

## **TOLLING AGREEMENT**

This Tolling Agreement (the "Agreement") is made and entered into as of this 9th day of September, 2013 (the "Agreement Date"), by and between Anna Maria Dettmer as Trustee of the AMD Family Trust ("Dettmer") and O'Brien Land Company, a California Limited Liability Company ("O'Brien") ("Dettmer" and "O'Brien" together "Dettmer/O'Brien," or "Applicants"), on the one hand, and the City of Lafayette, a municipal corporation ("City"), on the other hand. Dettmer/O'Brien and the City are individually referred to herein as a "Party" and collectively referred to herein as the "Parties".

**WHEREAS**, on March 21, 2011, Dettmer/O'Brien submitted an application to the City for the Terraces of Lafayette Apartment Project ("Project"), consisting of a proposed 315-unit multifamily, moderate-income development at the southwest corner of Pleasant Hill Road and Deer Hill Road.

**WHEREAS**, the Project applications include requests for a Land Use Permit (L03-11), Hillside Development Permit and Class I Ridgeline Exception (HDP06-11), Design Review (DR03-11), and Tree Permit (TP07-11) ("Applications").

**WHEREAS**, on September 12, 2011, the City entered into an agreement for professional services with The Planning Center/DCE to complete an Environmental Impact Report ("EIR") for the Project.

**WHEREAS**, on May 8, 2012, the Draft EIR was released for public review, and Dettmer/O'Brien as Applicants submitted comments on the DRAFT EIR, as did members of the public and other individuals and public agencies.

**WHEREAS**, on June 18, 2012 the Planning Commission held a public hearing to receive comments on the Draft EIR.

**WHEREAS**, the Final EIR, including Responses to Comments, was released on November 19, 2012.

**WHEREAS**, on January 7, 2013, and February 4, 2013, the Planning Commission held hearings concerning the certification of the Final EIR.

**WHEREAS**, Dettmer/O'Brien as Applicants submitted comments on the Final EIR, as did members of the public and other individuals and public agencies.

**WHEREAS**, on March 4, 2013, the Planning Commission adopted a resolution certifying the Final EIR (PC Resolution No. 2013-01).

**WHEREAS**, on March 18, 2013, the Applicants appealed the Planning Commission's decision certifying the Final EIR to the City Council.

**WHEREAS**, on April 29, 2013, June 24, 2013, and August 2, 2012, the City Council held public hearings on the Final EIR.

**WHEREAS**, on August 12, 2013, by City Council Resolution 2013-18, the City Council certified the Final EIR.

**WHEREAS**, the Final EIR makes findings to the effect that there are thirteen (13) significant and unavoidable impacts caused by the Project.

**WHEREAS**, prior to and at the August 12, 2013 hearing, Dettmer/O'Brien made claims challenging the City's certification of the Final EIR.

**WHEREAS**, by letter dated August 19, 2013, Dettmer/O'Brien through counsel proposed that the parties enter into a "tolling agreement," pursuant to which the claims and the defenses to claims arising from and/or related to the City's certification of the Terraces EIR would be "tolled", pending the outcome of the City's consideration of the Project and related applications on their merits.

**WHEREAS**, the Parties hereto believe that such tolling agreement would be in their joint best interests and may avoid a multiplicity of actions arising from and/or related to the Project and the City's various determinations made with respect thereto.

**WHEREAS**, in order, without litigation, to preserve any claims or potential claims by Dettmer/O'Brien against the City arising from the City's certification of the EIR and any defenses to such claims which the City may assert or potentially assert, without admissions of any kind or sort being attributed to them, the Parties desire to toll all applicable periods of limitations of any kind or sort for the period and on the terms set forth below.

