

ATTACHMENT – E

Codified Ordinance for Development Agreement

1 E. Will not adversely affect the orderly development of property or the preservation
2 of property values; and

3 F. Will provide significant public benefits.

4 The board concurs in these recommendations and specifically finds that the provisions
5 of the development agreement are consistent with the county's general plan. The board
6 further finds that the underlying development project to which the development
7 agreement relates was subject to full and proper environmental review under CEQA.
8 Findings regarding the same are contained in board of supervisors Resolution 2021-
9 _____, the adoption of this ordinance in this chapter is based on those findings.

10 **92310.28 – Approval.**

11 Pursuant to the authorization provided in Sections 65864 et seq. of the California
12 Government Code, and the County of Imperial Codified Ordinances, the board approves the
13 development agreement. The board authorizes the chairperson of the board to execute the
14 development agreement on behalf of the county.

15 **92310.29– Statute of Limitations.**

16 No action or proceeding ("action") may be brought by a person, public agency, public
17 or private corporation, partnership, association, organization, or other business or business
18 entity other than the parties to the development agreement or their successors, to attack,
19 interpret, set aside, void, or annul all or any part of the development agreement, or the
20 decision of the county of imperial to approve and execute the development agreement, unless
21 the action is commenced and service made on the county of imperial within one hundred
22 twenty (120) days from the county's adoption of the ordinance codified in this section.

23 **SECTION 2:** This Ordinance shall take effect and shall be in force thirty (30) days after
24 the date of its adoption, and prior to the expiration of fifteen (15) days from the passage thereof,
25 a summary of this Ordinance shall be published at least once in the IV Press a newspaper of
26 general circulation, printed and published in the County of Imperial, State of California, together
27 with the names of the members of the Board of Supervisors voting for and against the same.
28

1 **SECTION 3:** A complete executed copy of this Ordinance shall be on file with the Office
2 of the Clerk of the Board of Supervisors. It shall be available for review at the County
3 Administration Center, located at 940 W. Main Street, Suite 209, El Centro, California, 92243.
4 The Clerk of the Board of Supervisors may be reached at (442) 265-1020.

5 **SECTION 4: Severability.** If any provision or clause of this Ordinance or the application
6 thereof to any person or circumstances is held to be unconstitutional or to be otherwise invalid
7 by any court of competent jurisdiction, such invalidity shall not affect other Ordinance provisions
8 or clauses or applications thereof that can be implemented without the invalid provision or
9 clause or application, and to this end the provisions and clauses of this ordinances are declared
10 to be severable.

11 **PASSED, ADOPTED, AND APPROVED** by the Board of Supervisors of the County of
12 Imperial this 16th day of November, 2021.

13 **AYES:**

14 **NOES:**

15 **ABSENT:**

16 **ABSTAIN:**

17 _____
18 _____

19 **MICHAEL W. KELLEY, Chairman**
20 **Imperial County Board of Supervisors**

ATTEST: _____

BLANCA ACOSTA, Clerk of the
Board of Supervisors, County of
Imperial, State of California

Recording requested by, and
when recorded return to:

County of Imperial
County Executive Office
940 W. Main Street, Suite 208
El Centro, CA 92243

Imperial County Development Agreement Concerning Westside Battery Storage

THIS DEVELOPMENT AGREEMENT (“Agreement”) is entered into by and between the County of Imperial, a political subdivision of the State of California, (“County”) and CED Westside Canal Battery Storage, LLC, a limited liability company licensed to do business in the state of California (“Developer”) (individually, “Party;” collectively, “Parties”) with respect to the development of real property in the County, known as the Westside Battery Storage Project (“Project”).

1. **AUTHORIZATION.** California Government Code Sections 65864 through 65869.5 and Title 9, Division 23 of the County of Imperial Codified Ordinances (Sections 92301 – 92309) authorize the County to enter into binding development agreements with persons having legal or equitable interests in real property for the development of the property in order to establish certainty in the development process.

2. **PROPERTY AND PROJECT DESCRIPTION.**
 - 2.1. **Property Description.** The real property which is the subject of this Agreement consists of individual parcels in the Mount Signal area, directly south of the intersection of Liebert Road and the Westside Main Canal in the unincorporated Imperial County, and is more particularly described in **Exhibit “A”** attached hereto (“Property”).

 - 2.2. **Project Description.** The development that is the subject of this Agreement consists of the Project as described in the Final Environmental Impact Report (“FEIR”) certified by the Board of Supervisors. Generally, the Project consists of: one (1) Conditional Use Permit to develop a utility-scale energy storage complex incorporating lithium ion batteries and/or flow battery technologies throughout the Project site (“CUP”); one (1) Zone Change to change the zone of Property from A-3 (Heavy Agriculture) to M-2 (Medium Industrial) (“ZC”); amendment of Imperial County’s General Plan Renewable Energy and Transmission Element to create an Island Overlay for the project site, as defined in County Code section 91701.01; and one (1) Development Agreement.

3. **LEGAL OR EQUITABLE INTEREST IN PROPERTY.** Developer is the owner of the Property upon which the battery storage Project is to be constructed.

