

WHEN RECORDED RETURN TO:

City of Mesa
Attn: Real Estate Department
20 East Main Street
Mesa, Arizona 85201

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this “Agreement”) is entered into by and between the CITY OF MESA, an Arizona municipal corporation (the “City”) and Ellsworth Land LP, a Limited Partnership (the “Owner”). City and Owner are collectively referred to herein as the “Parties,” or individually as a “Party.”

RECITALS

A. Owner owns approximately seven and one half (7.5) acre(s) of property within the 3400 Block of South Ellsworth Road (west side), and within the 9000 to 9100 blocks of East Peterson Avenue (south side) , located north of Elliot Road on the west side of Ellsworth Road consisting of APN(s) 304-03-846L, as legally described in Exhibit A (the “Property”).

B. Developer applied to re-zone the Property (Case No. ZON23-00174) from Planned Employment Park with two (2) Planned Area Development overlays (PEP-PAD-PAD) and Limited Commercial with two Planned Area Development overlays (LC-PAD-PAD) to Limited Commercial (LC) for a large commercial development.

C. Owner desires to use the Property for a project known as “SWC Ellsworth Rd and Peterson Ave” consisting of a hotel, retail and two (2) drive thru restaurants (the “Project”). To develop the Project, Developer is also requesting site plan review and design review.

D. Owner intends to use the Property for hotel and retail space; however, the Parties have agreed to set certain limits on the allowed uses and activities on the Property to ensure the Property is used in line with the Project as the Zoning Case was presented to City Council for approval, and to agree to such other terms and conditions related to the Property as provided herein.

D. The Parties desire to enter into this Agreement for the primary purpose of limiting the land uses and activities permitted on the Property as may be otherwise permitted by Title 11 of the Mesa City Code (“Mesa Zoning Ordinance”) and intend this document to be a “Development Agreement” within the meaning of A.R.S. § 9-500.05.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated herein by reference, and the mutual promises set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties state, confirm, and agree as follows:

1. Owner's Duties and Obligations. Owner and 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 and its successors and assigns.

2. Prohibited Uses and Activities: General. In addition to other land use restrictions or prohibitions under the Mesa Zoning Ordinance or Mesa City Code, the below land uses and activities set forth in this Section 2 are not allowed and are prohibited on any portion of the Property. The land uses and activities shall have the same meaning as set forth in the Mesa Zoning Ordinance unless otherwise noted. For the purposes of clarity, except as provided in this Section 2, the Property may be used for all uses allowed by the Mesa Zoning Ordinance for the Property's zoning. The following uses are prohibited on the Property:

A. All residential uses as identified in Table 11-5-2 (Residential Districts) of the Mesa Zoning Ordinance as may be amended from time to time, and as defined in Article 8 the Mesa Zoning Ordinance, including but not limited to:

1. Single residence;
2. Multiple Residence;
3. Assisted living home;
4. Assisted living center;
5. Family community residence;
6. Transitional community residence;
7. Comprehensive youth residence;
8. Boarding house;
9. Small day care group home;
10. Large day care group home;
11. Manufactured home park;
12. Manufactured home subdivision;
13. Recreational vehicle park; and
14. Recreational vehicle subdivision.

B. Home occupations

3. RESERVED.

4. Disputes. The limitations on uses and activities in Section 2 are material and essential provisions of this Agreement and City would not have entered into this Agreement but for their inclusion herein. To the extent there is a disagreement between the Parties as to whether a use or activity is allowed or permitted under this Agreement, such determination shall be submitted to the City's Zoning Administrator, who shall determine whether the proposed use or

activity is prohibited or restricted and such decision shall be deemed a final decision of the Zoning Administrator that may be appealed in accordance with Chapter 77 of the Mesa Zoning Ordinance.

5. Tenants. Owner acknowledges that the prohibition and restrictions on uses or activities in this Agreement applies to Owner and all tenants, subtenants, licensees, sublicensees, or other occupants of any portion of the Property during the term of this Agreement (collectively, “Tenant”). Prior to any Tenant entering into an agreement with Owner to occupy the Property, Owner shall notify each such prospective Tenant in writing of the prohibitions and limitations applicable to the Tenant’s use or activities on the Property set forth in Section 2 of the Agreement. Owner shall include language in each lease, license, or similar agreement with a Tenant that prohibits the use or activity, or conversion to such use or activity, of the Property or Tenant’s space that would result in a violation of Section 2 of the Agreement.

6. Term/Termination. This Agreement shall become effective on the date this Agreement is recorded in accordance with Section 7.1 and shall continue in full force until automatically terminated upon the earlier of either: (a) fifty (50) years after the effective date or (b) termination by the mutual written agreement of Owner and City.

