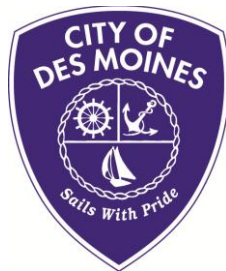


DRAFT 8: 5/17/12

ITEM NO. 6c Attach 3
Date of Meeting: June 5, 2012

**SECOND
DEVELOPMENT AGREEMENT
BY AND BETWEEN**

**THE CITY OF DES MOINES
and
THE PORT OF SEATTLE**



_____, 2012

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DRAFT

**SECOND DEVELOPMENT AGREEMENT BY AND BETWEEN
THE CITY OF DES MOINES
and
THE PORT OF SEATTLE**

THIS SECOND DEVELOPMENT AGREEMENT, hereinafter referred to as the “Agreement”, is entered into effective on the _____ day of _____, 2012 by and between the City of Des Moines, a Washington municipal corporation (hereinafter referred to as the “City”) and the Port of Seattle, a Washington municipal corporation (hereinafter referred to as the “Port”) in connection with the real property described herein (hereinafter referred to as the “Property”), and development of the Property by its assigns for the purposes and on the terms and conditions set forth herein.

RECITALS

A. The City, a non-charter code city organized pursuant to Chapter 35A.13 RCW of the laws of the State of Washington having authority to enact laws and enter into agreements to promote the health, safety, and welfare of its citizens, and thereby control the use and development of property within its jurisdiction.

B. The Port is a municipal corporation, with authority under the Revised Airports Act, Chapter 14.08 RCW; the Airport Zoning Act, Chapter 14.12 RCW, the State Environmental Policy Act (SEPA), Chapter 43.21C RCW; certain port district enabling statutes; and other state and local laws, to exercise discretionary land use jurisdiction over real property located within its boundaries.

C. The Port and City share the goals of creating an attractive and safe commercial development, an employment center that provides family wage jobs, a new source of direct and indirect long-term revenue for both the Port and the City, and increasing trade opportunities for the region.

D. The Port and the City executed the “First Development Agreement” concerning the Property in July 2005 under the authority of RCW 36.70B.170-.210, which is within the authority granted to municipal corporations under the Interlocal Cooperation Act, RCW Chapter 39.34, to enter into agreements for joint performance of actions within their separate powers.

E. The Port and City subsequently amended the First Development Agreement with a First Addendum in May 2008, and a Second Addendum modifying the First Addendum in November 2010 regarding compensation for dedicated and deeded rights of way and purchase of right of way frontage within and for the Des Moines Creek Business Park (DMCBP).

F. RCW 36.70B.170. et. seq., authorizes the City to enter into development agreements with owners, contract purchasers, and option holders of real property, to establish, among other things, the “development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.

G. RCW 36.70B.190 requires that any development agreement be recorded with the real property records of the county in which the property is located.

H. The City and the Port have agreed to enter into this Agreement to establish, among other things, the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the Property for the duration specified in the Agreement.

I. The proposed Project accomplishes the statutory intent of comprehensive, orderly, planned development within the City, providing public benefits to the citizens and residents of the City.

J. Pursuant to RCW 36.70B.200, a public hearing has been held before the City Council and the City Council has enacted Resolution _____ authorizing the City Manager to enter into this Agreement, and

K. The Port Commission voted on _____ to authorize the Port Chief Executive Officer to enter into this Agreement.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants of the parties contained herein, and pursuant to RCW 36.70B.170-200, the parties hereto agree as follows:

AGREEMENT

SECTION 1. DEFINED TERMS

Terms not otherwise defined herein have the meaning set forth in 36.70B.170 RCW, the provisions of which are incorporated herein by reference.

1.1 Agreement. The Second Development Agreement by and between the City of Des Moines and the Port of Seattle.

1.2 Conceptual Master Plan. *The Des Moines Creek Business Park Conceptual Master Plan* dated April 2006 prepared by CH2M Hill.

1.3 DMCBP. The Des Moines Creek Business Park, an approximately 89-acre property owned by the Port within the City, which can be generally described as the area bounded by South 216th Street to the south, the City municipal boundary to the north (roughly South 208th Street), 24th Avenue South to the east and the surplus SR 509 right-of-way to the west.

1.4 DMMC. The Des Moines Municipal Code.

1.5 Development Regulations. The controls, requirements, and limitations placed on development within the City adopted by the City, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, drainage requirements, transportation requirements, SEPA ordinances, and subdivision ordinances.

1.6 Environmental Documents. The background environmental studies identified in Sections 6.3 – 6.6 of this Agreement.

1.7 Master Plan. The generalized layout plans for development of the Property, including but not limited to environmental protections, transportation, surface water, general building location, associated parking facilities, loading facilities, square footage of buildings, utilities, and identification of lots and tracts.

1.8 Permitted Uses. The uses allowed on properties zoned Business Park (B-P) as established by DMMC 18.25.020.

1.9 The Port. The Port of Seattle and/or the developer(s) who have executed a ground lease with the Port for development within the DMCBP.

1.10 The Project. The phased build-out of the DMCBP consistent with the terms of this Agreement.

1.11 Transportation Gateway Project. The City's project to construct transportation improvements to the South 216th Street and 24th Avenue South rights-of-way to accommodate multiple modes of travel (pedestrians, bicycles, transit, automobiles, & freight) in support of the DMCBP as well as accommodating future growth as reflected in the City's Comprehensive Transportation Plan. The project limits for South 216th Street are between I-5 and 18th Avenue South and for 24th Avenue South are between South 208th Street and South 216th Street. The project has been split in to the following segments:

1.11.1 S. 216th St. - Segment 1A: This segment of the project includes the portion of South 216th Street from 29th Avenue South to 24th Avenue South.

1.11.2 S. 216th St. - Segment 1B: This segment of the project includes the portion of South 216th Street from 29th Avenue South to I-5. It is envisioned that Segment 1B of the project will be constructed concurrent with the State's SR 509 construction project.

