

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

**DEVELOPMENT AGREEMENT**

[c2014- ]

**THIS DEVELOPMENT AGREEMENT** (“Agreement”) is made as of the \_\_\_\_\_ day of December, 2014 (the “Effective Date”), among the **CITY OF TEMPE**, an Arizona municipal corporation (“City”), and **Hayden House Tempe LLC** a Delaware Limited Liability Company (“Developer”).

**RECITALS**

A. DEVELOPER is the owner of a parcel of real property approximately 2.509 acres in size located on the South West corner of Rio Salado Parkway and Mill Avenue and legally described in **Exhibit "A"** attached hereto and incorporated herein by this reference (the "Property"). The Property is located in a downtown redevelopment area as described in A.R.S. §36-1471, et seq.

B. DEVELOPER desires to develop the Property into a mixed-use project consisting of (i) approximately 274 hotel rooms, together with approximately 18,295 square feet of meeting space, (ii) approximately 280,262 square feet of Class “A” office space, (iii) approximately 2,678 square feet of retail uses, (iv) approximately 9,585 square feet of restaurant space, and (v) structured parking facilities containing approximately 1,100 parking spaces, along with historic preservation of the Hayden House (the "**Project**").

C. City and Developer hereby acknowledge and agree that significant benefits will accrue to City from the development of the Project by Developer, including, without limitation, increased tax revenues, the creation of approximately 1,200 jobs in the City, and that the Project will otherwise improve or enhance the economic welfare of the inhabitants of the City.

D. City hereby finds that upon execution of this Agreement, the conditions stated in Resolution 2010.76 will have been satisfied provided that the Government Property Lease is executed on or before May 20, 2020.

E. This Agreement is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

## **AGREEMENT**

**NOW THEREFORE**, in consideration of the above premises, the promises contained in this Agreement and for good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties hereto agree as follows:

### **ARTICLE I**

#### **DEFINITIONS**

The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

**1.1 “Certificate of Occupancy”** means either (a) a certificate of occupancy (final, temporary, shell, conditional or otherwise) for any buildings or improvements constructed on the Property issued by the Community Development Department and City Public Works Department of the City of Tempe, or (b) a certificate of completion in the form of **Exhibit B** hereto issued by the City of Tempe Community Development Department certifying that a building or other improvement constructed on the Property has been substantially completed.

**1.2 “City”** means the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

**1.3 “Developer”** means Hayden House Tempe LLC a Delaware limited liability company, and its permitted successors and assigns.

**1.4 “Force Majeure”** means a delay caused by fire, earthquake, unusual weather conditions for Tempe, Arizona or other acts of God, acts of public enemies, riot, insurrection, governmental regulation of the sale of materials and supplies or the transportation thereof, strikes directly affecting the work of construction, shortages of material or labor resulting directly from general market shortages, governmental control or diversion and other similar causes beyond Developer’s reasonable control, excluding financial difficulty or inability, and for which Developer gives notice within a commercially reasonable time but not later than 48 hours after the event or occurrence.

**1.5 “Improvements”** means all the improvements which may be constructed from time to time as part of the Project, including, without limitation, buildings, structures, utilities, driveways, parking areas, walls, landscaping and other improvements of any type or kind to be built by Developer.

**1.6 “PAD”** means the Planned Area Development (PAD) for the Property approved by City by June 30th, 2015.

**1.7 “Project”** means the mixed use project described in Recital B.

**ARTICLE II  
DEVELOPMENT PLAN**

**2.1 Duration of Development Agreement.** Notwithstanding an earlier termination under Section 3.2 below, the term of this Agreement shall commence on the Effective Date and continue until the earlier of expiration of the Government Property Lease (defined in Section 3.x) or May 20, 2020.

**2.2 General Cooperation.** City agrees to use its reasonable best efforts to assist Developer or its affiliates in the development of the Project, including any assistance with other governmental agencies as appropriate.

**ARTICLE III  
DEVELOPMENT MATTERS**

**3.1 Schedule of Performance.** City and Developer intend that the Project shall be developed pursuant to, and in accordance with, the milestones set forth on the “Schedule of Performance” attached hereto as **Exhibit C.** Developer shall use commercially reasonable efforts to develop the Project in accordance with the Schedule of Performance.

**3.2 Compliance with Schedule of Performance; Automatic Termination; Extensions.** Subject to Force Majeure and any extensions granted by City, if Developer fails to Substantially Complete the Project in accordance with the Schedule of Performance, then this Agreement shall automatically terminate. No notice of such termination shall be required, as the passage of time without completion of the appointed task cannot be cured. On any such termination, this Agreement shall be null and void and Developer shall have no further right to develop the Property pursuant to this Agreement. Developer is free at any time to request an extension of the dates set forth in the Schedule of Performance; however, City may grant or deny any such request in its unfettered discretion. If Developer notifies City of the occurrence of a Force Majeure event, it shall be entitled to a day for day extension of the time periods stated in the Schedule of Performance but not more than 90 days after the occurrence of such event.

So long as no then-current Developer Default is continuing, Developer shall also have the right to extend the time for performance of any item listed on the Schedule of Performance as hereafter provided. Developer may extend any item (which shall operate to extend all subsequent items for the same period) listed on the Schedule of Performance once for a period not to exceed 6 months by giving written notice to City not less than 45 days before the then-scheduled performance date and paying to City a nonrefundable extension fee of \$100,000.00.

**3.3 Development Plan.** Developer shall, at its sole cost and expense, develop the Project in general conformance with the description of the Project set forth in the PAD. City and Developer acknowledge that, while the Developer intends to develop the Project in general conformance with the PAD, to make the Project economically viable and otherwise feasible, Developer may request amendments to the PAD. The City shall process all submittals made by Developer in accordance with its normal review processes and requirements in connection with its approval of such submittals.

**3.4 Signage.** City and Developer hereby acknowledge that the distinctive location of the Project, and its redevelopment to a mixed-use office, retail, and commercial Project present a unique opportunity to enhance the visibility and high-profile nature of the Project. As a result, the parties acknowledge and agree that appropriate signage will and should be an integral part of the Project and will be necessary to attract high quality employers and tenants to the Project. City and Developer agree to coordinate their efforts and agree on appropriate signage for the Project. City authorizes and empowers the Director of Community Development to consent to any additional request of the Developer for sign approval that meet the intent of the project and deviate from Tempe Zoning code.

**3.5 Façade Conservation Easement.** Prior to the issuance of a building permit for any Improvements to be constructed as part of the Project, the Developer shall grant City, for the use and benefit of the City, a Conservation Easement in the form of *Exhibit D* hereto (the “Façade Conservation Easement”) covering the façade of the C.T. Hayden House.

**3.6 Airspace Conservation Easement.** Prior to the earlier of the issuance of (a) a demolition permit for work to be performed as part of the Project or (b) any building permit for any Improvements to be constructed as part of the Project, the Developer shall grant the City, for the use and benefit of the City, a Conservation Easement in the form of *Exhibit E* hereto (the “Airspace Conservation Easement”) covering the airspace above the C.T. Hayden House.

**3.7 Archaeology.** Prior to the issuance of a building permit, Developer shall provide City with an archeological survey of the Property conducted by a qualified person or firm, to ascertain the presence, and to review and assess the impact, of any archaeological artifacts or human remains that may exist upon or otherwise impact or affect the Property. If any such artifacts or remains are required by applicable law to be removed, relocated, preserved or otherwise remediated to permit development of the Property as contemplated by this Agreement, then Developer shall diligently undertake to satisfy all such legal obligations, at no cost or expense to City. Such archeological remediation shall not have any impact on the Schedule of Performance unless Developer and the City otherwise agree in writing.

**3.8 Encroachment Permit.** Subject to Developer’s compliance with all terms, covenants and conditions of this Agreement, the City agrees to issue to Developer or renew an encroachment Permit over those portions of Mill Avenue and Rio Salado Parkway contiguous to the Project Property, for outdoor dining associated with restaurants or food service providers operating from within the Project as set forth in the PAD, and subject to receipt by the restaurant or food service provider of all requisite licenses and permits required for

operation of such business at the Project. The Encroachment Permit will run with the title to the Property.

**3.9 Parking.** Within thirty (30) days after issuance of a Certificate of Occupancy for the Parking Garage, the parties shall enter into a Parking License Agreement, in the form of *Exhibit F* (the “**Parking License**”) hereto. Subject to the specific terms of the Parking License, among other things, the Parking License shall generally (a) allow the City to use up to 50 contiguous parking spaces on the first/ground level of the Parking Garage (with all spaces being located on the same level) being built as part of the Project on all nights (6:00 p.m. to 6:00 a.m.) and weekends; and (b) allow the City to retain all revenues generated during the night and weekend use of the parking spaces so long as the City operates the garage at such times.

**3.10 Pedestrian Pathway.** Developer shall grant City a perpetual easement over a portion of the Project Property, roughly consisting of a north-south corridor approximately 20 feet wide, for use as a bike and pedestrian pathway, allowing pedestrians to access Tempe Beach Park from the Light Rail Station located to the south of the Project. The exact location and square footage of the pathway will be determined by mutual agreement of the Parties. The easement shall be in substantially the form of *Exhibit G* hereto.

As part of the Project, Developer shall at its sole cost and expense, design and construct the pathway, to City of Tempe standards consistent with other similar pathways within the City, and shall agree to maintain the pathway in perpetuity pursuant to a maintenance agreement in substantially the form of Exhibit H hereto. Should Developer fail to complete construction of the pathway before the Project Completion Date, City shall have the rights and remedies granted to it pursuant to Section 4.1 of this Agreement.

**3.11 Government Property Lease.** City hereby acknowledges and agrees that if the Project is completed as contemplated in compliance with the Schedule of Performance (as it may be amended or extended) and Developer has otherwise satisfied its obligations, in all material respects, under this Agreement (taking into account all applicable cure periods, if any), then Developer shall be entitled to all statutorily-authorized property tax abatements available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209, inclusive, as in effect on May 20, 2010 which were reserved in Resolution 2010.76. Upon execution of this Agreement, the conditions stated in Section 2 of such Resolution shall have been satisfied. If Developer has fully performed its obligations hereunder and under this Agreement, then to facilitate property tax abatements, City hereby agrees that, at the request of Developer from time to time, City shall accept reconveyances of one or more Parcels and conveyances of Improvements thereon by deed substantially in the form attached hereto as *Exhibit I* and shall lease-back all such Parcels and Improvements to Developer upon the terms and conditions set forth in a lease substantially in the form attached hereto as *Exhibit J*.

**3.11.1 Lease Term.** The term of each such lease shall be for a period of 8 years from the date of issuance of a Certificate of Occupancy for the improvements constructed on the Parcel subject to the lease.

**3.11.2 Voluntary Contribution.** To assist the Tempe Union High School Foundation and the Tempe Impact Education Foundation (together, the “Foundations”) with their important educational missions, Developer agrees to make a voluntary contribution to the Foundations in the amount of \$25,000.00 (half to each foundation) per year for four (4) years, commencing on the date of execution of the first Lease and continuing on each anniversary thereof until the aggregate of such payments equals \$100,000; provided that Developer may at any time elect to prepay such amounts, so long as the entire \$100,000 is paid. The Foundations are an intended third party beneficiary of this provision of the Agreement, and shall have the exclusive power to enforce this provision during the term of this Agreement.

#### **ARTICLE IV DEFAULT; REMEDIES; TERMINATION**

**4.1 Default.** It shall be a default hereunder if either party fails to perform any of its obligations hereunder and such failure continues for a period of thirty (30) days after written notice from the non-defaulting party specifying in reasonable detail the nature of such failure; provided that if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion.

**4.1.1 Additional Developer Defaults.** In addition to the foregoing, it shall be a default hereunder if: (a) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the “Bankruptcy Code”) or for any form of relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against Developer or any partnership of which Developer is a partner, their respective assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing; (b) Developer makes an assignment for the benefit of creditors, is not paying material debts as they become due, or is granted an order for relief under any chapter of the Bankruptcy Code; (c) a custodian, as defined by the Bankruptcy Code, takes charge of any property of Developer or any property of any partnership of which Developer is a partner; (d) garnishment, attachment, levy or execution in an amount in excess of an amount equal to ten percent (10%) of its net worth is issued against any of the property or effects of Developer, or any partnership of which Developer is a partner, and such issuance is not discharged or bonded against within ninety (90) days; (e) the dissolution or termination of existence of Developer unless its successor by transfer or operation of law is continuing the business of operating the Project; or (f) there is a material breach of any representation and warranty by Developer in this Agreement when made.

**4.2 Dispute Resolution.** If the parties cannot resolve any dispute that arises out of this Agreement between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under

the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by Developer and the City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the City and the Developer shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the City and Developer, or in such other fashion as the mediator may order. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation upon the conclusion of mediation.

**4.3 Developer's Remedies.** If City is in default under this Agreement (beyond any applicable cure period) and the parties do not resolve the City's default pursuant to the nonbinding mediation described in Section 4.2, Developer shall have the right to terminate this Agreement upon written notice to the City. The Developer shall also have the right to pursue all other legal and equitable remedies which the Developer may have at law or in equity, including, without limitation, the right to seek specific performance, the right to seek and obtain damages and the right to self-help; provided that City shall in no event be liable for punitive, incidental or consequential damages.

**4.4 City's Remedies.** If the Developer is in default under this Agreement (beyond any applicable cure period) and the parties do not resolve the Developer's default pursuant to the nonbinding mediation described in Section 4.2, then the City shall have the right to terminate this Agreement immediately upon written notice to Developer and to pursue any other rights or remedies provided hereunder, at law or in equity; provided that Developer shall in no event be liable for punitive, incidental or consequential damages.

**4.5 Effect of Event of Termination.** Upon the termination of this Agreement as the result of the default or breach by the Developer (beyond any applicable cure period), the Developer shall have no further rights to the City-provided development incentives pursuant to this Agreement accruing from and after the termination of this Agreement.

