

**AGREEMENT TO PURCHASE REAL PROPERTY  
AND ESCROW INSTRUCTIONS  
(Residences on First Phase III Transaction)**

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DATE: \_\_\_\_\_, 2021

SELLER:                   ***City of Mesa, an Arizona municipal corporation***  
Address:                   20 East Main Street, Suite 500  
                                  Post Office Box 1466  
                                  Mesa, Arizona 85211  
                                  Attn: Kim Fallbeck  
                                  Real Estate Services  
Telephone:               480-644-2521  
Facsimile:               480-644-3392  
Email:                    [kim.fallbeck@mesaaz.gov](mailto:kim.fallbeck@mesaaz.gov)

BUYER:                   ***MHA III, LLC, an Arizona limited liability company***  
Address:                   233 East Southern,  
                                  Number 24641  
                                  Tempe, Arizona 85282  
                                  Attn: Todd Marshall  
Telephone:               480-966-3008  
Facsimile:               N/A  
Email:                    [tmarshall@marshallcompany.com](mailto:tmarshall@marshallcompany.com)

ESCROW AGENT:       ***Commonwealth National Commercial Services***  
Address:                   2390 East Camelback Road  
                                  Suite 230  
                                  Phoenix, Arizona 85016  
                                  Telephone: 602-287-3596  
Facsimile:               \_\_\_\_\_  
Escrow Officer:           Irma Hickman, AVP/Senior Commercial Escrow  
Officer  
Email: Attn               \_\_\_\_\_  
Escrow Number:         \_\_\_\_\_

PROPERTY:           The real property located near the southeast corner of S. Macdonald and  
                              W. 1<sup>st</sup> Avenue, Mesa in Maricopa County, Arizona, as depicted on Exhibit  
                              A attached hereto, consisting of approximately 1.48 +/- acres, and as will  
                              be legally described pursuant to Section 4.3 (the "Property").

**ARTICLE 1**  
**AGREEMENT OF THE PARTIES**

1.1 Agreement. In consideration of the mutual promises and covenants set forth in this Agreement and the Development Agreement, Seller agrees to sell to Buyer and Buyer agrees to buy the Property on the terms and conditions set forth in this Agreement. Seller and Buyer may be referred to herein individually as a “Party” or collectively as the “Parties.”

**ARTICLE 2**  
**SALES PRICE AND PAYMENT TERMS**

2.1 Sales Price. The Parties acknowledge and agree that the Sales Price below was calculated based on an appraisal obtained and paid for by Seller. The total sales price which Buyer agrees to pay for the Property is Seven Hundred Seventy-Five Thousand Dollars (\$775,000)(the “Sales Price”). The Sales Price is subject to the following terms and shall be payable as follows:

(a) Earnest Money. Buyer agrees to pay ten percent (10%) of the Sales Price as the earnest money (the “Earnest Money”) which Buyer agrees to deposit in Escrow on the Opening Date.

(b) At Closing, Buyer shall deposit with Escrow Agent the amount of Six Hundred Ninety-Seven Thousand Five Hundred Dollars (\$697,500.00) in cash or by wire transfer of immediately available funds (the “Closing Payment”).

(c) Prior to or at Closing, Buyer shall have entered into the certain Development Agreement pertaining to the Property (the “Development Agreement”), attached hereto as Exhibit B. Buyer acknowledges that Seller would not have entered into this Agreement but for Buyer’s agreement in the Development Agreement to timely Commence Construction (as defined in the Development Agreement) and to timely Complete Construction (as defined in the Development Agreement) of the Improvements because, *inter alia*, the Seller would not have sold the Property if the Property were to remain undeveloped or not be promptly developed in the manner provided in the Development Agreement.

2.2 Earnest Money Provisions. All Earnest Money required by this Agreement shall be deposited by wire transfer or other form of immediately available funds to the account of Escrow Agent in the amount of the required Earnest Money. Escrow Agent is hereby instructed to deposit all Earnest Money in a federally-insured money market or similar account, subject to immediate withdrawal, at a bank or savings and loan institution located in Maricopa County, Arizona (an “Approved Investment Account”). Upon Closing, the Earnest Money and interest earned thereon shall be credited to the Sales Price.

2.3 Disbursements. Escrow Agent shall disburse the Earnest Money and interest earned thereon, and the Closing Payment, to Seller on the Closing Date less any funds required to take into account the prorations and other adjustments required of Seller by this Agreement. If the Earnest Money and applicable interest and the Closing Payment are not disbursed to Seller

on the Closing Date, such amounts shall be invested by Escrow Agent in an Approved Investment Account until the next business day following the Closing Date when they shall be disbursed to Seller together with all interest earned thereon following the Closing Date. Escrow Agent shall not charge any fee for such investment of the Earnest Money and earned interest. If the Earnest Money is forfeited to Seller as provided in this Agreement, such amounts, with any interest earned thereon, shall be paid immediately to Seller. If Buyer is entitled at any time to a refund of Earnest Money deposits held in Escrow, any interest earned thereon shall be paid to Buyer.

2.4 Non-Refundable Nature of Earnest Money. If Buyer cancels or terminates this Agreement, as permitted under the terms of this Agreement, prior to the end of the Feasibility Period, the Earnest Money shall be returned to Buyer. After the Feasibility Period, the Earnest Money shall be absolutely non-refundable to Buyer, except as otherwise expressly provided in Sections 5.1(a)(iv), 5.3, 9.1(b) and 11.2, in consideration for Seller giving and granting Buyer the right to purchase the Property as described in this Agreement and taking the Property off the market and not as a penalty.

### **ARTICLE 3 ESCROW**

3.1 Establishment of the Escrow. An escrow for this transaction (the “Escrow”) is established with Escrow Agent, and Escrow Agent is engaged to administer the Escrow.

3.2 Opening Date. Within three (3) business days after the execution of this Agreement by both Buyer and Seller, Seller will deliver a fully executed copy of this Agreement (PDF is acceptable) to Escrow Agent and Buyer will deliver the Earnest Money as specified in Section 2.1(a). The date that this Agreement together with the Earnest Money deposit is delivered to Escrow Agent is referred to in this Agreement as the “Opening Date.” Escrow Agent shall notify Buyer and Seller in writing of the Opening Date.

3.3 Acceptance of Escrow. By accepting the Escrow, Escrow Agent agrees to the terms of this Agreement as they relate to the duties of Escrow Agent.

3.4 Escrow Instructions. This Agreement constitutes escrow instructions to Escrow Agent. If Escrow Agent requires the execution of its standard form printed escrow instructions, Buyer and Seller agree to execute those instructions; however, those instructions will be construed as applying only to Escrow Agent’s engagement. If there are conflicts between the terms of this Agreement and the terms of the printed escrow instructions, the terms of this Agreement will control.

3.5 Escrow Cancellation Charges. If the Escrow fails to close because of Seller’s default, Seller will pay all customary Escrow cancellation charges. If the Escrow fails to close because of Buyer’s default or cancellation of this Agreement for any reason other than the default of Seller, Buyer will pay all customary Escrow cancellation charges. If the Escrow fails to close for any other reason, Seller and Buyer will each pay one-half of all customary Escrow cancellation charges, if any.

3.6 Insured Closing Letter. If Escrow Agent does not issue its own title insurance policies, but acts as an agent for the Title Insurer (as defined in Section 6.3), Escrow Agent will cause the Title Insurer to issue to the Parties, a closing protection letter or insured closing service in written form satisfactory to Buyer and Seller, within five (5) calendar days following the Opening Date.

## **ARTICLE 4 INFORMATION TO BE PROVIDED**

### **4.1 Information and Other Items to Be Provided.**

(a) Diligence Materials. During the Feasibility Period (as defined in Section 5.1(b)), Seller shall allow Buyer access, upon reasonable notice and during business hours, for review and copying of Seller's Real Estate Department's public records that relate to the Property (the "Seller's Materials"). Buyer shall be responsible, at Buyer's sole expense, to undertake any additional investigation desired by Buyer concerning the condition of the Property pursuant to the terms of the Access Agreement described in Section 5.1(b). Seller expressly does not warrant the truthfulness or accuracy of any fact, finding, conclusion, or opinion included in any of the Seller's Materials.

(b) Preliminary Title Report. Escrow Agent shall provide Buyer and Seller as soon as possible following the Opening Date with: (i) a commitment for an owner's title insurance policy (Form 2006) covering the Property to be issued by the Title Insurer to Buyer (the "Report"), which Report shall show the status of title to the Property as of the date of the Report and contain the express commitment of the Title Insurer to issue the Title Policy (described in Section 6.3), and (ii) legible copies of all documents referred to in the Report.

(c) Survey. Buyer, at its sole cost and expense, shall have a current ALTA survey of the Property (the "Survey") prepared by a registered land surveyor, licensed in the State of Arizona, satisfactory to Seller and Buyer, prior to expiration of the Feasibility Period. The Survey will include a legal description and depiction and indicate the acreage of the Property. The Survey shall be certified to be accurate, complete and correct to Buyer, Seller, and Title Insurer. Buyer shall provide Seller with three (3) copies of the Survey and Escrow Agent with one (1) copy of the Survey.

(d) Utility Easements. Seller is a public entity and there may be public improvements (e.g., water, sewer, electric, etc.) or public utility easements on the Property or Seller may have permitted other utilities and telephone providers to place public improvements on the Property; accordingly, Seller shall retain rights, in the form of easements on, over, under and across the Property to provide for repair and maintenance of, continued use of, and access to, the existing pipes, conduits, utility lines and other facilities and infrastructures located either on the Property, or on adjacent property owned by Seller. The nature of the easements, the form of easement grant and the exact descriptions of all easement premises (collectively, the "Utility Easements") shall be in Seller's standard forms for such easements and limited to the specific use then existing, or so specified, at the time of the Closing. Seller, at its sole election, may either reserve the Utility Easements, or require Buyer to grant the Utility Easements to Seller (and/or any other named parties in the approved easement grants) at Closing, either by instrument, by map of dedication or by plat. If Buyer is required to grant the Utility Easements to the City, the

Buyer shall do so at no cost to the City. Any reserved Utility Easements shall be deemed an Approved Title Exception; and any Utility Easements granted by Buyer to Seller at Closing shall be recorded immediately after the Deed, and prior to any lien, claim or encumbrance against the Property by or in favor of Buyer. The terms and conditions of this Section shall survive the Closing and will not merge with the provisions of any closing documents.

4.2 Zoning Clearance. A Zoning Clearance (as this term is defined in the Development Agreement) is necessary for Buyer to build its intended Project on the Property as contemplated in the Development Agreement. Buyer is solely responsible, at its sole cost and expense, for obtaining the Zoning Clearance; provided that Seller, as the current owner of the Property, will sign any necessary applications or documents required to allow the Buyer to submit and seek approval for the Zoning Clearance. Seller is a municipal entity and its agreement to sell the Property and sign necessary applications or documents is separate from, and does not affect, the City's separate powers and authority as a governmental entity including but not limited to the Zoning Clearance. Should the City deny Buyer's Zoning Clearance request such a denial shall not be a default or breach by the Seller under this Agreement, and monetary damages or any other form of relief shall not be assessed against the Seller for the City's decision to not approve the Zoning Clearance or other request to the City by Buyer for the Project.

4.3 Final Legal Description of the Property. While the Property is depicted in Exhibit A, Seller and Buyer agree that a metes and bounds legal description of the Property is required prior to Closing (the "Legal Description"). Within thirty (30) days of the Opening Date, Buyer shall provide Seller a current ALTA Survey of the Property and a proposed Legal Description of the Property that is based on the depiction of the Property in Exhibit A. The Parties recognize that the depiction of the Property is an approximation of the boundaries and the Legal Description of the Property may need modifications, adjustments or corrections based on, including but not limited to, setbacks, parcel configuration, requirements in the Mesa Zoning Ordinance and Mesa City Code, and the ALTA Survey. The Parties agree to work in good faith to agree on a final Legal Description of the Property; and the final Legal Description will be substituted for the depiction of the separate parcels presently constituting Exhibit A and will become the new Exhibit A. If the Parties, acting in good faith, cannot agree on a final Legal Description of the Property prior to the end of the Feasibility Period, either Party, each in its sole discretion, may cancel this Agreement, in which case all Earnest Money deposited with Escrow Agent prior to cancellation shall be returned to Buyer and the Parties shall have no other remedies under this Agreement.

## **ARTICLE 5 CONDITIONS TO CLOSING**

5.1 Conditions to Buyer's Obligation to Close. Buyer's obligations to close this transaction are subject to the satisfaction (or waiver by Buyer in writing), of the following conditions on and as of the expiration of the Feasibility Period unless a different date is specified:

(a) Title Review. Buyer shall be satisfied with the status of title to the Property as disclosed by the Report and the Survey. In that regard:

(i) Buyer shall have the later of: (i) thirty (30) Calendar Days following the Opening Date or (ii) ten (10) Business Days following receipt of the Survey and

Report (the “Title Review Period”) to approve or disapprove the status of title as shown by the Survey or the Report. If Buyer is dissatisfied with any exception to title as shown in the Report or the Survey, then Buyer may, by giving notice to Seller and Escrow Agent within the Title Review Period, either:

(1) Cancel this Agreement; or

(2) Provisionally accept title subject to Seller’s cure of the material flaw in Seller’s title described in Buyer’s notice either by removal of any disapproved matters, exceptions, or objections; or Seller obtaining title insurance endorsements satisfactory to Buyer against such matters, exceptions, and objections within five (5) Business Days following receipt of Buyer’s notice (the “Seller’s Title Cure Period”). If Seller does not remove such matters, exceptions and objections before the expiration of the Seller’s Title Cure Period, then, Buyer’s sole and exclusive remedies shall be either to waive such disapproved matters or to cancel this Agreement by giving written notice to Seller and Escrow Agent on or before the second (2nd) Business Day following expiration of the Seller’s Title Cure Period. Seller shall have no obligation whatsoever to eliminate or obtain title insurance endorsements over any matters shown by the Report or Survey to which Buyer has made an objection.

(ii) If, prior to Closing, Escrow Agent issues a supplemental title report showing additional exceptions to title (a “Title Supplement”), Buyer shall have a period of time equal to five (5) Business Days from the date of receipt of the Title Supplement and a copy of each document referred to in the Title Supplement (a “Supplemental Title Review Period”) in which to give notice of dissatisfaction as to any material title defect reflected by any additional exceptions shown in the Title Supplement. If Buyer is dissatisfied with any additional exception in the Title Supplement that reflects a material flaw in Seller’s title to the Property, then Buyer may, by giving notice to Seller and Escrow Agent within the Supplemental Title Review Period, either:

(1) Cancel this Agreement; or

(2) Provisionally accept title subject to Seller’s cure of the material flaw in Seller’s title described in Buyer’s notice by removal of any disapproved matters, exceptions, and objections, or Seller obtaining title insurance endorsements satisfactory to Buyer against such matters, exceptions, and objections within five (5) Business Days following issuance of the applicable Title Supplement (the “5-Day Period”). If Seller does not remove such matters, exceptions, and objections before the expiration of the 5-Day Period, then, Buyer’s sole and exclusive remedy shall be either to waive such disapproved matters or to cancel this Agreement by giving written notice to Seller and Escrow Agent on or before the second (2nd) calendar day following expiration of the 5-Day Period. Seller shall have no obligation whatsoever to eliminate or obtain title insurance endorsements over any matters shown by the Title Supplement to which Buyer has made an objection.

(iii) If Buyer does not object to an exception to title as disclosed by the Survey, Report or Title Supplement within the Title Review Period or Supplemental Title Review Period, as applicable, the matter will be deemed to have been approved by Buyer. The matters shown in the Survey, Report and any Title Supplement (other than standard printed exceptions and exclusions that will be included in the Title Policy) that are approved or deemed approved by Buyer in accordance with this Section 5.1(a), including all existing permits, licenses, and easements on the Property, and any other matters approved by Buyer in writing, are

referred to in this Agreement as the “Approved Title Exceptions.”

(iv) Upon a cancellation by Buyer that is permitted under the provisions of Section 5.1(b), all Earnest Money shall be returned to Buyer, together with all documents deposited in Escrow by Buyer. If Buyer’s cancellation occurs outside the timeframes in which Buyer is allowed to cancel the Agreement under the provisions of Section 5.1(b) or otherwise does not comply with the terms of this Section 5.1, all Earnest Money required to be paid prior to such date shall be paid to and retained by Seller unless the cancellation arises out of a new title exception voluntarily placed on the Property by Seller without Buyer’s consent or deemed consent pursuant to Sections 5.1(a)(iii), in which case the Earnest Money shall be returned to Buyer upon such cancellation. Following any cancellation pursuant to this provision, all documents deposited in Escrow by Seller shall be returned to Seller and this Agreement shall terminate.

(b) Buyer’s Investigations. Buyer shall have until 5:00 P.M. (Local Arizona Time) seventy-five (75) days from the date City Council approves this Agreement (the “Feasibility Period”) to conduct an investigation and inspection of the Property (subject to the obligation, which Buyer confirms, to restore any damage caused by its activities and to indemnify Seller as provided in the Access Agreement). Buyer’s investigation may include, among other things: (1) the physical condition of the Property; (2) the environmental condition of the Property; and (3) the feasibility of Buyer’s anticipated development of the Property and matters related thereto. Buyer shall execute the Access Agreement attached hereto as Exhibit C (the “Access Agreement”) on the Opening Date, which shall govern the terms and conditions of Buyer’s rights to access the Property prior to the Closing or earlier termination of this Agreement. If Buyer is not satisfied with its investigations and inspections with respect to the Property and this transaction or for any reason or no reason whatsoever, then Buyer will have the right, exercisable in its sole discretion, to cancel this Agreement by delivering written notice of cancellation to Seller and Escrow Agent prior to the end of the Feasibility Period, in which case all Earnest Money deposited with Escrow Agent prior to cancellation shall be returned to Buyer.

(c) Development Agreement. Buyer and Seller shall have approved the Development Agreement for the Property prior to or at Closing.

(d) Legal Description. Buyer and Seller, each in its sole discretion, shall have approved the final Legal Description for the Property prior to or at Closing.

(e) Zoning Clearance. On or before the end of the Feasibility Period, Buyer shall have obtained approval of the Zoning Clearance, which approval is subject to the City of Mesa governmental process and City Code for such approvals.

(f) Permits for the Improvements. On or before Closing, Buyer shall have all permits ready for approval (i.e., all approvals but for payment of final fees) for the construction of all the Improvements (as this term is defined in the Development Agreement).

5.2 Conditions to Seller’s Obligation to Close. Seller shall have no obligation to sell the Property to Buyer unless each of the following matters has been satisfied; provided, however, that Seller in its sole and unfettered discretion may elect to waive any such matter.

(a) Full Compliance. Seller’s obligation to close this transaction is subject to Buyer fully performing all of its obligations to be performed by Buyer on or before the Closing

Date (unless waived by Seller in writing).

(b) Approval of this Agreement. The City of Mesa Council's approval of the sale of the Property prior to Closing (Seller intends to obtain City Council approval prior to the City executing this Agreement).

(c) Development Agreement. The City of Mesa Council's approval, and Buyer's approval, of the Development Agreement for the Property prior to or at Closing.

(d) Zoning Clearance. On or before Closing, Buyer shall have obtained the approval of the Zoning Clearance for the Project, which approval is subject to the City of Mesa governmental process and City Code for such approvals.

(e) Permits for the Improvements. On or before Closing, Buyer shall have all permits ready for approval (i.e., all approvals but for payment of final fees) for the construction of all the Improvements described in the Development Agreement.

(f) Utility Easements. On or before Closing, Buyer shall have executed and delivered to Escrow Agent, for recordation by Escrow Agent, the Utility Easements in accordance with Section 4.1(d).

(g) Financial and Contractual Ability to Perform. On or before Closing, Buyer shall have provided clear and sufficient evidence to establish to the City of Mesa's City Manager, as determined in his reasonable discretion, the financial ability of Buyer to perform the obligations in the Development Agreement, including the financial ability to construct all the Improvements.

(h) Legal Description. Buyer and Seller, each in its sole discretion, shall have approved the final Legal Description for the Property prior to or at Closing.

5.3 Return of Earnest Money. If Closing does not occur solely due to Section 5.2(b), 5.2(c), 5.2(d), 5.2(g), or due to the failure of Seller to comply with the terms of this Agreement, the Earnest Money shall be returned to Buyer, and the Parties shall have no further obligations or liability to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination.

## **ARTICLE 6 CLOSING DOCUMENTS; TITLE POLICIES**

6.1 Seller's Closing Documents. On or before the Closing Date, Seller will deposit the following documents into the Escrow for delivery to Buyer at the Closing each of which will have been duly executed and, where appropriate, acknowledged:

(a) Deed. A Special Warranty Deed in the form attached hereto as Exhibit D (the "Deed") for conveyance of the Property.

(b) Development Agreement. The Development Agreement attached as Exhibit B.

(c) Title Insurance Affidavit. An affidavit from Seller to the Escrow Agent and Title Insurer regarding parties in possession and mechanic's and materialmen's lien, in



customary form, stating information accurate at the time of Closing to Seller's actual knowledge and belief, for Title Insurer to delete exceptions in the title insurance policy for parties in possession and mechanic's and materialmen's liens.

(d) Additional Documents. Such other documents as may be necessary or appropriate to transfer and convey the Property to Buyer and to otherwise consummate this transaction in accordance with the terms of this Agreement.

6.2 Buyer's Closing Documents. On or before the Closing Date and in addition to all funds required to be paid by Buyer, Buyer will deposit into the Escrow the following documents for delivery to Seller at the Closing, each of which will have been duly executed and, where appropriate, acknowledged:

(a) Deed. The Deed.

(b) Utility Easements. Forms of easement grants for the Utility Easements pursuant to Section 4.1(d).

(c) Development Agreement. The Development Agreement attached as Exhibit B.

(d) Additional Documents. Such other documents as may be necessary or appropriate to acquire the Property and to otherwise consummate this transaction in accordance with the terms of this Agreement.

6.3 Title Policy. At the Closing, and subject to Buyer's compliance with the terms of this Agreement including but not limited to obtaining an ALTA Survey of the Property, Seller will pay for a standard coverage owner's policy of title insurance (the "Title Policy") issued by Chicago Title Insurance Company (the "Title Insurer"), in the amount of the Sales Price, effective as of the Closing, insuring Buyer that fee simple title to the Property is vested in Buyer, subject only to the usual printed exceptions and exclusions contained in such title insurance policies and the Approved Title Exceptions. Buyer, if it desires, may obtain an ALTA extended policy of title insurance, which cost shall be paid by Buyer. The Title Policy shall contain endorsements, if any, that Seller has agreed to obtain to cure title objections of Buyer made pursuant to Section 5.1(a) and shall also contain any endorsements requested by Buyer that Title Insurer has agreed to issue. Seller shall have no obligation to provide endorsements to the Title Policy, however, Seller may, in its sole and absolute discretion, agree to provide endorsements to the Title Policy. Seller will satisfy Escrow Agent's standard requirements for issuance of such policy, other than those, if any, within Buyer's control. Buyer must satisfy all of Escrow Agent's requirements for issuance of any title insurance endorsements requested by Buyer.

## **ARTICLE 7 CLOSING THE TRANSACTION**

7.1 Closing. The closing of this transaction (the "Closing" or "Close of Escrow") is subject to and shall occur after the completion and satisfaction of all of the closing requirements in Article 5. After the completion and satisfaction of all of the closing requirements set forth in Article 5, Buyer and Seller shall promptly, in writing, inform Escrow Agent that these closing requirements have been satisfied. The Closing shall occur on or before August 31, 2022 (the "Closing Date"). If the date of the Closing would otherwise occur prior to expiration of a

Supplemental Title Review Period, at Buyer's request, the Closing Date shall be extended to the day following expiration of the Supplemental Title Review Period. The Closing shall occur in the offices of Escrow Agent. Notwithstanding anything in this Agreement to the contrary and provided that no notice or cure period shall apply to the following: if the requirements in Article 5 have not been satisfied and Closing has not occurred on or before September 16 2022, then this Agreement shall automatically terminate and shall be of no further force or effect, and Buyer and Seller shall have no further obligations or liabilities hereunder, except for any obligations or liabilities which survive the termination of this Agreement.

## 7.2 Closing Costs and Prorations.

(a) Escrow Fees. Buyer will pay the Escrow fees.

(b) Title Insurance Fees. Seller will pay the entire premium for a standard coverage owner's policy of title insurance in the amount of the Sales Price and the premium for endorsements (if any) which Seller, in its sole discretion, has agreed to obtain under Section 5.1. Buyer will pay the additional premium necessary to obtain the Title Policy described in Section 6.3 and the cost of any additional endorsements to such Title Policy requested by Buyer.

(c) Recording Fees. Buyer will pay the cost of recording the Deed. Seller will pay the cost of removing liens, encumbrances or other title matters only if Seller, in its sole discretion, elects to undertake such matters under Section 5.1(a)(i)(2). Recording fees for any new loan(s) obtained by Buyer shall be paid by Buyer.

(d) Taxes and Assessments. Real estate taxes, irrigation district assessments, and improvement assessment fees, if any, will be prorated in the escrow as of the Closing based upon the most current information then available to Escrow Agent.

(e) Miscellaneous Closing Costs. Any other closing costs not provided for above will be paid by Buyer.

7.3 Payments and Disbursements to be Handled through the Escrow. The various charges, credits and prorations contemplated by this Agreement will be handled by Escrow Agent through the Escrow by appropriate charges and credits to Buyer and Seller, and each party shall pay its allocable closing costs and charges in cash. All amounts payable pursuant to this Agreement will be paid to Escrow Agent for disposition through the Escrow. Escrow Agent is authorized to make all disbursements to the parties and to third parties contemplated by this Agreement from funds deposited for those purposes, as necessary or appropriate to close this transaction.

7.4 Final Disbursement to Seller. Upon the Closing or prior to such date as expressly required by this Agreement, all amounts paid according to Sections 2.1 will be disbursed to Seller.

7.5 Buyer's Obligation to Deposit Additional Funds. On or before the Closing, Buyer will deposit with Escrow Agent cash in an amount sufficient to pay all closing costs and other amounts payable by or otherwise chargeable to Buyer.

7.6 IRS Reporting at Closing. Escrow Agent agrees to be the designated "reporting person" under Section 6045(e) of the U.S. Internal Revenue Code with respect to the real estate

transaction described in this Agreement and to prepare, file and deliver such information, returns and statements as the U.S. Treasury Department may require by regulations or forms in connection therewith, including Form 1099-B.

7.7 Recording and Filing of Documents. At the Closing, the Escrow Agent shall record, in the Maricopa County Recorder's Office, without any delay whatsoever and prior to any lien, claim or encumbrance against the Property by or in favor of Buyer, the following documents in prescribed order: the Deed, the Development Agreement, and the Utility Easements to Seller. The obligations of this Section 7.7 shall not merge with the Deed or any Closing documents and shall survive the Closing.

## **ARTICLE 8 ADDITIONAL COVENANTS**

8.1 Possession. Sole and exclusive possession of the Property will be delivered to Buyer upon the Closing, subject only to the Approved Title Exceptions, Development Agreement, easements, and any restrictions set forth in the Deed.

8.2 Risk of Loss. Except as provided in the Access Agreement, the risk of loss or damage to the Property and all liability to third persons until the Closing will be borne by Seller.

8.3 Right to Enter and Inspect the Property. Subject to the Access Agreement, from time to time prior to the Closing, Buyer may enter the Property with Buyer's representatives, contractors, and agents to examine the Property, conduct soil tests, environmental studies, engineering feasibility studies, and other tests and studies, and to plan the proposed development of the Property pursuant to the terms of the Access Agreement.

8.4 Brokerage. If any person asserts a claim to a finder's fee, brokerage commission or other compensation on account of alleged employment as a finder or broker or performance of services as a finder or broker in connection with this transaction, the party under whom the finder or broker is claiming shall be fully responsible for all claims related thereto and, to the extent authorized by law, shall indemnify, pay, defend and hold the other party harmless for, from, and against any claims related thereto. This indemnity will survive the Closing or the cancellation of this Agreement.

## **ARTICLE 9 REPRESENTATIONS AND WARRANTIES**

9.1 Representations and Warranties of Seller.

(a) Seller represents that:

(i) As of the date hereof, to the best of Seller's actual knowledge, there are no pending, threatened or contemplated actions, suits, proceedings or investigations, at law or in equity, or otherwise in, for or by any court or governmental board, commission; agency, department or office arising from or relating to this transaction, the Property or the operations of Seller on the Property.

(ii) Seller has not granted any options or rights of first refusal to

purchase all or any part of the Property.

(iii) Subject to Seller's City Council's approval of this transaction and the express terms and limitations in this Agreement, the person or persons executing this Agreement on behalf of Seller are duly authorized to do so and thereby bind Seller hereto without the signature of any other party.

(iv) Subject to Seller's City Council's approval of this transaction, Seller has all requisite power and authority to enter into and perform this Agreement and to incur the obligations provided for herein and has taken all action necessary to authorize the execution, delivery and performance of this Agreement subject to the express terms and limitations in this Agreement.

(v) As of the date hereof, to the best of Seller's actual knowledge, Seller has received no written notice of any noncompliance with any Federal, state or local laws, regulations and orders relating to environmental matters with respect to the Property.

(b) Inaccuracy of Representation. If a matter represented by Seller under this Agreement was true as of the date of this Agreement, but subsequently is rendered or determined to be materially untrue, inaccurate or incomplete (collectively "Material Inaccuracy"), then Buyer's sole and exclusive remedies are those provided in Section 11.2 of this Agreement; provided further, that if Buyer knows of the Materially Inaccuracy before Closing and Buyer does not elect to cancel this Agreement and Closes this transaction, Buyer shall be deemed to have waived any and all claims and remedies for such Materially Inaccuracy.

(c) Actual Knowledge of Seller. When used in this Agreement, the term "actual knowledge of Seller" (or words of similar import) shall mean and be limited to the actual (and not imparted, implied or constructive) current knowledge of Jeff McVay, Downtown Transformation Manager, and Jeff Robbins, Economic Development Project Manager. Notwithstanding anything herein to the contrary, neither Mr. McVay nor Mr. Robbins are parties to this Agreement, and neither shall have any personal liability or liability whatsoever with respect to any matters set forth in this Agreement or Seller's representations and/or warranties herein being or becoming untrue, inaccurate or incomplete in any respect.

## 9.2 Representations and Warranties of Buyer.

(a) Buyer represents that:

(i) The person or persons executing this Agreement on behalf of Buyer are duly authorized to do so and thereby bind Buyer hereto without the signature of any other party.

(ii) Buyer has all requisite power and authority to enter into and perform this Agreement and to incur the obligations provided for herein and has taken all action necessary to authorize the execution, delivery and performance of this Agreement, subject to the express terms and limitations in this Agreement. Buyer is a duly formed Arizona limited liability company.

(iii) The execution, delivery and performance of this Agreement by Buyer does not result in any violation of, and does not conflict with or constitute a default under, any present agreement, mortgage, deed of trust, indenture, credit extension agreement; license,

security agreement or other instrument to which Buyer is a party, or any judgment, decree, order; statute, rule or governmental regulation.

(iv) No approvals or consents by third parties or governmental authorities are required in order for Buyer to consummate the transactions contemplated hereby.

(b) Inaccuracy of Representation. If a matter represented by Buyer under this Agreement was true as of the date of this Agreement, but subsequently is rendered or determined to be materially untrue, inaccurate or incomplete (collectively “Material Inaccuracy”), then Seller’s sole and exclusive remedies are those provided in Section 11.1 of this Agreement; provided further, that if Seller knows of the Materially Inaccuracy before Closing and Seller does not elect to cancel this Agreement and Closes this transaction, Seller shall be deemed to have waived any and all claims and remedies for such Materially Inaccuracy.

(c) Actual Knowledge of Buyer. When used in this Agreement, the term “actual knowledge of Buyer” (or words of similar import) shall mean and be limited to the actual (and not imparted, implied or constructive) current knowledge of Todd Marshall and Charles Huellmantel. Notwithstanding anything herein to the contrary, neither Mr. Marshall nor Mr. Huellmantel are parties to this Agreement, and neither shall have any personal liability or liability whatsoever with respect to any matters set forth in this Agreement or Buyer’s representations and/or warranties herein being or becoming untrue, inaccurate or incomplete in any respect.

9.3 Survival. Each of the representations and warranties contained in Sections 9.1 and 9.2, whether made by Seller or Buyer, shall be true and correct as of the Closing (subject to modification as expressly permitted by this Agreement) and shall survive the Closing and the delivery of the Deed to Buyer for a period of two (2) years.

## **ARTICLE 10 RELEASE**

10.1 Release from Representations and Warranties. Except as is otherwise expressly provided in Section 9.1 of this Agreement or any Closing documents, Seller hereby specifically disclaims any warranty (oral or written) concerning: (i) the nature and condition of the Property and its suitability for any and all activities and uses that Buyer may elect to conduct on the Property; (ii) the manner, construction, condition and state of repair or lack of repair of any improvements located on the Property; (iii) the nature and extent of any right-of-way, lien, encumbrance, license, reservation, condition, or otherwise; (iv) the compliance of the Property or its operation with any laws, rules, ordinances or regulations of any government or other body, it being specifically understood that Buyer shall have full opportunity during the Feasibility Period, to determine for itself the condition of the Property; and (v) any other matter whatsoever except as expressly set forth in this Agreement or any Closing documents. The sale of the Property as provided for in this Agreement is made on a strictly “AS IS” “WHERE IS” basis as of the Closing Date. Except as otherwise expressly provided in this Agreement or in any Closing documents, Buyer expressly acknowledges that, in consideration of the agreements of Seller in this Agreement, SELLER MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT IN NO WAY LIMITED TO, ANY WARRANTY OF QUANTITY; QUALITY; CONDITION, HABITABILITY, MERCHANTABILITY, SUITABILITY OR FITNESS FOR A

PARTICULAR PURPOSE OF THE PROPERTY, ANY IMPROVEMENTS LOCATED ON THE PROPERTY OR ANY SOIL CONDITIONS RELATED TO THE PROPERTY.

BUYER SPECIFICALLY ACKNOWLEDGES THAT BUYER IS NOT RELYING ON (AND SELLER HEREBY DISCLAIMS AND RENOUNCES) ANY REPRESENTATIONS OR WARRANTIES MADE BY OR ON BEHALF OF SELLER OF ANY KIND OR NATURE WHATSOEVER EXCEPT THOSE SET FORTH IN SECTION 9.1. FURTHER, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, BUYER, FOR BUYER AND BUYER'S SUCCESSORS AND ASSIGNS, HEREBY RELEASES SELLER FROM AND WAIVES ANY AND ALL CLAIMS AND LIABILITIES AGAINST SELLER FOR, RELATED TO, OR IN CONNECTION WITH, ANY ENVIRONMENTAL CONDITION AT THE PROPERTY (OR THE PRESENCE OF ANY MATTER OR SUBSTANCE RELATING TO THE ENVIRONMENTAL CONDITION OF THE PROPERTY), INCLUDING, BUT NOT LIMITED TO, CLAIMS AND/OR LIABILITIES RELATING TO (IN ANY MANNER WHATSOEVER) ANY HAZARDOUS, TOXIC OR DANGEROUS MATERIALS OR SUBSTANCES LOCATED IN, AT, ABOUT OR UNDER THE PROPERTY, OR FOR ANY AND ALL CLAIMS OR CAUSES OF ACTION (ACTUAL OR THREATENED) BASED UPON, IN CONNECTION WITH OR ARISING OUT OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, 42 U.S.C. § 9601, *ET SEQ.* ("CERCLA"); THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6901, *ET SEQ.* ("RCRA"); AND THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT, 42 U.S.C. § 9601, *ET SEQ.* ("SARA") OR ANY OTHER CLAIM OR CAUSE OF ACTION (INCLUDING ANY FEDERAL OR STATE BASED STATUTORY, REGULATORY OR COMMON LAW CAUSE OF ACTION) RELATED TO ENVIRONMENTAL MATTERS OR LIABILITY WITH RESPECT TO OR AFFECTING THE PROPERTY.

BUYER REPRESENTS TO SELLER THAT BUYER HAS CONDUCTED, OR WILL CONDUCT BEFORE CLOSING, SUCH INVESTIGATIONS OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, THE PHYSICAL AND ENVIRONMENTAL CONDITIONS THEREOF, AS BUYER DEEMS NECESSARY TO SATISFY ITSELF AS TO THE CONDITION OF THE PROPERTY AND THE EXISTENCE OR NONEXISTENCE OR CURATIVE ACTION TO BE TAKEN WITH RESPECT TO ANY HAZARDOUS OR TOXIC SUBSTANCES ON OR DISCHARGED FROM THE PROPERTY AND WILL RELY SOLELY ON SAME AND NOT ON ANY INFORMATION PROVIDED BY OR ON BEHALF OF SELLER OR ITS AGENTS OR EMPLOYEES WITH RESPECT THERETO, OTHER THAN SUCH REPRESENTATIONS, WARRANTIES, AND COVENANTS OF SELLER AS ARE EXPRESSLY SET FORTH IN THIS AGREEMENT OR IN ANY CLOSING DOCUMENTS.

UPON CLOSING, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BUYER SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING, *BUT NOT* LIMITED TO, CONSTRUCTION DEFECTS AND ADVERSE PHYSICAL AND ENVIRONMENTAL CONDITIONS, MAY NOT HAVE BEEN REVEALED BY BUYER'S INVESTIGATIONS, AND BUYER, ON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED, AND RELEASED SELLER FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT), LOSSES, DAMAGES, LIABILITIES, COSTS, AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS) OF ANY AND EVERY KIND OR

CHARACTER, KNOWN OR UNKNOWN, THAT BUYER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER, AT ANY TIME BY REASON OF OR ARISING OUT OF ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR PHYSICAL CONDITIONS, VIOLATIONS OF ANY APPLICABLE LAWS (INCLUDING, WITHOUT LIMITATION, ANY ENVIRONMENTAL LAWS) AND ANY AND ALL OTHER ACTS, OMISSIONS, EVENTS, CIRCUMSTANCES, OR MATTERS REGARDING THE PROPERTY EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT.

BUYER AGREES THAT SHOULD ANY CLEANUP, REMEDIATION, OR REMOVAL OF HAZARDOUS SUBSTANCES OR OTHER ENVIRONMENTAL CONDITIONS ON THE PROPERTY BE REQUIRED AFTER THE DATE OF CLOSING, SUCH CLEANUP, REMOVAL, OR REMEDIATION SHALL BE THE RESPONSIBILITY OF AND SHALL BE PERFORMED AT THE SOLE COST AND EXPENSE OF BUYER.

Buyer acknowledges and agrees that the provisions contained in this Section 10.1 were a material factor in Seller's willingness to sell the Property to Buyer and that Seller was unwilling to sell the property to Buyer unless Seller was released as expressly set forth above. BUYER, WITH BUYER'S COUNSEL, HAS FULLY REVIEWED THE DISCLAIMERS AND WAIVERS SET FORTH IN THIS AGREEMENT AND UNDERSTANDS THEIR SIGNIFICANCE AND EFFECT. BUYER ACKNOWLEDGES AND AGREES THAT THE DISCLAIMERS AND OTHER AGREEMENTS SET FORTH IN THIS AGREEMENT ARE AN INTEGRAL PART OF THIS AGREEMENT; AND THAT SELLER WOULD NOT HAVE AGREED TO SELL THE PROPERTY TO BUYER FOR THE SALES PRICE WITHOUT THE DISCLAIMERS AND OTHER AGREEMENTS SET FORTH IN THIS AGREEMENT. THE TERMS AND CONDITIONS OF THIS SECTION 10.1 WILL EXPRESSLY SURVIVE THE CLOSING, ARE NOT SUBJECT TO THE TIME LIMITATION SET FORTH IN SECTION 9.3 AND WILL NOT MERGE WITH THE PROVISIONS OF ANY CLOSING DOCUMENTS.

## **ARTICLE 11 REMEDIES**

11.1 Seller's Remedies. If Buyer fails to deposit the Closing Payment (as defined in Section 2.1(b)) in the time and manner set forth in this Agreement or to perform when due any other act required by this Agreement, then provided that Seller has fully performed its obligations in accordance with this Agreement, Seller's sole and exclusive remedy shall be to: (i) cancel this Agreement and the Escrow, such cancellation to be effective immediately upon Seller giving written notice of cancellation to Buyer and Escrow Agent, and (ii) to receive the Earnest Money paid pursuant to Section 2.1(a) from Buyer as liquidated damages and not as a penalty, the Parties agreeing and hereby stipulating that the exact amount of damages would be extremely difficult to ascertain and that such amount constitutes a reasonable and fair approximation of such damages. Immediately following Seller's cancellation as described herein and without further instructions from Buyer, the Earnest Money shall be released by Escrow Agent to Seller in payment of the liquidated damages amount payable to Seller pursuant to this Section 11.1. Following such cancellation and payment of the liquidated damage amount, both Parties shall be relieved of and released from any further liability under this Agreement, except that in addition to payment of the liquidated damage amount, (a) the indemnification obligations of Buyer set forth in this Agreement and in the Access Agreement shall survive the cancellation or Closing of Escrow and shall be performable and owing by Buyer to Seller; and (b) Seller shall also have the right (if it is the prevailing party) to collect from Buyer all costs and expenses

(including, without limitation, reasonable attorneys' fees and expenses) incurred by Seller if Buyer disputes Seller's right to cancel this transaction and receive liquidated damages as provided herein.

11.2 Buyer's Remedies. If Seller fails to perform when due any act required by this Agreement to be performed, then, provided Buyer has fully performed its obligations in accordance with this Agreement, Buyer's sole and exclusive remedy hereunder is to elect one of the following remedies: (i) cancel this Agreement and the Escrow and receive the return of all Earnest Money (and Escrow Agent is hereby instructed to deliver any such amounts in Escrow to Buyer), such cancellation to be effective immediately upon Buyer giving written notice of cancellation to Seller and Escrow Agent; or (ii) waive such default and consummate the transaction contemplated hereby in accordance with the terms hereof. In any event, Buyer hereby waives any right to seek, and shall not be entitled to seek or recover, actual, consequential, exemplary, or punitive damages or any other type of damages or any other legal or equitable remedy against Seller.

11.3 Notice of Breach; Remedies. In the case of an alleged breach of this Agreement by either Party, the Party shall not be considered to be in breach and no remedies may be pursued for such breach until a written notice describing the alleged breach and the action required to cure the breach has been given to the allegedly defaulting Party and such Party has failed to cure the default within ten (10) calendar days thereafter; or, if the cure cannot reasonably be completed within the ten-day period and the defaulting Party has commenced the cure within the thirty-day period and is diligently pursuing the cure, the defaulting Party shall have up to an additional thirty (30) days to cure. Notwithstanding any contrary provision of this Agreement, the provisions of Article 11 shall not limit the Parties' rights in connection with any indemnity granted pursuant to this Agreement or the Access Agreement, or limit Seller's rights to collect any amounts payable by Buyer to Seller pursuant to Section 2.1.

## **ARTICLE 12 GENERAL PROVISIONS**

12.1 Certain Definitions. As used in this Agreement, certain capitalized terms are defined as follows:

(a) "Business Day" means a day other than (i) a Friday, Saturday or Sunday; (ii) a legal holiday of the City of Mesa, and (iii) a legal holiday on which national banking associations are not open for general banking business.

(b) "Claims" means any and all obligations, debts, covenants, conditions, representations, costs, and liabilities and any and all demands, causes of action, and claims, of every type, kind, nature or character, direct or indirect, known or unknown, absolute or contingent, determined or speculative, at law, in equity or otherwise, including attorneys' fees and litigation and court costs.

12.2 Assignment. No assignment or similar transfer of Buyer's interest in this Agreement, or in the current management, ownership or control of Developer (each, a "Transfer") shall occur without the prior written consent of City, which consent may be given or withheld in City's sole and unfettered discretion; provided, however, that the foregoing restriction will not apply up to a maximum of two Transfers to an Affiliate (as defined in the Development Agreement) of Buyer upon City's reasonable determination that the management



and control of the Affiliate transferee is materially the same as the management and control of Buyer as of the Effective Date. In connection with any assignment approved by Seller: (a) the assignee shall assume the obligations of Buyer hereunder pursuant to an assignment agreement which inures to the benefit of and is enforceable by Seller, and (b) Seller shall be provided with an executed copy of the assignment agreement at least ten (10) calendar days prior to the Closing. Any assignment in violation of this Section 12.2 shall be void, and not voidable, and the purported assignee shall acquire no rights under this Agreement.

12.3 Binding Effect. Except as limited by Section 12.2, the provisions of this Agreement are binding upon and will inure to the benefit of the Parties and their respective heirs, personal representatives, successors and assigns.

12.4 Attorneys' Fees. In any suit, action, or proceeding: (a) to enforce and/or defend this Agreement or any modification hereof; (b) to interpret this Agreement or any modification hereof, and/or (c) arising out of or related to this Agreement or any modification hereof, the Prevailing Party shall be entitled to recover from the non-prevailing Party reasonable attorneys' fees, costs of suit, and any other relief granted by the court, whether or not any judgment is entered. The phrase "Prevailing Party" within the meaning of this Section includes, without limitation, a party who agrees to dismiss an action or proceeding upon the other's payment of the sums allegedly due or performance of the covenants allegedly breached, or who obtains substantially the relief sought by it.

12.5 Waivers. No waiver of any of the provisions of this Agreement will constitute a waiver of any other provision, whether or not similar, nor will any waiver be a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver. Either party may waive any provision of this Agreement intended for its benefit; provided, however, such waiver will in no way excuse the other party from the performance of any of its other obligations under this Agreement.

12.6 Construction. The terms and provisions of this Agreement represent the results of negotiations among the Parties, each of which has been represented by counsel of its own choosing, and neither of which has acted under any duress or compulsion, whether legal, economic or otherwise. Consequently, the terms and provisions of this Agreement shall be interpreted and construed in accordance with their usual and customary meanings, and the Parties each hereby waive the application of any rule of law which would otherwise be applicable in connection with the interpretation and construction of this Agreement that ambiguous or conflicting terms or provisions contained in this Agreement shall be interpreted or construed against the Party whose attorney prepared the executed Agreement or any earlier draft of the same.

12.7 Severability. If any provision of this Agreement is unenforceable, the remaining provisions shall nevertheless be kept in effect.

12.8 No Partnership. Any and all provisions, implications, or interpretations of or from this Agreement to the contrary notwithstanding, no partnership, joint venture or other relationship is created, implied or acknowledged between or among the Parties.

12.9 Time. Time is of the essence of this Agreement.

12.10 Notices.

(a) Notices will be in writing and will be given by (i) personal delivery, or (ii) any nationally recognized courier service (e.g., Federal Express or UPS) sent for next Business Day delivery. Notices will be delivered or addressed to Seller, Buyer and Escrow Agent at the addresses set forth on the first page of this Agreement or at such other address or number as a Party may designate in writing. The date notice is deemed to have been given, received and become effective will be: (a) the date on which the notice is delivered, if notice is given by personal delivery, or (b) the date of actual receipt, if the notice is sent by courier.

(b) Copies of all notices shall also be provided as follows:

Buyer's Attorney: Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101  
Attn: Joseph P. McCarthy Telephone: 206-386-7534  
Email: joseph.mccarthy@stoel.com

Seller's Attorney: *If given by personal delivery or courier:*  
  
James N. Smith  
City Attorney, City of Mesa  
20 E. Main St., Suite 850  
Mesa, Arizona 85201-7425

12.11 Further Documentation. Each Party agrees in good faith to execute such further or additional documents as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.

12.12 Time Periods. Except as expressly provided for in this Agreement, the time for performance of any obligation or taking any action under this Agreement will be deemed to expire at 5:00 o'clock p.m. (Mesa Local Time) on the last day of the applicable time period provided for in this Agreement. If the time for the performance of any obligation or taking any action under this Agreement expires on a Friday, Saturday, Sunday or legal holiday of the City of Mesa, the time for performance or taking such action will be extended to the next succeeding day which is not a Friday, Saturday, Sunday or legal holiday of the City of Mesa.

12.13 Headings and Counterparts. The headings of this Agreement are for purposes of reference only and will not limit or define the meaning of any provision of this Agreement. This Agreement may be executed in any number of counterparts, each of which will be an original but all of which will constitute one and the same instrument.

12.14 Entire Agreement. This Agreement includes the following Exhibits:

<u>Exhibit A</u>	Depiction of Property
<u>Exhibit B</u>	Development Agreement
<u>Exhibit C</u>	Access Agreement
<u>Exhibit D</u>	Special Warranty Deed

This Agreement and the above Exhibits constitutes the entire agreement between the parties pertaining to the subject matter contained in this Agreement. All prior and contemporaneous agreements, representations and understandings of the parties, oral or written, are superseded by and merged in this Agreement. No supplement, modification or amendment of this Agreement will be binding unless in writing and executed by Buyer and Seller.

12.15 Compliance with State Law Restrictions. The obligations of Seller, pursuant to the provisions of this Agreement which require the expenditure of funds do not constitute a general obligation or indebtedness of Seller within the meaning of any constitutional or statutory debt limitation or restriction, and do not obligate Seller to make any expenditure from proceeds from ad valorem taxes or obligations to which any general taxing authority is pledged or from its general funds unless the expenditure has been duly budgeted if and to the extent required by law and is within all budget and expenditure limitations of, and is not in conflict with, the Constitution or laws of the State of Arizona.

12.16 Applicability of Certain Statutes. Notice is hereby given of the applicability of A.R.S. § 12-133, § 12-1518, and § 38-511.

12.17 Nondiscrimination. Buyer and Seller agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity, immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.

12.18 Records. To the extent required by A.R.S. § 35-214, Buyer and Seller agree to retain all records relating to this Agreement and to make those records available at all reasonable times for inspection and audit by the other party or the Auditor General of the State of Arizona during the term of this Agreement and for a period of five (5) years after the completion of this Agreement. The records shall be provided at a location designated by the requesting party upon reasonable notice to the other.

12.19 Governing Law, Jurisdiction, Venue. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal, substantive laws of the State of Arizona (without reference to conflict of law principles). Any action brought to interpret, enforce or construe any provision of this Agreement may only be commenced and maintained in the Superior Court of the State of Arizona in and for the County of Maricopa (or in the United States District Court for the District of Arizona, if, but only if, the Superior Court lacks or declines jurisdiction over such action); Seller and Buyer irrevocably consent to jurisdiction and venue in such courts for such purposes and agree not to seek transfer or removal of any action commenced in accordance with the terms of this Section 12.19.

12.20 Violation of State Law. Preserve 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 Attorney General determines that this Agreement violates any provision of state law or the Constitution of Arizona and Seller and Buyer are not able (after good faith attempts) to modify the Agreement 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), this Agreement shall automatically terminate at midnight on the thirtieth 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 requires the posting of a bond under A.R.S. § 41-194.01(B)(2), Seller shall be entitled to terminate this Agreement, except if Buyer 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, Seller may terminate this Agreement, and in which event neither Party will have any further rights or interest in this Agreement or claim against the other Party for a breach or default under this Agreement.

12.21 NO BINDING CONTRACT UNTIL EXECUTION. NEITHER THE PREPARATION NOR THE DELIVERY OF THIS AGREEMENT TO BUYER FOR EXAMINATION SHALL BE DEEMED TO BE AN OFFER BY SELLER TO SELL THE PROPERTY BUT SHALL BE MERELY A PART OF THE NEGOTIATIONS BETWEEN BUYER AND SELLER.

*[All signatures appear on the following pages.]*

Buyer and Seller have executed this Agreement as of the date first above written.

**SELLER:**

City of Mesa, an Arizona municipal corporation

\_\_\_\_\_  
Christopher J. Brady  
City Manager

**BUYER:**

MHA III, LLC, an Arizona limited liability  
company

By: Urban Housing Partners VI, LLC, an Arizona limited  
liability company

Its: Manager

By:\_\_\_\_\_

Name: Todd Marshall

Its: Member

The undersigned Escrow Agent accepts the  
engagement to handle the Escrow on the terms  
and conditions described herein.

SECURITY TITLE AGENCY

By:\_\_\_\_\_

Name:\_\_\_\_\_

Title:\_\_\_\_\_

OPENING DATE: \_\_\_\_\_

**EXHIBIT A TO AGREEMENT TO PURCHASE REAL PROPERTY**  
**AND ESCROW INSTRUCTIONS**

**DEPICTION OF REAL PROPERTY**

Map created by Engineering GIS DATE SAVED: 12/7/2021 Path: Z:\Project\_Files\DowntownManager\NESMacdonaldAndW2nd\NESMacdonaldAndW2nd.mxd



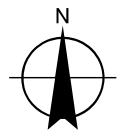
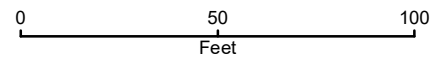
### NE S Macdonald & W 2nd Ave



Assessor Parcel



Assessor Parcels to be Conveyed for Approximate Development Area



**EXHIBIT B TO AGREEMENT TO PURCHASE REAL PROPERTY  
AND ESCROW INSTRUCTIONS**

**DEVELOPMENT AGREEMENT**



**EXHIBIT C TO AGREEMENT TO PURCHASE REAL PROPERTY  
AND ESCROW INSTRUCTIONS**

**ACCESS AGREEMENT**

THIS ACCESS AGREEMENT (“Agreement”) is made as of \_\_\_\_\_, 2020 (“Effective Date”), by and between City of Mesa, an Arizona municipal corporation (“Seller”), and MHA III, LLC, an Arizona limited liability company (“Licensee”) (each, a “Party” and, collectively, the “Parties”).

**RECITALS**

A. Seller and Licensee are parties to that certain Agreement to Purchase Real Property and Escrow Instructions dated as of \_\_\_\_\_, 2021 (“Purchase Agreement”), for a sale by Seller to Licensee, as Buyer, of certain real property located in Maricopa County, Arizona, more particularly described in Exhibit “A” attached hereto and incorporated herein (“Property”), owned by Seller.

B. Licensee desires to enter onto the Property in accordance with the Purchase Agreement and this Agreement for the purpose of conducting various inspections of and performing certain work on the Property as described herein.

**AGREEMENTS**

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. License to Enter Property. Seller hereby grants Licensee and its duly authorized agents, consultants and independent contractors (collectively, “Representatives”) a nonexclusive license to enter upon the Property, at Licensee’s sole cost and expense, from the Effective Date until the termination of the Purchase Agreement, for the purpose of inspecting the Property, including but not limited to conducting a land survey, design and engineering studies, and soil and environmental investigation (collectively, the “Tests”), provided that each of Licensee’s or its Representatives’ entries onto the Property be made only after all of the following conditions are met:

(a) Licensee will give the City at least one business day prior written notice of Licensee’s request, sent by email to Kim Fallbeck, Real Estate Services Administrator, at [Kim.Fallbeck@mesaaz.gov](mailto:Kim.Fallbeck@mesaaz.gov). The term “business day” means Monday through Thursday of each week, between 7:00 a.m. and 6:00 p.m., and excludes each Friday and each legal holiday of the City of Mesa.

(b) Licensee will access the Property in the presence of a member of City staff, or as otherwise arranged with the City.

(c) Licensee will access the Property during City business hours, which are between 7:00 a.m. and 6:00 p.m., Monday through Thursday, or as otherwise arranged with the City.

(d) Licensee will conduct its Tests in such a manner so as not to damage, alter or interfere with the use of the Property by City.

2. Government Regulations. While on the Property, Licensee and its Representatives shall comply with all applicable governmental laws and regulations.

3. Liens. Licensee shall not suffer or permit to be enforced against the Property any mechanics', materialmen's, contractors' or subcontractors' liens or any claim for damage arising from the Tests performed by Licensee or its Representatives and Licensee shall pay or cause to be paid all of said liens, claims or demands before any action is brought to enforce the same against the Property or Seller.

4. Indemnity. Licensee shall and does hereby agree to indemnify, defend (by counsel reasonably satisfactory to Seller) and hold Seller, its elected officials and the members of any boards or commissions and its employees, its and their respective successors and assigns (collectively, the "Indemnitees") harmless for, from and against any loss, damage, injury, accident, fire or other casualty, liability, claim, cost or expense (including, but not limited to, reasonable attorneys' fees) of any kind or character to any person or property, including the property of the Indemnitees (collectively, the "Claims") arising in whole or part, from or relating to Licensee's entry onto the Property, including without limitation: (a) any entry and/or use of the Property by Licensee, or any of its Representatives; (b) any act or omission of Licensee, or any of its Representatives; (c) any bodily injury, property damage, accident, fire or other casualty to or involving Licensee, or any of its Representatives and its or their property on the Property; (d) any violation or alleged violation by Licensee, or any of its Representatives, of any law or regulation now or hereafter enacted relating to the Property; (e) any loss or theft whatsoever of any property or anything placed or stored by Licensee, or any of its Representatives, on or about the Property; (f) any breach by Licensee, or any of its Representatives, of its or their obligations under this Agreement; and (g) any enforcement by Seller of any provision of this Agreement and any cost of removing Licensee, or any of its Representatives, from the Property; provided, however, that the foregoing indemnity shall not apply to the extent any such Claim is ultimately established by a court of competent jurisdiction to have been proximately caused by the acts or omission of any of the Indemnitees. Anything to the contrary contained herein notwithstanding, the terms and conditions of this Section 4 shall survive the termination or expiration of this Agreement, the close of escrow on the Property or the termination or cancellation of the Purchase Agreement. This indemnification provision shall not be limited by the amount of insurance set forth in Section 5 below.