1.11.3 S. 216th St. - Segment 2: This segment of the project includes the portion of South 216th Street from 24th Avenue South to 18th Avenue South including the 24th/216th intersection.

1.11.4 24th Avenue South Segment: The portion of 24th Avenue South from South 208th Street to South 216th Street.

SECTION 2. PURPOSE.

2.1 General. The parties agree that this Agreement is premised upon the DMCBP Master Plan for Area 1 (**Exhibit B**), which will be approved by the City concurrent with this Agreement and the DMCBP Short Plat (**Exhibit C**), which will be approved by the City concurrent with this Agreement and later recorded. This Agreement addresses the development standards and other provisions that apply to and govern and vest the development, use, and mitigation of the development of the Property for the duration specified herein. It will guide the phased development of the Project, including addressing the street and stormwater improvements related to build-out of the Project.

2.2 Assurances. The Port desires to obtain and the City makes the following assurances:

- The Property is appropriately zoned to serve the needs envisioned in the Master Plan.
- The requirements for improvements to public streets and related infrastructure under the jurisdiction of the City are specifically identified.
- The development standards, including any modifications and other provisions which apply to the development of the Property, are clearly specified.
- Required environmental mitigation is accurately identified.

- Upon receipt of its development and construction permits the Port may proceed with the development of the Project.
- The Development Regulations vested for the duration of the Project are clearly identified.

SECTION 3. PROPERTY DESCRIPTIONS

3.1 Property. The Property subject to this Agreement is commonly referred to as the DMCBP and is fully described in **Exhibit A** attached hereto and incorporated herein by this reference.

3.2 Zoning Designation. The zoning designation of the Property as Business Park (B-P) shall be unchanged for the duration of this Agreement.

SECTION 4. PARTIES

4.1 The City. The City of Des Moines, a municipality of the State of Washington, exercises governmental functions and powers pursuant to the laws of the State of Washington and the DMMC. The principal office of the City is located at 21630 11th Avenue South, Des Moines, Washington 98198.

4.2 The Port. The Port of Seattle, a municipal corporation, exercises governmental functions and powers pursuant to the laws of the State of Washington. The principal office of the Port is located at 2711 Alaskan Way, Seattle, Washington 98121.

SECTION 5. PROJECT

5.1 General. The DMCBP is envisioned as a thriving center for diverse light industrial and commercial activities.

5.2 Phases. It is anticipated that the Project will be developed in three phases that correspond to the three geographical areas identified in the Master Plan (**Exhibit B**) and generally described as follows:

5.2.1 Area 1 – Area 1 consists of Lots 1 – 3 and Tract Y of the DMCBP Short Plat. The Port plans to enter into a long-term lease agreement with Puget Sound Energy (PSE) covering this area. PSE intends to assign the lease to Benaroya Capital Co., LLC to construct a central operational facility to provide improved maintenance and emergency services to the Puget Sound Region and the greater Pacific Northwest.

5.2.2 Area 2 – Area 2 consists of Lots 4 – 5 of the DMCBP Short Plat. The Port anticipates this area will be developed with business park uses, including light industrial or commercial office uses. The Port expects to enter into a long-term lease agreement with a developer for this area.

5.2.3 Area 3 – Area 3 consists of Lots 6 – 9 of the DMCBP Short Plat. The Port anticipates this area will be developed with business park uses, including light industrial, commercial office, or retail uses. If this area is developed for retail uses, the Port anticipates the property will be purchased by the City or its assignee pursuant to Section 10 of this Agreement. Otherwise, the Port expects to enter into a long-term lease agreement with a developer for this area.

SECTION 6. BACKGROUND DOCUMENTATION AND PREVIOUS AGREEMENTS

6.1 General. The terms of this Agreement and the development envisioned for the DMCBP is influenced by a number of previously prepared documents. The documents identified in this Section evaluated numerous aspects of the Property and provide critical information utilized to formulate decisions associated with the development of the Property and the preparation of this Agreement.

6.2 DMCBP Conceptual Master Plan. *The Des Moines Creek Business Park Conceptual Master Plan* dated April 2006 prepared by CH2MHill. This report presented illustrative concepts for the development of the DMCBP given the site's physical features, the applicable development regulations, and market conditions. It was meant to be representative of the range of possible future buildout scenarios. This report was also utilized to complete the environmental review analysis required under the State Environmental Policy Act (SEPA).

6.3 DMCBP Draft EIS. *The Des Moines Creek Business Draft Environmental Impact Statement* dated November of 2006 prepared by Blumen Consulting Group Inc., A.C. Kindig and Co., Cedarock Consultants, and CH2MHill. The Draft Environmental Impact Statement (DEIS) analyzed and identified the probable significant environmental impacts that could occur as a result of development of the DMCBP. The DEIS also identified environmental mitigation measures which must be incorporated into the Project in order to reduce or prevent the identified environmental impacts. The DEIS was completed jointly by the City and the Port as SEPA Co-Lead Agencies.

6.4 DMCBP Final EIS. *The Des Moines Creek Business Final Environmental Impact Statement* (FEIS) dated March of 2007 prepared by Blumen Consulting Group Inc., A.C. Kindig and Co., Cedarock Consultants, and CH2MHill. The FEIS provided additional

information and responses based on comments received during the comment period for the DEIS. Together, the FEIS and DEIS comprise the environmental impact statement for the DMBCP project as required by SEPA.

6.5 Traffic Trip Thresholds Technical Memorandum. The *Des Moines Creek Business Park – Draft Project Element Traffic Trip Thresholds Technical Memorandum* dated February 20, 2007 prepared by CH2MHill. This technical memorandum describes the amount of traffic volume the DMBCP could generate in year 2008, 2015 and 2024 before triggering the project elements described in the Traffic Analysis Report of the DMBCP DEIS.