## **ARTICLE V GENERAL PROVISIONS**

**5.1 No Personal Liability.** No member, shareholder, director, partner, manager, officer or employee of Developer shall be personally liable to City, or any successor or assignee, (a) in the event of any default or breach by the Developer, (b) for any amount which may become due to the City or its successor or assign, or (c) pursuant to any obligation of Developer under the terms of this Agreement.

**5.2 No Personal Liability.** No member, official or employee of the City shall be personally liable to Developer, or any successor or assignee, (a) in the event of any default or breach by the City, (b) for any amount which may become due to the Developer or its

successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

**5.3 Liability and Indemnification.** Developer hereby agrees to indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of Developer's performance or failure to perform its obligations under this Agreement, including any third party claims relating to environmental conditions on the Property.

**5.4 Conflict of Interest.** Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to A.R.S. § 38-511.

**5.5 Notice.** All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by registered or certified mail, return receipt requested, or by personal delivery or by overnight mail, addressed as follows:

To Developer: Hayden House Tempe LLC  
Attn: Douglas Wilson  
1620 Fifth Avenue, Suite 400  
San Diego, CA 92101

With a copy to: Manjula Vaz  
Gammage & Burnham  
Two North Central, Suite 1500  
Phoenix, AZ 85004

To the City: City Manager  
City of Tempe  
31 East Fifth Street  
Tempe, Arizona 85281

With a copy to: City Attorney  
City of Tempe  
21 East Sixth Street, Suite 201  
Tempe, Arizona 85281

Either party may designate any other address for this purpose by written notice to the other party in the manner described herein. The date of service of any communication hereunder shall be the date of personal delivery or seventy-two (72) hours after the postmark on the certified or registered mail, or the date received if sent by overnight mail, as the case may be.

**5.6 Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

**5.7 Successors and Assigns; Restrictions on Assignment.** This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. The provisions of this Agreement shall inure to the benefit of and be binding upon the permitted successors and assigns of the parties hereto. Notwithstanding anything contained in the foregoing to the contrary, unless otherwise approved by the City, until completion of construction of the Project, the right of Developer to assign its rights, duties and obligations under this Agreement shall be limited and restricted to the following:

5.7.1 An assignment of the right of Developer to develop a specific component of the Project (such as the residential condominium units, office or hotel) to a reputable and financially capable developer that specializes in the financing, development and/or operation of such projects;

5.7.2 An assignment of all rights and obligations of Developer under this Agreement to a commercial real estate developer reasonably acceptable to and approved by the City; provided, however, that if Developer or a current principal of Developer retains a controlling ownership interest and management control in such commercial real estate developer, then, in that event, the City's prior approval shall not be required;

5.7.3 An assignment by Developer of its rights under this Agreement to a corporation, partnership, joint venture, limited liability company, trust or other legal entity which is controlled by, under common control with, or which controls Developer, or which is owned or controlled by a principal of Developer; or

5.7.4 A collateral assignment as security for one or more lenders in connection with Project financing.

Notwithstanding anything contained in the foregoing to the contrary, no assignment of this Agreement or any specific rights, obligations or duties of Developer under this Agreement shall release Developer from its obligations hereunder, unless specifically agreed to by the City.

**5.8 Waiver.** No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

**5.9 Severability.** In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

**5.10 Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

**5.11 Attorneys' Fees.** In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

**5.12 Schedules and Exhibits.** All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

**5.13 Recordation of Agreement.** This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after execution of this Agreement by the City.

**5.14 City Manager's Power to Consent.** The City authorizes and empowers the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

{Remainder of page intentionally left blank}

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be duly executed on or as of the day and year first above written.

ATTEST:

***“CITY”***

THE CITY OF TEMPE, an Arizona municipal corporation

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

By \_\_\_\_\_  
Mark W. Mitchell, Mayor

\_\_\_\_\_  
City Attorney

STATE OF ARIZONA        )  
  )  
COUNTY OF MARICOPA    )        ss

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2014, by Mark W. Mitchell, the Mayor of the City of Tempe.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

**“DEVELOPER”**

By: \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

STATE OF ARIZONA        )  
  )  
COUNTY OF MARICOPA    )        ss

The foregoing instrument was acknowledged before me this \_\_\_\_day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

**EXHIBIT A  
THE "PROPERTY"**

PARCEL NO. 1:

LOTS 1 TO 11, INCLUSIVE AND LOTS 14 AND 15, PLAT OF BLOCK 67 AND SUBDIVISION OF BLOCK 66, TEMPE, ACCORDING TO BOOK 8 OF MAPS, PAGE 1, RECORDS OF MARICOPA COUNTY, ARIZONA.

PARCEL NO. 2:

LOTS 12 AND 13, PLAT OF BLOCK 67 AND SUBDIVISION OF BLOCK 66, TEMPE, ACCORDING TO BOOK 8 OF MAPS, PAGE 1, RECORDS OF MARICOPA COUNTY, ARIZONA.

PARCEL NO. 3:

THE SOUTH 72 FEET OF THE EAST 137.5 FEET OF BLOCK 66, TEMPE, ACCORDING TO BOOK 2 OF MAPS, PAGE 26, RECORDS OF MARICOPA COUNTY, ARIZONA;

EXCEPT ALL OIL, GAS AND OTHER MINERAL RIGHTS IN OR UNDER SAID PROPERTY TOGETHER WITH THE EXCLUSIVE RIGHT TO USE SUCH PORTION OF SAID PROPERTY LYING MORE THAN 500 FEET BELOW THE SURFACE FOR THE EXTRACTION OF OIL, GAS AND MINERALS; HOWEVER, WITH NO RIGHTS OF SURFACE ENTRY WHATSOEVER AS RESERVED IN DEED RECORDED IN DOCKET 8063, PAGE 884, RECORDS OF MARICOPA COUNTY, ARIZONA.

PARCEL NO. 4:

THE NORTH 28 FEET OF THE SOUTH 100 FEET OF THE EAST 137.5 FEET OF BLOCK 66, TEMPE, ACCORDING TO BOOK 2 OF MAPS, PAGE 26, RECORDS OF MARICOPA COUNTY, ARIZONA;

EXCEPT ALL OIL, GAS AND OTHER MINERAL RIGHTS IN OR UNDER SAID PROPERTY TOGETHER WITH THE EXCLUSIVE RIGHT TO USE SUCH PORTION OF SAID PROPERTY LYING MORE THAN 500 FEET BELOW THE SURFACE FOR THE EXTRACTION OF OIL, GAS AND MINERALS; HOWEVER, WITH NO RIGHTS OF SURFACE ENTRY WHATSOEVER AS RESERVED IN DEED RECORDED IN DOCKET 8063, PAGE 884, RECORDS OF MARICOPA COUNTY, ARIZONA.

PARCEL NO. 5:

THOSE PORTIONS OF MAPLE AVENUE AND SECOND STREET ABANDONED BY ORDINANCE NO. 842 OF THE CITY OF TEMPE AND RECORDED IN DOCKET 13428, PAGE 487, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

THAT PORTION OF MAPLE AVENUE LYING NORTH OF THE CENTERLINE OF SECOND STREET AND SOUTH OF THE SOUTH RIGHT-OF-WAY LINE OF FIRST

STREET AS SHOWN ON MAP OF TEMPE, BOOK 2 OF MAPS, PAGE 26, RECORDS OF MARICOPA COUNTY, ARIZONA;

EXCEPT THE WEST HALF OF MAPLE AVENUE;

THAT PORTION OF SECOND STREET LYING WEST OF THE WEST RIGHT-OF-WAY LINE OF MILL AVENUE AND EAST OF THE CENTERLINE OF MAPLE AVENUE;

EXCEPT THE SOUTH HALF OF SECOND STREET.

PARCEL NO. 6:

THAT CERTAIN NORTH-SOUTH ALLEY IN BLOCK 66, TEMPE, ACCORDING TO BOOK 8 OF MAPS, PAGE 1, RECORDS OF MARICOPA COUNTY, ARIZONA, AS ABANDONED BY ORDINANCE NO. 95-09 OF THE CITY OF TEMPE AND RECORDED IN DOCUMENT NO. 95-163670;

EXCEPT AS TO ALL PARCELS ANY PORTION OF THE PROPERTY CONVEYED TO THE CITY OF TEMPE IN RECORDING NO. 98-0649301 MORE PARTICULARLY DESCRIBED AS FOLLOWS:

THOSE PORTIONS OF LOT 11, BLOCK 66, AS SHOWN ON THE PLAT OF TEMPE AS RECORDED IN BOOK 2 OF MAPS, PAGE 26 AND AMENDED IN BOOK 8 OF MAPS, PAGE 1, AND THE ADJACENT ABANDONED RIGHT-OF-WAY OF MAPLE AVENUE AS RECORDED IN DOCKET 13428, PAGE 487, RECORDS OF MARICOPA COUNTY, ARIZONA, LOCATED IN SECTION 15, TOWNSHIP 1 NORTH, RANGE 4 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHERLY RIGHT-OF-WAY LINE OF FIRST STREET AT THE NORTHEAST CORNER OF OFFICE PLAZA 222 AS RECORDED IN BOOK 236 OF MAPS, PAGE 48, RECORDS OF MARICOPA COUNTY, ARIZONA;

THENCE NORTH  $89^{\circ} 50' 54''$  EAST, A DISTANCE OF 142.31 FEET ALONG SAID SOUTHERLY RIGHT-OF-WAY LINE;

THENCE SOUTH  $83^{\circ} 16' 56''$  WEST, A DISTANCE OF 131.76 FEET TO A TANGENT CURVE;

THENCE SOUTHWESTERLY, A DISTANCE OF 11.46 FEET ALONG THE ARC OF SAID CURVE, BEING CONCAVE NORTHWESTERLY, HAVING A RADIUS OF 544.58 FEET, THROUGH A CENTRAL ANGLE OF  $01^{\circ} 12' 21''$  TO THE EAST LINE OF SAID OFFICE PLAZA 222;

THENCE NORTH  $00^{\circ} 13' 59''$  WEST, A DISTANCE OF 16.26 FEET ALONG SAID WEST LINE TO THE POINT OF BEGINNING.

DESCRIBED PROPERTY BEING LOCATED IN THE SOUTHWEST QUARTER OF SECTION 15, TOWNSHIP 1 NORTH, RANGE 4 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA AND COMPRISING AN AREA OF 109,293 SQUARE FEET OR 2.5090 ACRES MORE OR LESS.

TITLE REPORT NOTE:

INFORMATION ON THIS SURVEY IS FROM DATA PROVIDED BY A COMMITMENT FOR TITLE INSURANCE, TITLE NO. 2618582 BY CHICAGO TITLE INSURANCE COMPANY, DATED NOVEMBER 2, 2006 AT 7:30 A.M.

EXHIBIT B

Certificate of Completion

When recorded, return to

City of Tempe  
31 East Fifth Street  
Tempe, Arizona 85281  
Attention: City Clerk

CERTIFICATE OF COMPLETION

In accordance with the terms of the Development and Disposition Agreement dated \_\_\_\_\_, 2014, by and between the CITY OF TEMPE (CITY) and \_\_\_\_\_, and recorded \_\_\_\_\_ at Recorders No. \_\_\_\_\_, this Certificate of Completion is issued for the building located on the following described parcel of land:

Construction of improvements were initiated on or about \_\_\_\_\_, and were completed on or about \_\_\_\_\_, as evidenced by the Letter of Compliance attached as Exhibit A.

Dated: \_\_\_\_\_.

Respectfully,

\_\_\_\_\_  
Community Development Manager  
City of Tempe, Arizona

STATE OF ARIZONA        )  
  ) ss.  
COUNTY OF MARICOPA    )

The foregoing Certificate of Completion, consisting of two (2) pages, was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2014, by \_\_\_\_\_ the Community Development Manager of the City of Tempe, an Arizona municipal corporation, and that in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_

**Exhibit C**  
**Schedule of Performance**

PAD Approved by City Council	June 30, 2015
Obtain Foundation Permit	January 31, 2016
Obtain Certificate of Occupancy	December 31, 2018

***Exhibit D***  
Façade Conservation Easement

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

DEED OF CONSERVATION EASEMENT (FAÇADE)

THIS DEED OF CONSERVATION EASEMENT (FAÇADE) (the “Easement”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2014, by and between Hayden House Tempe LLC a Delaware limited liability company (the “Developer”), and the City of Tempe, a municipal corporation organized and existing under the laws of the State of Arizona, (the “City”).

RECITALS

A. The City is authorized under Arizona’s Uniform Conservation Act, Arizona Revised Statutes, Sections 33-271 through 276, inclusive (collectively, as and if amended, the “Act”) to accept conservation easements for conservation purposes or to preserve the historical, architectural, archeological or cultural aspects of real property.

B. The City is a municipal corporation whose responsibilities include the protection of the public interest in preserving architecturally significant structures within the City of Tempe.

C. The Developer is the owner in fee simple of that certain property located at 1 West Rio Salado Parkway, Tempe, Maricopa County, Arizona, which is more particularly described in ***Exhibit A*** attached hereto and made a part hereof (the “Project Property”), particularly the C.T. Hayden House (the “Structure”).

D. The Developer and the City recognize the historical, cultural or architectural value and significance of the Structure and have the common purpose of conserving and preserving the aforesaid value and significance of the Structures on the Project Property.

E. In order to effectuate the obligations of the Developer under that certain Development Agreement dated as of \_\_\_\_\_, 2014, the Developer desires to sell, grant, convey, transfer and assign to the City and the City, pursuant to the Act, desires to accept a conservation easement on the Structure.

## AGREEMENT

NOW, THEREFORE, in consideration of the City's agreement to pay the Developer \$10 and other good and valuable consideration, the Developer and the City hereby agree as follows:

1. Grant of Easement: The Developer does hereby irrevocably grant, convey, transfer and assign unto the City a "conservation easement," as defined under the Act, in perpetuity, in and to the Structure as depicted in ***Exhibit B*** and which covenants contained herein contribute to the public purpose of conserving and preserving the Structure and accomplishing the other objectives set forth herein.

