

When Recorded Return To:

City of Mesa
Attn: City Clerk
20 East Main Street
Mesa, Arizona 85211

FIRST AMENDMENT TO DEVELOPMENT AGREEMENT AND OPTION AGREEMENT

THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT AND OPTION AGREEMENT (this “**First Amendment**”) is made to be effective as of this ____ day of December, 2016 (“**Amendment Effective Date**”), by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the “**City**”); and RIVER VIEW HOTEL, LLC, an Arizona limited liability company (“**Owner**”), as successor to BCY Limited Partnership, an Arizona limited partnership (“**Owner’s Predecessor**”). City and Owner are sometimes referred to herein collectively as the “**Parties**,” or individually as a “**Party**.”

RECITALS

A. City previously conveyed certain unimproved real property (the “**Property**”) to Owner’s Predecessor by an instrument entitled “Special Warranty Deed with Property Restrictions, Rights of Reverter and Rights of Re-Entry” dated as of January 2, 2014 (the “**Deed**”) which was recorded in the Official Records of Maricopa County, Arizona (the “**Official Records**”) as Instrument No. 2014-005362 on January 3, 2014.

B. Immediately following the conveyance of the Property by City to Owner’s Predecessor, the Property was encumbered by a Development Agreement and Option Agreement, entered into by and between City and Owner’s Predecessor and dated to be effective as of January 2, 2014 (the “**Development Agreement**”) which was recorded in the Official Records as Instrument No. 2014-005363 on January 3, 2014.

C. The Property was later conveyed by Owner’s Predecessor to Owner, subject in all events to the Deed and the Development Agreement; and specifically by the terms of (i) that certain Special Warranty Deed, dated March 10, 2014 and recorded as Instrument No. 2014-0154020 in the Official Records, on March 11, 2014, and (ii) that certain Assignment and Assumption Agreement, dated March 11, 2014 and recorded as Instrument No. 2014-0154028 in the Official Records, on March 11, 2014.

D. The Parties now wish to enter into this First Amendment for the sole and express purposes of: (i) extending the dates for performance and modifying the definition of Retail Improvements in Section 4.6 of the Development Agreement; (ii) confirming the termination of the Option and Option/Pad granted in the Development Agreement; and (iii) terminating the Right of First Refusal (“**ROFR**”) granted by the Development Agreement. In addition, because of the

change of dates in Section 4.6 of the Development Agreement, the Parties acknowledge the need to approve a corresponding change in the Deed ("**Deed Modification**").

E. Notwithstanding the foregoing recitals, Owner acknowledges that City requires the subordination of all liens and other claims recorded against the Property subsequent to the recording of the Deed and the Development Agreement in the Official Records in order to insure City's rights and priority in the Property; and accordingly the effectiveness of this First Amendment and any Deed Modification is expressly conditioned upon Owner's obtaining such subordinations, at Owner's sole cost and expense, and in forms satisfactory to City in its sole and absolute discretion, all as more fully set forth in this First Amendment.

AGREEMENTS

Now, therefore, in consideration of the foregoing recitals and representations and the mutual promises contained in this Agreement, the Parties agree as more fully set forth below. All defined terms used in this First Amendment, unless otherwise defined in this First Amendment, shall have the meanings given to them in the Development Agreement.

1. **Retail Improvements.** Section 4.6 of the Development Agreement is deleted in its entirety and is replaced with the following:

4.6 **Retail Improvements.** Owner shall cause the Commencement of Construction of the Retail Improvements to occur no later than December 31, 2017; and Owner shall cause the Completion of Construction of the Retail Improvements to occur no later than June 30, 2019. The Retail Improvements shall consist of not less than 20,000 rentable square feet of retail shop space, which may take the form of approximately 6,290 rentable square feet of retail shop space and approximately 16,490 rentable square feet of space to be used as a bowling alley, or such other similar combinations of retail, restaurant and entertainment uses as City's City Manager reasonably deems equivalent.

2. **Deed Modification.** Upon Owner's satisfaction of the Amendment Conditions, City will cause the Deed Modification, in the form attached to this First Amendment as **Exhibit "A"** (and which is incorporated into this First Amendment for all purposes), to be executed and acknowledged by and on behalf of City and recorded in the Official Records. Although the Deed Modification will not be effective (or be deemed effective) until the satisfaction of the Amendment Conditions, the execution and acknowledgement of the Deed by and on behalf of City, and its recordation in the Official Records, the automatic reverter is deferred and suspended pending the satisfaction by Owner of the Amendment Conditions, but in no event later than December 2, 2017.

3. **Termination of Option, Option/Pad and ROFR.** Notwithstanding anything in the Development Agreement to the contrary, Owner confirms that the Option and the Option/Pad have previously been terminated by reason of Owner's failure timely to exercise such Option and Option/Pad prior to the expiration of the Option Term; and Owner further agrees that, as of the Amendment Effective Date, the ROFR is now also fully terminated and extinguished. Owner has, and shall have, no right, title or interest in, to or with respect to the Option, the Option/Pad, the ROFR, the Pad, or the Phase Two Parcel.

