

WHEN RECORDED RETURN TO:

City of Mesa (Beth Hughes-Ornelas)  
55 North Center Street  
Mesa, AZ 85201

## **DEVELOPMENT AGREEMENT**

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THIS DEVELOPMENT AGREEMENT (this "Agreement") is entered into \_\_\_\_\_, 2016, by and between SHELLEY and MICHAEL MCKOWN, a married couple ("Owner"), and the CITY OF MESA, an Arizona municipal corporation (the "City"). Owner and City are collectively referred to herein as the "Parties," or individually as the "Party."

### **RECITALS:**

A. Owner owns approximately 1.43 acres of real property located at 2600 E. Southern Avenue and legally described in Exhibit "A" and depicted in Exhibit "B" (the "Property") within the City of Mesa, Arizona.

B. The Owner has submitted an application to rezone the Property from RS-43 to OC with a Site Plan Review to allow the Property to be used as a banquet and conference center. The Owner would like to conduct certain banquet and conference center activities outdoors.

C. The Property is located next to a residential district and the City would like to ensure the outdoor activities or outdoor entertainment is not detrimental to the adjacent or surrounding property owners. In consideration of this, the Owner has agreed to abide by a Plan of Operation and Good Neighbor Policy to ensure the outdoor activities are compatible with the surrounding residential uses.

D. The Parties desire to enter into this Agreement for the purpose of establishing a Plan of Operation and Good Neighbor Policy for outdoor activities or outdoor entertainment and penalties/relief for the violation thereof and intend this document to be a "Development Agreement" within the meaning of A.R.S. § 9-500.05.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated herein by reference, and the mutual promises set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties state, confirm and agree as follows:

1. Owner's Duties and Obligations. Owner, its successors and assigns agree that the obligations set forth in this Agreement are covenants running with the land that are binding and enforceable upon Owner, its successors, assigns, mortgagees and other persons who may have or who may acquire any right, title or interest in the Property, or any part thereof.

1.1 Plan of Operation & Good Neighbor Policy. The Owner agrees to conform with the following Plan of Operation & Good Neighbor Policy with regards to all outdoor activities and outdoor entertainment:

1.1.1 Hours of operation for outdoor activities or outdoor entertainment on the Property will generally be from 9:00 AM to 10:00 PM Monday through Saturday. No outdoor activities or outdoor entertainment will take place on Sunday.

1.1.2 During outdoor activities or outdoor entertainment, the Owner will have a minimum of five (5) event staff on the Property to perform tasks associated with the outdoor use. The Owner shall not be required to provide security for outdoor activities or outdoor entertainment. The Owner however, at its own discretion, may hire outside security personnel for any outdoor activities or outdoor entertainment.

1.1.3 The Owner will ensure the Property is free from litter after any outdoor activity or outdoor entertainment including ensuring there is no litter on adjacent areas, alleyways, or the church parking lot. If any adjacent property owner finds any litter on their property that is believed to have originated from an outdoor activity or outdoor entertainment from the Property, they can contact the Owner who will arrange to have the litter removed within forty-eight (48) hours from the time the Owner receives the complaint. It is understood that such cleaning of litter may take place after 10:00 PM, provided the Owner abides by the City's noise ordinance.

1.1.4 The Owner agrees to provide adjacent property owners, his/her name and mobile telephone number so they can contact the Owner if there are any concerns related to the outdoor activity or outdoor entertainment. Owner agrees to address any complaints related to the outdoor activity or outdoor entertainment immediately and agrees to return initial complaints within forty-eight (48) hours.

1.1.5 The Owner will comply with the City of Mesa noise ordinance and will use a decibel meter to monitor the noise level to ensure compliance.

1.1.6 No hard alcohol will be permitted at any events on the Property. Only beer, wine or champagne will be permitted. The Owner agrees to enforce this provision by including this limitation in the operating agreement and or contract the Owner enters into with a customer.

2. Term/Termination. This Agreement shall become effective on the date this Agreement is recorded and shall continue in full force and effect and shall automatically terminate upon the earlier of: (i) a Council vote that does not approve the Zoning requested by the Owner in case Z15-041 and contemplated by this Agreement, (ii) a Board of Adjustment vote that does not approve the Special Use Permit for the outdoor

activities or outdoor entertainment, (iii) the effective date of Council approved re-zoning in conflict with this Agreement, (iv) termination by the mutual consent of the Owner and City pursuant to this Agreement, or (iv) fifty (50) years from the approval date of this Agreement.

3. General Provisions.

3.1 Recordation. This Agreement shall be recorded in its entirety in the Official Records of Maricopa County, Arizona, not later than ten (10) days after its full execution by the Parties.

3.2 Notices and Requests. Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if (A) delivered to the party at the address set forth below, (B) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below or (C) given to a recognized and reputable overnight delivery service, to the address set forth below:

The City: City of Mesa  
20 East Main Street, Suite 750  
Mesa, Arizona 85211  
Facsimile: 480-644-2175  
Attn: City Manager

With copy to: Mesa City Attorney's Office  
20 East Main Street, Suite 850  
Mesa, Arizona 85211  
Facsimile: 480-644-2498  
Attn: City Attorney

Owner: Shelley and Michael McKown  
2600 E. Southern Avenue  
Mesa, Arizona 85204  
Facsimile: 480-844-7303

With copy to: Pew & Lake, PLC  
Attn: Reese L. Anderson  
1744 S. Val Vista, Suite 217  
Mesa, Arizona 85204  
Facsimile: (480) 461-4670

or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this Section. Notices shall be deemed received (A) when delivered to the party, (B) three (3) business days after being placed in the U.S. Mail, properly addressed, with sufficient postage or (C) the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day. If a copy of a notice is also given to a party's counsel or

other recipient, the provisions above governing the date on which a notice is deemed to have been received by a party shall mean and refer to the date on which the party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

3.3 Choice of Law, Venue and Attorneys' Fees. The laws of the State of Arizona shall govern any dispute, controversy, claim or cause of action arising out of or related to this Agreement. The venue for any such dispute shall be Maricopa County, Arizona, and each Party waives the right to object to venue in Maricopa County for any reason. Neither Party shall be entitled to recover any of its attorneys' fees or other costs from the other Party incurred in any such dispute, controversy, claim, or cause of action, but each Party shall bear its own attorneys' fees and costs, whether the same is resolved through arbitration, litigation in a court, or otherwise.

3.4 Default. In the event a Party fails to perform or fails to otherwise act in accordance with any term or provision hereof (the "Defaulting Party") then the other Party (the "Non-Defaulting Party") may provide written notice to perform to the Defaulting Party (the "Notice of Default"). The Defaulting Party shall have 30 days from receipt of the Notice of Default to cure the default. In the event the failure is such that more than 30 days would reasonably be required to cure the default or otherwise comply with any term or provision herein, then the Defaulting Party shall notify the City of such and the timeframe needed to cure such default, so long as the Defaulting Party commences performance or compliance or gives notice of additional time needed to cure within said 30-day period and diligently proceeds to complete such performance or fulfill such obligation; provided further, however, that no such cure period shall exceed 90 days. Any written notice shall specify the nature of the default and the manner in which the default may be satisfactorily cured, if possible.

3.5 Remedy/Equitable Relief. The Parties agree that damages alone are not an adequate remedy for the breach of any provision of this Agreement. In the event the Owner fails to perform or fails to otherwise act in accordance with any term or provision hereof the City shall be entitled to immediately seek enforcement of this Agreement by means of specific performance, injunction or other equitable relief, without any requirement to post a bond or other security. The specific performance remedy provided in this section 3.5 shall be cumulative relief, and shall not be a limitation on the City's other remedies and right to seek contract damages hereunder.

3.6 Good Standing; Authority. Each Party represents and warrants that it is a duly formed and legally valid existing entity under the laws of the State of Arizona with respect to Owners, or a municipal corporation within Arizona with respect to the City and that the individuals executing this Agreement on behalf of their respective Party are authorized and empowered to bind the Party on whose behalf each such individual is signing.

3.7 Assignment. The provisions of this Agreement are binding upon and shall inure to the benefit and burden of the Parties, and all of their successors in interest and assigns.

3.8 Third Parties. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between the Parties. No term or provision of this Agreement is intended to, or shall be for the benefit of any person, firm or entity not a party hereto, and no such other person, firm, or entity shall have any right or cause of action hereunder.

3.9 Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver of any breach shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant, or condition of this Agreement. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted such waiver.

