WHEN RECORDED RETURN TO:

City of Mesa
Attn: Real Estate Services
20 E. Main Street
Mesa, Arizona 85201

DEVELOPMENT AGREEMENT

"GALLERY PARK"

CITY OF MESA, ARIZONA,
an Arizona municipal corporation

AND

THS DUAL FLAG AT GP, LLC,
an Arizona limited liability company

_____ ____, 2024

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this "**Agreement**") is made as of the ____ day of _____, 2024 (the "**Effective Date**"), by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the "**City**"); and THS DUAL FLAG AT GP, LLC, an Arizona limited liability company ("**Developer**"), its permitted successors and assigns. The City and Developer are sometimes referred to in this Agreement collectively as the "**Parties**," or individually as a "**Party**."

RECITALS

A. As of the Effective Date, Developer owns that certain unimproved real property located within Mesa, AZ consisting of approximately 3.6 +/- acres of land, the legal description and depiction of which are attached as Exhibit A (the "**Property**") which, as the Effective Date, is identified as Maricopa County APN 304-30-975.

B. Developer intends to develop the Property as a portion of the project known as "Gallery Park" which will consist of a full-service, dual flag, 174 room hotel comprised of a Tempo by Hilton ("**Tempo**") and a Homewood Suites by Hilton ("**Homewood Suites**") (collectively, the "**Hotel**") catering to regional guests traveling for business, leisure and extended stay, and featuring an independently branded and operated full-service 6,000 square foot restaurant currently called "The William New American Kitchen and Bar," which name may change during the term of this Agreement ("**Restaurant**"). Collectively, hereinafter, the Hotel, Restaurant, and related improvements may be referred to as the "**Project**" and descriptions and renderings of the Project are attached as Exhibit B.

C. The original development for the Property was to be a dual flag Hilton Garden Inn and a Homewood Suites with accompanying eating accommodations designed primarily to serve Hilton Garden Inn and Homewood Suites guests; the Developer previously obtained the entitlements and site plan approval for the original development concept. The new, potential inclusion of the Tempo brand and the accompanying Restaurant would introduce a higher caliber of accommodations and a full-service restaurant designed to serve the general public. The Developer estimates that the projected average daily room rate for the Tempo brand over a three-year period is 18.3% higher than for Hilton Garden Inn, with a projected increase over a ten-year period in City transient lodging tax of 21.9% and transaction privilege tax of 21.9%. The addition of the Restaurant, which would still provide Hotel guests with sit-down and in-room dining options, would also provide the general public with a full-service restaurant with, per the Developer, a projected ten-year transaction privilege tax rate increase of 91.9% over the tax collected for an eating establishment at a standard Hilton Garden Inn.

D. The City reasonably believes that the development of the Project as described in this Agreement, with the inclusion of Tempo and the Restaurant, will generate substantially increased transaction privilege and transient lodging tax revenues for the City and will serve an area need for a full-service, sit-down restaurant and hotel accommodations at the caliber of Tempo and the Restaurant.

E. In order to ensure the Project is able to be constructed with the higher-caliber Tempo and Restaurant that would provide increased transaction privilege and transient lodging tax

and serve a specific area need that would otherwise remain unfulfilled by the original development concept, Developer requested, and the City is willing to provide a tax "incentive consisting of reimbursement for public infrastructure dedicated to and accepted and controlled upon completion of the project by the city" that is permitted by A.R.S. § 42-6010(D)(4) as an exception to tax incentives otherwise prohibited under state law; specifically, a reimbursement of the non-dedicated Construction Sales Tax (defined below) collected by the City from the Project that would be used to reimburse Developer for the construction costs of certain portions of the public infrastructure for the Project as described herein.

F. The City Council finds and determines, that the development of the Project, as described in this Agreement with the inclusion of Tempo and the Restaurant: (a) will substantially enhance the economic health of the City; (b) will result in a net increase or retention of jobs in the City; (c) will add to the City's tax base; (d) will otherwise improve or enhance the economic welfare and quality of life of the residents and businesses of the City; and (e) demonstrates the potential to generate revenues and other benefits to the City, which outweigh or are not disproportionate to the costs associated with the tax incentive.

AGREEMENTS

Now, therefore, in consideration of the foregoing recitals and representations and the mutual promises contained in this Agreement, the Parties agree as follows:

1. **Definitions**. In this Agreement, unless a different meaning clearly appears from the context, the below words and phrases shall be construed as defined in this Section. Words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The use of the term "shall" in this Agreement means a mandatory act or obligation. The term "including" means "including but not limited to" or "including without limitation." All references to laws or regulations mean such laws and regulations as amended or replaced, whether or not specifically designated as such.

"**Agreement**" means this Agreement, as amended, modified, or supplemented in writing from time to time, including the Recitals and attached Exhibits which are incorporated by this reference.

"**Applicable Laws**" means, collectively, the federal, state, county and local laws (statutory and common law), ordinances, rules, regulations, standards, permit requirements, and other requirements and official policies of the City, as they may be amended or hereafter enacted from time to time, which apply to the development of the Property or Project, including the City Code, Mesa Zoning Ordinance (Title 11 of the City Code), Mesa Building Code (Title 4 of the City Code), Mesa Subdivision Regulations, Tax Code (Title 5, Chapter 10 of the City Code), A.R.S. Title 42 (Taxation), A.R.S. Title 34 (Public Buildings and Improvements), and all related approvals or requirements by City Council, City boards (by way of example, but not limitation, Design Review Board or Planning and Zoning Board), or other governing authorities.

"**A.R.S.**" means Arizona Revised Statutes as now or later enacted or amended.

"**City**" means the Party designated as "City" in this Agreement.

"**City Code**" means the Code of the City of Mesa, Arizona, as amended from time to time.

"**City Council**" means the City Council of the City.

"**City Default**" means as defined in Section 11.2.

"**City Indemnified Parties**" is defined in Section 7.1.

"**City Representative**" is defined in Section 12.1.

"**Claims**" is defined in Section 7.1.

"**Completion of Construction**" or "**Completed**" means, as to the Minimum Improvements and the Public Improvements as a whole, the date on which both of the following have occurred: (i) all final certificates of occupancy have been issued by the City for the Minimum Improvements, which issuance shall not be unreasonably withheld, conditioned, or delayed; and (ii) with regard to the Public Improvements, one or more letters of acceptance from the appropriate administrative staff member of the City of the completed Public Improvements for warranty and maintenance in accordance with the policies, standards and specifications contained in Applicable Law, which acceptance shall not be unreasonably withheld, conditioned or delayed.

"**Conditions Precedent**" is defined in Section 5.

"**Construction Sales Tax**" means the portion of the City's transaction privilege sales and use taxes received by the City from Taxable Activities pursuant to Section 5-10-415 of the Tax Code titled "Construction Contracting; Construction Contractors," as the same may change from time-to-time, that is made part of the City's general fund, and that has not otherwise been dedicated or assigned to specific purposes (i.e. non-dedicated). As of the Effective Date, of the City's total 2.0% transaction privilege and use tax rate for Taxable Activities, 1.20% of the tax rate is considered non-dedicated and would qualify; the remaining .80% is dedicated or assigned to a specific purpose (.30% for the street maintenance fund, .25% for the quality-of-life fund, and .25% for public safety) and is therefore not considered Construction Sales Tax for the purposes of this Agreement.

"**Developer**" means the Party designated as "Developer" in this Agreement, and its permitted successors and assigns (if any).

"**Developer Default**" is defined in Section 11.1.

"**Developer Representative**" is defined in Section 12.1.

"**Effective Date**" means as defined on Page 1.

"**Eligible Public Improvement Costs**" is defined in Section 4.6.

"**Enforced Delay**" is defined in Section 11.6.

"**Final Completion Date**" is defined in Section 5.

"**Final Payment Period**" is defined in Section 6.4.2.

"**Homewood Suites**" is defined in Recital B.

"**Hotel**" is defined in Recital B.

"**Indemnify**" is defined in Section 7.1.

"**Initial Payment Period**" is defined in Section 6.4.1.

"**Minimum Improvements**" is defined in Section 3.

"**Notice**" is defined in Section 15.7.1.

"**Party**" or "**Parties**" means Developer and the City and their permitted successors and assigns (if any).

"**Person**" means and includes natural persons, corporations, limited partnerships, general partnerships, joint stock companies, joint ventures associations, limited liability companies, limited liability partnerships, trusts, land trusts, business trusts or other organizations, whether or not legal entities.