6.6 Wetland Re-Delineation Report. The *Wetland Delineation and Habitat Assessment – Des Moines Creek Business Park Puget Sound Energy Facilities* dated February 15, 2012 prepared by Soundview Consultants. The report re-delineated and assessed the wetlands and other potentially regulated aquatic features within Areas 1 and 2 of the Property. The Port acknowledges that an updated delineation report for the wetlands and other potentially regulated aquatic features will be completed as part of the development of Area 3.

SECTION 7. DEVELOPMENT REGULATIONS

7.1 General. The Port shall comply with all applicable Development Regulations, except as modified by this Agreement.

7.2 Parking. The City agrees to waive the requirement of DMMC 18.25.080(1) that any buildings containing three or more floors provide at least fifty percent (50%) of the required parking within the building or an adjacent multistory parking structure pursuant to DMMC 18.52.100. Further, the City agrees to waive the parking requirement established by DMMC 18.44.060(5)(c) that requires one (1) parking space for every 2,000 square feet of uncovered storage area for Area 1 pursuant to DMMC 18.44.040(1).

7.3 Recreation Requirements. The Port shall provide the recreational facilities described in this Section. In consideration for these facilities, the City pursuant to DMMC 18.52.100 waives the requirement of DMMC 18.25.060(1) that sites within the B-P zone submit a park study to evaluate the impact on the City's park system and identify the recreational needs of the employees and customers.

7.3.1 Joint Use Access Path. The Port will construct a 12-foot-wide joint use pedestrian and bike pathway located on the north and west side of the Internal Loop Road discussed in Section 11.1.2. The construction of the joint use access pathway will be completed in conjunction with the construction of each segment of the Internal Loop Road.

7.3.2 Des Moines Creek Trail Connection. The Port will construct a 12-foot-wide joint use pedestrian and bike pathway within a 24-foot-wide tract to provide a connection to the Des Moines Creek Trail in conjunction with the development of Area 3. The location of the tract will be south of the tract established for the detention facilities for Areas 1 and 2, as illustrated on the Master Plan and DMCBP Short Plat (**Exhibits B and C** respectfully). The tract will be established as part of the DMCBP Short Plat. This connection will provide access from the Joint Use Access Path via Barnes Creek Trail to the Des Moines Creek Trail which is part of the Lake to Sound Regional Trail System.

7.4 Landscaping Requirements. The City agrees to waive the requirement of DMMC 18.41.310(2) that sites within the DMCBP to provide a twenty (20) feet wide Type I landscaping strip including a five (5) foot tall earthen berm adjacent to 24th Avenue South and South 216th Street pursuant to DMMC 18.52.100. In lieu of the required landscaping, the Port agrees to install a ten (10) foot wide Type II landscaping strip as defined by DMMC 18.41.350 along 24th Avenue South and South 216th Street.

7.5 Design Standards. The City agrees that the Port-prepared DMCBP Design Guidelines are approved by this Agreement to guide the development of the Property and are attached hereto as **Exhibit D** and incorporated herein by this reference.

SECTION 8. MASTER PLAN

8.1 Approval. The City agrees that the Master Plan attached as **Exhibit B** and incorporated by this reference satisfies requirements of DMMC 18.25.030 for Area 1. The Port agrees that separate Master Plans for Areas 2 and 3 will be submitted to the City for review that will be processed in accordance with DMMC 18.25.030(5) and as an Amendment to this Agreement pursuant to Section 17.2.

8.2 Limitation. The Parties acknowledge that approval of the Master Plan by the City constitutes approval of the general layout of the Project and is subject to permitting conditions to be identified on individual permits. Master Plan approval does not constitute acceptance or approval of specific details of the Project. When the Port seeks permits to develop an individual area within the Property, the Port shall submit appropriate applications which include but are not limited to the applications identified in Section 14 and the supplemental traffic impact analysis as described in Section 9.3.

SECTION 9. STATE ENVIRONMENTAL POLICY ACT (“SEPA”)

9.1 Development Agreement. The City’s approval of a development agreement is a “project action” as defined by the State Environmental Policy Act (SEPA) and, as such, requires environmental review. The Parties agree that the SEPA review required for consideration and adoption of this Agreement has been fulfilled with the publication of the Environmental Documents.

9.2 SEPA Review. The Parties acknowledge that the Environmental Documents fully evaluated the environmental impacts from the development of the Project, except for the environmental impacts associated with the retail development as discussed in Section 10 of this Agreement. The City agrees that if additional SEPA analysis is needed to assess the environmental impacts associated with retail development within Area 3, the cost for such additional SEPA analysis will be paid for by the City or its assign.

9.3 Supplemental Traffic Impact Analysis. Several project and system improvements were identified within the Environmental Documents, and assumed to be constructed and in place at various points of the phased build-out of the Project. In order to mitigate the traffic impacts associated with the Project, trip thresholds were established that would trigger these various project and system improvements. The Port shall submit, for City review and approval, a supplemental traffic impact analysis with each phase of the Project to document that the proposed phase of the Project is consistent with the traffic analysis in the Environmental Documents. If the proposed phase of the development is not consistent with the traffic analysis in the Environmental Documents, mitigating measures shall be identified and constructed.

9.4 Other Mitigation Measures. As triggered during build-out of the Project, the Port agrees to implement the other environmental mitigation measures not related to traffic impacts established by the Environment Documents and provided in **Exhibit E**.

SECTION 10. RETAIL DEVELOPMENT

10.1 General. Following preparation of the Conceptual Master Plan and the Environmental Documents, the City requested that the Port include destination retail use on Area 3. The Port agreed in principle to allow the City to option Area 3 for retail use subject to certain conditions.

10.2 Purchase Option. If the City concludes that retail development is viable to the Port’s satisfaction by September 28, 2012, the Port and the City shall negotiate and execute an option agreement within three (3) months of such date that outlines the terms for a fixed-term, assignable option not exceeding two (2) years for the City (or its assign) to acquire Area 3 for

retail development. If the City declines to pursue an option, the Port shall then either develop Area 3 of the Project with other business park uses permitted by the DMMC.

