

WHEN RECORDED RETURN TO:

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

**FOURTH AMENDMENT TO
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT
(Mesa Proving Grounds)**

**CITY OF MESA, ARIZONA,
an Arizona municipal corporation**

AND

**DMB MESA PROVING GROUNDS LLC,
A Delaware limited liability company**

Dated: _____

**FOURTH AMENDMENT TO
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT
(MESA PROVING GROUNDS)**

THIS FOURTH AMENDMENT TO PRE-ANNEXATION AND DEVELOPMENT AGREEMENT (MESA PROVING GROUNDS) (the “**Fourth Amendment**”) is entered into by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the “**City**”), and DMB MESA PROVING GROUNDS LLC, a Delaware limited liability company (the “**Developer**”) (collectively, “**Parties**”).

RECITALS

A. The Developer and the City are entering into this Fourth Amendment pursuant to the provisions of A.R.S. § 9-500.05, which authorizes the City to enter into and amend a development agreement with a landowner or any other person having an interest in real property located in the City.

B. The Developer and the City are parties to the Pre-Annexation and Development Agreement dated November 3, 2008, as recorded in the Official Records of Maricopa County as Document No. 2008-0974930, as amended by the First Amendment to Pre-Annexation and Development Agreement dated May 16, 2011, as recorded in the Official Records of Maricopa County as Document No. 2011-0456474 (the “**First Amendment**”), the Second Amendment to the Pre-Annexation and Development Agreement dated November 21, 2013, as recorded in the Official Records of Maricopa County as Document No. 2013-1005620 (the “**Second Amendment**”) and the Third Amendment to Pre-Annexation and Development Agreement dated December 15, 2016, as recorded in the Official Records of Maricopa County as Document No. 2016-0940133 (the “**Third Amendment**”) (collectively, the “**MPG Development Agreement**”).

C. The Developer is the Master Developer of that certain real property that is subject to the MPG Development Agreement. The property is located in the City of Mesa, Arizona and initially consisted of approximately three thousand one hundred fifty-four (3,154) acres (the “**Eastmark Project**”). The Eastmark Project, excluding therefrom any portion thereof as to which a termination has occurred pursuant to said Section 9.6(c) of the MPG Development Agreement, is hereinafter referred to as the “**Property**”.

D. Since the Parties first entered into the MPG Development Agreement, significant development has occurred in the Eastmark Project, and the Parties’ expectations for future development have adjusted to account for current and projected economic, market and site conditions. The Parties are entering into this amendment to document negotiated agreements concerning changes to Articles III and IV, and Exhibits G and G-1, of the MPG Development Agreement.

AGREEMENT

NOW, THEREFORE, the Parties agree as follows:

1. Fire Protection.

Section 3.12(c) of the MPG Development Agreement is hereby revised to read in its entirety as follows (deletions are shown by strikeout and additions by underscore):

(c) **Construction of Permanent Fire Stations on the Property/Developer Payment.** The City shall design, construct, and operate a permanent fire station on the First Permanent Fire Station Site. If the City elects to purchase the Second Permanent Fire Station Site, the City shall design, construct and operate a permanent fire station on the Second Permanent Fire Station Site. Except as expressly provided herein, the Developer shall not be responsible for any costs associated with the design or construction of the permanent fire stations other than to pay the City's Fire Impact Fee in place at the time of issuance of each building permit. The City agrees that the permanent fire stations shall comply with the design guidelines governing commercial development on the Property. Within thirty (30) days of receipt of a written notice from the City, which notice states that the City has determined that adequate operating revenues are available to the City and calls for fire service in the response boundaries warrant construction of a fire station on the First Permanent Fire Station Site, the Developer shall pay to the City the sum of two million two hundred thousand dollars (\$2,200,000.00) (**"Developer Payment for Fire Station"**), which funds shall be used toward the design and construction of a fire station on the First Permanent Fire Station Site.

(i) The Parties are considering three locations for the placement of the First Permanent Fire Station Site, as follows: (a) on Warner near Ellsworth Road; (b) just north of Warner on Ellsworth Road; and (c) near Point Twenty-Two Boulevard and Ellsworth Road, in each case subject to prior sale by the Developer. As set forth in Section 3.12(b)(i), Developer will convey property for the First Permanent Fire Station Site at no cost to the City.