"**Project**" is defined in Recital B and described in Exhibit B.

"**Property**" is defined in Recital A and legally described and depicted in Exhibit A.

"**Public Improvements**" is defined in Section 4.1.

"**Public Improvement Costs**" means all reasonable costs, expenses, fees and charges actually incurred by Developer and paid to Third Party contractors, subcontractors, construction managers, architects, engineers, surveyors, consultants, attorneys, governmental agencies and other Third Parties for studies, reports, tests, inspections, reviews, materials, labor, design, engineering, surveying, site excavation and preparation, grading, drainage, removal, relocation and replacement of utility facilities and improvements, governmental permits and fees (excluding, impact fees), payment, performance and other bonds, and other similar costs and expenses reasonably necessary for the design, permitting, construction, installation, or provision of the Public Improvements.

"**Request for Reimbursement**" is defined in Section 6.4.1.

"**Restaurant**" is defined in Recital B.

"**Tax Calculation Documents**" is defined in Section 6.4.1.

"**Tax Code**" means Title 5, Chapter 10 of the City Code, as amended from time to time.

"**Tax Incentive Period**" is defined in Section 6.1.

"**Tax Reimbursement**" is defined in Section 6.1.

"**Tax Report**" is defined in Section 6.7.1.

"**Taxable Activities**" is defined in Section 6.1.

"**Term**" means the period commencing on the Effective Date and ending thirty (30) days after the Tax Reimbursement is paid in full to Developer unless earlier terminated in accordance with the terms of the Agreement.

"**Third Party**" means any Person other than a Party.

"**Total Reimbursement Amount**" is defined in Section 6.2.

2. **Scope and Regulation of the Project**.

2.1 Compliance with Applicable Laws. Developer agrees that all design and development of the Property (including the Project, Minimum Improvements, and Public Improvements) shall comply with the terms of this Agreement and Applicable Laws. All Applicable Laws in effect at the time of development of any portion of the Property shall apply to such development. Developer shall pay all applicable fees related to the development and construction of the Project.

2.2 City Review and Approval of Plans. Developer recognizes that the development and construction of the Property is subject to the City's normal and customary planning, engineering and building plan submittal, review, approval and inspection processes and related fees; provided, however, that the review and approval of all construction plans, applications and other submissions by or on behalf of Developer will be in accordance with a customized review schedule mutually agreed upon by the City and Developer. The customized review schedule will not result in, or require the payment of, an additional fee by Developer for the agreed upon scheduled processing and approval of Developer's submittals. Standard permit fees will be charged for the Project consistent with the City's adopted fee schedule.

3. **Minimum Improvements; Public Improvements**. The "**Minimum Improvements**" shall consist of the Completion of Construction of the Hotel and Restaurant in accordance with Applicable Laws and in commercially reasonable conformance with the renderings depicted in Exhibit B. Developer acknowledges that the Public Improvements (see Section 4 below) must be Completed and accepted by the City in accordance with the terms of this Agreement prior to issuance of the final certificate(s) of occupancy by the City for the Project. The Minimum Improvements shall include, at a minimum, the following:

a. The Hotel shall consist of: (a) 97 Homewood Suites rooms; (b) 77 Tempo rooms; (c) lobby café and bar; (d) meeting rooms; (e) board room; (f) swimming pool; and (g) and any requirements for the construction of the Project set forth in Applicable Laws.

b. The Restaurant shall consist of: (i) an independently branded and operated full-service, approximately 6,000 square foot, restaurant currently called "The William New American Kitchen and Bar"; (ii) an approximately 1,300 square foot outdoor patio; and (iii) and any requirements for the construction of the Project set forth in Applicable Laws.

4. **Public Improvements**.

4.1 Public Improvements. In addition to any other public infrastructure or development requirements for the Project, Developer shall plan, design, construct and dedicate to the City those public improvements consisting of the water and sewer lines described in Exhibit C and depicted within the highlighted areas of Exhibit C (**"Public Improvements"**) which: (i) are directly related to the construction, development, or operation of the Project; (ii) are not constructed for another project or development; and (iii) must be constructed in accordance with the requirements of this Agreement. The requirement for Developer to construct the Public Improvements is limited only to the extent the Public Improvements are not otherwise constructed by the City, improvement districts, community facilities districts, utility companies, neighboring property owners, or agencies or divisions of the federal government, State of Arizona, or Maricopa County.

4.2 Design, Bidding, and Construction. In addition to other requirements set forth in this Agreement, to be eligible for reimbursement, the Public Improvements shall be planned, designed, bid, constructed and dedicated in compliance with Applicable Laws, including Title 34 of A.R.S. and the City's procurement and public bidding procedures.

4.3 City Review and Approval of Plans. Developer recognizes that the development and construction of the Public Improvements pursuant to this Agreement is subject to the City's normal engineering plan submittal, review, and approval processes, and day-to-day inspection services and requirements that will be subject to the customized review schedule outlined in Section 2.2.

4.4 Payment of Costs. Developer is solely responsible for the payment of all development and construction costs related to the Property and Project as the same become due, including costs for the Public Improvements and any related maintenance, replacement, or repairs of the Public Improvements that come due prior to acceptance of the Public Improvements by the City in accordance with Section 4.5.

4.5 Dedication, Acceptance and Maintenance of Public Improvements. When the Public Improvements are Completed, Developer shall dedicate, and, so long as the Public Improvements meet the requirements of this Agreement, the City shall accept such Public Improvements in accordance with Applicable Laws, and upon such reasonable conditions as the City may impose, including Developer providing a two (2) year workmanship and materials contractor's warranty. Upon acceptance by the City, the Public Improvements shall become public facilities and property of the City, and the City shall be responsible for all subsequent maintenance, replacement, or repairs of the Public Improvements. With respect to any Claims arising prior to acceptance of the Public Improvements by the City, Developer shall bear all risk of, and shall Indemnify the City Indemnified Parties against, any Claim arising prior to the City's acceptance of the Public Improvements arising from or related to the condition, loss, damage to or failure of any of the Public Improvements, except to the extent caused solely by the gross negligence or

willful acts or omissions of the City Indemnified Parties. (See Section 7.2 for more information on acceptance of the Public Improvements and risk of loss.)

4.6 Public Improvement Costs Compliance. In order for Public Improvement Costs to be eligible for the Tax Reimbursement set forth in Section 6.1, the Public Improvement Costs must be in compliance with the requirements of this Agreement, including the requirements of Title 34 of A.R.S. ("**Eligible Public Improvement Costs**"). Within ninety (90) days of the acceptance of the Public Improvements by the City, Developer shall submit to the staff of the City Development Services Department or City Engineering Departments (as directed by the City) documentation showing the Public Improvement Costs. Documentation to support the Public Improvement Costs include evidence of paid itemized receipts or invoices, lien releases, and proof of payment, and contracts with contractors and subcontractors. The City shall review the Public Improvement Costs for compliance and determine the Eligible Public Improvement Costs. Developer agrees that it will work with City staff in the provision of information and documentation necessary for the reasonable determination of the Eligible Public Improvement Costs available for reimbursement under this Agreement. Any Public Improvement Costs claimed by Developer that are not deemed by the City to be Eligible Public Improvement Costs shall be deemed disallowed and ineligible for reimbursement from the Tax Reimbursement or any other financial incentive under this Agreement (if any). Any decision related to the disallowance of Public Improvement Costs may be appealed in accordance with Section 12.2.

5. **Completion of Conditions Precedent for Receipt of Tax Reimbursement.** Developer acknowledges and agrees that, to provide Developer the Tax Reimbursement for the Eligible Public Improvement Costs, the construction of the Public Improvements must meet all requirements under this Agreement and Applicable Laws, including A.R.S. § 42-6010 and Title 34 of A.R.S. As a condition for Developer to have the right to receive any of the Tax Reimbursement, all of the following shall take place on or before the dates listed subject to Enforced Delay (collectively, "**Conditions Precedent**"): (i) Completion of Construction and acceptance by the City of the Public Improvements on or before September 1, 2026; (ii) Completion of Construction of the Minimum Improvements on or before October 1, 2026; (iii) the Hotel and Restaurant shall have received final building inspections before October 1, 2026; and (iv) Developer shall not have an uncured Developer Default under this Agreement. Notwithstanding any other provisions of this Agreement or Enforced Delay, if all the Conditions Precedent are not satisfied on or before December 1, 2026 ("**Final Completion Date**"), Developer will not have met the conditions required to receive any financial incentives under this Agreement, and Developer will not be entitled to, nor will Developer receive, any portion of the Tax Reimbursement or any other financial or tax related incentives granted under this Agreement (if any) related to the development of the Property, and this Agreement shall automatically terminate, without further act or Notice required except that the obligations identified in this Agreement that survive termination will remain in full force and effect; provided, however, Developer may request a one-time extension from the City Manager of the dates set forth in this Section 5, including the Final Completion Date, which may be granted at the City Manager's sole and absolute discretion, but the extension granted may be no greater than one hundred eighty (180) days.