4. **APPROVALS.**

- 4.1. This Agreement was approved by Ordinance No. _____ (“DA Ordinance”), adopted on _____, 2021, and shall be effective on the date the DA Ordinance becomes effective (“Effective Date”)
- 4.2. As of the Effective Date, this Agreement has been given all required discretionary approvals from the following County entities:
- 4.2.1. Environmental Evaluation Committee;
- 4.2.2. Planning Commission;
- 4.2.3. Board of Supervisors.
- 4.3. County and Developer agree that the Planning Commission and Board of Supervisors provided their recommendations and discretionary approvals for the Project and received all public testimony thereon at public hearings properly noticed as provided in Government Code Sections 65867, 65090, and 65091, and County of Imperial Codified Ordinances Section 92303, in addition to any other notice required by law for other actions considered concurrently with the Agreement.
- 4.4. County and Developer agree that all environmental impacts associated with the development of the Project as provided under this Agreement have been analyzed and adequately addressed in the FEIR in accordance with the California Environmental Quality Act (“CEQA”), and that the adoption of this Agreement will not result in any new or different significant environmental effect, or substantial increase in severity of a previously identified significant environmental impact considered in the certified FEIR.

5. **ENTITLEMENTS; STATUTORY REQUIREMENTS FOR DEVELOPMENT AGREEMENT; PERMITTED USES; DENSITY/INTENSITY OF USE; HEIGHT AND SIZE; DEDICATION OF PUBLIC LANDS.**

- 5.1. **Entitlements.** The County’s Board of Supervisors has approved the following land use entitlements for the Property, which entitlements and their implementation are the subject of this Agreement:
- 5.1.1. FEIR.
- 5.1.2. CEQA Findings and Mitigation Monitoring and Reporting Program (“MMRP”).
- 5.1.3. Water Supply Assessment.

- 5.1.4. GPA 19-0003 to create an Island Overlay for the Project site.
- 5.1.5. ZC 19-0004 to change the zone of the Property from A-3 (Heavy Agriculture) to M-2 (Medium Industrial).
- 5.1.6. CUP 19-0015 to develop a utility-scale energy storage complex incorporating lithium ion batteries and/or flow battery technologies throughout the Project site.
- 5.2. **Permitted Uses.** The permitted uses of the Property are those uses authorized and described in the CUP, those uses described in the FEIR, and those uses allowed by right and conditionally within the existing zones.
- 5.3. **Density/Intensity of Use.** The permitted density and intensity of use shall not exceed the density and intensity of the uses authorized and described in the CUP, those uses described in the FEIR, or those uses allowed by right and conditionally within the existing zones.
- 5.4. **Height and Size.** The permitted height and size of proposed structures shall be the limits allowed by the existing zone.
- 5.5. **Dedication/Reservation Public Lands.** The provisions for reservation or dedication of lands for public purposes are those described in the FEIR for open space or habitat protection.

6. **DURATION OF AGREEMENT AND ENTITLEMENTS; PHASING; EARLY TERMINATION OF CUPS.**

- 6.1. The term of this Agreement shall commence on the Effective Date as defined in Paragraph 4.1, and shall extend for a period of ten (10) years following the Effective Date. This Agreement may be extended by mutual agreement of the Parties, or by authorization of the Planning Director, as set forth in the County of Imperial Codified Ordinances.
 - 6.1.1. Any building permit under which construction has not commenced within three (3) years of issuance, and any CUP on which Commencement of Construction (as defined below) has not commenced by the tenth (10th) anniversary of the Effective Date of this Agreement, shall be of no further force and effect. In that event, the Parties agree that notwithstanding any other provisions of this Agreement or the entitlements, any CUP not so commenced shall terminate on that tenth (10th) anniversary date without notice or hearing. Developer agrees that such termination is voluntarily negotiated and waives any notice or public hearing of such termination. Developer agrees that there shall be no vested right and no legal remedy

available to Developer if any CUP terminates for failure to Commence Construction.

6.1.2. Notwithstanding any other provisions of this Agreement or the entitlements, in no event shall any entitlement exceed forty (40) years from the Effective Date of this Agreement. Such termination of the entitlements is consensual and shall not be subject to a public hearing.

6.1.3. As used here, "Commence Construction" or "Commencement of Construction" means the earlier of the date on which Developer obtains a grading permit or building permit, as may be applicable, in reliance on a CUP. Developer agrees that there shall be no vested right and no legal remedy available to Developer if such CUP terminates for failure to Commence Construction.

6.2. The term of this Agreement may terminate sooner as provided herein.

6.3. This Agreement shall run with the Property for the term of this Agreement, and shall bind each and every owner of such Property.

7. RULES, REGULATIONS, AND POLICIES.

7.1. County acknowledges that Developer would not enter into this Agreement or agree to provide the public benefits and improvements described in this Agreement if it were not for the commitment of the County that the Property can be developed, in accordance with County's ordinances, rules, regulations, and policies, including but not limited to those governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications applicable to the development of the Property existing as of the Effective Date of this Agreement.

7.2. The Property shall not be subject to any subsequently enacted amendment, modification of, or substitution for, the General Plan, zoning, or subdivision ordinances without the mutual written consent of the County and Developer, except as otherwise provided here.

