THIS HARDY DRIVE & 23rd STREET SEWER EXPANSION DEVELOPMENT AGREEMENT (“Agreement”) is made as of the _____ day of _____________________, 2019 (the “Effective Date”), between the CITY OF TEMPE, an Arizona municipal corporation (the “City”) and UNITED DAIRYMEN OF ARIZONA, a domestic marketing cooperative nonprofit membership corporation (“UDA”). City and UDA may be referred to herein, collectively, as the “Parties” and, individually, as a “Party”, as the context may require.

RECITALS

A. The City and UDA hereby acknowledge and agree that significant mutual benefits will accrue from replacing and expanding the sewer line along Hardy Drive from 2008 S. Hardy Drive to 23rd Street and along 23rd Street from Hardy Drive to Priest Drive (“Hardy Drive & 23rd Street Sewer Expansion”), including without limitation preserving public health, safety, and welfare, promoting business expansion, creating the potential for increased tax revenues and opportunities for employment within the City, and otherwise improving or enhancing the economic welfare of the inhabitants of the City.

B. 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:

1. GENERAL TERMS

1.1. Incorporation of Recitals. The Recitals are true and correct and are incorporated herein by reference.

1.2. Duration of Development Agreement and Encumbrance Against the Real Property. The term of this Agreement (the “Term”) shall commence on the Effective Date and continue until the date UDA pays all reimbursements required under this Agreement in full or, if applicable, such earlier date on which this Agreement terminates as hereinafter provided. This Agreement shall encumber UDA’s interest in the real property described in Exhibit 2 hereto (the “Real Property”). This Agreement shall at all times during the Term encumber all of UDA’s right, title, and interest in the Real Property.
2. PAYMENT FOR HARDY DRIVE & 23rd STREET SEWER EXPANSION

2.1. City Payment for Hardy Sewer Expansion. The City anticipates that the construction phase of the Hardy Drive & 23rd Street Sewer Expansion will commence in June 2019 and be completed by November 2019. The cost to design and construct the Hardy Drive & 23rd Street Sewer Expansion is estimated to be $5,100,000 not to exceed $5,338,114. The City shall pay the monies necessary to pay for design and construction of the Hardy Drive & 23rd Street Sewer Expansion, subject to reimbursement by UDA as described in Section 2.2 below.

2.2. UDA Reimbursement. UDA hereby agrees to reimburse the City, in ten (10) equal annual installments, for all actual costs incurred by the City to design and construct the Hardy Drive & 23rd Street Sewer Expansion in a total amount not to exceed $5,338,114 (the “Reimbursement Amount”) as shown in Exhibit 4. UDA shall pay the first annual installment of the Reimbursement Amount within 30 days after completion of the construction project. UDA shall pay each subsequent annual installment of the Reimbursement Amount on or before the annual anniversary of the due date of the prior annual installment of the Reimbursement Amount.

2.2.1. Default Interest. Any annual installment payment of the Reimbursement Amount or portion thereof not paid timely by UDA shall bear interest, from the date of delinquency until paid in full, at a rate equal to the consensus prime rate of interest, as published in the Wall Street Journal from time to time (or, in the event such consensus prime rate is no longer published by the Wall Street Journal, a published consensus prime rate or equivalent measure selected by City in its reasonable discretion), plus five percent (5%) (“Default Interest Rate”).

2.2.2. Prepayment. Notwithstanding anything herein to the contrary, at any time, UDA may pay the unpaid balance of the Reimbursement Amount in full to the City without penalty, whereupon this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of the City or UDA.

2.3. Reimbursement. The City shall cause all reimbursement payments from UDA for the Hardy Drive & 23rd Street Sewer Expansion to be deposited into a separate account established for such purpose (the “Reimbursement”).

2.3.1. Administration of Reimbursement. All amounts deposited in the Reimbursement Account and any earnings thereon shall be used exclusively to reimburse the City for monies previously disbursed by the City to pay for construction of the Hardy Drive & 23rd Street Sewer Expansion.

2.4. Hardy Drive. The City shall cause the Hardy Drive & 23rd Street Sewer Expansion to be built in accordance with plans previously provided to and approved in writing by UDA, attached hereto as Exhibits 1, 2 & 3. During the construction and development of the Hardy Drive & 23rd Street Sewer Expansion, the construction and development shall not unreasonably interfere with UDA’s use and enjoyment of the Real Property.

3. DEFAULT; REMEDIES

3.1. Default. It shall be a default hereunder if a Party fails to perform any of its obligations hereunder and: (a) if such failure to perform is the failure to pay any amount payable
hereunder as and when due, such failure continues for a period of ten (10) business days after written notice from the non-defaulting Party, provided, in the event there have been two or more prior failures to timely pay, immediately upon such failure to pay, or (b) if such failure to perform is the failure to perform a non-monetary obligation, 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 the failure, provided, if the nature of the default is such that it cannot reasonably be cured within the thirty (30) 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 within ninety (90) days.

3.2. **UDA Defaults.** In addition to the foregoing, it shall be a default hereunder if: (a) UDA makes an assignment of the Real Property for the benefit of creditors; (b) a receiver takes possession of the Real Property; or (c) the dissolution or termination of existence of UDA unless its successor by transfer or operation of law is continuing to operate UDA’s former business on the Real Property.