2. Developer's Covenants: In furtherance of the conservation easement herein granted, the Developer hereby covenants and agrees with the City as follows:

2.1 Documentation of the Exterior Condition of the Structure. For the purpose of this easement, the exterior facades shall be depicted in an original set of photographs dated thirty (30) days following the execution of this Easement, (collectively, the "Photographs") and filed in the Office of the City of Tempe Historic Preservation Officer, or designated successor. The exterior condition and appearance of the Structure as depicted in the Photographs (collectively, the "Present Structure") is deemed to describe their external nature as of the date thereof.

2.2 Preservation and Maintenance of the Structure. Effective immediately, the Developer will preserve the Present Structure in its current location. The Developer will, at all times, maintain each of the Structure in a good and sound state of repair so as to prevent the deterioration of Structure or any portion thereof. Subject to the casualty provisions of Paragraph 4 below, this obligation to maintain shall require replacement, repair and reconstruction within a reasonable time whenever necessary to have the external nature of the facades of the Structure at all times appear to be the same as the Present Structure, or as redeveloped and reconstructed in the event Developer redevelops or reconstructs all or any portion of the Structure as contemplated by Section 2.3 below.

2.3 Redevelopment of Project Property. Notwithstanding the Developer's immediate preservation and maintenance obligations as stated in Section 2.2 above, Developer and the City acknowledge and agree that Developer may, in its sole and absolute discretion, and pursuant to properly approved Planned Area Development ("PAD") Applications, modify all or part of the Structure.

2.4 Maintenance of the Structural Elements. The Developer will maintain and repair the Structure as is required to ensure the structural soundness and the safety of the Structure.

2.5 Inspection. In order to periodically observe the Structure, representatives of the City shall have the right to enter the Property to inspect the exterior. This inspection will be made at a time mutually agreed upon by the Developer and the City.

2.6 Conveyance and Assignment. The City may convey, transfer and assign this Easement to a similar local, state or national organization whose purposes are to promote historic preservation, and which is a “qualified organization” under Section 170(h)(3) of the Internal Revenue Code of 1986, as amended, provided that any conveyance or assignment requires that the conservation purposes for which this Easement was granted will continue to be carried out. No such conveyance shall be deemed to impose any greater obligations on the Developer or any limitations on the Developer’s discretion and rights than is expressly stated in this Conservation Easement.

2.7 Insurance. The Developer, at his sole cost and expense, shall at all times (a) keep the Structure insured at their replacement cost value on an “all risk” basis to ensure complete restoration of the Structure in the event of loss or physical damage. Said property coverage policy shall contain provisions which ensure that the face amount of the policy is periodically adjusted for inflation, and the Developer shall provide a Certificate of Insurance to the City which contains reference to such provision; and (b) carry and maintain liability insurance in an amount reasonably satisfactory to the City to protect against injury to visitors or other persons on the property, and to provide a Certificate of Insurance to the City evidencing such insurance, and naming the City as an additional insured on the policy.

2.8 Visual Access. The Developer agrees not to substantially obstruct the opportunity of the general public to view the exterior architectural/archaeological features and exhibits of the ancient and historic context of the Property from publicly accessible areas such as public streets or public use easements.

3. Warranties and Representations of the Developer. The Developer hereby represents and warrants to the City as follows:

3.1 Information Furnished, True and Correct. All information given to the City by the Developer in order to induce the City to accept this Easement, including all information contained in this Easement, is true, correct and complete to the best of Developer’s knowledge, information and belief.

3.2 Legal, Valid and Binding. This Easement is in all respects, legal, valid and binding upon the Developer and enforceable in accordance with its terms, and grants to the City a direct, valid and enforceable conservation easement upon the Structure.

3.3 No Impairment of Conservation Easement. The Developer, for himself, his heirs, personal representatives, and assigns, has not reserved, and to his knowledge, no other person or entity has reserved, any rights, the exercise of which may impair the conservation easement granted herein.

4. Application of Insurance Proceeds. Subject to the insurance proceeds requirements of any recorded Deed of Trust or Mortgage applicable to the Property, in the event of damage or destruction of any of the Structures resulting from casualty, the Developer agrees to apply all available insurance proceeds and donations to the repair and reconstruction of the damaged Structures. In the event the City determines, in its reasonable discretion, after reviewing all bona

vide cost estimates in light of all available insurance proceeds and other monies available for such repair and reconstruction, that the damage to the Structures is of such magnitude and extent that repair and reconstruction of the damage would not be possible or practical, then the Developer may elect not to repair or reconstruct the damaged Structures. Notwithstanding the foregoing, in the event the City notifies the Developer in writing that the City has determined that repair and reconstruction of the damaged Structures is impossible or impractical and that the damaged Structures presents an imminent hazard to public safety, the Developer will at his sole cost and expense raze the damaged Structures and remove all debris, slabs and any other portions and parts of the damaged structures within the time period required by the City to protect the health, safety and welfare of the public, unless the Developer has commenced and is diligently pursuing repair or reconstruction of the damaged Structures. Upon razing of the damaged portion of the Structures, the City shall release any interest it has in the insurance proceeds for the damaged Structures. Nothing in this paragraph is intended to supersede or impair the rights to insurance proceeds of a lienholder pursuant to a recorded Deed of Trust or Mortgage applicable to the Property.

5. Indemnification. The Developer covenants that he shall pay, protect, indemnify, hold harmless and defend the City at the Developer's sole cost and expense from any and all liabilities, claims, attorneys' fees, judgments or expenses asserted against the City, its mayor, city council members, employees, agents or independent contractors, resulting from actions or claims of any nature arising out of the conveyance, possession, administration or exercise of rights under this Easement, except in such matters arising solely from the gross negligence of the City, its mayor, city council members, employees and agents.

5.1 Survival of Indemnification. For purposes of explanation of Paragraph 5 only, and without in any manner limiting the extent of the foregoing indemnification, the Developer and the City agree that the purpose of Paragraph 5 is to require the Developer to bear the expense of any claim made by any third party against the City, which arises because the City has an interest in the Property as a result of this Easement. The Developer will have no obligation to the City for any claims which may be asserted against the City as a direct result of the City's intentional misconduct or gross negligence.

6. Default/Remedy. In the event the Developer (a) fails to perform any obligation of the Developer set forth herein, or otherwise comply with any stipulation or restriction set forth herein, or (b) any representation or warranty of the Developer set forth herein, is determined by the City to have been materially untrue when made, in addition to any remedies now or hereafter provided by law and in equity, the City or its designee, following prior written notice to the Developer, may (i) institute suit(s) to enjoin such violation by ex parte, temporary, preliminary or permanent injunction, including prohibitory and or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance required under this Easement or (ii) enter upon the Property, correct any such violation, and hold the Developer responsible for the cost thereof, and such cost until repaid shall constitute a lien on the Property, or (iii) revoke the City's acceptance of this Easement by seeking judicial extinguishment in a court of competent jurisdiction on the grounds that the Developer's default renders impossible or impractical the continued use of the Property for conservation purposes as defined under the Act. In the event the Developer violates any of its obligations under this Easement, the Developer shall reimburse all reasonable court costs and attorneys' fees.

7. Waiver. The exercise by the City or its designee of any remedy hereunder shall not have the effect of waiving or limiting any other remedy and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

8. Effect and Interpretation. The following provisions shall govern the effectiveness and duration of this Easement:

8.1 Interpretation. Any rule of strict construction designed to limit the breadth of restriction on alienation or use of property shall not apply in the construction or interpretation of this Easement, and this Easement shall be interpreted broadly to affect the transfer of rights and restrictions on use herein contained.

8.2 Invalidity of the Act. This Easement is made pursuant to the Act as the same now exists or may hereafter be amended, but the invalidity of such Act or any part thereof, or the passage of any subsequent amendment thereto, shall not affect the validity and enforceability of this Easement according to its terms, it being the intent of the parties hereto to agree and to bind themselves, their successors, heirs and assigns, as applicable, during the Term hereof, whether this Easement be enforceable by reason of any statute, common law or private agreement either in existence now or at any time subsequent thereto.

8.3 Violation of Law. Nothing contained herein shall be interpreted to authorize or permit the Developer to violate any ordinance or regulation relating to building materials, construction methods or use, and the Developer agrees to comply with all applicable laws, including, without limitation, all building codes, zoning laws and all other laws related to the maintenance and demolition of historic property. In the event of any conflict between any such laws and the terms hereof, the Developer promptly shall notify the City of such conflict and shall cooperate with the City and the appropriate authorities to accommodate the purposes of both this Easement and such ordinance or regulation.

8.4 Amendments and Modifications. For purposes of furthering the preservation of the Structure and the other Property and the other purposes of this Easement, and to meet changing conditions, the Developer and the City are free to amend jointly the terms of this Easement in writing without notice to any party; provided, however, that no such amendment shall limit the terms or interfere with the conservation purposes of this Easement. Such amendment shall become effective upon recording the same among the land records of Maricopa County, Arizona, in the office of the County Recorder.

8.5 Recitals. The above Recitals are incorporated herein by this reference.

8.6 Time of the Essence. Time is of the essence in the performance of each and every term and condition of this Easement by the Developer.

8.7 Feminine and Masculine. For purposes of this Easement, the feminine shall include the masculine and the masculine shall include the feminine.

IN WITNESS WHEREOF, the Developer and the City executed this Easement on the date  
fist above written, which Easement shall be effective immediately upon such execution.

***“Developer”***

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

STATE OF ARIZONA        )  
  ) ss  
County of Maricopa        )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of  
\_\_\_\_\_, 2014 by \_\_\_\_\_ the  
\_\_\_\_\_ of \_\_\_\_\_

\_\_\_\_\_  
Notary Public

Notary Seal:

**ATTEST:**

CITY OF TEMPE, an Arizona municipal corporation

\_\_\_\_\_  
City Clerk

By \_\_\_\_\_  
Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

STATE OF ARIZONA        )  
  ) ss  
County of Maricopa        )

On this \_\_\_\_ day of \_\_\_\_\_, 2014 before me, the undersigned officer, personally appeared Mark W. Mitchell, who acknowledged himself to be Mayor of the City of Tempe, an Arizona Municipal corporation, and he, in such capacity, being authorized so to do, executed the forgoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

Notary Seal:

*Exhibit A*  
Of the  
Conservation Easement  
“Project Property”

(Legal Description of the Project Property)

***Exhibit B***  
Of the  
Conservation Easement

(This exhibit will be created after the modification and rehabilitation of the Structure.)

***Exhibit E***  
Airspace Conservation Easement

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

DEED OF CONSERVATION EASEMENT (AIRSPACE)

THIS DEED OF CONSERVATION EASEMENT (Airspace) (the “Easement”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2014, by and between \_\_\_\_\_, a \_\_\_\_\_ (the “Developer”), and the City of Tempe, a municipal corporation organized and existing under the laws of the State of Arizona, (the “City”).

RECITALS

A. The City is authorized under Arizona’s Uniform Conservation Act, Arizona Revised Statutes, Sections 33-271 through 276, inclusive (collectively, as and if amended, the “Act”) to accept conservation easements for conservation purposes or to preserve the historical, architectural, archeological or cultural aspects of real property.

B. The City is a municipal corporation whose responsibilities include the protection of the public interest in preserving architecturally significant structures within the City of Tempe.

C. The Developer is the owner in fee simple of that certain property located at 1 West Rio Salado Parkway, Tempe, Maricopa County, Arizona, which is more particularly described in ***Exhibit A*** attached hereto and made a part hereof (the “Project Property”), particularly the C.T. Hayden House (the “Structure”).

D. The Developer and the City recognize the historical, cultural or architectural value and significance of the Structure and have the common purpose of conserving and preserving the aforesaid value and significance of the Structures on the Project Property. The Structures are commonly known as Hayden House. The terms “Project Property” and “Hayden House” may be used interchangeably in this agreement.

E. To effectuate the obligations of the Developer under that certain Development Agreement dated as of \_\_\_\_\_, 2014 (the “Development Agreement”), the Developer desires to sell, grant, convey, transfer and assign to the City and the City, pursuant to the Act, desires to accept a conservation easement of the airspace above the Hayden House.

## AGREEMENT

NOW, THEREFORE, in consideration of the City's agreement to pay the Developer \$10 and other good and valuable consideration, the Developer and the City hereby agree as follows:

1. Grant of Easement: The Developer does hereby irrevocably grant, convey, transfer and assign unto the City a "conservation easement," as defined under the Act, in perpetuity, in and to the airspace above Hayden House as depicted in *Exhibit B*, measured from the top of any existing structure constituting Hayden House and extending upward to the plane of the Earth's atmosphere (the "Airspace"), and which covenants contained herein contribute to the public purpose of conserving and preserving Hayden House and accomplishing the other objectives set forth herein.

2. Developer's Covenants: In furtherance of the conservation easement herein granted, the Developer hereby covenants and agrees with the City as follows:

2.1 The Airspace shall remain open and free of any development except as shown on the PAD (as defined in the Development Agreement).

2.2 Inspection. In order to periodically observe the Structure, representatives of the City shall have the right to enter the Property to inspect the exterior. This inspection will be made at a time mutually agreed upon by the Developer and the City.

2.3 Conveyance and Assignment. The City may convey, transfer and assign this Easement to a similar local, state or national organization whose purposes are to promote historic preservation, and which is a "qualified organization" under Section 170(h)(3) of the Internal Revenue Code of 1986, as amended, provided that any conveyance or assignment requires that the conservation purposes for which this Easement was granted will continue to be carried out. No such conveyance shall be deemed to impose any greater obligations on the Developer or any limitations on the Developer's discretion and rights than is expressly stated in this Conservation Easement.

3. Warranties and Representations of the Developer. The Developer hereby represents and warrants to the City as follows:

3.1 Information Furnished, True and Correct. All information given to the City by the Developer in order to induce the City to accept this Easement, including all information contained in this Easement, is true, correct and complete to the best of Developer's knowledge, information and belief.