7. General Provisions.

7.1. Recordation. This Agreement shall be recorded in its entirety in the Official Records of Maricopa County, Arizona, no later than ten (10) days after its full execution by the Parties.

7.2. 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: (1) delivered to the Party at the address set forth below; (2) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address of the Party set forth below, postage prepaid; or (3) given to a recognized and reputable overnight delivery service, delivery charges prepaid, to the Party at the address set forth below. The addresses set forth in this Section 7.2 may be modified by a Party at any time by such Party designating in writing by notice duly given pursuant to this Section.

City: City of Mesa
Attn: City Manager
20 East Main Street, Suite 750
Mesa, Arizona 85201

with a copy to: Mesa City Attorney’s Office
Attn: City Attorney
20 East Main Street, Suite 850
Mesa, Arizona 85201

with a copy to: City of Mesa Development Services Department
Attn: Planning Director
55 N. Center
Mesa, Arizona 85211

Owner: Ellsworth Land LP
720 3rd East
Saskatoon SK CAN
S7H 1M3

with a copy to: Gammage and Burnham
Attn: Lindsay Schube
40 North Central, 20th Floor
Phoenix, Arizona 85004

Notices shall be deemed received: (i) when delivered to the Party; (ii) three (3) business days after being placed in the U.S. Mail, properly addressed, with sufficient postage; or (iii) 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. Although a copy of a notice shall be provided to the applicable Party address noted as “with a copy to”, such copy shall not be deemed as providing notice to a Party in accordance with the requirements of this Agreement.

7.3. Choice of Law, Venue, and Attorneys’ Fees. The laws of the State of Arizona shall govern any dispute, controversy, claim, or cause of action (collectively, “Dispute”) arising out of or related to this Agreement. The venue for any Dispute shall be in Maricopa County, Arizona, and each Party specifically waives the right to object to venue in Maricopa County for any reason. Neither Party shall be entitled to recover any of its attorneys’ fees or other costs from the other Party incurred in any Dispute, and each Party shall bear its own attorneys’ fees and costs, whether the Dispute is resolved through arbitration, litigation, or otherwise.

7.4. Default. In the event a Party fails to perform or otherwise fails to 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 thirty (30) days from receipt of the Notice of Default to cure the default. In the event the failure is such that more than thirty (30) days would reasonably be required to cure the default or otherwise comply with the applicable term(s) or provision(s) in this Agreement, then the Defaulting Party shall notify the Non-Defaulting Party of such and the timeframe needed to cure such default and, so long as the Defaulting Party commences performance or compliance or gives notice of additional time needed to cure within the required thirty (30) day period and diligently proceeds to complete such performance or fulfill such obligation, then the time to cure the default shall be extended for the requested reasonable cure period; however, no such extended cure period shall exceed ninety (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.

7.5. Remedy/Equitable Relief. The Parties agree that damages alone are not an adequate remedy for the breach of any provision of this Agreement. In the event Owner fails to perform or fails to otherwise act in accordance with any term or provision hereof City shall be entitled, subject to any cure period set forth in this Agreement, to immediately seek enforcement of this Agreement by means of specific performance, injunction, or other equitable relief, without any requirement to post bond or other security. The specific performance remedy provided in this

Section 7.5 shall be cumulative relief and shall not be a limitation on City's other remedies, including the right to seek contract damages under this Agreement. Additionally, City reserves the right to withhold any City permits or approvals needed to develop, construct, or improve any portion of the Property and may revoke any City approval, permit, or certificate of occupancy if Owner allows any of the Property prohibited uses or activities, or violated any of the restrictions/limitations, identified in this Agreement.

7.6. Good Standing; Authority. Owner represents and warrants that it is either, as applicable, duly formed and a legally valid existing entity under the laws of the State of Arizona or that it is a foreign entity registered with the Arizona Corporation Commission and is legally authorized to transact affairs or conduct business in Arizona. City represents and warrants that it is a municipal corporation in Arizona. Each Party represents and warrants that the individual(s) 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.

7.7. Assignment. The provisions of this Agreement are binding upon and shall inure to the benefit and burden of the Parties, and their successors in interest and assigns. Wherever the term "Party" or the name of any particular Party is used in this Agreement such term will include any such Party's permitted successors and assigns.

7.8. No Partnership or Joint Venture; Third Parties. 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. No term or provision of this Agreement is intended to, or shall be for the benefit of any person, firm, or entity not a party hereto, and no such other third-party person, firm, or entity shall have any right or cause of action hereunder.

7.9. 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.

