
MEMORANDUM OF UNDERSTANDING
City of Mesa, Arizona | R^3 Mesa, LLC
February 26, 2018

1. **Parties to Memorandum.** The Parties to this Memorandum of Understanding (“Memorandum”) are the City of Mesa, Arizona, an Arizona municipal corporation (“City”) and R^3 Mesa, LLC (“Developer”), an Arizona limited liability company.

2. **Background.** Developer desires to redevelop certain City owned improved property located on the south side of Pepper Place just east of North Robson comprised of lots APN 138-35-010A, 138-35-011, 138-35-012, 138-35-054, 138-35-053, and 138-35-056 totaling approximately 38,629 square feet of land depicted in the attached Exhibit A (“Pepper Place Lot”). The proposed development is intended to include market rate apartments, commercial space, a parking garage, and other public improvements (“Project”).

3. **Memorandum of Understanding.** The Parties acknowledge that this document is a “Memorandum of Understanding,” and is neither an agreement or contract between them, nor an offer from the City that invites acceptance by Developer. It is intended to be an outline of certain terms on which the Parties have found preliminary agreement and which form the basis for further discussions and negotiations, with the Parties understanding that (a) such terms are not complete and require further detail and explication, and (b) there are material terms that are essential to any agreement between the Parties that have not been included in this Memorandum. This Memorandum is not binding upon the Parties or legally enforceable, imposes no enforceable obligations upon the Parties, and does not grant any rights to or in favor of any Party as against the other. Each Party waives any and all rights that it may have to attempt to enforce the terms of this Memorandum as an agreement or a contract against the other Party. In addition to the foregoing, Developer acknowledges that any ultimate agreement with the City requires the approval of the City Council in the form of a resolution or ordinance, which approval may be granted or withheld in the City Council’s sole discretion notwithstanding any prior City Council approval of this Memorandum and approval of subsequent negotiations. The approval of this Memorandum by the City Council shall not be, or be deemed to be, an approval of an agreement between the City and Developer, and does not allow Developer the right to use any of the City property including, but not limited to, the Pepper Place Lot.

4. **Outline of Certain Material Terms.** Subject to the foregoing and additional terms and conditions precedent described below, the Parties provide the following outline of certain terms to be included in an agreement between them:

A. **Developer’s Preliminary Obligations.** In conjunction with the Parties negotiating an agreement for the proposed Project, Developer will perform, obtain, and/or provide the following at Developer’s sole cost and expense:

i. **Business Plan.** The business plan shall include the Project’s budget and pro-forma; it will describe and demonstrate the Project’s viability, including details for the operation and management of the Project after completion of construction. The business plan will include a third-party market analysis of the Project. The business plan will also:

- a. Provide research/market demand data.
- b. Provide details on how Developer intends to utilize the Project site and in what form of control of the site, or portion thereof, the Project requires.

- c. Provide the Project's development costs in detail and itemized, including all site acquisition, construction costs, soft costs, and contingencies.
 - d. Provide the Project's operating pro forma in detail, including all revenues, expenses, debt service, taxes, and other assessments for the same number of years for which City assistance is requested.
 - e. Provide projected commercial lease rates and apartment rental rates, and the basis for such rates and prices.
 - f. Provide reasonable assumptions for all costs and revenues.
 - g. As the Project parameters are refined and detailed, Developer will update the business plan, and provide such updates to the City.
- ii. Financial Ability. Developer will provide information to the City Manager to demonstrate Developer's financial capacity to execute and complete the Project successfully, including:
- a. Describe a clear strategy to fund all Project costs.
 - b. Specify and describe funding sources for the Project.
 - c. Meeting with the City Manager to establish that there are lenders/investors that will fund the Project.