SECTION 11. TRANSPORTATION INFRASTRUCTURE IMPROVEMENTS

11.1 Access and Internal Roadways. Roadways on the Property accessing South 216th Street and 24th Avenue South will be built to public street construction standards and located within separate tracts and right-of-way as described in this Section. These roadways will be designed to match the final grades provided in the Transportation Gateway Project. Accommodations for interim grade transitions should be included in the Port's civil plans to address construction timing issues. The individual roadways are further described below:

11.1.1 South 208th Street (Public). The Port shall construct the northern access roadway identified in the Environmental Documents generally within the boundaries of the vacated/surplused South 208th Street; provided that the roadway will be modified to be a dead end cul-de-sac and not connect to the Internal Loop Road discussed in Section 11.1.2. This road will be placed within a 60-foot-wide right-of-way, shall align with South 208th Street on the east side of 24th Avenue South, and shall be dedicated to the City as part of the DMCBP Short Plat. Prior to the construction of the road, the Port shall prepare civil engineering plans for review and approval by the City generally consistent with the cross-section provided in **Exhibit F**. The City will take over maintenance responsibility of this roadway when its construction is completed, and it is accepted in accordance with the provisions of the City's right-of-way permit. The threshold trigger for completion of South 208th Street shall be concurrent with the development of Area 1.

11.1.2 Internal Loop Road (Public): The Port shall construct the Internal Loop Road providing a connection from South 216th Street to 24th Avenue South as identified in the Environmental Documents; provided that the alignment of the roadway will be modified to connect to 24th Avenue South at the approximate location of the vacated/surplused South 212th Street.

The Internal Loop Road will be constructed in phases. The first phase will be constructed concurrent with the development of Area 1 and is identified as Phase 1 on **Exhibit G**. This first phase of the road will be placed within a 66-foot-wide (minimum) right-of-way and dedicated to the City as part of the DMCBP Short Plat. The City will take over maintenance responsibility of the first phase of this roadway when its construction is

completed, and it is accepted in accordance with the provisions of the City's right-of-way permit.

Construction of subsequent phases of the Internal Loop Road shall be concurrent with the development of Areas 2 and 3, respectively, unless supplemental traffic impact analysis determines that its complete construction is required. As part of the DMCBP Short Plat, these future road segments will be shown in a 66-foot-wide (minimum) tract. When the construction of that phase of the roadway is completed, the tract will be dedicated to the City as right-of-way.

Prior to the construction of each phase of the Internal Loop Road, the Port shall prepare civil engineering plans for review and approval by the City consistent with the cross-section provided in **Exhibit H**.

11.2 Frontage Improvements. In accordance with the Environmental Documents and the DMMC, the Port is responsible for providing frontage improvements along South 216th Street and 24th Avenue South consistent with the design of the Transportation Gateway Project when permits are issued for construction fronting on these streets. Consistent with DMMC 12.40.040(2) and in advance of permitted development, the Port agrees to make an in-lieu cash payment to the City to fulfill the requirement to physically construct the required frontage improvements. Such payment will reduce, cap and limit the Port's future costs. In addition, the payment will allow the City to secure committed state grant funds and improve its competitiveness for additional regional and federal funds. In accepting the in-lieu cash payment, the City agrees to take the lead on and be responsible for the construction of the frontage improvements adjacent to South 216th Street and 24th Avenue South. This in-lieu cash payment is based on the estimated cost of the frontage improvements pursuant to DMMC 12.40.040(2) and further described below:

11.2.1 South 216th Street. The Port is responsible for fifty percent (50%) of the cost of Segment 2 of the Gateway Road Project as a condition for the City's issuance of a building permit for Area 3. The Port agrees that the cost estimate for Segment 2, including engineering, administration, right-of way, and construction totals \$8,653,787. Therefore, the Port's in-lieu cash payment for this frontage totals \$4,326,894.

11.2.2 24th Avenue South. The Port agrees that it is responsible for fifty percent (50%) of the cost of the 24th Avenue Segment of the Transportation Gateway Project improvements as a condition for the City's issuance of a building permit for Areas 1 and 2. The cost estimate for this Segment, including engineering, administration, right-of-way, and construction

totals \$9,569,989. Therefore, the Port's in-lieu cash payment for this frontage totals \$4,784,995.

11.2.3 Advance Payment of In-Lieu Fees. The Parties acknowledge that as of the date of this Agreement, the Port is only prepared to begin the development of Area 1 and that any in-lieu cash payments made by the Port for Areas 2 and 3 are in advance of the typical payment trigger for development of Areas 2 and 3. The Parties further acknowledge that due to the magnitude and complexity of the Transportation Gateway Project, completing its construction in incremental stages would be significantly more costly than constructing it as one integrated project, given its off-set alignment, comprehensive storm drainage systems, traffic signal systems, and other utility improvements. Incremental construction would be most costly due to the fact that each individual stage of construction would have to account for interim roadway transitions, utility terminations, and other temporary systems, which would increase project costs by at least twenty percent (20%) and potentially as high as thirty percent (30%). Therefore, the Parties agree that in order to minimize the overall roadway improvement costs, the improvements are best completed at one time as part of an integrated project with advance payment of all in-lieu fees by the Port. The Port's agreement to such advance payment will help the City secure state and/or federal grants needed to complete the Transportation Gateway Project improvements, without which the Port's share of the costs for the roadway improvements would be significantly higher. To induce the Port's advance payment of all the in-lieu payments for the required Transportation Gateway Project frontage improvements, the Parties agree to the following payment amounts and schedule:

11.2.3.1 South 216th Street. The City has secured a Transportation Improvement Board (TIB) grant of \$4 million for the construction of Segment 2 of the Transportation Gateway Project. This grant requires the construction of this segment be underway in the first quarter of 2013. To facilitate the City's adherence to this schedule and to provide the necessary local match for the grant, the Port agrees to pay the City an advance in-lieu cash payment in the amount of \$2.5 million, on or before January 31, 2013 instead of the \$4,326,894 that would otherwise be due. In return, the City agrees that the requirement for the Port to provide frontage improvements along South 216th Street will be fully satisfied. The Port's payment of \$2.5 million,

together with the in-lieu cash payment described in Section 11.2.3.2, is the basis for the Transportation Impact Fee waiver described in Section 11.3.