7.3. Except as otherwise provided in this Agreement, Developer shall have the right, to the fullest extent permitted under California Government Code Sections 65864 et seq. and provisions of the County of Imperial Codified Ordinances to: (1) develop the Property in accordance with this Agreement, rules, regulations, ordinances, policies, conditions, environmental regulations, exactions, entitlements, assessments, payments, and fees applicable to and governing development of the Property in effect as of the Effective Date of this Agreement; and (2) develop the Property with respect to the permitted use(s) of land, density, and intensity of use(s), and timing and phasing of development as generally described in this

Agreement and in the entitlements set forth in Section 5 of this Agreement in effect as of the Effective Date of this Agreement, provided that:

- 7.3.1. Developer acknowledges that the Project must comply with all future amendments, modifications, or alterations of County's building, plumbing, mechanical, electrical, signage, and fire codes.
- 7.3.2. If a conflict between this Agreement and federal or State laws or regulations arises that prevents or precludes compliance with one or more provisions of this Agreement, such provisions of the Agreement shall, without further action by either Party, be deemed suspended as may be necessary to allow continuous compliance with such State or federal laws or regulations, and such suspension shall mean that non-compliance with such suspended provisions shall not be a breach of this Agreement from and after the date on which such conflict arose. County and Developer shall meet and confer in good faith in a reasonable attempt to modify the suspended terms of this Agreement to the extent feasible so that such terms, as modified, can be met without conflicting with federal or State laws or regulations.
- 7.3.3. Nothing in this Agreement shall be construed to be in derogation of County's police power to protect the public health and safety in the event of a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services involving the Property or the community.
- 7.3.4. Developer acknowledges that the Project must comply with any new or amended ordinance, resolution, rule, regulation, or policy that does not conflict with the entitlements, or those ordinances, resolutions, rules, regulations, and policies in effect at the Effective Date, and that is generally applied equally to all real property in the County with the same zoning designations and/or land uses. A conflict is one that would significantly limit the authorized disturbance area within the applicable CUP. Developer further acknowledges that this Agreement does not prevent the County from denying or conditionally approving any subsequent discretionary development project application on the basis of such existing or new rules or regulations.
- 7.3.5. This Agreement shall not be construed to limit the authority or obligation of County to hold necessary public hearings, or to limit the discretion of County or any of its officers or officials with regard to rules, regulations, ordinances, laws, and entitlements of use that require the exercise of discretion by County, or any of its officers or officials, provided that subsequent discretionary actions: (1) shall not prevent or delay development of the Property for the uses and to the density and intensity of development as provided by this Agreement and the other entitlements in effect as of the

Effective Date of this Agreement; and (2) shall not be inconsistent with the entitlements.

8. **INFRASTRUCTURE CAPACITY.** Subject to conditions of approval requiring specific upgrades, County hereby acknowledges that it has been informed that the Project will have sufficient capacity in its infrastructure, services, and utility systems, including without limitation, traffic circulation, flood control, water supply treatment, distribution, and service, to accommodate the Project.
9. **PUBLIC BENEFITS PROVIDED BY DEVELOPER.** County acknowledges that Developer's performance under this Agreement provides significant public benefits to County, including, but not limited to:
 - 9.1. **FEIR Mitigation Measures and Conditions of Approval.** Notwithstanding any other provision in this Agreement to the contrary, if Developer elects to develop the Project on the Property, Developer shall be bound by, and shall perform, all CUP provisions, conditions of approval and mitigation measures for which Developer is responsible as contained in the Project entitlements and certified FEIR for the Project, as well as those provided in this Agreement, and failure to do so without prior County authorization shall be a default under this Agreement as well as the CUP. In the event of a conflict among the terms of Agreement, a CUP, and the FEIR / MMRP, the hierarchy of documents that shall control the Parties' rights and obligations are the FEIR, MMRP, the Agreement, then the CUP.
 - 9.2. **Sales Tax Benefit.**
 - 9.2.1. To the extent permitted by applicable local, state, and Federal law, Developer will require that all qualifying contractors and subcontractors exercise their option to obtain a California Department of Tax and Fee Administration ("CDTFA") sub-permit for the jobsite and allocate all eligible sales and use tax payments to County and the Local Transit Authority ("LTA").
 - 9.2.2. Prior to commencement of any construction activity onsite, Developer shall require that the contractor or subcontractor provide County with a copy of their CDTFA account number and sub-permit. Developer shall either cause its construction contractor to treat the Project in accordance with California Sales and Use Tax Regulation 1521(b)(2)(B), California Sales and Use Tax Regulation 1521(c)(13)(B), and California Sales and Use Tax Regulation 1826(b) for sales and use tax purposes, or form a "Buying Company," as defined in the California Sales and Use Tax Regulation 1699(h). Developer may adopt an alternate methodology to accomplish this goal if such methodology is approved by the County's Executive Officer prior to issuance of any building permit.

9.2.3. No later than forty-five (45) days after the due date for filing sales and use tax returns for each calendar quarter, occurring after the commencement of any construction activity on-site through and including the first anniversary of commercial operating date (“COD”), Developer shall report, or cause its general contractor to report to County, the total amount of sales and use taxes related to the Project that are allocated to the County, and reported on Developer’s, general contractor’s and subcontractors’ applicable California sales and use tax returns.