7.10. Further Documentation & Acts. The Parties agree in good faith to execute such further or additional instruments or documents and to take such further acts as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.

7.11. Fair Interpretation. The Parties have each been represented by counsel or been given the opportunity to be represented by a counsel of its choosing in the negotiation and drafting of this Agreement, and no such counsel or other representative of the Party negotiating this Agreement has acted under any duress or compulsion, whether legal, economic, or otherwise. 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.

7.12. Computation of Time. A "business day" shall mean a City business day which is any day Monday through Thursday except for a legal holiday. In computing any time period under this Agreement, the date of the act or event from which the designated time period

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 in this Agreement.

7.13. Conflict of Interest. Pursuant to A.R.S. § 38-503 and A.R.S. § 38-511, no member, official, or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official, or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership, or association in which he or she is, directly or indirectly, interested. This Agreement is subject to cancellation pursuant to the terms of A.R.S. § 38-511.

7.14. Entire Agreement. This Agreement, together with the following Exhibit(s) attached hereto (which are incorporated herein by this reference), constitute the entire agreement between the Parties regarding the subject matter hereof:

A. Exhibit A: Legal Description of the Property

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

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

7.16. Severability. If any provision(s) of this Agreement is/are declared void or unenforceable, such provision(s) shall be severed from this Agreement, which shall otherwise remain in full force and effect.

7.17. Amendments. Any change, addition, or deletion to this Agreement requires a written amendment executed by both City and Owner. Within ten (10) days after any amendment to this Agreement, such executed amendment shall be recorded in the Official Records of Maricopa County, Arizona.

7.18. Proposition 207 Waiver. Owner hereby waives and releases City from any and all claims under A.R.S. § 12-1134 *et seq.*, including any right to compensation for reduction to the fair market value of the Property, as a result of City's approval of this Agreement. The terms of this waiver shall run with the land and shall be binding upon all subsequent landowners and shall survive the expiration or earlier termination of this Agreement.

7.19. Preservation of State Shared Revenue. Notwithstanding any other provision of, or limitation in, this Agreement to the contrary, if pursuant to A.R.S. § 41-194.01 the Arizona Attorney General determines that this Agreement violates any provision of state law or the Constitution of Arizona (including A.R.S. § 42-6201 *et seq.*), City and Owner shall use all and best faith efforts to modify the Agreement so as to fulfill each Parties rights and obligations in the Agreement while resolving the violation with the Attorney General. If within thirty (30) days of notice from the Attorney General pursuant to and under the provisions of A.R.S. § 41-194.01(B)(1), City and Owner cannot agree to modify this Agreement so as to resolve the violation

with the Attorney General, this Agreement shall automatically terminate at midnight on the thirtieth (30th) day after receiving such notice from the Attorney General, and upon such termination the Parties shall have no further obligations under this Agreement. Additionally, if the Attorney General determines that this Agreement may violate a provision of state law or the Constitution of Arizona under A.R.S. § 41-194.01(B)(2), and the Arizona Supreme Court requires the posting of a bond under A.R.S. § 41-194.01(B)(2), City shall be entitled to terminate this Agreement, except if Owner posts such bond, if required; and provided further, that if the Arizona Supreme Court, determines that this Agreement violates any provision of state law or the Constitution of Arizona, City or Owner may terminate this Agreement and the Parties shall have no further rights, interests, or obligations in this Agreement or claim against the other Party for a breach or default under this Agreement. The computation of time set forth in Section 7.12 shall be superseded by the computation of time utilized by the Arizona Attorney General's Office for alleged violations of A.R.S. § 41-194.01.

7.20. Covenant. Notwithstanding any express or implied covenant of good faith and fair dealing applicable to this Agreement, (a) any act of a Party that may be exercised in its sole discretion is not a breach of such covenant, and (b) such covenant does not require any Party to extend any date for payment or performance set forth in this Agreement.

7.21. Consents and Approvals. Wherever this Agreement requires or permits the consent or approval of a Party to any act, document, use or other matter, such consent or approval may be given or denied by such Party in its reasonable discretion, unless this Agreement expressly provides otherwise. Any consent or approval required by this Agreement for City may be provided by the City Manager or their designee unless otherwise specified or required by law; the City Manager or their designee does not have the authority to consent or approve acts that require the approval of the City Council unless the City Council expressly provides the City Manager or their designee with such authority. In accordance with the requirements of this Section 7.21, the City Manager or their designee is expressly authorized to execute and deliver: (i) all amendments to this Agreement so long as such modifications do not materially alter the overall structure of the agreement as it was presented to the City Council; and (ii) other transaction documents required by, contemplated under, or authorized in this Agreement.