3.10 Further Documentation. The Parties agree in good faith to execute such further or additional instruments and documents and to take such further acts as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.

3.11 Fair Interpretation. The Parties have been represented by counsel in the negotiation and drafting of this Agreement and this Agreement shall be construed according to the fair meaning of its language. The rule of construction that ambiguities shall be resolved against the Party who drafted a provision shall not be employed in interpreting this Agreement.

3.12 Computation of Time. In computing any period of time under this Agreement, the date of the act or event from which the designated period of time begins to run shall not be included. The last date of the period so completed shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day that is not a Saturday, Sunday or legal holiday. The time for performance of any obligation or taking any action under this Agreement shall be deemed to expire at 5:00 p.m. (Phoenix, Arizona time) on the last day of the applicable time period provided herein.

3.13 Conflict of Interest. Pursuant to A.R.S. § 38-503 and § 38-511, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to cancellation pursuant to the terms of A.R.S. § 38-511.

3.14 Entire Agreement. This Agreement, together with the following Exhibits attached hereto (which are incorporated herein by this reference) constitute the entire agreement between the Parties:

Exhibit "A": Legal Description of the Property

Exhibit "B": Depiction of the Property

All prior and contemporaneous agreements, representations and understandings of the Parties, oral or written, are superseded by and merged in this Agreement.

3.15 Time of the Essence. Time is of the essence in this Agreement and with respect to the performance required by each Party hereunder.

3.16 Severability. If any provisions of this Agreement is declared void or unenforceable, such provisions shall be severed from this Agreement, which shall otherwise remain in full force and effect.

3.17 Proposition 207 Waiver. Developer hereby waives and releases the City from any and all claims under A.R.S. § 12-1134 et seq., including any right to compensation for reduction to the fair market value of the Property, as a result of the City's approval of this Agreement. The terms of this waiver shall run with the land and shall be binding upon all subsequent landowners and shall survive the expiration or earlier termination of this Agreement.

3.18 E-Verify. To the extent applicable under A.R.S. § 41-4401 and § 23-214, Owner represents and warrants compliance with all federal immigration laws and regulations that relate to their employees and their compliance with the E-verify requirements of A.R.S. § 23-214(A). Breach of the above-mentioned warranty shall be deemed a material breach of the Agreement and may result in the termination of the Agreement by City. The City retains the legal right to randomly inspect the papers and records of any employee who works under this Agreement to ensure compliance with the above-mentioned laws.

3.19 Prior Appropriation. Pursuant to A.R.S. § 42-17106, the City is a governmental agency which relies upon the appropriation of funds by its governing body to satisfy its obligations. City represents that it intends to pay all monies due under this Agreement if such funds have been legally appropriated. City agrees to actively request funding for future fiscal periods in order to satisfy the terms of this Agreement. However, in the event that an appropriation is not granted and operating funds are not otherwise legally available to pay the monies due or to become due under this Agreement, City shall have the right to terminate the Agreement without penalty on the last day of the fiscal period for which funds were legally available. In the event of such termination, City agrees to provide a minimum of thirty (30) calendar days' advance written notice of its intent to terminate.

[SIGNATURES OF THE PARTIES APPEAR ON THE FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first set forth above:

**“City”**

CITY OF MESA,  
an Arizona municipal corporation

By: \_\_\_\_\_  
Christopher J. Brady, City Manager

ATTEST:

\_\_\_\_\_  
Dee Ann Mickelson, City Clerk

APPROVED AS TO FORM

\_\_\_\_\_  
James Smith, City Attorney

STATE OF ARIZONA     )  
  ) ss.  
County of Maricopa     )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2016, by Christopher J. Brady, the City Manager for the CITY OF MESA, an Arizona municipal corporation.

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

My Commission Expires:

\_\_\_\_\_

**“Owner”**

Shelley and Michael McKown,  
a married couple

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

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

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

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

STATE OF ARIZONA     )  
  ) ss.  
County of Maricopa     )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of  
\_\_\_\_\_, 2016, by \_\_\_\_\_ and  
\_\_\_\_\_, a married couple.

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

My Commission Expires:

\_\_\_\_\_



**EXHIBIT “A”  
TO DEVELOPMENT AGREEMENT  
(Legal Description of the Property)**

**EXHIBIT “B”  
TO DEVELOPMENT AGREEMENT  
(Depiction of the Property)**