

INDEMNIFICATION AGREEMENT

THIS AGREEMENT is entered into this 28th day of February, 2017, by and between the COUNTY OF FRESNO, a political subdivision of the State of California, (hereinafter "COUNTY") and RE Tranquillity, LLC, (hereinafter "APPLICANT") a California limited liability company.

## WITNESSETH:

WHEREAS, APPLICANT has applied to COUNTY for one or more land use approvals; and

WHEREAS, litigation challenging the granting or issuance of land use approvals by governmental bodies is proliferating, and such litigation exposes COUNTY to potential liability for damages, costs, and attorney's fees; and

WHEREAS, in such litigation, the person or entity receiving land use approvals is designated as a real party in interest and is the party that primarily and directly benefits from the granting or issuance of the land use approvals; and

WHEREAS, the Board of Supervisors is an objective decision-making body and, therefore, has no special interest in the approval or denial of land use applications, or the outcome of litigation arising from such grant or denial, except as to those which promote important public policy; and

WHEREAS, COUNTY could incur great expense in the active defense of such litigation and, if unsuccessful, may also be required to pay the prevailing party's attorney's fees and costs; and

WHEREAS, fairness and sound fiscal policy require that the person or entity receiving the benefits of a land use approval should also bear the burden of the liability for potential injuries and the expense of such litigation; and

WHEREAS, APPLICANT and COUNTY mutually desire to enter into this Indemnification Agreement, by which APPLICANT shall indemnify, (at COUNTY's request) defend, save and hold COUNTY harmless, in order that COUNTY shall bear no fiscal or

1 financial burden whatsoever resulting from any litigation challenging the COUNTY's grant or  
2 issuance of land use approvals to APPLICANT.

3 1. DEFINITIONS.

4 a. "APPLICANT" means the person or entity to whom the land use approval  
5 will be granted or issued, and his, her, or its heirs, assigns or successors in interest;

6 b. "Land Use Approval" shall include any benefit arising from any of the  
7 following: the certification of an Environmental Impact Report ("EIR"), the grant of an  
8 amendment to the general plan or a rezoning; the issuance of a variance, conditional use permit,  
9 Director's Review and Approval, or other discretionary land use permit; the approval of a  
10 parcel, tentative or final subdivision map; and any other document prepared pursuant to the  
11 California Environmental Quality Act ("CEQA") or other law that is approved in conjunction  
12 with the land use approval. "Land use approval" does not include a ministerial permit;

13 c. "COUNTY" shall mean the County of Fresno, a political subdivision of the  
14 State of California; and,

15 d. "Project" means the use of the land authorized by the Land Use Approval:  
16 Unclassified Conditional Use Permit No. 3451.

17 2. HOLD HARMLESS.

18 The APPLICANT hereby agrees to save, indemnify, hold harmless and, at  
19 COUNTY's request, defend COUNTY, its officers, agents, and employees, the Fresno County  
20 Board of Supervisors, each member of the Fresno County Board of Supervisors, the Fresno  
21 County Planning Commission, from and against all expenses, demands, liabilities, claims, costs  
22 (including but not limited to court costs and attorney's fees), or damages of any nature  
23 whatsoever occurring or resulting to COUNTY, including, but not limited to, an award of  
24 attorney's fees and costs to the person, organization or entity bringing the cause of action, or  
25 their officers, agents, and employees, arising, from resulting from, or in connection with any  
26 COUNTY action in granting, issuing or approving Land Use Approvals for the Project.

27 When defending COUNTY, APPLICANT shall pay all attorneys' fees and costs  
28 related to the defense in any action brought against the COUNTY and the APPLICANT, except

1 for any fees and costs incurred by the COUNTY in defense of any action, as provided in  
2 section 4 of this agreement. APPLICANT shall defend COUNTY through counsel selected by  
3 APPLICANT (including but not limited to in-house counsel) and shall keep the COUNTY fully  
4 informed as to the progress of such defense. COUNTY shall cooperate fully with  
5 APPLICANT in the defense of the claim.

