

WHEN RECORDED RETURN TO:

CITY OF MESA  
Real Estate/Engineering  
PO Box 1466  
Mesa, AZ 85211-1466

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "Agreement") is entered into as of \_\_\_\_\_, 2017, by and between PECOS MERRILL 20 LLC, an Arizona limited liability company (the "**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 is the owner of a twenty (20) acre parcel of real property located south of Pecos Road and west of the alignment of Merrill Road in Mesa, Arizona, (the "Pecos Property"), as legally described in Exhibit A, attached hereto.

B. City is purchasing the south 6 acres from Owner (the "Property") as legally described in Exhibit B, attached hereto, subject to the terms set forth herein and the Real Estate Purchase and Sale Agreement entered into by the Parties (the "Purchase Agreement"). City is acquiring from Owner a Right of Way described in Exhibit C.

C. The Pecos Property is being farmed pursuant to a lease with Barney Farms LLP (the "Lease") and is classified agricultural for property tax assessment purposes. The property retained by Owner after the closing of the sale of the Property (the "Retained Property") being less than 20 acres, will not qualify for the agricultural property tax assessment unless farmed jointly with another property with the two properties having no less than 20 acres. The Parties desire to ensure that the agricultural property tax classification is maintained.

D. The Parties agree to cooperate in a joint farming arrangement with the Property and Retained Property after the closing of the sale of the Property, subject to the conditions and terms set forth herein.

## **AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing Recitals, which are incorporated herein by reference, and the mutual promises set forth in this Agreement, the Parties agree as follows:

### **ARTICLE I PURPOSES AND TERM**

Section 1.1 Purposes. The purposes of this Agreement are (i) to facilitate and coordinate the farming on the Pecos Property and provide for termination of such farming activity; (ii) to facilitate the dedication and development of right-of-way for Merrill Road; and (iii) to set forth the requirements and restrictions on the development of the Property according to the terms of this Agreement and the Real Estate Purchase and Sale Agreement.

Section 1.2 Term/Termination. This Agreement shall become effective on the date this Agreement is recorded and shall continue in full force and effect for fifteen (15) years at which time this Agreement will automatically terminate. If the Property or the Retained Property are ready for development prior to the expiration of the term of this Agreement, either Party may terminate this Agreement upon thirty (30) days written notice of such termination, subject to the provisions of Section 2.2 of this Agreement. For this purpose, "ready for development" means the immediate commencement of construction of proposed physical improvements at the end of the notice period.

### **ARTICLE II JOINT FARMING AGREEMENT**

Section 2.1 Farming Lease. The Pecos Property is subject to the Lease with Barney Farms LLP or a subsequent farming tenant. The Lease terminates on October 22, 2017. The Parties agree that upon the closing on the sale of the Property, the Property and the Retained Property will be farmed jointly subject to the Lease. Income shall be shared proportionately. Upon expiration of the Lease, the Parties agree to renew the Lease periodically subject to either; (a) joint lease agreements for farming entered into by Owner or Owner's successors or assigns and City; or (b) separate farm leases providing for joint management and operation of the farming activities on the Property and Retained Property. The option of a shared lease agreement or separate lease agreements lies solely within City's discretion. No party shall terminate or cancel its lease without cause unless circumstances exist that allows such party to terminate this covenant. If Barney Farms LLP terminates a lease or fails to perform, either party may obtain replacement leases for both properties.

Section 2.2 Terms of the Farming Lease. The terms of the Lease and any renewal lease agreements with Barney Farms LLP, whether a joint lease or separate leases, shall be subject to the same terms as the Lease except that the

renewal lease agreement for the Property shall allow for termination if the Property or Retained property is ready for development upon one hundred eighty (180) days written notice to the tenant and Owner or City. For this purpose “ready for development” shall mean construction of physical improvements that makes farming impractical to commence immediately after the end of the notice period.

Section 2.2 Tax Status. During the term of the Lease or subsequent lease and/or leases, Owner is authorized to file agricultural use applications with the Maricopa County Assessor to maintain the agricultural tax classification on the Property and the Retained Property. City shall provide a copy of the executed lease agreement with Barney Farms LLP or a subsequent farming tenant and any renewals thereof within ten (10) business days (business days in City are Monday through Thursday) after execution of such lease agreement.

### **ARTICLE III MERRILL ROAD RIGHT-OF-WAY**

Section 3.1 Dedication of Right-of-Way. Pursuant to the Purchase Agreement, Owner at closing dedicate to City the 40-feet wide right-of-way (the “Right-of-Way”) along the east side of the Retained Property. The Right-of-Way is attached hereto as Exhibit D. The Right-of-Way will be used for ingress and egress to the Property and may be used for ingress and egress to the Retained Property and for use of the private irrigation canal located next to or within the Right-of-Way.

Section 3.2 Improvement of the Right-of-Way. The Right-of-Way shall be improved at the time of development of the Property or the Retained Property. If the Retained Property is developed before the Property, Owner or Owner’s successors or assigns shall be responsible for the Right-of-Way improvements to the standards required by City for similar developments and shall include removal or tiling of the private irrigation canal. If the Property is developed before the Retained Property, City shall be responsible for paving a portion of the Right-of-Way and shall include either removing if there are no farming activities on the Retained Property or tiling the private irrigation canal. The paving shall be of laid to the standards required for similar developments. Until the Right-of-Way is improved, City will post notice that the Right-of-Way is not to be used for travel by the general public.

Section 3.3 Retained Easement. Owner has retained an easement 33 feet wide along the east boundary of the Property for the purpose of using, operating, maintaining, repairing, replacing and granting access to a concrete irrigation ditch located thereon. City shall have the right to relocate the irrigation ditch to a different location on the Property and/or may replace the ditch with underground pipe, if City determines such is required for the development of the Property. If City relocates the irrigation ditch prior to the termination of the Easement by its terms, City must (i) use reasonable commercial efforts to minimize the disruption of the farming operation on the Pecos Property; (ii) provide the same

water flow capacity and function as existed prior to the relocation; and (iii) be solely responsible for the costs of relocating or piping the irrigation ditch.

#### **ARTICLE IV INDEMNIFICATION**

Section 4.1 Owner Indemnification. Owner, to the extent permitted by law, agrees to indemnify and save harmless City, or any of its departments, agencies, officers or employees against all loss, expense, damage or claim of any nature whatsoever which is caused by an event arising out of use of the Retained Property or the Right-of-Way for purposes of accessing or using the Retained Property. City shall in all instances be indemnified against all liability, losses or damages of any nature for or on account of any injuries to or death of persons or damages to or destruction of property other than damages caused by City's negligence. The above cost of damages incurred by City or any of its departments, agencies, officers or employees shall include reasonable attorneys' fees, costs, and/or expenses incurred in the event of any such claim, whether arising out of litigation or otherwise. This indemnification obligation may be assumed contractually by a tenant in actual use or control of the Retained Property or Right-of-Way.

Section 4.2 City Indemnification. City, to the extent permitted by law, agrees to indemnify and save harmless Owner against all loss, expense, damage or claim of any nature whatsoever which is caused by an event arising out of use of the Property or the Right-of-Way for purposes of accessing or using the Property. Owner shall in all instances be indemnified against all liability, losses or damages of any nature for or on account of any injuries to or death of persons or damages to or destruction of property other than damages caused by Owner's negligence. The above cost of damages incurred by Owner shall include reasonable attorneys' fees, costs, and/or expenses incurred in the event of any such claim, whether arising out of litigation or otherwise. This indemnification obligation may be assumed contractually by a tenant in actual use or control of the Property or Right-of-Way.

#### **ARTICLE V GENERAL PROVISIONS**

Section 5.1 Binding on Owner. 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 and assigns.

Section 5.2 Binding on City. City, on its behalf and on behalf of each of its subdivisions and departments and City's successors, assigns, agrees that the obligations set forth in this Agreement are covenants running with the land that are binding and enforceable upon City and each of its departments and subdivisions.

Section 5.3 Recordation. This Agreement shall be recorded in its entirety (but without the Purchase Agreement) in the Official Records not later than ten (10) days after the Agreement Date.

Section 5.4 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  
Attn: City Manager

With a copy to: Mesa City Attorney's Office  
20 East Main Street, Suite 850  
Mesa, Arizona 85211  
Attn: City Attorney

Owner: Pecos Merrill 20 LLC  
C/O Sheldon Sternberg  
5730 N. Echo Canyon Drive  
Phoenix, AZ 85018

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.

Section 5.5 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.

Section 5.6 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 Owner, or a municipal corporation within Arizona with respect to 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.

Section 5.7 Default and Remedies. 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 of the non-defaulting party 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. City's remedies for a default by Owner shall include suspension of any or all of its obligations under this Agreement, and exercise of any remedies available at law or in equity, specifically including but not limited to specific performance by Owner. Owner's remedies for a default by City shall include shall include suspension of any or all of its obligations under this Agreement, and exercise of any remedies available at law or in equity, specifically including but not limited to loss of rental income and damages related to an increase in property taxes solely due to a loss of agricultural classification.

