

WHEN RECORDED, RETURN TO:

City of Tempe Basket

DEVELOPMENT AGREEMENT

[c2016-]

THIS DEVELOPMENT AGREEMENT (“Agreement”) is made as of the _____ day of _____, 2016 (the “Effective Date”), between the **CITY OF TEMPE**, an Arizona municipal corporation (“City”), and **FDG LOCAL TEMPE ASSOCIATES, LLC**, a Colorado limited liability company (“Developer”).

RECITALS

A. Developer has entered a contract to purchase the real property located at the northwest corner of University Drive and Ash Avenue more particularly described on **Exhibit A** attached hereto and incorporated herein (the “**Property**”).

B. Developer intends to develop the Property into a mixed-use project consisting of various residential, retail and grocery uses, and structured parking facilities (the “**Project**”).

C. The Property is located in a downtown redevelopment area as described in A.R.S. §36-1471, et seq.

D. 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 jobs in the City, and that the Project will otherwise improve or enhance the economic welfare of the inhabitants of the City.

E. 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.

F. 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

In addition to terms defined elsewhere herein, 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 FDG Local Tempe Associates, LLC, a Colorado limited liability company, and its permitted successors and assigns.

1.4 “Force Majeure” means a delay caused by fire, explosion or other casualty; earthquake, lightning and other severe or unusual weather conditions for Tempe, Arizona or other acts of God; acts of public enemies, war, terrorism, riot, insurrection; governmental regulation of the sale of materials and supplies or the transportation thereof; unusual delays in transportation; strikes, lock outs or boycotts directly affecting the work of construction; embargoes and shortages of material, energy, fuel or labor resulting directly from general lack of market availability; governmental control or diversion; concealed conditions in the soil; 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 “Market” means a retail establishment not less than 30,000 square feet in size, which is leased to a national retail chain for the purpose of selling groceries and

sundries to the general public, with any such lease having an initial term of not less than ten (10) years.

1.7 “**PAD**” means the Planned Area Development (PAD) for the Property approved by City on _____, as amended.

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

ARTICLE II DEVELOPMENT PLAN

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

2.2 **Duration of Development Agreement.** Subject to 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 3.7) or May 20, 2030.

2.3 **General Cooperation.** City and Developer acknowledge and agree that they shall cooperate in good faith with each other and use their respective good-faith and commercially reasonable efforts to pursue development of the Project in accordance with the PAD and otherwise as contemplated by this Agreement. City agrees to use its reasonable best efforts to assist Developer in obtaining all approvals required by state, federal, county or other governmental authorities in order to develop the Property in accordance with the PAD and the Schedule of Performance. To further the commitment of City and Developer to cooperate in the implementation of this Agreement, City shall designate and appoint a representative to act as liaison between the City and its various departments and Developer shall designate and appoint a representative to act on its behalf under this Agreement. The initial representative for the City (“**City Representative**”) shall be Alex Smith, and the initial representative for Developer (“**Developer Representative**”) shall be Kevin Foltz. Both the City Representative and the Developer Representative shall be available at reasonable times to discuss and review the performance of the City and Developer under this Agreement and the development of the Property. A party may change its Representative at any time by giving notice to the other party as provided in **Section 9.5**.

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 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 180 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 one hundred eighty (180) days by giving written notice to City not less than thirty (30) days before the then-scheduled performance date. In addition, 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 an additional period not to exceed one hundred eighty (180) days by giving written notice to City not less than thirty (30) days before the then-scheduled performance date (as it may previously have been extended), and paying to City a nonrefundable extension fee of \$100,000.00. City agrees that no extension fee will be payable if as of the date the extension fee is due, Developer has made the deposit required by Section 3.5.1; provided, however, that if the deposit required by Section 3.5.1 has not been made as of the date the extension fee is due, when the extension fee is paid, City agrees to use the fee for the purpose of reimbursing UPRR for constructing the gates in accordance with said Section 3.5.1.

Completion and opening of the Market is not covered by the Schedule of Performance and is not subject to the foregoing extension rights. Any extension of the date by which the Market must open must be approved separately by City.

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 Other Development Matters.

3.4.1 Condominium Plat. City desires to promote home ownership in the downtown area where and when appropriate. Developer intends to develop that portion of the Project designated as residential dwelling units (collectively the “Dwelling Units”) with amenities and interior finishes that are consistent with amenities and interior finishes

that are found in condominium projects. To facilitate the ability of successor owners of the Dwelling Units to offer the individual Dwelling Units for sale to retail buyers if they later decide to do so, Developer shall prepare and process for approval prior to execution of the Government Property Lease (as defined in Section 7), a condominium plat designating each Dwelling Unit as a separate condominium unit, and following approval by the City, the approved plat executed by Developer shall be held in escrow with Fidelity National Title Agency, or such other escrow company as is acceptable to City and Developer, with irrevocable instructions to record same in the records of Maricopa County, Arizona on the tenth (10th) anniversary of the date of issuance of the Certificate of Occupancy for the Improvements or on earlier termination thereof; provided that the condominium plat shall be recorded prior to reconveyance of the Property to Developer. Although City encourages future owners to consider sales of the units at the appropriate time, neither Developer nor any successor shall be required to offer the individual Dwelling Units for sale to retail buyers, and nothing contained herein shall limit Developer or its successors from offering such Dwelling Units for rent. Developer shall pay all costs, expenses and fees associated with the escrow and recording of the plat.

3.4.2 Inclusion of Market. Developer and City agree that a Market is one of the potential occupants of a portion of the retail space in the Project. Developer has solicited, and intends to continue to solicit, proposals from grocers, and will consider any proposals it may receive from grocers and if any such proposals are acceptable to Developer (in its sole discretion) will attempt to negotiate a lease with such grocer. However, City acknowledges that (i) Developer cannot guaranty the inclusion or continuous operation of any particular tenants (including, but not limited to a grocer) in the Project, and (ii) the terms of any lease, including a lease with a grocer, will be determined by, and must be acceptable to, Developer in its sole discretion. Notwithstanding the foregoing, Developer acknowledges that the term of the Government Property Lease is subject to the provisions set forth in Section 3.7.1 herein. With respect to operation of the Market, Developer shall cause the Market operator to take such actions as are necessary and consistent with operating procedures used at other similar grocery stores to prevent theft of grocery carts.

3.5 Quad Gates.

3.5.1 City has previously worked with Union Pacific Railroad (“UPRR”) to establish a quiet zone along the area adjacent to the Project. To preserve the quiet zone status, the development of the Project will necessitate installation of traffic calming/quad-gates at the railroad crossing adjacent to the Project. Such installation must be approved and completed by UPRR, through an agreement with City covering construction and annual maintenance. Therefore, while City agrees to work directly with UPRR on construction of the gates, City requires that Developer agree to pay all costs and other fees imposed by UPRR in connection therewith. Developer shall contribute to City such sums as are necessary to pay or reimburse UPRR for installing the gates. Construction of the gates must be completed prior to issuance of a Certificate of Occupancy for the Project; however, Developer acknowledges that City cannot control the timing of installation of the gates, or the cost thereof, items that remain subject to negotiation; and Developer further acknowledges that actual construction will be undertaken by UPRR. Within ninety (90) days after Developer submits an application for

building permits for the Project, Developer shall deposit with City the sum of \$500,000.00, which City shall place in a CIP account for the purpose of reimbursing UPRR for constructing the gates. To enable Developer time to obtain the funds for completion of the quad gates, City agrees to use its best efforts to defer execution of the agreement with UPRR until Developer has the funds available and actually makes the requisite deposit. Developer acknowledges that such delay may cause the price to increase, and may cause delays in its ability to commence construction of the Project, and Developer hereby knowingly assumes those risks. Developer further agrees that City shall not be obligated to issue building permits for the Project until City has received the foregoing deposit. If the cost of installing the gates exceeds the amount previously deposited with City, then Developer hereby agrees to pay to City any additional amounts required for such purposes within ten (10) days after request, or such shorter period as is necessary to enable City to meet the requirements applicable under any agreement with UPRR. If this Agreement is terminated for any reason prior to the completion of the quad gates, and if it is possible to cease construction of the quad gates, then after making any final payments required to be made to UPRR, City shall return to Developer the unspent amount (if any) then remaining on deposit allocated to payment for construction of the quad gates. Within thirty (30) days after completion of the quad gates and receipt of written acknowledgement from UPRR that all construction costs have been paid, City shall notify Developer in writing of the unspent amount (if any) then remaining on deposit allocated to payment for construction of the quad gates, and return such funds to Developer. If requested by City, Developer shall enter into a separate agreement with City to govern the process and Developer's agreement to comply with any requirements imposed by UPRR in connection with construction of the gates; however, City and Developer agree that their intent is for all monetary obligations arising under any such agreement be borne and paid by Developer. City shall keep Developer apprised of the status of negotiations with UPRR, shall provide Developer with copies of its draft agreements with UPRR throughout the negotiation process, and shall provide Developer with a copy of the final agreement with UPRR within ten (10) business days after the parties have approved the final form to be executed. City shall also provide Developer with copies of any invoices and other documentation received from UPRR with regard to construction of the quad gates and the cost thereof.