6. **Economic Incentive.** Prior to entering into this Agreement, the City Council made the findings set forth in Recital F. Accordingly, the City shall pay to Developer the Tax Reimbursement in accordance with the terms of this Section 6.

6.1 Tax Reimbursement; Taxable Activities. In consideration of Developer's constructing or causing to be constructed the Public Improvements and otherwise satisfying the conditions of this Agreement, including meeting the requirements of the Conditions Precedent, the City shall reimburse and pay to Developer the Eligible Public Improvement Costs from the taxes received by the City for Taxable Activities, up to and not exceeding the Total Reimbursement Amount (see Section 6.2) (the "**Tax Reimbursement**"). For the purposes of this Agreement "**Taxable Activities**" means all taxable activities for the development of the Project (including the Minimum Improvements and Public Improvements), conducted from the Effective Date through the date of issuance of the final certificate of occupancy for the Project ("**Tax Incentive Period**"), that generate Construction Sales Tax paid to the City. Developer specifically acknowledges the definition of Construction Sales Tax as used in this Agreement and its limitations on what qualifies for Taxable Activities eligible for the Tax Reimbursement under this Agreement.

6.2 Limitations on Payments to Developer. The City will pay to Developer the Tax Reimbursement in an amount not to exceed the lesser of either (the "**Total Reimbursement Amount**"): (i) the Eligible Public Improvement Costs for the Public Improvements set forth in Exhibit C that meet the requirements of this Agreement, or (ii) an amount measured by the Construction Sales Tax actually received by the City for Taxable Activities during the Tax Incentive Period. If Developer's Eligible Public Improvement Costs are less than the Total Reimbursement Amount, the City will not pay Developer the difference to reach the Total Reimbursement Amount. If Developer's Eligible Public Improvement Costs are more than the Total Reimbursement Amount, the City will not pay Developer any amount over the Total Reimbursement Amount. Developer acknowledges that the Construction Sales Tax is specifically defined in this Agreement (see Section 1) and includes only the non-dedicated portion of such collected tax and does not include all transaction privilege or use tax collected by the City related to the Project.

6.3 Modifications to Tax Code or Applicable Laws. Developer acknowledges that this Agreement in no way binds the City Council or any taxing authority to prevent future modifications to Applicable Laws related to taxation, including the Tax Code. Changes in the Tax Code (including changes to the Construction Sales Tax structure, the dedication or assignment of any portion of tax to a specific purpose, the tax rate, or taxable activities) may result in changes to the amount of the Tax Reimbursement received by Developer. If during the Tax Incentive Period the Arizona Legislature eliminates the Construction Sales Tax, the City will pay the Tax Reimbursement, in accordance with this Agreement, from the Construction Sales Tax the City receives prior to the elimination of the Construction Tax.

6.4 Requests for Reimbursement.

6.4.1 Initial Request for Reimbursement. Within sixty (60) days of Developer meeting all the requirements of the Conditions Precedent, Developer will submit an initial request for reimbursement to the City's Tax Audit & Collections Administrator or their designee ("**Request for Reimbursement**"). The initial Request for Reimbursement will cover the period from the beginning of the Tax Incentive Period through the date of the completion of the Conditions Precedent ("**Initial Payment Period**"). To determine the Construction Sales Tax received by the City from Taxable Activities during the Initial Payment Period, and to calculate the reimbursement payments for the Public Improvements, Developer will provide to the City's

Tax Audit & Collections Administrator or their designee the necessary authorizations, summaries, and any other documentation reasonably requested by City to track the Construction Sales Tax generated from and received by the City for Taxable Activities (the "**Tax Calculation Documents**") that occurred during the Initial Payment Period. The City will review the initial Request for Reimbursement and accompanying Tax Calculation Documents, then the City will generate an initial Tax Report and make an initial Reimbursement Payment to Developer in accordance with Section 6.7 and Section 6.8.

6.4.2 Final Request for Reimbursement. Within sixty (60) days following the issuance of the final certificate of occupancy for the Project, Developer will submit a second, final Request for Reimbursement to cover the period from the end of the Initial Payment Period through the end of the Tax Incentive Period (i.e. the date of the issuance of the final certificate of occupancy for the Project) ("**Final Payment Period**"). The City will review the second Request for Reimbursement and accompanying Tax Calculation Documents for the Final Payment Period to determine the Construction Sales Tax received by the City from Taxable Activities during the Final Payment Period, and to calculate any remaining Tax Reimbursement payment owed to Developer for the Public Improvements, then the City will generate a final Tax Report and make any final reimbursement payment to Developer in accordance with Section 6.7 and Section 6.8.

6.5 Determining the Construction Sales Tax Revenues Received by City. The City in its sole and absolute discretion will determine the amount of monthly Construction Sales Tax revenues received and eligible for reimbursement from Taxable Activities that occurred during the Tax Incentive Period.

6.6 Right to Receive Revenues and Interest. Notwithstanding the accumulation of Construction Sales Tax revenues received by the City from Taxable Activities or any language to the contrary herein, Developer shall have no rights or claims, under any circumstances, to the Tax Reimbursement or any portion of such funds unless and until Developer meets all the Conditions Precedent within the required timeframes set forth in Section 5. Developer acknowledges that it shall not be entitled to the payment of any interest (if any) accrued on revenues received by City for Construction Sales Tax from Taxable Activities which shall be retained by the City free and clear of any claims by Developer. If the Conditions Precedent are not met in accordance with the requirements of Section 5 and all other applicable terms of this Agreement, all funds and interest accrued thereon (if any) from Construction Sales Tax for Taxable Activities shall be retained by the City free and clear of any claims by Developer.

6.7 Tax Reports and Reimbursement Payments.

6.7.1 Initial Tax Report & Initial Tax Reimbursement Payment. Following the Developer's submission of the initial Request for Reimbursement in accordance with Section 6.4.1, the City will determine, utilizing the Tax Calculation Documents, the amount of Construction Sales Tax received by the City for Taxable Activities during the Initial Payment Period. The City will then issue Developer a tax report ("**Tax Report**") containing (i) a summary of the Construction Sales Tax received during the Initial Payment Period, and (ii) the amount of the initial Tax Reimbursement payment to Developer representing the portion of the Total Reimbursement Amount that Developer is eligible to receive for the Initial Payment Period. In conjunction with the issuance of the initial Tax Report, the first, initial payment of the Tax Reimbursement will be made to Developer in the amount set forth in the initial Tax Report.

6.7.2 Final Tax Report & Final Reimbursement Payment. Following the Developer's submission of the final Request for Reimbursement in accordance with Section 6.4.2, the City will determine, utilizing the Tax Calculation Documents, the amount of Construction Sales Tax received by the City for Taxable Activities during the Final Payment Period. The City will then issue Developer a Tax Report containing (i) a summary of the Construction Sales Tax received during the Final Payment Period, and (ii) the amount of any final Tax Reimbursement payment owed to Developer representing any remaining portion of the Total Reimbursement Amount that Developer is eligible to receive for the Final Payment Period.

6.7.3 Requirements for Tax Reports and Payments. Any Tax Report shall be subject to Applicable Laws that may prohibit or limit the dissemination or use of the Tax Calculation Documents required for such report, including confidentiality requirements of the Arizona Department of Revenue. If necessary to meet confidentiality requirements, the City will require the completion of consents to release tax information from the Developer or any third parties. Developer, prior to the issuance of the initial Tax Report, will provide the City's Tax Audit & Collections Administrator or their designee with bank account information for the issuance of the Tax Reimbursement payments.

6.8 Requests for Refund or Amended Return. Should the Developer, contractors, subcontractors, or any other taxpayer that was included in the Tax Report amend its tax returns or request a refund for taxes paid in accordance with Applicable Laws within the Tax Incentive Period and the Tax Reimbursement included amounts requested for refund or impacted by an amended return, the Developer will return to the City within thirty (30) days of demand the portion of the Tax Reimbursement that was paid in error as a result of the incorrect tax return filings.