B. Developer's Project Requirements.

- i. Minimum Improvements. At Developer's sole cost and expense, Developer will design, obtain permits for, and construct all the following minimum Project improvements ("Minimum Improvements") on or above the Pepper Place Lot:
- a. A minimum of seventy (70) unique market rate/luxury highly sustainable apartments which may include: hybrid car sharing program, a natural pool, water catchment system for landscape irrigation, and a micro and macro energy use display.
 - b. A minimum of 5,000 square feet of commercial space.
 - c. A multi-story, structured parking garage with improved ground floor parking, ("Pepper Place Garage"). Developer shall provide to the City, at no cost to the City, a minimum of seventy-six (76) parking spaces in the Pepper Place Garage that the City will own and control for public or City permit parking and any other uses determined by the City ("City Parking"). The City Parking shall consist of all the ground floor parking spaces and all the contiguous parking spaces necessary for the City Parking. At the City's request and expense, Developer will design and construct additional City Parking within the Pepper Place Garage in accordance with City requirements.
- ii. Lease and Option Terms. As consideration for building the Minimum Improvements and maintaining the Pepper Place Garage, including the City Parking, as described in Section 4(B)(iv) and 4(B)(v), Developer will enter into a development agreement and will enter into either a ground lease with an option to purchase or a real estate purchase agreement, as follows:
- a. Ground Lease with Option to Purchase. The ground lease will be a long-term lease in which Developer will pay a reduced rental amount for the first fifteen (15) years for any property leased to Developer. The amount of the rental reduction will reflect the benefits the City will receive which includes operation and maintenance of City Parking and the conversion of the existing City parking spaces from uncovered to covered City Parking. After fifteen (15) years, Developer will pay market rate for the remainder of the lease term. The lease terms may contain an option to purchase the property at fair market value and

- include when Developer can exercise this option (this option is not subject to GPLET which is defined in Section 4(F)).
- b. **Real Estate Purchase Agreement.** The real estate purchase agreement will allow Developer to purchase the Pepper Place Lot subject to the following terms:
1. **Purchase Price.** The purchase price for the Pepper Place Lot will be fair market value. The purchase price may be adjusted, if agreed upon by the Parties, to account for the benefits the City will receive which may include: 1) operation and maintenance of City Parking; 2) the conversion of the existing City parking spaces from uncovered to covered City Parking; and 3) a permanent easement for City Parking.
 2. **Perpetual Easement.** Developer will convey a perpetual easement to the City to allow the City to use City Parking in perpetuity. The easement will give the City the ability to utilize all the drive aisles and all access points related to City Parking and will give the City the right to use City Parking for City and public purposes, including public parking.
 3. **GPLET.** The development agreement and real estate purchase agreement may include GPLET terms and conditions that allows Developer to transfer the Pepper Place Lot and the Minimum Improvements to the City and allows the City to transfer the Pepper Place Lot and the Minimum Improvements back to Developer. Any agreements are subject to eligibility and the GPLET statutory requirements. See Section 4(F).
- iii. **Permit & Deadline Requirement.** Developer will have control of the site either upon the lease effective date or upon closing under the real estate purchase agreement, as applicable. The agreement(s) will include deadlines, agreed upon by both Parties, requiring Developer to obtain all approvals and permits, commence construction, and complete construction for the Minimum Improvements and the City will be able to terminate the lease or take back the property if Developer defaults on a deadline, provided the default is not a result of delays caused by the City.
- iv. **Customary Operation and Maintenance.**
- a. **City Parking & Commonly Shared Drive Aisles.** For fifteen (15) years, Developer is solely responsible for the customary operation and maintenance including non-capital repair and replacement (“O&M”) of the City Parking and the commonly shared drive aisles. After fifteen (15) years, the City is responsible for the O&M of the City Parking and the City and Developer will equitably share the O&M of the commonly shared drive aisles.
 - b. **The Project.** Except as described in Subsection 4(B)(iv)(a) above, Developer is solely responsible for the O&M of the Project including but not limited to Pepper Place Garage, the Minimum Improvements, and all other improvements constructed at the Pepper Place Lot.
- v. **Structural and Capital Repair and Replacement.** Developer is solely responsible for all structural and capital repairs and replacements of the Project in perpetuity, including but not limited to, Pepper Place Garage (including City Parking and commonly shared drive aisles), the Minimum Improvements, and all improvements constructed at the Pepper Place Lot.
- C. **City’s Project Requirements.** Subject to Developer completing the Developer’s preliminary obligations (Section 4(A) above) and other conditions precedent as described above:

- i. City and Developer will enter into an agreement as described in Section 4(B)(ii).
 - ii. All options to purchase will be subject to compliance with the terms of a development agreement and lease including but not limited to completion of the Minimum Improvements.
 - iii. City and Developer may elect to enter into a lease that may qualify for tax abatement under A.R.S. § 42-6209. If the Parties so elect, City, at its expense, will engage an independent third party to perform an economic analysis as required by A.R.S. § 42-6209(C)(2).
 - iv. The City Parking will be owned and controlled by the City and will remain open for public or City permit parking and other uses determined by the City.
 - v. The City will enter into a development agreement for the Project with Developer (“Development Agreement”). The Development Agreement may, if agreed to by the Parties and allowed by law, include provisions whereby the City will reimburse Developer for the construction of certain public infrastructure improvements which may be subject to a cap and other restrictions including, but not limited to, Title 34 of the Arizona Revised Statutes and A.R.S. § 42-6010.
 - vi. City will provide impact fee offsets, in accordance with the Mesa City Code, for previous development on the Pepper Place Lot.
 - vii. Review of construction plans, applications and other submissions by or on behalf of Developer shall be in accordance with a customized review schedule, agreed upon between the City and Developer.
 - viii. If required in order to accommodate the Project, the City will initiate a rezoning case consistent with the provisions of the adopted Form-Based Code. All zoning approvals are subject to approval by the City Council, in its sole discretion.
 - ix. The City will assign a dedicated Development Services Department Project Manager to oversee the zoning and development entitlements for the Project.
- D. Parking Structure Redevelopment. Developer may design the parking structure at the Pepper Place Garage to allow conversion to residential and commercial uses as the demand for parking decreases, subject to compliance with applicable codes (e.g. building codes) and payment of applicable fees; however, Developer will be allowed to redevelop the parking structure only above the ground level and only so long as the parking garage continues to provide the minimum number of City Parking.
- E. Use Restrictions. The Pepper Place Lot’s use will be restricted to uses consistent with the intent of the Project; uses the City deems to have a deleterious impact on the Project will be prohibited.
- F. GPLET. The Project may involve a lease of property and improvements that would be subject to the Arizona GPLET Statutes, A.R.S. § 42-6201 *et seq*, which are subject to pending legislation and may be amended from time to time by the State Legislature. Any lease will be subject to the terms and limitations of the GPLET statutes, as they may be amended. Developer will be responsible for ensuring that all GPLET taxes are paid, if and as applicable. The City does not represent that the Project and the site are eligible for, or comply with, any GPLET statutory tax abatement or reduction.
- G. Remedies. In addition to other remedies, any agreement(s) between the Parties related to the Project will provide that if Developer fails to timely construct the Minimum Improvements within the time required, the City would be able to terminate the agreement(s).
- H. Use of Pepper Place Garage. The City Parking at the Pepper Place Garage will be subject to the exclusive control of the City. The City will retain all revenue generated from the use of all City Parking. Except for the City Parking, the Pepper Place Garage will be subject to the exclusive

control of Developer, and Developer will retain all revenue generated from the use of such space. Parking revenue generated from public events will be equitably distributed based on the available spaces that may be parked for the event.

- I. Security. The City is not obligated to provide any type of security for the Pepper Place Garage. Developer may install or provide security in the Pepper Place Garage, at Developer's sole cost and expense.
- J. Indemnification. Developer will insure, indemnify, and defend the City against claims relating to the Project, Minimum Improvements, and all improvements built on or above the Pepper Place Lot including, but not limited to, claims relating to structural engineering and construction.
- K. Utilities. The Project will use City of Mesa utilities (water, sewer, electric, gas, solid waste) as it is located in the City of Mesa service area, and Developer will be responsible for all utility costs for the Project and all improvements. The City has certain incentive and reduced utility rates; if the Project qualifies for such rates, the Project may be able to participate in such rates. Further, the City and Developer will consider the possibility of a separate accommodation where Developer may independently purchase electric power supplies (and associated transmission to the City system) to facilitate Developer's desire for the ability to provide electricity from a renewable energy source for the Project.
- L. Signs. All signage for the Project must comply with the City of Mesa sign code and Zoning Code, as amended. Signage on the Project will be allowed subject to terms to be agreed upon in a Development Agreement and compliance with applicable law.

5. **Further Negotiations**. By their execution of this Memorandum, the Parties confirm that this is not an agreement between them, but are authorizing their attorneys and representatives to pursue further negotiations regarding the subject matter of this Memorandum, in accordance with the terms and conditions set forth in this Memorandum, in order to produce a binding agreement(s) subject to approval by the City Council.

6. **Sunset**. This Memorandum shall be deemed automatically terminated, and without further act or notice required, on the earlier of (a) the City Council's approval of a Development Agreement between the City and Developer for the Project, or (b) December 31, 2018.

(Signature page follows)

R^3 Mesa, LLC, an Arizona
limited liability company

The City of Mesa, Arizona, an Arizona municipal
corporation

By: Habitat Metro, LLC, an Arizona limited
liability company, its Manager

By: _____

By: Sprague & Hill, LLC, an Arizona
limited liability company, its Manager

Its: _____

By: _____

Wm. Timothy Sprague

Its: Manager