

## **VISIT MESA AGREEMENT**

This Agreement (the "Agreement") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2016 by and between the City of Mesa, an Arizona municipal corporation, ("City") and Visit Mesa, an Arizona nonprofit corporation, ("Visit Mesa").

### **RECITALS**

- A. City currently imposes a 5% Transient Lodging Tax ("TLT"), which generally is a tax on hotels and lodging for the use of lodging space.
- B. In March of 2004, City of Mesa voters approved an increase of .5% in the TLT, which at that time increased the percentage rate to 3% effective July 1, 2004. The collections from this 3% of the TLT are referred to herein as the "3% TLT Collection."
- C. In November of 2010, City of Mesa voters approved an increase of 2% in the TLT which increased the TLT to its current rate of 5%. The collections from this 2% increase are referred to herein as the "2% TLT Collection."
- D. Visit Mesa is a nonprofit corporation organized for the promotion of tourism, including sporting and community events and cultural exhibits, in Mesa, Arizona.
- E. Arizona Revised Statute ("ARS") § 9-500.06 requires that a certain portion of the TLT to be expended for the promotion of tourism either directly by the City or by a nonprofit organization that promotes tourism.
- F. In compliance with ARS § 9-500.06, City desires to transfer a portion of the TLT (the "TLT Transfer," as defined below) to Visit Mesa for the promotion of tourism in Mesa, Arizona, and subject to the terms of this Agreement.
- G. Visit Mesa represents and warrants that it will expend the TLT Transfer for the promotion of tourism in Mesa, Arizona, in compliance with ARS § 9-500.06.
- H. Visit Mesa will create and promote a "Convention & Visitors Bureau Program" as further set forth in this Agreement.

### **TERMS AND CONDITIONS**

In consideration of the mutual promises and agreements contained in this Agreement, and the Recitals which are incorporated herein, the parties agree as follows:

1. **TLT Transfer.** Subject to the other provisions of this Agreement, City agrees to make available to Visit Mesa such proceeds from the TLT as are approved by the City Council in the final City budget (the "TLT Transfer"). The TLT Transfer is also subject to the following

conditions, limitations, and transfer cap provisions:

- 1.1 TLT Transfer will be reduced for the following: (i) for such TLT amounts that the City is obligated to pay, or set aside for the possible future payment, pursuant to the terms of a development agreement or other agreement that has such obligations, (ii) for amounts that the Mesa City Council determines is appropriate, in its sole discretion, to retain, and (iii) for amounts that the Mesa City Manager determines is appropriate, in his sole discretion, to retain for the City of Mesa.
- 1.2 The Mesa City Manager may direct Visit Mesa to spend specific amounts of the TLT Transfer funds on specific civic, community, or tourism projects or events such as the Arizona Celebration of Freedom, Merry Main Street, El Tour de Mesa, downtown events and/or other similar activities for the promotion of tourism in Mesa and brand value-add.
- 1.3 The TLT Transfer from the 3% TLT Collection shall also be reduced by the following annual amounts: (i) \$25,000, as an administrative charge reflecting the expenses incurred by the City in administering this Agreement and collecting the TLT; (ii) \$100,000, for Spring Training facility improvement costs; and (iii) \$200,000, for capital needs at the Mesa Convention Center. These deductions, which do not sunset, will be divided over the twelve monthly TLT Transfers.
- 1.4 The amount of the transfer from the City's 2% TLT Collection is subject to a monthly cap (the "2% TLT Cap"). Specifically, from the City's 2% TLT Collection, the City will only transfer up to \$500,000 during the term of this Agreement. The 2% TLT Cap will be applied on a monthly basis after all deductions to the TLT Transfer have been applied. The 2% TLT Cap will be \$41,666.67 on a monthly basis; if the cap is not reached in a particular month, the cap will NOT change in the following month (i.e., no increase in the cap due to down months).
- 1.5 The TLT Transfer will be distributed by the City to Visit Mesa in twelve monthly payments on or before the 10<sup>th</sup> day of each month. Beginning on July 1, 2016, the monthly TLT Transfer will equal the TLT collected by the City in the previous months subject to the 2% TLT Cap, and less all deductions and reductions to the TLT Transfer as provided herein.
- 1.6 Visit Mesa acknowledges and agrees that it is not guaranteed a specific sum or any sum of Mesa's TLT, and the TLT Transfer is subject to deductions and reductions as described herein.

