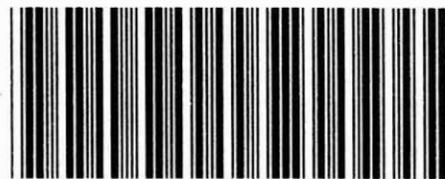


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**THIRD AMENDED AND RESTATED  
DEVELOPMENT AND DISPOSITION AGREEMENT**

(Hayden Ferry South)

ORDINANCE NO. 2006.60

[ C2001-96A ]

THIS THIRD AMENDED AND RESTATED DEVELOPMENT AND DISPOSITION AGREEMENT (the "Third Agreement") is made as of the 20<sup>th</sup> day of July, 2006, by and between THE CITY OF TEMPE, an Arizona municipal corporation (the "City"), and MCW TEMPE MILL, LLC, an Arizona limited liability company ("MCW" or the "Developer").

**RECITALS:**

A. The City and Bay State/Benton-Robb, L.L.C., an Arizona limited liability company entered, into that Amended and Restated Development and Disposition Agreement dated as of April 30, 1998, and recorded as Instrument No. 98-0617868, Official Records of Maricopa County, Arizona (the "Restated Agreement"), whereby the City and Bay State/Benton-Robb, L.L.C. agreed to undertake coordinated planning of the redevelopment of certain real property located within the City and more particularly described therein. The Restated Agreement was amended pursuant to the First Amendment to Amended and Restated Development and Disposition Agreement dated as of July 7, 1998 and recorded as Instrument No. 98-0650245, Official Records of Maricopa County, Arizona (the "First Amendment"). The Restated Agreement was further amended pursuant to the Second Amendment to the Amended and Restated Development and Disposition Agreement dated as of January 25, 2001, to change the Schedule of Performance (the "Second Amendment"), and was further amended pursuant to the Third Amendment to Amended and Restated Development and Disposition Agreement dated January 25, 2001, (the "Third Amendment") which permitted the assignment of all rights of Bay State/Benton-Robb to MCW Bay State Hayden Mill L.L.C., which rights were subsequently assigned to MCW Tempe Mill L.L.C. The Restated Agreement, the First Amendment, Second Amendment and Third Amendment are collectively referred to as the First Agreement.

B. The City and MCW entered into that Second Amended and Restated Development and Disposition Agreement dated as of April 27, 2001, and recorded as Instrument No. 2001-0355079, Official Records of Maricopa County, Arizona (the "Second Agreement"), whereby the City and MCW agreed to undertake the coordinated planning of the redevelopment of certain real property located within the City including the "Project Property" as defined in **Section 3.15** of this Third Agreement, as well as additional property including that real property described in

the Second Agreement as the “Remaining Property,” which was subject to a Request for Proposal tendered by the City on March 31, 2000 (the “RFP”). MCW responded to the RFP and the City selected MCW to redevelop the Remaining Property as part of the Project Property.

C. Pursuant to the Second Agreement MCW was the owner of the Project Property with an approved Planned Area Development (“PAD”). As a result of a series of events under the Second Agreement the City acquired legal title of the entirety of the Project Property. However, MCW disputed the City’s acquisition of portions of the Project Property previously owned by MCW and, as a result thereof, MCW initiated a lawsuit in the Maricopa County Superior Court, MCW Holdings, L.L.C., et al. v. City of Tempe, Cause No. CV2004-00948 against the City, in which the City also filed counterclaims and affirmative defenses against MCW and its affiliates (the “Pending Litigation”).

D. On June 15, 2006 MCW executed and the City formally approved a Settlement Agreement and Release with respect to the Pending Litigation. As part of and in consideration for the resolution and settlement of the Pending Litigation as between MCW and the City, MCW and the City have agreed to enter into this Third Agreement relating to the acquisition and development of the Project Property.

E. As part of the settlement of the Pending Litigation, the City and Developer agree that the Second Agreement and the development rights thereunder have remained in effect notwithstanding the parties’ disputes and the City and Developer desire to further amend and restate the Second Agreement in its entirety and are entering into this Third Agreement pursuant to which the City and Developer desire to provide for the reacquisition and redevelopment of the Project Property by Developer for a mixed-use project.

F. The Project Property is currently entitled with a minimum of 469,160 square feet of development rights, which was the minimum amount of development that MCW was entitled to under the Second Agreement, but MCW agrees that such development shall occur only within the Project Property depicted in *Exhibit A* attached hereto, and not in the area that the City is now retaining as part of the Preserve Parcel. The Developer may apply for additional development rights above said minimum entitled square footage. Such additional development rights are subject to the normal City processes.

G. The Parties acknowledge that the Parties, and each of them, are relying upon the other Parties’ performance of their respective promises and obligations in this Third Agreement, and have therefore agreed that the Pending Litigation shall be dismissed with prejudice upon execution of this Third Agreement even though the reconveyance of the Project Property to the Developer shall not occur until a future date.

H. The City and Developer hereby acknowledge and agree that significant benefits will accrue to the City, which will further implement the City’s prior plans and policies for redevelopment of the Project Property, from the acquisition and redevelopment of the Project Property by Developer, including, without limitation, the creation of improvements to and new uses of the Project Property, the realization of substantial tangible and intangible benefits by the City and its citizenry from the redevelopment of the Project Property, the stimulation of further economic development within the City, the development of needed residential improvements in the downtown area, and other tangible and intangible, direct and indirect, benefits to the City and its residents. The

City and Developer acknowledge that this Third Agreement is a development agreement pursuant to the provisions of A.R.S. §9-500.05.

NOW THEREFORE, in consideration of the above premises, the promises contained in this Third Agreement and for other good and valuable consideration, the receipt and sufficiency of which the parties hereby acknowledge, the parties hereto agree as follows:

## A G R E E M E N T

1. **Restatement of Development and Disposition Agreement.** This Third Agreement supersedes and replaces the Second Agreement in its entirety with respect to the Project Property. Hereafter, this Third Agreement shall be the only development agreement in effect for the Project Property.

2. **Effective Date.** This Third Agreement shall be effective on the date on which the last representative for the parties signs this agreement (“Effective Date”).

3. **Definitions.** For purposes of this Third Agreement, the following terms shall have the meanings set forth below:

3.1. **“Certificate of Completion”** shall mean and refer to a document certifying that the construction of the Improvements required under this Third Agreement for any portion of the Project Property that has been certified by City to be substantially completed.

3.2. **“City”** shall mean and refer to the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

3.3. **“Default”** shall mean and refer to the conditions set forth and defined in ***Section 12.1.***

3.4. **“Developer”** shall mean and refer to MCW Tempe Mill, LLC, an Arizona limited liability company, and its successors and assigns.

3.5. **“Hayden Ferry-South Schedule of Performance”** or Schedule of Performance” shall mean and refer to that Schedule of Performance set forth in ***Section 5.3*** below and ***Exhibit C*** hereto. The Hayden Ferry-South Schedule of Performance supersedes all previous schedules of performance applicable to the Project Property. Notwithstanding the use of or reference to the term “Hayden Ferry-South” to refer to the Project Property and the schedule of performance applicable to the Project Property, such name shall not be deemed to imply that the Project Property must be developed and operated under the name “Hayden Ferry-South,” and the parties hereby acknowledge that the Project Property may be developed under any other name deemed to be desirable by Developer.

3.6. **“Improvements”** shall mean and refer to all public and private improvements that may be constructed from time to time on the Project Property, including, without limitation, all structures, buildings, roads, driveways, parking areas, walls, landscaping and other improvements of any type or kind, or any other alteration of the natural terrain to be built by the Developer or the City, as the case may be, pursuant to the terms of this Third Agreement.

3.7. “Infrastructure” shall mean all potable water lines, sanitary sewer lines, streets and roadways, sidewalks, streetscape improvements and various other public infrastructure improvements that are described in or contemplated by the Project Concept, the cost of which is to be borne by the City as provided herein but which shall be installed by the Developer as part of the construction of the Project.

3.8. “Owner” shall mean and refer to each individual owner or ground lessee of any portion of the Project Property.

3.9. “PAD” shall mean and refer to a Planned Area Development that is approved by the City with respect to the development of any Phase of the Project, which sets forth the specific uses, densities, features and other development matters with respect to such Phase.

3.10. “Phase” shall mean and refer to each separate component or portion of the Project which is or may be developed by Developer or by another Owner pursuant to this Third Agreement.

3.11. “Preserve Parcel” means and refer to that portion of the Project Property depicted by cross-hatching as Parcel B in *Exhibit A* attached hereto and incorporated herein by this reference.