9.2.4. *Guarantee Amounts.* Prior to the issuance of any building permit for the Project, Developer shall provide County with a guarantee of the minimum sales and use that will be received by County and LTA under existing applicable sales and use tax laws. The guarantee amount shall be based on the total storage capacity of the Project in megawatts, which is projected to be two thousand megawatts (“2000 MW”). Should Developer choose to develop the Project in phases, and receives the required approvals from County to do so, then Developer shall provide a separate guarantee amount for each phase of the project based on the total storage capacity in megawatts for the applicable phase.

- (a)** Developer warrants that the sales/use tax guarantee amounts to be provided to County as mandated in this Subparagraph 9.2.4 shall be true and accurate estimates of the projected sales and use taxes that will be generated for this Project. Developer shall provide County with evidence of the projected sales/use taxes for the Project, including but not limited to sales tax receipts, and executed or anticipated engineering contracts, procurement contracts, and construction contracts. If the Parties are unable to agree upon a guarantee amount, then the dispute shall be referred to an independent accountant mutually acceptable to both Parties. The costs for such nonbinding mediation shall be borne by Developer.
- (b)** Developer warrants that the sales/use tax guarantee amounts to be provided to County as mandated in this Subparagraph 9.2.4 will incorporate any and all sales/use tax exemptions that Developer and/or its contractors and subcontractors intend to utilize, and that such exemptions will be disclosed to County fully and in good faith prior to the issuance of any building permit for this Project.
- (c)** Developer understands and acknowledges that the sales/use tax guarantee amounts to be provided to County as mandated by this Subparagraph 9.2.4 are a part of the consideration to be received by County in return for entering into this Agreement, and further understands and acknowledges that County would not enter into this Agreement but for said guarantee from Developer.

9.2.5. In the event that County and / or LTA receives less than the amount of sales/use taxes guaranteed pursuant to Subparagraph 9.2.4, then Developer shall pay, as and when provided below, to County or LTA as applicable, the amount of the applicable shortfall.

9.2.6. *Adjustments to Guarantee Amounts.*

- (a)** The amount of sales and use tax anticipated to be generated is based on the projected construction of a 2000 MW utility-scale energy storage complex incorporating lithium ion batteries and/or flow battery technologies throughout the Project site. Construction of any additional storage capacity beyond the 2000 MW storage capacity now projected will require the sales/use tax guarantee amounts to be adjusted based on the actual storage facilities of the Project as evidenced by any power purchase agreement or power storage agreement subsequently entered into by Developer related to this Project.
- (b)** To the extent of any reduction in the size of the Project as the result of any final ruling, stipulated judgment, or settlement, the sales/use tax guarantee amounts mandated under Subparagraph 9.2.4 shall be reduced pro rata based on the size of such reduction.
- (c)** Should Developer become aware of a change in circumstances that would materially affect the sales/use tax guarantee amount, then Developer shall, within thirty (30) days of learning of such change in circumstances, inform the County in writing of the change in circumstances. If the County determines that such change in circumstances warrants an adjustment to the sales/use tax guarantee amount, then County shall negotiate in good faith with Developer in revising the sales/use tax guarantee amount. If the Parties are unable to agree upon a revised guarantee amount, then the dispute shall be referred to an independent accountant mutually acceptable to both Parties. The costs for such nonbinding mediation shall be borne by Developer. Failure of the Developer to inform the County of the change in circumstances shall constitute a waiver of Developer's ability to seek any adjustment to the sales/use tax guarantee based on such change in circumstances.

9.2.7. The complete sales/use tax guarantee amount due to County and LTA for the Project must be received within one (1) year after COD for this Project, or such later date as any applicable sales/use tax is due or is transmitted from the CDTFA, unless it is delayed due to causes beyond Developer's control or for which Developer is not responsible. If, within one (1) year after issuance of the final certificate of occupancy, or such later date as any applicable sales/use tax is due or is transmitted from the CDTFA, the

sales/use taxes received by the County are less than the sales use tax guarantee amounts mandated under Subparagraph 9.2.4, then Developer shall pay the difference to the County.

9.2.8. Payments to County and LTA as a result of a shortfall shall be due within forty-five (45) calendar days of Developer's receipt of written notice of shortfall from the County. Failure to make such payment within the forty-five (45) day timeframe shall be considered a default pursuant to Section 18 of this Agreement, and may lead to termination of this Agreement. Developer hereby agrees to pay interest at the rate of six percent (6%) per annum of the payment due for any payment received by County beyond the forty-five (45) day due date. The obligation to pay interest shall survive the termination of this Agreement. The obligation to pay interest shall be stayed for up to thirty (30) calendar days when such amounts are disputed in good faith, so long as Developer submits the payments "under written protest" with a complete explanation of the reasons for the protest. Upon resolution of the protested payment, such late charges may be assessed if it is determined by County that the dispute was not made in good faith. Repeated protests of the same point rejected in a prior protest shall be considered a protest in bad faith. Any such payments later found not to be due by Developer shall be refunded by County promptly, and in all events within thirty (30) calendar days after the determination of the amounts owing is made.