(ii) Upon receipt of ~~such funds~~ the Developer Payment for Fire Station, the City will proceed diligently with the design and construction of a fire station on the First Permanent Fire Station Site. The Developer will not receive credits against the City's Fire Impact Fee for its payment under this paragraph.

(iii) The Parties acknowledge that they are no longer considering placing the First Permanent Fire Station Site on the east side of Eastmark Parkway, north of Ray Road (APN 304-32-427), that they are still considering this location for other municipal uses contemplated by the MPG Development Agreement, but have made no agreement to that end, and that Developer shall be free to market this location to third parties if Developer and the City have not entered into a formal written agreement for the City to acquire such location within one (1) year after the recording of this Amendment.

2. Police Services. Section 3.13(a) of the MPG Development Agreement is hereby revised to read in its entirety as follows (deletions are shown by strikeout and additions by underscore):

If requested by the City, Developer agrees to reserve one (1) site for sale to the City for the construction and operation of a police substation on the Property (“**Police Substation Site**”). With the submission of each Development Unit Plan, the City will consider the need for a Police Substation Site within the particular Development Unit. If City determines it needs a Police Substation Site, Developer and City will work in good faith to mutually agree upon the Police Substation Site. ~~Unless otherwise agreed to in writing between Developer and the City’s City Manager, upon the Developer’s payment of funds pursuant to Section 3.12, paragraph (c), and in conjunction with a subdivision plat~~ The City shall purchase from the Developer the Police Substation Site. The City in its sole discretion will determine the need for a Police Substation with the submission of a Development Unit Plan or separately. The City will purchase, unless otherwise agreed to in writing by Developer and City, the Police Substation Site pursuant to Section 3.19. City is under no obligation to construct a police substation. The Developer will not receive credits against the City’s Public Safety Impact Fee for its conveyance of the Police Substation Site. If City decides to construct a police substation, City will be solely responsible for the costs of designing and constructing a permanent police substation.

3. Construction Commitments of the City And Construction of Accelerated Public Improvements. Section 4.1 of the MPG Development Agreement is hereby revised to read in its entirety as follows (deletions are shown by strikeout and additions by underscore):

4.1 Construction of Accelerated Public Improvements. Subject to the conditions, terms and limitations set forth in **Exhibit G** to the Second Amendment to this Agreement, and in order to facilitate the provision of public infrastructure necessary to attain jobs-based City planning goals for the Mesa Gateway region, the City, at its sole cost and expense, ~~shall~~ has ~~designed, engineered, bid, constructed and installed~~ (or caused the same to be done) some of the ~~those~~ public improvements ~~(and only those public improvements)~~ (the “**Accelerated Public Improvements**”) listed as projects 1, 2(a), (b), and (c), and 3, and more fully described, on Exhibit G-1 to this Agreement to the Second Amendment (the “**Accelerated Project List**”); ~~subject to a maximum City expenditure of Project Costs in the amount of \$17,800,000.00 (the “Maximum City Cost”). Upon expending the Maximum City Cost, City shall have no further obligations to construct (or cause to be constructed) the Accelerated Public Improvements and shall have no further obligations under this Article IV of the Agreement.~~ Specifically, the following Accelerated Public Improvements on Exhibit G-1 are complete, and the Parties have determined Developer’s financial responsibilities as set forth below:

- Ray Road Wastewater Interceptor. Developer’s financial responsibility is to reimburse the City, in the form of a “Reimbursement Credit” (defined below), the amount of \$1,217,527.00.
- Non-potable System Projects -- Turnout Structure. Developer’s financial responsibility is to reimburse the City, through a Reimbursement Credit, the amount of \$192,445.00.
- Non-potable System Projects -- Raw Waterline. Developer’s financial responsibility is to reimburse the City, through a Reimbursement Credit, the amount of \$464,000.00.

(a) Reimbursement Credit. For the purposes of the MPG Development Agreement, the Parties have established a Reimbursement Credit in the total amount of \$1,873,972.00. The City may apply the Reimbursement Credit, or a portion of it, to the purchase of real property from the Developer for the siting and construction of City assets including but not limited to a second fire station site, library site or well site(s), for the design and construction of various public improvements, or for any other purpose concerning the development of the Property including but not limited to the purchase of amenities, fixtures and personal property related to parks, a library, a police substation or fire stations on the Property. In the event that the Parties cannot agree upon the application of some or all of the Reimbursement Credit within six years after the execution of this Fourth Amendment, then the Developer will pay the full value of the Reimbursement Credit (or the unapplied thereof, as applicable) to the City in cash, within 30 days of a written demand.