2. **Visit Mesa's Obligations:** Visit Mesa shall comply with all of the following terms and conditions:
- 2.1 In Attachment A, Visit Mesa hereby provides its proposed annual FY 15/16 Year End Projections budget; Attachment B-F provides proposed FY 16/17 budgets by Visit Mesa program. Visit Mesa agrees to provide the services and programing described in the attached Convention & Visitors Bureau Program. Visit Mesa agrees that the Mesa City Council may make such changes in the proposed budget and programing as it deems appropriate.
- 2.2 Visit Mesa has provided Attachment A as its proposed FY 15/16 Year End projections and will submit its financial summary statement for the currently ending fiscal year FY 15/16, when available.
- 2.3 Visit Mesa agrees to use sound and prudent financial business practices, follow generally accepted accounting principles, and keep complete and accurate records of all monies received and disbursed under this Agreement.
- 2.4 Visit Mesa shall submit reports to the Mayor and City Council twice each year or as requested through the City Manager that detail the expenditure of funds conveyed under this Agreement, and the results anticipated and achieved through the expenditures.
- 2.5 Visit Mesa will administer the day-to-day operation of the Convention & Visitors Bureau Program.
- 2.6 Visit Mesa agrees that decisions on funding priorities for civic, community or tourism activities will be made in consultation with and approved by the City.
- 2.6 From that portion of the TLT Transfer that comes from (or can reasonably be attributed to) the 3% TLT Collection, Visit Mesa shall utilize 15% of such funds for specific civic, community, or tourism projects or events such as the Arizona Celebration of Freedom, Merry Main Street, El Tour de Mesa, downtown events and/or other similar activities for the promotion of tourism in Mesa and brand value-add as directed by the City Manager or his designee.
- 2.7 Visit Mesa shall expend and use all of the TLT Transfer funds for the promotion of tourism in compliance with ARS § 9-500.06.
3. **Term and Effective Date.** The Parties intend, and agree, that the existing agreement for FY 15/16 will remain in effect until the end of its term on June, 30, 2016, and that all the terms of this Agreement shall become effective on the 1<sup>st</sup> day of July 2016 and shall terminate on the 30<sup>th</sup> day of June 2017.

4. **Assignment.** Visit Mesa may not assign or transfer its rights or obligations under this Agreement.
5. **Indemnity.** To the fullest extent permitted by law, Visit Mesa shall defend, indemnify and hold harmless the City, its agents, officers, officials, and employees from and against all claims, damages, losses, costs, charges, and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), relating to, arising out of, or alleged to have resulted from: (1) any negligent acts, errors, mistakes or omissions in the work, services, or professional services of Visit Mesa, its agents, representatives, subcontractors, subconsultants, or employees in the performance of this Agreement or providing any service under or related to the Convention & Visitors Bureau Program; and (2) Visit Mesa's, its agents', representatives', subcontractors', sub-consultants', or employees' failure to comply with or fulfill the obligations established by this Agreement. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.
6. **Audit & Record Review.** Visit Mesa shall be audited, including audited financial statements, on an annual basis by an independent certified public accounting firm, and a copy of such audit, and any and all updates to the audit, shall be provided to the City within ten (10) business days of Visit Mesa receiving the audit or audit updates, as applicable. Visit Mesa shall, at the City's request, make available for inspections and provide a copy all of Visit Mesa's financial records, all records related to this Agreement, and all records of all monies received and disbursed under this Agreement.
7. **Conflict of Interest.** Visit Mesa shall adopt a conflict of interest policy that any director, officer, employee of Visit Mesa, or their relatives having a substantial interest in any Visit Mesa transaction may not be involved or participate in the discussion or decision of whether Visit Mesa should enter into the transaction.