3.12. “Project” shall refer to the overall development of that portion of the Project Property or portions thereof. The Project shall consist of the Public Amenities defined in *Section 3.15* and an integrated mixed use development which may include retail, office, for sale residential and a boutique hotel consisting of approximately 120 room keys. Preservation of the Historic Flour Mill and Silos through an adaptive reuse will include interpretive installations that display the milling operation and processes. Also preserved will be the view relationships from Mill Avenue at 2nd Street and at the corner of Mill Avenue and Rio Salado Parkway. Special attention will be given to enhance the pedestrian experience along Mill Avenue and Rio Salado Parkway taking into consideration neighboring properties. Given today's standards, building heights at any location on the Project Property may be as great as (but no greater than) equal to the highest point of the Silos. Overall quality of the development will be comparable to other downtown developments such as the project commonly referred to as the Brickyard and Hayden Ferry at Lakeside. The Project will be planned in phases, with an anticipated series of PAD submittals from MCW to the City regarding the respective phases of the Project. The First Phase of the Project Property will include at minimum, 25,000 square feet of uses for retail and/or office, and/or restaurant, the particular mix of such uses for such 25,000 square feet to be in MCW's sole discretion, some or all of which uses may be located inside of and/or attached to the Historic Flour Mill building. In addition, the First Phase shall include certain Public Amenities, hereinafter the “First Phase Public Amenities” which will consist of (i) an interpretive center including signs and permanent exhibits open to the public, demonstrating the ancient and historic content of the site; (ii) a trail head at the historic base of Hayden Butte together with twenty (20) public parking spaces, both of which will be available for general public use, but both of which may be temporary and be subject to relocation as appropriate to accommodate future development at the site; (iii) public access and sidewalks to allow access to the Hayden Butte trail head, which may be temporary and subject to relocation as appropriate to accommodate future development at the site; (iv) public infrastructure as necessary, but only as necessary to accommodate development of the First Phase; (v) a conservation easement, attached as *Exhibit D*, ensuring that the Mill Building and Silos will be preserved on the site subject

to being redeveloped for appropriate reuse at the Developer's discretion, in which event the facades of the redeveloped Mill Building and/or Silos will be subject to the conservation easement; and (vi) exterior cosmetic renovation, including repainting, of the exteriors of the Mill Building and Silos pending potential future redevelopment and reuse of those structures. All required parking for the First Phase, and for each subsequent phase will be provided concurrently with each such phase. If permitted under applicable covenants, deed restrictions and development regulations, a boutique hotel will be constructed in the Silos or attached thereto and will also be included in the First Phase if timely approvals and/or deed restriction waivers are obtained by the Developer. Remaining phases will be planned and constructed as the financial, leasing and sale markets dictate. MCW agrees to comply with the Hayden Ferry South Development Guidelines as approved by the Rio Salado Advisory Commission in May 2000 with the exception of Subsection D relative to the buildings. MCW agrees to work reasonably with the City's Historic Preservation Commission.

3.13. "Project Concept" is a concept for the Project and also includes certain Public Amenities as further detailed in *Sections 3.12 and 5.1* of this Third Agreement.

3.14. "Project Property" consists of 469,160 square feet of development rights, which was the minimum amount of development that MCW had pursuant to the Second Agreement, but MCW agrees that such development shall occur only within the Project Property depicted in *Exhibit A* attached hereto. MCW may apply for additional development rights above said minimum entitled square footage, subject to the normal City processes. At this time, the Project Property excludes the Lowe Property and the Remaining City Parcel, each as depicted on *Exhibit A* (the "Lowe Property"). If the Lowe Property and the Remaining City Parcel at some future date, become part of the Project Property under the circumstances set forth in *Section 4* below, then the Lowe Property and the Remaining City Parcel as depicted on *Exhibit A* shall thereafter, without the necessity of any further action or any amendment to this Third Agreement, be included within the definition of Project Property and be part of this Third Agreement.

3.15. "Public Amenities" are: (a) a trail head at the base of Hayden Butte along with twenty (20) public parking spaces to be constructed by MCW as part of the Project and available for general public use; (b) public infrastructure constructed within the Project Property by MCW including water, sewer, and similar elements that would be typically constructed by the City or Developer; (c) rights of public access, including public sidewalks and trails, to Hayden Butte as constructed and installed by MCW as part of the Project; (d) traffic signalization and other traffic controls as necessary; (e) permanent exhibits, open to the public, demonstrating the ancient and historic context of the site constructed and installed by MCW as part of the Project; and (f) the Conservation Easement as more fully described in *Section 7.5* of this Third Agreement and attached as *Exhibit D*.

3.16. "Certificate of Substantial Completion" shall mean and refer to certification by the responsible architect as to the substantial completion, as defined in Standard American Institute of Architects ("AIA") documents, of any portion of the Improvements to be constructed by the Developer on the Project Property.

#### 4. Lowe Property.

4.1 Lowe Property City Acquisition and Developer Purchase Option. The City shall diligently and in good faith pursue acquisition of the Lowe Property and shall keep MCW informed and advised of its acquisition efforts and shall promptly give the Developer written notice of closing the acquisition of any interest in the Lowe Property (collectively “Lowe Property”). Any such acquisition by the City shall include the right of the City to assign its rights to Developer and shall also allow, in the sole discretion of the City or its assignee, the prepayment of any note or other obligation in connection with the acquisition. In the event that the City obtains any rights to or title to the Lowe Property, the Developer shall have the option to acquire the Lowe Property (“Purchase Option”), for the same purchase price and on the same terms, including but not limited to payments over time if applicable, as the City’s acquisition provided such option is exercised within sixty (60) days after the City gives MCW written notice that it has closed the acquisition. The parties presently anticipate that the City’s Purchase Price for the Lowe Property will be approximately \$5.4 million. For purposes of the Developer’s exercise of its right to obtain an assignment of the City’s rights, the City’s Purchase Price shall not be increased in any way related to parking or any other issues or obligations between the City and Lowe or any third party. In addition, the City shall not require the Developer to provide additional monetary consideration or non-monetary benefits to the City or any third party, including, but not limited to, the provision of parking spaces for the benefit of the City or any third party, as a condition of exercising the Developer’s Purchase Option. To the extent the City has obtained a survey, title documents, environmental documents and any other typical due diligence materials, then the City shall provide copies of such materials to the Developer along with such written notice, and shall also provide reasonable access for reasonable inspections and testing; and such due diligence materials, if any, must first be delivered to MCW for the City’s written notice to be effective and for the sixty (60) day exercise period to begin running. The City shall cure any title, environmental, or other reasonable objections to the status of the Lowe Property, but only which have occurred or developed during the period of time during which the City held title to the Lowe Property. In the event the Developer exercises such option, the Remaining City Parcel, as depicted on *Exhibit A* (the “Remaining City Parcel”), shall thereafter, without the necessity of further action or any amendment to this Agreement, be included within the definition of Project Property and be part of this Agreement and the City shall also convey the Remaining City Parcel to the Developer, at no additional cost to the Developer, together with and at the same time as the Lowe Property. To the extent the City currently has them in its possession, the City shall provide, on a timely basis the same due diligence materials and have the same cure obligations for the Remaining City Parcel as set forth above for the Lowe Property. However, the City shall not be required to create or cause the preparation of due diligence materials not currently in existence. Closing of the Developer’s acquisition of the Lowe Property and the Remaining City Parcel shall occur within sixty days of the Developer’s exercise of its option to purchase the Lowe Property. Exercise and/or closing of MCW’s option to acquire the Lowe Property and Remaining City Parcel may in the City’s reasonable discretion, occur before closing on the Project Property under *Section 6* below. In addition to all other damages and remedies at law or in equity, including consequential damages, MCW shall have the right to specifically enforce any Purchase Option for the Lowe Property and Remaining City Parcel.

4.2 Easement. In the event that the City does not acquire the Lowe Property on a timely basis before the time the Developer commences construction of improvements on the Project Property, or in the event that the Developer does not exercise the Purchase Option, the City

acknowledges that it will be necessary to grant, and the City shall grant to the Developer, an appropriate Easement over the Remaining City Parcel as described in **Section 7.6** below. Should the Developer later acquire the Lowe Property and the Remaining City Parcel pursuant to **Section 4.1** above, then this Easement shall be merged into the Developer's fee title to the remaining City Parcel.

4.3 Inclusion of Lowe Property in PAD Development. If MCW acquires the Lowe Property, it shall include the Lowe Property in one of the phases of its PAD development submittals for the Project Property. MCW shall have sole and absolute discretion to determine whether or not the Lowe Property, if MCW acquires it, will be included within the First Phase or any subsequent Phase of the Project Property development. However, in the event that MCW does not include the Lowe Property in one of the phases of its PAD submittals to the City for the Project Property and then sells or otherwise transfers the Lowe Property at any time within five (5) years of the exercise of the Lowe Property Purchase Option, MCW shall then within thirty (30) days of closing such sale or transfer pay to the City the difference, if any, between the fair market value of the Lowe Property at the time of such sale or transfer and the Option Purchase Price. In no event will the City require the Developer to provide parking for the use of the City or any third party who is located outside the Project Property, or make any financial contribution whatsoever regarding such parking as a condition of approval of any PAD submittal pertaining to the Lowe Property.

4.4 City's Option to Purchase Parking Spaces. Notwithstanding the above provisions, if Developer acquires the Lowe Property, and includes the Lowe Property in one of the phases of its PAD, the City shall then have the right and option to purchase up to sixty (60) underground parking spaces within the parking structure anticipated to be built on the Project. The City must exercise this option by written notice to Developer within 180 days of closing of the City's acquisition of the Lowe Property; and payment by the City to Developer of the Developer's incremental increase in total cost to construct sixty (60) additional underground parking spaces shall be made upon commencement of construction of the parking structure. This option shall not affect in any way whatsoever the development rights for the project including but not limited to square footage, density, and height. This right and option shall be transferred to and assumed by any successor in interest to the Developer under this Third Agreement. The City reserves the right to assign permits to the purchased spaces in accordance with its shared parking model. If the City's option is exercised and the payment made by the City, the Developer shall still retain exclusive management and control of the anticipated parking structure; and, the City shall pay its pro rata share of operation, maintenance, repairs, and similar expenses for the anticipated parking structure.

4.5 Effect of Non-Acquisition of Lowe Property. The other provisions of this Agreement are in no way contingent upon acquisition by the City or by MCW of the Lowe Property or the development by MCW of the Lowe Property. However, if the City or MCW does not acquire the Lowe Property, the City will nonetheless provide MCW the Easement called for in **Section 4.2** above.

## 5. Development Plan.

5.1. Project Concept. The Project Concept consists of the Project and Public Amenities as defined in **Section 3** of this Third Agreement, and includes the First Phase as defined in **Section 3.12** and that is conceptually portrayed on **Exhibits B** and **B-1**. The parties acknowledge and agree that **Exhibit B-1** is conceptual but is representation of the intended quality and scope of the proposed interpretive display and further acknowledge and agree that it may not be economically feasible based on further engineering and architectural study to reconstruct and reuse the Hayden Flour Mill building in the depicted manner. The specific locations of such buildings, structures and uses will be further defined in each PAD approved for the Project Property or any Phase therein, with the acknowledgment and understanding of the parties that such specific locations and further definitions shall reasonably relate to the types of basic land uses, permissible range of intensity and density of such uses, and the permissible range and the relative height, bulk and size of improvements as set forth in the Butte Guidelines, except that the height limitations shall be as otherwise set forth in this Third Agreement. The City and Developer hereby acknowledge and agree that the development of the Project in accordance with this Third Agreement and the Butte Guidelines may be developed in Phases as contemplated and provided for herein. If, at any time after the date of this Agreement and prior to the date that PAD is approved with respect to all of the Project Property, the Developer determines that it is necessary to modify and project concept to reflect changes in market conditions and/or Project financing, the City and Developer shall cooperate with each other in good faith and use best efforts in connection with the processing and approval of any amendments to the Project concept deemed necessary by Developer in order to accomplish the goals for the development of the Project Property as contemplated by this Third Agreement. The parties agree that the Property is currently entitled with a minimum of 469,160 square feet of development rights, in addition to redevelopment rights to the existing Flour Mill Building and Silo structures, but that in order to further preserve the Preserve Parcel such development shall occur only within the Project Property depicted in **Exhibit A** attached hereto. The Developer may apply for additional development rights, subject to the normal City processes. The First Phase of the Project Property shall include at a minimum, the First Phase Public Amenities defined in **Section 3.12** above, 25,000 square feet of retail, restaurant, office and other commercial uses in MCW's sole discretion, but subject to approval through normal City processes, and some or all of such uses may be located inside of and/or attached to the Historic Flour Mill building. All required parking for the First Phase, and for each subsequent phase will be provided concurrently with each such phase. If permitted under applicable covenants, deed restrictions and development regulations, a boutique hotel will be constructed in the Silos and will also be included in the First Phase if timely approvals and/or deed restriction waivers are obtained by the Developer. The Developer shall comply with the Hayden Ferry South Development Guidelines as approved by the Rio Salado Advisory Commission in May, 2000 with the exception of Subsection D relative to buildings, which Subsection D shall not be applicable to development of the Project Property. MCW agrees to work reasonably with the City's Historic Preservation Commission in development of the Project Property.

5.2. PAD Plans. The City hereby acknowledges that the Developer intends to submit to the City for its approval a PAD for the Project Property or specific Phases therein. The PAD approved by the City shall operate to refine and shall be deemed to supersede any conceptual plans with respect to the Project Property or the Phase therein with respect to which the PAD applies. Developer and the City acknowledge that amendments to each PAD may be necessary from time to time to reflect changes in market conditions and/or financing for Improvements. The parties hereto covenant and agree to cooperate with each other in good faith and to use their best

efforts to allow Developer to prepare and seek approval of all such amendments that may be necessary to accomplish the goals intended by this Third Agreement, with the acknowledgment and understanding of the Developer that the ultimate approval of any such amendments are within the appropriate discretion of the Tempe City Council. The parties covenant and agree that, during the Developer's preparation and pursuit of approval of any PAD or any modifications thereto, each will reasonably consider the economic feasibility of the development of the Project Property and any Phase therein, including, without limitation, consideration of marketing parameters, economic feasibility, financing constraints and physical site constraints. The City's failure to approve any PAD that is prepared in substantial conformance with the Project Concept, or the failure of the City to approve any construction plans and specifications which are prepared in substantial conformance with an approved PAD, which in either event precludes the Developer from realizing the land uses, intensities or densities specified in such PAD shall be a breach of this Agreement by the City, in which event Developer shall have the right to exercise its remedies set forth in this Agreement; provided, however, that nothing contained herein shall preclude the City from the reasonable exercise of its normal review processes and requirements in connection with its approval of such construction plans and specifications. In connection with the City's approval of any proposed PAD for the Project or any Phase therein, the City agrees that it shall support the following modifications and variances to its development and building code standards and requirements as may be necessary to accommodate the Project as contemplated by the project concept and as may be further refined in any approved PAD, including, without limitation, the following matters:

(a) Appropriate signage. The City and Developer acknowledge and agree that a distinctive characteristic of the Project is the location as the entrance to the Downtown District. However, the configuration may require that a multi-tenant/project identification monument sign at the corner of Mill Avenue and Rio Salado Parkway and proper commercial identification signage be in place in order to help ensure the successful development of the Property. Temporary event signage in the form of banners, flags or similar may also be necessary within the internal plaza area of the project to further promote the vibrancy desired. While not a requirement, due to the historic nature of the property, the City and Developer acknowledge and agree that the Developer will make reasonable efforts where appropriate to recreate signage similar to current and past building signage to the extent reasonable and feasible and not inconsistent with an adaptive reuse of the Mill Building and Silos. Therefore, the City and Developer agree that appropriate signage as described above, is an integral part of the development of the property and is necessary to attract users and occupants to the Property. However, all such signage must be presented and approved through the City's normal review process;

(b) Approval of "shared" parking models for calculation of required parking, that will operate to reduce the total number of parking spaces that would normally be required for the Project considering the types of land uses developed therein and that include reasonable bicycle requirements and which will result in parking ratios, including bicycle requirements, similar to the 11<sup>th</sup> Amended PAD for the Center Point Development;

(c) Review by City for (i) the use of "scissor" stairs as a means of ingress and egress and the use of smoke vestibules in elevator wells; (ii) use of Uniform Plumbing Code approved plastic pipe for high rise residential water distribution; and (iii) such other items as may be required to implement the high density uses contemplated by the Project Concept with the understanding that the same standard of review shall be used for

this Project as was used for the project community referred to as the Center Point Development.

5.3 Schedule of Performance. The Schedule of Performance for the Project is attached as *Exhibit C*. Pursuant to the Schedule of Performance, the First Phase Preliminary Area Development (“PAD”) will be submitted by the Developer to the City within one hundred twenty (120) days from the Developer’s execution of this Third Agreement and will satisfy the 25,000 square foot First Phase use minimum specified in *Section 5.1* above. Building permits will be applied for by the Developer to the City within twelve (12) months of First Phase final PAD approval by the City. The Developer will commence construction of the First Phase within thirty (30) days, after issuance of said building permits. All Developer performance obligations under this Third Agreement are subject to Day-For-Day Extensions for any City delays as provided for in the *Exhibit C* Schedule of Performance. From time to time following the date of this Agreement, however, the Developer and the City may reasonably, by mutual written agreement refine and revise the Hayden Ferry-South Schedule of Performance as may be necessary to accommodate any unforeseeable factors, events, or occurrences that necessitate such refinement or revision.

5.4 Phasing of Development. The City hereby acknowledges that the development of the Project Property in accordance with the Project Concept, as may be modified by the Developer and approved by the City, contemplates that such development will be phased in accordance with any subsequently approved Preliminary PAD and/or Final PAD.

5.5 Certificate of Completion. Promptly after substantial completion of the construction of any Developer Improvements on any portion of the Project Property in accordance with the PAD approved with respect thereto, the City shall furnish to the Developer or other Owner thereof a Certificate of Completion. The Developer or other Owner thereof may request the issuance of a Certificate of Completion prior to substantial completion of such Improvements if the Developer or other Owner thereof presents adequate assurances of completion of the Improvements through bonds or other assurances that substantial completion will be forthcoming. The City shall not unreasonably withhold its consent to such a request by Developer or any other Owner thereof. Within fifteen (15) days after request for issuance of a Certificate of Completion, the City shall act upon the Developer’s or other Owner’s request. Upon issuance of the Certificate of Completion, the Developer or other Owner, as the case may be, may record the Certificate of Completion in the Office of the Maricopa County Recorder. In the event that the City refuses or fails to provide the Certificate of Completion, the City shall, within fifteen (15) days after written request by the Developer or other Owner for such certification, provide the Developer or other Owner with a written statement indicating in adequate detail why the Certificate of Completion was not issued by the City and what measures or acts the City requires before the City will issue the Certificate of Completion. The City acknowledges that Certificates of Completion may be obtained for completed portions of buildings, even though other portions thereof are not completed, provided Developer complies with all life safety requirements of the City for any portions to be occupied. In addition to all Certificates of Completion, the City shall also execute and deliver a quit-claim deed and/or any other documents reasonably required by a title insurance company to issue clear, unencumbered title insurance free of any City lien or other City encumbrance asserted under this Agreement with respect to any portion of the Project Property to the extent such portion of the Project Property is no longer subject to obligations contained in this Agreement.

5.6 Expedited Approvals. The City hereby acknowledges and agrees that development of the Project Property in accordance with the project concept, as may be further modified by any Preliminary PAD and Final PAD, will, as a result of unusual site conditions, the size of the Project Property, market conditions and other economic factors, occur over a span of a number of years and will require the City's ongoing participation in the review and response of modifications to the Project Concept, PAD, site plans, infrastructure plans, drainage plans, design plans, building plans, grading permits, building permits, archaeological and historic preservation review and disposition, and other plans, permit applications and inspections that are a part of the City's current building, development and permitting requirements (hereinafter collectively called "Approval Requests"). The City hereby agrees that, in connection with all such Approval Requests relating to the development of any portion of the Project Property and the construction of any Improvements, the City will expedite its review and will respond expeditiously to all such Approval Requests. To ensure the City's expeditious response to any and all Approval Requests by the Developer or any other Owner, the City hereby agrees to designate a representative of the City to act as a liaison between the City and the Developer and between the City's various internal departments and the Developer. Such liaison shall be at Developer's expense if the City is required to retain a non-City staff person to act as such liaison. Such representative shall be available at all reasonable times to serve as such liaison. It is the intention of this Section to provide Developer with one individual as the City's principal representative with respect to the Project Property. The Developer shall also designate a representative who shall serve as a liaison between the Project Property and the City. The initial representative for the City shall be Chris Messer, and the initial representative for the Developer shall be Theodore F. Claassen. The City further agrees that no unusual or extraordinary plan or review requirements, conditions or stipulations will be imposed on Developer or any other Owner of any portion of the Project Property.

5.7 Moratoria. The parties hereby acknowledge and agree that, upon the City's approval of a PAD with respect to any Phase, no future City imposed moratorium, ordinance, resolution or other land use rule or regulation imposing a limitation on or conditioning the amount, rate, timing or sequence of the development of such Phase or any portion thereof shall apply to or govern the development of the Phase, whether affecting the Developer's rights under this Agreement, any subdivision map, building permit, occupancy permit or any other entitlements with respect to such Phase, except as may be necessary to comply with any state or federal laws or regulations; provided, however, that if any such state or federal law or regulation prevents or precludes compliance with any provision of this Agreement, then such provision shall be modified as may be necessary to meet the minimum requirements of such state or federal law or regulation. In the event of the enactment of any such moratorium, future ordinance, resolution, rule or regulation, unless enacted and enforced by the City as provided under the exceptions contained above, the Developer shall continue to be entitled to apply for and receive approvals for the implementation of a plan for development of a Phase in accordance with the approved Final PAD therefor in accordance with the rules, regulations, ordinances and official policies applicable to and governing the development of such Phase which are existing and in force as of the date of the approval of the Final PAD.

## 6. Acquisition and Disposition of Property.

6.1. Terms of Conveyance. The City and Developer hereby acknowledge and agree that the following provisions shall apply with respect to the conveyance of the Project Property by the City to Developer:

6.1.A Opening of Escrow. The parties shall open escrow for the conveyance of the Project Property promptly after execution of this Agreement. The escrow shall be opened with Capital Title Agency, Patty Marino, Escrow Agent. The Escrow Agent shall be supplied with copies of this Agreement and the parties' Settlement Agreement as Escrow Instructions; and, the parties may execute additional Standard Form Escrow Instructions, to the extent those Standard Form Instructions do not conflict with this Agreement or the Settlement Agreement and further provided that the thirteen day cancellation rights and other inapplicable provisions are deleted. The Escrow shall allow for standard and typical due diligence by the Developer on the Project Property including but not limited to title, survey, environmental and other due diligence. The costs and expenses of the escrow, as well as title insurance fees and other charges, shall be allocated in the typical and standard manner for transaction of this nature, if not more specifically set forth in this Agreement. The City shall be responsible for conveying the Project Property to the Developer free of any environmental contamination which occurred during the City's ownership of the Project Property, but the City shall not be responsible for any environmental contamination, or other conditions that occurred at a time when the City did not own the Project Property.

6.1.B Close of Escrow. Escrow shall close on the Project Property upon the City's issuance of building permits for the First Phase of construction (the "Closing"). Notwithstanding the foregoing, in no event shall close of escrow of the Project Property occur later than 18 months following the execution of this Third Agreement. The City may refuse to close escrow only if (a) there is a material breach by Developer of the Schedule of Performance, or (b) the Developer fails to submit a PAD for the First Phase in conformity to the minimum requirements for 25,000 square feet of retail, restaurant office and other commercial uses as provided for in **Section 3.12** above, and the First Phase Public Amenities as also defined in **Section 3.12** above. No other allegation of breach by the Developer shall be grounds to excuse the City's obligation to timely close escrow on the Project Property. Upon submittal of a PAD by the Developer, both Parties agree to diligently pursue the approval of the PAD. In addition to any other remedies and damages, including consequential damages, available at law or in equity, the parties agree that MCW shall have the right to compel specific performance of the City's obligation to close escrow should the City fail or refuse to close escrow in accordance with this Third Agreement. The Closing shall take place at the office of the Escrow Agent, or at such other place or time as the City and Developer mutually agree in writing. At or prior to the Closing, the parties hereto shall execute and deliver such documents and perform such acts as are provided for herein, or as are necessary, to consummate the conveyance of the Project Property to Developer.

6.1.1. Purchase Price. The total purchase price to be paid for the Project Property (the "Purchase Price") by Developer shall be \$7,400,000.00. The Purchase Price shall be paid in full in cash by Developer upon the Closing, subject to the City's credit to the Developer of the purchase of Public Amenities as described in **Section 6.1.10** and the prorations and other adjustments as hereinafter set forth.

6.1.2. Condition of Title; Survey. Title to the Project Property to be conveyed to Developer pursuant to this Agreement shall be subject to the review and approval of the Developer. In connection therewith, prior to or concurrently with the execution of this Agreement, the Escrow Agent shall prepare a preliminary title report prepared by a title insurer (the "Title Company") acceptable to the Developer (the "Preliminary Title Report") which sets forth all liens, encumbrances or other exceptions to title applicable to the Project Property, together with legible

copies of all recorded liens, encumbrances and title exceptions as may be disclosed therein. In addition, within thirty (30) days after the execution of this Agreement, the City shall cause to be prepared and delivered to Purchaser a current ALTA survey of the Project Property (the "Survey"). Fee simple title to the Project Property shall be conveyed to Developer free of any liens, encumbrances or other exceptions to title, except those items approved by Developer in the Preliminary Title Report (the "Permitted Title Exceptions"). Fee simple title to the Project Property shall be insured by an ALTA extended owner's policy of title insurance issued by the Title Company insuring Developer for the full amount of the Purchase Price, together with any additional endorsements desired by Developer. The City shall pay that portion of the title insurance equal to a standard coverage title insurance policy, and the Developer shall pay the incremental cost of the extended coverage insurance and for all endorsements. If, after reviewing the Preliminary Title Report and the Survey, the Developer objects to any title exceptions set forth in the Preliminary Title Report or shown on the Survey, the City shall use commercially reasonable efforts to cause any such objected items to be removed as a title exception or to cause the Title Company to insure over such matters at its sole cost and expense. If the City fails to cause such matter to be removed as an exception or insure over such matter, then the Developer shall have the right to cause the same to occur and offset the costs incurred against the Purchase Price to be paid by Developer to the City at Closing.

6.1.3. Taxes, Assessments and Bonds. All taxes and assessments imposed against the Project Property shall be prorated and apportioned between the City and the Developer as of the Close of Escrow based upon the latest available information.

6.1.4. Ownership and Maintenance of Project Property Prior to Conveyance to Developer. Prior to the conveyance of the Project Property to the Developer pursuant to the terms of this Third Agreement, the City shall be entitled to all rents and returns from the Project Property and shall bear all costs for maintenance and ownership. Notwithstanding the foregoing, the City agrees that the Developer shall have the right, without additional cost, fee or charge, to enter upon the Project Property to conduct any feasibility inspection, pre-construction activities or construction staging activities as the Developer deems reasonably necessary, including, without limitation, the removal of utility lines and conduits and the like. The Developer shall maintain appropriate insurance and indemnify, hold harmless and defend the City from and against any and all liabilities, obligations, claims, demands, costs and expenses, including reasonable attorneys' fees, directly caused by work done by Developer or its agents in connection with any such preconstruction activities or construction staging activities.