(a) Determination to add Projects 4 and 5 to the Accelerated Public Improvements. ~~The City has identified current funding for the construction of projects 1, 2(a), (b) and (c), and 3. The City shall use good faith efforts to identify additional sources of City funds, up to the Maximum City Cost, for the construction of the Accelerated Public Improvements including Projects 4 and 5. The City Manager, on or before November 24, 2008, shall conclusively determine, and advise Developer in writing, whether City funding is available to add projects 4 and 5, as listed and described on the Accelerated Project List, to the Accelerated Public Improvements for the City to construct (or cause to be constructed); provided, however, if the City Manager does so determine to add Projects 4 and 5 to the Accelerated Public Improvements, the Maximum City Cost shall not increase and shall remain \$17,800,000.00. If the City Manager fails to timely advise Developer of such determination or if the City Manager timely advises Developer that Projects 4 and 5 shall not be added to the Accelerated Public Improvements, then and in either such event, the City shall have no obligations whatsoever as to Projects 4 and 5 and neither the City nor Developer shall have any further obligations relative to the Accelerated Public Improvements except as expressly provided in Exhibit G community facilities district.~~

5. Public Improvements for Water/Wastewater. Section 4.3 of the MPG Development Agreement (added pursuant to the Second Amendment) is hereby deleted in its entirety and replaced with the following:

4.3 Public Improvements for Water/Wastewater. Contingent on the conditions and terms described in this Section 4.3, the City will reimburse Developer for up to \$3,000,000 for future, mutually agreed to water and wastewater improvements to support non-residential economic development within the Property subject to the following terms and limitations:

(a) ~~The City's obligations under this Section 4.3 are all contingent upon the City obtaining new and additional bonding authority that includes uncommitted funds for utility improvements (specifically, water and wastewater improvements) that can be spent within the Property. Accordingly, the City's obligations are contingent on the following: (i) City Council calling a bond election, which election includes a question seeking authorization for water and sewer utility bond authority that includes uncommitted funds that may be spent on public water and wastewater improvements within the Property, (ii) voter approval on such utility~~

bonds, and (iii) Council authorization, exercised at their sole discretion, to issue such utility bonds.

~~(b)~~(a) If the conditions precedent in subsection (a) above are all met, Developer agrees to submit to the City's City Manager projects within the Property that create economic development consistent with the Strategic Plan (e.g., non-residential uses) that need public water or wastewater improvements. The Developer's submitted plan will include a description of the project, graphically representation of the water/wastewater improvements, economic development impact projection, and timeline for the completion of the project and expected reimbursement. If the City Manager in his reasonable discretion approves such public water or wastewater improvements as part of the economic development (which is an "Approved Water/Wastewater Project" individually and collectively the "Approved Water/Wastewater Projects"), Developer may seek reimbursement for the costs to construct and install (or cause the same to be done) the Approved Water/Wastewater Projects, subject to the maximum expenditure of \$3,000,000 (the **Maximum Approved Water/Wastewater Project Costs**) ~~from the utility bond funds described in this Section 4.3.~~ The Maximum Approved Water/Wastewater Project Costs is a cap on the potential reimbursement Developer may seek under this Section 4.3. Procurement by Developer of all contracts relating to Approved Water/Wastewater Projects for which the Developer will seek to be reimbursed by the City shall strictly comply with the terms and conditions in **Exhibit K** to this Agreement (as amended) and with A.R.S. Title 34 as determined by the City Engineer.

~~(e)~~(b) Developer shall not receive reimbursement for improvements constructed prior to obtaining approval from the City's City Manager for such project.

~~(d)~~ — If such utility bonds as described in this Section 4.3 receive voter authorization, Developer will coordinate with City regarding the scheduling timeframes for reimbursement with the bond issuances. Developer may not begin construction of an Approved Water/Wastewater Project until after the utility bonds as described in this Section 4.3 receive voter authorization. Developer understands that due to bond limitations Developer may only seek reimbursement for Approved Water/Wastewater Projects which have been completed in compliance with Exhibit K within three (3) years of the issuance related to the Approved Water/Wastewater Project; and Developer may only submit for reimbursement after the issuance of such utility bonds. Further, City and Developer shall agree upon the method of dedicating the completed Approved Water/Wastewater Projects.

