

## ATTACHMENT A

### SPECIFIC FINDINGS FOR A DEVELOPMENT AGREEMENT BETWEEN THE NORTON SIMON ART FOUNDATION AND THE CITY OF PASADENA FOR PROPERTY AT 237-337 W. COLORADO BOULEVARD AND 55-77 ST. JOHN AVENUE

- 1. *The proposed development agreement is in the best interest of the City.*** The City would enjoy many benefits from the proposed development agreement. The existing luxury brand automobile dealership generates significant revenues to the City through sales taxes and other taxes and revenues and is among the top ten percent of revenue generators of businesses in the City. Furthermore, as a luxury brand dealership, it attracts a large portion of its customers from outside Pasadena, making it a regional draw. Maintaining these revenues and visitors for many years into the future would be considered a benefit to the City and community. The agreement would also eliminate uncertainty in the planning process and provide for the orderly future development of the property. The lack of certainty can result in a waste of resources, escalate the cost of housing and other development and discourage investment and a commitment to comprehensive planning. Developing the property in accordance with existing policies, rules and regulations with conditions of approval may strengthen the planning process and reduce the economic cost of development. All of this would be considered a benefit to the City and community making the proposed development agreement in the best interest of the City.
- 2. *The proposed development agreement is in conformance with the goals, policies and objectives of the General Plan and the purpose and intent of any applicable specific plan, and the Zoning Code.*** One of the General Plan's Seven Guiding Principles states that "Economic vitality will be promoted to promote jobs, services, revenues and opportunities." General Plan Objective #12 discusses fiscal health and the need to encourage a business climate that contributes to the City's fiscal health. General Plan Policy 12.1 states "Retail: encourage retail and sales-producing businesses to remain, expand in, or come to, Pasadena and promote healthy retail areas." The existing luxury brand automobile dealership generates significant revenues to the City through sales taxes and other taxes and revenues and is among the top ten percent of revenue generators of businesses in the City. Therefore, a development agreement to maintain the dealership would be consistent with the General Plan.

The property is located in the West Gateway Specific Plan area and is zoned WGSP-1C (West Gateway Specific Plan, The Colorado Boulevard area). Automobile dealerships are permitted "by right" in the WGSP-1C zoning district. Goals and objectives outlined in the Specific Plan include the need to preserve the existing character of the commercial district and regulating the scale of new

development. A development agreement to maintain the dealership would be consistent with the existing scale of the area. If a proposed new project were to move forward at some point in the future, the new project would be required to comply with all standards and regulations of the existing Specific Plan.

3. ***The proposed development agreement would not be detrimental to the health, safety and general welfare of persons residing in the immediate area, nor be detrimental or injurious to property or persons in the general neighborhood or to the general welfare of the residents of the City.*** The proposed development agreement would maintain the existing luxury brand automobile dealership, which has been a quality use in the area since the 1920s. The use has not been a nuisance to the surrounding area or community; rather the use has had a very positive impact on the City's revenue base. Automobile dealerships are permitted "by right" within the subject property's zoning district, so the existing use is not considered legal non-conforming. If a proposed new project were to move forward at some point in the future, the new project would be required to comply with all standards and regulations of the existing West Gateway Specific Plan. Furthermore, a proposed new project would need to comply with all existing public hearing and noticing requirements to inform the public of the future project and all provisions of the California Environmental Quality Act (CEQA) to review and disclose potential environmental issues. This would ensure any proposed new project would not be detrimental or injurious to the general welfare of the community.
  
4. ***The proposed development agreement is consistent with the provisions of California Government Code Sections 65864 through 65869.5.*** These Government Code Sections outline requirements related to the contents of agreements, the applicability of an agreement and on the public hearing and approval process. In addition, the agreement complies with Chapter 17.66 of the Zoning Code, which outlines the procedures and requirements for the review, approval and amendment of development agreements. The proposed agreement meets or exceeds the standards outlined by the State and City. The agreement specifies the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of property buildings (as all development standards are all outlined in the West Gateway Specific Plan). In addition, the agreement does not allow a use that would not be permitted by the Zoning Code, nor does it constitute a rezoning of the property or permit a variance to a specific standard. The agreement was presented to the City's Planning Commission as the recommending body and the City Council for final decision. Both meetings were noticed as public hearing and included a newspaper notice, notices mailed to all property owners within 500 feet of the subject property and multiple on-site postings.

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## ATTACHMENT B

CITY OF PASADENA

WHEN RECORDED MAIL TO:

City of Pasadena  
Attention: City Attorney  
100 North Garfield Ave., Room N-210  
Pasadena, CA 91109

### DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this "Agreement") is made by and between THE CITY OF PASADENA, a California municipal corporation (the "City"), and the Norton Simon Art Foundation, a California non-profit public benefit corporation ("NSAF"). The City and NSAF are individually referred to herein as a "Party" and collectively referred to as the "Parties."

### RECITALS

This Agreement is made and entered into with regard to the following facts, each of which is acknowledged as true and correct by the Parties to this Agreement.

A. NSAF is the fee owner of that certain real property located in the City of Pasadena, California and described in Exhibit A attached hereto and incorporated herein by reference (the "NSAF Property").

B. NSAF currently leases the NSAF Property for use as a multi-brand luxury auto dealership. The auto dealership generates significant revenues for the City, through sales taxes and other taxes and revenues. The current lease is set to expire on -----.