7.22. References to Authority. Any reference to a statute, ordinance, regulation, law or similar legal authority in this Agreement refers to the legal authority as it existed on the effective date or as the same may be amended from time-to-time during the term.

7.23. Section Headings. The Section headings contained in this Agreement are for convenience in reference only and are not intended to define or limit the scope of any provision of this Agreement.

7.24. Counterparts. This Agreement may be executed in two (2) 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.

[SIGNATURES OF THE PARTIES APPEAR ON THE FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates set forth below.

CITY

CITY OF MESA, ARIZONA,
An Arizona municipal corporation

By: _____

Its: _____

Date: _____

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM

By: _____
City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me, a notary public, this ____ day of _____, 20____, by _____, the _____ of the City of Mesa, an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument on behalf of City.

Notary Public

My Commission Expires:

OWNER

Ellsworth Land LP
A Limited Partnership

By: _____

Its: _____

Date: _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me, a notary public, this ____
day of _____, 20____, by _____, as _____
of _____, a(n) _____.

Notary Public

My Commission Expires:

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

(SEE ATTACHED)



First American

Exhibit A

ISSUED BY
First American Title Insurance Company

File No: NCS-1096417-PHX1

File No.: NCS-1096417-PHX1

The Land referred to herein below is situated in the County of Maricopa, State of Arizona, and is described as follows:

PARCEL NO. 1:

A PORTION OF THE SOUTHEAST QUARTER SECTION 9, TOWNSHIP 1 SOUTH, RANGE 7 EAST, OF THE GILA AND SALT RIVER MERIDIAN, MARICOPA, ARIZONA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID SECTION 9, FROM WHICH THE EAST QUARTER CORNER THEREOF BEARS, NORTH 00 DEGREES 51 MINUTES 45 SECONDS WEST, 2636.22 FEET;

THENCE ALONG THE EAST LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 9, NORTH 00 DEGREES 51 MINUTES 45 SECONDS WEST, 571.40 FEET;

THENCE LEAVING SAID EAST LINE, NORTH 89 DEGREES 39 MINUTES 44 SECONDS WEST, 65.01 FEET TO THE POINT OF BEGINNING;

THENCE NORTH 89 DEGREES 39 MINUTES 44 SECONDS WEST, 296.01 FEET;

THENCE NORTH 00 DEGREES 20 MINUTES 16 SECONDS EAST, 471.00 FEET;

THENCE NORTH 89 DEGREES 39 MINUTES 44 SECONDS WEST, 401.00 FEET;

THENCE NORTH 00 DEGREES 20 MINUTES 13 SECONDS EAST, 265.51 FEET TO A POINT ON THE SOUTHERN RIGHT-OF-WAY OF PETERSON AVENUE;

THENCE ALONG SAID RIGHT-OF-WAY, SOUTH 89 DEGREES 39 MINUTES 09 SECONDS EAST, 660.48 FEET;

THENCE LEAVING SAID RIGHT-OF-WAY, SOUTH 45 DEGREES 15 MINUTES 27 SECONDS EAST, 30.17 FEET TO A POINT ON THE WESTERN RIGHT-OF-WAY OF ELLSWORTH ROAD;

THENCE ALONG SAID RIGHT-OF-WAY, SOUTH 00 DEGREES 51 MINUTES 45 SECONDS EAST, 715.45 FEET TO THE POINT OF BEGINNING.

PARCEL NO. 2:

NONEXCLUSIVE EASEMENTS FOR PEDESTRIAN AND VEHICULAR INGRESS AND EGRESS, UNDERGROUND UTILITIES, AND DRIVEWAY AS MORE PARTICULARLY DESCRIBED IN THE EASEMENT AGREEMENT WITH COVENANTS, CONDITIONS AND RESTRICTIONS RECORDED IN 2016-0090506 AND RERECORDED AS 2016-0842343 OF OFFICIAL RECORDS, AND FIRST SUPPLEMENTAL DECLARATION OF EASEMENTS, COVENANTS AND RESTRICTIONS RECORDED AS 2017-0264723 OF OFFICIAL RECORDS, FIRST AMENDMENT TO FIRST SUPPLEMENTAL RECORDED 2017-0511071 OF OFFICIAL RECORDS AND SECOND SUPPLEMENTAL DECLARATION OF EASEMENTS, COVENANTS AND RESTRICTIONS RECORDED AS 2021-0970750 OF OFFICIAL RECORDS.

This page is only a part of a 2016 ALTA® Commitment for Title Insurance issued by First American Title Insurance Company. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I-Requirements; Schedule B, Part II-Exceptions.

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