3.2 Legal, Valid and Binding. This Easement is in all respects, legal, valid and binding upon the Developer and enforceable in accordance with its terms, and grants to the City a direct, valid and enforceable conservation easement upon Hayden House.

3.3 No Impairment of Conservation Easement. The Developer, for himself, his heirs, personal representatives, and assigns, has not reserved, and to his knowledge, no other person or entity has reserved, any rights, the exercise of which may impair the conservation easement granted herein.

4. Application of Insurance Proceeds. Subject to the insurance proceeds requirements of any recorded Deed of Trust or Mortgage applicable to the Property, in the event of damage or destruction of any of the Structures resulting from casualty, the Developer agrees to apply all available insurance proceeds and donations to the repair and reconstruction of the damaged Structures. In the event the City determines, in its reasonable discretion, after reviewing all bona fide cost estimates in light of all available insurance proceeds and other monies available for such repair and reconstruction, that the damage to the Structures is of such magnitude and extent that repair and reconstruction of the damage would not be possible or practical, then the Developer may elect not to repair or reconstruct the damaged Structures. Notwithstanding the foregoing, in the event the City notifies the Developer in writing that the City has determined that repair and reconstruction of the damaged Structures is impossible or impractical and that the damaged Structures presents an imminent hazard to public safety, the Developer will at his sole cost and expense raze the damaged Structures and remove all debris, slabs and any other portions and parts of the damaged structures within the time period required by the City to protect the health, safety and welfare of the public, unless the Developer has commenced and is diligently pursuing repair or reconstruction of the damaged Structures. Upon razing of the damaged portion of the Structures, the City shall release any interest it has in the insurance proceeds for the damaged Structures. Nothing in this paragraph is intended to supersede or impair the rights to insurance proceeds of a lienholder pursuant to a recorded Deed of Trust or Mortgage applicable to the Property.

5. Indemnification. The Developer covenants that he shall pay, protect, indemnify, hold harmless and defend the City at the Developer's sole cost and expense from any and all liabilities, claims, attorneys' fees, judgments or expenses asserted against the City, its mayor, city council members, employees, agents or independent contractors, resulting from actions or claims of any nature arising out of the conveyance, possession, administration or exercise of rights under this Easement, except in such matters arising solely from the gross negligence of the City, its mayor, city council members, employees and agents.

5.1 Survival of Indemnification. For purposes of explanation of Paragraph 5 only, and without in any manner limiting the extent of the foregoing indemnification, the Developer and the City agree that the purpose of Paragraph 5 is to require the Developer to bear the expense of any claim made by any third party against the City, which arises because the City has an interest in the Property as a result of this Easement. The Developer will have no obligation to the City for any claims which may be asserted against the City as a direct result of the City's intentional misconduct or gross negligence.

6. Default/Remedy. In the event the Developer (a) fails to perform any obligation of the Developer set forth herein, or otherwise comply with any stipulation or restriction set forth herein, or (b) any representation or warranty of the Developer set forth herein, is determined by the City to have been materially untrue when made, in addition to any remedies now or hereafter provided by law and in equity, the City or its designee, following prior written notice to the

Developer, may (aa) institute suit(s) to enjoin such violation by ex parte, temporary, preliminary or permanent injunction, including prohibitory and or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance required under this Easement or (bb) enter upon the Property, correct any such violation, and hold the Developer responsible for the cost thereof, and such cost until repaid shall constitute a lien on the Property, or (cc) revoke the City's acceptance of this Easement by seeking judicial extinguishment in a court of competent jurisdiction on the grounds that the Developer's default renders impossible or impractical the continued use of the Property for conservation purposes as defined under the Act. In the event the Developer violates any of its obligations under this Easement, the Developer shall reimburse all reasonable court costs and attorneys' fees.

7. Waiver. The exercise by the City or its designee of any remedy hereunder shall not have the effect of waiving or limiting any other remedy and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

8. Effect and Interpretation. The following provisions shall govern the effectiveness and duration of this Easement:

8.1 Interpretation. Any rule of strict construction designed to limit the breadth of restriction on alienation or use of property shall not apply in the construction or interpretation of this Easement, and this Easement shall be interpreted broadly to affect the transfer of rights and restrictions on use herein contained.

8.2 Invalidity of the Act. This Easement is made pursuant to the Act as the same now exists or may hereafter be amended, but the invalidity of such Act or any part thereof, or the passage of any subsequent amendment thereto, shall not affect the validity and enforceability of this Easement according to its terms, it being the intent of the parties hereto to agree and to bind themselves, their successors, heirs and assigns, as applicable, during the Term hereof, whether this Easement be enforceable by reason of any statute, common law or private agreement either in existence now or at any time subsequent thereto.

8.3 Violation of Law. Nothing contained herein shall be interpreted to authorize or permit the Developer to violate any ordinance or regulation relating to building materials, construction methods or use, and the Developer agrees to comply with all applicable laws, including, without limitation, all building codes, zoning laws and all other laws related to the maintenance and demolition of historic property. In the event of any conflict between any such laws and the terms hereof, the Developer promptly shall notify the City of such conflict and shall cooperate with the City and the appropriate authorities to accommodate the purposes of both this Easement and such ordinance or regulation.

8.4 Amendments and Modifications. For purposes of furthering the preservation of Hayden House, the Structure and the other Property and the other purposes of this Easement, and to meet changing conditions, the Developer and the City are free to amend jointly the terms of this Easement in writing without notice to any party; provided, however, that no such amendment shall limit the terms or interfere with the conservation purposes of this Easement.

Such amendment shall become effective upon recording the same among the land records of Maricopa County, Arizona, in the office of the County Recorder.

8.5 Recitals. The above Recitals are incorporated herein by this reference.

8.6 Time of the Essence. Time is of the essence in the performance of each and every term and condition of this Easement by the Developer.

8.7 Feminine and Masculine. For purposes of this Easement, the feminine shall include the masculine and the masculine shall include the feminine.

IN WITNESS WHEREOF, the Developer and the City executed this Easement on the date first above written, which Easement shall be effective immediately upon such execution.

***“Developer”***

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

STATE OF ARIZONA        )  
  ) ss  
County of Maricopa        )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2014 by \_\_\_\_\_ the \_\_\_\_\_ of \_\_\_\_\_

\_\_\_\_\_  
Notary Public

Notary Seal:

**ATTEST:**

CITY OF TEMPE, an Arizona municipal corporation

\_\_\_\_\_  
City Clerk

By \_\_\_\_\_  
Mark W. Mitchell, Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

STATE OF ARIZONA        )  
  ) ss  
County of Maricopa        )

On this \_\_\_\_ day of \_\_\_\_\_, 2014 before me, the undersigned officer, personally appeared Mark W. Mitchell, who acknowledged himself to be Mayor of the City of Tempe, an Arizona municipal corporation, and he, in such capacity, being authorized so to do, executed the forgoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

Notary Seal:

*Exhibit A*  
Of the  
Airspace Conservation Easement  
“Project Property”

(Legal Description of the Hayden House property)

***Exhibit B***  
Of the  
Airspace Conservation Easement

“Hayden House”

(This exhibit will be created after the modification and rehabilitation of the Hayden House structure.)

**EXHIBIT F**  
**Form of Parking License Agreement**

When recorded, return to:

City of Tempe  
31 East Fifth Street  
Tempe, Arizona 85281  
Attention: City Clerk

**PARKING USE LICENSE  
AGREEMENT**

**THIS PARKING USE LICENSE AGREEMENT** (this “Agreement”) is entered into between the CITY OF TEMPE, an Arizona municipal corporation and a political subdivision of the State of Arizona (the “Licensee”), and \_\_\_\_\_, LLC, an Arizona limited liability company (“Licensor”), this \_\_\_\_ day of \_\_\_\_\_, 2014.

**RECITALS**

A. This Agreement is entered pursuant to Section 3.9 of that certain Development Agreement (the “Development Agreement”) dated \_\_\_\_\_, 2014 and recorded \_\_\_\_\_, 2014 at Recorder’s No. 2014-\_\_\_\_\_, records of Maricopa County, Arizona; and

B. The initial capitalized terms and phrases used in this Agreement shall have the meanings ascribed thereto in the Development Agreement unless otherwise specifically defined herein.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as:

**AGREEMENT**

1. Definitions. The following initial capitalized terms used in this Agreement shall have the meanings hereinafter set forth:

1.1 **“Licensee”** shall mean CITY OF TEMPE, an Arizona municipal corporation and a political subdivision of the State of Arizona, its permitted successors and assigns.

1.2 **“Licensee Use Periods”** shall mean (a) the hours between 6:00 p.m. and 6:00 a.m. on every day that is not a weekend or holiday, and (b) the hours between 6:00 p.m. on Friday (or the day preceding any day that is not a business day) and 6:00 a.m. on the following Monday (or next succeeding business day).

1.3 **“Licensor”** shall initially mean \_\_\_\_\_, LLC, an Arizona limited liability company.

1.4 **“Licensor Exclusive Use Period”** shall mean all hours between 6:00 a.m. and 6:00 p.m. on every business day.

1.5 **“Licensor’s Permitted Users”** shall mean Licensor’s tenants and subtenants, and their respective employees, agents, customers and invitees, and all other persons who are authorized by Licensor to use the Parking Facility.

1.6 **“Parking Facility”** shall mean the \_\_\_\_\_ story approximately \_\_\_\_\_ space parking garage located on the real property legally described on *Exhibit A* attached hereto (the “Property”); provided, however, that only 50 parking spaces in the Parking Facility will be subject to this Agreement.

2. Grant of License. Licensor hereby grants to Licensee a non-exclusive license to use the Parking Facility during all Licensee Use Periods, subject to the terms and conditions of this Agreement, including, without limitation the rights reserved by Licensor to any exclusive parking within the Parking Facility during the Licensor Exclusive Use Period, and the Licensor Exclusive Use Period may be extended so long as Licensor’s vehicles have entered the Parking Facility during the Licensor Exclusive Use Period. In addition, Licensee shall have the right to pedestrian ingress and egress to and from the Parking Facility and all adjacent public or private pedestrian thoroughfares over and across the Property as may be designated for such use from time to time by Licensor.

3. Operation and Maintenance. During the term of this Agreement, Licensor or an independent parking operator shall operate and maintain the Parking Facility, subject to the terms and conditions of this Agreement, in a manner consistent with normal and customary practices for similar commercial parking facilities in Tempe, Arizona. Licensee and its designees will also have no responsibility or liability for paying for operation, repairs, taxes, or any other expenses of operating the Parking Facility.

At its sole cost and expense, Licensor shall maintain the Parking Facility and the parking spaces (including striping) in good condition, ordinary wear and tear expected, such that the Parking Facility shall be safe for and passable by motor vehicles and pedestrians. Licensor shall provide at Licensor’s sole expense electricity and lighting for the Parking Facility to the extent the same are currently being provided to similar parking facilities within the City of Tempe. Except as otherwise provided herein, Licensor shall, at its sole cost and expense, operate and maintain the Parking Facility, subject to the terms and conditions of this Agreement, in a manner consistent with normal and customary practices for similar parking facilities within the City of Tempe. In the exercise of its duties, Licensor may, without limitation, (a) enter into contracts with professional managers having experience with similar properties for the day-to-day operation and

maintenance of the Parking Facility, (b) establish and enforce reasonable rules and regulations governing the use of all parking spaces within the Parking Facility and all appurtenant facilities used in connection therewith, (c) reasonably determine and enforce the manner in which the Parking Facility (and all appurtenant facilities) shall be operated, (d) evaluate and implement appropriate security measures, and (e) obtain and maintain appropriate amounts of liability insurance and replacement cost casualty loss insurance with insurance companies licensed to do business in Arizona. Licensor's obligation to operate and maintain the Parking Facility is subject to acts of God, strikes, labor and materials unavailability or shortages, government delays or orders, war, terrorism, inclement weather or other acts or events beyond the reasonable control of Licensor ("force majeure"). Licensee and its designees shall adhere to and comply with all rules, regulations and policies adopted by Licensor from time to time concerning use or operation of the Parking Facility, and all appurtenant facilities.

4. Capital Improvements, Alterations and Modifications to Parking Facility. Licensor shall have the right, from time to time during the term of this Agreement, to make capital improvements and/or alterations and modifications to the Parking Facility or any components thereof at its sole expense, so long as Licensee's license rights within the Parking Facility under this Agreement are not affected thereby. Notwithstanding the foregoing, Licensor shall have the right to temporarily close portions of the Parking Facility in connection with the construction of any such improvements, alterations or modifications for periods not exceeding ninety (90) consecutive days or affecting more than ten percent (10%) of the parking spaces within the Parking Facility or five percent (5%) of the Parking Spaces at any one time.

5. Licensor Permitted Usage. In addition to the right to use the Parking Facility during the Licensor Exclusive Use Period, Licensor and Licensor's Permitted Users shall have the right to use the Parking Facility during any Licensee Use Periods without cost or charge; provided, however, that Licensor shall be charged for all Excess Usage at hourly parking rates equal to the lesser of (a) the rate then charged by Licensee to all other users during the Licensee Use Periods, or (b) a rate which is equal to those rates then charged in similar parking facilities in the downtown Tempe area. Such credit shall be determined each calendar month during the term of this Agreement by multiplying the applicable hourly parking fee then charged by Licensee, as limited pursuant to the initial sentence of this Section 5, by the number of hours of Excess Usage. Licensor shall, at its expense, install such equipment or initiate such monitoring and control procedures as may be reasonably required in order to determine on a daily basis the hours of Excess Usage of the Parking Facility by Licensor's Permitted Users. Licensor shall also have the right to designate and mark a reasonable number of parking spaces in the Parking Facility as "Reserved" and/or "Visitor" parking during the periods of time that Licensor has exclusive use of such Parking Facility pursuant and subject to the terms and conditions hereof. Licensee shall not cover over or mask any such designations during the Licensee Use Periods without the prior written approval of Licensor.

