

WHEN RECORDED RETURN TO:

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

**SECOND AMENDMENT
TO
AMENDED AND RESTATED
DEVELOPMENT AGREEMENT**

THIS SECOND AMENDMENT TO THE AMENDED AND RESTATED DEVELOPMENT AGREEMENT (this “Second Amendment” or “Agreement”) is entered into as of this ____ day of _____, 2019, by and between MHA III, LLC, an Arizona limited liability company (“MHA III” or “Developer”) and the City of Mesa, an Arizona municipal corporation (the “City”). MHA III and City are collectively referred to herein as the “Parties,” or individually, as a “Party.”

RECITALS

A. On December 19, 2016, the City, MHA III and Mesa Housing Associates II, LLC, an Arizona limited liability company, executed that certain Amended and Restated Development Agreement which was recorded on December 21, 2016, as Document No. 2016-0940132 in the Official Records of the Maricopa County, Arizona Recorder’s Office (“Official Records”); and on June 27, 2018, City and MHA III entered into that certain First Amendment to Amended and Restated Development Agreement (the “First Amendment”), which was recorded on June 27, 2018, as Document No. 2018-0488396 in the Official Records (the foregoing, collectively, the “Development Agreement”).

B. Simultaneously with the execution of the Development Agreement, the City and MHA III executed that certain Addendum to Purchase and Sale Agreement and Escrow Instructions, whereby the parties amended certain provisions of the “Purchase and Sale Agreement and Escrow Instructions” (Southeast Corner of 1st Avenue and Macdonald, Mesa, AZ Lot 1- Affordable Housing Project) dated as of February 25, 2016 (as amended, the “Purchase and Sale Agreement”) for certain real property described therein (the “Property”).

C. Capitalized terms used, but not defined, in this Second Amendment shall have the meaning given in the Development Agreement or Purchase and Sale Agreement.

D. On July 11, 2017, MHA III timely elected to purchase the Property at the Market Rate Price pursuant to Section 4.1D of the Development Agreement and Section 2.2 of the Purchase and Sale Agreement, by depositing the Earnest Money in Escrow.

E. Pursuant to Section 4.1D of the Development Agreement, MHA III's election triggered the obligation to develop the Second Market Rate Project on the Property.

F. Simultaneously with the execution of the First Amendment, the Parties entered into that certain Second Addendum to the Purchase and Sale Agreement and Escrow Instruction dated June 27, 2018, which, *inter alia*, revised various deadlines and dates and provided for the purchase and sale of certain additional real property (the "Additional Property") and the development of certain additional amenities (the "Additional Amenities").

G. Developer has provided notice of its intent to purchase the Additional Property pursuant to the Development Agreement, that Developer intends to purchase the Additional Property along with the Property, and that Developer intends to develop the Additional Amenities with the Second Market Rate Project. On April 24, 2019, the City issued its site plan for the Second Market Rate Project, including the Additional Property and the Additional Amenities, under Zoning Clearance Case No. ADM19-00116. On July 24, 2019, the City executed the final plat of SEC First & Macdonald Phase 2, which re-plats the Property to include the Additional Property, which as recorded on August 6, 2019, under recording number 20190599381, at book 1476, page 15, in the official records of the Maricopa County Recorder. All references in this Second Amendment to the "Property" shall hereafter be deemed to include the Additional Property. The legal description of the Property is attached hereto as Exhibit 1.

H. The completion of the First Market Rate Project was the first market rate apartment complex completed in downtown Mesa in over two decades; and the Parties desire to have the Second Market Rate Project completed (and thereby completing the entire Project). Accordingly, the Parties are entering into this Second Amendment to facilitate the completion of the Second Market Rate Project.

I. City acknowledges that the development of the Second Market Rate Project in accordance with this Development Agreement will generate substantial monetary and non-monetary benefits for City, including, without limitation, by, among other things: (i) providing for planned and orderly development of the Property consistent with the General Plan and the Zoning; (ii) increasing tax revenues to City arising from or relating to the improvements to be constructed on the Property; (iii) enhancing the economic and social welfare of the residents of City; and (iv) providing a vibrant new residential area in City's central business district to benefit City's residents.