11.2.3.2 24th Avenue South. The City is in the process of securing federal, state, and/or regional grants for the construction of this segment. To facilitate the City's timely construction of this segment and to provide local match for these grants, the Port agrees to pay an advance in-lieu cash payment to the City in the amount of \$3.5 million, on or before May 31, 2013 instead of the \$4,784,995 that would otherwise be due. In return, the City agrees that the requirement for the Port to provide frontage improvements along 24th Avenue South will be fully satisfied. The payment of \$3.5 million from the Port, together with the in-lieu cash payment described in Section 11.2.3.1, is the basis for the Transportation Impact Fee waiver described in Section 11.3.

11.2.3.3 20th Avenue South Traffic Signal. The Port acknowledges that the development of Area 1 will generate 364 PM peak hour trips. This is significant given the threshold trigger points identified in **Exhibit I**. Several project and system improvements are identified in the Environmental Documents when the total PM peak hour trips generated by the DMCBP are 390 or greater. The Parties acknowledge that one of these requirements is the installation of a traffic signal at the intersection of South 216th Street and 20th Avenue South, along with the associated roadway improvements at the intersection. This improvement is part of the Transportation Gateway Project, and therefore is included in the in-lieu cash payment for Segment 2 of South 216th Street. The Port agrees that while the development of Area 1 does not specifically trigger the requirement for this improvement at this time, its development does contribute to the overall and eventual need for the improvement, and that it would likely be triggered by the next phase of development on the Property whether in Area 2 or 3.

11.3 Transportation Impact Fees. In consideration for the Port providing in-lieu cash payments as discussed in Section 11.2, the Port shall not be required to pay Transportation Impact Fees (TIF) pursuant to RCW 82.02.060 for the duration of this Agreement; provided

however that this waiver does not relieve the Port of providing actual project and system improvements as described in Section 11.4.

11.4 Project and System Improvements. The Port shall construct the required Project and system improvements identified in the Environmental Documents, and any additional Project or system improvements that may be identified in supplemental traffic impact analysis submitted for each phase of the Project. A list of the Project and system improvements, along with their threshold trigger points, is provided in **Exhibit I**. This list is not all inclusive, as it only includes the Project and system improvements identified in the Environmental Documents submitted as of the date of this Agreement. The list does not include any additional Project or system improvements that may be identified in supplemental traffic impact analysis submitted for each phase of the Project.

The City will accept proportionate share contributions from the Port for the system improvement identified for South 216th Street – Segment 1A (between 29th Avenue South and 24th Avenue South (refer to **Exhibit I** – Project 5). When the threshold for the system improvement is triggered by a specific phase of the Project, that phase of the Project (and all subsequent phases of the Project) will make a proportionate share contribution towards this system improvement. The proportionate share contribution shall be calculated by taking the total PM peak hour trips generated by the specific phase of the Project at the intersection of Pacific Highway South and South 216th Street, dividing it by the total PM peak hour trips at the intersection, and multiplying the result by the cost estimate for the system improvement.

SECTION 12. DRAINAGE REQUIREMENTS AND INFRASTRUCTURE

12.1 General. The Port shall provide stormwater facilities to address surface water runoff created as the result of development of the Property. All stormwater facilities shall be located in separate public tracts. The stormwater facilities will be built by the Port, and, upon completion, deeded to the City as part of the DMCBP Short Plat for long-term ownership and maintenance.

12.2 Standard. The Port shall comply with the version of the *King County Surface Water Design Manual* (KCSWDM) in effect at the time that permits are submitted for the development of Area 3. Development within Areas 1 and 2 shall be vested to the regulations of the 2009 *King County Surface Water Design Manual* for the duration of this Agreement. It is anticipated that Low Impact Development drainage standards will be a KCSWDM requirement for any development within the City after January 1, 2016. Before January 1, 2016, it is preferred, but not required, that stormwater be handled using Low Impact Development approaches when economically and technically feasible. The City may impose additional water quality or flow control requirements if it is deemed through performance that the facilities are not sufficient in achieving the standards set forth in the KCSWDM.

12.3 Surface Water Management Fees. All surface water development fees and surface water service fees are applicable to the DMCBP in accordance with Chapter 11.12 of the DMMC.

12.4 Flow Control. The Port may utilize the King County Level 1 flow control criterion and the 1994 land use condition as the pre-developed for sizing flow control facilities that discharge directly to Des Moines Creek, a drainage tributary or to a City conveyance system as set forth in the KCSWDM for the sizing of stormwater detention facilities due to the implementation of the Des Moines Creek Basin project. However, areas that discharge directly or indirectly to a wetland shall meet the criterion set forth in the KCSWDM as amended by Chapter 11.28 DMMC – Supplemental Storm Water Standards.

12.5 Detention Tracts. Per Des Moines Municipal Code 17.36.100, all detention facilities are to be located within separate tracts that are deeded to the City, whereupon the City shall assume all maintenance and ownership responsibilities. A private access easement to the detention tracts shall also be provided to allow access to the facilities for water quality testing that may be required in order to meet any issued industrial NPDES permits. Prior to City acceptance of the detention facilities, the Port will provide the City with an operations and maintenance manual for the care of the facilities, including any special instructions for maintaining any protective netting or plantings that is required to satisfy FAA regulations.

12.6 Drainage Reports.

12.6.1 Areas 1 and 2. The City agrees that the Technical Information Report (drainage report) submitted for the detention facility located in Tract A of the DMCBP Short Plat has been designed to address the drainage associated with the development of Areas 1 and 2 of the Property; provided that the development occurs consistent with the assumptions established in **Section ??** of the _____ prepared by Barghausen Engineering dated _____.