6.1.5. Due Diligence Investigation. Upon the mutual execution of this Agreement, the City shall deliver to the Developer all reports, studies, investigations, materials, analyses, tests and evaluations (including, without limitation, environmental assessments, soils tests and archaeological studies) which the City may have in its possession or its control and in any way related to the Project Property. In addition to the materials provided by the City, the Developer shall have the right from time to time to enter upon the Project Property for the purpose of conducting any separate investigation, test, survey, analysis or evaluation with respect to the condition of the Project Property. All costs and expenses of any additional tests, studies, surveys or analyses desired by the Developer shall be paid for by the Developer; provided, however, that the City provides the Developer with the previously prepared Phase I environmental assessment of the Project Property. The City shall be responsible for the remediation and cure, at the City's sole cost and expense, of any environmental contamination on the Project Property that arose while the City held title;

provided, however, that the City shall not be responsible for any environmental contamination that arose while the City did not hold title.

6.1.6. Archaeological Remediation. The parties hereby acknowledge that, during the Escrow, and also after the Close of Escrow to the extent (if any) applicable and necessary, the City shall with all necessary diligence continue to review and assess the impact of any archaeological artifacts or human remains that may exist upon or otherwise impact or affect the Project Property and, to the extent any such artifacts or remains are required by applicable law to be removed, relocated, preserved or otherwise remediated in order to permit development of the Project Property as contemplated by this Agreement, then the City shall retain such responsibility and shall diligently undertake all such efforts deemed necessary or appropriate by the City to satisfy all such legal obligations, including, without limitation, notifying and processing all claims of the Arizona Historical Society and/or any Indian tribes which may have rights with respect thereto, at no cost or expense to Developer. Such archeological remediation shall not delay closing of the Developer's acquisition of the Project Property; unless, Developer and the City mutually agree to delay closing for a period of time equal to any delays by the City in any necessary such remediation in which case the Schedule of Performance shall also be similarly adjusted. Such archeological remediation may entitle Developer to a Day-For-Day Extension of the Developer's performance obligations as provided for in the *Exhibit C* Schedule of Performance.

6.1.7. Condition of Property. Except as specifically set forth in this Agreement, the Project Property shall be conveyed by the City to the Developer in its existing "as is," "where is" condition.

6.1.8. Conditions Precedent to Closing. The City and Developer hereby acknowledge and agree that the Developer's obligation to acquire the Project Property pursuant to the terms of this Agreement shall be subject to and conditioned upon the satisfaction of the following conditions precedent:

(a) The Developer shall have reviewed and approved the physical condition of the Project Property pursuant to the provisions of *Section 6.1.5* above;

(b) The Developer shall have reviewed and approved the condition of title and all survey matters affecting the Project Property pursuant to the provisions of *Section 6.1.2* above;

(c) The Developer shall have reviewed and approved a plan presented by the City for the removal, relocation or remediation as contemplated pursuant to *Section 6.1.6* above. All archaeological artifacts or human remains which are identified or discovered during the Escrow shall have been removed, relocated or otherwise remediated as contemplated pursuant to *Section 6.1.7* above;

(d) The Pending Litigation shall have been fully and completely resolved and settled on terms and conditions such that the Project Property is not affected in any way by the Pending Litigation.

6.1.9. Developer's Right To Assign. Developer may assign its rights under this Agreement at any time prior to the Closing, or thereafter, upon the City's written consent, which

consent the City shall not unreasonably withhold. Any Assignee of the Developer shall immediately succeed to all remaining rights of the Developer and shall assume all remaining obligations and responsibilities of the Developer under this Agreement.

6.1.10. City's Purchase of Preserve Parcel, Infrastructure and Public Amenities. The City and Developer hereby acknowledge and agree that, concurrently with the City's issuance of building permits for the First Phase of the Project, the City shall purchase from Developer the Preserve Parcel, Infrastructure and Public Amenities. The parties hereby agree that the Purchase Price to be paid by the City to Developer for the Public Amenities shall be equal to \$13,100,000.00 (the "Public Amenities Purchase Price"). A portion of the Public Amenities Purchase Price shall be paid by the City at the Close of Escrow and shall be paid by the application of a Credit in the amount of \$7,100,000.00 to be applied against the Developer's \$7,400,000 Purchase Price for the Project Property pursuant to the provisions of **Section 6.1.1** above (herein, the "Public Amenities Credit"). The parties acknowledge and agree that this credit shall be applied simultaneously with and applied toward MCW's obligation to pay the \$7,400,000 Purchase Price at the Close of Escrow. Except as may be specifically otherwise provided in **Section 6.1.B** of this Third Agreement, in no event shall the Close of Escrow and the City's \$7,100,000 payment or credit against the Project Property Purchase Price occur later than eighteen months (18) after execution of this Agreement. The balance of the Public Amenities Purchase Price (\$6,000,000 on a net present value basis as defined in **Section 9** below valued as of the date of the execution of this Third Agreement) shall be paid by the City through the application of the fee waivers and tax abatements described in **Section 9** below. As further consideration and as part of the Public Amenities the Preserve Parcel shall, at the time of the Close of Escrow, remain with the City, and shall not become part of the Project Property despite such Preserve Parcel being included as part of the First Agreement and Second, and the Developer hereby relinquishes any right or entitlement to the Preserve Parcel as of the Close of Escrow.

## 7. Easements.

7.1. Easements in Public Rights-of-Way. Subject to all terms, covenants and conditions of this Agreement, the City agrees to convey to Developer the following perpetual easements; (i) easements across, over and under the street rights of way for Mill Avenue and Rio Salado Parkway contiguous to the Project Property. The purpose of these easements is to permit the construction, occupancy, operation, maintenance and use of the Project buildings per the approved PAD and other plans approved by the City and construction of new and relocation of existing utilities that service the Project Property. These Construction and Occupancy Easements will run with the title to the Project Property; (ii) easements for outdoor dining related to indoor restaurants or food service providers as approved on the PAD (subject to receipt of any required use permits therefor). There will be no annual or other fee, rent or charge to Developer or its tenants for any of these easements or use of the easement property, except normal construction or permit fees and a standard City annual license fee, if applicable.

After construction of any building, if for any reason the building should be abandoned, removed or destroyed and within a period of thirty-six (36) months reconstruction has not yet begun, then, at the City's reasonable discretion, the easements described above may be modified to exclude any easements solely benefiting that building and Developer, and or its successor(s) will fully cooperate in connection therewith.

During the effective term of the easements and as a condition precedent to the effectiveness of the easements, the Developer and its successors and assigns, at its own expense shall maintain in full force a policy or policies of comprehensive liability insurance, including property damage, written by one or more responsible insurance companies licensed to do business in Arizona, which shall insure the Developer, the City, including its employees and agents, against liability for injury to persons and property and for the death of any person occurring in, on or about any of the easements. The limits of such insurance shall not be less than \$2,000,000 for each occurrence to include property damage, personal injury, and bodily injury, products, and completed operations, with a \$5,000,000 general aggregate. Said insurance limits shall be periodically reviewed to ensure coverage based on market and risk requirements throughout the effective term of the easements. Said insurance shall be primary to the City's self-insurance or any other insurance policy coverage applicable to the City. The certificate of insurance shall be issued and shall name the City, its employees, officers, agents and volunteers as an additional insured and shall provide coverage for claims made after the effective term of any easements for occurrences during the effective term of the easements.

The party benefited by each easement shall provide the City with duplicates of insurance policies maintained by such party pursuant to this Agreement, or certificates of insurance relating thereto issued by the insurers. In the event such party shall fail to maintain or renew any insurance policy required under this Agreement, or to pay the premiums therefore, the City and/or any mortgagee of structures or improvements within the easement may, with thirty (30) day written notice to such party, at their respective options but without obligation to do so, procure such insurance or pay such premiums, and any sums expended therefore shall be repaid by such party to the party expending the same upon demand, together with interest thereon at the rate of two percent (2%) above "prime interest rate" charged by Bank One, or its successor, at the date of the payment until repaid by such party.

The party benefited by each easement shall obtain the agreement of each insurance company in which a policy required by the Agreement is carried that such policy shall not be canceled or terminated without thirty (30) days prior written notice to the City and to the mortgagee of any mortgage covering the easement.

7.2. Timing of Easements. City shall execute separate from this Agreement, the documents creating the above stated easements for recording purposes. Said documents shall be executed and recorded, upon request of Developer, prior to the issuance of building permits for the construction of any building or improvement of the easement property.

7.3. Parking License. The City hereby agrees to grant to Developer, for the use and benefit of Developer and the Project, a nonexclusive, irrevocable and perpetual license within the US Airways Parking Facility, which license shall provide to the Project not less than 300 permits to be made available between 6:00 p.m. and 6:00 a.m. to all users of the Project for vehicular parking (the "Parking License"). The parking permits to be provided pursuant to the Parking License shall be provided at no additional cost or expense to Developer or any subsequent Owner or any user of the Project. Concurrently with the commencement of construction of Improvements on the Project Property by Developer, the City shall execute a license agreement establishing the Parking License, which shall contain such provisions as may be mutually agreed to

by the parties hereto and recorded in the Official Records of Maricopa County, Arizona. In no event shall the Developer be entitled to any greater rights in the parking permits than the City currently has with respect to such parking in its agreements to utilize the permits within the US Airways Parking Facility.