9.2.9. In the event that Developer repowers or replaces the equipment onsite, to the extent permitted under then applicable law, each site shall be designated as the "point of sale" so as to create an additional local tax-funding source for the County of Imperial.

9.3. Office of Emergency Services Obligations. In consideration of the potential hazards to County Office of Emergency Services ("Fire/OES") employees associated with responding to fires originating at utility-scale energy storage sites such as the Project, Developer agrees to provide the following:

9.3.1. Prior to the issuance of the first grading permit for the Project, Developer shall purchase, or contribute its proportionate share associated with the cost of the purchase, of a Type 1 fire engine, which shall meet all National Fire Protection Association ("NFPA") standards for structural firefighting. Final cost, conditions, and equipment to be installed on the Type 1 fire engine shall be reasonably determined by County Fire/OES, but the total cost of the Type 1 fire engine shall not exceed five hundred thousand dollars (\$500,000).

(a) County agrees to require, as a condition of approval of any other utility-scale energy storage project located within the southwest solar power generation and battery storage area, which is generally

described as that area west of the City of Calexico, north of the International Border, east of Dunway Road, and south of Interstate 8 (“Service Area”), that such other utility-scale energy storage projects shall either purchase or contribute their proportionate share for the cost associated with the purchase of the Type 1 fire engine.

- (b) The proportionate cost for utility-scale energy storage developers within the Service Area, including Developer shall be based on a unit price of two hundred fifty dollars (\$250) per megawatt of energy storage.
- (c) If Developer purchases the Type 1 fire engine, Developer shall be reimbursed up to seventy-five percent (75%) of the cost of purchase, not to exceed three hundred seventy-five thousand dollars (\$375,000).
- (d) Conversely, if a Type 1 fire engine has already been purchased by another utility-scale energy storage project developer in the Service Area, then Developer shall only be required to pay their proportionate share to reimburse the purchaser of the Type 1 fire engine, which shall not exceed one hundred twenty-five thousand dollars (\$125,000).
- (e) The County shall be responsible for managing the reimbursement component of this condition.

9.3.2. Developer shall pay County Fire/OES one hundred dollars (\$100) per megawatt of storage capacity at point of interconnection as a one-time payment to provide additional training to Fire/OES personnel during the life of the Project. The nature and frequency of such training shall be at the discretion of County Fire/OES, but shall be intended for assisting with responses to utility-grade energy storage project fires and emergencies. This payment shall be made before issuance of the first building permit for the Project, or for each phase of the Project, whichever is applicable.

9.3.3. Developer shall pay County Fire/OES one hundred fifty dollars (\$150) per megawatt of storage capacity at point of interconnection as a one-time payment to provide additional equipment for Fire/OES personnel during the life of the Project. The type and amount of equipment required shall be at the discretion of County Fire/OES, but shall be intended for assisting with responses to utility-grade energy storage project fires and emergencies. This payment shall be made before issuance of the first building permit for the Project, or for each phase of the Project, whichever is applicable.

- 9.3.4. Developer shall provide an approved water supply capable of supplying the required fire flow to the Project as determined by Appendix B of the 2019 California Fire Code. Developer shall be responsible for all costs associated with the provision of the water supply, including but not limited to installation and maintenance. Developer shall also install and maintain private fire service mains and appurtenance in accordance with NFPA section 24.
- 9.3.5. An approved automatic fire suppression system shall be installed on all required structures as per the 2019 California Fire Code. All fire suppression systems will be maintained to the current adapted fire code and regulations.
- 9.3.6. Project access roads and gates will be installed and maintained in accordance with the current adapted fire code. Developer shall maintain a Knox Box for access to the Project site.
- 9.3.7. Developer shall provide product containment areas(s) for both product and water run-off. All product and water runoff shall be retained for removal in accordance with applicable law.
- 9.3.8. All hazardous materials shall be handled, stored, and disposed of in accordance with an approved Hazardous Waste Materials Plan (“HWMP”). All spills shall be documented and reported to County Fire/OES and the County Certified Unified Program Agency as required by applicable law.
- 9.3.9. Any Fire Mitigation Payments set out in the CUP are separate from the payments required under this section.

10. **VALUE OF PAYMENTS.** In addition to other provisions of this Agreement, all payments referenced in this Agreement shall escalate annually beginning on January 1, 2023, based upon the Consumer Price Index – Los Angeles SMSA – all urban consumers (“CPI”), but in no case shall the CPI be less than zero (0).

11. **EMINENT DOMAIN.** The Parties to this Agreement understand and acknowledge that County has no present or foreseeable future need to acquire public access to the Project not already authorized under the CUP and/or County-issued entitlements for this Project. However, should a future need arise in which County requires additional public access to the Project, County shall, before engaging in any eminent domain proceedings, meet and negotiate in good faith with Developer concerning the proposed public access to the Project.

12. **PERIODIC REVIEW.**

12.1. County shall review the extent of good faith compliance by Developer with the terms of this Agreement at least every twelve (12) months pursuant to California Government Code section 65865.1.