12.6.2 Area 3. A Technical Information Report shall be prepared, for City Approval, to identify drainage facility requirements and demonstrate compliance with the KCSWDM or other approved standards as specified in Section 12.4 at the time the Design Review Application and/or Grading Permit is submitted for development of Area 3.

SECTION 13. ENVIRONMENTALLY CRITICAL AREAS

13.1 Wetlands. There are a number of wetlands that exist on or directly adjacent to the Property. The Environmental Documents envisioned filling all of the on-site wetlands in conjunction with the development of the Property.

13.2 Permits. The Port shall secure the required approvals from the Army Corps of Engineers and/or the Washington State Department Ecology as may be necessary for the fill of wetlands W, B11, 14 and 32 and any other regulated waters identified in the Environmental Documents. The City acknowledges that local permits are not required to fill these wetlands pursuant to Section V – Step 2(4) of the *First Development Agreement between the City of Des Moines and the Port of Seattle*.

13.3 Mitigation Site. The City agrees to issue all necessary easements, construction licenses, and consent to construct the required mitigation for impacts to the wetlands and ditches regulated by the Army Corps of Engineers within the area illustrated on **Exhibit J** and further described in **Exhibit K** within the boundaries of the Des Moines Creek Park.

13.4 Critical Aquifer Recharge Area. The Port shall submit, for City approval, a report prepared by a licensed professional engineer demonstrating that the Project complies with DMMC 18.86.240, Critical Aquifer Recharge Areas (CARA). The Parties agree that the CARA Report can be submitted at the time of submittal of the building permit application(s) for each Area.

13.5 Tracts. The Port agrees to place the wetlands and corresponding buffers, stream buffers, and ravine sidewalls and corresponding buffer into separate tract(s) as part of the DMCBP Short Plat.

SECTION 14. PERMITTING

14.1 General. The Port shall submit all permit applications required by the City for the development of Areas 1, 2 and 3 within the Project. The Port acknowledges that the City has attempted to identify the permits and applications required for the development of the Project and that subsequent review of proposed development for Areas 1, 2 and 3 may reveal additional issues that may require other permits or applications not discussed in this Section.

14.2 Design Review. The Port shall submit, for City approval, a Design Review application consistent with Chapter 18.58 DMMC – Design Review for development of each individual Area within the Property. The application materials required for Design Review are provided on Form DSW-01.

14.3 Clearing and Grading. The Port shall submit, for City approval, a Clearing and Grading Plan consistent with Chapter 14.24 DMMC for the development of each individual Area within the Property. The application materials required for Grading Permit are provided on page 4 of Form DSA-02. Clearing and grading for the Project shall be restricted to those areas identified on the clearing and grading plans approved by the City for each Area. No other clearing of any nature shall be allowed without prior written approval of the City.

14.4 Building Permits. The Port shall submit, for City approval, Building, Electrical, Plumbing, and Mechanical Permit Applications consistent with Title 14 DMMC – Building Code.

14.5 Right-of-Way Permits. The Port shall submit, for City review and approval, right-of-way permits for any work occurring within the City right-of-way. Since both South 208th Street and the Internal Loop Road identified in Section 11 will eventually be dedicated to the City, right-of-way permits will also be required for the construction of these roadways.

14.6 Permit Fees. The City agrees to vest the Port to the provision of Des Moines Executive Order 10-001 (**Exhibit L**) for the term of this Agreement. This Executive Order established a *City-Wide Development Incentive Program* for all commercial projects by reducing fees for design review, environmental review, subdivision, planned unit development, short subdivision and lot line adjustment, engineering plan review, building plan check and building permit, land clearing, grading or filling, mechanical, electrical and plumbing permit, and right of way permits by twenty percent (20%) for projects with over 50,000 square feet of gross floor area excluding parking areas.

SECTION 15. VESTED RIGHTS AND TERM

15.1 Duration and Termination. This Agreement shall remain in effect for a period of fifteen (15) years unless either (a) the Parties both agree to extend the Agreement for a period to be defined, (b) the Project is fully developed consistent with Master Plans approved by the City for Areas 1 – 3, or (c) the Agreement is sooner terminated by the Parties. Other than as may be prohibited by law, and specifically subject to the limitations of RCW 36.70B.180, the Parties may terminate this Agreement by providing ninety (90) days written notice pursuant to Section 17.1. Termination of this Agreement shall not result in termination of any other legally binding agreement or action based upon this Agreement unless such additional termination is required under the terms of such other agreement or action. Notice of termination shall be provided in accordance with Section 17.1.

15.2 Vesting of Development Regulations. The Port is assured that all Development Regulations that govern development of the Property that are in effect as of the date of the City's approval of this Agreement shall apply for a period of fifteen (15) years from the effective date

of this Agreement; provided, the Port shall be required to comply with the International Building Code, the City's Street Design and Construction Standards, and other regulatory codes adopted by the State of Washington and King County that preempt the City's authority in effect as of the date that the Port submits a particular development application to the City for review. If the Property has not reached full build-out within this 15-year period, the Parties agree that Development Regulations in effect at that time will control the further development of the Property. The Port may elect, at its discretion, to conform to new Development Regulations that the City may adopt from time to time. Notwithstanding the foregoing, the City reserves the authority to impose new or different regulations to the extent necessary or required to address a threat to public health or safety.

SECTION 16. CERTAINTY OF DEVELOPMENT AGREEMENT

16.1 Development Agreement Deemed Controlling. This Agreement, once recorded, and any terms, conditions, maps, notes, references, or regulations which are a part of the Agreement shall be considered enforceable. In the event of a specific conflict with any provisions of the DMMC, this Agreement shall take precedence. Unless otherwise provided by this Agreement, the City's ordinances, resolutions, rules and regulations, and official policies governing permitted land uses, density, design, improvement, and construction standards shall be those City ordinances, resolutions, rules and regulations, and official policies in force at the time of the execution of this Agreement.