~~(e)~~ — Reimbursement to Developer for Approved Water/Wastewater Projects is subject to any and all limitations of such future utility bonds as contemplated in this Section 4.3, any issuance and subsequent bond authorization limitations, the availability of funds for reimbursement from such bond issuance, and any and all limitations under state and federal law.

~~(f) — Nothing in this Agreement obligates the City Council to seek voter approval for future utility bonds as described in this Section 4.3 or to issue such bonds if there is voter approval after a bond election.~~

~~(g) — If there is no election to authorize the utility bonds and/or there is no issuance of utility bonds as contemplated by this Section 4.3 within twenty (20) years of the Effective Agreement of this Second Amendment, the City shall have no obligations, liability, or reimbursement obligation under this Section 4.3, or Exhibit K for claims related to this Section 4.3; provided, however, in such event, City will use good faith efforts to reimburse Developer under the terms of this Section 4.3 from available and uncommitted water and sewer capital project bond funds if such bond funds held by the City are lawfully available and uncommitted.~~

3. (c) **Economic or Development Declines.** Developer agrees that if there are changes in the economy or other factors that result in material delays or declines in the development of the Property, the City Manager, in his discretion, may take such in consideration as to whether to approve a particular ~~street or~~ water/wastewater project.

Exhibit K to the Agreement (added pursuant to the Second Amendment) is hereby replaced with Exhibit K attached hereto (deletions are shown by strikeout and additions by underscore).

6. Disposition Of The Other Accelerated Public Improvements And Accelerated Project List. The following new Section 4.4 is hereby added to the MPG Development Agreement:

4.4 The Other Accelerated Public Improvements. The Parties hereby make the following additional dispositions of the Accelerated Public Improvements listed on the Accelerated Project List:

a. Non-Potable Flow Control Structure. Based on changes in the Developer's plans for the type and nature of the development on the Property, the parties agree that the following Accelerated Projects will not be constructed and that neither Party will have any further obligations with respect to the following Accelerated Projects:

- Non-Potable System Projects – Non-Potable System Backup Well.
- Non-Potable System Projects - Non-Potable Flow Control Structure, Piping, and Individual Meters/Flow Control at Each Lake.

b. City-Completed Accelerated Projects. The City has completed, or will complete, and Developer shall have no further financial responsibility for the following Accelerated Projects on the Accelerated Project List:

- Signal Butte Water Transmission Main
- 1/2 Street Elliot – Phases 1 and 2

c. **Developer-Completed Accelerated Projects.** The Developer has completed, or will complete, and the City shall have no further financial responsibility for the following Accelerated Projects on the Accelerated Project List:

- Partial Ellsworth Road

d. **No Further Obligations.** Except for the obligations set forth in this Amendment (e.g., the establishment and the City's use of the Reimbursement Credit), neither Party shall have any further obligation with respect to the Accelerated Public Improvements, the Accelerated Project List, or Exhibits G and G-1.

7. **Gaylord Hotel.** The Parties acknowledge that the Gaylord Property (as defined in Section 1.30 of the MPG Development Agreement) will not be developed with a Gaylord Hotel, and that the Gaylord Entitlements DA has been terminated. Accordingly, the Parties agree that Sections 1.28, 1.29, 1.30, 1.62, 2.10, and 9.6(d) of the MPG Development Agreement are hereby deleted in their entirety.

8. **General Provisions.**

8.1 **Counterparts.** This Fourth Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.

8.2 **Headings.** The descriptive headings of the Paragraphs of this Fourth Amendment are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

8.3 **Exhibits and Recitals.** Any exhibit attached hereto shall be deemed to have been incorporated herein by this reference with the same force and effect as if fully set forth in the body hereof. The Recitals set forth at the beginning of this Fourth Amendment are hereby acknowledged and incorporated herein and the Parties hereby confirm the accuracy thereof.