C. NSAF is willing to negotiate a long-term lease extension (15 years or more) for the continued use of the NSAF Property as an auto dealership as long as NSAF can preserve its right to develop the NSAF Property in the future in accordance with the City's current planning and zoning codes, rules and regulations including the General Plan and West Gateway Specific Plan, (each as hereinafter defined).

D. NSAF has applied to the City for approval of this mutually binding Agreement, pursuant to the provisions of the Development Agreement Act (as hereinafter defined) and other applicable laws, primarily including Pasadena Municipal Code ("PMC"), Zoning Code Chapter 17.66 (Development Agreements).

E. The City Council has specifically considered the benefits of the continued leasing of the NSAF Property for auto dealership use and the advantages and impacts of preserving NSAF's continued right to develop the NSAF Property in the future in accordance with the

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Applicable Rules (as hereinafter defined) including without limitation the Zoning Code, General Plan and the West Gateway Specific Plan and believes that the execution of this Development Agreement will benefit the City.

F. This Agreement eliminates uncertainty in planning and provides for the potential orderly development of the NSAF Property in the future in a manner consistent with the City's current Applicable Rules including without limitation the Zoning Code, General Plan and the West Gateway Specific Plan.

G. To provide such certainty, the City desires, by this Agreement, to provide NSAF with assurance that NSAF can continue to lease the NSAF Property for auto dealership use while preserving NSAF's right to proceed in the future with development of the NSAF Property with the uses, density and other land use characteristics specified in the City's Applicable Rules including without limitation the Zoning Code, General Plan and the West Gateway Specific Plan.

H. NSAF would not enter into a long-term lease extension for the NSAF Property as an auto dealership without the City's agreement that the NSAF Property can be developed in the future, during the term of this Agreement, with the uses, density and other land use characteristics specified in the Applicable Rules including without limitation the Zoning Code, General Plan and the West Gateway Specific Plan.

I. The City has determined that, as a result of the Development Agreement, substantial benefits will accrue to the public.

J. On [date], pursuant to the requirements of the Development Agreement Act and PMC Chapter 17.66, the Planning Commission of the City of Pasadena (the "Planning Commission") conducted a hearing on NSAF's application for this Agreement.

K. On [date], pursuant to the requirements of the Development Agreement Act and PMC Chapter 17.66, the City Council of the City of Pasadena (the "City Council") conducted a hearing on NSAF's application for this Agreement.

L. The City Council has found and determined that this Agreement is consistent with the City's Zoning Code, General Plan, West Gateway Specific Plan and all other plans, policies, rules and regulations applicable to the NSAF Property.

M. On [date], the City Council reviewed and certified, after making appropriate findings, the Notice of Exemption that contemplates this Agreement.

N. On [date], and pursuant to PMC Section 17.66.040.G(6), the City Council conducted first reading of Ordinance No. [Ordinance no.] approving this Agreement, and on [date] conducted second reading, and such Ordinance became effective on [date].

## **AGREEMENT**

NOW THEREFORE, pursuant to the authority contained in the Development Agreement Act, as it applies to the City, and in consideration of the mutual promises and covenants herein

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contained and other valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

1. Definitions. For all purposes of this Agreement, except as otherwise expressly provided herein, or unless the context of this Agreement otherwise requires, the following words and phrases shall be defined as set forth below:

(a) “Applicable Rules” means the rules, regulations, ordinances, resolutions, codes, guidelines, and officially adopted procedures and official policies of the City governing the use and development of real property, including, but not limited to, the City’s General Plan, the West Gateway Specific Plan, the Zoning Code, the Subdivision Ordinance and building regulations, in effect as of the Effective Date. Among other matters, the Applicable Rules set forth and govern the permitted uses of land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, parking requirements, setbacks, and development standards, the provisions for reservation or dedication of land for public purposes, and the design, improvement and construction guidelines, standards and specifications applicable to the development of the NSAF Property. However, the provisions of Transfer of Development Rights (TDRs) would not apply if that right was removed from the West Gateway Specific Plan or Zoning Code for the NSAF property

(b) “Building Permit” means a permit issued by the City pursuant to Title 14 of the Pasadena Municipal Code to authorize construction of a building or other structure.

(c) “Business Day” means any day other than a Saturday, Sunday or California or Federal holiday on which banks in the City are customarily closed.

(d) “CEQA” means the California Environmental Quality Act (California Public Resources Code Section 21000 et seq.), as it now exists or may hereafter be amended.

(e) “Developer Fees” shall mean those fees established and adopted by the City pursuant to Section 66000 et seq., of the Government Code of the State of California to offset the impact of development on the City’s capital facilities, including, without limitation, parking impact fees, affordable housing fees, traffic fees, infrastructure fee, linkage fees, exactions, assessments or fair share charges or other similar impact fees imposed by the City on or in connection with new development on the NSAF Property. Developer Fees do not mean or include Processing Fees.

(f) “Development Agreement” or “Agreement” means this Agreement.

(g) “Development Agreement Act” means Article 2.5 of Chapter 4 of Division 1 of Title 7 (Sections 65864 through 65869.5) of the California Government Code (as the same may be amended and/or re-codified from time to time).

(h) “Discretionary Action(s)” or “Discretionary Approval(s)” means an action which requires the exercise of judgment, deliberation or discretion on the part of the City, including any board, agency, commission or department or any officer or employee thereof, in the process of approving or disapproving a particular activity, as distinguished from a Ministerial Permit or Ministerial Approval (as hereinafter defined).

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(i) “Effective Date” shall mean the date this Agreement, fully executed, is recorded in the official records of the Los Angeles County Recorder.

(j) “Future Approvals” shall mean all future Discretionary Actions or Discretionary Approvals, Ministerial Permits and Ministerial Approvals required or requested with respect to the NSAF Property.

(k) “Future Development” shall mean development of the NSAF Property, in whole or in part, consistent with the Applicable Rules in effect as of the Effective Date.

(l) “General Plan” means the General Plan of the City, as it exists as of the Effective Date.

(m) “Luxury-branded Auto Dealership” means a new automobile sales dealership specializing in the sale of new luxury-branded cars, including but not limited to Audi, Porsche, Jaguar, Bentley, Rolls Royce, Ferrari, Maserati, BMW, and Mercedes. Luxury-branded Automobile Dealership also may include ancillary pre-owned vehicle sales, service, and administrative offices.

(n) “Ministerial Permit(s),” or “Ministerial Approval(s)” means a permit or approval, including, but not limited to, Building Permits, grading permits, shoring and excavation permits, demolition permits, zone clearances, and certificates of occupancy, which requires the City, including any board, agency, commission or department or any officer or employee thereof, to determine whether there has been compliance with applicable rules, statutes, ordinances, conditions of approval, and/or regulations, as distinguished from an activity which is included in the definition of Discretionary Action or Discretionary Approval.\

(o) “Mortgage” means any mortgage, deed of trust, encumbrance, sale leaseback or other security interest encumbering all or any portion of the NSAF Property, given by NSAF.

(p) “Mortgagee” means the holder of the beneficial interest under any Mortgage.

(q) “Notice of Exemption” shall mean the Notice of Exemption adopted by the City with respect to this Agreement pursuant to CEQA. It is specifically acknowledged that such Notice of Exemption applies only to the City’s action of entering into this Development Agreement, and not to any construction project that may occur on the NSAF Property in the future, and that such future construction project will be separately subject to analysis pursuant to CEQA.

(r) “NSAF Property” means the real property described in Exhibit “A” attached hereto.

(s) “Processing Fees” means all processing fees and charges required by the City that are applied uniformly to all construction or development related activity including, but not limited to, fees for land use applications, Building Permit applications, Building Permits, grading permits, shoring and excavation permits, hauling permits, encroachment permits,

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demolition permits, subdivision or parcel maps, lot line adjustments, street vacations, inspections, certificates of occupancy and plan check. Processing Fees shall not mean or include Developer Fees.

(t) “Reserved Powers” means the power and authority of the City to enact regulations and/or take Discretionary Action if the same is expressly found by the City to be necessary to protect residents of the City, those employed in the City, or visitors to the City, from a condition that is dangerous to public health or safety or if the same is required to comply with California or federal laws (whether enacted previous or subsequent to the Effective Date of this Agreement).

(u) “Subdivision Ordinance” shall mean the official Subdivision Ordinance of the City, Title 16 of the Pasadena Municipal Code, in effect as of the Effective Date of this Agreement.

(v) “Subsequent Land Use Regulations” means any change in or addition to the Applicable Rules adopted after the Effective Date of this Agreement, including, without limitation, any change in any applicable general or specific plan, zoning, subdivision, or building regulation, including, without limitation, any such change by means of an ordinance, initiative, resolution, policy, order or moratorium, initiated or instituted for any reason whatsoever by the Mayor, City Council, Planning Commission or any other board, agency, commission or department of City, or any officer or employee thereof, or by the electorate, as the case may be, which would, absent this Agreement, otherwise be applicable to the NSAF Property.

(w) “West Gateway Specific Plan” shall mean the West Gateway Specific Plan applicable to a portion of the City including, but not limited to, the NSAF Property in the Orange Grove / Colorado Sub-area, in effect as of the Effective Date of this Agreement.

(x) “Zoning Code” shall mean the official Zoning Code of the City, Title 17 of the Pasadena Municipal Code, in effect as of the Effective Date of this Agreement.

## 2. Recitals of Premises, Purpose and Intent.

(a) State Enabling Statute. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Act which authorizes any city to enter into binding development agreements establishing certain development rights in real property with persons having legal or equitable interests in such property. Section 65864 of the Development Agreement Act expressly provides as follows:

“The Legislature finds and declares that:

“(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and a commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

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“(b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic cost of development.”

Notwithstanding the foregoing, to ensure that the City remains responsive and accountable to its residents while pursuing the benefits of development agreements contemplated by the Legislature, the City accepts restraints on its police powers contained in development agreements only to the extent and for the duration required to achieve the mutual objectives of the Parties.

(b) Future Development. During the term of this Agreement, NSAF may seek to develop the NSAF Property subject to the Applicable Rules and this Agreement. The Parties hereby agree that, subject to the exercise of the City’s Reserved Powers, for the term of this Agreement, the permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, parking requirements, setbacks, and development standards, provisions for reservation or dedication of land for public purposes and location of public improvements, and the design, improvement, construction and other guidelines, standards and specifications applicable to the development and use of the NSAF Property shall be those set forth in the Applicable Rules, and this Agreement. Subject to the exercise of the City’s Reserved Powers, any Future Approvals shall, at the election of NSAF, be subject to the Applicable Rules or the rules, regulations, ordinances, resolutions, codes, guidelines, and officially adopted procedures and official policies of the City at the time of such Future Approvals.

3. Property Subject to Agreement. This Agreement shall apply to all of the NSAF Property.

4. Application of Agreement. This Agreement shall apply to the development and use of the NSAF Property. Such development and use shall be in accordance with the Applicable Rules and this Agreement.

5. Term of Agreement. The term of this Agreement shall commence on the Effective Date of this Agreement, and shall continue for twenty-three (23) years, subject to early termination as provided for in this Section 5. In the event NSAF fails to enter into a lease extension or lease to extend the use of the Property as a Luxury-branded Automobile Dealership as provided by Section 10, this Agreement shall terminate at the end of the existing lease. In the event NSAF enters into a lease extension or a lease to extend the use of the Property as a Luxury-branded Automobile Dealership as provided by Section 10 and such lease or lease extension terminates in less than five (5) years after the Effective Date, this Agreement shall terminate on the termination date of such lease extension or lease. In the event NSAF enters into a lease extension or lease to extend the use of the Property as a Luxury-branded Automobile Dealership and such lease extension or lease terminates five (5) years or more after the Effective Date, then this Agreement shall terminate three (3) years following the termination of the lease extension or lease, but under no circumstances shall this Agreement exceed a total of twenty-three (23) years beyond the Effective Date. For the purposes of this Agreement, the Luxury-branded Automobile Dealership shall be deemed to have terminated if the sale of luxury-branded



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automobiles at the Property has been discontinued for a period of one hundred and eighty (180) days. If NSAF files an application for a Future Development, which application the City reasonably determines is complete (other than for any required compliance with CEQA) prior to the end of the term, this Agreement shall be automatically extended for such time as may be required for the City to process and make a final determination with respect to such application for Future Development provided that NSAF diligently processes such application.

6. Timing of Development. The Parties acknowledge that NSAF cannot at this time predict when or if the NSAF Property will be developed. Such decisions depend upon numerous factors that are not within the control of NSAF. Because the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal. 3d 465, (the Pardee Case) that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the Parties' intent to cure that deficiency by acknowledging and providing that, except as provided below, NSAF shall have the right to develop the NSAF Property consistent with the Applicable Rules and this Agreement in such order and at such rate and at such times as NSAF deems appropriate within the exercise of its sole and subjective business judgment during the term of this Agreement. This provision shall be broadly construed to provide NSAF the greatest amount of time and flexibility (in light of the Pardee Case and/or any other similar or distinguishing cases) as necessary or appropriate to permit NSAF to complete development of the NSAF Property irrespective of later adopted rules, regulations or initiatives which would otherwise restrict NSAF's time to develop the NSAF Property.

7. Permitted Uses; Density; Building Heights and Sizes; Required Dedications. The City and NSAF hereby agree that the permitted uses of the NSAF Property, the density and intensity of such uses, the maximum heights and sizes of the buildings and improvements to be constructed on the NSAF Property, and the reservation and dedication of land for public purposes, if any, required in connection with the development of the NSAF Property shall be as set forth in and consistent with the Applicable Rules, this Agreement, and Future Approvals.

8. NSAF's Rights. NSAF shall have and is hereby vested with the rights, during the term of this Agreement, including any extensions, to develop the NSAF Property as allowed by the Applicable Rules. NSAF shall not be obligated to pay Developer Fees in connection with the development of the NSAF Property except as required by the Applicable Fees.

9. Changes in Applicable Rules.

(a) Non-Application of Changes in Applicable Rules. The adoption of any Subsequent Land Use Regulations after the Effective Date of this Agreement, or any change in, or addition to, the Applicable Rules (other than changes in Developer Fees as currently provided for in the Applicable Rules and Processing Fees as provided in this Agreement), including, without limitation, any changes in the General Plan, the West Gateway Specific Plan, the Zoning Code, or the Subdivision Ordinance (including any regulation relating to the timing, sequencing, or phasing of development of the NSAF Property or construction of all or any part of Future Development), adopted after the Effective Date of this Agreement, including, without limitation, any such change by means of ordinance, initiative, resolution, motion, policy, order or moratorium, initiated or instituted for any reason whatsoever and adopted by any board, agency,

## **DEVELOPMENT AGREEMENT**

commission or department of the City, or by the electorate, as the case may be, which would, absent this Agreement, otherwise be applicable to the NSAF Property and which would conflict in any way with or be more restrictive than the Applicable Rules, shall not be applied to the NSAF Property or Future Development of the NSAF Property during the term of this Agreement unless such changes represent an exercise of the City's Reserved Powers.

(b) Changes in Uniform Codes. Notwithstanding any provision of this Agreement to the contrary, development of the NSAF Property shall be subject to changes occurring from time to time in the provisions of the City's building, mechanical, plumbing and electrical regulations which are based on the recommendations of a multi-state professional organization and become applicable throughout the City, including, but not limited to, the California Building Code, and other similar or related uniform codes.

(c) Changes Mandated by California or Federal Laws or Regulations. Changes in, or additions to, the Applicable Rules adopted or made operative on or after the Effective Date shall apply to the NSAF Property and Future Development if such changes or additions are specifically mandated to be applied to such development by applicable California or federal laws or regulations. If the City or NSAF believes that such a change or addition required by California or federal law or regulation exists, then that Party shall provide the other Party hereto with a copy of such California or federal law or regulation and a statement of the nature of its conflict with the provisions of the Applicable Rules and/or of this Agreement.