16.2 Subsequent Actions. This Agreement shall not prevent the City, in subsequent actions applicable to the Property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the Property, nor shall this Agreement prevent the City from denying or conditionally approving any subsequent development project application on the basis of such new rules, regulations, and policies.

16.3 Changes in the Law. In the event that state or federal laws or regulations, enacted after this Agreement has been entered into, prevent or preclude compliance with one or more of the provisions of the Agreement, such provisions of the Agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations following modification procedures in Section 17 for an amendment or cancellation.

16.4 Emergency Situations. The City may suspend the issuance of building permits for the planned Project if it finds that continued construction would place surrounding residents or the immediate community in a condition dangerous to their health or safety.

SECTION 17. GENERAL PROVISIONS

17.1 Notices, Demands and Communications. Formal notices, demands and communications between the City and the Port shall be sufficient if given and shall not be deemed given unless dispatched by certified mail, postage prepaid, returned receipt requested, or delivered personally, to the principal offices of the City and the Port as follows:

City:

Tony Piasecki or successor
City Manager
City of Des Moines
21630 11th Avenue South
Des Moines, Washington 98198

Port:

Tay Yoshitani or successor
Chief Executive Officer
Port of Seattle
2711 Alaskan Way
Seattle, Washington 98121

17.2 Amendments. This Agreement may be amended or modified in accordance with RCW 36.70B.170-200, and other applicable laws, rules or regulations, and upon mutual consent of the Parties, such mutual consent of the Parties shall be evidenced by a written amendment signed by the Parties.

17.3 Other Government Approvals. Should the Port at any time require the approval of any governmental body or board, whether of local, regional, state or federal jurisdiction, the Port shall bear the sole cost and responsibility for obtaining needed approvals. The City, upon request by the Port, shall lend its full cooperation and affirmative support if it deems such would be in the interest of timely performance under this Agreement, and such cooperation and support would not compromise the responsibilities of the City, including its responsibilities to the Port as set forth in this Agreement. Nothing contained herein is designed to relieve the Port of the necessity of complying with the laws governing the permitting requirements, conditions, terms or restrictions.

17.4 Conflict of Interests. No member, official or employee of the City shall make any decision relating to the Agreement which affects his or her personal interests or the interests of any corporation, partnership or association in which he or she is directly or indirectly interested. The Port warrants that it has not paid or given, and shall not pay or give, any third person any money or other consideration for securing the City's approval of this Agreement.

17.5 Non-Liability of City, Officials, Employees, and Agents. No member, official, employee or agent of the City shall be personally liable to the Port, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Port or successor or on any obligation under the terms of this Agreement.

17.6 Enforced Delay. Performance by either party under this Agreement shall not be deemed to be in default where delays or defaults are due to war; insurrection; strikes, lock-outs; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; lack of transportation; governmental restrictions of priority; litigation (including suits filed by third parties concerning or arising out of this Agreement); unusually severe weather; inability to secure necessary labor, materials or tools; acts or failure to act of any public or governmental authority or entity (other than the acts or failure to act of the City which shall not excuse performance by the City), or any other causes (other than lack of funds of the Port) beyond the control or without the fault of the party claiming an extension of time to perform. An extension of time for any such cause shall be for a period of the enforced delay and shall commence to run from the commencement of the cause, if notice by the party claiming such extension is sent to the other party within fifteen (15) calendar days of the commencement of the cause. Times of performance under this Agreement may also be extended in writing by the City's City Manager or designee.

17.7 Title of Parts and Sections. Any titles of the parts, sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any part of its provisions.

17.8 Hold Harmless. The Port shall indemnify and hold harmless the City and their officers, agents and employees, or any of them from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by any reason of or arising out of the negligent act or omission of the Port, its officers, agents, employees, or any of them relating to or arising out of the performance of this Agreement. If a final judgment is rendered against the City, its officers, agents, employees and/or any of them, or jointly against the City and the Port and their respective officers, agents and employees, or any of them, the Port shall satisfy the same to the extent that such judgment was due to the Port's negligent acts or omissions.

17.9 Enforcement, Rights and Remedies Cumulative. This Agreement shall be enforceable by the City, applicant, or successor-in-interest notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the City which alters or amends the rules, regulations, or policies specified in this Agreement. Enforcement may be through any remedy or enforcement method or process, or combination thereof, allowed under law and/or equity. Except as otherwise stated in this Agreement, the rights and remedies of the Parties are cumulative, and the exercise or failure to exercise one or more of these rights or remedies by either party shall not preclude the exercise by it, at the same time or different times, of any right or remedy for the same default or any other default by the other party.

17.10 Applicable Law. This Agreement shall be interpreted under and pursuant to the laws of the State of Washington. Venue for any legal action brought hereunder shall be in the King County Superior Court.

17.11 Severability. If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

17.12 Legal Actions. In the event any legal action is commenced to interpret or to enforce the terms of this Agreement, or to collect damages as a result of any breach of the Agreement, the party prevailing in any such action shall be entitled to recover against the party not prevailing all reasonable attorneys' fees and costs incurred in the action.

17.13 Binding Upon Successors. This Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors in interest and assigns of each of the Parties. Any reference in this Agreement to a specifically named party shall be deemed to apply to any successor heir, administrator, executor or assign of such party who has acquired an interest in compliance with the terms of this Agreement, or under law.

17.14 Parties Not Co-ventures. Nothing in this Agreement is intended to or does establish the Parties as partners, co-venturers, or principal and agent with one another, nor employees and/or employers of each other.

17.15 Warranties. The City expresses no warranty or other representation to the Port or any other Party as to fitness or condition of the Property other than those expressed within this Agreement.

17.16 Reasonable Approvals. The approval of a party of any documentation or submissions herein called for shall not be unreasonably withheld unless the text clearly indicates a different standard. All such approvals shall be given or denied in a timely and expeditious fashion.