6. Revenue. Licensor shall be entitled to retain all revenues from the use of the Parking Facility during the Licensor Exclusive Use Period. Licensee shall be entitled to retain all revenues from the use of the Parking Facility during all Licensee Use Periods. Except as set forth in the preceding sentence, Licensee shall not be entitled to any revenue derived from the use of the Parking Facility.

7. Sublicensing; Assignment. Licensor may sublicense any or all of the parking spaces during the Licensor Exclusive Use Period and Licensee may sublicense any or all of the parking spaces during the Licensee Use Period. If a party sublicenses its parking spaces pursuant to this Section 7, such sublicensing party shall diligently enforce the terms and conditions of any such sublicense. Each party shall deliver written notice to the other party of any sublicense of parking spaces. Such notice shall set forth the name of the sublicensee and the number of parking spaces and permitted parking times sublicensed to any such sublicensee.

8. Term. The term of this Agreement shall commence immediately upon the date both parties have executed this Agreement and shall continue thereafter in full force and effect for a term of twenty (20) years (the "Term") unless otherwise agreed in writing by the parties hereto.

9. Damage and Destruction. If, at any time during the term of this Agreement any portion of the Parking Facility is damaged or destroyed as a result of an insured casualty then, in that event, Licensor shall cause such portions of the Parking Facility to be reconstructed, rebuilt, or restored, as soon as reasonably possible thereafter, utilizing the proceeds of all available insurance; provided, however, that Licensor shall not be required to expend funds to rebuild, reconstruct, or restore such damaged portions of the Parking Facility beyond the proceeds of the insurance received as a result of such damage or destruction. All insurance proceeds for property damage to the Parking Facility shall be paid to Licensor for the purpose of repairing any partial or complete damage to or destruction of the Parking Facility. Licensor and Licensee each hereby waive all rights of recovery against the other, and their respective tenants, subtenants, sublicensees, assignees, agents and contractors, to the extent of the receipt of insurance proceeds from any insurance policy in force at the time of the damage or destruction to the Parking Facility.

10. Condemnation. If the whole or any part of the Parking Facility shall be taken or condemned by any competent authority for any public use or purpose during the term of this Agreement (a "Condemnation"), then this Agreement shall terminate with respect to the part of the Parking Facility so taken. Licensor reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or damages based upon loss, damage or injury to its interest in the Parking Facility. Licensee, for itself, its successors and assigns, including, without limitation, any sublicensees, hereby waives and otherwise assigns to Licensor all claims, awards and entitlements relating to the Parking Facility arising from such Condemnation, including, without limitation, any claim for loss of its interest as Licensee hereunder.

11. Default; Remedies. It shall be a default if either party fails to perform any of its obligations hereunder within any time period required for such performance, and such failure is not cured within thirty (30) days after receipt of written notice from the other party. In the event of a default, the non-defaulting party shall have all rights and remedies available at law or in equity. In addition, the non-defaulting party shall have the right to terminate this Agreement immediately upon written notice to the defaulting party. If Licensee is the defaulting party and Licensor elects to terminate this Agreement, then all of Licensee's rights and the rights of any sublicensee or assignee of Licensee under this Agreement shall immediately terminate, and Licensee and its sublicensees or assignees shall have no further right to (a) use the Parking Facility or any portion thereof, or (b) collect any revenues allocated thereto after the date of termination.



If to Licensor:

With a copy to:

or to such other street address as may be designated by the respective parties in writing from time to time.

14.2 Time of Essence. Time is of the essence of each and every provision of this Agreement.

14.3 Attorneys' Fees. In the event any action, suit or proceeding is brought by any party to enforce compliance with this Agreement, to exercise any rights or remedies under this Agreement or to declare the rights of the parties to this Agreement, the party prevailing in such action shall be entitled to receive from the non-prevailing party all costs and expenses of such action, suit or proceeding, together with such sum as the court, and not the jury, may adjudge as reasonable attorneys' fees.

14.4 No Third-Party Beneficiaries. Except as otherwise specifically set forth in this Agreement, no person or entity shall be a third-party beneficiary to this Agreement.

14.5 Further Assurances. Each party hereby agrees to perform such further acts and to execute and deliver such additional agreements, documents, acknowledgments and instruments as the other party may reasonably require to consummate, evidence, confirm, or carry out the transactions contemplated by this Agreement.

14.6 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

14.7 Force Majeure. In the event that performance of any non-monetary obligation hereunder by either party hereto shall be delayed as a result of a force majeure event, such as war, insurrection, acts of God or any other causes beyond the reasonable control or without the fault of the party claiming an extension of time to perform, such event shall operate to extend the time required for the performance of such obligation for the period of such force majeure event.

14.8 Relationship of Parties. No partnership, joint venture or other business relationship is established between the parties to this Agreement. Neither party to this Agreement shall be liable for any acts, omissions or negligence on the part of the other party, its employees, agents, independent contractors, licensees and invitees resulting in either personal injury or property damages to any person.

14.9 Consents and Approvals. Wherever this Agreement requires the consent or approval of a party to any act, document, use or other matter, such consent or approval may be

given or denied by such party in its reasonable discretion, unless this Agreement expressly provides otherwise.

14.10 Successors and Assigns. This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

14.11 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute an original and all of which together shall constitute one and the same instrument.

14.12 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, covenant or condition herein contained.

14.13 Amendment. This Agreement or any provision hereof may not be waived, modified, amended, discharged or terminated except by an instrument in writing signed by Licensee, on the one hand, and Licensor or its successors and assigns, on the other hand, and in no event shall the consent of any sublicensee be necessary.

{Signature Pages Follow}



\_\_\_\_\_,  
a \_\_\_\_\_ limited liability company

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF ARIZONA     )  
  ) ss.  
COUNTY OF MARICOPA )

On this \_\_\_\_ day of \_\_\_\_\_, 2014, before me, the undersigned officer,  
personally appeared \_\_\_\_\_, who  
acknowledged him/herself to be the \_\_\_\_\_ of \_\_\_\_\_  
\_\_\_\_\_, a \_\_\_\_\_ limited liability company:

\_\_\_\_\_ whom I know personally;  
\_\_\_\_\_ whose identity was proven to me on the oath of  
\_\_\_\_\_, a credible  
witness by me duly sworn;  
\_\_\_\_\_ whose identity I verified on the basis of his/her

\_\_\_\_\_,  
and s/he, in such capacity, being authorized so to do, executed the foregoing instrument for the  
purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

\_\_\_\_\_  
Notary Public

*Exhibit A*  
*Of the Parking License*

Legal Description of the Property

**Exhibit G**  
**Form of Pathway Easement**

WHEN RECORDED RETURN TO:

CITY OF TEMPE BASKET

---

NON-EXCLUSIVE EASEMENT

For the consideration of One Dollar (\$1.00) and other valuable considerations, \_\_\_\_\_, LLC, an Arizona limited liability company (“Grantor”), hereby grants to the CITY OF TEMPE, a municipal corporation, organized and existing under and by virtue of the laws of the State of Arizona (“Grantee”), a perpetual non-exclusive easement to install, operate, maintain, repair and replace a path for pedestrian and bicycle use, lighting, landscaping, and other appurtenances over, under, through and across the following real property (hereinafter called the “easement area”):

SEE EXHIBIT “A” ATTACHED HERETO AND BY  
REFERENCE INCORPORATED HEREIN

together with the right of ingress and egress over, under and across the easement area to permit the operation and maintenance of said bikepath and facilities.

THE FOREGOING EASEMENT GRANT IS SUBJECT TO AND UPON THE FOLLOWING TERMS AND CONDITIONS, ALL OF WHICH GRANTEE AGREES TO BY ACCEPTANCE HEREOF.

Grantee shall exercise its rights hereunder in a manner so as not to damage Grantor’s real property or any property or improvements that may at any time be thereon.

Grantor reserves the right to use, occupy, and improve (including the right to permit others to use, occupy or improve) the easement area for any and all purposes not inconsistent with the rights granted herein.

Grantee shall indemnify and hold Grantor harmless for, from and against any and all claims, damages, losses, costs, suits, liabilities and expenses (including reasonable attorneys’ fees) that may be brought or made against or incurred by Grantor on account of or arising out of Grantee’s use and enjoyment of the easement privileges herein granted or any violation or breach by Grantee of the terms hereof, including as a result of any damages, injuries or death to persons or property.

In the event the easement privileges herein granted are at any time abandoned and cease to be used for the purpose herein granted, all rights herein granted shall automatically cease and revert to Grantor, its successors and assigns.

Dated as of the \_\_\_\_ day of \_\_\_\_\_, 2014.

Grantor:

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF ARIZONA            )  
  )    ss.  
County of \_\_\_\_\_)

This Non-Exclusive Easement dated \_\_\_\_\_, 20\_\_\_\_, consisting of three (3) pages (including all signature pages, exhibits, schedules and other pages appended or attached to the aforesaid document), was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, as the \_\_\_\_\_ of \_\_\_\_\_, LLC, an Arizona limited liability company, on behalf of such entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

**Exhibit H**  
**Form of Maintenance Agreement**

WHEN RECORDED RETURN TO:

City of Tempe

**CITY OF TEMPE**

**PATHWAY MAINTENANCE AGREEMENT**

This Pathway Maintenance Agreement (“Agreement”) is made to be effective as of the \_\_\_\_ day of \_\_\_\_\_, 2014, by and among THE CITY OF TEMPE, a municipal corporation organized under the laws of the State of Arizona (“Tempe” or “City”), and \_\_\_\_\_, LLC, an Arizona limited liability company (“Developer”).

**RECITALS:**

A. City and Developer are parties to that certain Development and Disposition Agreement dated as of \_\_\_\_\_ (the “DDA”), pursuant to which Developer (i) granted City an easement over the real property legally described on Exhibit A hereto for use as a pedestrian and bicycle pathway (“Pathway Easement”), and (ii) agreed to construct and maintain the pedestrian and bicycle pathway (the “Pathway”).

B. Developer has completed construction of the Pathway, and such construction has been approved and accepted by City, and the parties now desire to set forth herein their agreements and understandings with respect to maintenance of the Pathway.

**AGREEMENT:**

NOW THEREFORE, in consideration of the mutual covenants hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City and Developer hereby agree as follows:

1. Pathway Construction. Developer has constructed the Pathway in a good and workmanlike manner in accordance with the construction drawings for the Project, as submitted to and approved by City on \_\_\_\_\_ (“Approved Plans”).

2. Maintenance. On completion of the Pathway, City issued a Letter of Acceptance evidencing that the installation of thereof has been completed as of the date set forth therein (“Completion Date”). Developer shall and hereby does assume full responsibility for repairing, replacing and maintaining the Pathway in good condition and repair in a condition adequate for the normal operation and use thereof, and consistent with

(i) applicable City of Tempe standards as in effect at the Completion Date, and (ii) the Approved Plans.

3. Failure to Maintain. While this Agreement is in effect, if Developer fails to perform its obligations hereunder, and City has actual notice of such conditions, City may, at its sole discretion, without being under any obligation to do so, perform or have performed any and all such work as City, in its reasonable discretion, deems necessary to maintain or restore the Pathway to good condition. City may take immediate action if it deems that the condition presents a risk to the public safety or welfare; otherwise, City shall notice a default under Section 5 and allow Developer the opportunity to cure. If Tempe performs any such work, these actions do not alter, diminish or constitute a waiver with respect to the obligations of Developer pursuant to this Agreement. Tempe shall present to Developer any bills for reasonable costs actually incurred in connection with such maintenance and repair, and Developer shall pay the amount of such bills within thirty (30) days of presentation. Any amounts not paid when due shall bear interest at the rate of 10% per annum from the date of presentation until paid in full, compounded daily.

4. Indemnification. Developer shall indemnify, defend and hold harmless Tempe, its agents, officers, officials, and employees (“City Parties”), from and against all claims, damages, losses, and expenses (included but not limited to attorney’s fees, court costs, and the costs of appellate proceedings), arising out of, or alleged to have resulted from the negligent acts, errors, mistakes, omissions, work, services, or professional services of Developer, its agents, employees, or any other person (not the City) for whose acts, errors, mistakes, omissions, work, services, or professional services Developer may be legally liable in the performance of this Agreement. Developer’s duty to hold harmless and indemnify the City Parties shall arise in connection with any claim for damage, loss or expenses that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting therefrom, caused by any negligent acts, errors, mistakes, omissions, work, services, or professional services in the performance of this Agreement by Developer or any employee of Developer, or any other person (not the City) for whose negligent acts, errors, mistakes, omissions, work, or services Developer may be legally liable in the performance of this Agreement. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of indemnity in this paragraph.

5. Term; Termination; Default.

a. This Agreement shall remain in effect for so long as the Pathway Easement remains in effect, or unless otherwise agreed in writing by the parties hereto, or unless sooner terminated as provided herein.

b. It shall constitute a default hereunder if Developer fails to perform any obligation required to be performed by it hereunder, and such failure continues for a period of ten (10) calendar days after written notice thereof from the City, specifying in reasonable detail the nature of such non-performance. No default will be deemed to exist if the cure is commenced within the cure period and diligently pursued to completion within thirty (30) calendar days after the written notice is issued or such longer period as City and Developer agree is reasonable in the circumstances.