Section 5.8 Partnership. 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.

Section 5.9 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.

Section 5.10 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.

Section 5.11 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.

Section 5.12 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 which 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.

Section 5.13 A.R.S. § 38-511. In the event a conflict of interest was to be found in the negotiation of this Agreement, this Agreement is subject to cancellation pursuant to A.R.S. § 38-511.

Section 5.14 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 Pecos Property  
Exhibit B: Legal Description of the Property  
Exhibit C: Legal Description of the Right-of-Way

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

Section 5.15 Time of the Essence. Time is of the essence in this Agreement and with respect to the performance required by each Party hereunder.

Section 5.16 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.

Section 5.17 Counterpart. This agreement may be signed in counterpart.

**[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 Mickelsen, City Clerk

APPROVED AS TO FORM

\_\_\_\_\_  
James N. Smith, City Attorney

STATE OF ARIZONA \_\_\_\_\_ )  
\_\_\_\_\_) ss.  
County of Maricopa \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2017, by Christopher J. Brady, the City Manager for the CITY OF MESA, an Arizona municipal corporation.

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



PECOS MERRILL 20, LLC

By: \_\_\_\_\_  
Sheldon H. Sternberg

STATE OF ARIZONA       )  
                                      ) ss.  
County of Maricopa       )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2017, by Sheldon H. Sternberg, and he in such capacity being authorized so to do, executed the foregoing instrument for the purposes contained therein, on behalf of Pecos Merrill 20, LLC.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

**EXHIBIT A**  
**LEGAL DESCRIPTION OF THE PECOS PROPERTY**

THE NORTH 944.58 FEET OF THE FOLLOWING DESCRIBED PARCEL;

A PORTION OF THE NORTHWEST QUARTER OF SECTION 2, TOWNSHIP 2 SOUTH, RANGE 7 EAST, OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A FOUND REBAR AT THE NORTH QUARTER CORNER OF SAID SECTION 2, SAID POINT LYING SOUTH 89 DEGREES 26 MINUTES 06 SECONDS EAST, A DISTANCE OF 2643.73 FEET FROM A FOUND REBAR MARKING THE NORTHWEST CORNER OF SAID SECTION 2;

THENCE SOUTH 00 DEGREES 41 MINUTES 41 SECONDS EAST 1336.93 FEET;

THENCE NORTH 89 DEGREES 26 MINUTES 06 SECONDS WEST 668.46 FEET;

THENCE NORTH 00 DEGREES 41 MINUTES 41 SECONDS WEST 1336.93 FEET;

THENCE SOUTH 89 DEGREES 26 MINUTES 06 SECONDS EAST 668.46 FEET TO THE TRUE POINT OF BEGINNING;

EXCEPT 1/16<sup>th</sup> of all oil, gases and other hydrocarbon substances, coal, stone, metals, minerals, fossils, and fertilizers of every name and description and except all materials which may be essential to the production of fissionable material as reserved in Arizona Revised Statutes, except Lot 3; and

EXCEPT all coal and other minerals as reserved in the Patent from the State of Arizona, pursuant to the Act of Congress, dated January 25, 1927, except lot 3; and

EXCEPT from Lot 3, all oil, gas, metals, mineral rights and right to other materials as reserved in the Patents from the State of Arizona, as provided by A.R.S. 37-231.

Parcel No 2: Temporary easement for irrigation, access and other appurtenant purposes as set forth in document recorded as 2012-972637, Official of Maricopa County.

Parcel No 3: Temporary easement for irrigation, access and other appurtenant purposes as set forth in document recorded as 2012-972638, Official of Maricopa County.

Parcel No. 4: Temporary easement for irrigation, access and other appurtenant purposes as set forth in document recorded as 2012-972636, Official of Maricopa County.

**EXHIBIT B**  
**LEGAL DESCRIPTION OF PROPERTY**

A PORTION OF THE NORTHWEST QUARTER OF SECTION 2, TOWNSHIP 2 SOUTH, RANGE 7 EAST, OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A FOUND REBAR AT THE NORTH QUARTER CORNER OF SAID SECTION 2, SAID POINT LYING SOUTH 89 DEGREES 26 MINUTES 06 SECONDS EAST, A DISTANCE OF 2643.73 FEET FROM A FOUND REBAR MARKING THE NORTHWEST CORNER OF SAID SECTION 2;

THENCE SOUTH 00 DEGREES 41 MINUTES 41 SECONDS EAST 1336.93 FEET;

THENCE NORTH 89 DEGREES 26 MINUTES 06 SECONDS WEST 668.46 FEET;

THENCE NORTH 00 DEGREES 41 MINUTES 41 SECONDS WEST 1336.93 FEET;

THENCE SOUTH 89 DEGREES 26 MINUTES 06 SECONDS EAST 668.46 FEET TO THE TRUE POINT OF BEGINNING;

EXCEPT THE NORTH 944.58 FEET THEREOF.