3.5.2 In City's experience, UPRR generally charges a flat fee (which increases over time) for annual maintenance of facilities such as the quad gates. Accordingly, during the 20-year period commencing on the date construction of the quad gates is completed and continuing until the 20th anniversary of such date, Developer shall pay or reimburse City for payment to UPRR of all maintenance costs associated with the quad-gates, and at City's request Developer shall execute a maintenance agreement or other document evidencing its agreement in this respect. City shall also provide Developer with copies of any invoices and other documentation received from UPRR with regard to maintenance of the quad gates.

3.6 Alley Abandonment; Parking.

3.6.1 Developer has requested that City abandon the existing alley more particularly described on *Exhibit D* hereto (the "Alley"), and City hereby agrees to do so in compliance with City's normal process for abandonment, including without limitation, Developer's payment of all costs associated with relocation of any utilities or other

facilities located within the Alley. Developer acknowledges and agrees that it is acquiring the abandoned Alley AS IS, WHERE IS, and that the only representations or warranties made by the City with respect to the Alley are those set forth in this Agreement. Developer acknowledges that it is accepting the Alley in its AS IS condition, and assumes the risks associated with the condition thereof.

3.6.2 In consideration for abandoning the Alley, Developer shall provide City with parking spaces in the garage to be constructed as part of the Project. Within thirty (30) days after issuance of a Certificate of Occupancy for the parking garage, City and Developer shall enter into a Parking Easement Agreement, in the form of **Exhibit E** (the “**Parking Easement**”) hereto. Subject to the specific terms of the Parking Easement, among other things, the Parking Easement shall generally: (a) provide City with thirty (30) entrance cards or permits to the parking garage (if needed) for use of up to ten (10) contiguous parking spaces on the first/ground level of the parking garage (with all spaces being located on the same level) for use by City’s employees or by other typical downtown office and/or employee users solely for the parking of motorized vehicles (i.e. not storage or staging), that shall be available to City 7 days per week, 24 hours per day; (b) allow City to sublicense its rights to the parking spaces; and (c) allow the City to enforce its easement rights. City shall not be required to contribute to the cost of operating or maintaining the parking garage.

3.7 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 Sections 2 and 3 of such Resolution shall have been satisfied. City and Developer hereby agree that the voluntary payment to be made by Developer pursuant to Section 3.7.2 satisfies the contribution referenced in Section 3 of such Resolution. Upon issuance of a Certificate of Occupancy for the Project (i) the Property shall be conveyed to City by a special warranty deed in substantially the form of **Exhibit F** attached hereto, or a form otherwise mutually acceptable to City and Developer, and (ii) City shall lease back the Property to Developer pursuant to a separate Land and Improvements Lease substantially in the form attached hereto as **Exhibit G**, or a form otherwise mutually acceptable to City and Developer (the “Government Property Lease”). The Property must be conveyed to City within 180 days after issuance of the first Certificate of Occupancy for the Project.

3.7.1 Term of Government Property Lease. The term of the Government Property Lease shall be ten (10) years from the date of issuance of the Certificate of Occupancy for the government property improvement which is the subject of the Government Property Lease; provided, however, that the Government Property Lease shall automatically terminate if (a) the Market is not open by the first anniversary of the date of execution thereof; or (b) once open, the Market (or any replacement Market) ceases operation for a period of sixty (60) days, unless (i) Developer executes a lease with another grocer within two hundred seventy (270) days from the date the Market or replacement

Market ceased operation, and (ii) the replacement Market opens to the public for business within two hundred seventy (270) days after execution of the lease. The intent of the parties is that a Market shall be in operation at the Project during the entire term of the Government Property Lease, and that the Government Property Lease will terminate if the Market or any replacement Market ceases operation for a period longer than 540 days.

3.7.2 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 \$50,000.00 (half to each Foundation) on the date of execution of the first Lease. Each Foundation is 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.

3.8 Signage. City and Developer acknowledge and agree that appropriate signage will and should be an integral part of the Project. City and Developer agree to agree on appropriate signage for the Project. City agrees that it will consider approval of unique signage concepts which may be proposed by Developer for the Project in accordance with its normal process for such requests. City authorizes and empowers the Director of Community Development to consent to any requests of Developer for sign approval that meet the intent of the Project and deviate from the Tempe Zoning and Development Code, to the extent permitted by the Code.

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 within ninety (90) days.

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, its 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; (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, 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; (f) there is a material breach of any representation and warranty by Developer in this Agreement when made; or (g) if there is a default under any document or instrument executed in connection herewith, including without limitation, the Government Property Lease and the Parking Easement.

4.2 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, 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 actual damages and the right to self-help; provided that City shall in no event be liable for punitive, incidental or consequential damages.

4.3 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, 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.

4.4 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.

4.5 Lender Rights. Developer has represented to City that it may obtain financing for acquisition, development and/or construction of the Project from one or more third parties (each a "**Lender**") and that each Lender may request a collateral assignment of this Agreement as part of the collateral for its loan(s) to Developer or any assignee (a "**Borrower**"). City has agreed in Section 5.7.4 hereof that such collateral assignments are permissible without City's consent. If a Lender is permitted, under the terms of its agreement with Borrower, to cure a Default by Borrower and/or to assume Borrower's position with respect to this Agreement, City agrees to recognize such rights of Lender and to otherwise permit Lender to assume all of the rights and obligations of Borrower under this Agreement. If City is notified in writing of any such collateral assignment in accordance with Section 5.5 hereof, and such notice contains the identity and address of any such Lender, then City agrees to give such Lender a copy of any notice of default hereunder concurrently with the giving of such notice to Developer. No such notice of default given by City to Developer shall be binding upon or affect the Lender unless a copy of same is given to the Lender pursuant to this Section.

The Lender shall have the right for a period of thirty (30) days after the expiration of any grace period afforded Developer pursuant to Section 4.1 (but not Section 4.1.1) to cure any such default, and City agrees to accept performance by Lender with the same force and effect as if performed by Developer and the Lender shall thereby and hereby be subrogated to the rights of City. Nothing contained in this Agreement shall be

deemed to prohibit, restrict or limit in any way the right of the Lender to take title to all or any portion of its collateral pursuant to a foreclosure proceeding, trustee's sale, or deed in lieu of foreclosure (each a "**foreclosure**"), and following any such foreclosure, Lender will not have any obligation to Complete construction of the Project. Upon receipt of written request from a Lender, City will enter into a separate agreement with such Lender consistent with the provisions of this Section. Failure to complete the Project in accordance with the Schedule of Performance shall result in termination of the Development Agreement as provided elsewhere herein.

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 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 City shall be personally liable to Developer, 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 the Developer or its successor or assign, or (c) pursuant to any obligation of City under the terms of this Agreement.

5.3 Liability and Indemnification. Developer hereby agrees to indemnify, protect, defend and hold harmless 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, except to the extent resulting from the gross negligence or willful misconduct of City.