6. Insurance.

a. After the Pathway Completion Date and for the duration of the effective term of this Agreement, Developer, at its own expense shall maintain in full force a policy or policies of commercial general liability insurance against claims for bodily injury, personal injury, death, and property damage (including contractual liability) occurring on or about the Easement Area. The insurance must be maintained by an insurer licensed to do business in Arizona, name City as an additional insured, and remain at all times in effect without cancellation unless 30 days' notice of cancellation is provided to the insured and all additional insureds. Developer will be solely responsible for paying all real estate taxes on the Easement Area. Said insurance shall be primary to the City's self-insurance or any other insurance policy coverage applicable to the City.

b. Developer shall provide Tempe with certificates of insurance or other evidence of insurance policies maintained by it pursuant to this Agreement and certificates of insurance relating thereto issued by the insurers.

c. Insurance limits shall be periodically reviewed by City's Risk Manager to ensure coverage based on market and risk requirements throughout the effective term of this Agreement. All insurance required hereunder shall be primary to the City's self-insurance or any other insurance policy coverage applicable to the City. The certificate of insurance shall be issued and shall name the City, its employees, officers, agents and volunteers as an additional insured and shall provide coverage for claims made after the effective term of the Agreement for occurrences during the effective term of this Agreement. All such policies shall name the City of Tempe, its employees, agents, officers and volunteers, as additional insureds and shall state that they may not be cancelled prior to expiration without thirty (30) days prior written notice to the City.

7. Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official, or employee of Tempe shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to A.R.S. § 38-511.

8. Governing Law. This Agreement shall be governed by, construed and enforced under the laws of the State of Arizona.

9. Notices. Notices will be in writing and will be given by personal delivery, or certified mail, return receipt requested. Notices will be delivered or addressed to the applicable party at the addresses set forth below or at such other address or number as a party may designate in writing:

To Developer: \_\_\_\_\_, LLC  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

With a copy to:

To Tempe: City of Tempe  
31 East 5th Street  
Tempe, Arizona 85281  
Attention: City Manager's Office

With a copy to: City of Tempe  
31 East 5th Street  
Tempe, Arizona 85281  
Attention: City Attorney's Office

The date notice is deemed to have been given, received and become effective will be (i) the date on which the notice is delivered or refused, if notice is given by personal delivery or certified mail; or (ii) the date of actual receipt.

10. Amendments; Entire Agreement. This Agreement may only be revoked or amended only by an instrument in writing reciting such amendment, bearing the signatures of the parties to this Agreement in effect at that time, or their successors in interest. This Agreement and the attached Exhibit is the entire agreement between the parties pertaining to the subject matter hereof. All prior and contemporaneous agreements, representations and undertakings of the parties, oral or written, are hereby superseded and merged herein.

11. Counterparts. This Agreement may be executed in counterparts. Each such counterpart hereof shall be deemed an original, but all counterparts shall constitute but one agreement.

12. Benefit and Binding Effect. This Agreement and all provisions hereunder shall inure to the benefit of, and be binding upon, the parties hereto and their respective successors and assigns. The benefits and burdens of this Agreement shall be binding upon the parties hereto, their successors and assigns, and constitute covenants running with the land.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in the manner and by the individuals herein indicated.

**TEMPE:**

City of Tempe, Arizona, a municipal corporation

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

\_\_\_\_\_ Andy Goh, City Engineer

STATE OF ARIZONA        )  
  ) ss.  
County of Maricopa        )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
  
\_\_\_\_\_

**LLC:**

\_\_\_\_\_, LLC, an  
Arizona limited liability company

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_

STATE OF ARIZONA            )  
  )    ss.  
County of \_\_\_\_\_)

This Walkway Maintenance Agreement dated \_\_\_\_\_, 20\_\_\_\_, consisting of six (6) pages (including all signature pages, exhibits, schedules and other pages appended or attached to the aforesaid document), was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, as the \_\_\_\_\_ LLC, an Arizona limited liability company, on behalf of such entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_

**EXHIBIT I**  
**DEED**

When recorded, return to:  
City of Tempe Basket

EXEMPT PER  
A.R.S. §11-1134A.3

SPECIAL WARRANTY DEED

For and in consideration of Ten Dollars (\$10.00) and other good and valuable consideration, \_\_\_\_\_, a \_\_\_\_\_ (“Grantor”) does hereby sell and convey to CITY OF TEMPE, an Arizona municipal corporation, the following described real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto (“Property”):

See Exhibit A attached hereto and by this reference incorporated herein.

SUBJECT TO all taxes and assessments, reservations, any and all easements, rights-of-way, covenants, conditions, restrictions, liens and encumbrances of record or that would be shown by an accurate survey. Grantor does warrant and agree to defend the title against its acts and none other.

DATED this \_\_\_ day of \_\_\_\_\_, 2014.

[insert signature block]

STATE OF ARIZONA        )  
  ) ss.  
County of Maricopa        )

The foregoing instrument was acknowledged before me this \_\_\_ day of \_\_\_\_\_, 2014, by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

EXHIBIT A  
To Special Warranty Deed

Property

**EXHIBIT J**  
LAND AND IMPROVEMENTS LEASE

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

**LAND AND IMPROVEMENTS LEASE**

THIS LAND AND IMPROVEMENTS LEASE (“**Lease**”) is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_ (the “Effective Date”) by and between the **CITY OF TEMPE**, a municipal corporation (“**Landlord**”), and \_\_\_\_\_ (“**Tenant**”).

**RECITALS**

- A. Landlord has title of record to the real property as described in *Exhibit A* hereto (the “**Land**”), together with all rights and privileges appurtenant thereto and all improvements and future additions thereto or alterations thereof (collectively, the “**Premises**”).
- B. The Premises are located in a single central business district in a redevelopment area established pursuant to Title 36, Chapter 12, Article 3 of Arizona Revised Statutes (A.R.S. §§36-1471 et seq.). Tenant’s construction of the Premises resulted in an increase in property value of at least one hundred percent.
- C. The Premises will be subject to the Government Property Lease Excise Tax as provided for under A.R.S. §42-6203 (A).

**AGREEMENT**

For and in consideration of the rental and of the covenants and agreements hereinafter set forth to be kept and performed by Tenant, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord the Premises for the term, at the rental and subject to and upon all of the terms, covenants and agreements hereinafter set forth.

1. Quiet Enjoyment. Landlord covenants and agrees with Tenant that conditioned upon Tenant’s paying the Total Rent (defined in Section 3) herein provided and performing and fulfilling, in all material respects, the covenants, agreements, conditions and provisions herein to be kept, observed or performed by Tenant (taking into account any applicable cure period), Tenant may at all times during the term hereof peaceably, quietly and exclusively have, hold and enjoy the Premises.

2. Term. The term of this Lease shall be for 8 years, commencing on the Effective Date and ending, at midnight on the 8th anniversary of the Effective Date, subject to earlier termination at Tenant's option, as provided herein.

3. Rental. Tenant covenants to pay to Landlord as rental for the Premises the sum of \$10.00 per year on the Effective Date and every anniversary thereof (the "Total Rent"). Tenant shall have the right to prepay the \$80.00 Total Rent for the entire term of this Lease. The consideration for this Lease includes, without limitation: Tenant's payment of the entire cost of construction of the improvements constituting the Premises, Tenant's performance, in all material respects, of the covenants and obligations under this Lease and Tenant's contribution toward fulfillment of Landlord's policy and desire to promote development within a redevelopment area, to encourage the creation of jobs within the City of Tempe, and to enhance tax revenues resulting from the operation of businesses on the Premises, including transaction privilege taxes. Tenant, at its option and without prejudice to its right to terminate this Lease as provided herein, may prepay the Total Rent for the entire lease term, but upon any early termination of this Lease, Landlord shall not be obligated to refund any portion of the prepaid Total Rent.

4. Leasehold Mortgage of Premises.

4.1 Subject to the applicable provisions of this Lease, Tenant is hereby given the absolute right without the Landlord's consent to create a security interest in Tenant's leasehold interest under this Lease (and in any subleases and the rents, income and profits therefrom) by mortgage, deed of trust, collateral assignment or otherwise. Any such security interest shall be referred to herein as a "Leasehold Mortgage," and the holder of a Leasehold Mortgage shall be referred to herein as a "Leasehold Mortgagee." In addition, if landlord holds title to the premises subject to the lien of a fee deed of trust executed by tenant as trustor prior to the acquisition of the premises by landlord, then (i) such fee deed of trust shall be deemed to be a leasehold mortgage for the purposes of this lease, (ii) the beneficiary under such fee deed of trust shall be deemed to be a leasehold mortgagee for the purposes of this lease and shall be entitled to all of the rights and privileges of a leasehold mortgagee under the terms and provisions of this lease, (iii) such fee deed of trust shall be deemed to be the most senior leasehold mortgage, and (iv) the beneficiary under such fee deed of trust shall be deemed to have satisfied the notice requirements under section 17.2.

4.2 No liability for the performance of Tenant's covenants and agreements hereunder shall attach to or be imposed upon any Leasehold Mortgagee, unless such Leasehold Mortgagee forecloses its interest and becomes the Tenant hereunder, following which the liability shall attach only during the term of ownership of the leasehold estate by said Leasehold Mortgagee.

5. Taxes; Lease Obligations.

5.1 Payment. Tenant shall pay and discharge all general and special real estate and/or personal property taxes and assessments levied or assessed against or with respect to the Premises during the term hereof and all charges, assessments or other fees payable with respect to or arising out of this Lease and all recorded deed restrictions affecting or relating to the Premises. Any sales, use, excise or transaction privilege tax consequence incurred by Landlord because of this Lease or in relation to the Premises or improvements included therein may be passed on to the Tenant either directly if applicable or as “additional rent.”

5.2 Enhanced Services District Assessments. Tenant acknowledges that the Property is located within an Enhanced Services District and that the Premises are subject to an assessment that would normally be collected along with property taxes. In addition to all other amounts that Tenant is required to pay hereunder, Tenant shall pay to City all amounts assessed against the Premises by reason of its inclusion in the Enhanced Services District, semiannually within thirty (30) days after City submits written request for payment.

5.2 Protest. Tenant may, at its own cost and expense, protest and contest, by legal proceedings or otherwise, the validity or amount of any such tax or assessment herein agreed to be paid by Tenant and shall first pay said tax or assessment under protest if legally required as a condition to such protest and contest, and the Tenant shall not in the event of and during the bona fide prosecution of such protest or proceedings be considered in default with respect to the payment of such taxes or assessments in accordance with the terms of this Lease.

5.3 Procedure. Landlord agrees that any proceedings contesting the amount or validity of taxes or assessments levied against the Premises or against the rentals payable hereunder may be filed or instituted in the name of Landlord or Tenant, as the case may require or permit, and the Landlord does hereby appoint the Tenant as its agent and attorney-in-fact, during the term of this Lease, to execute and deliver in the name of the Landlord any document, instrument or pleading as may be reasonably necessary or required in order to carry on any contest, protest or proceeding contemplated in this Section. Tenant shall hold the Landlord harmless from any liability, damage or expense incurred or suffered in connection with such proceedings.

5.4 Allocation. All payments contemplated by this Section 5 shall be prorated for partial years at the Effective Date and at the end of the Lease term.

6. Use. Subject to the applicable provisions of this Lease and A.R.S. §42-6201(2), the Premises may be used and occupied by Tenant for any lawful purpose, including without limitation the sale of alcoholic beverages, subject to Tenant obtaining all

required permits, licenses, and approvals from the Arizona Department of Liquor Licenses and Control.

7. Landlord Non-Responsibility. Landlord shall have no responsibility, obligation or liability under this Lease whatsoever with respect to any of the following:

7.1 Utilities, including gas, heat, water, light, power, telephone, sewage, and any other utilities supplied to the Premises;

7.2 Disruption in the supply of services or utilities to the Premises;

7.3 Maintenance, repair or restoration of the Premises;

7.4 Any other cost, expense, duty, obligation, service or function related to the Premises.

8. Entry by Landlord. Landlord and Landlord's agents shall have the right at reasonable times and upon reasonable notice to enter upon the Premises for inspection, except that Landlord shall have no right to enter portions of any building on the Premises without consent of the occupant or as provided by law.

9. Alterations. Subject to the applicable provisions of this Lease, Tenant shall have the right, in its sole and absolute discretion, and without the consent of Landlord, to construct additional improvements on the Premises, and to make subsequent alterations, additions or other changes to any improvements or fixtures on the Premises existing from time to time, and the Premises shall constitute all such improvements as they exist from time to time. In connection with any action which Tenant may take with respect to Tenant's rights pursuant hereto, Landlord shall not be responsible for and Tenant shall pay all costs, expenses and liabilities arising out of or in any way connected with such improvements, alterations, additions or other changes made by Tenant, including without limitation materialmen's and mechanic's liens. Tenant covenants and agrees that Landlord shall not be called upon or be obligated to make any improvements, alterations or repairs whatsoever in or about the Premises, and Landlord shall not be liable or accountable for any damages to the Premises or any property located thereon. Tenant shall have the right, in its sole and absolute discretion, and without the consent of Landlord, at any time to demolish or substantially demolish improvements located upon the Premises (provided that this Lease shall terminate if the Premises are so demolished). In making improvements and alterations, Tenant shall not be deemed Landlord's agent and shall hold Landlord harmless from any expense or damage Landlord may incur or suffer. During the term of this Lease, title to all improvements shall at all times be vested in Landlord.

10. Easements, Dedications and Other Matters. At the request of Tenant, and provided that no Event of Default (as defined in Section 17.1) shall have then occurred and be continuing, Landlord shall dedicate or initiate a request for dedication to public use of the improvements owned by Landlord within any roads, alleys or easements and convey any portion so dedicated to the appropriate governmental authority, execute (or participate

in a request for initiation by the appropriate commission or department of) petitions seeking annexation or change in zoning for all or a portion of the Premises, consent to the making and recording, or either, of any map, plat, condominium documents, or declaration of covenants, conditions and restrictions of or relating to the Premises or any part thereof, join in granting any easements on the Premises, and execute and deliver (in recordable form where appropriate) all other instruments and perform all other acts reasonably necessary or appropriate to the development, construction, demolition, redevelopment or reconstruction of the Premises.