EXCEPT 1/16<sup>th</sup> of all oil, gases and other hydrocarbon substances, coal, stone, metals, minerals, fossils, and fertilizers of every name and description and except all materials which may be essential to the production of fissionable material as reserved in Arizona Revised Statutes, except Lot 3; and

EXCEPT all coal and other minerals as reserved in the Patent from the State of Arizona, pursuant to the Act of Congress, dated January 25, 1927, except lot 3; and

EXCEPT from Lot 3, all oil, gas, metals, mineral rights and right to other materials as reserved in the Patents from the State of Arizona, as provided by A.R.S. 37-231.

TOGETHER WITH THE NON-EXCLUSIVE RIGHT TO USE THE EASEMENTS RECORDED AS 2012- 97237, 2012- 97238, AND 2012- 97236 OF OFFICIAL RECORDS OF MARICOPA COUNTY, ARIZONA.

THE PROPERTY IS SUBJECT TO THE RESERVATION OF AN EASEMENT OVER, ACROSS, UNDER AND THROUGH THE EAST 33 FEET OF THE ABOVE DESCRIBED PROPERTY FOR THE SOLE PUPOSE OF USING, OPERATING, MAINTAINING, REPAIRING REPLACING AND GRANTING ACCESS TO A CONCRETE IRRIGATION DITCH LOCATED ON THE PROPERTY.

**EXHIBIT C**  
**LEGAL DESCRIPTION OF RIGHT-OF-WAY**

THE EAST 40 FEET OF THE NORTH 944.58 OF THE FOLLOWING DESCRIBED PARCEL;

A PORTION OF THE NORTHWEST QUARTER OF SECTION 2, TOWNSHIP 2 SOUTH, RANGE 7 EAST, OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A FOUND REBAR AT THE NORTH QUARTER CORNER OF SAID SECTION 2, SAID POINT LYING SOUTH 89 DEGREES 26 MINUTES 06 SECONDS EAST, A DISTANCE OF 2643.73 FEET FROM A FOUND REBAR MARKING THE NORTHWEST CORNER OF SAID SECTION 2;

THENCE SOUTH 00 DEGREES 41 MINUTES 41 SECONDS EAST 945.94 FEET;

THENCE NORTH 89 DEGREES 26 MINUTES 06 SECONDS WEST 40.00 FEET;

THENCE NORTH 00 DEGREES 41 MINUTES 41 SECONDS WEST 945.94 FEET;

THENCE SOUTH 89 DEGREES 26 MINUTES 06 SECONDS EAST 40.00 FEET TO THE TRUE POINT OF BEGINNING;

EXCEPT 1/16<sup>th</sup> of all oil, gases and other hydrocarbon substances, coal, stone, metals, minerals, fossils, and fertilizers of every name and description and except all materials which may be essential to the production of fissionable material as reserved in Arizona Revised Statutes, except Lot 3; and

EXCEPT all coal and other minerals as reserved in the Patent from the State of Arizona, pursuant to the Act of Congress, dated January 25, 1927, except lot 3; and

EXCEPT from Lot 3, all oil, gas, metals, mineral rights and right to other materials as reserved in the Patents from the State of Arizona, as provided by A.R.S. 37-231.

SUBJECT TO THE RESERVATION OF AN EASEMENT OVER, ACROSS, UNDER AND THROUGH THE EAST 33 FEET OF THE ABOVE DESCRIBED PROPERTY FOR THE SOLE PUPOSE OF USING, OPERATING, MAINTAINING, REPAIRING REPLACING AND GRANTING ACCESS TO A CONCRETE IRRIGATION DITCH LOCATED ON THE PROPERTY.

SUBJECT TO THE RESERVATION OF AN EASEMENT OVER, ACROSS, UNDER AND THROUGH THE OF THE ABOVE DESCRIBED PROPERTY FOR INGRESS AND AGRESS TO THE ADJACENT PROPERTY RETAINED BY GRANTOR AND SUBJECT

TO THE USE OF THE PROPERTY PURSUANT THE PROVISIONS OF A  
DEVELOPMENT AGREEMENT EXECUTED HERewith.