6.9 City's Prepayment Right. Should the requirements for payment of the Tax Reimbursement under this Agreement be met, following issuance of the Tax Report prepayment by the City of the Tax Reimbursement in the Total Reimbursement Amount, in whole or in part, is permitted at any time, and from time to time, without penalty. The City may authorize such prepayment through any means available to the City.

7. Indemnity; Risk of Loss.

7.1 Indemnity. Developer will pay, defend, indemnify and hold harmless (collectively, "**Indemnify**") the City and its City Council members, officers, officials, agents, volunteers and employees (collectively, including the City, ("**City Indemnified Parties**") for, from and against any and all claims, demands, fines, penalties, costs, expenses, damages, losses, obligations, judgments, liabilities, and suits (including associated attorneys' fees, experts' fees and court costs) which may be imposed upon, incurred by or asserted against the City Indemnified Parties by Third Parties ("**Claims**") which arise from or relate in any way, whether in whole or in part, to: (i) any act or omission by Developer, or its employees, contractors, subcontractors, vendors, agents or representatives, undertaken in fulfillment of Developer's obligations under this Agreement, including the development and construction of the Project; or (ii) any loss of or reduction in State shared monies arising in connection with a claim brought or maintained under A.R.S. § 41-194.01 or A.R.S. § 42-6010 as a result of this Agreement. The obligation of Developer to Indemnify shall extend to and encompass all costs incurred by the City Indemnified Parties in defending against the Claims, including attorney, witness and expert fees, and any other

litigation-related expenses. However, the provisions of this Section will not apply to Claims to the extent such Claims are solely and directly caused by the acts or omissions of the City Indemnified Parties.

7.2 Risk of Loss. Developer assumes the risk of any and all loss, damage or claims to any portion of the Public Improvements unless and until title to the Public Improvements is transferred to the City. At the time title to the Public Improvements is transferred to the City by dedication deed, plat recordation, or otherwise, Developer will, to the extent allowed by law, assign to the City any unexpired warranties relating to the design, construction and/or composition of such Public Improvements. Acceptance of the Public Improvements shall be conditioned on the City's receipt of a two (2) year warranty of workmanship, materials and equipment, in form and content reasonably acceptable to the City; provided, however, that such warranty or warranties may be provided by Developer's contractor or contractors directly to the City and are not required from Developer, and that any such warranties shall extend from the date of Completion of Construction of any Public Improvement, any component thereof, or the work of any specific trade or contractor, as applicable.

7.3 Survivability. The obligations of Developer under Section 7 shall survive the expiration or termination of this Agreement.

8. **Insurance**. During the applicable period of time set forth in Exhibit D, Developer will obtain and provide the City with proof of payment of premiums and certificates of insurance showing that Developer is carrying, or causing its contractor(s) to carry, policies of insurance in amounts and coverages set forth on Exhibit D. Such policies of insurance will be placed with financially sound and reputable insurers, require the insurer to give at least thirty (30) days advance written Notice of cancellation to City, and will name City as an additional insured on such policies.

9. **City Representations**. The City represents and warrants to Developer that as of the Effective Date:

9.1 All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

9.2 The City will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence, and enforce this Agreement.

9.3 The City knows of no litigation, proceeding, initiative, referendum, investigation or threat of any of the same contesting the powers of the City or its officials with respect to this Agreement that has not been disclosed in writing to Developer.

9.4 This Agreement (and each undertaking of the City contained herein), constitutes a valid, binding and enforceable obligation of the City, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application.

9.5 The execution, delivery and performance of this Agreement by the City is not prohibited by, and does not conflict with, any other agreements, instruments or judgments or decrees to which the City is a party or is otherwise subject.

9.6 The City has been assisted by counsel of its own choosing in connection with the preparation and execution of this Agreement.

10. **Developer Representations**. Developer represents and warrants to the City that as of the Effective Date:

10.1 It is a duly formed and legally valid existing entity under the laws of the State of Arizona.

10.2 All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

10.3 Developer knows of no litigation, proceeding, or investigation pending or threatened against or affecting Developer contesting the validity or enforceability of this Agreement or Developer's performance under this Agreement.

10.4 Developer will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

10.5 This Agreement (and each undertaking of Developer contained herein) constitutes a valid, binding and enforceable agreement of Developer, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application.

10.6 The execution, delivery and performance of this Agreement by Developer is not prohibited by, and does not conflict with, any other agreements, instruments, judgments or decrees to which Developer is a party or to which Developer is otherwise subject.

10.7 Developer has not paid or given, and will not pay or give, any Third Party any money or other consideration for obtaining this Agreement other than normal costs of conducting business and costs of professional services such as the services of architects, engineers and attorneys.

10.8 Developer has been assisted by, or been given the opportunity to receive assistance from, counsel of its own choosing in connection with the preparation and execution of this Agreement.

11. **Events of Default; Remedies**.

11.1 Events of Default by Developer. Event of default by Developer (**"Developer Default"**) under this Agreement shall mean one or more of the following:

(a) Any representation or warranty made in this Agreement by Developer was materially inaccurate when made;

(b) Developer fails to comply with the dates established in this Agreement for the Completion of Construction of the Minimum Improvements or Public Improvements, for any reason other than an Enforced Delay;

(c) Developer transfers or attempts to transfer or assign this Agreement in violation of its terms; or

(d) Developer fails to observe or perform any other covenant, obligation or agreement required of it under this Agreement.

11.2 Events of Default by the City. Event of default by City (**"City Default"**) under this Agreement shall mean one or more of the following:

(a) Any representation or warranty made in this Agreement by the City was materially inaccurate when made or shall prove to be materially inaccurate during the Term;

(b) Subject to the terms of this Agreement, the City fails to pay the Tax Reimbursement in the Total Reimbursement Amount as provided in this Agreement; or

(c) The City fails to observe or perform any other covenant, obligation or agreement required of it under this Agreement.

11.3 Grace Periods; Notice and Cure. Upon the occurrence of a Developer Default or a City Default, the defaulting Party shall, upon written Notice from the other Party, proceed immediately to cure or remedy such default and, in any event, such default shall be cured within thirty (30) days (or twenty (20) days in the event of a monetary non-performance) or ninety (90) days if the default relates to the date for Completion of Construction of the Minimum Improvements). Any Notice of a default shall specify the nature of the default and the manner in which the default may be satisfactorily cured, if possible.

11.4 Remedies for Default. Whenever any Developer Default or City Default occurs and is not cured (or the cure is not undertaken) in accordance with Section 11.3, the non-defaulting Party may take any the following actions applicable to the non-defaulting Party:

11.4.1 Remedies of the City. The City's exclusive remedies for an event of Developer Default shall consist of, and shall be limited to, any or all of the following:

(a) The City may suspend any of its obligations under this Agreement during the period of the uncured default. If the Developer Default is not cured within the grace period provided in Section 11.3, the City may terminate this Agreement by written Notice thereof to Developer, and all of Developer's rights in and to any portion of the Tax Reimbursement that have not already been paid to Developer shall terminate.

(b) If a Developer Default occurs at any time relating to public health or safety or to unlawful construction or other activity which is not in accordance with the terms of this Agreement, the City may seek special action or other similar relief (whether characterized as mandamus, injunction or otherwise), requiring Developer to address the public health or safety concern or to enjoin the unlawful construction or other activity undertaken by Developer which is not in accordance with the terms of this Agreement.

(c) The City shall have the right to all remedies allowed at law or in equity except that City Waives any right to seek consequential, punitive, multiple, exemplary or any other damages from the Developer for a Developer Default.

(d) The remedies provided in this Section 11.4.1 shall not limit the City's right to seek damages related to Developer's duty to Indemnify the City under the provisions of this Agreement, or under any right the City has as the municipal government unit in which the Property is located.

11.4.2 Remedies of Developer. Developer's exclusive remedy for City Default shall consist of and shall be limited to: (i) terminating this Agreement by written Notice thereof to the City, and all of Developer's rights in and to any portion of the Tax Reimbursement that have not already been paid to Developer shall terminate; and/or (ii) seeking specific performance by the City of its obligations under this Agreement. Developer waives any right to seek consequential, punitive, multiple, exemplary or any other damages from the City for a City Default.

11.4.3 Cancellation or Termination. Following any cancellation or termination of this Agreement, both Parties shall be relieved of and released from any further liability under this Agreement, except for those specific terms and conditions identified in this Agreement that survive the cancellation or termination.

11.4.4 Rights and Remedies Cumulative. The rights and remedies of an individual Party that are allowed under this Agreement for the Party are cumulative, and the exercise by either Party of any one or more of its rights will not preclude the exercise by it, at the same or different times, of any other of its rights or remedies.

11.5 Delays; Waivers. Except as otherwise expressly provided in this Agreement, any delay by any Party in asserting any right or remedy under this Agreement shall not operate as a waiver of any such rights or limit such rights in any way; and any waiver in fact made by such Party with respect to any default by the other Party shall not be considered as a waiver of rights with respect to any other default by the performing Party or with respect to the particular default except to the extent specifically waived in writing. It is the intent of the Parties that this provision will enable each Party to avoid the risk of being limited in the exercise of any right or remedy provided in this Agreement by waiver, laches, or otherwise at a time when it may still hope to resolve the problems created by the default involved.

11.6 Enforced Delay in Performance for Causes Beyond Control of Party. Whether stated or not, all periods of time in this Agreement are subject to this Section 11.6. Neither the City nor Developer shall be considered in default of its obligations under this Agreement in the event of enforced delay (an "**Enforced Delay**") due to causes beyond its control and without its fault, negligence or failure to comply with Applicable Laws, including acts of God, pandemics, extreme economic or market conditions, or civil unrest. In no event will Enforced Delay include any delay resulting from general economic or market conditions, unavailability for any reason of particular tenants or purchasers of portions of the Property, nor from the unavailability for any reason of particular contractors, subcontractors, vendors, investors or lenders desired by Developer in connection with the Project, it being agreed that Developer will bear all risks of delay which are not Enforced Delay. If the Developer believes that circumstances have

occurred that should be considered Enforced Delay, Developer shall notify City of such circumstances and the Developer and City shall informally meet and confer and attempt to resolve the issue relating to Enforced Delay with the City having the right to decide, at its sole and absolute discretion, if the circumstances described by the Developer shall be considered Enforced Delay under this Agreement. In the event of the occurrence of any such Enforced Delay, the time(s) for performance of the obligations of the Party claiming delay shall be extended for a period of the Enforced Delay; provided that the Party seeking the benefit of the provisions of this Section 11.6 shall, within thirty (30) days after such Party knows (or reasonably should have known) of any such Enforced Delay, first notify the other Party of the specific delay in writing and claim the right to an extension for the period of the Enforced Delay; provided, however, that either Party's failure to notify the other of an event constituting an Enforced Delay shall not alter, detract from, or negate its character as an Enforced Delay if such event of Enforced Delay were not known or reasonably discoverable by such Party; and provided further, that no period of Enforced Delay may exceed ninety (90) calendar days.

12. **Cooperation and Alternative Dispute Resolution**.

12.1 Representatives. To further the cooperation of the Parties in implementing this Agreement, the City and Developer each shall designate and appoint a representative to act as a liaison between the City and its various departments and Developer. The initial representative for the City shall be the City staff member assigned as the project manager (the "**City Representative**") and the initial representative for Developer shall be its project manager, as identified by Developer from time to time (the "**Developer Representative**"). The City Representative and Developer Representative shall each be available at all reasonable times to discuss and review the performance of the Parties to this Agreement and the development of the Property.

12.2 Impasse. The City acknowledges and agrees that it is desirable for Developer to proceed rapidly with the implementation of this Agreement and the development of the Property. Accordingly, the Parties agree that if at any time Developer believes an impasse has been reached with City staff on any issue affecting the Property which is not an event of Developer Default, Developer shall have the right to immediately appeal to the City Representative for an expedited decision pursuant to this Section. If the Developer and City Representative cannot resolve the impasse within ninety (90) days, the Developer has the right to meet with the City Manager or his designee.

12.3 Mediation. If there is a dispute hereunder which is not an uncured Developer Default or City Default and which the Parties cannot reasonably resolve between themselves, the Parties agree that there shall be a ninety (90) day moratorium on litigation during which time the Parties agree to attempt to settle the dispute by non-binding mediation before commencement of litigation using a mediator agreed upon by the Parties and all administrative fees shall be divided evenly between the City and Developer.

13. Defense of Agreement. Developer will Indemnify the City and defend the validity and enforceability of this Agreement, at its sole cost and expense, in the event of any Third Party challenge to the validity and enforceability of this Agreement or any proceeding or litigation arising from its terms that names the City or Developer as a party or which challenges the authority of the Parties to enter into or perform any of its obligations hereunder. Developer will cooperate

with the City and will otherwise meet its obligation to Indemnify the City set forth herein in connection with any other action by a Third Party in which the City is a party and the benefits of this Agreement to the City are challenged. The severability provisions of Section 15.5 below shall apply in the event of any successful challenge to this Agreement.

14. Preservation of State Shared Revenue. Notwithstanding any other provision of, or limitation in, this Agreement to the contrary, if the City's state shared revenue is withheld or is subject to being withheld under either A.R.S. § 41-194.01 or A.R.S. § 42-6010 as a result of this Agreement, the below provisions shall apply, as applicable:

14.1 A.R.S. § 41-194.01. 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, then the City and Developer, in good faith, will attempt to modify this Agreement so as to resolve the violation with the Attorney General 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). If, by the twenty-ninth (29th) day after the date of the notice from the Attorney General, the Parties, after good faith efforts, are not successful in modifying this Agreement to the satisfaction of the Attorney General, this Agreement shall automatically terminate at midnight on the thirtieth (30th) day after the date of receiving such notice from the Attorney General, and upon such termination the Parties shall have no further obligations under this Agreement. Additionally, if, under A.R.S. § 41-194.01(B)(2), 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 post such bond; 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 may terminate this Agreement and the Parties shall have no further obligations hereunder.

14.2 A.R.S. § 42-6010. If a court of competent jurisdiction determines that this Agreement or the Tax Reimbursement is a violation of A.R.S. § 42-6010 that would result in a withholding by the Arizona Department of Revenue in the City's state shared revenue as a penalty under A.R.S. § 42-6010(B), this Agreement shall automatically terminate at midnight on the day after receiving notice of the court's ruling, and upon such termination the Parties shall have no further obligations under this Agreement. Additionally, if the Attorney General or any state agency determines that this Agreement may violate A.R.S. § 42-6010, the City shall be entitled to terminate this Agreement and the Parties shall have no further obligations hereunder.

15. **General Provisions**.

15.1 Term. The term of this Agreement means the period commencing on the Effective Date and ending upon the earlier of the date of: (i) the Tax Reimbursement being paid in full to Developer in accordance with the terms of the Agreement; or (ii) the termination of this Agreement as allowed herein.

15.2 Governing Law; Choice of Forum. 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). The

Parties wish to confer jurisdiction, to the extent possible, upon the Superior Court of Maricopa County for the purpose of coordinating and centralizing any required judicial administration of this Agreement. Accordingly, any action brought to interpret, enforce or construe any provision of this Agreement shall be commenced and maintained in the Superior Court of the State of Arizona in and for the County of Maricopa (or, as may be appropriate, in the Justice Courts of Maricopa County, Arizona, 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). The Parties irrevocably consent to the exclusive 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.

15.3 E-Verify. To the extent applicable under A.R.S. § 41-4401 and A.R.S. § 23-214, Developer represents and warrants that it will comply with all federal immigration laws and regulations that relate to its employees and their compliance with the E-Verify requirements of A.R.S. § 23-214(A), and Developer will contractually require its subcontractors to comply with same. Breach of the above-mentioned warranty shall be deemed a material breach of the Agreement and may result in the termination of the Agreement by the City. The City retains the legal right to randomly inspect the papers and records of any employee of Developer who works under this Agreement to ensure compliance with the above-mentioned laws.

15.4 Restrictions on Assignment and Transfer. Except as specifically provided herein, this Agreement may not be assigned, either in whole or in part, by any Party without first receiving the written consent of the other Parties. Any attempted assignment, either in whole or in part, without such consent will be null and void. The provisions of this Agreement are binding upon and shall inure to the benefit and burden of the Parties, and their heirs, successors, executors, administrators, and assigns.

15.5 Severability. The City and Developer each believes that the execution, delivery and performance of this Agreement are in compliance with all Applicable Laws. However, in the unlikely event that any provision of this Agreement is declared void or unenforceable (or is construed as requiring the City to do any act in violation of any Applicable Laws), such provision shall be deemed severed from this Agreement and this Agreement shall otherwise remain in full force and effect; provided that this Agreement shall retroactively be deemed reformed to the extent reasonably possible in such a manner so that the reformed agreement (and any related agreements effective as of the same date) provide essentially the same rights and benefits (economic and otherwise) to the Parties as if such severance and reformation were not required. The Parties further agree, in such circumstances, to do all acts and to execute all amendments, instruments and consents necessary to accomplish and to give effect to the purposes of this Agreement, as reformed.

15.6 Construction. The terms and provisions of this Agreement represent the results of negotiations between the Parties, each of which has been or has had the opportunity to be represented by counsel of its own choosing, and none 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 who prepared or whose attorney prepared the executed Agreement or any earlier draft of the same.

15.7 Notices.

15.7.1 Addresses. Except as otherwise required by law, any notice required or permitted under this Agreement (each, a "**Notice**") shall be in writing and shall be given by one of the following methods at the respective addresses set forth below, or at such other address as a Party may designate in writing pursuant to the terms of this Section: (i) personal delivery; (ii) deposit in the United States certified, registered or express mail, return receipt requested, postage prepaid, addressed to the Parties; or (iii) any nationally recognized express or overnight delivery service (e.g. Federal Express or UPS), delivery charges prepaid, for next business day delivery.

If to the City:	City of Mesa 20 East Main Street, Suite 750 Mesa, Arizona 85211 Facsimile: 480-644-2175 Attn: City Manager
With a required copy to:	Mesa City Attorney's Office 20 East Main Street, Suite 850 Mesa, Arizona 85211 Facsimile: 480-644-2498 Attn: City Attorney
If to Developer:	THS Dual Flag at GP LLC Attention: Devan Wastchak 4650 East Cotton Center Boulevard Phoenix, Arizona 85040
With a required copy to:	VIVO Development Partners Attention: Debbie Axelson 4650 East Cotton Center Boulevard Phoenix, Arizona 85040

15.7.2 Effective Date of Notices. Any Notice sent by United States Postal Service certified, registered or express mail shall be deemed to be effective the earlier of the actual delivery, or three (3) business days after deposit in a post office operated by the United States Postal Service. Any Notice sent by a recognized national overnight delivery service shall 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 shall be deemed effective upon its receipt or refusal to accept receipt by the addressee. Notices transmitted digitally or electronically or by facsimile may be offered as a courtesy, but do not constitute "Notice" for the purposes of Section 15.7.

15.7.3 Payments. Unless otherwise agreed to by the Parties, payments shall be made and delivered in the same manner as Notices or by wire transfer; provided, however, that payments shall be deemed made only upon actual receipt by the intended recipient.

15.8 Time of Essence. Time is of the essence of this Agreement and each provision hereof.

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

15.10 Attorneys' Fees and Costs.

15.10.1 Between the Parties. In the event of a breach by any Party and commencement of a subsequent legal action in an appropriate forum, the prevailing Party in any such dispute will be entitled to reimbursement of its reasonable attorneys' fees and court costs, including its reasonable costs of expert witnesses, transportation, lodging and meal costs of out-of-town parties and witnesses, costs of transcript preparation, and other reasonable and necessary direct and incidental costs of such dispute.

15.10.2 Third-Party Claim Naming Developer. Developer at its sole cost and expense, and by counsel of its own choosing, and subject to its reasonable business judgment, will defend the validity and enforceability of this Agreement in the event of any proceeding or litigation arising from its terms that names Developer as a party or which challenges the authority of Developer to enter into or perform any of its obligations hereunder or the enforceability of any term or condition of this Agreement. The City will cooperate with Developer in connection with any action by a Third Party in which Developer (but not the City) is a party in such action and the benefits of this Agreement to the City are challenged.

15.10.3 Third-Party Claim Naming City. The City will defend, by counsel of its own choosing, the validity and enforceability of this Agreement in the event of any proceeding or litigation arising from its terms that names the City as a party to such proceeding or litigation and which challenges (i) the authority of the City to enter into this Agreement or perform any of its obligations under this Agreement, (ii) the enforceability of any term or condition of this Agreement, or (iii) the compliance of this Agreement with any Applicable Laws (including a claim or determination arising under A.R.S. § 41-194.01); provided, however, that Developer (within thirty days of written demand from the City) must reimburse the City all of the City's actual out-of-pocket attorneys' fees and costs incurred under this Section 15.10.3. The City may settle any such proceeding or litigation on such terms and conditions as the City may elect in its sole and absolute discretion, but at no additional expense or liability to Developer (beyond the reimbursement of the attorneys' fees and costs) without Developer's approval, however the term "expense or liability to Developer" shall not include the loss of any benefit anticipated by Developer to be obtained by Developer under this Agreement, including the Tax Reimbursement.

15.11 Waiver. The Parties agree that neither the failure nor the delay of any Party to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver of such right, remedy, power or privilege, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any other right,

remedy, power or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted such waiver.

15.12 Third-Party Beneficiaries. No Person shall be a third-party beneficiary to this Agreement, except for permitted assignees to the extent that they assume or succeed to the rights and obligations of Developer under this Agreement, and except that the City Indemnified Parties shall be third party beneficiaries of such indemnification provisions.

15.13 Exhibits. Without limiting the provisions of Section 1 of this Agreement, the Parties agree that all references to this Agreement include all Exhibits designated in and attached to this Agreement, such Exhibits being incorporated into and made an integral part of this Agreement for all purposes.

15.14 Entire Agreement. Except as expressly provided herein, this Agreement constitutes the entire agreement between the Parties with respect to the subject matters hereof and supersedes any prior agreement, understanding, negotiation or representation regarding the subject matters covered by this Agreement.

15.15 Further Assurances. Each Party agrees to perform such other and further acts and to execute and deliver such additional agreements, documents, affidavits, certifications, acknowledgments and instruments as any other Party may reasonably require to consummate, evidence, confirm or carry out the matters contemplated by this Agreement or confirm the status of: (a) this Agreement as in full force and effect; and (b) the performance of the obligations hereunder at any time during its Term.

15.16 Business Days; Computation of Time. As used in this Agreement, a "business day" is Monday through Friday excluding any legal holidays in which the City's offices are closed. If the last day of any time period stated in this Agreement or the date on which any obligation to be performed under this Agreement shall fall on a Saturday, Sunday or legal holiday in which the City's offices are closed, then the duration of such time period or the date of performance, as applicable, shall be extended so that it shall end on the next succeeding day which is not a Saturday, Sunday or legal holiday in which the City's offices are closed. The time for performance of any obligation or taking any action under this Agreement shall be deemed to expire at 5:00 p.m. (Phoenix, Arizona time) on the last day of the applicable time period provided herein.

15.17 Consents and Approvals. Wherever this Agreement requires or permits the consent or approval of a Party to any act, document, use or other matter, such consent or approval shall be given or denied by such Party in its reasonable discretion, unless this Agreement expressly provides otherwise.

15.18 Covenants Running With Land; Inurement. The covenants, conditions, terms and provisions of this Agreement shall run with the Property and shall be binding upon, and shall inure to the benefit of the Parties and their respective permitted successors and assigns with respect to such Property. Wherever the term "Party" or the name of any particular Party is used in this Agreement such term shall include any such Party's permitted successors and assigns.

15.19 Recordation. Within ten (10) days after this Agreement has been approved by the City and executed by the Parties, the City shall cause this Agreement to be recorded in the Official Records of Maricopa County, Arizona.

15.20 Amendment. Except as otherwise expressly provided for or permitted in this Agreement, no change or addition is to be made to this Agreement except by written amendment executed by the City and Developer. Within ten (10) days after the full execution of any amendment to this Agreement, such amendment shall be recorded in the Official Records of Maricopa County, Arizona. Upon amendment of this Agreement as established herein, references to "Agreement" shall mean the Agreement as amended. The effective date of any duly processed amendment shall be the date on which the last representative for the Parties executes the Agreement. If, after the effective date of any amendment, the Parties find it necessary to refer to this Agreement in its original, unamended form, they shall refer to it as the "Original Development Agreement." When the Parties mean to refer to any specific amendment to the Agreement, which amendment is unmodified by any subsequent amendments, the Parties shall refer to it by the number of the amendment as well as its effective date.

15.21 Good Faith of Parties; City Council Discretion. Except where any matter is expressly stated to be in the sole and/or absolute discretion of a Party, in performance of this Agreement or in considering any requested extension of time, the Parties agree that each will act in good faith and will not act unreasonably, arbitrarily or capriciously and will not unreasonably withhold, delay or condition any requested approval, acknowledgment or consent. Any decision related to this Agreement that must be made by City Council shall be at the City Council's sole and absolute discretion.

15.22 Survival. The provisions of Section 7 (indemnification and risk of loss) and Section 14 (Preservation of State Shared Revenue) shall each survive the execution and delivery of this Agreement, the closing of any transaction contemplated herein, and the rescission, cancellation, expiration or termination of this Agreement.

15.23 Nonliability of Officials, Employees, Members, Partners, and Etc. No City Council member, official, representative, agent, attorney or employee of the City shall be personally liable to the other Party, or to any successor in interest to the other Party, in the event of any uncured City Default or breach by the City or for any amount which may become due to the other Party or their successors, or with respect to any obligation of the City under the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the liability of Developer under this Agreement shall not extend to or be enforceable against: (a) the individual assets of any of the individuals or entities who are shareholders, members, managers constituent partners, officers or directors of the general partners or members of Developer; (b) the shareholders, members or managers or constituent partners of Developer; or (c) officers of Developer.

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

15.25 No Boycott of Israel. Developer certifies pursuant to A.R.S. § 35-393.01 that it is not currently engaged in, and for the duration of this Agreement will not engage in, a boycott of Israel.

15.26 City Council Action. The City and Developer acknowledge that, notwithstanding any language of this Agreement or any subsequent additional document, no act, requirement, payment or other agreed-upon action to be done or performed by the City which would, under any Applicable Laws require formal action, approval or concurrence by the City Council, will be required to be done or performed by the City unless and until said formal City Council action has been taken and is no longer subject to referendum. This Agreement does not bind the City Council or remove its independent authority to make determinations related to action of the City Council in any way.

15.27 Waiver of Claims Pursuant to A.R.S. § 12-1134 *et seq*. Developer hereby waives and releases City from any and all claims under A.R.S. § 12-1134, *et seq.*, including any right to compensation for reduction to the fair market value of all or any part of the Property, as a result of City's approval of this Agreement, any and all restrictions and requirements imposed on Developer, the Project and the Property by this Agreement, City's approval of Developer's plans and specifications for the Project, the issuance of any permits, and all related zoning, land use, building and development matters arising from, relating to, or reasonably inferable from this Agreement. The terms of the waiver in this Section shall run with all land that is the subject of this Agreement and shall be binding upon all subsequent landowners, assignees, lessees and other successors, and shall survive the expiration or earlier termination of this Agreement.

17.27 Consent. Wherever the City's consent is required to be given in this Agreement, such consent will be the consent of the City Manager (or his/her designee), without the requirement of the prior approval of the City Council unless required by Applicable Law, City policy, or the City Manager, and the City Manager (or his/her designee) will enter into such amendments to this Agreement demonstrating such consent as deemed necessary or appropriate by the Parties.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

DEVELOPER

THS DUAL FLAG AT GP, LLC, an Arizona limited liability company

By: Vivo Development Partners, LLC, an Arizona limited liability company – Its: Manager

By: Devan Wastchak

Printed name: DEVAN WASTCHAK

Title: MANAGER

STATE OF ARIZONA

COUNTY OF MARICOPA

On September 30, 2024, before me, Deborah A. Cox, a Notary Public in and for said State, personally appeared Devan Wastchak personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Signature Deborah A Cox

(Seal)

DEBORAH A COX
Notary Public - Arizona
Maricopa County
Commission # 593542
My Comm. Expires Nov 21, 2024

[SIGNATURE PAGE CONTINUES]

CITY

CITY OF MESA, an Arizona municipal corporation

By: _____
Christopher J. Brady, City Manager

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney

[SEAL]

LIST OF EXHIBITS

Exhibit A: **Legal Description and Depiction of the Property**

Exhibit B: **Renderings of the Project**

Exhibit C: **Public Improvements Description & Depiction**

Exhibit D: **Insurance**

EXHIBIT A

LEGAL DESCRIPTION AND DEPICTION OF THE PROPERTY

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF MARICOPA, STATE OF ARIZONA, AND IS DESCRIBED AS FOLLOWS:

PARCEL NO. 1:

LOT 5, OF GALLERY PARK REPLAT 3, ACCORDING TO THE PLAT OF RECORD IN THE OFFICE OF THE COUNTYRECORDER OF MARICOPA COUNTY, ARIZONA, RECORDED IN BOOK 1768 OF MAPS, PAGE 29.

EXCEPT ALL OIL, GAS, OTHER HYDROCARBON SUBSTANCES, HELIUM OR OTHER SUBSTANCES OF A GASEOUS NATURE, GEOTHERMAL RESOURCES, COAL, METALS MINERALS, FOSSILS FERTILIZERS OF EVERY NAME AND DESCRIPTION, TOGETHER WITH ALL URANIUM, THORIUM OR ANY OTHER MATERIAL WHICH IS OR MAY BE DETERMINED BY THE LAWS OF THE UNITED STATES, OR OF THIS STATE, OR DECISIONS OF COURT, TO BE PECULIARLY ESSENTIAL TO THE PRODUCTION OF FISSIONABLE MATERIALS WHETHER OR NOT OF COMMERCIAL VALUE, AS RESERVED IN THE PATENT FORM THE STATE OF ARIZONA.

PARCEL NO. 2:

EASEMENTS AS SET FORTH IN COMMON OPERATION AND RECIPROCAL EASEMENT AGREEMENT FOR GALLERY PARK MESA, ARIZONA RECORDED IN DOCUMENT NO. 2019-0971747 AND THEREAFTER SUPPLEMENT NO. 1 RECORDED IN DOCUMENT NO. 2019-0978029; 2ND AMENDED AND RESTATED SUPPLEMENT NO. 2 RECORDED IN DOCUMENT NO. 2022-0400697; SUPPLEMENT NO. 3 RECORDED IN DOCUMENT NO. 2022-0109417; SUPPLEMENT NO. 4 RECORDED IN DOCUMENT NO. 2022-0304153; AND SUPPLEMENT NO. 5 RECORDED IN DOCUMENT NO. 2023-0432471; SUPPLEMENT NO. 6 RECORDED IN DOCUMENT NO. 2023-0595300 AND SUPPLEMENT NO. 7 RECORDED IN DOCUMENT NO. 2024-0065991.

ALTA / NSPS LAND TITLE SURVEY
LOT 5 - GALLERY PARK REPLAT 3
MESA, ARIZONA
RICE
OPTIMUS
RWCD CANAL
PARCEL NO. 1
LOT 5
S. POWER ROAD

EXHIBIT B

RENDERINGS OF THE PROJECT

[SEE ATTACHED]

{00540011.1}

A **LOBBY | RECEPTION**

B **PORTE-COCHERE ENTRY**

C **HOTEL ENTRY WATER| ART FEATURE**

D **RIDE SHARE WAITING AREA**

E **THE WILLIAM NEW AMERICAN KITCHEN & BAR**
An independently branded casual dining experience that enhances the hotel guest experience, while helping generate group bookings and shared catering revenue for events held within one of the hotel's many amenity spaces.

F **THE WILLIAM'S SHADED EVENT PATIO**
Guests can enjoy al-fresco dining year-round on the shaded, misted and heated open air patio.

G **LANDMARK FIREPLACE**
The two-sided fireplace marks the front door to THE WILLIAM and adds to the patio's charm.

H **OUTDOOR FITNESS LAWN**

I **RESORT POOL AREA AND OTHER AMENITIES**

J **POOL PAVILION**

K **EVENT LAWN AND STAGE**


HOMEWOOD
SUITES by Hilton


THE WILLIAM
NEW AMERICAN KITCHEN & BAR

EXHIBIT C

PUBLIC IMPROVEMENTS DESCRIPTION & DEPICTION

(SEE BELOW AND ATTACHED)

Public Improvements means the public utility water and sewer line improvements shown on the attached depiction and constructed to City standards, that meet the requirements of the Agreement. Public Improvements shall be planned, designed, bid, constructed and dedicated in compliance with Applicable Laws including, without limitation, Title 34 of A.R.S. and the City's procurement and public bidding procedures.

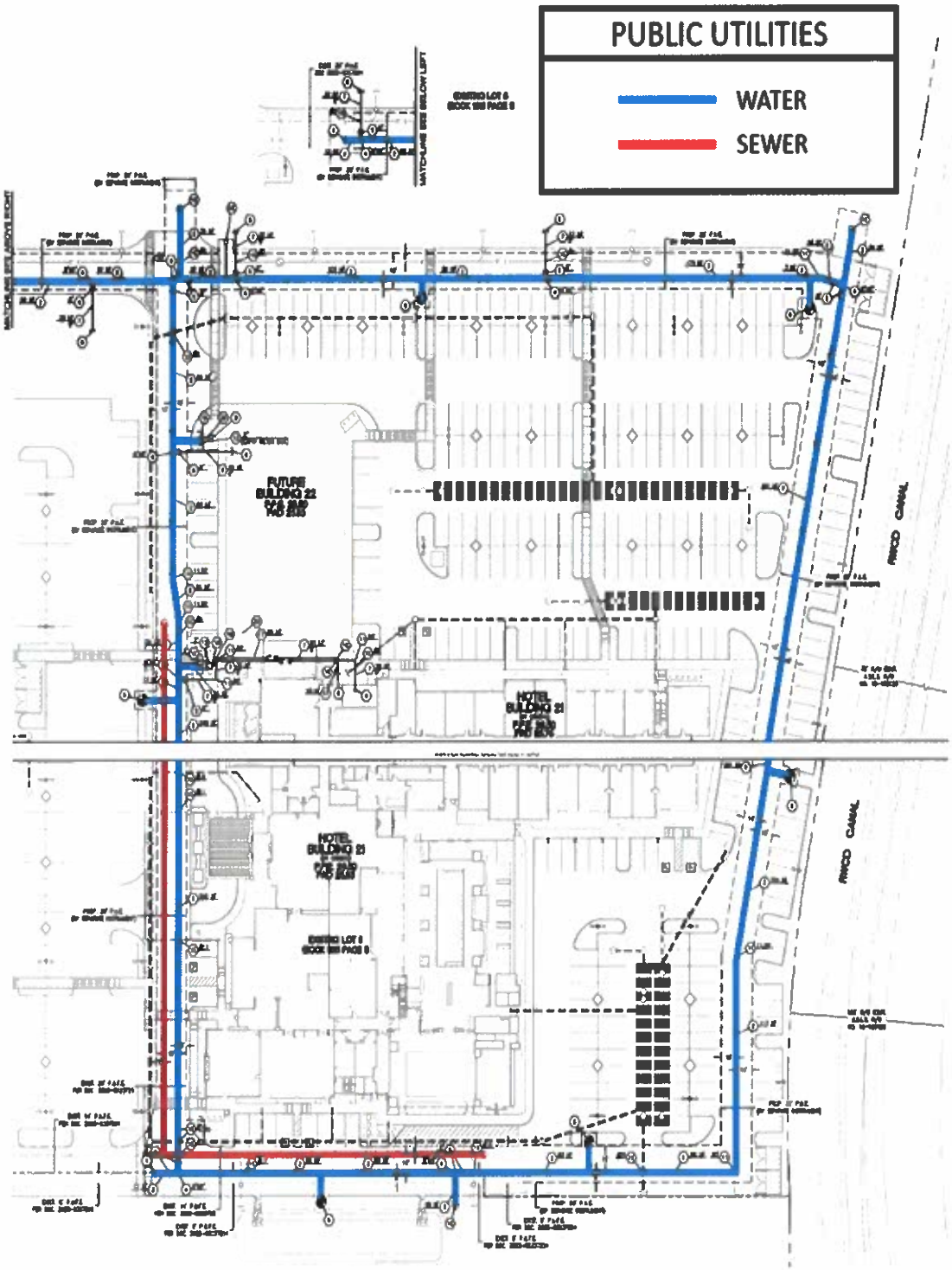
PUBLIC UTILITIES
WATER
SEWER
FUTURE BUILDING 22
HOTEL BUILDING 21
HOTEL BUILDING 23
RWCD CANAL
RWCD CANAL

EXHIBIT D

INSURANCE

City of Mesa Insurance Requirements

Developer, at its sole cost and expense, will maintain insurance coverage as follows:

A. Property. Developer agrees to provide and maintain such policies of property insurance ("Causes of Loss-Special Form") on all buildings and other improvements located on the Property.

B. Liability. During the Term of the Agreement, insurance covering the Developer and (endorsing as an additional insured) City against liability imposed by law or assumed in any written contract, and/or arising from personal injury, bodily injury or property damage, with a combined single limit of $5,000,000.00 per occurrence and annual aggregate with respect to the Project and Public Improvements, or arising out of the maintenance, use or occupancy thereof, including premises liability, operations, products and completed products providing coverage at least as broad as ISO policy for CG001. Such policy shall be written to provide standard ISO contractual liability language. At least $1,000,000.00 of such coverage shall be primary coverage and the remaining $4,000,000.00 of such coverage may be pursuant to an umbrella or excess liability policy

C. Contractor. During the period of any construction involving the Public Improvements and for a period of not less than three (3) years following Completion of Construction, and with respect to any construction activities relating to the same, each of the general or other contractors with which the Developer contracts for any such construction will be required to carry liability insurance of the type and providing the minimum limits set forth below:

(1) Workman's Compensation insurance and Employer's Liability with limits of $1,000,000.00 per accident, $1,000,000.00 per disease and $1,000,000.00 policy limit disease.

(2) Commercial general liability insurance on a $5,000,000.00 per occurrence basis providing coverage for (and endorsing the City as additional insured for):

Products and Completed Operations

Blanket Contractual Liability

Personal Injury Liability

Broad Form Property Damage

(3) Business automobile liability including all owned, non-owned and hired autos with a limit of liability of not less than $1,000,000.00 combined single limit for personal injury, including bodily injury or death, and property damage.

D. Architect. In connection with any construction involving the Public Improvements, and with respect to any construction activities relating to the same, the Developer's architect will be required to provide architect's or engineer's professional liability insurance with a limit of $1,000,000.00 per occurrence. This policy, or other policies, will cover claims for a period of not less than three (3) years after the Completion of Construction involving the Property and the Public Improvements.

E. Engineer. During the period of any construction involving the Public Improvements, and with respect to any construction activities relating to the same, the Developer's soils engineer or environmental contractor will be required to provide engineer's professional liability insurance with a limit of $1,000,000.00 per occurrence. This policy, or other policies, will cover claims for a period of not less than three (3) years after the Completion of the Construction involving the Property and the Public Improvements.

F. Primary Coverage. Developer's insurance coverage will be primary insurance with respect to City, its officers, officials, agents, and employees. Any insurance or self-insurance maintained by the City, its officers, officials, agents, and employees will be in excess of the coverage provided by Developer and will not contribute to it.

G. Indemnities. Coverage provided by the Developer will not be limited to the liability assumed under the indemnification provisions of the Agreement.

H. Waiver of Subrogation. All policies will contain a waiver of subrogation in favor of the City, its officers, officials, agents, and employees.

I. Notice of Cancellation. Each insurance policy will include provisions to the effect that it may not be suspended, voided, cancelled, or reduced in coverage except after thirty (30) days' prior written Notice has been given to the City which must be provided directly to the City in accordance with the Notice provisions of the Agreement.

J. Acceptability of Insurers. Insurance is to be placed with insurers duly licensed of approved unlicensed companies in the State of Arizona and with an "A.M. Best" rating of not less than A- VII. The City in no way warrants that the above-required minimum insurer rating is sufficient to protect Developer from potential insurer insolvency.

K. Endorsements and Verification of Coverage. Developer will furnish the City with endorsements naming the City, its officers, officials, agents, and employees as

additional insureds. The endorsements will be original cert
ACCORD forms approved by the City. The certificates for each
signed by a person authorized by that insurer to bind coverage
endorsements that restrict of limit coverage will be clearly n
insurance.

(1) All certificates are to be received and ap
commencement of construction of the Public Improvements. E
be in effect at or prior to the commencement of construction
permits actual commencement of physical construction) and mu
duration set forth in this Exhibit or, if no date is specified, th
Failure to maintain the insurance policies as required by this
timely evidence of renewal will be considered a material breach

(2) All certificates required by this Agreeme
City of Mesa, Attn: Risk Manager, 20 E. Main Street, P.O. B
85211-1466. The City reserves the right to require complet
insurance policies and endorsements required by this Exhibit at

L. Approval. Any modification or variation from th
in this Exhibit must have prior approval from the City Mana
decision will be final. Such action will not require formal cont
be made by administrative action.

M. Miscellaneous. References to "Developer" in
Developer and include its general contractor(s). References to th
the development agreement of which this Exhibit is a part. Capit
defined in this Exhibit will have the meanings set forth in the A
way warrants that the minimum limits contained herein are suffi
from liabilities that might arise, and Developer may purchase su
Developer determines necessary.