

FIRST AMENDMENT TO THE AGREEMENT TO PURCHASE REAL PROPERTY AND ESCROW INSTRUCTIONS

This First Amendment to the Agreement to Purchase Real Property and Escrow Instructions (this “Amendment”) is made and entered into as of _____, 2021 by and between City of Mesa, a municipal corporation (“City” or “Seller”), and EV Development, LLC, a Delaware limited liability company (“Developer” or “Buyer”). City and Developer are sometimes referred to in this Amendment collectively as the “Parties,” or individually as a “Party.”

RECITALS

A. City (as Seller) and Developer (as Buyer) are party to that certain purchase agreement approved by the Mesa City Council on August 31, 2020 and executed as of August 31, 2020 (the “Purchase Agreement”) and that is in escrow with Security Title Agency under Escrow Number 63200989-063-KJJ (the “Escrow”). The Purchase Agreement is for the sale of that certain property (the “Property”) legally described in Exhibit A to the Purchase Agreement for development as a mixed-use commercial and residential development described and defined as the “Project” in the Purchase Agreement.

B. As a condition precedent to Closing, the Parties are to enter into a certain Development Agreement attached as Exhibit B to the Purchase Agreement (the “Development Agreement”) for the development of the Project.

C. Due to the Parties’ needs to resolve certain issues related to electric utility services and consequences arising from the Covid-19 pandemic, the Parties need to extend certain dates and deadlines in the Purchase Agreement and Development Agreement and to make other modifications to these agreements.

D. The Parties also acknowledge that the Purchase Agreement currently does not, but should, include an obligation that the Parties enter into that certain Electric Distribution Facilities Design and Construction Agreement (the “Electric Service Agreement”) and that Developer shall make a contribution in aid of construction payment (the “CIAC Payment”) into Escrow that shall be separate from and not reduce or offset the Sales Prices or any other cost or expense of Developer’s under the Purchase Agreement; and Buyer also acknowledges that there are other payment obligations under the Electric Service Agreement that will occur after the Closing as set forth in the Electric Service Agreement.

E. The Parties further acknowledge the need to make certain modifications to the Development Agreement including modifying compliance dates and requirements in Sections 4.11(b) through (d), and in Section 5.3; and modifying certain requirements in Exhibit F to the Development Agreement; and since the Development Agreement has not been executed, the Parties desire to replace, in its entirety, the Development Agreement attached as Exhibit B to the Purchase Agreement with the revised Development Agreement attached to this Amendment as Exhibit B.

F. Therefore, the Parties desire to amend the Purchase Agreement to modify the Closing Date, to include requirements for the Parties to enter into the Electric Service Agreement, and to require Developer to make the CIAC Payment; and to amend the Purchase Agreement and Development Agreement by replacing Exhibit B to the Purchase Agreement (which is the Development Agreement) with a new, modified Development Agreement that modifies the compliance dates and requirements in Sections 4.11(b) through (d), Section 5.3, and Exhibit F of the Development Agreement; all of which as is further set forth in this Amendment.

G. Accordingly, the Parties are willing to modify the terms of the Purchase Agreement and the Development Agreement, including certain Exhibits, as set forth in this Amendment.

AGREEMENT

IN CONSIDERATION of the foregoing recitals and representations, all of which are fully incorporated into this Amendment and made a part of this Amendment for all purposes, and the mutual covenants and agreements and conditions in this Amendment, the Parties agree as follows:

1. Definitions. All capitalized words and phrases used in this Amendment will have the same meanings as set forth in the Purchase Agreement (and in the exhibits to the Purchase Agreement, as applicable), unless a different definition is set forth in this Amendment.

2. Electric Service Agreement. Within fifteen (15) days of entering into this Amendment, City and Developer shall each execute and provide copies to Escrow Agent and to each other Party the Electric Service Agreement in the form attached hereto as Exhibit 1. The Electric Service Agreement shall become effective upon execution by City and Developer.

2.1 Payment into Escrow, Disbursement, and Non-Refundability of the CIAC Payment. Within fifteen (15) days of entering into this Amendment, Developer shall deposit the CIAC Payment in the amount of one hundred forty thousand dollars (\$140,000.00) in Escrow in cash or by wire transfer of immediately available funds. The CIAC Payment shall be separate from and not reduce or offset the Sales Prices or any other cost or expense of Developer's under the Purchase Agreement. Because the City will incur certain costs (some of which have already occurred or will occur before Closing or any earlier termination or cancellation of the Purchase Agreement) in the design and/or construction of electric facilities for the Property and the Project before Closing, the CIAC Payment shall be absolutely non-refundable and shall be paid to City upon the earlier of the Closing or any termination or cancellation of the Purchase Agreement; except that if Closing does not occur and Buyer is entitled to, and does receive, the Earnest Money pursuant to Section 5.3 of the Purchase Agreement, then the CIAC Payment shall be returned to Buyer with the Earnest Money.

2.2 Termination of Electric Service Agreement. If the Closing does not occur, the Electric Service Agreement shall automatically terminate and shall no longer be of any force or effect.

3. Amendment to Closing Dates in Section 7.1. The Parties desire to amend the Purchase Agreement by modifying the Closing date to be on or before September 15, 2021, and with an automatic termination date of November 15, 2021, and all other terms and requirements of Section 7.1 remaining the same; accordingly, the Parties agree that Section 7.1 is hereby deleted and replaced in full as follows:

7.1 Closing. The closing of this transaction (the “Closing” or “Close of Escrow”) is subject to and shall occur after the completion and satisfaction of all of the closing requirements in Article 5. After the completion and satisfaction of all of the closing requirements set forth in Article 5, Buyer and Seller shall promptly, in writing, inform Escrow Agent that these closing requirements have been satisfied. The Closing shall occur on or before September 15, 2021 (the “Closing Date”). If the date of the Closing would otherwise occur prior to expiration of a Supplemental Title Review Period, at Buyer’s request, the Closing Date shall be extended to the day following expiration of the Supplemental Title Review Period. The Closing shall occur in the offices of Escrow Agent. Notwithstanding anything in this Agreement to the contrary and provided that no notice or cure period shall apply to the following: if the requirements in Article 5 have not been satisfied and Closing has not occurred on or before November 15, 2021, then this Agreement shall automatically terminate and shall be of no further force or effect, and Buyer and Seller shall have no further obligations or liabilities hereunder, except for any obligations or liabilities which survive the termination of this Agreement.

4. Replacing the Development Agreement with the Attached Exhibit B. The Parties desire to amend the Development Agreement by modifying compliance dates and requirements in Sections 4.11(b) through (d), and in Section 5.3; and modifying certain requirements in Exhibit E; accordingly, the Parties agree that the Development Agreement attached as Exhibit B to the Purchase Agreement shall be replaced in its entirety with the Development Agreement attached to this Amendment as Exhibit B. All references to the Development Agreement and Exhibit B in the Purchase Agreement shall mean the Development Agreement attached to this Amendment and Exhibit B to this Amendment, respectively.

4.1 Supplemental Escrow Instructions to Escrow Agent. To avoid any possible confusion or mistakes at Closing, Escrow Agent is hereby instructed to remove and discard, promptly after the execution of this Amendment, the Development Agreement attached as Exhibit B to the Purchase Agreement and to insert a page in its place stating: “Exhibit Intentionally Removed see Exhibit B to the Amendment.” Escrow Agent shall take all additional reasonable precautions to ensure that the Development Agreement attached to this Amendment is the Development Agreement the Parties execute prior to Closing and that is recorded on the Property.

5. Escrow Agent and Notice Addresses. The Escrow Officer contact information under Escrow Agent is hereby amended to Kelly Johnson, Telephone 480-807-6032, Facsimile 480-807-5948, Email Kelly.johnson@securitytitle.com, and the notice address for Buyer’s Attorney under Section 12.10(b) is amended to Sharon J. Oscar, 2527 E. Carol Avenue, Phoenix, AZ 85028, Telephone 602-819-2930 (cell), Email sjoscar2021@gmail.com.

6. Counterparts. This Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all Parties may be physically attached to a single document.

7. Effect of Amendment. This Amendment shall be deemed to amend the Purchase Agreement with respect to all terms, provisions and changes set forth in this Amendment. To the extent of any conflict between the Purchase Agreement and this Amendment regarding the subject of this Amendment, including all Exhibits referenced herein (including the Development Agreement attached hereto as Exhibit B), the Amendment shall control. Except as amended by this Amendment, all terms, provisions, and conditions of the Purchase Agreement shall remain in full force and effect.

8. Severability. If any term or provision of this Amendment is held to be invalid or unenforceable, the validity of the other provisions shall not be affected, and this Amendment shall be construed and enforced as if it did not contain the particular term or provision that is deemed to be invalid or unenforceable.

9. Statutory Notice Requirement. The Parties acknowledge that this Amendment is subject to cancellation pursuant to the provisions of A.R.S. § 38-511.

10. Incorporation of Recitals. The recitals set forth herein are acknowledged by the Parties to be true and correct and are incorporated herein by this reference.

11. Governing Law, Venue, and Jurisdiction. This Amendment shall be governed by the laws of Arizona. A Party may only bring any action related to a dispute arising out of this Amendment in a court of appropriate venue and jurisdiction in Maricopa County, State of Arizona.

IN WITNESS WHEREOF, the Parties have executed this Amendment as of the date written above.

CITY

City of Mesa, Arizona
an Arizona municipal corporation

DEVELOPER

EV Development, LLC
a Delaware limited liability company

Chris Brady
City Manager

William Timothy Sprague
Authorized Agent

The undersigned Escrow Agent accepts
the Supplemental Escrow Instructions as
provided herein.

SECURITY TITLE AGENCY

Kelly Johnson
Escrow Officer

EXHIBIT 1
ELECTRIC SERVICE AGREEMENT

EXHIBIT B
DEVELOPMENT AGREEMENT