(d) Changes in Developer Fees and Processing Fees Under Applicable Rules. The NSAF Property and Future Development of the NSAF Property shall be subject to any increase in Developer Fees and Processing Fees imposed by the City, provided that such a change is applied on a Citywide basis.

10. NSAF's Consideration/Obligation. NSAF agrees to use good faith efforts to maintain a Luxury-branded Automobile Dealership at the Property for a term of fifteen years following the Effective Date including without limitation (i) NSAF negotiating a 15 year extension of the existing lease or other extensions of the lease with the Luxury-branded Automobile Dealership currently leasing the NSAF Property, or (ii) entering into a new lease with a Luxury-branded Automobile Dealership for use of the Property. The foregoing notwithstanding, nothing herein shall require NSAF to enter into any specific lease or lease extension with any party or agree to any specific terms for a lease or a lease extension; the City specifically understands and agrees that the decisions as to the terms of any lease are in the sole and absolute discretion of NSAF.

11. Default. Failure by City or NSAF to perform any term or provision of this Agreement for a period of thirty (30) days from the receipt of written notice thereof from the other shall constitute a default under this Agreement, subject to extensions of time by mutual consent in writing. Said notice shall specify in detail the nature of the alleged default and the manner in which said default may be satisfactorily cured. If the nature of the alleged default is such that it cannot reasonably be cured within such thirty (30) day period, the commencement of the cure within such time period and the diligent prosecution to completion of the cure shall be deemed a cure within such period.

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Subject to the foregoing, after notice and expiration of the thirty (30) day period without cure, the notifying party, at its option, shall have all rights and remedies provided by law, including injunctive relief, except that in no event shall monetary damages be available against the City or NSAF for any alleged default or breach of this Agreement.

12. Termination and Expiration. Upon the expiration of the term or termination of this Agreement, the vested rights provided by this Agreement shall terminate and be of no further force or effect. However, such expiration or termination shall not affect any Future Approvals or Building Permits that have been issued for any Future Development of the NSAF Property consistent with this Agreement.

13. Transfers of Interests in Property or Agreement. In the event of a proposed transfer of all or a portion of the NSAF Property by NSAF to a transferee, NSAF agrees to provide the City with thirty (30) days prior written notice of such proposed transfer and shall provide an assignment and assumption agreement from the transferee agreeing to assume the obligations of NSAF under this Agreement with respect to the NSAF Property or the portion of the NSAF Property being transferred. The assignment and assumption agreement shall be in a form reasonably satisfactory to the City. However, NSAF has no obligation to obtain the consent of the City to the transfer of the NSAF Property. Notwithstanding the foregoing: (i) the terms, covenants and conditions of this Agreement shall be binding upon any transferee whether or not such an assignment and assumption agreement is signed by the transferee upon acquiring all or a portion of the NSAF Property; and (ii) no such transfer shall relieve NSAF (transferor) of any obligations under this Agreement unless: (A) at least thirty (30) days prior to any transfer, NSAF has submitted to City the name of the proposed transferee and financial information regarding the transferee reasonably satisfactory to the City, and the City determines, prior to transfer, that the proposed transferee is able to satisfactorily fulfill the obligations of this Agreement, and (B) the transferee accepts, in writing, the obligations of NSAF under this Agreement. Such writing shall be in form reasonably satisfactory to the City.

14. Mortgagee Protection.

(a) *In General.* The provisions of this Agreement shall not prevent or limit NSAF's right to encumber the NSAF Property or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to such portion. Any Mortgagee shall be entitled to the rights and privileges set forth in this Section.

(b) *Notice of Default to Mortgagee.* If a Mortgagee has submitted a request in writing to City in the manner specified herein for giving notices, the City shall exercise its best efforts to provide to such Mortgagee written notification from the City of any failure or default by NSAF in the performance of NSAF's obligations under this Agreement, which notification shall be provided to such Mortgagee at such time as such notification is delivered to NSAF.

(c) *Right of Mortgagee to Cure.* Any Mortgagee shall have the right, but not the obligation, to cure any failure or default by NSAF during the cure period allowed NSAF under this Agreement, plus an additional sixty (60) days if, in order to cure such failure or default, it is necessary for the Mortgagee to obtain possession of the property such as by seeking

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the appointment of a receiver or other legal process. Any Mortgagee that undertakes to cure or attempt to cure any such failure or default shall provide written notice to the City that it is undertaking efforts of such a nature; provided that no initiation of any such efforts by a Mortgagee shall obligate such Mortgagee to complete or succeed in any such curative efforts.

(d) *Liability for Past Defaults or Obligations.* Subject to the foregoing, any Mortgagee, including the successful bidder at a foreclosure sale, who comes into possession of NSAF Property, or any part thereof pursuant to foreclosure, eviction or otherwise, shall take such property subject to the terms of this Agreement and in no event shall any such property be released from any obligations associated with its use and development under the provisions of this Agreement. Nothing in this Section shall prevent City from exercising any remedy it may have for a default under this Agreement, provided, however, that in no event shall such Mortgagee personally be liable for any defaults of NSAF arising prior to acquisition of possession of such property by such Mortgagee.