3.3. **Remedies.** If a Party is in default under this Agreement, the non-defaulting Party shall have the right to pursue all legal and equitable remedies which such Party may have at law or in equity, including, without limitation, the right to seek specific performance and, in the case of the City, to collect interest at the Default Interest Rate (if applicable); provided, in no event shall any Party be liable for incidental, consequential, punitive, special, speculative or similar damages or any monetary damages other than actual damages (and each Party hereby waives the right to pursue an award of damages other than actual damages).

4. **GENERAL PROVISIONS**

4.1. **No Partnership.** Nothing in this Agreement is intended or shall be construed to create a joint venture, partnership, agency, or fiduciary relationship between the City and UDA.

4.2. **No Third Party Beneficiary.** This Agreement is intended solely for the benefit of the City and UDA and their respective successors and assigns, and no other party shall have any rights or interest in this Agreement or the Reimbursement.

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

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

4.5. **Conflict of Interest.** Pursuant to Arizona law, rules and regulations, no member, official or employee of 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.

4.6. **Compliance with Laws.** Each Party will comply with all federal, state and local laws, rules regulations, standard and Executive Orders, without limitation to those designated within this Agreement. Any changes in the governing laws, rules and regulations during the terms of this Agreement will apply but do not require an amendment of this Agreement. Unless preempted by applicable law, any company entering this Agreement hereby certifies that it is not currently engaged in, and agrees for the duration of the Agreement, not to engage in a boycott of Israel as set forth in A.R.S. § 35-393.01.

4.7. **Notice.** All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted either (i) by registered or certified mail, return receipt requested, or (ii) by personal hand delivery, and addressed as follows:

To UDA:  
CEO  
Keith Murfield  
2008 South Hardy Drive  
Tempe, AZ 85282

To 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 additional notice parties (e.g., owners association) or any other address for this purpose by written notice to the other Party in the manner described herein.

4.8. **Governing Law.** This Agreement shall be governed by and construed in accordance with the internal substantive laws of the State of Arizona (without reference to conflict of laws principles). This Agreement has been made and entered into in Maricopa County, Arizona.

4.9. **Successors and Assigns.** This Agreement shall run with the Real Property and shall be binding upon and accrue to the benefit of the Parties’ respective successors and assigns.

4.10. **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.

4.11. **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.

4.12. **Entire Agreement.** This Agreement, together with the Exhibits attached hereto, 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.

4.13. **Further Instruments.** Each of the Parties hereto shall execute and deliver such documents or instruments as the other Party shall reasonably request in order to consummate the transactions contemplated by this Agreement.

4.14. **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 and be included in the decision, order or judgment, as applicable. If both Parties are awarded relief, then the award for attorneys’ fees shall be apportioned in the discretion of the court.

4.15. **Exhibits.** All Exhibits, including Exhibit 1-Maximum Discharge Limits, Exhibit 2-Project Overview, Exhibit 3-Maintenance of Facility Access During Construction, and Exhibit 4 – Project Cost Breakdown Summary attached hereto are incorporated herein by this reference as though fully set forth herein.

4.16. **Counterparts: Originals.** This Agreement may be executed in counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same agreement.

4.17. **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 City. At the request of UDA, the City shall provide, within ten (10) days of written request therefore, a recordable release or termination of this Agreement upon the expiration of the Term or prior termination of the Agreement in form reasonably acceptable to UDA.

4.18. **City Manager’s Power to Consent.** The City authorizes and empowers its City Manager or his designee to consent to any and all requests of UDA 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.

[NO FURTHER TEXT ON THIS PAGE]
4.19. **Estoppel Certificate.** Within thirty (30) days after receipt of written request therefor from the other Party, the City or UDA, as the case may be, shall execute, acknowledge and deliver to the requesting Party and/or its lender a statement certifying that this Agreement is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Agreement, as so modified, is in full force and effect), and acknowledging that there are not, to the certifying Party’s knowledge, any uncured defaults on the part of the other Party hereunder, or specifying such defaults if any are claimed. Any such statement may be conclusively relied on by any auditor of either Party, or by any prospective purchaser of the Property.

**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:

______________________________
Carla R. Reece, City Clerk

APPROVED AS TO FORM:

______________________________
Judith R. Baumann, City Attorney

THE CITY OF TEMPE, an Arizona municipal corporation

By______________________________
Mark W. Mitchell, Mayor

STATE OF ARIZONA )
) ss
COUNTY OF MARICOPA )

The foregoing instrument was acknowledged before me this ___day of
____________________, 20___, by ________________________, the Mayor of the City of Tempe.

______________________________
Notary Public

My Commission Expires:

______________________________
UNITED DAIRYMEN OF ARIZONA, a domestic electric cooperative nonprofit membership corporation

By: __________________________
Name: _________________________
Title: __________________________

STATE OF ________ )
COUNTY OF ________ ) ss

The foregoing instrument was acknowledged before me this _____ day of _____________, 201_ by __________________________, on behalf of the company.

________________________________
Notary Public

My Commission Expires:

________________________