- 12.2. Upon written request from the County, Developer shall have the duty to demonstrate its good faith compliance with the terms of this Agreement.
- 12.3. Any County failure to annually review Developer's compliance with the terms and conditions of this Agreement shall not constitute or be asserted by County or Developer to be a breach or default of the Agreement, and shall not be used as grounds to amend, modify, alter, or terminate the Agreement.
13. **ASSIGNMENT AND DELEGATION.** As set out here, Developer may sell, transfer, or assign (collectively, "assign") all or part of Developer's rights, title and interest in the Project. This Agreement shall be binding on all successors in interest of the Developer pursuant to County of Imperial Codified Ordinances Code Section 92325.
- 13.1. **Partial Assignment.** When one or more CUP is assigned, but the assignment is of less than the entire Project area, the assignment is referred to herein as a "partial assignment." The assignment, including but not limited to any partial assignment, shall expressly include the assignment and assumption of all rights, duties, and obligations arising under or from this Agreement, other County-issued entitlements and the MMRP applicable to the CUP. There shall be no assignment of less than the entire CUP area, and any such attempted assignment is void.
- 13.2. Developer shall not, without prior notification to the Imperial County Planning and Development Services Department, assign, sell, transfer, or grant control of the Project, or any right or privilege therein granted by the CUP. The Developer shall provide a minimum of forty-five (45) days written notice prior to any proposed transfer becoming effective. An approved assignment agreement shall be in place for the new Project owner to build and maintain as agreed to by the conditions set forth in this Agreement. The County Assessor's Office shall be notified of any ownership change.
- 13.3. Within fifteen (15) calendar days after an assignment: (1) Developer shall notify the County, in writing, of such assignment and shall provide County with both: (a) an executed copy of the assignment evidencing that the assignee expressly assumes all the assigned duties and obligations of Developer under this Agreement, other County-issued entitlements, and the MMRP applicable to the CUP area; and (b) Developer's requested form of release of such duties and obligations related to that CUP area; (2) assignee shall provide County with the assignee's financial security equal in value to the financial security required of Developer by the Project entitlements including any and all entitlement-required increases to secure performance of its obligations with respect to the portion of the Project assigned, including but not limited to that for the decommissioning and reclamation plan; and (3) Developer and/or assignee shall provide any and all additional information necessary to determine the sufficiency of such replacement financial security. As used here "financial security" may mean one or more security instruments which can include letters of credit, performance bonds, or other forms of security

consistent with those previously accepted by the County for this or other development projects in the County.

- 13.4. Within forty-five (45) calendar days of delivery of the information required under Paragraph 13.3, the County Planning and Development Services Department shall determine the sufficiency of the replacement security in its reasonable discretion, which can include letters of credit, performance bonds, or other forms of security consistent with those previously accepted by the County for this or other development projects. The County shall have the discretion to require security having a greater value (i.e. a larger face amount) than the security being replaced related to that CUP area when such security is subject to increase pursuant to the provisions of the CUP. Notwithstanding the failure of any assignee to execute the assignment or provide the required security, the burdens of this Agreement shall be binding upon such assignee, but the benefits of this Agreement shall not inure to such assignee until and unless such assignment is executed, and such security is provided and the County has delivered a written release to Developer confirming the sufficiency of the replacement security.
- 13.5. Notwithstanding any sale, transfer, or assignment, Developer shall continue to be obligated under this Agreement until the County executes a release of such financial security. The County's unreasonable failure to approve the assignment or execute such release may be a default under Section 18 of this Agreement.
- 13.6. County shall be reimbursed by Developer for any costs of review of the replacement financial security instrument(s).
14. **RELATIONSHIP OF COUNTY AND DEVELOPER.** The contractual relationship between County and Developer arising out of this Agreement does not create an agency relationship.
15. **INDEMNIFICATION AND HOLD HARMLESS.**
 - 15.1. Developer shall indemnify and shall hold the County, its officers, agents, attorneys and employees harmless from third-party liability, claims, demands, expenses or costs, including but not limited to costs of experts and separate attorneys chosen by County at County's sole discretion: (1) to attack, set aside, void or annul this Agreement, any entitlement, CUP, approval or the certification of any environmental document accompanying such entitlements, or any determination made under such CUP or this Agreement, whether there is concurrent, passive, or active negligence on the part of the County, its officers, agents, attorneys, or employees; or (2) for personal injury (including but not limited to death), property damages, just compensation, judicial or equitable relief, arising or alleged to arise from the direct or indirect operations of the Developer or its contractors, subcontractors, agents, employees, or other persons acting on Developer's behalf that relate to the Project (including but not limited to Developer's actions or failure

to act in drilling, grading, construction, operation, abandonment, reclamation or decommissioning) of the Project or any CUP.

15.2. Developer shall execute County's most current form of indemnification funding agreement. County and Developer shall cooperate in the defense against claims subject to these indemnities and Developer shall enter into the applicable form of agreement to confirm such joint defense. Notwithstanding, Developer's failure to provide payment of any fees or costs required under this Agreement shall cause Developer to be in non-compliance with this Agreement. Upon notification of such non-compliance, County may, at its sole discretion, cease processing of the Project or defending any lawsuit or paying for costs associated with the Project.