J. Upon Completion of Construction of the Second Market Rate Project with the Additional Amenities, it is the desire and intent of MHA III to convey the Second Market Rate Project's property and improvements to City, and thereafter to lease the property and improvements from City pursuant to A.R.S. §§42-6201 *et seq*, with the lease substantially in the form attached hereto as Exhibit 2 (the "Lease").

K. The Parties understand and acknowledge that this Second Amendment is a “Development Agreement” within the meaning of, and entered into pursuant to the terms of, A.R.S. § 9-500.05, and that the terms of this Second Amendment will constitute covenants running with the Property as more fully described in this Second Amendment and the Development Agreement.

L. The Parties also understand and acknowledge that this Agreement is authorized by and entered into in accordance with the terms of A.R.S. § 9-500.11. The actions taken by City pursuant to this Agreement and the development of market rate apartment in downtown Mesa are for economic development activities as that term is used in A.R.S. § 9-500.11, will assist in the creation and retention of jobs, and will improve and enhance the economic welfare of the residents of City. Further, this Agreement is made by City consistent with, and as permitted by, A.R.S. §§ 42-6201, *et seq.*

AGREEMENT

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

1. Reimbursement. In order to ensure compliance with A.R.S. §§ 42-6201 *et seq.*, City obtained a professional analysis of the economic impact of the Second Market Rate Project. Prior to the effective date of the Lease, Developer shall reimburse the City \$3,100, which was the cost to obtain that analysis.

2. Lease. Upon (i) Developer’s Completion of Construction of the Second Market Rate Project and the Additional Amenities shown on the approved site plan in compliance with the Development Agreement, and (ii) approval by City in its reasonable discretion of the condition of title to the Property (including but not limited to its lien-free condition [but subsequent leasehold mortgages are allowed as provided in the Lease]) including the issuance to City of a standard owner’s title insurance policy in the amount of the purchase price for the Property (the premium for which will have been paid by Developer) in a form satisfactory to City in its sole discretion and reflecting the condition of title as approved, and (iii) Developer’s conveyance of the Property to City by form of special warranty deed approved by City in its reasonable commercial discretion, then City will lease the Property to Developer by means of the Lease, substantially in the form attached hereto as Exhibit 2. Notwithstanding the foregoing, City will not enter into the Lease, and shall have no obligation to accept conveyance of the Property, if: (a) Developer fails to complete the Completion of Construction of the Second Market Rate Project and the Additional Amenities on or before June 30, 2020, which date and deadline shall not be subject to any Notice of Default or cure under Section 6.5 or any other notice or cure provision of the Development Agreement; (b) Developer is in default of any term of the Development Agreement; or (c) the Property is burdened by financial liens and encumbrances (including mechanics’ or materialmen’s liens); provided further that if Developer diligently seeks to challenge any mechanics or materialmen’s liens, Developer may discharge such liens of record by bond, deposit or order of a court of competent jurisdiction or alternately cause them to be insured over by title insurance endorsement reasonably satisfactory to City. For purposes of clarification between documents, the term “Second Market Rate Project” means as defined and described in the Development

Agreement, and also includes, but not limited to, the description and all the obligations contained in Paragraph #2 in the First Amendment (which is entitled “Scale of the Second Market Rate Project”).

3. Preserve State Shared Revenue. Notwithstanding any other provision of, or limitation in, the Development Agreement (which includes any amendments thereto) to the contrary, if pursuant to A.R.S. § 41-194.01 the Attorney General determines that the Development Agreement or the Lease violates any provision of state law or the Constitution of Arizona and City, and if City and Developer are not able (after good faith attempts) to modify the Development Agreement (or Lease, as applicable) so as to resolve the violation with the Attorney General within thirty days of notice from the Attorney General pursuant to and under the provisions of A.R.S. § 41-194.01(B)(1), the Development Agreement and Lease shall automatically terminate at midnight on the thirtieth day after receiving such notice from the Attorney General, and upon such termination the City will reconvey the Property to Developer and the Parties shall have no further obligations under the Development Agreement or Lease. Additionally, if the Attorney General determines that the Development Agreement or Lease may violate a provision of state law or the Constitution of Arizona under A.R.S. § 41-194.01(B)(2), and requires the posting of a bond under A.R.S. § 41-194.01(B)(2), City shall be entitled to terminate this Development Agreement and Lease (in which case, the City shall reconvey the Property to Developer, if Developer has conveyed the Property to the City for purposes of the Lease), except if Developer post such bond; and provided further, that if the Arizona Supreme Court, determines that the Development Agreement (or Lease, as applicable) violates any provision of state law or the Constitution of Arizona, the Development Agreement and Lease shall automatically terminate upon such a determination, and the City will reconvey the Property to Developer and the Parties shall have no further obligations thereunder.