15. Binding Effect. All of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this Agreement shall be binding upon the Parties and their respective successors (by merger, reorganization, consolidation or otherwise) and assigns, administrators, representatives, and all other persons acquiring the NSAF Property, or any portion thereof, or any interest therein, whether by operation of law or in any manner whatsoever, and shall inure to the benefit of the parties and their respective heirs, successors and assigns. All of the provisions of this Agreement shall constitute covenants running with the land.

16. Indemnification.

(a) NSAF agrees to and shall indemnify, hold harmless, and defend, the City and its respective officers, officials, members, agents, employees, and representatives, from liability or claims for death or personal injury and claims for property damage which may arise from the acts, errors, and/or omissions of NSAF or its contractors, subcontractors, agents, employees or other persons acting on its behalf in relation to the NSAF Property, Future Development and/or in any manner arising from this Agreement. The foregoing indemnity applies to all deaths, injuries, and damages, and claims therefor, suffered or alleged to have been suffered by reason of the acts, errors, and/or omissions referred to in this Section 16, regardless of whether or not the City prepared, supplied, or approved plans or specifications, or both. In the event of litigation, the City agrees, at no cost to the City, to cooperate with NSAF. This indemnification, hold harmless and defense requirement shall survive the termination or expiration of this Agreement. The City reserves the right, in cases subject to this indemnity, to reasonably approve the attorney selected by NSAF to defend NSAF and the City in any such action.

(b) In the event of any court action or proceeding challenging the validity of this Agreement or the Notice of Exemption, NSAF shall defend, at its own expense, the action or proceeding. In addition, NSAF shall reimburse the City for the City's costs and fees in defending any court action or proceeding challenging the validity of this Agreement or the Notice of Exemption, and NSAF shall also pay any award of costs, expenses and fees that the court having jurisdiction over such challenge makes in favor of any challenger and against the City. NSAF shall cooperate with the City in any such defense as the City may reasonably

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request and may not resolve such challenge without the agreement of the City. In the event NSAF elects not to defend any challenge to this Agreement, NSAF may terminate this Agreement by providing written notice to the City and through the process set forth in PMC Section 17.66, but NSAF shall only continue to have an obligation to reimburse the City for any cost to defend this Agreement (including any award or settlement of attorneys' fees) incurred up to the time that the request for termination from NSAF is received by the City. In the event NSAF fails or refuses to reimburse the City for its cost to defend any challenge to this Agreement or the Notice of Exemption, the City shall have the right to terminate this Agreement as provided in PMC Section 17.66, subject to the notice and cure requirements of Section 11 above. In all events, the City shall have the right to resolve any challenge in any manner, in its sole discretion, provided, however, NSAF's consent shall be required if the resolution of the challenge shall require a payment by NSAF or limit NSAF's rights under this Agreement, which consent shall not be unreasonably withheld. Additionally, in the event of any litigation or referendum initiated by third parties to attack, set aside, modify, void or annul this Agreement, or the Notice of Exemption, the term of this Agreement shall be tolled for the period during which such challenge is proceeding until fully and finally resolved.

The City shall promptly notify NSAF of any claim, action or proceeding within the scope of this Section and the City shall cooperate fully in the defense of any such claim or action, but shall have the right to resolve any challenge, in any manner, in its sole discretion, provided, however, NSAF's consent shall be required if the resolution of the challenge shall require a payment by NSAF or limit NSAF's rights under this Agreement, which consent shall not be unreasonably withheld.

17. Relationship of the Parties. The Parties acknowledge and agree that NSAF is not acting as an agent, joint venturer or partner of the City, but each is, in fact, an independent contractual party.

18. Recordation. As provided in Government Code Section 65868.5, the City Clerk shall record a copy of this Agreement with the Registrar-Recorder of the County of Los Angeles within ten (10) days following its execution by both Parties. NSAF shall reimburse the City for all costs of such recording, if any.

19. No Third Party Beneficiaries. The only signatories to this Agreement are the City and NSAF. There are no third party beneficiaries and this Agreement is not intended and shall not be construed to benefit or be enforceable by any other person whatsoever other than the successors in interest of the signatories.

20. Advice; Neutral Interpretation. Each Party has received independent legal advice from its attorneys with respect to the advisability of executing this Agreement and the meaning of the provisions hereof. This Agreement has been drafted through a joint effort of the Parties and their counsel and therefore shall not be construed against either of the Parties in its capacity as draftsperson, but in accordance with its fair meaning.

21. Certificate of Compliance. At any time during the term of this Agreement, any Mortgagee or other party may request any Party to this Agreement to confirm that (i) this Agreement is unmodified and in full force and effect (or if there have been modifications hereto,

## DEVELOPMENT AGREEMENT

that this Agreement is in full force and effect as modified and stating the date and nature of such modifications) and that (ii) to the best of such Party's knowledge, no defaults exist under this Agreement or if defaults do exist, to describe the nature of such defaults and (iii) any other information reasonably requested. Each Party hereby agrees to provide a certificate to such lender or other party within ten (10) Business Days of receipt of the written request therefor.

22. Consideration. The City and NSAF acknowledge and agree that there is good, sufficient and valuable consideration flowing to the City and to NSAF pursuant to this Agreement as more particularly set forth in the Recitals and Section 2 of this Agreement. The Parties further acknowledge and agree that the exchanged consideration hereunder is fair, just and reasonable.

23. Periodic Reviews. The City shall conduct annual reviews of this Development Agreement pursuant to the process required by PMC Chapter 17.66 (Development Agreements) to determine, among other things, whether NSAF is acting in good faith compliance with the provisions of this Agreement and Government Code Section 65865.1. The Director of Planning and Community Development shall be the designated as the review authority for the annual review.