4. **Amendment Conditions.** On or before December 1, 2017 (the “**Amendment Condition Date**”), Owner, at Owner’s sole cost and expense, shall satisfy all of the following conditions (the “**Amendment Conditions**”):

- (a) Execute, acknowledge, and deliver to City, the Deed Modification;
- (b) Obtain (and deliver to City for recordation in the Official Records) an executed and acknowledged subordination agreement (or agreements), in form or forms suitable for recording in the Official Records, subordinating all liens, rights, claims and interests of lenders and other persons that have arisen from and after the date of recording the Deed in the Official Records. Such subordination agreement or agreements shall be in a form or forms satisfactory to City in City’s reasonable discretion, shall be obtained by Owner at Owner’s sole cost and expense, and shall unconditionally provide for City’s rights under the Deed (including but not limited to the Right of Reverter) to be prior and senior to all such liens, rights, claims and interests.
- (c) Obtain (and deliver to City for recordation in the Official Records) an executed and acknowledged subordination agreement (or agreements), in form or forms suitable for recording in the Official Records, subordinating all liens, rights, claims and interests of lenders and other persons that have arisen from and after the date of recording the Development Agreement in the Official Records. Such subordination agreement or agreements shall be in a form or forms satisfactory to City in City’s reasonable discretion, shall be obtained by Owner at Owner’s sole cost and expense, and shall unconditionally provide for City’s rights under the Development Agreement as amended (including but not limited to this First Amendment) to be prior and senior to all such liens, rights, claims and interests.
- (d) If required by City in its sole and absolute discretion, obtain and deliver to City at Owner’s sole cost and expense, a policy of title insurance insuring City’s interests in the Property arising from the Deed (as modified by the Deed Modification) and the Development Agreement (as amended by this First Amendment) in such amounts, and subject to such other matters as City may approve in its sole and absolute discretion, as senior to all liens, rights, claims and interests of lenders and other persons that have arising from and after the date of recording the Deed and Development Agreement in the Official Records.

In the event that Owner has not satisfied the Amendment Conditions on or before the Amendment Condition Date, then all extensions, modifications and amendments set forth or intended by Section 1 and Section 2 of this First Amendment and the Deed Modification shall be automatically and without further act or notice required, be (and be deemed) fully withdrawn as of the Amendment Effective Date; City shall have all rights granted to it by and under the Deed and Development Agreement without regard to this First Amendment or the Deed Modification (including but not limited to right to exercise City’s Right of Reverter granted in the Deed); and neither Owner nor any third party shall have any rights under this First Amendment or the Deed Modification. Notwithstanding the foregoing, Owner agrees and acknowledges that despite the failure by Owner to satisfy the Amendment Conditions and the withdrawal of Section 1 and Section 2 of this Amendment, Section 3 of this First Amendment shall bind Owner and be in full force and effect notwithstanding such failure.

5. **OWNER REPRESENTATIONS.** As of the Amendment Effective Date, Owner represents and warrants to City that:

(a) There are no acts or omission of City under the Development Agreement that, but for the passage of time, the giving of notice, or both, would be a Default of Event of Default of City under the Development Agreement.

(b) Owner has the full right, power and authorization to enter into and perform this First Amendment and of the obligations and undertakings of Owner under this First Amendment, and the execution, delivery and performance of this First Amendment by Owner has been duly authorized and agreed to in compliance with the organizational documents of Owner.

(c) All consents and approvals necessary to the execution, delivery and performance of this First Amendment have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

(d) Owner will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this First Amendment.

6. **Waiver.** Owner hereby waives and releases City ("**Waiver**") 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 all or any part of the Property (and in Owner's interest, if any, in the Option, the Option/Pad, the ROFR, the Pad and the Phase Two Parcel) as a result of City's approval of this First Amendment and the Deed Modification, and all related zoning, land use, building and development matters arising from, relating to, or reasonably inferable from this First Amendment and the Deed Modification. The terms of this Waiver shall run with all land that is the subject of this First Amendment and shall be binding upon all subsequent landowners, assignees, lessees and other successors, and shall survive the expiration or earlier termination of this First Amendment.

7. **Conflict of Interest Statute.** This First Amendment is subject to, and may be terminated by City in accordance with, the provisions of A.R.S. § 38-511.

8. **Full Force and Effect.** Except as expressly modified and amended by this First Amendment, the Development Agreement shall be unchanged and remain in full force and effect.

9. **Execution.** The Parties have executed this First Amendment to be effective as of the Amendment Effective Date.

Signatures of the Parties are on the Following Two [2] Pages.

SIGNATURE PAGE OF THE CITY

CITY:

THE CITY OF MESA, ARIZONA,
an Arizona municipal corporation

By: _____

Its: _____

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2016, by _____, the _____ of the City of Mesa, Arizona, an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument on behalf of City.