16. AMENDMENT OR CANCELLATION. This Agreement may be amended or canceled by the mutual consent of County and Developer, in the manner set forth in California Government Code section 65868 and County of Imperial Codified Ordinances Sections 92306.00 and 92306.01.

17. MINOR MODIFICATION. Unless as otherwise required by law (including but not limited to the County of Imperial Codified Ordinances) interpretations and minor modifications or changes can be made to the Project with the mutual agreement of Developer and the County's Planning Director, only in one (1) of the following circumstances:

17.1. Where the change is: (i) ministerial or mutually agreeable to the County's Planning Director and Developer; (ii) constitutes an administrative interpretation or less than significant amendment; (iii) constitutes a change or technical modification to the design, construction, and/or operation of the Project under the existing applicable rules, regulations, and laws of the County; or (iv) amends the CUP to allow development and operation of the Project subject to two or more CUPs, provided that the subsequent CUPs shall be bound by the effective date and term of the original CUP, and does not:

17.1.1. Alter the permitted uses of the Property as a whole or within any CUP;

17.1.2. Increase the density or intensity of use of the Property as a whole or within any CUP;

17.1.3. Increase the maximum height and size of permitted buildings or structures;

17.1.4. Delete a requirement for the reservation or dedication of land for public purposes within the Property as a whole;

17.1.5. Conflict with a condition of approval or MMRP provision; or

17.1.6. Constitute a discretionary approval by the County for which a subsequent or supplemental environmental impact report would be required pursuant to Section 21166 of the California Public Resources Code.

17.2. Where the change is ministerial, mutually agreeable to County and Developer, and constitutes an administrative interpretation, less than significant amendment, or change or technical modification to the design, construction, and/or operation of the Project under the existing applicable rules, regulations, and laws of non-County agencies as to Project matters within their sole jurisdiction.

18. **DEFAULT.** A default under this Agreement shall be deemed to have occurred upon the happening of one or more of the following events or conditions:

18.1. A warranty, representation, or statement made or furnished in this Agreement by either Party proves to have been false in any material respect when it was made.

18.2. A finding by County pursuant to County of Imperial Codified Ordinances Sections 92308.00 and 92308.01, based on substantial evidence, that the Developer has not complied in good faith with one or more of the terms or conditions of this Agreement.

18.3. Any other act or omission by either Party which breaches or materially interferes with the terms of this Agreement.

18.4. A default under this Agreement with respect to obligations owed to the County by the Developer shall not constitute a default under this Agreement to the extent this Agreement has been partially assigned to another entity in accordance with Section 13, and a default under this Agreement with respect to obligations owed to the County by an assignee of a portion hereof in accordance with Section 13 shall not constitute a default under this Agreement by the Developer.

19. **PROCEDURE UPON DEFAULT.**

19.1. Upon the occurrence of default by Developer or County, prior to any proceedings pursuant to Title 9, Division 23 of the County of Imperial Codified Ordinances, and as an informal resolution procedure prior to any litigation being filed (including but not limited to any breach of contract action), the non-defaulting party shall provide the other party written notice specifying the nature of the alleged default and the actions required to cure such default. Such notice shall not be required in the event the default creates a threat to public health and safety.

19.2. After proper notice, the non-defaulting Party has the option to terminate the Agreement if: (1) the defaulting Party fails to take such actions or otherwise cure such default within forty-five (45) calendar days after the receipt of such notice; or (2) in the event that such default cannot be cured within such forty-five (45) calendar day period but can be cured within a longer time, the defaulting party fails

in such forty-five (45) day period to commence the actions necessary to cure such default and to diligently proceed to complete such actions and cure such default.

- 19.3. All other remedies at law or in equity which are not inconsistent with the provisions of this Agreement are available to County and Developer to pursue in the event there is a default.
20. **LEGAL ACTION.** Either Party may institute legal action to cure, correct, or remedy any default, to enforce any covenant or agreement herein, to enjoin any threatened or attempted violation, or to compel specific performance. In no event shall County or its officers, employees or agents be liable in damages for any breach of this Agreement, it being expressly understood and agreed that the sole remedy available to Developer for a breach of this Agreement by County shall be a legal action in mandamus, specific performance (including the return of protested fees or other payments), injunction or declaratory relief to enforce the Agreement.
21. **ATTORNEYS' FEES.** In the event any legal action is brought to enforce or construe this Agreement, the prevailing Party shall be entitled to an award of reasonable attorneys' fees, expert witness and consulting fees, and litigation costs.
22. **DISCRETION TO ENCUMBER.** This Agreement shall not prevent or limit Developer from encumbering the Property, or any improvement on the Property, by any mortgage, deed of trust, or other security device.
23. **ENTIRE AGREEMENT; WAIVER AND RECORDED STATEMENT.** This Agreement constitutes the entire understanding and agreement of County and Developer with respect to the matters set forth in this Agreement. This Agreement supersedes all negotiations or previous agreements between County and Developer respecting this Agreement. Any County waivers of the provisions of this Agreement must be authorized by the terms of this Agreement or by County ordinance, and approved as set out therein. Any waiver by Developer shall be in writing. No waiver of any term or condition of this or any determination of a protest hereunder shall be a continuing waiver or determination hereunder. Upon the completion of performance of this Agreement, or its revocation or termination, a statement evidencing completion, revocation, or termination signed by the appropriate agents of County shall be recorded in the Official Records of Imperial County, California.
24. **NOTICES.**
- 24.1. All notices or deliveries required or provided for by this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the following:

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COUNTY

County of Imperial
Attn: County Executive Officer
940 W. Main St., Suite 208
El Centro, CA 92243

DEVELOPER

CED Westside Canal Battery Storage, LLC
Attn: Mark Noyes, President and CEO
c/o Con Edison Development
100 Summit Lake Drive, Ste. 210
Valhalla, NY 10595

With a copy to:

Paul F. Mapelli, General Counsel
CED Westside Canal Battery Storage, LLC
c/o Con Edison Development
100 Summit Lake Drive, Ste. 210
Valhalla, NY 10595
mapellip@conedceb.com

- 24.2. County or Developer may change its address by giving notice in writing to the other Party. All notices or deliveries shall be deemed to have been given when received.
25. **CAPTIONS.** The captions of this Agreement are for convenience and reference only and shall not define, explain, modify, construe, limit, amplify, or aid in the interpretation, construction, or meaning of any provision of this Agreement.
26. **RECORDING.** The Clerk of the Board shall cause a copy of this Agreement to be recorded with the Office of the County Recorder of Imperial County, California, within ten (10) days following the execution of this Agreement, pursuant to California Government Code section 65868.5.
27. **INTERPRETATION AND GOVERNING LAW.** This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the state of California.
28. **VENUE.** In the event of any legal or equitable proceeding arising out of or relating to this Agreement, the Parties agree that venue shall lie only in the federal or state courts located in the County of Imperial.

29. **TIME OF ESSENCE.** Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.
30. **UNENFORCEABLE PROVISIONS.** The terms, conditions, and covenants of this Agreement shall be construed, whenever possible, as consistent with applicable laws and regulations. To the extent that any provision of this Agreement as so interpreted is held to violate any applicable law or regulation, the remaining provisions shall nevertheless be carried into full force and effect and remain enforceable.
31. **REPRESENTATION OF CAPACITY TO EXECUTE CONTRACT.** Each Party to this Agreement represents and warrants that the person or persons signing have the authority to execute this Agreement on behalf of the Party represented by those individuals.
32. **NO WAIVER.** The failure of either Party to enforce any term, covenant, or condition of this Agreement on the date it is to be performed shall not be construed as a waiver of that Party's right to enforce this or any other term, covenant, or condition of this Agreement at any later date, or as a waiver of any term, covenant, or condition of this Agreement.
33. **COUNTERPARTS.** This Agreement may be executed by the Parties in counterparts, which counterparts shall be construed together and have the same effect as if all the Parties had executed the same instrument.
34. **FORCE MAJEURE.** Neither Party shall be deemed to be in default where failure or delay in performance of any of its obligations is beyond its reasonable control, such as, floods, earthquakes, acts of God, fires, wars, riots or similar hostilities, strikes, and other labor difficulties. Economic factors shall not be considered beyond the reasonable control of a Party.
35. **GENDER, NUMBER AND INTERPRETATION.** As used herein, the neutral gender includes the masculine and feminine, the feminine gender includes the masculine, and the masculine gender includes the feminine. As used herein, the singular of any word includes the plural. In the event of an ambiguity, there shall be no presumption against the drafter, all Parties hereto being represented by counsel.
36. **FURTHER COOPERATION.** Each of the Parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement, and the satisfaction of the conditions of this Agreement. Upon the request of either Party at any time, the other Party shall promptly execute with acknowledgment or affidavit (if reasonably required) and file or record such required instruments and writings and take any actions as may be reasonably necessary under the terms of this Agreement to carry out the intent and fulfill the provisions of this Agreement, or to evidence or consummate the transactions contemplated by this Agreement. Notwithstanding the foregoing sentence, if Developer delivers to County a written request for an estoppel certificate confirming that there is no default under this Agreement, that this Agreement is in full force and effect, or that this Agreement has not been amended, then the County shall use its best efforts to respond within twenty (20)

calendar days of the provision of such estoppel certificate and all necessary supporting information for such issuance.

37. **SURVIVAL.** Developer's payment obligations to County as specified in Sections 9 and 10 shall survive the expiration or termination of this Agreement.

[Signatures on Following Page]

IN WITNESS WHEREOF, the Parties have notarized and executed this Agreement as of the Effective Date stated in this Agreement as authorized by Ordinance No. _____ of the Board of Supervisors of the County of Imperial.

County of Imperial

**CED Westside Canal
Battery Storage, LLC**

By: _____
Michael W. Kelley, Chairman
Imperial County Board of Supervisors

By: _____
Mark Noyes, President and CEO
CED Westside Canal Battery Storage

ATTEST:

By: _____
Blanca Acosta, Clerk of the Board,
County of Imperial, State of California

APPROVED AS TO FORM:

By: _____
Adam G. Crook
County Counsel

Exhibit A
Legal Descriptions