6 3. NOTIFICATIONS AND COOPERATION BY COUNTY.

7 COUNTY shall NOTIFY applicant within seven (7) COUNTY business days of its  
8 receipt of any demand, claim, action, proceeding, or litigation in which COUNTY is to be  
9 indemnified and held harmless by APPLICANT. If COUNTY requests that APPLICANT  
10 defend COUNTY, it shall notify APPLICANT in writing within ten (10) COUNTY business  
11 days of its receipt of any such demand, claim, action, proceeding, or litigation. COUNTY shall  
12 cooperate fully in such defense.

13 4. COUNTY PARTICIPATION IN DEFENSE.

14 Nothing contained herein shall prohibit COUNTY, in its sole discretion, from  
15 participating in the defense of any demand, claim, action, proceeding, or litigation over and  
16 above representation by outside counsel, or from participating in the defense of any demand,  
17 claim, action, proceeding, or litigation. If COUNTY elects to also defend, it shall do so in good  
18 faith and COUNTY shall bear its attorney's fees and cost. Except as otherwise provided in this  
19 paragraph, in no event shall COUNTY's participation in the defense of any demand, claim,  
20 action, proceeding, or litigation affect the obligations imposed upon APPLICANT in section 2  
21 of this Agreement.

22 5. REIMBURSEMENT OF COUNTY'S COSTS RE: ADMINISTRATIVE  
23 RECORD.

24 COUNTY acknowledges that it will make all reasonable efforts to look to Petitioner  
25 bringing action for payment of costs associated with preparation of administrative record as  
26 provided by law. However, only if the Petitioner refuses to pay within 90 days, APPLICANT  
27 agrees to reimburse COUNTY for its actual cost incurred, including, but not limited to,  
28 COUNTY staff and attorney time expended, for certifying and/or preparing the administrative

1 record in connection with any litigation/ proceedings related to the subject matter of this  
2 Indemnification Agreement. To the extent administrative record reimbursement and related  
3 costs are recovered by the COUNTY in any litigation, APPLICANT shall be reimbursed to the  
4 extent of any such recovery.

5 6. COVENANT NOT TO SUE.

6 (a) Upon issuance of a final Certificate of Occupancy for the Project,  
7 APPLICANT on behalf of itself, and its successors, and assigns, hereby fully releases  
8 COUNTY, its successors, and all other persons and associations, known or unknown, from all  
9 claims and causes of action, as a result of the above-described land use approval and covenants  
10 not to sue relating to such claims.

11 (b) APPLICANT acknowledges and agrees that this release applies to all  
12 claims that APPLICANT may have against COUNTY arising out of the above-described land  
13 use approval for injuries, damages, or losses to APPLICANT's person and property, real or  
14 personal, whether those injuries, damages, or losses are known or unknown, foreseen or  
15 unforeseen, or patent or latent.

16 (c) APPLICANT acknowledges and warrants that APPLICANT's execution  
17 of this release is free and voluntary.

18 (d) This release pertains to a disputed claim and does not constitute an  
19 admission of liability by COUNTY for the above-described land use approval.

20 (e) The provisions of paragraph 8 herein below, shall not apply to this  
21 covenant not to sue.

22 7. TERMINATION OF AGREEMENT.

23 (a) This Indemnification Agreement may be terminated only upon the  
24 following conditions:

25 (i) The parties, by their express, mutual, written consent agree to  
26 terminate this Indemnification Agreement, which consent shall not be unreasonably withheld;  
27 or  
28

1 (ii) The APPLICANT petitions the Fresno County Board of  
2 Supervisors to terminate this Indemnification Agreement by providing to the Board, a written  
3 opinion of APPLICANT'S legal counsel, as required under subsection 8(b) of this  
4 Indemnification Agreement, and the Board, in its sole discretion, determines that termination of  
5 this Indemnification Agreement is in the best interest of the public and the COUNTY. It is  
6 understood and agreed that the Board, in making such determination of whether to terminate  
7 this Indemnification Agreement, may reasonably rely upon said opinion of APPLICANT'S  
8 legal counsel.