5.4 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.

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: FDG Local Tempe Associates, LLC
Attn: Kevin Foltz
4500 Cherry Creek Drive South, Suite 550
Glendale, Colorado 80246

With a copy to: Darin Sender, Esq.
Sender Associates, Chtd.
464 S. Farmer Ave., Suite 102
Tempe, Arizona 85281

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. 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 units or retail) to the party ultimately intended to own such component or to a reputable and financially capable developer that specializes in or without specializing in, has experience (directly or through an affiliate) in, the financing, development and/or operation of such projects;

5.7.2 An assignment by Developer of its rights under this Agreement to a reputable and financially capable 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.

After the issuance of a Certificate of Occupancy for the Project, or any component thereof, Developer may assign its rights, duties and obligations under this Agreement without City's consent.

Upon any such assignment, Developer shall be released from liability for any events occurring after the date of any such assignment.

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 City.

5.14 No Third Party Rights. No provision of this Agreement (except the Foundations may collectively enforce payment of the voluntary contribution payable under Section 3.8(d)) shall be construed to permit anyone other than Developer, City and their respective successors and assigns to rely upon the covenants and agreements herein

contained nor to give any such third party a cause of action (as a third party beneficiary or otherwise) on account of any nonperformance hereunder.

5.15 Estoppels. City shall, within a reasonable time (but in no event sooner than 15 days or later than 30 days) after receipt of a written request by Developer, any Lender, or any successor or assign, provide an estoppel certificate evidencing that this Agreement is in full force and effect, that it has not been amended or modified (or, if appropriate, specifying such amendment or modification), and that no default by Developer or any successor or assign exists hereunder (or, if appropriate, specifying the nature and duration of any existing default) and certifying to such other matters reasonably requested by Developer or its successor or assign.

5.16 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 _____, 2016, by Mark W. Mitchell, the Mayor of the City of Tempe.

Notary Public

My Commission Expires:

“DEVELOPER”

FDG LOCAL TEMPE ASSOCIATES, LLC, a Colorado limited liability company

By: **Forum Management, Inc.**, a
_____ corporation

Its: **Manager**

By: _____
Kevin Foltz
Vice President and Secretary

STATE OF ARIZONA)
)
COUNTY OF MARICOPA) ss

The foregoing instrument was acknowledged before me this ____ day of _____, 2016 by Kevin Foltz, Vice President and Secretary of Forum Management, Inc., a _____ corporation, Manager of FDG LOCAL TEMPE ASSOCIATES, LLC, a Colorado limited liability company, for and on behalf of the company.

Notary Public

My Commission Expires:

CONSENT TO DEVELOPMENT AGREEMENT

The undersigned as the owner of the Property hereby consents to this Development Agreement and hereby executes the same for purposes of binding the Property.

UNIVERSITY AND ASH OWNER, LLC,
a Delaware limited liability company

By: _____
 Its: _____
 —

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2016, by _____, the _____ of UNIVERSITY AND ASH OWNER, LLC, a Delaware limited liability company, for and on behalf of the company.

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

Notary Public

My commission expires:

EXHIBIT A
The "Property"

LOT 1, COSMOPOLITAN, ACCORDING TO BOOK 900 OF MAPS, PAGE 35, AND
AFFIDAVIT OF CORRECTION IN RECORDING NO. 2007-0429022, RECORDS OF
MARICOPA COUNTY. ARIZONA;

EXCEPT ANY MINE FOR GOLD, SILVER, CINNABAR, OR ANY VALID MINING CLAIM HELD
UNDER THE EXISTING LAS AS RESERVED IN PATENT RECORDED IN BOOK 15 OF
DEEDS, PAGE 634.

EXHIBIT B
Form of 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

EXHIBIT C
Schedule of Performance

Obtain a Building Permit for the Project on or before December 31, 2017

Obtain Certificate of Occupancy for the Project on or before December 31, 2019

EXHIBIT D
The "Alley"

DESCRIPTION

OF ABANDONMENT OF PUBLIC ALLEY
PER MAP OF TEMPE, BOOK 2 OF MAPS, PAGE 26
RECORDS OF MARICOPA COUNTY, ARIZONA
TEMPE, ARIZONA

That certain 20 foot wide alley located within Lot 1, COSMOPOLITAN, according to Book 900 of Maps, Page 35, and Affidavit of Correction in Recording No. 2007-0429022, records of Maricopa County, Arizona, said alley being originally shown on the Map of Tempe, recorded in Book 2 of Maps, Page 26, records of Maricopa County, Arizona, and being more particularly described as follows:

*COMMENCING at the Northeast corner of said Lot 1 being the beginning of a curve to the right the center of which bears South 79 degrees 47 minutes 32 seconds West 620.00 feet;
THENCE Southerly along the arc of said curve and the Easterly line of said Lot 1 through a central angle of 8 degrees 22 minutes 28 seconds an arc length of 90.62 feet to the Northeast corner of said alley and the POINT OF BEGINNING of this description;
THENCE Southerly continuing along said curve through a central angle of 1 degree 50 minutes 55 seconds an arc length of 20.00 feet to the Southeast corner of said alley;
THENCE South 89 degrees 59 minutes 42 seconds West 113.28 feet along the South line of said alley to the East line of abandoned alley per Docket 11414, Page 1224, records of Maricopa County, Arizona;
THENCE North 00 degrees 00 minutes 18 seconds West 20.00 feet along said East line to the North line of said alley;
THENCE North 89 degrees 59 minutes 42 seconds East 112.97 feet along said North line to the POINT OF BEGINNING.*



EXPIRES 3/31/17



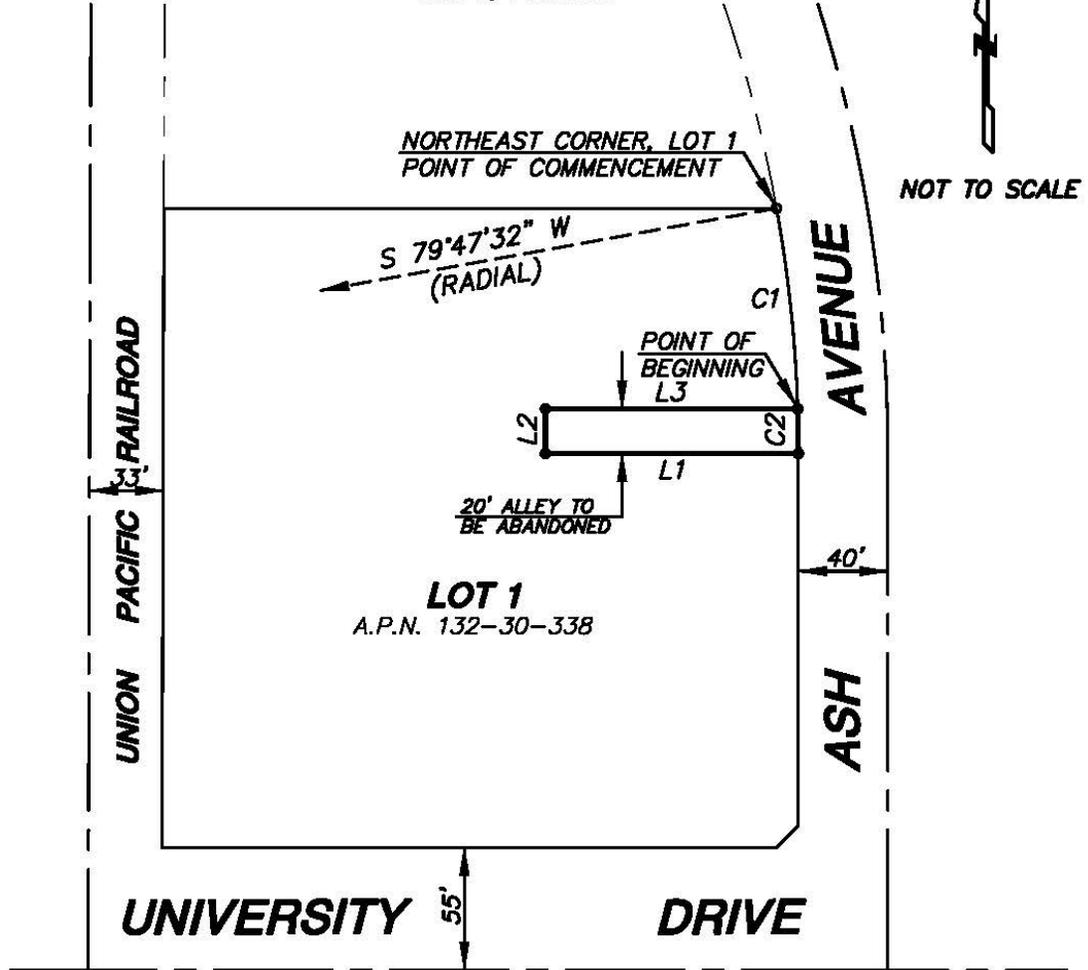
21415 N. 23rd Avenue
Phoenix, AZ 85027
623-869-0223 (office)
623-869-0726 (fax)
www.superiorsurveying.com
info@superiorsurveying.com