8.4 **Good Standing; Authority.** Each of the Parties represents to the other (i) that it is duly formed and validly existing under the laws of Arizona, with respect to the Developer or a municipal corporation within the State of Arizona, with respect to the City, (ii) that it is a Delaware limited liability company or municipal corporation duly qualified to do business in the State of Arizona and is in good standing under applicable state laws, and (iii) that the individual(s) executing this Fourth Amendment on behalf of the respective parties are authorized and empowered to bind the party on whose behalf each such individual is signing.

8.5 **Recordation.** This Fourth Amendment shall be recorded in its entirety in the Official Records of Maricopa County, Arizona not later than ten (10) days after this Fourth Amendment is executed by the City and the Developer.

8.6 **Mortgagee Rights.** The parties hereto acknowledge and agree that all of Developer's rights and benefits under the MPG Development Agreement, as amended by this

Fourth Amendment, shall inure to the benefit of any party acquiring title to the Property or any portion thereof under or pursuant to a mortgage foreclosure, trustee's sale or deed in lieu of foreclosure or trustee's sale, or otherwise.

8.7 No Pledge of General Credit. The City's obligations under this Fourth Amendment shall not constitute an indebtedness or pledge of the general credit of the City within the meaning of any constitutional, charter, or statutory provision relating to the incurring of indebtedness or a pledge of the full faith and credit of the City. Nothing contained in this Fourth Amendment shall be construed to require the City to levy a tax, issue bonds, or call an election.

9. Effect of Fourth Amendment. This Fourth Amendment shall be deemed to amend and supersede the MPG Development Agreement with respect to all terms, provisions and changes set forth in this Fourth Amendment. To the extent of any conflict between the MPG Development Agreement and this Fourth Amendment, including all Exhibits, the Fourth Amendment shall control. Except as amended by this Fourth Amendment, all terms, provisions and conditions of the MPG Development Agreement shall remain in full force and effect. Any capitalized terms not defined in this Fourth Amendment shall have the meaning set forth in the MPG Development Agreement.

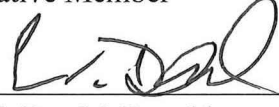
[Signatures on following pages]


IN WITNESS WHEREOF, the Parties have executed this Fourth Amendment to be effective on the date that this Fourth Amendment is approved by the City Council (the "Effective Date").

DMB MESA PROVING GROUNDS LLC, a Delaware limited liability company

By: DMB/BROOKFIELD EASTMARK LLC, a Delaware limited liability company, its Manager

By: BROOKFIELD EASTMARK LLC, a Delaware limited liability company, its Administrative Member

By: 
Name: W. Dea McDonald
Title: Vice President

By: 
Name: Brad Chelton
Title: Senior Vice President

CITY OF MESA, ARIZONA, an Arizona municipal corporation

By: _____

Its: _____

ATTEST:

By: _____

City Clerk

APPROVED AS TO FORM

By: _____

James N. Smith, City Attorney

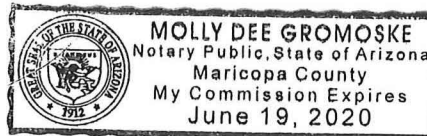
STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing Declaration of Covenants was acknowledged before me this 17th day of August, 2018, by W. Dea McDonald, the Vice President, and Brad Chelton, the Sr. Vice President of BROOKFIELD EASTMARK LLC, a Delaware limited liability company, in its capacity as Administrative Member of DMB/BROOKFIELD EASTMARK LLC, a Delaware limited liability company, in its capacity as Manager of DMB MESA PROVING GROUNDS LLC, a Delaware limited liability company, on behalf thereof.

Molly Dee Gromoske
Notary Public

My commission expires:

6/19/20



STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this ____ day of _____, 2018, by _____, City _____ of the City of Mesa, Arizona, an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument on behalf of the City.