9 (b) The opinion of APPLICANT'S legal counsel shall include, without  
10 qualification, the following applicable representations and opinion:

11 (i) if a demand, claim, action, proceeding, or litigation is brought by  
12 anyone upon or after the date of such opinion that could give rise to APPLICANT'S  
13 obligations herein to defend, indemnify, and/or hold harmless the COUNTY, such demand,  
14 claim, action, proceeding, and/or litigation is completely and forever barred by the statute of  
15 limitations; and

16 (ii) if a demand, claim, action, proceeding, or litigation has been  
17 brought by anyone that has given rise to APPLICANT'S obligations herein to defend,  
18 indemnify, and/or hold harmless the COUNTY, a final judgment thereof, as identified by  
19 APPLICANT'S legal counsel, has been rendered by a court of competent jurisdiction; and

20 (iii) APPLICANT'S legal counsel is not aware of any demand, claim,  
21 action, proceeding, or litigation which is pending or threatened by anyone that could give rise  
22 to APPLICANT'S obligations herein to defend, indemnify, and/or hold harmless the  
23 COUNTY.

24 (c) If this Indemnification Agreement is terminated, as provided, above, the  
25 COUNTY shall execute a written release of APPLICANT'S obligations under this  
26 Indemnification Agreement within ten (10) days of the date of termination. It shall be  
27 APPLICANT'S responsibility to record such document with the office of the Recorder of the  
28 County of Fresno.

1           8.     SEVERABILITY.

2           If any provision of this Agreement is determined to be illegal, invalid, void, or  
3     unenforceable in a final judgment by a court of competent jurisdiction, each and every other  
4     provision hereof shall remain in full force and effect, unless this severability provision would  
5     deny one or more of the parties to the Agreement of the material benefits of the Agreement, in  
6     which case the entire Agreement shall have no force and effect.

7           9.     APPLICABLE LAW.

8           This Agreement is made and entered into in the State of California and shall be deemed  
9     to have been executed and delivered within the State of California, and the rights and  
10    obligations of the parties hereunder shall be governed by, and construed, and enforced in  
11    accordance with the laws of the State of California.

12          10.    CONSTRUCTION OF CONTRACT.

13          The parties hereby acknowledge that they and their respective counsel have cooperated  
14    in the drafting and preparation of this agreement, for which reason this agreement shall not be  
15    construed against any party as the drafter thereof.

16          IN WITNESS WHEREOF, APPLICANT and COUNTY hereby execute this  
17    Agreement.

18    **APPLICANT:**

19    [fill in name of Applicant]

20    By Nick C. Seuers

21    Print Name: Nick C. SEUERS

22    Title: Senior VP, Project Dev. + Construction  
23           Chairman of the Board, or  
          President, or any Vice President

24    Date: 12/16/16

25  
26    By E. L. Spencer

27    Print Name: Elliott L. Spencer

28    Title: Secretary

**COUNTY OF FRESNO**

By D. P. P.  
Chair, Board of Supervisors

Date: February 28, 2017

BERNICE E. SEIDEL, Clerk  
Board of Supervisors

By Josie Cough Deputy  
Date: February 28, 2017

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Secretary (of Corporation), or  
any Assistant Secretary, or  
Chief Financial Officer, or  
any Assistant Treasurer

Date: 12/16/16

APPROVED AS TO LEGAL FORM:

By Samuel Edmonds

Attorney for Applicant

APPROVED AS TO LEGAL FORM:  
DANIEL C. CEDERBORG, COUNTY  
COUNSEL

By A. H. White

REVIEWED AND RECOMMENDED  
FOR APPROVAL:  
STEVEN E. WHITE, Director  
Department of Public Works and Planning

By [Signature]