**NOW, THEREFORE**, in consideration of the mutual promises of the Parties contained herein, the Parties hereby agree as follows:

1. The time period extending from the Agreement Date (as set forth in the first sentence of this Agreement), until the date this Agreement expires in accordance with its terms (the "Tolling Period"), shall not be counted in determining the time in which Dettmer/O'Brien, or their successors, shall be required by any applicable statutes of limitations to file any action against the City with respect to any claims or potential claims Dettmer/O'Brien, or their successors, may now have or in the future may have arising from or related in any way to the City's certification of the EIR, including, but not limited to, the findings made and conclusions adopted, the process involved, or any other matters of any kind or sort. Similarly, the Tolling Period shall be applicable to any and all defenses the City may now have or in the future may have arising from or related in any way to claims asserted by Dettmer/O'Brien. During the Tolling Period, all applicable statutes of limitations shall be tolled and suspended and shall not run against any of the Parties to this Agreement, or their successors.

2. The term "statutes of limitations" as used herein shall include, without limitation, all time-based defenses such as statutes of limitations, of repose, laches, estoppel, and/or any other legal or equitable requirement concerning the timely filing of actions, whether arising by statute, common law, contract, court order, or otherwise.

3. This Agreement shall remain in full force and effect until the earlier of February 12, 2014, or until thirty (30) days after any party hereto provides written notice of withdrawal from this Agreement.

4. This Agreement shall be construed in all respects as jointly drafted, and shall not be construed in any way against any other Party hereto on the grounds that the Party was the drafter of this Agreement.

5. Nothing in this Agreement shall constitute or be construed as an admission by any Party that any claim could properly be asserted against it by any other Party or that any such claim would have any basis in law or in fact. Except as expressly provided in this Agreement with respect to time-based defenses, this Agreement is not intended to and shall not have any effect upon any defense that any Party may assert to any claim brought by any other Party. Nothing in this Agreement shall be construed as an admission by any Party regarding whether or when any statutes of limitations, laches or other time-based defense has or has not begun to run on any claim or whether or not any claim is or is not already barred, impaired or limited by the passage of time.

6. This Agreement shall be governed in all respects by the internal laws of the State of California in effect at the time of its execution, without reference to California's conflict of law rules.

7. This Agreement may not be amended or modified, except if done in writing and executed by all of the Parties hereto.

8. Notice required or permitted under this Agreement shall be in writing and shall be deemed duly delivered upon personal delivery, or as of three (3) days after depositing in the United States mail, certified mail, return receipt requested, postage prepaid, or as of the first business day after depositing such notice with a nationally recognized overnight courier service, expenses prepaid, addressed as follows:

**For Dettmer/O'Brien:**

Allan C. Moore  
Gagen, McCoy, McMahon, Koss, Markowitz & Raines.  
279 Front Street  
P.O. Box 218  
Danville, CA 94596-0218

**For City:**

Malathy Subramanian  
Best Best & Krieger LLP  
2001 N. Main Street, Suite 390  
Walnut Creek, CA 94596

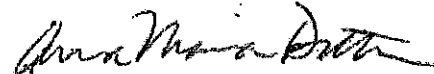
9. The Parties agree to execute and deliver such other and further documents and perform such other acts as shall be necessary to effectuate the purpose of this Agreement.

10. This Agreement may be executed in counterpart originals, each of which shall be deemed to be an original by all Parties signatory to the counterpart.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement effective as of the date first above written.

**DETTMER/O'BRIEN:**


**DETTMER**



Anna Maria Dettmer,  
Trustee of the AMD Family Trust, as amended  
and restated on September 23, 2005

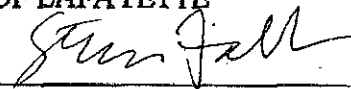
Date of Execution: September 10, 2013  
O'BRIEN LAND COMPANY, LLC,  
a California limited liability company

**O'BRIEN**

By:   
David Baker  
Vice President

Date of Execution: Sept. 10, 2013

**CITY OF LAFAYETTE: CITY OF LAFAYETTE**

By:   
Steve Falk  
City Manager

Date of Execution: SEPT 11, 2013