Notary Public

My commission expires:

SIGNATURE PAGE OF THE OWNER

OWNER:

RIVER VIEW HOTEL, LLC
an Arizona limited liability company

By: Power Hotels, LLC, an Arizona limited liability
company, its Manager

By: _____
Gaylord Bob Yost, Manager

STATE OF ARIZONA)
) ss.
County of Maricopa)

On _____, 2016, before me, _____, a Notary Public in and for said State, personally appeared Gaylord Bob Yost, who acknowledged himself to be the Manager of Power Hotels, LLC, an Arizona limited liability company, who is the Manager of River View Hotel, LLC, an Arizona limited liability company, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

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

Notary Public

My commission expires:

EXHIBIT "A"
(FORM OF DEED MODIFICATION)

When Recorded Return To:

City of Mesa
Attn: City Clerk
20 East Main Street
Mesa, Arizona 85211

**DEED MODIFICATION AGREEMENT
AND CONFIRMATION OF PROPERTY RESTRICTIONS,
RIGHTS OF REVERTER AND RIGHTS OF RE-ENTRY**

THIS DEED MODIFICATION AGREEMENT AND CONFIRMATION OF PROPERTY RESTRICTIONS, RIGHTS OF REVERTER AND RIGHTS OF RE-ENTRY (this "**Deed Modification**") is made to be effective as of the ____ day of _____, 2017, by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the "**Grantor**"); and RIVER VIEW HOTEL, LLC, an Arizona limited liability company, as successor in interest to BCY Limited Partnership, an Arizona limited partnership ("**Grantee**").

RECITALS

A. Grantor previously conveyed certain unimproved real property (the "**Property**") to Grantee's predecessor by an instrument entitled "Special Warranty Deed with Property Restrictions, Rights of Reverter and Rights of Re-Entry" dated as of January 2, 2014 (the "**Deed**") which was recorded in the Official Records of Maricopa County, Arizona (the "**Official Records**") as Instrument No. 2014-005362, on January 3, 2014.

B. The Property was thereafter conveyed to Grantee by Grantee's predecessor, and Grantee has assumed all of the obligations of Grantee's predecessor in, to and under the Deed through that certain Special Warranty Deed, dated March 10, 2014 and recorded as Instrument No. 2014-0154020 in the Official Records, on March 11, 2014.

C. Upon the satisfaction of certain conditions, Grantor has agreed to modify the Deed as more fully set forth below.

AGREEMENTS

Now, therefore, in consideration of the foregoing recitals and representations and the mutual promises contained in this Deed Modification, the Parties agree as more fully set forth below. All defined terms used in this Deed Modification, unless otherwise defined in this Deed Modification, shall have the meanings given to them in the Deed.

1. **Retail Reverter Dates.** Section 4 of the Deed shall be amended to provide that the “Retail Reverter Date” is changed, modified and amended to be December 31, 2017.

2. **Grantee’s Confirmations.** Grantee unconditionally agrees, acknowledges and confirms (collectively, the “**Confirmations**”) that: (i) all other terms, conditions and provisions of the Deed, including but not limited to the Restrictions, the Rights of Reverter and the Rights of Re-Entry granted to Grantor in the Deed, continue in full force and effect, except for the change in the Retail Reverter Date, which is the sole change effected by this Deed Modification; and (ii) except as expressly modified by this Deed Modification, Grantor retains all rights and remedies granted to or retained by Grantor in and under the Deed.

IN WITNESS WHEREOF, Grantor has caused this Deed Modification to be executed as of this ____ day of _____, 201____, and Grantee has caused this Deed Modification to be executed to evidence Grantee’s acceptance of the terms and conditions of this Deed Modification, including but not limited to the Confirmations, and Grantee agrees, on behalf of itself and its successors and assigns, fully to be bound by this Deed Modification, the Restrictions, Reverter and Re-Entry, by executing this Deed Modification.

[Two Separate Signature Pages Follow.]

SIGNATURE PAGE OF THE GRANTOR

GRANTOR:

CITY OF MESA,
an Arizona municipal corporation

By: _____
Christopher J. Brady, City Manager

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the ____ day of _____, 20____, before me, the undersigned Notary Public, personally appeared Christopher J. Brady, who acknowledged himself to be the City Manager of the CITY OF MESA, an Arizona municipal corporation and that, being authorized so to do, he executed the foregoing instrument for the purposes herein contained on behalf of the Grantor.

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

Notary Public

(Seal)

SIGNATURE PAGE OF THE GRANTEE

GRANTEE:

RIVER VIEW HOTEL, LLC
an Arizona limited liability company

By: Power Hotels, LLC, an Arizona limited liability
company, its Manager

By: _____
Gaylord Bob Yost, Manager

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the ____ day of _____, 20____, before me, the undersigned Notary Public, personally appeared Gaylord Bob Yost, who acknowledged himself to be the Manager of Power Hotels, LLC, an Arizona limited liability company, who is the Manager of River View Hotel, LLC, an Arizona limited liability company, , the Grantee named in this Deed Modification Agreement and Confirmation of Property Restrictions, Rights of Reverter and Rights of Re-Entry, and that, being authorized so to do, he executed the foregoing instrument for the purposes herein contained on behalf of the Grantee.

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

Notary Public

(Seal)