DATE: 12/3/14

JOB NO.: 140257

EXHIBIT

OF ABANDONMENT OF PUBLIC ALLEY
 PER MAP OF TEMPE, BOOK 2 OF MAPS, PAGE 26
 RECORDS OF MARICOPA COUNTY, ARIZONA
 TEMPE, ARIZONA



NOT TO SCALE

*SEE PAGE 2 FOR LINE
 AND CURVE TABLES

PAGE 1 OF 2



David S. Klein

EXPIRES 3/31/17

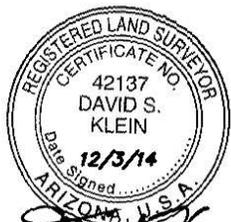
 SUPERIOR SURVEYING SERVICES, INC.	21415 N. 23rd Avenue Phoenix, AZ 85027 623-869-0223 (office) 623-869-0726 (fax) www.superiorsurveying.com info@superiorsurveying.com
DATE: 12/3/14	JOB NO.: 140257

EXHIBIT

OF ABANDONMENT OF PUBLIC ALLEY
 PER MAP OF TEMPE, BOOK 2 OF MAPS, PAGE 26
 RECORDS OF MARICOPA COUNTY, ARIZONA
 TEMPE, ARIZONA

LINE TABLE		
LINE	BEARINGS	LENGTH
L1	S 89°59'42" W	113.28'
L2	N 00°00'18" W	20.00'
L3	N 89°59'42" E	112.97'

CURVE TABLE					
CURVE	RADIUS	DELTA	LENGTH	CHORD BEARING	CHORD DISTANCE
C1	620.00'	8°22'28"	90.62'	S06°01'14"E	90.54'
C2	620.00'	1°50'55"	20.00'	S00°54'33"E	20.00'



David S. Klein

EXPIRES 3/31/17

PAGE 2 OF 2

<p style="font-weight: bold; font-size: 1.2em; margin: 0;">SUPERIOR</p> <p style="font-weight: bold; font-size: 0.8em; margin: 0;">SURVEYING SERVICES, INC.</p>	21415 N. 23rd Avenue Phoenix, AZ 85027 623-869-0223 (office) 623-869-0726 (fax) www.superiorsurveying.com info@superiorsurveying.com
DATE: 12/3/14	JOB NO.: 140257

EXHIBIT E
Form of Parking Easement Agreement

When Recorded, Return to:

City of Tempe basket

PARKING EASEMENT
AGREEMENT

THIS PARKING EASEMENT AGREEMENT (this “**Agreement**”) is made and entered into this ____ day of _____, 2016 by and between _____, a _____ (“**Developer**”), and the CITY OF TEMPE, ARIZONA, an Arizona municipal corporation (“**City**”).

RECITALS

A. City and Developer are parties to that certain Development Agreement dated _____, 2016 [c2016-_____] (the “Development Agreement”) pertaining to the development of certain real property owned by Developer, located at the North West corner of University Drive and Ash Avenue (the “Developer Property”).

B. Pursuant to Section 3.6 of the Development Agreement, Developer agreed to grant City a perpetual easement for the use of ten (10) contiguous parking spaces in the parking garage to be constructed as part of the Project (as defined in the Development Agreement).

C. This Agreement is being entered to set forth the terms of the said parking easement.

AGREEMENT

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

1. Definitions. Unless the context clearly requires otherwise, the following terms used in this Agreement are defined as follows. Defined terms appear throughout this Agreement with the initial letter of such term capitalized.

(a) “**Authorized Users**” means the tenants, designees, permittees, licensees and invitees of the City, identified from time to time in writing to Developer by City.

(b) “**City Spaces**” shall mean ten (10) contiguous parking spaces on the first/ground level of the Garage, available 7 days per week, 24 hours per day.

(c) “**Condominium**” shall have the meaning assigned to such term in the Condominium Act.

(d) “**Condominium Act**” means the Arizona Condominium Act, A.R.S. § 33-1201, et seq., as amended from time to time.

(h) “**Garage**” shall mean any parking garage(s) on the Developer Property that includes any of the Parking Spaces.

(i) “**Motor Vehicle**” shall mean automobiles, motorcycles, sport utility vehicles, pickup trucks or other passenger vehicles or recreational vehicles that are of a size and height sufficient to access the Parking Facility and that readily fit within a single, standard-sized or van-accessible handicap accessible parking space.

(l) “**Parking Facility**” or “**Parking Facilities**” shall mean any Garage containing Parking Spaces, or any surface parking area(s) containing Parking Spaces, together with all related driveways, ramps, paved areas, walkways, stairs, elevators, gates, card readers and such other improvements and equipment as may, from time to time, be made available for, or required in connection with, utilization of any of the Parking Spaces in such Garage or surface parking area solely to exercise the purposes and intent of this Agreement and shall not include use of any other improvements and equipment not required for such purpose or otherwise designated for use by people other than the Authorized Users.

(m) “**Parking Spaces**” shall mean all parking spaces within the Parking Facility, including the City Spaces.

(n) “**Prime Rate**” shall mean the fluctuating rate announced from time to time by JPMorgan Chase Bank, N.A., a national banking association (“**Bank**”), or its successor, as its prime rate (which rate may not be the lowest, best or most favorable rate of interest which Bank may charge on loans to its customers). If Bank ceases to announce its prime rate, the Prime Rate shall be equal to a “prime rate” announced from time to time by a different financial institution determined by Developer.

(o) “**Project**” shall mean the mixed-use redevelopment project being constructed on the Developer Property, as described and defined in the Development Agreement.

(q) “**Temporary Spaces**” the Motor Vehicle parking spaces to which all or any portion of the City Spaces are temporarily relocated in accordance with the provisions of this Agreement. All Temporary Spaces shall be located within a three

hundred (300) foot radius of any exterior boundary of the Developer Property and/or to such other location as the parties may reasonably agree; provided however, that any surface lot or other location for the Temporary Spaces must at all times be lighted at night time, and to the extent any of the above described locations are not lighted at night time, then the City Spaces may not be temporarily relocated to, or remain at, such location unless and until night time lighting is provided and continually maintained. Notwithstanding anything to the contrary contained in this Agreement, Developer shall be obligated only to provide Temporary Spaces in an amount equal to the difference between the total number of Parking Spaces and the aggregate total number of usable City Spaces.

2. Grant of Easements. Developer hereby grants to the City and its respective successors and assigns, the following easements:

(a) A perpetual, exclusive easement over, upon and across the Developer Property for purposes of parking Motor Vehicles on a continuous and uninterrupted basis (subject to Force Majeure as defined in Paragraph 20 below) in the City Spaces;

(b) A non-exclusive easement for vehicular access over, upon and across all driveways, ramps and paved areas improved for vehicular traffic as reasonably necessary to provide convenient vehicular access to and from the Parking Spaces; and

(c) A non-exclusive easement for pedestrian traffic over all stairs, elevators, walkways and sidewalks, and all driveways, ramps and paved areas as reasonably necessary to provide convenient pedestrian access to and from the Parking Spaces.

(d) The foregoing easements are for the benefit of the City and all Authorized Users designated by the City. Developer or the Operator shall provide City with no fewer than thirty (30) entrance cards or permits to the Parking Facility for use by City's Authorized Users in connection with the City Spaces.

(e) The parties understand and acknowledge that, except as otherwise expressly provided in this Agreement, Developer has the right to control and make all decisions with respect to the City Spaces as it deems appropriate, including, without limitation, designating which of the Parking Spaces are City Spaces, designating all or any portion of the Parking Spaces as exclusive spaces which provide an exclusive right to use the applicable space for 24 hours a day, 7 days a week to a specific Authorized User and/or to designate any Parking Space as a visitor space, and/or to designate any Parking Space to provide Authorized Users the right to park in such space only during certain hours; provided, however, in no event may Developer, without the prior written consent of the City, make any decisions with respect to the City Spaces that will result in a violation of the City's obligations under any obligations owed by City to third parties with respect to the City Spaces.

(f) Without the prior written consent of the City, Developer may not designate any City Spaces as exclusive spaces.

(g) The parties acknowledge and agree that some access points to the Parking Spaces, including driveways, ramps, other paved areas, stairs, elevators, walkways and/or sidewalks, may, from time to time, be temporarily restricted or closed to accommodate (i) planned traffic flows and related matters associated with special events in downtown Tempe, and/or (ii) construction activities on or in connection with the land and/or improvements on which Parking Spaces are located, expressly provided that: (A) at least one method of vehicular and pedestrian access to the Parking Spaces shall be maintained at all times except as may be due to Force Majeure (as defined in Paragraph 20 below); (B) Developer shall provide written notice to City no less than ten (10) business days in advance of any such restriction or closure, unless in the case of an emergency in which event subsequent notice shall be provided as soon as reasonably possible thereafter; and (C) Developer shall use commercially reasonable efforts to minimize the restriction or closure to only that extent reasonably needed for the special event or construction activity, and in any event such restriction or closure with respect to accommodating planned traffic flows and related matters associated with each special event in downtown Tempe may only extend for a period of up to five (5) consecutive days.

3. Future Improvement of Developer Property; Maintenance of Parking Spaces.

(a) Developer may subject all or a portion of the Developer Property, including any improvements located thereon, to one or more Condominiums. To the extent any Parking Facility located on the Developer Property is entirely within one or more Condominium Units and/or Common Elements or Limited Common Elements (as such terms are defined in the Condominium Act) within a Condominium, City will cooperate with Developer to amend this Agreement as necessary to restrict the easements granted in Paragraph 2 above to the applicable Condominium Units and/or Common Elements or Limited Common Elements.

(b) The parties acknowledge that, because the easements granted in Paragraph 2 above are perpetual, improvements on or to be developed on the Developer Property will be designed, redesigned, developed and/or redeveloped periodically in the future altering the exact location of the Parking Facilities or Parking Spaces. To accommodate such future development and redevelopment and the modification of the location of improvements, when any design and/or redesign or redevelopment of any area impacting the Parking Facility or Parking Spaces commences, City will reasonably cooperate with Developer and, if applicable, the fee owner of the subject land (if other than Developer or its successors) by amending this Agreement and/or such other agreement reflecting the existence of the affected Parking Spaces and access thereto to reasonably identify only the exact land upon which such new spaces and Parking Facilities are to be relocated as a result of such development and/or redevelopment. Thus, promptly following the receipt of a written request of any party, the other parties shall reasonably cooperate to execute, acknowledge and deliver such recordable instruments as may be reasonably requested to confirm of record the location of the City's easement rights in and to such new spaces and related Parking Facilities.

(c) Notwithstanding anything to the contrary contained in Paragraph 2(a) above, if the location of any Parking Spaces on the Developer Property is modified as a result of any development or redevelopment of improvements on the Developer Property, the easements for the Parking Spaces and access thereto granted pursuant to Paragraph 2 above affecting the Developer Property shall be deemed amended (without need for further action by any party) to lie over, upon and across only the resulting new spaces and any related Parking Facilities as same have been developed and/or redeveloped, and the City's easement rights in and to the portion of the Developer Property containing such Spaces and related Parking Facilities shall be at all times senior to any and all rights of persons who acquire any interest in the Developer Property after the date of this Agreement without the necessity of subordinating such rights or executing and/or recording any documents or instruments to confirm the existence and seniority of such easement rights. Promptly following the receipt of a written request of any party, however, the other parties shall reasonably cooperate to execute, acknowledge and deliver such recordable instruments as may be reasonably requested to confirm of record the location of the City's easement rights in and to such redesigned and/or redeveloped City Spaces and related Parking Facilities.

4. Maintenance and Operation. Developer shall, at its sole cost and expense, cause the Parking Facilities to be continuously operated, cleaned, maintained and repaired as necessary to keep them in good condition, and in a condition consistent with similar first-class parking facilities in downtown Tempe, including restriping of all Parking Spaces as reasonably necessary. Developer, or an Operator responsible for maintaining the Parking Spaces, will have the right to enter upon the Parking Spaces as necessary in connection with the foregoing obligations and the same will not constitute a violation of the City's easements or rights hereunder. Developer retains the right, in perpetuity, to use the Parking Facilities for any and all uses that do not unreasonably interfere with the rights of the City under this Agreement, to cross over, through and use the Parking Facilities (except as otherwise provided to the contrary in this Agreement) for any and all purposes, subject to the rights of the City hereunder. Developer shall cause the Parking Spaces and related Parking Facilities to be operated as a reasonable and prudent owner would do and shall schedule cleaning, maintenance, repairs and other services to reasonably minimize interference with operation of the Parking Spaces and related Parking Facilities and with access thereto consistent with good and efficient operation, but Developer will have no responsibility for any such interference if Developer's actions are reasonable and are not discriminatory against City's or any Authorized User's rights.

5. Insurance and Damage or Destruction of the Parking Facilities.

(a) Developer shall at all times maintain in effect, or cause to be maintained in effect, a property insurance policy that, at a minimum, covers the Parking Facility and related driveways, lights and other parking related improvements on the land upon which the Parking Spaces are located. The insurance policy shall be issued in an amount not less than one-hundred percent (100%) of full replacement cost for any fire loss of the Parking Facilities containing any Parking Spaces, on a broad form "All Risk" property policy (or builder's risk during construction) with reasonably available sublimits available in the insurance marketplace for other losses such as flood, earthquake, rents, soft costs, landscaping, law and ordinance and such other coverages typically carried by

owners of first class parking facilities in the greater Phoenix market, providing protection against any and all perils generally included within the “All Risk” classification, and which shall name Developer, Developer’s secured lender (if any), and the City as loss payees.

(b) In addition, at all times from and after the date hereof Developer shall maintain, or cause to be maintained, commercial general liability insurance that covers all Parking Spaces and related Parking Facilities on the Developer Property in an amount not less than One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) in the aggregate, with an umbrella policy that follows the form of the governing policy of not less than Five Million Dollars (\$5,000,000) per occurrence, together with not less than One Million Dollars (\$1,000,000) combined single limit automobile liability. Such coverage amounts may be increased at the request of City if such coverage amounts are no longer consistent with typical coverage amounts maintained for general liability coverage with respect to parking facilities for similar first class residential or mixed-used projects in areas comparable to downtown Tempe. The foregoing liability insurance policy (i) shall be written on an occurrence basis, (ii) shall name the City, and its successors and assigns, and its council members, officers, managers, agents, employees, and volunteers as “additional insured” (iii) shall be primary on a non-contributory basis, (iv) shall be issued by an insurer authorized to do business in the State of Arizona, with a financial rating of not less than A-VIII, as rated in the most current edition of Best’s Key Rating Guide, (v) shall not be cancelled or non-renewed, nor shall any material change be made to the policy, without at least thirty (30) days prior written notice to the City (vi) shall have a deductible not in excess of \$50,000 (with respect to bodily injury and course of construction) and not in excess of \$100,000 (with respect to completed operations), and (vii) shall include an endorsement acknowledging the waiver of subrogation contained herein. Notwithstanding the foregoing (vi) to the contrary, if the deductibles set forth in (vi) are not reasonably available in the insurance marketplace for a reasonable premium, any party to this Agreement, with the consent of the other parties, shall have the right to change the deductible amounts to be consistent with typical deductibles maintained for general liability coverage and if the other parties do not agree, the matter will be subject to arbitration pursuant to Paragraph 18.