Notary Public

My commission expires:

EXISTING LENDER CONSENT

The undersigned, as Beneficiary (“**Existing Lender**”) under that certain DEED OF TRUST, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING (the “**Deed of Trust**”), by and between DMB MESA PROVING GROUNDS, LLC, a Delaware limited liability company (“**Developer**”), as Trustor, and FIRST AMERICAN TITLE INSURANCE COMPANY, a Nebraska corporation, as Trustee, dated December 8, 2016, and recorded on December 9, 2016 as Document No. 2016 0910174 in the Official Records of Maricopa County, Arizona, in respect of certain real property which is subject to this Fourth Amendment to Pre-Annexation and Development Agreement, dated _____, 2018, by and among the CITY OF MESA, ARIZONA, an Arizona municipal corporation, and Developer (the “**Amendment**”), but not as a party, hereby: (i) consents to this Fourth Amendment; (ii) acknowledges that this Amendment shall bind that portion of the Property that is subject to the Deed of Trust, as modified, and subject to the Amendment; (iii) approves the recordation of this Amendment; (iv) agrees that this Amendment shall continue in full force and effect, at Existing Lender’s option, in the event of foreclosure or trustee’s sale pursuant to such Deed of Trust or any other acquisition of title by the undersigned, its successors, or assigns, of all or any portion of the Property covered by such Deed of Trust; (v) represents and warrants that the undersigned has the requisite right, power and authorization to enter into, execute, and deliver this Existing Lender Consent on behalf of Beneficiary; and (vi) the execution and delivery of this Existing Lender Consent by Beneficiary is not prohibited by, and does not conflict with any other agreements or instruments to which Beneficiary is a party.

DATED: August __, 2018

[Signatures on following page]

By:

Name:

Its:

The foregoing Existing Lender Consent was acknowledged before me this 20 day of August, 2018, by Dean Paltenghi, the Vice President of WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association.

Notary Public

4-9-2021

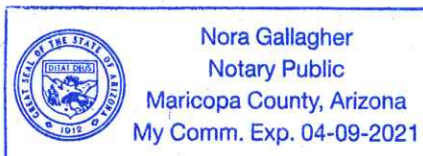


EXHIBIT K
PUBLIC IMPROVEMENTS

The Approved Projects shall be designed, engineered, bid and constructed on the terms and conditions stated in Article IV of the Agreement and as follows.

1. **Definitions.** All section references refer to this **Exhibit K**, unless otherwise noted. All definitions contained within **Exhibit K** apply solely to the provisions contained within **Exhibit K**.

(a) **“Completion of Construction”** means the date on which final acceptance by the City of the completed Approved Projects for maintenance in accordance with the policies, standards and specifications contained in applicable City ordinances.

(b) **“Project Costs”** means all actual costs and expenses incurred to construct the Approved Project or portions thereof, as applicable, and, unless Developer otherwise agrees, the Project Costs attributed to construction shall be the lowest and best bid received by the City.

(c) **“Approved Projects”** means the Approved Street Projects and Approved Water/Wastewater Project (if there is funding for such projects) that are approved by the City’s City Manager pursuant to ~~Sections 4.2 and 4.3~~ Section 4.2, as amended by the Second Amendment (“Amended Section 4.2”) and Section 4.3, as amended by the Fourth Amendment (“Amended Section 4.3”), and the Approved Projects are individually referred to as an **“Approved Project.”**

2. **Developer Design and Construction.** Developer will be responsible for the design of all portions of the work in respect of the Approved Projects at no cost to the City, subject to the terms and conditions of this Agreement and in compliance with the City’s Code, ordinances, engineering standards, procurement requirements, guidelines, and all applicable State statutes, and state procurement laws and requirements (the **“Engineering and Procurement Requirements”**).

(a) **Bidding, Construction and Dedication.** Any such Approved Projects, or portions thereof, for which the design has been procured by Developer at no cost to the City shall be bid, constructed and dedicated, as applicable, by the Developer in accordance with the Engineering and Procurement Requirements, including, without limitation, the City’s normal plan submittal, review and approval processes, day-to-day inspection requirements, insurance requirements and financial assurance requirements.

(b) **Payment of Approved Projects Costs.** Subject to the terms and limitations of ~~Sections~~ Amended Section 4.2 and Amended Section 4.3, the City shall reimburse Developer for costs for the Approved Projects incurred by Developer in compliance with the Engineering and Procurement Requirements within ninety (90) days following Completion of Construction of each Approved Project or, if the City and Developer have mutually agreed concerning a lesser scope of work, applicable portion thereof. The amount of potential reimbursement and other limitations, conditions, and

requirement for Approved Projects are further set forth in ~~Sections~~ Amended Section 4.2 and Amended Section 4.3.

