.

**“Reconfigured/Substituted Site Process.”** See Section 1.1.

**“Regulations.”** See Section 6.1(a).

**“RMA.”** See Section 6.4(a).

**“SAB.”** See Section 5.1(l).

**“School Consultants.”** See Section 3.1(b).

**“School Construction Obligation.”** See Section 8.2(b).

**“School Facility Program”** means the State program established pursuant to the School Facilities Act to provide for funding for new construction and modernization of school facilities, as described in Title 2 of the California Code of Regulations, Section 1859 *et seq.*

**“School Facilities Act”** means the Leroy F. Greene School Facilities Act of 1998, Chapter 12.5 of the Education Code

**“School Mitigation Agreement.”** See Recital C.

**“School Site Laws.”** See Section 1.2., 5.1(f)

**“Second Site.”** Section 1.1.

**“Site Acquisition Reimbursement.”** See Section 3.1(d).

**“Site Funds.”** See Section 7.6.

**“Site Development Reimbursement.”** See Section 3.1(d).

**“Site Improvement Costs.”** See Section 4.2.

**“Site Improvements.”** See Section 4.2.

**“Site Work.”** See Section 1.5.

“**State**” means State of California.

“**State Approval Date.**” See Section 5.1.

“**State Approvals.**” See Section 5.1.

“**State Funds**” means funds available to or obtained by District from the State, and which funds are either (a) designated by the State for the school facilities contemplated to be constructed pursuant to this Agreement, or (b) in the event such funds are not specifically designated by the State for such facilities, applied by District in a proportionate share to all District facilities authorized to be funded by such funds; provided, however, that “State Funds” shall not include any funds available to or obtained by District from the State exclusively for enhancements to such facilities beyond the size, scope, design and education specifications of the facilities contemplated by this Agreement.”

“**Title Company.**” See Section 5.1(i).

“**Title Policy.**” See Section 5.1(i).

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

IRVINE UNIFIED SCHOOL DISTRICT

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

HERITAGE FIELDS EL TORO, LLC,  
a Delaware limited liability company

By: HERITAGE FIELDS EL TORO SOLE MEMBER LLC,  
a Delaware limited liability company  
Its: Sole Member

By: HERITAGE FIELDS LLC,  
a Delaware limited liability company  
Its: Sole Member

By: FIVE POINT HERITAGE FIELDS, LLC,  
a Delaware limited liability company  
Its: Administrative Member

By: FIVE POINT OPERATING COMPANY, LLC,  
a Delaware limited liability company  
Its: Sole Member

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
District Counsel

**EXHIBIT A**

**DEPICTION THE SCHOOL SITE**

*[Legal description shall be substituted for depiction upon completion]*

**EXHIBIT B**

**DEPICTION OF SECOND SITE**

**EXHIBIT C**

**GRANT DEED**

**EXHIBIT D**

**PROJECT SCHEDULE**

**EXHIBIT E**

**DECLARATION OF SPECIAL LAND USE RESTRICTIONS**

**EXHIBIT F**

**SITE PLAN AND DESCRIPTION OF FACILITIES**