(c) Developer shall provide City with certificates evidencing the insurance coverages required hereunder with respect to the Parking Facilities prior to or concurrently with the execution hereof, and thereafter within twenty (20) days following reasonable written request therefor, and shall send replacement certificates to the City as policies are renewed, replaced or modified. The parties acknowledge that the Required Policies may be master policies covering all or portions of the Developer Property (and any Condominium Units or Common Elements of a Condominium into which the Developer Property or any portion thereof is subdivided).

(d) If Developer fails to provide evidence of insurance as required above, Developer shall be deemed to not have the required insurance in place, and notwithstanding anything to the contrary contained herein, City may, without any obligation to do so, after providing written notice to Developer, immediately obtain the required coverages at Developer’s expense. If City, without any obligation to do so, obtains any such insurance coverage, City shall notify Developer of same and all premiums

expended in connection therewith shall be due and payable to City within thirty (30) days after receipt of such notice and interest at the Default Rate shall accrue on such sums if not paid within such thirty (30) day period.

(e) If there is any casualty loss, damage or destruction to any Parking Spaces, or to any Parking Facilities or other improvements (including driveways, ramps, pathways, stairs, elevators, etc.) located on the Developer Property (collectively, the “**Damaged Facility**”) that in any way impairs the utility or accessibility of any of the Parking Spaces, then Developer as soon as reasonably possible will restore or rebuild the Damaged Facility. If at any time any Parking Space becomes unusable or inaccessible as a result of a casualty, then Developer shall provide Temporary Spaces to replace each such unusable or inaccessible Parking Space as soon as possible (and in any event within 60 days) after such casualty; provided, however, that if Developer fails to secure such Temporary Spaces, City shall have the right to secure such Temporary Spaces at Developer’s cost and expense, with City being entitled to reimbursement of such costs and expenses on an ongoing basis within thirty (30) days after written demand therefore is delivered to Developer. Any requested reimbursement not paid within such thirty (30) day period shall bear interest at the Default Rate until paid in full. Developer understands and acknowledges that any Temporary Spaces provided in accordance with the foregoing are not intended to be permanent replacements of Parking Spaces, and if any Parking Spaces required to be rebuilt or restored in accordance with the foregoing are not rebuilt or restored in accordance with the original plans and specifications therefor or insurance proceeds are not made available to Developer for such purposes, then Developer shall, in any event, take such actions as are necessary to replace and restore such spaces as soon as reasonably possible.

(f) When restoration and repair of the Damaged Facility is commenced, Developer and the City agree to cooperate with Developer and Developer’s secured lender, if any, in all respects to allow proceeds of insurance to be deposited into an escrow account controlled by an escrow agent in Arizona at a nationally recognized title insurance company pursuant to mutually acceptable escrow instructions established to allow for the disbursement of insurance proceeds to Developer to pay for the restoration and repair of the Damaged Facility provided that no proceeds shall be disbursed from the escrow if, after disbursement, sufficient funds will not remain to pay all costs to complete the restoration and repair in a good and workman-like and lien free fashion.

(g) In connection with its use of any Temporary Space, Developer shall maintain commercial general liability insurance in an amount not less than One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) in the aggregate, with an umbrella policy that follows the form of the governing policy of not less than Five Million Dollars (\$5,000,000) per occurrence, together with not less than One Million Dollars (\$1,000,000) combined single limit automobile liability coverage.

6. Operating Costs. Developer shall pay all costs, expenses and fees associated with the Parking Facility, including without limitation, (i) all costs for operating, managing, cleaning, maintenance and repair of the Parking Spaces and Parking Facilities, (ii) the costs for obtaining and maintaining insurance coverage for the Parking

Facilities required to be maintained under Paragraph 5, and (iii) all real property and personal property taxes for the Parking Facilities.

City shall have no obligation to pay or contribute to payment of any operating costs or expenses, nor to pay or contribute to payment of any capital expenditures, including without limitation (i) any costs incurred in connection with or directly related to the original construction (and compliance with all code or other governmental requirements) or voluntary modification, redevelopment, remodeling or replacement (as distinguished from normal maintenance and repair) of any Parking Facilities and any other improvements; (ii) principal and/or interest payments on any financing or rental under any ground lease or other underlying lease relating to the Parking Facilities and/or Parking Spaces; (iii) capital expenditures (i.e., expenditures which, in accordance with generally accepted accounting principles consistently applied or federal income tax regulations, are not fully chargeable to a current account in the year the expenditures are incurred); (iv) the cost of correcting defects in or inadequacies of the design or construction of any improvements or repair and/or replacement of any of the materials or equipment required as a result of such defects or inadequacies; (v) any expense resulting from the negligence of Developer, its agents, servants, contractors or employees, or any expense incurred to repair any damage or destruction caused in whole in or part through the act of Developer or any tenants or residents of any improvements on the Developer Property, or their respective designees, permittees, licensees and invitees (whether or not such act is negligent or otherwise culpable); (vi) costs for operating, managing, cleaning, maintenance, repair and replacement of any improvements, including the Parking Facility, driveways, ramps, paved areas, roofs and facades of the Garage and other improvements, stairs, elevators, walkways and sidewalks, gates or other security devices whether or not used for parking spaces; (vii) any interest or penalties incurred as a result of any failure to pay any bill as the same shall become due and costs, fines, or fees incurred due to knowing violations of any federal, state or local law, statutes or ordinances, or any rule, regulation, judgment or decree of any governmental authority; (viii) any and all costs associated with the operation of the business of any entity that owns the land on which any Parking Spaces are located or any affiliate thereof or any affiliate of any owner thereof, intending by this exclusion to distinguish the costs of operation of the Parking Spaces and Parking Facilities.

7. Controlled Access. Controlled access shall be maintained for any Parking Facilities within which any of the Parking Spaces are located. The controlled access or gate system shall be sufficient to be programmed to facilitate the controlled access to the Parking Facilities by Authorized Users. The controlled access system, once installed, will not be modified without the prior approval of the parties whose easement rights are affected by such controlled access system, which shall not be unreasonably conditioned, withheld or delayed.

8. Revenue.

(a) Revenues Generated from Access Cards/Permits. City shall be entitled to retain all revenue generated by its sale or lease of parking access cards or permits issued to City for City Spaces. Developer shall be entitled to retain all revenue

generated by its sale or lease of parking access cards or permits issued for all Parking Spaces other than the City Spaces.

(b) Other Revenues. Developer shall be entitled to all revenues generated from all of the Parking Spaces other than the City Spaces, however derived.

9. Rules and Regulations. City shall follow and adhere to, and shall cooperate with Developer in directing the Authorized Users to follow and adhere to, all reasonable rules and regulations pertaining to traffic control, safety, deposits and charges for access cards and other management issues that are imposed by Developer from time to time and delivered to City in writing; provided, however, that (i) Developer shall give City at least thirty (30) days advance notice of the adoption or modification of any such rules or regulations, (ii) no such rules or regulations may be imposed without the prior input and consent of City, (iii) if Developer has an approval right over the adoption of rules or regulations that affect Parking Spaces not owned by Developer, then Developer shall not approve any such rules or regulations without the prior input and consent of City, and (iv) any rules and regulation applicable to a Parking Facility must be enforced in a non-discriminatory fashion against all persons parking in that Parking Facility. The Operator or Developer (whomever is managing the Parking Facility) shall be responsible for using commercially reasonable efforts to prevent persons other than Authorized Users from using the Parking Spaces, and City has any liability or responsibility to prevent Authorized Users from using parking spaces in the Developer Property other than the Parking Spaces, and Developer agrees to refrain from affirmatively encouraging or allowing persons other than Authorized Users to use the Parking Spaces (except as may be expressly permitted under this Agreement) and City agrees to refrain from affirmatively encouraging or allowing Authorized Users to use parking spaces in the Developer Property other than the Parking Spaces. Developer will have the absolute right to eject or remove from the Parking Facilities or any of its property any person violating the rules and regulations established under this paragraph or violating the law.