(c) **Right of Entry.** Subject to compliance with the Engineering and Procurement Requirements (including obtaining applicable permits), Developer and its agents and contractors shall have the right to enter, remain upon and cross over any City easement or right-of-way to the extent reasonably necessary to design such Approved Projects (or portion thereof).

4. **Non-Performance.** This Section 4 shall apply solely in connection with the rights and obligations of the City and Developer under ~~Sections~~ Amended Section 4.2 and Amended Section 4.3 of the Agreement and this **Exhibit K**. If the City or Developer, respectively, fails to perform its obligations under ~~Sections~~ Amended Section 4.2 and Amended Section 4.3 and this **Exhibit K**, and such failure continues for a period of sixty (60) days after written notice thereof from the other Party (the “**Cure Period**”), such failure shall constitute a default under ~~Sections~~ Amended Section 4.2 and Amended Section 4.3 and this Exhibit K (a “**Default**”); provided, however, that if the failure is such that more than sixty (60) days would reasonably be required to perform such action or comply with any term or provision hereof, then such Party shall have such additional time as may be necessary to perform its obligations so long as such Party commences performance or compliance within said sixty (60) day period and diligently proceeds to complete such performance. Any notice of an alleged Default shall specify the nature of the alleged Default and the manner in which the alleged Default may be satisfactorily cured. If a Default is not cured within the Cure Period, the remedies of Developer and the City shall consist of and shall be limited to the following:

(a) **City Remedies.** Whenever a Default occurs and is not cured (or, if appropriate, cure undertaken) by Developer within the Cure Period accordance with this Section 4, the City’s sole and exclusive remedies shall consist of and be limited to the following:

(i) Specific performance, an injunction, special action, declaratory relief or other similar relief requiring Developer to undertake and fully and timely perform its obligations under this Agreement.

(ii) All such remedies shall be cumulative and not exclusive of one another, and the exercise of any one or more of the remedies shall not constitute a waiver or election with respect to any other available remedy

(b) **Developer Remedies.** Whenever a Default occurs and is not cured (or, if appropriate, cure undertaken) by the City in accordance with this Section 4, Developer’s sole and exclusive remedies shall consist of and be limited to the following:

(i) Specific performance, an injunction, special action, declaratory relief or other similar relief requiring the City to undertake and fully and timely perform its obligations under this Agreement. The City further agrees that specific performance, special action, declaratory or injunctive relief is appropriate in the event of a failure to timely perform its obligations as set forth in Sections 4.2 and 4.3; ~~provided, however, no such relief can be obtained against the City’s City Council to perform any act or approve any measure, resolution, act, or~~

~~ordinance, including but not limited to no such relief can require the City Council to seek voter approval for bonds nor require the City Council to authorize the issuance of bonds~~ Amended Section 4.2 and Amended Section 4.3.

(ii) Developer is responsible for the design, engineering, bid and/or construction of the Approved Projects (or portions thereof) under the terms of ~~Sections~~ Amended Section 4.2 and Amended Section 4.3, as applicable, and this Exhibit K; and, subject to the terms and limitation of ~~Sections~~ Amended Section 4.2 and Amended Section 4.3, as applicable, and this Exhibit K, if the City does not timely reimburse Developer for Approved Projects, the City expressly acknowledges and agrees that Developer may seek damages from the City, which the Parties agree shall be limited to the reimbursement amount Developer is entitled to for the Approved Projects; provided further, damages for the Approved Street Projects may not exceed the Maximum Street Project Costs and the damages for the Approved Water/Wastewater Projects (if any) may not exceed the of the Maximum Water/Wastewater Cost, and Developer's attorneys' fees and court costs, and not for any other damages of any kind or nature.

(iii) Except as expressly provided in the above Section 4(b)(ii), Developer expressly waives any and all right to seek damages of any kind or nature as a remedy with respect to a Default by the City, although any order or equitable decree may require the City to reimburse monies it may be obligated to reimburse pursuant to this Agreement.

(v) All such remedies shall be cumulative and not exclusive of one another, and the exercise of any one or more of the remedies shall not constitute a waiver or election with respect to any other available remedy.

(c) **Limitation on Damages.** Claims for damages (when and if permitted) shall be limited to actual damages as of the time of entry of judgment and the City and Developer hereby waive any right to seek consequential, special, punitive, multiple, exemplary or other similar damages.