7.1 "Substantial Interest" shall mean as defined in A.R.S. § 38-502(11)

7.2 "Relative" shall mean as defined in A.R.S. § 38-502(9)

## 8. **Insurance**

8.1 Without limiting any liabilities or any other obligations of this Agreement, Visit Mesa shall obtain and maintain minimum insurance coverages and terms as follows:

8.2 Primary Coverage. Visit Mesa's insurance or self-insurance shall be primary insurance and any insurance or self-insurance maintained by City shall be in addition to Visit Mesa's insurance and shall not contribute to it.

8.3 Visit Mesa's insurance carrier will add 'the City of Mesa, its employees, officers and agents,' as Additional Insureds under Visit Mesa's insurance policy, and Visit Mesa shall provide the City with an Insurance Certificate with the Additional Insured endorsement.'

9. **Non-Performance, Cure, and Termination.** "Non-Performance" by Visit Mesa shall mean one or more of the following: (i) Visit Mesa fails to comply with the approved Convention & Visitors Bureau Program, or (ii) fails to observe or perform any other obligations or agreement required under this Agreement. Visit Mesa shall, upon written notice from the City, proceed to immediately cure or remedy such Non-Performance and, in any event such Non-Performance shall be cured within thirty (30) calendar days after receipt of such notice. If Visit Mesa fails to cure the Non-Performance within such 30 days, City may terminate this Agreement by written notice to Visit Mesa, and such termination shall not constitute a waiver of any rights or remedies.
10. **Termination Upon Notice.** City may terminate this Agreement for any or no reason upon ninety (90) calendar days written notice. Such termination shall be effective ninety (90) calendar days after the date of such notice or at such latter date specified in such notice of termination. Termination Upon Notice shall not constitute a waiver of any rights or remedies.
11. **A.R.S. § 38-511 Notice.** This Agreement is subject to the provisions of A.R.S. § 38-511 and the City may terminate this Agreement if any person significantly involved in negotiating, drafting, securing, or obtaining this Agreement for or on behalf of the City becomes an employee in any capacity of any other party to this Agreement.
12. **E-Verify Compliance.** To the extent required by A.R.S. §§ 41-4401 and 23-214, Visit Mesa 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 breach of the Agreement and may result in the termination of the Agreement by the City. The City retains the legal right to randomly inspect the papers and records of the Visit Mesa and any of its contractors and subcontractors who work under this Agreement to ensure compliance with the above-mentioned laws. Further, Visit Mesa shall include a provision in its contracts with contractors and subcontractors requiring compliance with, and a warranty under, A.R.S. §§ 41-4401 and 23-214, and allowing Visit Mesa to terminate any such contract for a breach of such warranty and allowing Visit Mesa and the City to inspect the papers and records of the contractor's and subcontractor's employees to ensure compliance with the above-mentioned laws.
13. **Surviving Provisions.** All warranties, representations, and duties to indemnify, defend, and hold harmless shall survive the termination, cancellation, or expiration of this Agreement; additionally, all obligations which reasonably should survive shall survive.

[Signatures on the following pages.]

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first hereinabove written.

CITY OF MESA,  
an Arizona municipal corporation

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

Approved as to form:

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

State of Arizona                    )  
  ) ss.  
County of Maricopa                )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ the \_\_\_\_\_ of Visit Mesa, and he/she in such capacity being authorized so to do, executed the foregoing instrument for the purposes contained therein, on behalf of said Arizona nonprofit corporation.

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

My Commission Expires:

\_\_\_\_\_

VISIT MESA,  
an Arizona nonprofit corporation

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

State of Arizona                    )  
  ) ss.  
County of Maricopa                )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
20\_\_\_\_, by \_\_\_\_\_ the \_\_\_\_\_ of Visit  
Mesa, and he/she in such capacity being authorized so to do, executed the foregoing  
instrument for the purposes contained therein, on behalf of said Arizona nonprofit corporation.

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

My Commission Expires:

\_\_\_\_\_

ATTACHMENTS PROVIDED: as stated