10. Assignment.

(a) City shall have the right to authorize Authorized Users of City to exercise the easement rights granted under Paragraph 2 above. City also shall have the right to assign its rights hereunder to a single person or entity.

(b) Effective immediately upon the delivery to Developer of a recorded assignment and assumption as provided above, the assignor shall be released from all future or prospective liabilities, responsibilities and obligations hereunder with respect to the rights and obligations assigned to the assignee, and the assignee shall be deemed conclusively to have assumed all such future and prospective liabilities, responsibilities and obligations relating to the easements and rights assigned, and the Developer shall recognize the assignee as if it were an original party to this Agreement to the extent of the easements and rights assigned and all references to City in this Agreement shall be deemed also to refer to each such assignee as the context requires. No such assignment shall release the assignor from pre-existing or accrued liabilities or obligations, and the assignee shall

not be deemed to have assumed any pre-existing or accrued liabilities or obligations unless otherwise agreed to in writing by Developer and such assignee.

11. Sale by Developer; Assignment to Association.

(a) Nothing contained in this Agreement shall preclude Developer from freely selling, transferring, mortgaging, encumbering or conveying (i) all of the Developer Property including any improvements constructed thereon from time to time or (ii) the portion thereof subject to the easements under Paragraph 2 above (as such portion may be modified as contemplated by Paragraphs 3(a) and 3(b) above, including such property's interest in Common Elements and/or Limited Common Elements of any Condominium to the extent the same are subject to such easements); provided that such sale or assignment is of all (and not a portion) of Developer's rights and obligations under this Agreement. Effective immediately upon the delivery to the City of a copy of a recorded deed therefor, the grantor shall be released from all future or prospective liabilities, responsibilities and obligations hereunder, and the grantee, without necessity for a specific assumption instrument, shall be deemed conclusively to have assumed all future and prospective liabilities, responsibilities and obligations hereunder. The grantor will not be released from any pre-existing or accrued liabilities, responsibilities or obligations hereunder, and the grantee shall not be deemed to have assumed any pre-existing or accrued liabilities or obligations of the grantor. Neither Developer, nor any assignee or transferee of Developer, may assign or transfer less than all of its rights and obligations under this Agreement, and any attempt to divide such rights and obligations shall be void.

(b) In addition, to the extent that a Condominium Association under the Condominium has jurisdiction over the Parking Facilities or the portions thereof subject to the easements set forth in Paragraph 2 above, Developer may assign its rights and obligations under this Agreement to the Association, which assignment shall be evidenced by a written, recorded assignment and assumption (a copy of which shall be delivered to the City). Provided a recorded copy of such assignment and assumption is delivered to the City, then effective as of the date of recordation of such assignment and assumption in the official records of Maricopa County, Arizona, the assignor shall be released from all future or prospective liabilities, responsibilities and obligations hereunder and the Condominium Association shall be deemed conclusively to have assumed all future and prospective liabilities, responsibilities and obligations. No such assignment shall release the assignor from pre-existing or accrued liabilities or obligations, and the assignee Condominium Association shall also be deemed to assume all pre-existing or accrued liabilities or obligations unless otherwise agreed to in writing by City.

12. Enforcement.

(a) In addition to the remedies under Paragraphs 3(f) and 5(d) above, if any party fails to timely pay any sum or perform any obligation required under this Agreement, and fails to cure any such breach within thirty (30) days after receipt of written demand therefor, the party to whom such payment or performance is due, upon an additional thirty (30) days advance written notice, shall have the right if such default has not been cured at the expiration of the second 30 day period, to exercise all remedies

available under this Agreement or at law or in equity, including without limitation, specific performance (but excluding termination of the easements and rights hereunder), which remedies shall be enforced through arbitration or legal action if arbitration is not applicable as provided below; provided, however, if such non-monetary breach is not reasonably capable of being cured within sixty (60) days, then, the breaching party shall be in default only if it fails to commence the cure within thirty (30) days following receipt of the first notice of the breach and thereafter fails to diligently pursue completion of the cure within a reasonable period time.

(b) Before terminating any of the easements set forth in Paragraph 2 above, Developer shall, not earlier than the expiration of the second thirty (30) day period set forth above, provide a third written notice to the City, and if the default is not cured within fifteen (15) days after Developer gives such third notice, then Developer may, in addition to the exercise of all of its other rights and remedies, terminate the defaulting party's easements and other rights under this Agreement.

(c) After delivery of the second notice and expiration of the applicable time to cure, any non-breaching party shall be entitled, after notice to the breaching party and all other parties, to proceed with all actions reasonably necessary to perform the breached obligation on behalf of the breaching party and to recover from the breaching party all costs incurred in such performance, together with interest on all such sums at the Default Rate, from the date such costs are incurred through the date on which all such costs and interest are paid in full.

(d) If the City, without any obligation to do so, cures Developer's breach and provides written notice thereof to Developer, then Developer shall repay to the City all costs incurred by the City to cure such breach, together with interest on all such sums at the Default Rate, from the date such costs are incurred, within thirty (30) days following delivery of the notice from the City advising Developer that the City has cured Developer's breach.

(e) If Developer, without any obligation to do so, cures City's breach and provides written notice thereof to City, then City shall repay to Developer all costs incurred by Developer to cure such breach, together with interest on all such sums at the Default Rate, from the date such costs are incurred, within thirty (30) days following delivery of the notice from Developer advising the City that Developer has cured City's breach.

13. Parking Obligations of City. City previously agreed and may hereafter agree to provide certain parking rights to third parties within or on the Developer Property (the "**City Parking Obligations**"). Developer is not assuming any obligations under the City Parking Obligations, including any obligation to recognize any right of any third party to purchase a permanent easement for spaces on the Developer Property. It shall be City's sole obligation, at its sole cost and expense, to satisfy the City Parking Obligations through use of the City Spaces or otherwise. Without limiting the foregoing, Developer shall have no obligation to provide any additional spaces, or to grant any additional easements for the purpose of satisfying the City Parking Obligations. Developer shall indemnify, defend and

hold City harmless for, from and against all claims and liabilities (including reasonable attorneys' fees, costs and expenses) arising out of the failure to continually provide the City Spaces, as needed by City to comply with the City Parking Obligations, subject to Force Majeure.

14. City Approval. Wherever in this Agreement the approval, consent or agreement of the City is required for any matter, the City agrees to not unreasonably withhold, delay or condition such approval, consent or agreement and such approval, consent or agreement shall be deemed given by the party from whom it is requested unless that party reasonably objects in writing, noting in reasonable detail the specific reasons for objection, and delivers the same to Developer within twenty (20) days after that party's receipt or deemed receipt of the request for approval, consent or agreement. If the parties disagree or cannot resolve a disagreement relating to any matter for which an approval, consent or agreement is requested, the same shall be subject to arbitration under Paragraph 15 below.

15. Arbitration.

(a) Any controversy or claim arising out of or relating to any provision of this Agreement, and any breach of those provisions, shall be settled by arbitration in Maricopa County, Arizona in accordance with the Rules of the American Arbitration Association in effect at the time a demand for arbitration is filed with such Association, or such other rules mutually approved by the parties prior to the occurrence of the controversy, provided that any party may, in its sole discretion, give notice of its election to not utilize arbitration if the amount in controversy exceeds or reasonably may exceed \$200,000, whereupon no arbitration shall occur and the parties will have all rights and remedies available at law or in equity in the courts. Such election shall be made before the electing party picks an arbitrator as provided below, and if the party picks an arbitrator, it shall have no right to not participate in and be bound by the arbitration proceeding.

