

WHEN RECORDED RETURN TO:

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

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

THIS THIRD AMENDMENT TO THE AMENDED AND RESTATED DEVELOPMENT AGREEMENT (this “Third 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”). 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. On September 9, 2019, City and MHA III entered into that certain Second Amendment to Amended and Restated Development Agreement (the “Second Amendment”), which was recorded on September 10, 2019, as Document No. 2019-0706307 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 for certain real property described therein (the “Property”). On June 27, 2018, the City and MHA III entered into that certain Second Amendment to Purchase and Sale Agreement and Escrow Instructions. (as amended, the “Purchase and Sale Agreement”).

C. The Parties desire to further amend the Development Agreement. Capitalized terms used, but not defined, in this Third Amendment shall have the meaning given in the Development Agreement or Purchase and Sale Agreement.

D. The Parties understand and acknowledge that this Third 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 Third Amendment will constitute covenants running with the Property as more fully described in this Third Amendment and the Development Agreement.

E. 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 Third Amendment, the Parties agree as follows:

1. Amendment of Paragraph 2 of Second Amendment. The Parties agree to modify the terms of Section 2 of the Second Amendment, so that they are amended to state:

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 to the Second Amendment 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 December 31, 2021, 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 the project shown and described in the Re-Submittal of Project ADM19-00116, dated April 23, 2019, which was approved pursuant to the Zoning Clearance for the Residences on First Phase II, zoning clearance case number ADM19-00116, dated April 24, 2019, signed by Nana Appiah, Planning Director.

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

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.

IN WITNESS WHEREOF, the Parties have executed this Third 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:
