

MEMORANDUM OF UNDERSTANDING

City of Mesa, Arizona

Habitat Fenix, LLC

July 8, 2024

1. Parties to Memorandum. The Parties to this Memorandum of Understanding (“Memorandum”) are the City of Mesa, Arizona, an Arizona municipal corporation (“City”) and Habitat Fenix, LLC, an Arizona limited liability company (“Developer”). City and Developer may individually be referred to as a “Party” or collectively as the “Parties”.
2. Background. City desires to sell or lease, and Developer desires to acquire (by purchase, lease, or a combination thereof) and develop certain parcels of real property located on the south side of West Pepper Place, between North MacDonald and South Center, comprised of APNs 138-36-016, 138-36-021A, and 138-36-022, totaling approximately 41,585 square feet of land depicted in the attached Exhibit A (“Green Lot”). The proposed development of the Green Lot is intended to include market rate apartments, commercial space, a parking garage, and other private and public improvements as more specifically described herein; additionally, Developer may construct a solar electric generating project, the infrastructure or other improvements necessary to support a solar electric generating project, or a portion of a solar electric generating project on the top level of the existing City owned parking structure located at 30 West Pepper Place (“Pepper Place Garage”), located north of the Green Lot (collectively, including the prior stated development improvements, the “Project”). The Green Lot and the Pepper Place Garage may collectively be referred to as the “Project Property.”
3. Memorandum of Understanding. The Parties acknowledge that this document is a “Memorandum of Understanding,” and is neither an agreement, contract, nor however styled, binding in any way for any purpose. This Memorandum is not an offer from City that allows acceptance by Developer and is simply an outline of certain terms which the Parties intend to use as the basis for further discussions and negotiations, with the Parties understanding that (A) such terms are not complete and require further detail and explication; and (B) there are material terms that are essential to any potential future agreement between the Parties that are not included in this Memorandum. *This Memorandum is not binding upon either Party nor legally enforceable, imposes no enforceable obligations upon either Party, and does not grant any rights, privileges, or obligations to or in favor of either Party as against the other.* City and Developer each irrevocably waive any and all rights they may have to enforce or attempt to enforce any of the terms of this Memorandum as an agreement or a contract against the other Party. In addition to the foregoing, Developer acknowledges that any ultimate agreement with City for the sale, lease, or development of the Green Lot or the Pepper Place Garage requires the approval of the City Council in the form of a resolution or ordinance, or both, which approval may be granted or withheld in the City Council’s sole and absolute discretion, regardless of any prior City Council approval of this Memorandum or approval of subsequent negotiations. The approval of this Memorandum by the City Council shall not be, or be deemed to be, an approval of an agreement or contract between City and Developer, and does not allow Developer the right to use, occupy, or claim any ownership or encumbrance rights in any of the Project Property.
4. Transaction Structure; Potential Future Agreement(s) Between the Parties. This Memorandum is not and shall not be interpreted to be a guarantee of any future agreements between the Parties. The Parties are still negotiating the structure and terms of any potential future agreement(s) generally described in this Memorandum, which will be more specifically set forth in the potential future agreement(s). The terms in this Memorandum refer to potential future agreement(s), upon terms and conditions to be mutually agreed to by the Parties, that are approved by the City Council (as required by City), which approval may be granted or withheld in the City Council’s sole and absolute discretion, and negotiated and executed by the Parties and any necessary third parties. Any potential future agreement(s) are likely to include a real estate purchase agreement setting forth the specific terms and conditions of Developer’s acquisition of the Green Lot and one or more development agreements related to the development of the Project Property.

5. Outline of Certain Material Terms. Subject to the limitations and scope of this Memorandum, the Parties provide the following outline as the basis for future negotiations of terms related to the development of the Project Property and the potential future agreement(s) between them.
- A. Developer's Preliminary Obligations. Developer will perform, obtain, and provide the below outlined obligations for the Project Property at Developer's sole cost and expense (collectively, "Developer's Preliminary Obligations"). It is contemplated by the Parties that, promptly following the execution of this Memorandum, City and Developer will commence negotiations with respect to potential future agreement(s) for the Project Property based upon the outline set forth in this Memorandum. Concurrently with such negotiations, Developer will proceed with Developer's Preliminary Obligations. City may, in its sole and absolute discretion, terminate this Memorandum and any further negotiations for any reason or no reason at all, including Developer's failure to complete any of the Developer's Preliminary Obligations.
- i. Business Plan. Developer shall create and provide a business plan for the development of the Project. The business plan must include the Project's budget and pro-forma, describing and demonstrating the Project's viability, including details for the operation and management of the Project after completion of construction. As the Project parameters are refined and detailed, Developer will update the business plan, and provide such updates to City. The business plan must, at a minimum, also provide:
- a. Research/market demand data;
 - b. Details on how Developer intends to utilize the Green Lot and in what form of control of the site, or portion thereof, the Project requires;
 - c. The Project's development costs in itemized detail, including all site acquisition, construction costs, soft costs, and contingencies;
 - d. The Project's operating pro forma in detail, including all revenues, expenses, debt service, taxes, and other assessments for the same number of years for which City assistance (if any) is requested;
 - e. Projected commercial lease rates and apartment rental rates, and the basis for such rates and prices; and
 - f. Reasonable assumptions for all costs and revenues.
- ii. Developer's Financial Ability. Developer will provide information to the City Manager to demonstrate Developer's financial capacity to execute and complete the Project successfully. Developer will meet with the City Manager to establish that there are lenders/investors who will fund the Project. The information provided by Developer will, at a minimum:
- a. Describe a clear strategy to fund all Project costs, including operation and maintenance costs following completion of construction of the Project; and
 - b. Specify and describe funding sources for the Project.
- B. Real Estate Purchase Agreement. The Parties anticipate that the potential future agreements will include a future real estate purchase agreement with, at a minimum, the following concepts:

- i. Purchase Price. The purchase price of the Green Lot will be based on fair market value pursuant to a valuation methodology to be set forth in the real estate purchase agreement, which valuation methodology may include and consider the value of certain costs to develop the Green Lot, such as costs for public improvements, public amenities, or enhanced costs. The intent of such valuation approach is to provide fair and full compensation to City for the Green Lot, and such compensation may take the form of cash, public infrastructure, public amenities, or other consideration deemed appropriate by City, in its sole and absolute discretion, and allowed under applicable law. It is anticipated the purchase price will be determined within a reasonable time prior to the sale of the Green Lot.

 - ii. Option for Shared Parking in the Pepper Place Garage. Developer will be offered an option to obtain parking permits in the Pepper Place Garage for up to 70 parking spaces (each a “Permitted Space” and, collectively, the “Permitted Spaces”) for the parking of only residents, guests of residents, and commercial tenants of the Project (collectively, “Authorized Users”). Developer will have the right to exercise the option for twelve (12) months from completion of construction of the Project. The Pepper Place Garage will at all times be exclusively owned and controlled by City except that Developer, if Developer exercises the option, may obtain a license for use of Permitted Spaces by Authorized Users that will be demonstrated through a license agreement setting forth the specific terms and conditions. The license agreement is anticipated to include, at a minimum, the following concepts: (a) Developer will have the right to license or sublicense the Permitted Spaces to Authorized Users; (b) the fee for each Permitted Space will be forty-five dollars (\$45) per Permitted Space for the initial five (5) year period of the license agreement, and after the initial five (5) year period, the fee for each Permitted Space will be as set forth in City’s then-current schedule of fees and charges, which is set by the City Council through a public process and in City Council’s sole and absolute discretion, provided the fee for each Permitted Space will be the same as the fee for similarly situated customers as to similar parking spaces in Mesa; and (c) the term of the license agreement will be a maximum of fifteen (15) years. At the expiration of the license agreement, the Parties may negotiate a renewal of the license agreement or another, separate license agreement. The license agreement for the option described herein will be an exhibit to the real estate purchase agreement.
- C. Development Agreement. The Parties anticipate that the potential future agreements will include a development agreement with, at a minimum, the following concepts:
- i. Minimum Improvements. At Developer’s sole cost and expense, Developer will design, obtain permits for, and construct all the following minimum improvements for the Project (“Minimum Improvements”):
 - a. Green Lot. The following Minimum Improvements will be constructed on or above the Green Lot and Developer will, at a minimum, meet the following requirements related to such Minimum Improvements:
 - 1. Sustainable Apartments. A minimum of one hundred (100) unique market rate/luxury highly sustainable apartments which must be EnergyStar Multifamily rated, NGBS gold or platinum certified, and which may include hybrid car sharing programs, sustainable materials, an active solar array to

reduce energy demand on Developer's side of the electric meter, and a micro and macro energy use display.

2. Commercial Space. A minimum of 2,000 square feet of commercial space.
3. Green Garage. A multi-story, structured parking garage which will include improved ground floor parking ("Green Garage").
 - a. City Parking. Developer will provide to City, at no cost to City, a minimum of seventy-four (74) contiguous parking spaces and, at the City's request, Developer will include as part of the seventy-four (74) contiguous parking spaces a minimum of five (5) contiguous parking spaces equipped with conduit to support Level 2 electric vehicle charging stations (the charging stations to be installed by City), in the Green Garage that City will own and control for public or City permit parking and any other uses determined by City ("City Parking"). The City Parking will consist of all the ground floor parking spaces and any additional parking spaces contiguous to the ground floor parking spaces needed to meet the minimum required number of parking spaces for the City Parking. At City's request and expense, Developer will design and construct additional City Parking within the Green Garage in accordance with City requirements.
 - b. Perpetual Easement. Developer will convey a perpetual easement to City to allow City to use the City Parking in perpetuity. The perpetual easement will give City the ability to utilize all the drive aisles and all access points related to the City Parking and will give City the right to use the City Parking for public or City permit parking and any other uses determined by City.
 - c. Use and Control. The City Parking at the Green Garage will be subject to the exclusive control of City. City will retain all revenue generated from the use of all City Parking. Except for the City Parking, the Green Garage will be subject to the exclusive control of Developer, and Developer will retain all revenue generated from the use of such space. Parking revenue generated from public events will be equitably distributed based on the available spaces that may be parked for the event.
 - d. Access. Developer will provide ingress and egress for the Green Garage from West Pepper Place and from North MacDonald via the alley south of West Pepper Place and north of East Main Street. The specifics of the ingress and egress for the Green Garage will be as set forth in the final, approved site plan for the Project. The Parties acknowledge access to North MacDonald and the Green Garage may be reduced at times to accommodate City events on North MacDonald. The Parties agree to work cooperatively to minimize the reduction to access caused by City events, details of which may be included in the development agreement or other future agreement. Additionally, City will (i) make reasonable efforts to notify Developer in advance of upcoming City events that may reduce access to the Green Garage, so that Developer may continue to provide access to the Green Garage during such City events; and (ii) install bollards across North

MacDonald that align with the south side of the alley south of West Pepper Place and north of East Main Street.

- e. Security. City will not be obligated to provide any type of security for the Green Garage. Developer may install or provide security in the Green Garage, at Developer's sole cost and expense.
 4. Outdoor Plaza. On the southeast corner of North MacDonald and West Pepper Place, Developer shall design and develop an outdoor plaza or park available for use by the public which will include public amenities such as works of art, seating, landscaping, and lighting.
 5. Customary Operation and Maintenance. Developer is solely responsible for the customary operation and maintenance including non-capital repair and replacement ("O&M") of the Project at the Green Lot including of the Green Garage, the Minimum Improvements at the Green Lot, and all other improvements constructed at the Green Lot; except that Developer is solely responsible for the O&M of the City Parking and the commonly shared drive aisles for only the first eight (8) years following completion of construction of the Green Garage, and after eight (8) years, City is responsible for the O&M of the City Parking and City and Developer will equitably share the O&M of the commonly shared drive aisles.
 6. Structural and Capital Repair and Replacement. Developer is solely responsible for all structural and capital repairs and replacements of the Project at the Green Lot in perpetuity, including the Green Garage (including City Parking and commonly shared drive aisles), the Minimum Improvements at the Green Lot, and all improvements constructed at the Green Lot. Developer may redevelop the Green Lot after the expiration or termination of the development agreement provided Developer continues to meet its perpetual responsibilities for all structural and capital repairs and replacements and its obligations pursuant to the perpetual easement granted to City to allow City to use the City Parking in perpetuity.
 7. Use Restrictions. The Green Lot's use will be restricted to uses consistent with the intent of the Project to be further set forth in the development agreement. Any uses that City determines may have a deleterious impact on the Project or surrounding areas will be prohibited.
- b. Wayfinding. Developer will construct and install wayfinding for the Green Garage which will include directional signage for public parking at the Green Garage.
 - c. Solar Project. Developer may construct a solar electric generating project, the infrastructure or other improvements necessary to support a solar electric generating project, or a portion of a solar electric generating project on the top level of the Pepper Place Garage that may include electric battery storage ("Solar Project"). Alternatively, Developer may provide City a monetary contribution to be used towards the development of the Solar Project. If constructed, the Solar Project will result in all or a portion of the currently uncovered City parking spaces at the Pepper Place garage being converted by Developer to covered City parking spaces, at no cost to City. Detailed Solar Project requirements will be negotiated

as part of the development agreement and a separate solar agreement, which may be included as an exhibit to the development agreement.

- ii. Relocation of City’s Green Lot Parking Spaces. In anticipation of Developer constructing the Minimum Improvements, City will relocate its thirty (30) permit parking spaces currently located in the Green Lot to the Pepper Place Garage, or another location determined by City in City’s sole and absolute discretion, except that City will not relocate the subject parking spaces to the “Purple Parking Garage.”
- iii. GPLET. The potential future development agreement for the Project may include terms related to the lease of property and improvements authorized by the Arizona Government Property Lease Excise Tax (“GPLET”) statutes, Arizona Revised Statutes (“A.R.S.”) § 42-6201 et seq, which may be amended from time to time by the Arizona State Legislature. If the Project involves a GPLET lease, the development agreement will include GPLET terms and conditions that allow Developer to transfer the Green Lot and the Minimum Improvements at the Green Lot to City and allows City to transfer the Green Lot and the Minimum Improvements at the Green Lot back to Developer. Any potential future agreement(s) between the Parties are subject to eligibility and the terms and limitations of the GPLET statutes, as they may be amended. Developer will be responsible for ensuring that all GPLET taxes are paid, if and as applicable. City does not represent that the Project, the Green Lot, or the Minimum Improvements are eligible for, or comply with, any GPLET statutory tax abatement or reduction. As an element of consideration for a GPLET, City may require Developer to make a monetary contribution to City intended to be used for: (a) projects or programs that address homelessness or affordable housing related needs in Mesa; (b) costs associated with the development of the Solar Project by City in lieu of Developer constructing the Solar Project; and/or (c) projects or programs that address infill development in redevelopment areas or at properties in Mesa categorized as blighted.
- iv. Utilities. The Project is located in the City of Mesa service area and the Project will use all City of Mesa utilities that are offered, including water, sewer, electric, gas, and solid waste. The Project will use City of Mesa comingled recycling services, if and when that service is offered for the Project. Developer will be responsible for all utility costs for the Project and the Minimum Improvements including the rates and fees for City of Mesa utilities set forth in City’s then-current utility rates and fees for its users. Developer will relocate and consolidate the three (3) existing solid waste enclosures on the Green Lot to accommodate waste disposal and collection and will coordinate the relocation and consolidation of the solid waste enclosures with City’s Solid Waste Division. Developer and City will coordinate efforts to design the Project with sustainable power and energy with a goal of achieving maximum efficiency of the Project’s solar generated power.
- v. Signs. All signage for the Project must comply with the City of Mesa sign code and Zoning Code, as amended.
- vi. Permit and Deadline Requirement. The Parties will agree upon deadlines for Developer to obtain all approvals and permits, commence construction, and complete construction for the Minimum Improvements. City may terminate the future agreement(s) and take back title to the Green Lot if Developer defaults on any deadline.

- vii. Customized Review Schedule. The Parties agree to enter into a customized review and fee schedule. Review and approval of all plans, applications, and other submissions by or on behalf of Developer will be in accordance with the customized review and fee schedule. The fees set forth in the customized review and fee schedule will apply and no additional fee by Developer will be required for expediting the processing and approval of Developer's submittals.
 - viii. Reimbursement for Public Infrastructure Improvements. City may, if agreed to by the Parties and allowed by law, reimburse Developer for the construction of certain public infrastructure improvements which may be subject to a cap and other restrictions including A.R.S. Title 34 and A.R.S. § 42-6010.
 - ix. Impact Fee Offsets. Developer will be entitled to impact fee offsets for previous development on the Green Lot in accordance with the Mesa City Code.
- D. Development Entitlements. If required to accommodate the Project at the Green Lot, City will initiate a rezoning case consistent with the provisions of the City's adopted Zoning Ordinance including the Form-Based Code. All zoning approvals are subject to approval by the City Council, which approval may be granted or withheld in the City Council's sole and absolute discretion. City will assign a dedicated Downtown Transformation Department Project Manager to oversee the zoning and development entitlements for the Project.
- E. State Shared Revenue. Any potential future agreement(s) between the Parties, including the development agreement and GPLET lease, will contain the following provision, or a provision to the same effect as the following provision:

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 Developer shall use all and best faith efforts to modify this Agreement so as to fulfill each Parties rights and obligations in this 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 Developer 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 Developer 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 Developer 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 this Agreement 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. A determination by the Attorney General that this Agreement violates a provision of state law or the Constitution of Arizona shall not entitle City to terminate any of the other agreements regarding the Property between the Parties that the Attorney General has not determined violates a provision of state law or the Constitution of Arizona (collectively, the "Other Agreements"). All the Other Agreements shall remain in effect unless and until Developer does all the following: (i) no later than one hundred eighty (180) days after

City provides notice to Developer of the Attorney General's determination of violation regarding this Agreement, Developer provides to City a notice of election to terminate all the Other Agreements; and (ii) no later than one hundred fifty (150) days after Developer provides notice of election to terminate to City, Developer (a) restores the Property to substantially its condition existing immediately prior to Developer's acquisition of the Property and (b) if ownership of the Property was transferred to Developer, Developer transfers ownership of the restored Property back to City free and clear of all liens and encumbrances; all the Other Agreements shall terminate upon completion of all the requirements of this subsection.

- F. Remedies. In addition to other remedies, any potential future agreement(s) between the Parties will provide that if Developer fails to timely construct the Minimum Improvements within the time required, City may terminate the agreement(s), subject to reasonable notice and cure provided for in the agreement(s), and retain title to the Green Lot, free and clear of all liens and encumbrances.
 - G. Easements Retained. A condition precedent to any development agreement and/or purchase of the Green Lot is the execution of easements in favor of City for all utility improvements and municipal activities described in or contemplated by this Memorandum.
 - H. Indemnification. In all potential future agreement(s) between the Parties regarding the Project Property, Developer will, at a minimum, insure, indemnify, defend, pay, and hold harmless City, and City's employees, elected officials, contractors, agents, and all other persons acting for or on behalf of City for, from, and against any and all claims or liabilities relating to Developer's (and its employees', contractors', subcontractors', or invitees') actions and improvements on the Project Property, Solar Project, and the agreement(s) including claims relating to the construction of all improvements on the Project Property by Developer; and, if the structure of the deal involves a lease, including a GPLET lease, Developer will provide broad form indemnity acceptable to City and will defend and hold harmless City and City's employees, elected officials, contractors, agents, and all other persons acting for or on behalf of City.
6. Further Negotiations. By their execution of this Memorandum, the Parties confirm that this is not an agreement between them but are authorizing their attorneys and representatives to pursue further negotiations regarding the subject matter of this Memorandum, using the terms in this Memorandum, to potentially produce binding agreement(s) subject to approval by the City Council, which approval may be granted or withheld in the City Council's sole and absolute discretion.
7. Sunset. This Memorandum shall be deemed automatically terminated, without further act or notice required, on the earlier of (A) the City Council's approval, which approval may be granted or withheld in the City Council's sole and absolute discretion, of a development agreement between City and Developer for the Project; or (B) October 31, 2024; except that if a development agreement between City and Developer is not approved by City Council prior to October 31, 2024, the Parties may, upon written mutual agreement, extend the termination date for this Memorandum to a date no later than January 31, 2025, at which date this Memorandum shall be deemed automatically terminated without further act or notice required.

Habitat Fenix, LLC,
an Arizona limited liability company

By: _____
Wm. Timothy Sprague
Its: Manager

The City of Mesa, Arizona,
an Arizona municipal corporation

By: _____
Name: _____
Its: _____

EXHIBIT A TO THE MEMORANDUM OF UNDERSTANDING
Depiction of the Green Lot