11. Insurance. During the term of this Lease, the Tenant shall, at Tenant's expense, maintain general public liability insurance against claims for personal injury, death or property damage occurring in, upon or about the Premises. The limitation of liability of such insurance shall not be less than \$5,000,000.00 combined single limit. The minimum policy limits shall be increased whenever deemed appropriate by Landlord's Risk Management to adequately reflect current market conditions. All of Tenant's policies of liability insurance shall name Landlord and all Leasehold Mortgagees as additional insureds, and, at the written request of Landlord, certificates with respect to all policies of insurance or copies thereof required to be carried by Tenant under this Section 11 shall be delivered to Landlord. Each policy shall contain an endorsement prohibiting cancellation or non-renewal without at least thirty (30) days prior notice to Landlord (ten (10) days for nonpayment). Tenant may self-insure the coverages required by this Section with the prior approval of Landlord, which will not be unreasonably withheld, and may maintain such reasonable deductibles and retention amounts as Tenant may determine.

12. Liability; Indemnity. Tenant covenants and agrees that Landlord is to be free from liability and claim for damages by reason of any injury to any person or persons, including Tenant, or property of any kind whatsoever and to whomsoever while in, upon or in any way connected with the Premises during the term of this Lease or any extension hereof, or any occupancy hereunder, Tenant hereby covenanting and agreeing to indemnify and save harmless Landlord from all liability, loss, costs and obligations on account of or arising out of any such injuries or losses, however occurring, unless caused by the sole and gross negligence or willful misconduct of Landlord, its agents, employees, or invitees. Landlord agrees that Tenant shall have the right to contest the validity of any and all such claims and defend, settle and compromise any and all such claims of any kind or character and by whomsoever claimed, in the name of Landlord, as Tenant may deem necessary, provided that the expenses thereof shall be paid by Tenant. The provisions of this Section shall survive the expiration or other termination of this Lease.

13. Fire and Other Casualty. In the event that all or any portion of any improvements or fixtures within the Premises shall be totally or partially destroyed or damaged by fire or other casualty, then, at Tenant's election, either: (i) this Lease shall continue in full force and effect, and, subject to the applicable provisions of this Lease, Tenant, at Tenant's sole cost and expense, may, but shall not be obligated to, rebuild or repair the same; or (ii) this Lease shall terminate with respect to all of the Premises or to such portions of the Premises as Tenant may elect. Landlord and Tenant agree that the provisions of A.R.S. § 33-343 shall not apply to this Lease. In the event that, subject to the

applicable provisions of this Lease, Tenant elects to repair or rebuild the improvements, any such repair or rebuilding shall be performed at the sole cost and expense of Tenant. If there are insurance proceeds resulting from such damage or destruction, Tenant shall be solely entitled to such proceeds, whether or not Tenant rebuilds or repairs the improvements or fixtures, subject to the applicable provisions of this Lease and of any Leasehold Mortgage.

14. Condemnation.

14.1 Entire or Partial Condemnation. If the whole or any part of the Premises shall be taken or condemned by any competent authority for any public use or purposes during the term of the Lease, this Lease shall terminate with respect to the part of the Premises so taken and any other portion of the Premises as may be specified by Tenant, and, subject to the applicable provisions of this Lease, Tenant reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or damages based upon loss, damage or injury to its leasehold interest (as well as relocation and moving costs). In consideration of Tenant's payment for all of the cost of construction of the improvements constituting the Premises, Landlord hereby assigns to Tenant all claims, awards and entitlements relating to the Premises arising from the exercise of the power of condemnation or eminent domain.

14.2 Continuation of Lease. In the event of a taking of less than all of the Premises, this Lease shall continue in effect with respect to the portion of the Premises not so taken or specified by Tenant to be removed from this Lease.

14.3 Temporary Taking. If the temporary use of the whole or any part of the Premises or the appurtenances thereto shall be taken, the term of this Lease shall not be reduced or affected in any way. The entire award of such taking (whether paid by way of damages, rent, or otherwise) shall be payable to Tenant, subject to the applicable provisions of this Lease and of any Leasehold Mortgage.

14.4 Notice of Condemnation. In the event any action is filed to condemn the Premises or Tenant's leasehold estate or any part thereof by any public or quasi-public authority under the power of eminent domain or in the event that an action is filed to acquire the temporary use of the Premises or Tenant's leasehold estate or any part thereto, or in the event that action is threatened or any public or quasi-public authority communicates to Landlord or Tenant its desire to acquire the temporary use thereof, by a voluntary conveyance or transfer in lieu of condemnation, either Landlord or Tenant shall give prompt notice thereof to the other and to any Leasehold Mortgagee. Landlord, Tenant and each Leasehold Mortgagee shall each have the right, at its own cost and expense, to represent its respective interest in each proceeding, negotiation or settlement with respect to any taking or threatened taking. No agreement, settlement, conveyance or transfer to or with the condemning authority affecting Tenant's leasehold interest shall be made without the consent of Tenant and each Leasehold Mortgagee.

15. Termination Option.

15.1 Grant of Option. In the event changes in applicable law nullify, remove, or vitiate the economic benefit to Tenant provided by this Lease, or if any person or entity succeeds to Tenant's interest hereunder by foreclosure sale, trustee's sale, or deed in lieu of foreclosure (collectively, "**Foreclosure**"), or if Tenant, in its sole and absolute discretion, so elects for any or no reason, Tenant or Tenant's successor by Foreclosure shall have the option ("Option"), exercisable by written notice to Landlord, to terminate this Lease as to the entire Premises or as to such portions of the Premises as Tenant may specify, in each case, effective thirty (30) days after the date of the notice. Upon default under the Leasehold Mortgage (after giving effect to all applicable notice and cure rights), Tenant or Leasehold Mortgagee shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective twenty (20) days after the date of the notice.

15.2 Title Vesting in Tenant. Simultaneously with, and effective as of, any termination of this Lease, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant and Landlord shall comply with the obligations under Article 31.

15.3 Leasehold Mortgagees and Tenant. If there are any Leasehold Mortgagees as defined in Section 4.1, Tenant may not as of such time terminate, modify or waive its Option under this Section without the written approval of the Leasehold Mortgagees, and Landlord will not recognize or consent thereto without such approval.

16. Assignment; Subletting.

16.1 Transfer by Tenant. At any time and from time to time Tenant shall have the right (in its sole discretion) to assign this Lease and Tenant's leasehold interest or to sublease all of or any part of the Premises to any person or entity for any use permitted under this Lease, without the consent of the Landlord.

16.2 Liability. Each assignee, other than any residential subtenant, hereby assumes all of the obligations of Tenant under this Lease (but not for liabilities or obligations arising prior to such assignment becoming effective). Each assignment shall automatically release the assignor from any personal liability in respect of any obligations or liabilities arising under this Lease from and after the date of assignment, and Landlord shall not seek recourse for any such liability against any assignor or its personal assets. Landlord agrees that performance by a subtenant or assignee of Tenant's obligations under this Lease shall satisfy Tenant's obligations hereunder and Landlord shall accept performance by any such subtenant.

17. Default Remedies; Protection of Leasehold Mortgagee and Subtenants.

17.1 Default. The failure by Tenant to observe and perform any material provision of this Lease to be observed or performed by Tenant, or a failure by Tenant to pay any Tax when due, where such failure continues for sixty (60) days after written notice thereof by Landlord to Tenant, shall constitute an “**Event of Default**”; provided, however, that if the nature of such default is such that the same cannot reasonably be cured within such sixty (60) day period, no Event of Default shall be deemed to have occurred if Tenant shall within such period commence such cure and thereafter diligently prosecute the same to completion.

17.2 Remedies. Upon the occurrence of an Event of Default, Landlord may at any time during the continuance thereof, by written notice to Tenant, terminate this Lease, in which case Tenant shall immediately surrender possession of the Premises to Landlord. This Section constitutes the provision required under A.R.S. §42-6206(2) that failure by the prime lessee to pay the Tax after notice and an opportunity to cure is an event of default that could result in divesting the prime lessee of any interest or right or occupancy of the government property improvement.

17.3 Leasehold Mortgagee Default Protections. If any Leasehold Mortgagee shall give written notice to Landlord of its Leasehold Mortgage, together with the name and address of the Leasehold Mortgagee, then, notwithstanding anything to the contrary in this Lease, until the time, if any, that the Leasehold Mortgage shall be satisfied and released of record or the Leasehold Mortgagee shall give to Landlord written notice that said Leasehold Mortgage has been satisfied, Landlord shall provide written notice of any default under this Lease to Leasehold Mortgagee and Leasehold Mortgagee shall have the rights described in Section 20 of this Lease.

18. Consent of Leasehold Mortgagee. No act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender, amend, or modify this Lease or Tenant’s right to possession shall be binding upon or effective as against the Leasehold Mortgagee without its prior written consent.

19. Notice to Leasehold Mortgagee. If Landlord shall give any notice, demand, election or other communication required hereunder (hereafter collectively “**Notices**”) to Tenant hereunder, Landlord shall concurrently give a copy of each such Notice to the Leasehold Mortgagee at the address designated by the Leasehold Mortgagee. Such copies of Notices shall be sent by registered or certified mail, return receipt requested or by overnight delivery, and shall be deemed given seventy-two (72) hours after the time such copy is deposited in a United States Post Office with postage charges prepaid, addressed to the Leasehold Mortgagee or when received if sent by overnight mail. No Notice given by Landlord to Tenant shall be binding upon or affect Tenant or the Leasehold Mortgagee unless a copy of the Notice shall be given to the Leasehold Mortgagee pursuant to this Section. In the case of an assignment of the Leasehold Mortgage or change in address of

the Leasehold Mortgagee, the assignee or Leasehold Mortgagee, by written notice to Landlord, may change the address to which such copies of Notices are to be sent.

20. Leasehold Mortgagee Cure Rights. The Leasehold Mortgagee shall have the right for a period of thirty (30) days after the expiration of any grace period afforded Tenant to perform any term, covenant, or condition under this Lease and to remedy any Event of Default by Tenant hereunder or such longer period as the Leasehold Mortgagee may reasonably require to affect a cure, and Landlord shall accept such performance with the same force and effect as if furnished by Tenant, and the Leasehold Mortgagee shall thereby and hereby be subrogated to the rights of Landlord. The Leasehold Mortgagee shall have the right to enter upon the Premises to give such performance.

21. Prosecution of Foreclosure or Other Proceedings. In case of an Event of Default by Tenant in the performance or observance of any nonmonetary term, covenant or condition to be performed by it hereunder, if such default cannot practicably be cured by the Leasehold Mortgagee without taking possession of the Premises, in such Leasehold Mortgagee's reasonable opinion, or if such default is not susceptible of being cured by the Leasehold Mortgagee, then Landlord shall not serve a notice of lease termination pursuant to Section 17.2, if and so long as:

(i) the Leasehold Mortgagee shall proceed diligently to obtain possession of the Premises as mortgagee (including possession by a receiver), and, upon obtaining such possession, shall proceed diligently to cure Events of Default as are reasonably susceptible of cure (subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession); or

(ii) the Leasehold Mortgagee shall institute foreclosure proceedings and diligently prosecute the same to completion (unless in the meantime it shall acquire Tenant's estate hereunder, either in its own name or through a nominee, by assignment in lieu of foreclosure and subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession).

22. Effect of Cure Upon Event of Default. The Leasehold Mortgagee shall not be required to obtain possession or to continue in possession as mortgagee of the Premises pursuant to Section 21(i) above, or to continue to prosecute foreclosure proceedings pursuant to Section 21(ii) above, if and when such Event of Default shall be cured. If a Leasehold Mortgagee, its nominee, or a purchaser at a foreclosure sale shall acquire title to Tenant's leasehold estate hereunder, an Event of Default that is not reasonably susceptible to cure by the person succeeding to the leasehold interest shall no longer be deemed an Event of Default hereunder.

23. Extension of Foreclosure or Other Proceedings. If any Leasehold Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof by any process or injunction issued by any court or by

reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Tenant, the times specified in Sections 21(i) and (ii) above, for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition.

24. Additional Consent of Leasehold Mortgagee. No option of Tenant hereunder may be exercised, and no consent of Tenant allowed or required hereunder, shall be effective without the prior written consent of any Leasehold Mortgagee.

24.1 Protection of Subtenant. Landlord covenants that notwithstanding any default under or termination of this Lease or of Tenant's possessory rights, Landlord: (i) so long as a subtenant within the Premises complies with the terms and conditions of its sublease, shall not disturb the peaceful possession of the subtenant under its sublease, and in the event of a default by a subtenant, Landlord may only disturb the possession or other rights of the subtenant as provided in the Tenant's sublease, (ii) shall recognize the continued existence of the sublease, (iii) shall accept the subtenant's attornment, as subtenant under the sublease, to Landlord, as landlord under the sublease, and (iv) shall be bound by the provisions of the sublease, including all options, and shall execute documents as may be reasonably required by such subtenants to evidence these agreements. Notwithstanding anything to the contrary in this Lease, no act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender or modify this Lease or Tenant's right to possession shall be binding upon or effective as against any subtenant without its prior written consent.

25. New Lease.

25.1 Right to Lease. Landlord agrees that, in the event of termination of this Lease for any reason (including but not limited to any Event of Default by Tenant), Landlord, if requested by any Leasehold Mortgagee, will enter into a new lease of the Premises with the most senior Leasehold Mortgagee requesting a new lease, which new lease shall commence as of the date of termination of this Lease and shall run for the remainder of the original term of this Lease, at the rent and upon the terms, covenants and conditions herein contained, provided:

- a. Such Leasehold Mortgagee shall make written request upon Landlord for the new lease within sixty (60) days after the date such Leasehold Mortgagee receives written notice from Landlord that the Lease has been terminated;
- b. Such Leasehold Mortgagee shall pay to Landlord at the time of the execution and delivery of the new lease any and all sums which would, at that time, be due and unpaid pursuant to this Lease but for its termination, and in addition thereto all reasonable expenses, including reasonable attorneys'

fees, which Landlord shall have incurred by reason of such termination; and

- c. Such Leasehold Mortgagee shall perform and observe all covenants in this Lease to be performed and observed by Tenant, and shall further remedy any other conditions which Tenant under the Lease was obligated to perform under its terms, to the extent the same are reasonably susceptible of being cured by the Leasehold Mortgagee.