17.17 Recordation. Within ten (10) days after the effective date of this Agreement, or any modification or the cancellation thereof, the City Clerk shall have this Agreement, the modification or cancellation notice recorded with the County Auditor/Recorder of King County.

17.18 Execution of Other Documentation. The City and the Port agree to execute any further documentation that may be necessary to carry out the intent and obligations under this Agreement.

DRAFT 8: 5/17/12

17.19 Complete Understanding of the Parties. This Agreement is executed in two (2) duplicate originals, each of which is deemed to be an original. This Agreement consists of _____ pages and _____ attached Exhibits and constitutes the entire understanding and agreement of the Parties.

CITY OF DES MOINES

PORT OF SEATTLE

Anthony A. Piasecki
City Manager
By direction of the Des Moines City Council
in Open Public Meeting
on _____, 2012

Tay Yoshitani
Chief Executive Officer
By direction of the Port Commission
in Open Public Meeting
on _____, 2012

Dated: _____

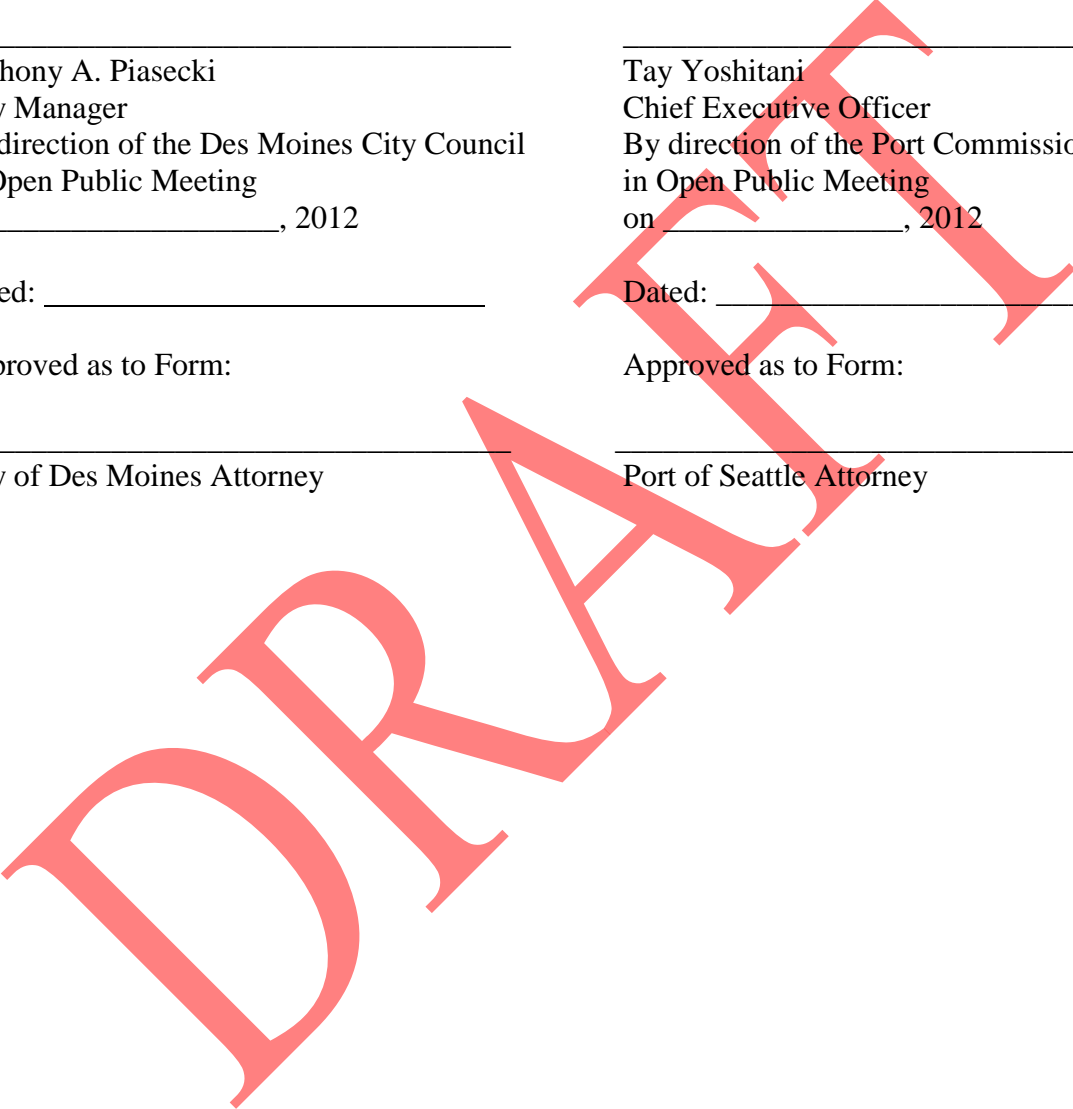
Dated: _____

Approved as to Form:

Approved as to Form:

City of Des Moines Attorney

Port of Seattle Attorney



DRAFT 8: 5/17/12

STATE OF WASHINGTON)
) ss
COUNTY OF _____)

On this _____ day of _____, 20__, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Anthony A. Piasecki to me known as the City Manager, for the City of Des Moines, the corporation who executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said City of Des Moines, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute said instrument on behalf of said municipal corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the date hereinabove set forth.

NAME

NOTARY PUBLIC in and for the State of
Washington, residing at _____
MY COMMISSION EXPIRES: _____

STATE OF WASHINGTON)
) ss
COUNTY OF _____)

On this _____ day of _____, 20__, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Tay Yoshitani to me known as the Chief Executive Officer, for the Port of Seattle, the corporation who executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said Port of Seattle, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute said instrument on behalf of said municipal corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the date hereinabove set forth.

NAME

NOTARY PUBLIC in and for the State of
Washington, residing at _____
MY COMMISSION EXPIRES: _____