4. Consents and Approvals. Wherever the Development Agreement requires or permits the consent or approval of a Party to any act, document, use or other matter, such consent or approval will be given or denied by such Party in its reasonable discretion, unless the Development Agreement expressly provides otherwise. Any consent or approval required by City may be provided by the City Manager (or designee), unless otherwise specified or required by applicable laws.

5. Incorporation. The terms and conditions of this Second Amendment are hereby incorporated in and made a part of the Development Agreement. The Development Agreement, as amended by this Second Amendment, is in full force and effect and all of the terms, covenants and conditions of the Development Agreement, as amended by this Second Amendment, are hereby ratified and confirmed. In the event of any conflict between the terms of the Development Agreement and those of this Second Amendment, the terms of this Second Amendment shall control.

[Signatures appear on the following pages]

IN WITNESS WHEREOF, the parties have executed this Second Amendment on the date first set forth above:

“CITY”

CITY OF MESA,
an Arizona municipal corporation

By: _____
Christopher J. Brady, City Manager

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of, _____ 2019 by Christopher J. Brady, the City Manager for the CITY OF MESA, an Arizona municipal corporation.

Notary Public

My Commission Expires:

APPROVED AS TO FORM

James N. Smith
City Attorney

“MHA III”

MHA III, LLC
an Arizona limited liability company

By: Urban Housing Partners VI, LLC
Its: Member

By: Marshall Urban Development Company
Its: Member

By: _____
Name: Todd Marshall
Its: President

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, 2019, by Todd Marshall, the authorized officer of Marshall Urban Development Company, on behalf of Urban Housing Partners VI, LLC, on behalf of MHA III, LLC.

Notary Public

My commission expires:

EXHIBIT 1
[Legal Description of the Property]

ALL OF LOT 1 ACCORDING TO BOOK 1308 OF MAPS, PAGE 26, OFFICIAL RECORDS OF MARICOPA COUNTY AND A PORTION OF THE SOUTHWEST QUARTER OF SECTION 22, TOWNSHIP 1 NORTH, RANGE 5 EAST, OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID LOT 1;

THENCE SOUTH 89 DEGREES 43 MINUTES 54 SECONDS EAST, A DISTANCE OF 77.50 FEET;

THENCE SOUTH 0 DEGREES 15 MINUTES 38 SECONDS WEST, A DISTANCE OF 110.00 FEET;

THENCE NORTH 90 DEGREES 0 MINUTES 0 SECONDS EAST, A DISTANCE OF 85.54 FEET;

THENCE SOUTH 0 DEGREES 0 MINUTES 0 SECONDS EAST, A DISTANCE OF 176.57 FEET TO A POINT OF CURVE TO THE LEFT;

THENCE SOUTHEASTERLY ALONG SAID CURVE, HAVING A RADIUS OF 35.00 FEET, THROUGH A CENTRAL ANGLE OF 89 DEGREES 55 MINUTES 23 SECONDS, A DISTANCE OF 54.93 FEET;

THENCE SOUTH 89 DEGREES 55 MINUTES 23 SECONDS EAST, A DISTANCE OF 3.03 FEET;

THENCE SOUTH 0 DEGREES 16 MINUTES 38 SECONDS WEST, A DISTANCE OF 144.21 FEET;

THENCE NORTH 89 DEGREES 43 MINUTES 25 SECONDS WEST, A DISTANCE OF 202.04 FEET;

THENCE NORTH 0 DEGREES 16 MINUTES 24 SECONDS EAST, A DISTANCE OF 465.18 FEET TO THE POINT OF BEGINNING.

EXHIBIT 2
[See attached Lease]