24. Future Litigation Expenses.

(a) Payment of Prevailing Party. If the City or NSAF brings an action or proceeding by reason of default, breach, tortious act, or act or omission, arising out of this Agreement, all parties shall bear their own costs and expenses of suit including, but not limited to, attorneys' fees and expert witness fees.

25. Headings. The section headings used in this Agreement are for convenient reference only and shall not be used in construing this Agreement. The words "include," "including" or other words of like import are intended as words of illustration and not limitation and shall be construed to mean "including, without limitation."

26. Amendment. This Agreement may be amended from time to time, in whole or in part, only as provided by PMC Section 17.66.080. .

27. Alterations. No alteration, amendment or modification of this Agreement shall be valid unless evidenced by a written instrument executed by the parties hereto with the same formality as this Agreement, and made in the manner required by the Development Agreement Act and PMC Chapter 17.66.

28. Waiver. The failure of either Party hereto to insist in any one or more instances upon the strict performance of any of the covenants, agreements, terms, provisions or conditions of this Agreement, or to exercise any election or option herein contained, shall not be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, condition, election or option, but the same shall continue and remain in full force and effect. No waiver by any Party hereto of any covenant, agreement, term, provision or condition of this Agreement shall be deemed to have been made unless expressed in writing and signed by an appropriate official or officer on behalf of such Party.

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29. Severability. If any article, section, subsection, term or provision of this Agreement, or the application thereof to any party or circumstance, shall, to any extent, be invalid or unenforceable, the remainder of the article, section, subsection, term or provision of this Agreement, or the application of the same to parties or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each remaining article, section, subsection, term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

30. Force Majeure. Performance by any Party of its obligations hereunder (other than for payment of money) shall be excused during any period of "Permitted Delay," which Permitted Delay shall mean and include delay caused by an event beyond the reasonable control of the Party claiming the delay (and despite the good faith efforts of such Party) that prevents the Party from fulfilling the obligations for which it seeks excuse including without limitation all of the following to the extent that they prevent the Party claiming delay from fulfilling the obligation from which it seeks to be excused: acts of God; civil commotion; riots; strikes; picketing or other labor disputes; shortages of materials or supplies; damage to work in progress by reason of fire, flood, earthquake or other casualties; failure, delay or inability of the other Party to act; terrorism, and litigation brought by a third party attacking the validity of this Agreement or the Notice of Exemption.

31. Notices. All notices, disclosures, demands, acknowledgments, statements, requests, responses and other communications (each, a "Communication") to be given under this Agreement shall be in writing, signed by a signatory hereto (or an officer, agent or attorney of such party) giving such Communication, and shall be deemed effective (i) upon receipt if hand delivered or sent by overnight courier service; or (ii) upon delivery or the date of refusal if sent by the United States mail, postage prepaid, certified mail, return receipt requested, in either case addressed as follows:

To NSAF:           President and CEO  
                          Norton Simon Art Foundation  
                          385 E. Colorado Blvd., Suite 240  
                          Pasadena, CA 91101

With Copy to:     George J. Muhlsten, Esq.  
                          Latham & Watkins LLP  
                          355 South Grand Avenue  
                          Los Angeles, CA 90017

To City:            City Manager  
                          City of Pasadena  
                          100 N. Garfield Ave., Room S-228  
                          Pasadena, California 91109

With Copy to:     City Attorney  
                          City of Pasadena  
                          100 N. Garfield Ave., Room N-201  
                          Pasadena, California 91109

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Any signatory hereto may from time to time, by notice given to the other signatories hereto pursuant to the terms of this Section 31 change the address to which communications to such signatory are to be sent or designate one or more additional persons or entities to which communications are to be sent.

32. Applicable Law. This Agreement shall be governed in all respects by the laws of the State of California.

33. Time is of the Essence. Time is of the essence of this Agreement and every term or performance hereunder.

34. Entire Agreement. This Agreement supersedes any prior understanding or written or oral agreements between the Parties hereto respecting the within subject matter and contains the entire understanding between the Parties with respect thereto.

35. 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 one and the same instrument.

36. Compliance With Law. Notwithstanding any provision of this Agreement, the Parties agree to comply with all federal, state and local laws and to act in good faith and reasonably in carrying out the terms of this Agreement.

37. Authorization. Each person executing this Agreement represents and warrants that he or she is authorized and has the legal capacity to execute and deliver this Agreement on behalf of the Party for which execution has been made.



# DEVELOPMENT AGREEMENT

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the  
\_\_\_\_ day of \_\_\_\_\_, 2012.

CITY OF PASADENA,  
A Municipal Corporation

\_\_\_\_\_  
William Bogaard  
Mayor of the City of  
Pasadena, California

ATTEST:

\_\_\_\_\_(SEAL)  
Mark Jomsky  
City Clerk

NORTON SIMON ART FOUNDATION,  
A California Nonprofit Public Benefit Corporation

By: \_\_\_\_\_  
Name: Walter W. Timoshuk  
Its: President

By: \_\_\_\_\_  
Name: Ronald H. Dykhuizen  
Its: Secretary

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

\_\_\_\_\_  
Michele Beal Bagneris  
City Attorney

\_\_\_\_\_  
Michael J. Beck  
City Manager

# DEVELOPMENT AGREEMENT

## EXHIBIT A

Norton Simon Art Foundation Property situated in the State of California, County of Los Angeles, City of Pasadena described as follows:

### PARCEL "A"

That portion of a tract of land marked "Mrs. Vawter" in Division "B" of the lands of the San Gabriel Orange Grove Association, in the City of Pasadena, in the County of Los Angeles, State of California, recorded in book 2, page 556 of Miscellaneous Records of said County, described as follows:

Beginning at the Northwest corner of Colorado Street and Vernon Avenue, as shown on a map of Master's Subdivision Recorded in book 10, page 73 of Miscellaneous Records; thence due North 587 feet to the Southeast corner of Lot 47 of said Master's Subdivision; thence West 500 feet; thence South 587 feet more or less to the North line of Colorado Street; thence East along said North line 500 feet to the point of beginning.

EXCEPTING therefrom that portion thereof described as follows:

Beginning at a point in the West line of Vernon Avenue, as shown on map of Master's Subdivision, recorded in book 10, page 73 of Miscellaneous Records, distant 380 feet Northerly from the North line of Colorado Street, as widened to 66 feet; thence West on a line parallel with Colorado Street 207 feet; thence South on a line parallel with Vernon Avenue 188 feet; thence East on a line parallel with Colorado Street 207 feet, to the West line of Vernon Avenue; thence North along said West line of Vernon Avenue to the point of beginning.

ALSO EXCEPTING therefrom that portion thereof described as follows:

Beginning at Northwest corner of Colorado Street 66 feet wide as it existed July 30, 1927 and said Vernon Avenue; thence West on Colorado Street 75 feet; thence North on a line parallel with Vernon Avenue 172 feet; thence East on a line parallel to Colorado Street 75 feet to the Westerly line of Vernon Avenue; thence South 172 feet to the point of beginning.

ALSO EXCEPTING that portion included within the following described lines;

Beginning at the intersection of the Southerly line of Master's Subdivision as per map recorded in book 10, page 73 of Miscellaneous Records, with a line parallel with and distant 500 feet Westerly, measured along said Southerly line of Master's Subdivision, from the Westerly line of Vernon Avenue as said Avenue is shown on said Map of Master's Subdivision, thence Easterly along said Southerly line of Master's Subdivision, 500 feet to the said Westerly line of Vernon Avenue; thence Southerly along said Westerly line of Vernon Avenue 41.20 feet; thence Westerly in a straight line which intersects said above described parallel line at a point distant 62.03 feet Southerly from the said Southerly line of Master's Subdivision, a distance of 460.02 feet to the beginning of a tangent curve, concave to the South and having a radius of 1341.33 feet; thence Westerly along said curve 40.05 feet, more or less, to the said above described parallel line; thence Northerly along said parallel line 62.68 feet, more or less, to the point of beginning.

ALSO EXCEPTING therefrom that portion thereof, included within the land described in Parcel 1 (49320-1) of the Deed of the State of California, recorded on April 6, 1972, as instrument No. 710 of Official Records of said County.

## DEVELOPMENT AGREEMENT

ALSO EXCEPTING therefrom that portion thereof lying Northerly of a line described as follows:

Beginning at a point in the West line of Vernon Avenue, as shown on Map of Master's Subdivision, recorded in book 10, page 73 of Miscellaneous Records, distance 422 feet Northerly from the North line of Colorado Street as widened to 66 feet; thence West on a line parallel with Colorado Street 250 feet; thence South on a line parallel with Vernon Avenue 51 feet; thence West on a line parallel with Colorado Street 250 feet to the West line of the above described parcel.

### PARCEL "B"

That portion of the tract of land marked "Mrs. Vawter 42.31 acres", in Division "B" of San Gabriel Orange Grove Association's land, in the City of Pasadena, as shown on map recorded in book 2, pages 556 et seq., of Miscellaneous Records, in the office of the County Recorder of said County, bounded by the following described lines:

Beginning at a point in the Westerly line of Vernon Avenue, 60 feet wide, as shown on map of Master's Subdivision, recorded in book 10, page 73 of said Miscellaneous Records, in the office of the County Recorder of said County, distant North 0° 09' 30" West thereon 180 feet from the Northerly line of Colorado Street, 98 feet wide, as established by condemnation in Case No. 235111 of the Los Angeles County Superior Court; thence along said Westerly line, North 0° 09' 30" West 188 feet; thence parallel with said Northerly line of Colorado Street, North 89° 59' 35" West 207 feet; thence parallel with said Westerly line, South 0° 09' East 188 feet; thence parallel with said Northerly line, South 89° 59' 35" East 207 feet to the point of beginning.

### PARCEL "C"

That portion of a tract of land marked "Mrs. Vawter" in Division "B" of the lands of the San Gabriel Orange Grove Association, in the City of Pasadena, as per map recorded in book 2, page 556 of Miscellaneous Records, in the office of the County Recorder of said County described as follows:

Beginning at the Northwest corner of Colorado Street (as widened to 66 feet) and Vernon Avenue; thence West on Colorado Street, 75 feet; thence North on the line parallel with Vernon Avenue, 172 feet; thence East on a line parallel to Colorado Street, 75 feet to the Westerly line of Vernon Avenue; thence South 172 feet to the point of beginning.

EXCEPTING therefrom the South 12 feet condemned by the City of Pasadena to widen Colorado Street, Case No. 235111, Superior Court.