25.2 The Tenant under the new lease shall have the same right of occupancy to the buildings and improvements on the Premises as Tenant had under the Lease immediately prior to its termination.

25.3 Notwithstanding anything to the contrary expressed or implied in this Lease, any new lease made pursuant to this Section 25 shall have the same priority as this Lease with respect to any mortgage, deed of trust, or other lien, charge, or encumbrance on the fee of the Premises, and any sublease under this Lease shall be a sublease under the new Lease and shall not be deemed to have been terminated by their termination of this Lease.

26. No Obligation. Nothing herein contained shall require any Leasehold Mortgagee to enter into a new lease pursuant to Section 25 or to cure any default of Tenant referred to above.

27. Possession. If any Leasehold Mortgagee shall demand a new lease as provided in Section 25, Landlord agrees, at the request of, on behalf of and at the expense of the Leasehold Mortgagee, upon a guaranty from it reasonably satisfactory to Landlord, to institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove the original Tenant from the Premises, but not any subtenants actually occupying the Premises or any part thereof.

28. Grace Period. Unless and until Landlord has received notice from each Leasehold Mortgagee that the Leasehold Mortgagee elects not to demand a new lease as provided in Section 25, or until the period therefore has expired, Landlord shall not cancel or agree to the termination or surrender of any existing subleases nor enter into any new leases or subleases with respect to the Premises without the prior written consent of each Leasehold Mortgagee.

29. Effect of Transfer. Neither the foreclosure of any Leasehold Mortgage (whether by judicial proceedings or by virtue of any power of sale contained in the Leasehold Mortgage), nor any conveyance of the leasehold estate created by this Lease by Tenant to any Leasehold Mortgagee or its designee by an assignment or by a deed in lieu of foreclosure or other similar instrument shall require the consent of Landlord under, or constitute a default under, this Lease, and upon such foreclosure, sale or conveyance,

Landlord shall recognize the purchaser or other transferee in connection therewith as the Tenant under this Lease.

30. No Merger. In no event shall the leasehold interest, estate or rights of Tenant hereunder, or of any Leasehold Mortgagee, merge with any interest, estate or rights of Landlord in or to the Premises. Such leasehold interest, estate and rights of Tenant hereunder, and of any Leasehold Mortgagee, shall be deemed to be separate and distinct from Landlord's interest, estate and rights in or to the Premises, notwithstanding that any such interests, estates or rights shall at any time be held by or vested in the same person, corporation or other entity.

31. Surrender, Reconveyance.

31.1 Reconveyance Upon Termination or Expiration. On the last day of the term of this Lease or upon any termination of this Lease, whether under Article 15 above or otherwise, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant at no cost or expense to Tenant other than as set forth in Section 33 below.

31.2 Reconveyance Documents. Without limiting the foregoing, Landlord upon request shall execute and deliver to Tenant: (i) a special warranty deed reconveying all of Landlord's right title and interest in the Premises (including all improvements constituting a part thereof) to Tenant; (ii) a memorandum in recordable form reflecting the termination of this Lease; (iii) an assignment of Landlord's right, title and interest in and to all licenses, permits, guaranties and warranties relating to the ownership or operation of the Premises to which Landlord is a party and which are assignable by Landlord; and (iv) such other reasonable and customary documents as may be required by Tenant or its title insurer including, without limitation, FIRPTA and mechanic's lien affidavits, to confirm the termination of this Lease and the revesting of title to the Premises (including all improvements constituting a part thereof) in all respects in Tenant.

32. Title and Warranties. Notwithstanding anything to the contrary in this Section, Landlord shall convey the Premises to Tenant subject only to: (i) matters affecting title as of the date of this Lease, and (ii) matters created by or with the written consent of Tenant. The Premises shall be conveyed "AS IS" without representation or warranty whatsoever. Notwithstanding the prohibition on the creation of any liens by or through Landlord set forth in this Section, upon any reconveyance, Landlord shall satisfy all liens and monetary encumbrances on the Premises created by Landlord.

33. Expenses. All costs of title insurance, escrow fees, recording fees and other expenses of the reconveyance to Tenant, except Landlord's own attorneys' fees and any commissions payable to any broker retained by Landlord, shall be paid by Tenant.

34. Trade Fixtures, Machinery and Equipment. Landlord agrees that all trade fixtures, machinery, equipment, furniture or other personal property of whatever kind and

nature kept or installed on the Premises by Tenant or Tenant's subtenants may be removed by Tenant or Tenant's subtenants, or their agents and employees, in their discretion, at any time and from time to time during the entire term or upon the expiration of this Lease. Tenant agrees that in the event of damage to the Premises due to such removal it will repair or restore the same. Upon request of Tenant or Tenant's assignees or any subtenant, Landlord shall execute and deliver any consent or waiver forms submitted by any vendors, landlords, chattel mortgagees or holders or owners of any trade fixtures, machinery, equipment, furniture or other personal property of any kind and description kept or installed on the Premises by any subtenant setting forth the fact that Landlord waives, in favor of such vendor, landlord, chattel mortgagee or any holder or owner, any lien, claim, interest or other right therein superior to that of such vendor, Landlord, chattel mortgagee, owner or holder. Landlord shall further acknowledge that property covered by such consent or waiver forms is personal property and is not to become a part of the realty no matter how affixed thereto and that such property may be removed from the Premises by the vendor, landlord, chattel mortgagee, owner or holder at any time upon default by the Tenant or the subtenant in the terms of such chattel mortgage or other similar documents, free and clear of any claim or lien of Landlord.

35. Estoppel Certificate. Landlord shall at any time and from time to time upon not less than ten (10) days' prior written notice from Tenant or any Leasehold Mortgagee execute, acknowledge and deliver to Tenant or the Leasehold Mortgagee a statement in writing (i) certifying that this Lease is unmodified and in full force and effect (or if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the dates to which the rental and other charges are paid in advance, if any; (ii) acknowledging that there are not, to Landlord's knowledge, any uncured defaults on the part of Tenant hereunder, or specifying such defaults if they are claimed; and (iii) certifying such other matters relating to this Lease as Tenant or the Leasehold Mortgagee may reasonably request. Any such statement may be relied upon by any prospective purchaser or encumbrancer of all or any portion of the leasehold estate and/or the improvements.

Landlord's failure to deliver a statement within the time prescribed shall be conclusive upon Landlord (i) that this Lease is in full force and effect, without modification except as may be represented by Tenant; (ii) that there are no uncured defaults in Tenant's performance; and (iii) the accuracy of such other matters relating to this Lease as Tenant as may have been set forth in the request.

36. General Provisions.

36.1 Attorneys' Fees. In the event of any suit instituted by either party against the other in any way connected with this Lease or for the recovery of possession of the Premises, the parties respectively agree that the successful party to any such action shall recover from the other party a reasonable sum for its attorneys' fees and costs in connection with said suit.

36.2 Transfer or Encumbrance of Landlord's Interest. Landlord may not transfer or convey its interest in this Lease or in the Premises during the term of this Lease without the prior written consent of Tenant, which consent may be given or withheld in Tenant's sole and absolute discretion. In the event of the permitted sale or conveyance by Landlord of Landlord's interest in the Premises, other than a transfer for security purposes only, Landlord shall be relieved, from and after the date specified in such notice of transfer, of all obligations and liabilities accruing thereafter on the part of the Landlord, provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest, shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee provided all of Landlord's obligations hereunder are assumed in writing by the transferee. Landlord shall not grant or create mortgages, deeds of trust or other encumbrances of any kind against the Premises or rights of Landlord hereunder, and, without limiting the generality of the foregoing, Landlord shall have no right or power to grant or create mortgages, deeds of trust or other encumbrances superior to this Lease without the consent of Tenant in its sole and absolute discretion. Any mortgage, deed of trust or other encumbrance granted or created by Landlord shall be subject to this Lease, all subleases and all their respective provisions including, without limitations, the options under this Lease and any subleases with respect to the purchase of the Premises.

36.3 Captions; Attachments; Defined Terms.

- a. The captions of the sections of this Lease are for convenience only and shall not be deemed to be relevant in resolving any question of interpretation or construction of any section of this Lease.
- b. Exhibits attached hereto, and addendums and schedules initialed by the parties, are deemed by attachment to constitute part of this Lease and are incorporated herein.
- c. The words "Landlord" and "Tenant", as used herein, shall include the plural as well as the singular. The obligations contained in this Lease to be performed by Tenant and Landlord shall be binding on Tenant's and Landlord's successors and assigns only during their respective periods of ownership.

36.4. Entire Agreement. This Lease and the Development Agreement between Landlord and Tenant, along with any addenda, exhibits and attachments hereto or thereto, constitutes the entire agreement between Landlord and Tenant relative to the Premises and this Lease, the Development Agreement and the addenda, exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by the party to be bound thereby. Landlord and Tenant agree hereby that all prior or contemporaneous oral agreements between and among themselves and their agents or representatives relative to the leasing of the

Premises are merged in or revoked by this Lease and the Development Agreement, except as set forth in any addenda hereto or thereto.

36.5 Severability. If any term or provision of this Lease shall, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law.

36.6 Binding Effect; Choice of Law. The parties hereto agree that all the provisions hereof are to be construed as both covenants and conditions as though the words importing such covenants and conditions were used in each separate paragraph hereof. All of the provisions hereof shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Arizona.

36.7 Memorandum of Land and Improvements Lease. The parties shall, concurrently with the execution of this Lease, complete, execute, acknowledge and record (at Tenant's expense) a Memorandum of Land and Improvements Lease, a form of which is attached hereto as Exhibit B.

36.8 Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered or if mailed by United States certified or registered mail, return receipt requested, postage prepaid, or by overnight mail, as follows:

If to Landlord:

City of Tempe  
City Manager' s Office  
31 East 5th Street  
Tempe, Arizona 85281

With a copy to:

City of Tempe  
City Attorney's Office  
31 East 5th Street  
Tempe, Arizona 85281

If to Tenant:

With a copy to:

Manjula Vaz  
Gammage & Burnham  
Two North Central, Suite 1500  
Phoenix, AZ 85004

or at such other place or to such other persons as any party shall from time to time notify the other in writing as provided herein. The date of service of any communication hereunder shall be the date of personal delivery or seventy-two (72) hours after the postmark on the certified or registered mail, or the date received if sent by overnight mail, as the case may be.

36.9 Waiver. No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver or the breach of any covenant, term or condition shall not be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant, term or condition.

36.10 Negation of Partnership. Landlord shall not become or be deemed a partner or a joint venturer with Tenant by reason of the provisions of this Lease.

36.11 Hold Over. If Tenant shall continue to occupy the Premises after the expiration of the term hereof without the consent of Landlord, such tenancy shall be from month to month on the same terms and conditions as are set forth herein.

36.12 Leasehold Mortgagee Further Assurances. Landlord and Tenant shall cooperate in, including by suitable amendment from time to time of any provision of this Lease which may be reasonably requested by any proposed Leasehold Mortgagee for the purpose of implementing the mortgagee-protection provisions contained in this Lease, allowing that Leasehold Mortgagee reasonable means to protect or preserve the lien of its Leasehold Mortgage upon the occurrence of a default under the terms of this Lease and of confirming the elimination of the ability of Tenant to modify, terminate or waive this Lease or any of its provisions without the prior written approval of the Leasehold Mortgagee. Landlord and Tenant each agree to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effect any such amendment; provided, however, that any such amendment shall not in any way affect the term or rent under this Lease nor otherwise in any material respect adversely affect any rights of Landlord under this Lease.

37. Nonrecourse. Landlord's sole recourse for collection or enforcement of any judgment as against Tenant shall be solely against the leasehold interest under this Lease and the improvements on the Premises and may not be enforced against or collected out of any other assets of Tenant nor of its beneficiaries, joint venturers, owners, partners, shareholders, members or other related parties.

IN WITNESS WHEREOF, the parties hereto have executed this Lease on the date and year first written above.

ATTEST:

LANDLORD:

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

**CITY OF TEMPE**, a municipal corporation

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
City Attorney

TENANT:

By: \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

STATE OF ARIZONA        )  
                                  )  
COUNTY OF MARICOPA    )        ss

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_

**EXHIBIT A**

Land

**EXHIBIT B**  
**of Land and Improvements Lease**

**WHEN RECORDED, RETURN TO:**

**MEMORANDUM OF LAND AND IMPROVEMENTS LEASE**

THIS MEMORANDUM OF LAND AND IMPROVEMENTS LEASE (“Memorandum”) is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 201\_\_, by and between the CITY OF TEMPE, an Arizona municipal corporation (“City”), and \_\_\_\_\_, a \_\_\_\_\_ (“Tenant”).

1. The City and Tenant have entered into that certain Land and Improvements Lease, dated \_\_\_\_\_, 201\_\_ (“Lease”), whereby the City leases to Tenant that real property and improvements more particularly described in Exhibit “A” attached hereto and by this reference incorporated herein (“Property”).

2. This Memorandum is being recorded to give constructive notice to all persons dealing with the Property that the City leases to Tenant the Property, and that the City and Tenant consider the Lease to be a binding agreement between the City and Tenant regarding the Property.

3. This Memorandum is not a complete summary of the Lease. The provisions of this Memorandum shall not be used in interpreting the Lease. In the event of any conflict between the terms and provisions of this Memorandum and the Lease, the terms and provisions of the Lease shall govern and control.

IN WITNESS WHEREOF, this Memorandum has been executed as of the day and year first set forth above.

[insert signature block for Tenant]

STATE of                    )  
                                  ) ss.  
County of                 )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_ 200\_\_ by \_\_\_\_\_, \_\_\_\_\_ of CITY OF TEMPE, an Arizona municipal corporation.

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_

STATE of            )  
                          ) ss.  
County of         )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
200\_\_ by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_