(b) If arbitration is to be utilized, there shall be (3) arbitrators chosen from a pool consisting solely of attorneys authorized to practice law in the State of Arizona who have practiced in the area of commercial real estate for a minimum of ten (10) years, with each party designating one such arbitrator. The arbitrators so appointed shall proceed to determine the matter in dispute, difference or in question. Immediately following appointment, the arbitrators shall provide written notice to the parties indicating the time and location of the scheduled hearing. The hearing must be held within thirty (30) calendar days following the date upon which the arbitrators were appointed. If a party alleges the existence of an emergency, the first hearing before the arbitrators shall occur within ten (10) days of the naming of the third arbitrator, with such additional proceedings and actions as the arbitrators may then specify to accommodate a bona fide emergency. Any decision of the arbitrators must be made consistent with the laws and court decisions of the highest court of the State of Arizona, if the highest court has rendered a decision, and otherwise, in accordance with the decisions of the Appellate Courts. The decision in writing of the majority of the arbitrators shall be final and conclusive and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction.

The arbitrators shall have power to award to any party or parties to such proceedings such sums for costs, expenses and attorney's fees as such arbitrators may deem proper.

16. Notices. All notices or other communications required or provided to be sent by either party shall be in writing and shall be sent (i) by United States Postal Service; postage prepaid, certified, return receipt requested; or (ii) by any nationally known overnight delivery service; or (iii) by courier; or (iv) by facsimile transmission; or (v) in person. All notices shall be deemed to have been given forty-eight (48) hours following deposit in the United States Postal Service or upon receipt if sent by overnight delivery service, courier, facsimile transmission, or personally delivered. Notwithstanding the foregoing, if a notice is given by facsimile transmission and the date of such transmission is not a business day or if such transmission is made after 5:00 pm on a business day, then such notice shall be deemed to be given on the first business day following such transmission. All notices shall be addressed to the party at the address below.

If to Developer:

With a copy to:

If to City: City of Tempe
31 East 5th Street
Tempe, Arizona 85281-2606
Attn: Community Development Director
Phone No. 480-350-8530
Fax No. 480-350-8872

With a copy to: City Attorney
140 East 5th Street
Tempe, Arizona 85281-2606
Phone No. 480-350-8227
Fax No. 480-350-8645

Any address or name specified above may be changed by notice given to the addressee by the other party in accordance with this paragraph. The inability to deliver because of a changed address of which no notice was given, or rejection or other refusal to accept any notice, shall be deemed to be the receipt of the notice as of the date of such inability to deliver or rejection or refusal to accept. Any notice to be given by any party hereto may be given by the counsel for such party.

17. Force Majeure. The parties' respective obligations hereunder, expressly excluding any payment obligations, are subject to extension of the time for performance by the reasonable delays caused by or resulting from casualty, unusual inclement weather, unusual governmental delays, strikes, labor disturbances, unusual materials unavailability

or shortages, events of God, condemnation, and other events beyond the reasonable control of the party whose performance is in question, excluding financial difficulty or inability (“**Force Majeure**”).

18. General. This Agreement is being entered into in the State of Arizona and shall be governed by the laws of the State of Arizona. If any party retains an attorney or commences any action or arbitration proceeding to enforce this Agreement or obtain remedies for its violation, the prevailing or non-defaulting party shall be entitled to recover from the losing party all costs and reasonable attorneys’ fees incurred in connection therewith and the same shall be included in the arbitration award and/or judgment. Time is of the essence of this Agreement. The parties agree that each party and its counsel have reviewed and revised this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement or any amendments or exhibits hereto. In this Agreement, the neuter gender includes the feminine and masculine, and the singular number includes the plural, and the words “person” and “party” include corporation, partnership, limited liability company, individual, firm, trust, or association wherever the context so requires. The captions of the paragraphs of this Agreement are for convenience only and shall not govern or influence the interpretation hereof. When used herein, the terms “include(s)” means “include(s) without limitation,” and the word “including” means “including, but not limited to”. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership or joint venture relationship between City and Developer. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, corporation or other entity not a party hereto (including, without limitation, any broker), and no such party shall have any right or cause of action hereunder. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, if any, and all references to any party shall be deemed references to such party and their permitted successors and assigns.

19. Amendments. This Agreement may be amended with the written consent of all parties; however, to the extent any amendment to this Agreement is applicable to and only affects some but not all parties and their respective rights and obligations hereunder, then any such amendment may be effectuated without the written consent of the part(ies) not affected. Any amendment to this Agreement to become effective must be recorded in the official records of Maricopa County, Arizona, and a copy thereof promptly provided to any party not executing the amendment.

20. Conflicts of Interest. No member, official or employee of the City may have any direct or indirect interest in this Agreement, nor participate in any decision relating to this Agreement that is prohibited by law. All parties hereto acknowledge that this Agreement is subject to cancellation pursuant to the provisions of Arizona Revised Statutes § 38-511.

21. Limitation of Liability. No partner, member, shareholder, trustee, beneficiary, director, officer, manager, or employee of any party hereto, or any partner of such parties, or any affiliate of any party hereto, shall have any personal liability to pay or perform the obligations of any party under this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement to be effective on the date first written above.

CITY OF TEMPE,
an Arizona municipal corporation

By: _____
Mark W. Mitchell, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM

City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

Acknowledged before me this ____ day of _____, 2016, by Mark W. Mitchell, the Mayor of the City of Tempe.

Notary Public

My Commission Expires:

DEVELOPER:

EXHIBIT F
Form of 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 _____, 2016.

[insert signature block]

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ___ day of _____, 2016, by _____.

Notary Public

My Commission Expires:

EXHIBIT A
To Special Warranty Deed

Property

EXHIBIT G
FORM OF 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 _____, a _____ (“**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). Landlord abated the Tax for the eight-year abatement period provided for in A.R.S. §42-6209.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 the Government Property Lease shall be ten (10) years from the date of issuance of the Certificate of Occupancy for the government property improvement which is the subject of the Government Property Lease; provided, however, that the Government Property Lease shall automatically terminate if (a) the Market is not open by the first anniversary of the date of execution thereof; or (b) once open, the Market (or any replacement Market) ceases operation for a period of sixty (60) days, unless (i) Developer executes a lease with another grocer within two hundred seventy (270) days from the date the Market or replacement Market ceased operation, and (ii) the replacement Market opens to the public for business within two hundred seventy (270) days after execution of the lease. The intent of the parties is that a Market shall be in operation at the Project during the entire term of this Lease, and that this Lease shall terminate automatically if the Market or any replacement Market ceases operation for a period longer than 540 days.

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 \$100.00 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 assessed valuation of the Premises, or 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 (or if permitted, provide a bond or other assurance of payment) if legally required as a condition to such protest and contest, and 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 assessed valuation of the Premises or 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); provided, however, that if Tenant's insurance carrier refuses to provide such an endorsement, Tenant shall notify Landlord of any notices received by Tenant relating to any potential event of cancellation or nonrenewal, and the failure to obtain such endorsement shall not be a default hereunder. 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. Except for any claims and liabilities that could have been asserted against Landlord if it were not the owner of the Premises, 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(A)(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 Mortgage 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:

a. 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

b. 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(a) above, or to continue to prosecute foreclosure proceedings pursuant to Section 21(b) 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 reversioning 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: FDG Local Tempe Associates, LLC
 Attn: Kevin Foltz
 4500 Cherry Creek Drive South, Suite 550
 Glendale, Colorado 80246

With a copy to: Darin Sender, Esq.
Sender Associates, Chtd.
464 S. Farmer Ave., Suite 102
Tempe, Arizona 85281

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 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. While Tenant retains an interest in the Premises, 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 while Tenant retains an interest in the Premises, except as otherwise permitted by law, 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.

38. Counterparts. This Lease 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.

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
of Land and Improvements Lease

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.
4. This Memorandum may be executed in multiple counterparts, each of which shall constitute an original and all of which shall constitute one and the same instrument.

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:
