

## **RESOLUTION NO. 2011-053**

Adopted by the Sacramento City Council

February 1, 2011

### **APPROVING THE CONSENT TO ASSIGNMENT AND ASSUMPTION AGREEMENT FOR THE RAILYARDS DEVELOPMENT AGREEMENT AND THE FUNDING AGREEMENT AND APPROVING MEMORANDUM OF UNDERSTANDING REGARDING RAILYARDS PROJECT AGREEMENTS WITH IA SACRAMENTO HOLDINGS, L.L.C.**

#### **BACKGROUND**

- A. On December 11, 2007, the City of Sacramento ("City") approved a Development Agreement, with S. Thomas Enterprises of Sacramento, LLC ("Thomas"), the owner of the Railyards property, for the Sacramento Railyards Project. The Development Agreement (City Agreement No. 2008-0150) was approved in furtherance of the Railyards Specific Plan, which Specific Plan and related entitlements specifies the required public facility and infrastructure improvements necessary for implementation of the Specific Plan consistent with the Railyards Specific Plan Public Facilities Financing Plan.
- B. On December 11, 2007, the City adopted the Final Environmental Impact Report for the Railyards Specific Plan and the Mitigation Monitoring Program, which analyzed the impacts of the development of the Project, including the public facility and infrastructure improvements and affordable housing that would be funded by the actions contemplated by the City as set out in the Development Agreement.
- C. On May 13, 2008, the City approved the Funding Agreement (City Agreement No. 2008-0409), which had been prepared in accordance with the Business Terms set out in the Development Agreement. The Funding Agreement provides commitments for the City to build or assist in development of specified infrastructure and park projects in furtherance of the Railyards Specific Plan to assist the developer to implement the Sacramento Railyards Project, and to allocate Housing Trust Funds generated by Railyards developments for affordable housing projects to assist in meeting the developer's inclusionary housing obligations. Thereafter, the Funding Agreement was amended as of February 4, 2009 (City Agreement No. 2008-0409-1) to allow \$300,000 of the \$600,000 park fund commitment to be spent on design of the West Tunnel portion of the multi-use trail, connecting Old Sacramento the Central Shops area.
- D. Ownership of the Railyards property was transferred from Thomas to IA Sacramento Holdings, L.L.C. ("Inland Holdings") on October 22, 2010 through a foreclosure proceeding. Inland Holdings has represented that Thomas has released its interest in the Development Agreement and Funding Agreement as part of the foreclosure proceedings through its assignment of Railyards contracts as security for the deed of trust. Inland Holdings has requested that the City assign to it the Development

Agreement and Funding Agreement in consideration of its assumption of Thomas' obligations thereunder.

- E. IA Holdings has also requested that the City release it from any outstanding obligations of Thomas under the terms of the Memorandum of Understanding (MOU), with exception of the \$200,000 in CEQA litigation costs. The MOU summarizes all of the financial commitments of IA Holdings under each agreement, in the total amount of \$14 million.

**BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:**

- Section 1. The City Council finds that there have been no project changes or new information of substantial importance which would require reevaluation of the Environmental Impact Report for the Railyards Specific Plan for compliance with the California Environmental Quality Act to support the proposed actions.
- Section 2. The City Manager or his designee is authorized to execute the Consent to Assignment and Assumption of Railyards Development and Funding Agreements with IA Sacramento Holdings L.L.C. ("Inland Holdings"), which will allow for these two agreements to remain in effect and for Inland Holdings to assume the obligations thereunder, in the form attached as Exhibit A.
- Section 3. The City Manager or his designee is authorized to execute the Memorandum of Understanding Regarding Railyards Project Agreements with Inland Holdings, which will allow for release of IA Holdings from the outstanding obligations of Thomas except as set out in each agreement between the City and IA Holdings, in the form attached as Exhibit B.

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- Exhibit A – Consent to Assignment and Assumption of Railyards Development and Funding Agreements
- Exhibit B – Memorandum of Understanding Regarding Railyards Project Agreements

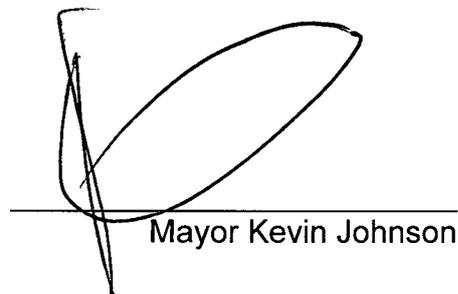
Adopted by the City of Sacramento City Council on February 1, 2011 by the following vote:

Ayes: Councilmembers Ashby, Cohn, D Fong, R Fong, McCarty, Pannell, Schenirer, Sheedy, and Mayor Johnson.

Noes: None.

Abstain: None.

Absent: None.



Mayor Kevin Johnson

Attest:

  
Shirley Concolino, City Clerk

**CONSENT TO ASSIGNMENT AND ASSUMPTION OF  
RAILYARDS DEVELOPMENT AND FUNDING AGREEMENTS**

THIS CONSENT TO ASSIGNMENT AND ASSUMPTION AGREEMENT (herein this "**Agreement**") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2011 ("**Execution Date**"), by and between **IA SACRAMENTO HOLDINGS, L.L.C.**, a Delaware limited liability company (hereinafter "**IA HOLDINGS**"), and the **CITY OF SACRAMENTO**, a municipal corporation (hereinafter "**CITY**"). IA HOLDINGS and CITY hereinafter may be referred to collectively as the "**Parties**" or in the singular as "**Party**," as the context requires.

**RECITALS**

A. IA HOLDINGS owns the approximate 240 acre parcel of land within downtown area of the City of Sacramento known as the Railyards (the "**Property**"), which is more particularly described in the Development Agreement. IA HOLDINGS obtained title to the Property on October 22, 2010 through a foreclosure proceeding (the "**Foreclosure**").

B. The prior owner of the Property, S. Thomas Enterprises of Sacramento, LLC ("**Thomas**"), and CITY entered into that certain Development Agreement for the Sacramento Railyards Project dated December 11, 2007, City Agreement No. 2008-0150, pursuant to Ordinance No. 2007-104 ( hereinafter the "**Development Agreement**"). Thomas obtained a vested right under the Development Agreement to develop the Property for the Project in accordance with the Development Plan, Phasing Plan and Project Entitlements (herein collectively referred to as "the **Project**"), subject to compliance with certain conditions and obligations set forth therein. In furtherance of the business terms set out in Exhibit P of the Development Agreement, CITY and Thomas thereafter entered into that certain Funding Agreement for the Sacramento Railyards Project dated May 13, 2008, City Agreement No. 2008-0409, which was amended under that First Amendment dated February 4, 2009, City Agreement No. 2008-0409-1 (collectively hereinafter the "**Funding Agreement**").

C. The rights of Thomas under the Development Agreement and the Funding Agreement were assigned to IA Sacramento Rail, L.L.C., as predecessor in interest of IA HOLDINGS under that certain Second Deed of Trust, Security Agreement and Fixture Filing ("**Deed of Trust**") dated August 29, 2008 and recorded against the Property on August 29, 2008, as additional security for repayment of loans under the Deed of Trust. The Deed of Trust was assigned to IA HOLDINGS prior to the Foreclosure, and IA HOLDINGS acquired all of the rights of Thomas under the Development Agreement and the Funding Agreement through the Foreclosure, subject to the approval of the City Council as more particularly set forth in the Development Agreement.

D. The assignment of the rights of Thomas under the Development Agreement, whether by the Deed of Trust or through the Foreclosure is subject to CITY's approval as more particularly set forth in the Development Agreement.

E. IA HOLDINGS and CITY desire and intend that the Development Agreement and Funding Agreement shall remain in full force and effect and shall confer the vested right to develop the Property to the current owner and, potentially, future owners of the Property as set forth in the Development Plan and Project Entitlements and receive the benefits under the Funding Agreement. IA HOLDINGS and City are willing to comply with the terms and conditions as set out in the Development Agreement and Funding Agreement.

F. IA HOLDINGS has agreed to remedy certain outstanding obligations of Thomas under the Development Agreement in order to obtain CITY's approval of this assignment regarding payment of CITY's legal costs in the amounts set forth herein, which legal costs were incurred in the joint defense of the CITY and the Redevelopment Agency of the City of Sacramento ("**Agency**") in regards to four lawsuits (the "**CEQA Lawsuits**") challenging CITY's approval of the Project Entitlements and the CITY and Agency's approval of the Railyards Redevelopment Plan and Agency's approval of the Railyards Owner Participation Agreements under the California Environmental Quality Act ("**CEQA**").

G. IA HOLDINGS and CITY acknowledge that due to changes in market conditions since the Project Entitlements were approved, it may be desirable to revise the Development Plan and Phasing Plan as defined in the Development Agreement, which may in turn require amendments to the Project Entitlements as well as an amendment to the Development Agreement and/or the Funding Agreement to address the respective rights and obligations of the Parties as a result of such revisions.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Incorporation by Reference.** The Development Agreement and Funding Agreement are hereby incorporated herein by this reference as if set forth in full. Except as specifically set forth herein, the terms and conditions of the Development Agreement and the Funding Agreement shall remain unchanged and be deemed to govern the respective rights and obligations of the Parties; and provided that the Recitals set forth in this Agreement are incorporated herein solely to provide background information and context for this Agreement and are not intended to modify the terms of the Development Agreement or the Funding Agreement. Unless otherwise expressly set forth in this Agreement, all capitalized terms used herein shall be deemed to have the meanings assigned to such terms in the Development Agreement and, if applicable, the Funding Agreement.

2. **Effective Date.** This Agreement shall be effective as between the Parties (the "**Effective Date**") as of October 22, 2010, the date when IA HOLDINGS acquired title to the Property pursuant to the Foreclosure.

3. Assignment and Assumption.

(a) As of the Effective Date, CITY hereby consents to and approves the assignment and transfer to IA HOLDINGS of the rights of LANDOWNER under the Development Agreement and the Funding Agreement as they relate to the Property, and IA HOLDINGS hereby accepts and assumes all of the duties and obligations of LANDOWNER under the Development Agreement and Funding Agreement; provided, however, that except as set forth herein IA HOLDINGS is not obligated to remedy any outstanding obligations of Thomas as LANDOWNER that arose prior to the Effective Date. IA HOLDINGS hereby agrees to observe and fully perform all of the duties and obligations of LANDOWNER that have arisen since the Effective Date under the Development Agreement and Funding Agreement or that may hereafter arise thereunder and to be subject to all of the terms and conditions thereof, with respect to ownership of the Property and development of infrastructure for the Project. CITY hereby agrees to observe and fully perform all of the duties and obligations of CITY under the Development Agreement and Funding Agreement for the benefit of IA HOLDINGS as LANDOWNER, as set forth in those Agreements and subject to all of the terms and conditions thereof.

(b) IA HOLDINGS has provided CITY with a fully executed copy of the Trustee's Deed Upon Sale that was executed, delivered and recorded pursuant to the Foreclosure. CITY's consent to and approval of the assignment of the Development Agreement and the Funding Agreement to IA HOLDINGS is provided pursuant to Section 8.1.3 of the Development Agreement.

(c) CITY acknowledges and agrees that, (i) as between CITY and IA HOLDINGS, IA HOLDINGS has not assumed any of the duties, liabilities or obligations of Thomas arising under or in connection with the Development Agreement prior to the Foreclosure Date, and (ii) except as set forth in Section 6 below, IA HOLDINGS is not hereby assuming any outstanding duties, liabilities or obligations of Thomas under the Development Agreement or Funding Agreement as of the Foreclosure Date. By assumption of the Development Agreement, CITY acknowledges and agrees that IA HOLDINGS shall not have any duties, liabilities or obligations to commence or complete any development of the Property for the Project, including any of the Backbone Infrastructure as described in the Development Agreement, by a date certain, unless such obligations are assumed by IA HOLDINGS under the terms of a separate agreement between the Parties.

(d) In connection with any Backbone Infrastructure project or other development project described in the Development Agreement that IA HOLDINGS may undertake or commence, the City shall promptly process its review and approval of all of the plans and specifications for such projects in accordance with the terms of the Development Agreement, the Project Entitlements and the applicable CITY ordinances, standards and procedures and applicable laws and regulations (collectively the "**City Requirements**"), to the extent not inconsistent with the rights granted to LANDOWNER under the Development Agreement. In accordance with the terms and obligations set out in the Development Agreement and the City Requirements, CITY shall not unreasonably withhold, condition or delay its approval of such projects. Furthermore, the City shall confirm, in writing, that, upon approval of any such plans and specifications, that such plans and specifications and the projects described

therein comply with the terms and provisions of the Development Agreement. Furthermore, upon the completion of a phase of infrastructure development of the Project that is sufficient to give access to and utilities for the lot or lots in such phase, the City shall promptly approve a Final Subdivision Map for such phase upon satisfaction of the conditions of the Tentative Map that are applicable to such phase and in accordance with the Development Agreement and the City Requirements.

4. **Further Obligations.** It is not the intent or purpose of this Agreement to address the rights and obligations of the Parties under any other agreements, irrespective of whether such agreements are referenced in the Development Agreement.

5. **Subsequent Purchasers.** CITY and IA HOLDINGS understand and agree that this Agreement is subject in particular to Section 2.7 of the Development Agreement, which reads as follows:

**“2.7 Assignment.**

2.7.1. **Right to Assign.** LANDOWNER shall have the right to freely sell, alienate, transfer, assign, lease, license and otherwise convey all or any portion of the Property and improvements thereon, and as part of a contemporaneous and related sale, assignment or transfer of its interests in the Property, or any portion thereof, without the consent of CITY; provided that no partial transfer shall be permitted to cause a violation of the Subdivision Map Act (Government Code Section 66410 et seq.). LANDOWNER shall notify CITY of any sale, transfer or assignment of all of LANDOWNER’s interests in all or any portion of the Property by providing written notice thereof to CITY in the manner provided in Section 9.2 not later than thirty (30) days before the effective date of such sale, transfer or assignment the assignment; provided, however, that LANDOWNER’s failure to provide such notice shall not invalidate such sale, transfer or assignment and provided further that any successor in interest in ownership of all or a portion of the Property shall not benefit from the Vested Rights conferred herein without entering into an Assignment and Assumption Agreement with CITY.

2.7.2. **Release of LANDOWNER.** Such purchaser, assignee or transferee shall execute and deliver to CITY an Assignment and Assumption Agreement whereby such purchaser, assignee or transferee assumes all obligations and other terms and conditions of this Agreement with respect to the Property or such portion thereof sold, assigned, or transferred. Upon such execution and delivery, CITY shall release LANDOWNER from all duties, liabilities and obligations under the Development Agreement with respect to the interest(s) sold, assigned or transferred only if LANDOWNER is not in default under this Agreement as of the effective date of the Agreement.

2.7.3 **Assignees.** The Assignee shall be obligated and bound by the terms and conditions of this Agreement if it executes the Assignment and Assumption Agreement, and shall be the beneficiary hereof and a party hereto, only with respect to the Property, or such portion thereof, sold, assigned, or transferred to Assignee by LANDOWNER. The Assignee shall observe and fully perform all of the duties and obligations of LANDOWNER under this Agreement, as such duties and obligations pertain to the

portion of the Property sold, assigned, or transferred. CITY shall release Assignee from all duties, liabilities and obligations under the Development Agreement of LANDOWNER with respect to the interest(s) that are not sold, assigned or transferred to Assignee. Any such assumption agreement shall be deemed to be to the satisfaction of the City Attorney if executed substantially in form of the Assignment and Assumption Agreement attached hereto as Exhibit K and incorporated herein by this reference, or such other form as shall be proposed by LANDOWNER and approved by the City Attorney prior to the effective date of the assignment.”

6. **CEQA Defense Costs.** IA HOLDINGS agrees to pay CITY’s (and Agency’s) outside legal counsel Stoel Rives for its work in defense of the CEQA Lawsuits for certain of their costs incurred prior to the Effective Date, which Thomas failed to pay, in the amount of One Hundred Fifty Five Thousand Six Hundred Eighty Two Dollars **(\$155,682)**. IA HOLDINGS shall make this payment within thirty (30) days from the Execution Date. CITY hereby accepts responsibility for collecting the amounts owed by the petitioners in the subject litigation to pay Stoel Rives additional outstanding costs in regards to the filing of the Motion to Tax Costs and any and all other amounts owed to Stoel Rives that were incurred prior to the Execution Date. IA HOLDINGS also agrees to pay CITY’s (and Agency’s) costs for Stoel Rives to participate in preparing the joint reply brief for the appellate court in an amount not to exceed Forty Four Thousand Three Hundred and Eighteen Dollars **(\$44,318)**. IA HOLDINGS shall pay the amounts billed by Stoel Rives for the appellate brief, subject to the foregoing monetary limitation, within thirty (30) days from the date of receipt of Stoel Rives’ invoices. IA HOLDINGS obligation to make the foregoing payments is conditioned on receipt of Stoel Rives invoices, which may be redacted to protect attorney client privileged matters, to verify that the costs are reasonable and the work billed was for the CEQA Lawsuits. In addition to the above-described payments to be made by IA HOLDINGS for CEQA Lawsuit costs already incurred, IA HOLDINGS shall be responsible for the CITY’s (and Agency’s under a joint defense) reasonable CEQA litigation costs incurred after the Execution Date in accordance with the litigation indemnity obligations as set out in the Development Agreement.

7. **Successors and Assigns.** All of the covenants, terms and conditions set forth in this Agreement shall be binding upon and shall inure to the benefit of the Parties and to their respective heirs, successors and assigns.

8. **No Existing Defaults.** CITY acknowledges and agrees that upon payment of the amounts to Stoel Rives described in Section 6 above in accordance with the terms of this Agreement, there are no remaining outstanding defaults of the prior LANDOWNER under the Development Agreement or the Funding Agreement as of the Execution Date.

9. **Representations; Entire Agreement.** Each of the Parties hereby affirms and acknowledges that neither Party has made any representations, commitments or promises to the other Party that are contrary to or different from the express terms and conditions of the Development Agreement and Funding Agreement, unless such terms and conditions have been set forth in writing and approved by the Parties and in the case of CITY such approval shall have occurred by an act of the City Council, to the extent such approval requires action by the City Council, prior to the execution of this Agreement. However, the Parties acknowledge that no representations, commitments or promises have been made with regard to changes to the

Development Plan which may require future amendments to the Project Entitlements. CITY represents and warrants to IA HOLDINGS that this Agreement has been submitted to and approved by the City Council.

10. **IA Holdings Agreements.** Notwithstanding anything herein to the contrary, nothing in this Agreement is intended, nor shall it be interpreted, to modify the terms and conditions or the respective rights and obligations of IA HOLDINGS and CITY as set out in any agreement between the Parties other than the Development Agreement and/or the Funding Agreement.

11. **Further Assurances.** The Parties agree to execute all such additional instruments and documents and to take all such additional actions, as may be reasonable and necessary to carry out the provisions of this Agreement.

12. **Notices.** All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the principal offices of the other Parties and to Lender, if applicable. Notice shall be effective on the date delivered in person, or the date when received if such notice was mailed to the address of the other Party(ies) as indicated below:

Notice to CITY:

City Manager  
City of Sacramento  
915 I Street, 5<sup>th</sup> Floor  
Sacramento, CA 95814  
Attention: John Dangberg  
Facsimile: (916) 808-5704  
Telephone: (916) 808-76186  
[jdangberg@cityofsacramento.org](mailto:jdangberg@cityofsacramento.org)

Notice to IA HOLDINGS:

c/o The Inland Real Estate Group  
2901 Butterfield Road  
Oak Brook, Illinois 60523  
Attention: Dean Stermer  
Facsimile: (630) 954-5655  
Telephone: (630) 586-6463  
[dean.stermer@inlandgroup.com](mailto:dean.stermer@inlandgroup.com)

With Copy to:

c/o The Inland Real Estate Group  
2901 Butterfield Road  
Oak Brook, Illinois 60523  
Attention: Michael Podboy  
Facsimile: (630) 954-5655  
Telephone: 630-218-8000  
[Podboy@inlandgroup.com](mailto:Podboy@inlandgroup.com)

c/o The Inland Real Estate Group  
2901 Butterfield Road  
Oak Brook, Illinois 60523  
Attention: Lori Foust  
Facsimile: (630) 954-5655  
Telephone: 630-218-8000  
[foust@inlandgroup.com](mailto:foust@inlandgroup.com)

c/o The Inland Real Estate Group  
2901 Butterfield Road  
Oak Brook, Illinois 60523  
Attention: Scott W. Wilton  
Facsimile: (630) 954-5655  
Telephone: 630-218-8000  
[swilton@inlandgroup.com](mailto:swilton@inlandgroup.com)

DLA Piper LLP (US)  
203 North LaSalle Street, Suite 1900  
Chicago, Illinois 60601  
Attention: James L. Beard  
Facsimile: (312) 630-7379  
Telephone: (312) 368-2169  
[james.beard@dlapiper.com](mailto:james.beard@dlapiper.com)

DLA Piper LLP (US)  
2000 University Avenue  
East Palo Alto, California 94303  
Attention: Angela L. Castro  
Facsimile: (650) 687-1110  
Telephone: (650) 833-2352  
[angela.castro@dlapiper.com](mailto:angela.castro@dlapiper.com)

Any Party may change the address to which notices are to be mailed by giving written notice of such changed address to each other Party(ies) in the manner provided herein.

13. **Governing Law.** The Agreement shall be governed by and construed in accordance with the laws of the State of California.

14. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original (including copies sent to a Party by facsimile transmission) as against the Party signing such counterpart, but which together shall constitute one and the same instrument.

[signature page follows]

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

**IA SACRAMENTO HOLDINGS, L.L.C.**

a Delaware limited liability company

By: IA Sacramento Development VP, L.L.C.,  
a Delaware limited liability company, its sole member

By: Inland American Real Estate Trust, Inc.,  
a Maryland corporation, its sole member

By: \_\_\_\_\_  
Scott W. Wilton, Secretary

**CITY OF SACRAMENTO**

A municipal corporation

By: \_\_\_\_\_  
John Dangberg  
Assistant City Manager

Approved as to Legal Form:

By: \_\_\_\_\_  
Senior Deputy City Attorney

Attest:

By: \_\_\_\_\_  
City Clerk

**MEMORANDUM OF UNDERSTANDING  
REGARDING RAILYARDS PROJECT AGREEMENTS**

This Memorandum of Understanding (the “**Memorandum**”) is made and entered into as of February \_\_, 2011 among IA Sacramento Holdings, L.L.C., a Delaware limited liability company (“**IA Holdings**”), and the City of Sacramento, a municipal corporation (the “**City**”). IA Holdings and City hereinafter may be referred to collectively as the “**Parties**” or in the singular as “**Party,**” as the context requires.

RECITALS

A. The City and S. Thomas Enterprises of Sacramento, LLC, a Delaware limited liability company (“**Prior Owner**”) entered into a Development Agreement dated January 10, 2008 (the “**Development Agreement**”) regarding development of parcels of land containing approximately 240 acres (the “**Property**”) located in the City and commonly referred to as the “**Railyards Project.**” In connection with the Railyards Project and the City’s Intermodal Project, the City (and in some cases the Redevelopment Agency of the City of Sacramento “**Agency**”) and Prior Owner entered in certain agreements, all of which are listed on **Exhibit A**, attached hereto and made a part hereof (collectively called the “**Thomas Agreements**”).

B. The City and Prior Owner entered into that Purchase and Sale Agreement and Joint Escrow Instructions dated December 13, 2006 (the “**City Purchase Agreement**”), which is included in the list of the Thomas Agreements. The City and Prior Owner have certain disagreements with respect to the amount to be paid by Prior Owner to the City with respect to the Purchase Price Differential (as defined in the City Purchase Agreement).

C. An affiliate of IA Holdings made two loans to the Prior Owner each of which were secured by, among other things, deeds of trust encumbering the Property. On October 22, 2010 (the “**Foreclosure Date**”), IA Sacramento Development L.L.C. acquired title to the Property from Prior Owner pursuant to a foreclosure of one of such deeds of trust, and the name of IA Sacramento Development L.L.C. was subsequently changed to IA Sacramento Holdings L.L.C.

D. IA Holdings has not assumed, and therefore is not responsible for, any of the duties, liabilities or obligations of the Prior Owner to the City or the Agency under or in connection with the Property or the Railyards Project which arose prior to the Foreclosure Date, including, without limitation, any duties, liabilities or obligations arising under the Thomas Agreements, including the City Purchase Agreement. However, IA Holdings nonetheless must comply with those terms of each of the Thomas Agreements which are expressly assumed by IA Holdings.

E. As contemplated in the Thomas Agreements, prior to the Foreclosure Date, the City and Prior Owner commenced the process of developing certain of the Backbone Infrastructure (as defined in the Development Agreement) for the Railyards Project, as generally described below (collectively, the “**Pending Infrastructure Projects**”):

- (a) The construction of the 5<sup>th</sup> Street Bridge and Roadway between H Street North to the future Stevens Street (the "**5<sup>th</sup> Street Extension Project**") by the Prior Owner, which is being funded by a \$17,000,000 grant to the City by the State Department of Housing and Community Development ("**HCD**") under Proposition 1C (the "**TOD Grant**"). The construction of the bridge portion of the 5<sup>th</sup> Street Extension Project commenced prior to the Foreclosure Date and is currently continuing towards completion. City assigned the TOD Grant to Prior Owner and IA Holdings and City are currently in discussions with respect to the possible assignment of the TOD Grant to IA Holdings; and
- (b) The construction of the 6<sup>th</sup> Street Roadway from H Street North to future Railyards Boulevard (the "**6<sup>th</sup> Street Roadway Project**") by the City. The construction of the two bridges needed for the 6<sup>th</sup> Street Roadway Project is near completion. The construction of the street extension is to be funded, in part, by a \$7,865,000 grant (the "**CTC Grant**") from the California Transportation Commission. The construction of the street extension portion to complete the 6<sup>th</sup> Street Roadway Project has not yet commenced, but it is anticipated that such construction will commence in late 2011. IA Holdings and City have entered into that certain agreement dated December 31, 2010 for IA Holdings to provide the grant match funds to allow the City to undertake construction of this improvement (the "**6<sup>th</sup> Street Roadway Project Escrow Agreement**"); and
- (c) The construction of portions of the extension of 5<sup>th</sup> Street North from Stevens Street to the future Railyard Boulevard (the "**Infill 5<sup>th</sup> Street Extension Project**") by IA Holdings to be funded by a \$30,000,000 Infill Infrastructure Grant (the "**II Grant**") from HCD under Proposition 1C. Prior Owner was awarded such II Grant and IA Holdings is currently working with HCD to have such II Grant transferred to IA Holdings.

F. In addition to the Pending Infrastructure Projects described in Recital E above, the City is proceeding to undertake relocation of the Union Pacific Railroad Company ("**UPRR**") mainline tracks pursuant to that certain Construction Operation and Maintenance Agreement dated November 23, 2009 (the "**COMA**"), which was entered into after the execution of that certain Track Relocation and Financing Agreement, dated December 13, 2006 (the "**TRFA**"), by and between the City and Prior Owner. Prior Owner and UPRR entered into that certain Track Relocation Agreement - Sacramento Yard and Depot, dated July 13, 2006, with the National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act (49 USC 24104 et. seq) known as "**AMTRAK**," Capital Corridor Joint Powers Authority, a joint powers authority organized under California law and the State of California known as "**CCJPA**," and the Department of Parks and Recreation known as "**CSRM**" (the "**TRA**"). Under the COMA, the City assumed certain of the Prior Owner's obligations under the TRA, as more particularly set forth in the COMA. The City has completed the environmental review process and the design plans, and is in the process of soliciting bids for undertaking the relocation and reconstruction of the existing UPRR railroad improvements to be located on Parcel B and other necessary crossings, infrastructure, platforms and other improvements, all as more particularly described in the COMA (referred to herein as the "**Track Relocation Project**").

G. Since the Foreclosure Date, IA Holdings, the City and the Agency have engaged in negotiations regarding the certain issues relating to assignment of certain of the Thomas Agreements, or creation of new agreements to address the same subject matters, and the 6<sup>th</sup> Street Roadway Project Escrow Agreement (collectively the “**IA Holdings Agreements**”) and desire to enter into this Memorandum to memorialize certain understandings and agreements of the City and IA Holdings with respect thereto.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt, adequacy and sufficiency of which is hereby acknowledged, the City and IA Holdings agree as follows:

1. **Parcel B and the City Purchase Agreement.** The City acknowledges and agrees that IA Holdings is not a party to the City Purchase Agreement, and IA Holdings has not assumed any of the duties, liabilities or obligations of the Prior Owner under the City Purchase Agreement. IA Holdings and the City have entered into a purchase and sale agreement (the “**Parcel B PSA**”) pursuant to which, among other things, IA Holdings shall (a) convey Parcel B and the Sliver Parcel (as defined in the Parcel B PSA) to the City, and (b) pay to the City the sum of \$3,235,000.00, in each case pursuant to, and subject to the terms and conditions of, the Parcel B PSA.

2. **6th Street Roadway Project.**

(a) The terms and conditions of the CTC Grant require the City to provide matching funds equal to the amount of the CTC Grant. IA Holdings has agreed to provide such matching funds and in connection therewith the City, IA Holdings and Chicago Title Insurance Company (“**Escrowee**”) entered into that certain 6<sup>th</sup> Street Roadway Escrow Agreement (“**6<sup>th</sup> Street Escrow Agreement**”) dated December 31, 2010 and IA Holdings deposited the sum of \$7,865,000 with Escrowee.

(b) Agency has acknowledged under the Consent to Assignment of Railyards Owner Participation Agreements with IA Holdings executed concurrently with this Memorandum that the 6th Street Roadway Project constitutes a “Qualified Infrastructure and Building Rehabilitation” as contemplated in that certain Initial Phase Infrastructure Owner Participation Agreement dated May 13, 2008 (the “**Initial OPA**”) between Prior Owner and the Agency and that any amount paid or incurred by IA Holdings in connection with the 6th Street Roadway Project shall be reimbursed by the Agency, with interest thereon, as set forth in the Initial OPA.

3. **Track Relocation Project.** The City has been allocated grants by state and federal agencies and Amtrak in the total amount of \$62,550,000.00 for the Track Relocation Project construction and the City has allocated \$4,000,000 in local funds, which in the total amount of \$66,550,000.00 equals the estimated construction costs plus an 8.2% contingency and the costs for construction management services. The City acknowledges that IA Holdings is not a party to, and has not assumed, any of the duties, liabilities or obligations of the Prior Owner under the TRFA or the TRA. Nevertheless, although it is not a party to the TRFA or the TRA, IA Holdings acknowledges that the completion of the Track Relocation Project is necessary to preserve the value of the foreclosed-on Property. Accordingly, IA Holdings has agreed to

contribute the sum of \$1,700,000.00 to pay the costs associated with the Track Relocation Project construction which are for the benefit of the Railyards Project and, in connection therewith, IA Holdings and the City entered into that certain Track Relocation Project Escrow Agreement (the "**Track Relocation Project Escrow Agreement**") with Escrowee pursuant to which IA Holdings shall deposit with the Escrowee \$1,700,000.00 to pay for certain costs associated with the Track Relocation Project construction, as more particularly provided in the Track Relocation Project Escrow Agreement. Except as set forth in the Track Relocation Project Escrow Agreement, City confirms, acknowledges and agrees that IA Holdings shall have no further additional duty, liability or obligation to make any payments, assume any duties, liabilities or obligations or otherwise take any further action with respect to the Track Relocation Project.

4. **Fifth Street Extension Project.** IA Holdings has not assumed the TOD Grant. Under the TOD Grant, construction of the housing component required thereunder must be commenced in 2013. Given the current status of the Railyards Project, it is highly unlikely that such timing obligation will be satisfied. IA Holdings hereby agrees to reasonably cooperate with City and HCD in an effort to address and resolve the foregoing timing issue.

5. **Development, Funding and Owner Participation Agreements.**

(a) Concurrently with the execution of this Memorandum, City and IA Holdings intend to enter into the Consent to Assignment and Assumption of Railyards Development and Funding Agreements (the "**Consent Agreement**") and the Agency and IA Holdings intend to enter into the Assignment and Assumption of Railyards Owner Participation Agreements and the Initial Phase Regulatory Agreement.

(b) City acknowledges and agrees that, except as set forth in Paragraph 5(c) below, and notwithstanding anything to the contrary set forth in the Development Agreement, IA Holdings has not assumed any of the duties, liabilities or obligations of the Prior Owner arising under or in connection with the Development Agreement prior to the Foreclosure Date. By assumption of the Development Agreement, City acknowledges and agrees that IA Holdings shall not have any duties, liabilities or obligations to commence or complete any development of the Railyards Project, including any of the Backbone Infrastructure described in the Development Agreement pursuant to the terms thereof.

(c) IA Holdings agrees that, promptly after the execution of the Consent Agreement, pursuant to an instrument in form and substance reasonably acceptable to IA Holdings, IA Holdings shall pay the invoices for outstanding legal fees for the Railyards Project CEQA litigation as set out in the Consent Agreement.

(d) After (i) the execution of the Consent Agreement and (ii) payment of the outstanding legal fees for the Railyards Project CEQA litigation, City shall execute and deliver to IA Holdings an estoppel certificate in the form provided for under Section 8.5 of the Development Agreement.

6. **Track 150.** The City is in the process of planning and developing the Richards Blvd/I-5 Access Improvement Project (the "**I-5/Richards Project**") as described in the Funding Agreement which involves, among other things, the southerly extension of Bercut Drive and Jibboom Street to Railyards Boulevard. The design and construction of the I-5/Richards Project is funded in part with a \$8.9 million North CBD Access grant which is administered by the State Department of Transportation ("**Caltrans**"), and \$1.7 million in local Measure A matching funds (in combination the "**I-5/Richards Grant**"). Track 150, which provides rail access to a portion of the Railyards Project known as the Central Shops, intersects the Railyards Boulevard connection between Bercut Drive and Jibboom Street (the "**Railyards Intersection**"). UPRR has advised that the relocation of Track 150 cannot occur until the Track Relocation Project construction is completed. As a result thereof, the City has advised IA Holdings that the construction of the Railyards Intersection cannot be added to the scope of the I-5/Richards Project due to certain timing constraints and the proposed commencement date for construction of the I-5/Richards Project. IA Holdings and CSRM believe that there may be an alternative option for removal of portions of Track 150 which now interfere with the Railyards Intersection construction. The City agrees to work together in good faith with IA Holdings and CSRM in a commercially reasonable manner to develop a plan for the relocation of Track 150; provided, however, that the City shall have no obligation to fund relocation of Track 150. Following completion of the relocation of Track 150 so that it no longer impedes construction of Railyards Intersection, the City shall be responsible for the inclusion of the Railyards Intersection as part of the I-5/Richards Project only if: (i) adding this component to the scope of work is approved by Caltrans, (ii) adding the cost of the Railyards Intersection to the I-5/Richards Project will not exceed the amount of the I-5/Richards Grant funds, and (iii) the work can be undertaken without causing any delays to the construction schedule which would expose the City to payment of contractor delay damages or require the City to pay additional costs which would exceed the amount of the I-5/Richards Grant funds.

7. **Prior Owner Liabilities.**

(a) IA Holdings has not, and does not intend to, assume any of the duties, liabilities or obligations of the Prior Owner in connection with the Railyards Project arising under or in connection with the Thomas Agreements (collectively, the "**Prior Owner Liabilities**"), except as, and to the extent, specifically set forth in each IA Holdings Agreement.

(b) The City hereby fully, forever, irrevocably and unconditionally waives and releases IA Holdings and its predecessors, successors and assigns, parents, subsidiaries and affiliates, agents, counsel, trustees, servicers, beneficiaries, and the officers, directors, shareholders, partners, employees, attorneys and agents of each of the foregoing (collectively, the "**Released Parties**"), from any and all claims, counterclaims, suits, accounts, losses, demands, damages, debts, liabilities, actions, causes of action, costs and expenses (including, but not limited to, reasonable attorneys' fees and costs) of any kind and nature whatsoever (collectively "**Claims**"), whether known or unknown, anticipated or unanticipated, and howsoever arising or accruing, relating to, or arising under or in connection with the Prior Owner Liabilities, except as and to the extent set forth specifically in each IA Holdings Agreement (collectively, the "**Released Claims**").

City hereby acknowledges that it has been informed by counsel of, and is familiar with, the provisions of California Civil Code Section 1542, which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

City \_\_\_\_\_

The City hereby expressly waives and relinquishes all rights and benefits it has or may have thereunder, as well as under any other statutes or common law principles of similar effect, with respect to the Released Claims released under this Paragraph 7. The City hereby acknowledges that it may later discover facts in addition to or different from the facts it now believes to be true and that it may later discover Claims it does not now suspect, and that the City intends for such release to operate as a final and irrevocable release of all of the Released Claims above described, and accordingly agrees that such release may not be terminated or rescinded because of any later discovery by the City of different or additional facts or any unknown or unsuspected past Claims.

8. **IA Holdings Agreements.** Except as and to the extent specifically set forth in this Memorandum, this Memorandum shall not be interpreted to modify the terms and conditions of any other agreement between the Parties.

9. **Attorneys' Fees.** In the event of any litigation regarding the rights and obligations under this Memorandum, the prevailing party shall be entitled to reasonable attorneys' fees and court costs. Each party shall bear its own attorneys' fees in connection with the preparation of this Memorandum and the consummation of the transactions contemplated hereunder.

10. **Time.** Time is of the essence of every provision herein contained. When the last day for the performance of any act permitted or required hereunder falls on any day which is not a business day in the City of Sacramento, California, such act may be performed on the next business day in said city. When an act must be performed or a notice given by the end of a specified day, such act must be performed or such notice given by 5:00 p.m. in the City of Sacramento, California.

11. **Applicable Law.** This Memorandum shall be governed by the laws of the State of California.

12. **No Oral Modification or Waiver.** This Memorandum may not be changed or amended orally, but only by an agreement in writing. No waiver shall be effective hereunder unless given in writing, and waiver shall not be inferred from any conduct of either party.

13. **Counterparts; Electronic Copy.** This Memorandum may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Memorandum is legally effective, valid, and enforceable despite the fact that it or signatures on it may be in electronic form or that it may have been created, transmitted, stored, or otherwise handled or formed, in whole or in part, by electronic means.

14. **Captions.** The captions of this Memorandum are for convenience and reference only and in no way define, describe, extend or limit the scope, meaning or intent of this Memorandum.

15. **Severability.** The invalidation or unenforceability in any particular circumstance of any of the provisions of this Memorandum shall in no way affect any of the other provisions hereof which shall remain in full force and effect.

16. **No Joint Venture.** This Memorandum shall not be construed as in any way establishing a partnership, joint venture, express or implied agency, or employer-employee relationship between City and IA Holdings.

17. **No Third Party Beneficiaries.** This Memorandum is for the sole benefit of the parties hereto, their respective successors and permitted assigns, and no other person or entity shall be entitled to rely upon or receive any benefit from this Agreement or any term hereof.

[signature page follows]

IN WITNESS WHEREOF, IA Holdings, the City, and the Agency executed this Memorandum of Understanding as of the date first above written.

IA Holdings:

City:

**IA Sacramento Holdings, L.L.C.**, a Delaware limited liability company

**City of Sacramento**, a municipal corporation

By: IA Sacramento Development VP, L.L.C., a Delaware limited liability company, its sole member

By: \_\_\_\_\_  
John Dangberg  
Assistant City Manager

By: Inland American Real Estate Trust, Inc., a Maryland corporation, its sole member

Attest:

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

By: \_\_\_\_\_  
City Clerk

Approved as to Legal Form:

By: \_\_\_\_\_  
Senior Deputy City Attorney

## **Exhibit A**

### **List of Thomas Agreements**

1. Track Relocation and Finance Agreement (City Agreement No. 2006-1406)
2. Purchase and Sale Agreement (City Agreement No. 2006-1405)
3. Parcel B Possession and Use Agreement (City Agreement No. 2009-0712)
4. Sliver Addition Possession and Use Agreement (City Agreement No. 2009-1036)
5. Development Agreement (City Agreement No. 2008-0150)
6. Funding Agreement and First Amendment (City Agreement No. 2008-0409 and 0409-1)
7. Master Owner Participation Agreement (Agency)
8. Initial Phase OPA and Regulatory Agreement (Agency)
9. 5<sup>th</sup> and 6<sup>th</sup> Streets Assignment and Assumption Agreement (TOD Grant) (City Agreement No. 2009-0905)
10. TOD Disbursement Agreement (City Agreement No. 2009-0904)
11. Private Utilities Services Agreement (City Agreement No. 2009-1053)
12. Parking and Operations Management Agreement (City Agreement No. 2007-0657)
13. MOU Regarding Remediation and Redevelopment (City Agreement No. 2008-0131)
14. Railyards Title Settlement and Exchange Agreement (City Agreement No. 2009-0792); unsigned by Thomas.