5. Insurance. Licensee, at its sole cost and expense, and as a condition precedent to Licensee's, or any of its Representatives', entry onto the Property, shall maintain comprehensive general liability insurance ("Liability Insurance") on an "occurrence basis" against claims for "personal injury," including without limitation, bodily injury, death or property damage, occurring upon, on or about the Property, such insurance to afford immediate minimum protection at all times during the term of this Agreement, to a limit of not less than One Million and No/100 Dollars (\$1,000,000.00) with respect to personal injury or death to any one or more persons or to damage to property. Such insurance shall designate, and be for the benefit of, Licensee, as the named insured party, and Seller, as an additional insured on the policy. The limits of said insurance shall not, however, limit the liability of Licensee under the indemnification provisions of this Agreement. No such policy shall be cancelable, or subject to reduction of coverage, or other modification except after prior written notice to Seller.

6. Payment of Claims. In addition to, and not in limitation of, Seller's other rights and remedies under this Agreement, should Licensee fail within ten (10) business days after written request from Seller to either: (a) pay and discharge any lien or claim arising out of Licensee's or its Representatives' use of the Property; or (b) indemnify, defend, pay and hold harmless the Indemnitees for, from and against any Claim as provided herein, then in any such case Seller, at its option, may pay any such lien or claim, or settle or discharge any action therefore, or satisfy any judgment thereon, and all costs, expenses and other sums incurred by Seller in connection therewith (including, but not limited to, reasonable attorneys' fees) shall be paid to Seller by Licensee upon written demand from Seller together with interest thereon at the rate of ten percent (10%) per annum, from the date incurred or paid until repaid in full.

7. Termination. Licensee's rights granted by this Agreement shall terminate automatically without notice upon the earlier to occur of: (a) the termination of the Purchase Agreement for any reason whatsoever (including the consummation of such Purchase Agreement through the transfer of title to the Property); or (b) the date Licensee is or becomes bankrupt or insolvent, makes an assignment for the benefit of creditors, or institutes a proceeding under the Bankruptcy Act in which case Licensee is the bankrupt party. Upon termination or expiration of this Agreement, Licensee and its Representatives shall immediately vacate the Property.

8. Nature of Licensee's Rights. Licensee acknowledges that: (a) this Agreement grants Licensee a revocable, nonexclusive license only; and (b) Licensee has no rights as an owner, purchaser or tenant by virtue hereof; and (c) this License confers no interest in real property. Upon termination or expiration of this Agreement, Licensee and its Representatives shall immediately vacate the Property.

9. Maintenance and Condition of Property. Licensee, at Licensee's sole cost, will be responsible for any damage done to the Property by Licensee or its Representatives and, upon departing from or being required to vacate the Property, will pay the costs of repairing and restoring the Property and every portion thereof, if caused by Licensee, or any of its Representatives, to at least as good a condition as existed prior to Licensee's, or any of its Representatives, entry onto the Property. The terms and conditions of this Section 9 shall survive the termination or expiration of this Agreement.

10. Assignability. This Agreement may not be assigned by Licensee, whether voluntarily or by operation of law, and Licensee shall not permit the use of the Property, or any part thereof, except in strict compliance with the provisions hereof, and any attempt to do so shall be null and void; provided, however, Licensee may assign this Agreement to any permitted assignee of Licensee's rights as buyer under the Purchase Agreement if the assignee agrees, in writing, to fully assume the obligations of Licensee under this Agreement and to otherwise be subject to and abide by the terms and provisions of this Agreement.

11. Attorneys' Fees. If any action is brought by either Party in respect to its rights under this Agreement, the prevailing Party, as determined by the court, shall be entitled to reasonable attorneys' fees and court costs as determined by the court.

12. Binding Effect. Subject to the provisions of Section 10, the provisions of this Agreement are binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

13. Applicable Law. This Agreement shall be construed according to Arizona law.

(a) 14. Notices. Except as otherwise required by law, any notice required or permitted under this Agreement will be in writing and will be given by (i) personal delivery or 11 any nationally recognized express or overnight delivery service (e.g., Federal Express or UPS), delivery charges prepaid. Notices shall be delivered or addressed to Seller and Licensee at the addresses set forth below or at such other address as a party may designate in writing. Any notice sent by a recognized national overnight delivery service will be deemed effective one (1) business day after deposit with such service. Any notice personally delivered or delivered through a same-day delivery/courier service will be deemed effective upon its receipt (or refusal to accept receipt) by the addressee. Telephone numbers and email addresses are provided for informational purposes only and shall not be deemed notice.

To Seller: CITY OF MESA  
20 East Main Street, Suite 500  
Mesa, AZ 85201-7425  
Attn: Kim Fallbeck  
Real Estate Services  
Email: [kim.fallbeck@mesaaz.gov](mailto:kim.fallbeck@mesaaz.gov)  
  
Telephone: (480) 644-2521  
Facsimile: (480) 644-3392

To Licensee: 233 East Southern, Number 24641  
Tempe, AZ 85282  
Attn: Todd Marshall  
Telephone: (480) 966-3008  
Facsimile: N/A

15. Entire Agreement. This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter contained herein. All prior and contemporaneous agreements, representations and understandings of the Parties, oral or written, are superseded by and merged in this Agreement. No supplement, modification or amendment of this Agreement shall be binding unless in writing and executed by Seller and Licensee.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

[Signatures of the Parties Appear on the Following Page]

**SELLER:**

THE CITY OF MESA, an Arizona municipal  
corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

**LICENSEE:**

MHA III, LLC, an Arizona limited liability  
company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**EXHIBIT A TO ACCESS AGREEMENT**

**LEGAL DESCRIPTION OF REAL PROPERTY**

**EXHIBIT D TO AGREEMENT TO PURCHASE REAL  
PROPERTY AND ESCROW INSTRUCTIONS**

**SPECIAL WARRANTY DEED**

When Recorded, Mail to:

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**SPECIAL WARRANTY DEED**

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For the consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration received, City of Mesa, an Arizona municipal corporation, ("**Grantor**"), does hereby convey to MHA III, LLC, an Arizona limited liability company ("**Grantee**"), all of Grantor's right, title and interest in and to the following described real property (the "**Property**") situated in Maricopa County, Arizona, together with all improvements thereon and all of Grantor's interest in any rights and privileges appurtenant thereto:

SEE EXHIBIT "A" ATTACHED HERETO  
AND BY THIS REFERENCE MADE A  
PART HEREOF

BUT EXCLUDING all rights granted (by plat or separate instrument) to or for the benefit of, or existing use by, the City of Mesa, an Arizona municipal corporation, or any department or agency of the City of Mesa, for rights-of-way, existing public utilities, public utility and facility easements, drainage and storm water easements, and such other easements for the benefit of the public (collectively, "**Public Rights**"), which Public Rights shall not merge with this Special Warranty Deed and shall remain as granted to or held by the City of Mesa, and its departments and agencies [Note: Only add this paragraph when City conveying the Property to Developer.]; and

SUBJECT ONLY TO matters of record and to any and all conditions, easements, encroachments, rights-of-way, public utilities, or restrictions which a physical inspection, or accurate ALTA survey, of the Property would reveal, and to all applicable municipal, county, state or federal zoning and use regulations.

AND GRANTOR hereby binds itself and its successors to warrant and defend the title against all of the acts of Grantor and no other, subject to the matters set forth above.

IN WITNESS WHEREOF, Grantor has caused this Special Warranty Deed to be executed as of this \_\_\_\_ day of \_\_\_\_\_, 2021.

GRANTOR:

City of Mesa, an Arizona municipal  
corporation

By: \_\_\_\_\_  
Its City Manager

STATE OF ARIZONA )

) ss.

County of Maricopa )

On this the \_\_\_\_ day of \_\_\_\_\_, 2021 before me, the undersigned Notary Public, personally appeared \_\_\_\_\_, who acknowledged himself to be the City Manager of the City of Mesa, an Arizona municipal corporation and that, being authorized so to do, he or she executed the foregoing instrument for the purposes herein contained on behalf of the Grantor.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_



**EXHIBIT "A" TO SPECIAL WARRANTY DEED**

**LEGAL DESCRIPTION OF PROPERTY**