7.4. Public Use and Recreational Easements. The City and Developer hereby agree that public use easements for public rights-of-access to the Preserve Parcel will be needed upon completion of the Improvements for recreational and City service purposes. The Developer hereby agrees that it will act in good faith in connection with any such request by the City and in connection with identifying and locating appropriate recreational and City service easements that do not unreasonably interfere or impede development of the Project Property or the use, maintenance and operation of any Improvements constructed thereon from time to time, taking into consideration any requirements necessary to maintain safe conditions for all Owners and occupants of the Project Property. In connection therewith, to the extent that any recreational and City service easements are made available to the City for general and certain specific public access, such use shall be subject to written rules and regulations promulgated by the Developer and/or the Owner(s) affected thereby, which may be amended from time to time.

7.5. Conservation Easement. The Developer hereby agrees to grant the City, for the use and benefit of the City, a Conservation Easement depicted in *Exhibit D* attached hereto covering the (a) façade of the Flour Mill Building, (b) the façade of the Silos, and (c) creating exhibits, open to the public, demonstrating the ancient and historic context of the site. Nothing contained herein shall be deemed to require the Developer to reconstruct the Flour Mill Building and/or Silos for appropriate reuse, except as otherwise specifically stated in this Third Agreement. The Developer also will reasonably cooperate and work with the City and the Historic Preservation Commission and the Economic Development Division on design and preservation of the façade of the Flour Mill Building, the façade of the Silos, and creating exhibits, open to the public, demonstrating the ancient and historic context of the site.

7.6. Remaining City Parcel Easement. The City hereby agrees to grant to the Developer, for the use and benefit of Developer and Project, an easement over the Remaining City Parcel for access, delivery, parking, vehicle turn around and other reasonable uses for the benefit of the Project Property. Such Easement shall be perpetual except that it shall be extinguished when, and if, Developer acquires the Lowe Parcel and Remaining City Parcel as described in *Section 4.1* above. Concurrently with the commencement of construction of Improvements on the Project Property by Developer, the City shall execute an Easement Agreement establishing the Remaining City Parcel Easement, which shall contain such provisions as may be mutually agreed to by both parties to this Agreement and recorded in the Official Records of Maricopa County, Arizona.

## 8. Parking and Transit Issues.

8.1. Public Transit Facilities. The Developer hereby agrees that it shall support the development and implementation of public transit facilities as such facilities may be desired by the City within the Project Property to serve the needs of the general public and that, subject to the infrastructure needs and requirements of the Improvements to be constructed within the Project Property as contemplated by the Conceptual Development Plan, the Developer shall cooperate in good faith with the City in connection with the location of any public transit facilities and public rights of way within the Project Property and the integration of such facilities and rights

of way with Improvements constructed or planned to be constructed thereon. In the event that the City requires the imposition of additional architectural, engineering, construction and maintenance costs on the Developer or any other Owner that are of a type or nature that are not imposed on other surrounding property owners (the “Extraordinary Costs”), the City shall be responsible for reimbursing the Developer or other Owner for all Extraordinary Costs resulting from structural or operational upgrades, betterments or other improvements that may be required to be made to any Improvements from time to time constructed or existing within the Project Property to ameliorate the effect or impact of public transit facilities on such Improvements.

9. **Balance of Public Amenities Purchase Price; Fee Waivers and Tax Abatements.**

The City and Developer acknowledge that, as a result of certain inherent risks and the costs of redevelopment of real property within downtown Tempe, the inherent risks of redeveloping the Hayden Flour Mill and Hayden Silos, the inherent risks of redeveloping the Project Property given its nature, condition, shape and size, and in consideration of the obligation of the City with respect to the balance of the Public Amenities Purchase Price not paid with the Credit described in **Section 6.1.10** above, the fee waivers and tax abatements hereinafter set forth are necessary and appropriate for the economic viability of the Project and to otherwise aid in the successful development of the Project Property. The Developer shall be entitled to receive such fee waivers and tax abatements until it has received an amount totaling the net present value of \$6,000,000, valued as of the date of the execution of this Agreement, and calculated at a discount rate of eight percent (8%) per annum, at which time the fee waivers and tax abatements shall cease.

9.1. **Fifty Percent Waiver of Development Processing Fees.** The City hereby agrees to waive 50% of all development processing fees, including, without limitation, building permit fees, processing fees, inspection fees and the like relating to the development and construction of the Project (the “Waived Permit Fees”), and agrees that neither the Project Property nor the Developer, including any of its contractors, will be subject to the payment of any such Waived Permit Fees with respect to the Project or any Phase therein.

9.2. **Sales Tax Rebate.** The City shall pay to the Developer each year the “Sales Tax Rebate Amount” (defined below) that accrues during the period (the “Tax Rebate Period”) commencing upon the start of the construction of the Project and continuing for so long as the Developer is entitled to receive fee waivers and tax abatements under **Section 9**, and rebates of the sales tax rebate amount and hotel bed tax rebate amounts described below.

9.2.1. **Sales Tax Rebate Amount.** The Sales Tax Rebate Amount for each calendar quarter occurring during the Tax Rebate Period means an amount equal to the product obtained by multiplying (a) seventy percent (70%) by (b) the unrestricted Project Sales Tax Revenue (currently 1.2%) for such calendar quarter.

9.2.2. **Project Sales Tax Revenue.** The Project Sales Tax Revenue for any calendar quarter occurring during the Tax Rebate Period means City revenues derived from those certain unrestricted privilege (sales) taxes levied and imposed by the City pursuant to Chapter 16 of the Tempe City Code on construction of the Project, the retail sale of condominium units thereon and on all other taxable transactions that occur on the Project premises within the Tax Rebate Period, or any successor statute, law, or regulation by which the City levies and is entitled to receive, and does, in fact receive, unrestricted taxes attributable to and derived from taxable sales, including sales tax paid with respect to the initial sale of all residential condominium units

developed, constructed and sold within the Project. As of the date of this Third Agreement, the City imposes a 1.2% unrestricted privilege tax.

9.2.3. Payment of the Sales Tax Rebate Amount. The Sales Tax Rebate Amount accrued in any calendar quarter shall be paid by the City to Developer on a quarterly basis. The payment of the Sales Tax Rebate Amount shall first occur three (3) months from the date of the issuance of the first Certificate of Substantial Completion as defined in **Section 3.16** with respect to any building in the First Phase of the Project and shall continue each calendar quarter until such time as the Developer has realized the total amount described in **Section 9**; provided that any such payment may be delayed by the City if any taxable party fails to file the applicable tax returns and make the applicable sales tax payments for the period to which the City's payment relates. If such a failure occurs, the City shall make the required payment of the Sales Tax Rebate Amount within ninety (90) days after the applicable taxable party files the applicable tax returns and/or makes the applicable sales tax payments. Nothing in this **Section 9.2.3** shall be construed to require the City to make any payment to Developer until Project Sales Tax Revenue is actually generated and received by the City.

9.3. Hotel Bed Tax Rebate Amount. In the event a hotel is built on the Project Property, the Developer shall be entitled to eighty percent (80%) of any hotel bed sales tax that is retained by the City and not otherwise encumbered or distributed to the Tempe Convention and Visitor's Bureau or any other entity from the date of the issuance of the certificate of occupancy with respect to such hotel and until the Developer has realized the total amount described in **Section 9**. Such payments shall be made in the same manner as the Sales Tax Rebate Amount set forth in **Section 9.2.3**.

9.4. Government Property Lease Excise Tax Abatement. The City hereby acknowledges and agrees that the Developer shall be entitled to all statutorily-authorized property tax abatements, including, without limitation, all such abatements currently available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209, inclusive, provided that such abatements shall be credited against the total amount described in **Section 9**, and provided, further, however, that the Developer shall be responsible for an annual in-lieu payment to the Tempe Union High School District and the Tempe Elementary School District No. 3 (the "School Districts"), during the abatement period in an amount equal to the lesser of: (a) that portion of the property tax which would have otherwise been payable by such portion of the Project but for the abatement and which would have been remitted to the School Districts, or (b) \$50,000.00, which amount, as applicable, shall be allocated equally to such School Districts. Any reconveyance of land and conveyances of Improvements shall be formalized in a separate Improvements Lease substantially in the form attached hereto as **Exhibit E**, or a form otherwise mutually acceptable to the City and the Developer.

9.5. Successor Financing Programs. The City hereby acknowledges that if, for any reason, any financing programs provided herein are amended, modified or repealed or rescinded such that the full benefits thereof as currently provided on the date of the execution of this Third Agreement are no longer in effect, then, in that event, the City will use its best efforts to provide alternative development financing and to cooperate with Developer with respect to any other available tax abatement programs or other public financing mechanisms provided for under Arizona law or otherwise available in order to obtain essentially the same economic benefits for the Project Property as are currently provided under existing law. Said financing or tax abatement

programs shall be limited such that they result in no greater cost to the City than those agreed to herein.

9.6. Deferral of Sewer Water and Residential Unit Development Fees. In addition to the foregoing fee waivers and tax rebates, and not as part of the Public Amenities Purchase Price, the City hereby agrees to defer payment of all potable water, sanitary sewer, and residential development fees (herein, the “Deferred Development Fees”), on individual for sale residential units until such time as each individual unit is sold to a third party purchaser, with the deferred sewer and water fees to be paid to the City out of escrow at the closing of each such sale. These deferred amounts shall not count against the total amounts otherwise described in **Section 9**.

10. Preservation of Flour Mill. The City and Developer hereby acknowledge and agree that a material part of the consideration to the City for its execution of this Agreement is the Developer's agreement to preserve the Hayden Flour Mill and Hayden Silos in their current locations on the Project Property and to incorporate the Hayden Flour Mill and Hayden Silos into or as part of the Project. If, however, at any time after the date of this Agreement, the Developer determines that it is not economically or otherwise feasible to incorporate the Hayden Silos into and as part of the Project, then, in that event, the Developer shall be responsible for preserving and maintaining Hayden Silos in their current location.

11. Subordinate Development Agreements. The City and Developer hereby acknowledge that the development of the Project Property in accordance with the Conceptual Development Plan will involve and may be accomplished by Developer through a series of sales, leases, joint ventures and/or other agreements and arrangements with other experienced developers, investors and Owners of real property. In connection therewith, it is anticipated and contemplated by the parties that such developers, investors or Owners may desire to negotiate and enter into separate and subordinate development agreements with the City and/or Developer with respect to infrastructure improvements, uses, plan approvals and other similar matters that may be the subject of separate agreements between such developers, investors and Owners and the City and/or Developer. The parties hereby agree that any and all development agreements entered into with any such developer, investor or Owner shall be subordinate in all respects to the terms and conditions of this Agreement and, in the event of any conflict or discrepancy between the provisions of any such development agreement and the terms and conditions of this Agreement, this Agreement shall govern and control.

12. Default; Remedies.

12.1. Events Constituting Default. A party hereunder shall be deemed to be in default under this Agreement if such party materially breaches any obligation required to be performed by it hereunder within any time period required for such performance, including, without limitation, any failure to comply with the Schedule of Performance, as said time periods may be extended for reasons of *Force Majeure Acts* or as a result of the failure of the other party to this Agreement to act in a timely manner as may be required. For the purposes of this Agreement, a Default shall not be deemed to have occurred unless such breach continues for a period of one hundred eighty (180) days after written notice thereof from the non-defaulting party (“Cure Period”). If the breach cannot reasonably be cured within one hundred eighty (180) days, then the party shall be in default if it fails to commence the cure of such breach and diligently pursue the same to completion. The Cure Period may be extended for *Force Majeure Acts* or for the period of

time that the other party hereto has failed to perform any obligation as and when required as otherwise set forth in this Agreement.

12.2. Developer's Remedies. If the City is in default under this Agreement and fails to cure any such default within the time period required therefor as set forth in **Section 12.1** above, then, in that event, in addition to all other legal and equitable remedies which the Developer may have, including, without limitation, the right to specific performance, the right to seek and obtain damages and the right to self-help, the Developer may terminate this Agreement upon written notice delivered to the City; provided, however; that any such termination shall not affect, and this Agreement shall continue in full force and effect with respect to, those portions of the Project Property upon which Improvements have been constructed or that are in the process of being constructed.

12.3. City's Remedies. In the event that Developer is in material default under this Agreement, but only with respect to the First Phase, Schedule of Performance, and such Schedule of Performance has not been suspended, tolled, modified or extended for reasons of *Force Majeure Acts*, or as a result of the failure of the City to act in a timely manner with respect to any of its obligations as provided in this Agreement, and Developer thereafter fails to cure any such default within the time period described in **Section 12.1** above, then the City shall have the right to seek all remedies to which it is entitled in law or equity and to terminate this Agreement immediately upon written notice to Developer:

(i) The City shall have delivered written notice of default to the Developer and the Owner of such parcel, if other than Developer, and all other parties required to receive such notices of default, and specify the nature of the default and the actions that must be taken to cure said default; and

(ii) Delays in performance or approvals required by the City that singularly are not defaults but in the aggregate constitute a default by the City under the terms of this Agreement shall not have been the proximate cause of the default by the Developer or the Owner of such parcel, if other than Developer.

12.4. Excused Delay in Performance. In addition to the specific provisions of this Agreement, and in addition to the day-for-day Developer performance extensions for City delays provided for in the **Exhibit C** Schedule of Performance, the performance by either party hereunder shall not be deemed to be a breach where delays or defaults are due to war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, casualties, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, unusually severe weather, or any other causes beyond the control or without the fault of the party claiming an extension, of time to perform ("*Force Majeure Acts*"), If one party to this Agreement is unable or fails to perform due to a *Force Majeure Act* then the time for performance of that party shall be extended for a period equal to the period of the delay caused by the *Force Majeure Act* plus a reasonable start-up period. If one party to this Agreement is unable or fails to perform due to a *Force Majeure Act* and it is the proximate cause of the other party being unable or failing to perform in accordance with the terms of this Agreement, then the time for the performance of the other party shall be extended for a period of time equal to the period of the delay caused by the *Force Majeure Act* event plus a reasonable start-up period.



15. **General Provisions.**

15.1. **Cooperation.** The City and Developer hereby acknowledge and agree that they shall cooperate in good faith with each other and use best efforts to pursue the economic development of the Project Property as contemplated by this Agreement.

15.2. **Dispute Resolution.** If there is a dispute hereunder that the parties cannot 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 nonbinding mediation before commencement of litigation. The matter in dispute shall be submitted to a mediator mutually selected by Developer and the City. If the parties cannot agree upon the selection of a mediator within ten (10) days, then within five (5) days thereafter, the City and the Developer shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the City and Developer, or in such other fashion as the mediator may order. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation upon the conclusion of mediation or ninety (90) days after the date the parties first reached an impasse on the subject matter of the dispute, whichever occurs later.

15.3. **Captions.** The captions used herein are for convenience only and not a part of this Agreement and do not in any way limit or amplify the terms and provisions hereof.

15.4. **Estoppel Certificates.** Within fifteen (15) days after receipt of request therefor from Developer or any other Owner, the City shall furnish to the Developer, such Owner or such other parties as the Developer or other Owner may specify, an estoppel certificate ("Estoppel Certificate") stating, if true, that the Developer has, to the date of the issuance of such Estoppel Certificate, satisfied Developer's contractual obligations with respect to the Project Property, or any portion of the Project Property referred to in the Estoppel Certificate or, if the Developer has not satisfied its contractual obligations, stating those obligations that the Developer has not satisfied and such other matters as may be reasonably requested. Upon issuance of an Estoppel Certificate, the City shall be estopped to deny the truth of any statement made in such Estoppel Certificate. If the City fails timely to execute and deliver such Estoppel Certificate, the Developer and any third party may conclusively presume and rely upon the following facts:

(a) That the terms and provisions of this Agreement have not been changed except as represented by the Developer;

(b) That the Developer has obtained the approvals of the City as set forth in the Developer's statements;

(c) That the Developer is not in breach or default under the terms and provisions of this Agreement.

15.5. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

15.6. Successors and Assigns. This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

15.7. Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

15.8. Attorneys' Fees. If a party commences any actual litigation against the other party in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of the prevailing party's costs and fees, including reasonable attorneys' fees and expert witness fees, which shall be determined by the court and not by the jury.

15.9. Severability. If any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.

15.10. Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

15.11. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute an original and all of which together shall constitute one and the same instrument.

15.12. Recordation of Agreement. The City shall cause this Agreement to be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

15.13. Warranty Against Payment of Consideration for Agreement; Conflict of Interest. The Developer warrants that it has not paid or given, and will not pay or give, any third person any money or other consideration for obtaining this Agreement, other than normal costs of conducting business, costs of professional services (such as architects, engineers and attorneys). To the best knowledge of Developer, no member, official or employee of the City shall have any direct or indirect interest in this Agreement, nor participate in any agreement relating to this Agreement which is prohibited by law. This Agreement is subject to the cancellation provisions of A.R.S. §38-511.

15.14. Manager's Power to Consent. The City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect the Developer and/or the development of the Project Property, and hereby authorizes and empowers the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action

of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any further amendment or modification of this Agreement.

15.15. Consents and Approvals. Except as may be otherwise set forth in this Agreement, the City and Developer shall at all times act reasonably with respect to any and all matters that require any party to review, consent or approve of any act or matter hereunder,

***SIGNATURE PAGE FOLLOWS***



**"DEVELOPER"**

MCW TEMPE MILL, LLC, an Arizona limited liability company

By: MCW Holdings, L.L.C., an Arizona limited liability company

Its: Manager

By:   
Theodore F. Claassen  
Its: Member

STATE OF ARIZONA                    )  
  ) ss.  
COUNTY OF MARICOPA            )

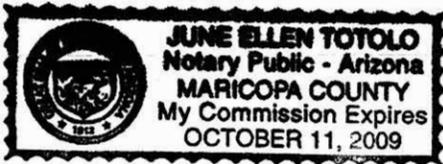
On this 25th day of July, 2006, before me, the undersigned officer, personally appeared Theodore F. Claassen, who acknowledged him/herself to be the member of MCW TEMPE MILL, LLC, an Arizona limited liability company:

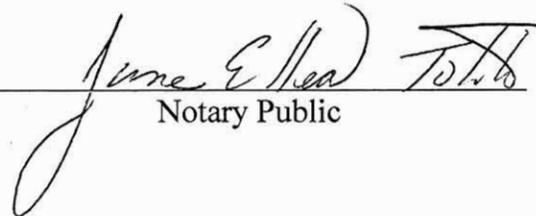
X whom I know personally;  
       whose identity was proven to me on the oath of \_\_\_\_\_, a credible witness by me duly sworn;  
       whose identity I verified on the basis of his/her \_\_\_\_\_,  
      ,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

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

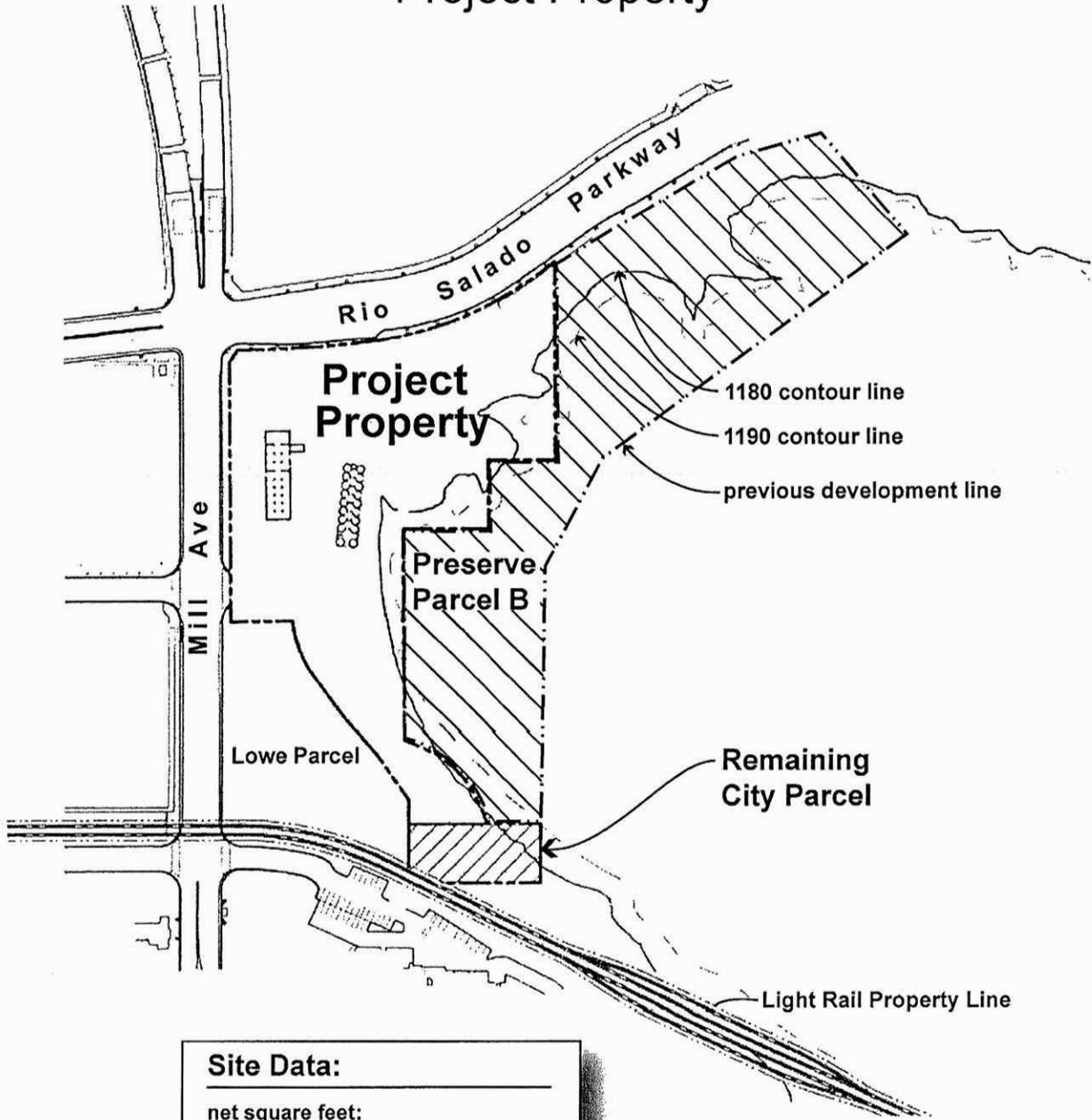
NOTARY SEAL:



  
Notary Public

# EXHIBIT "A"

## Project Property



### Site Data:

#### net square feet:

Project Property ± 219,700 sf

#### net acreage:

Project Property ± 5 acres



north  
May 2006

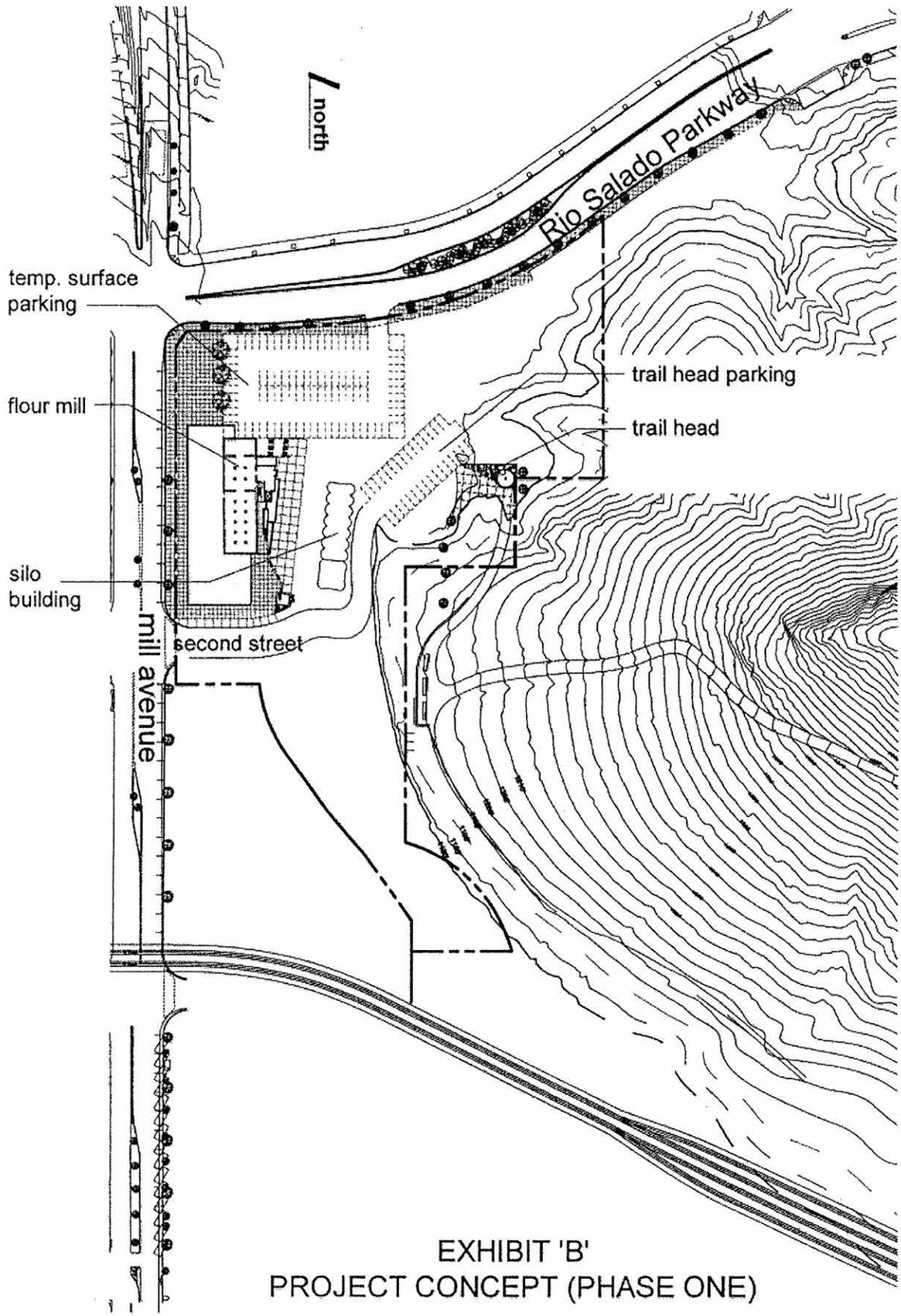
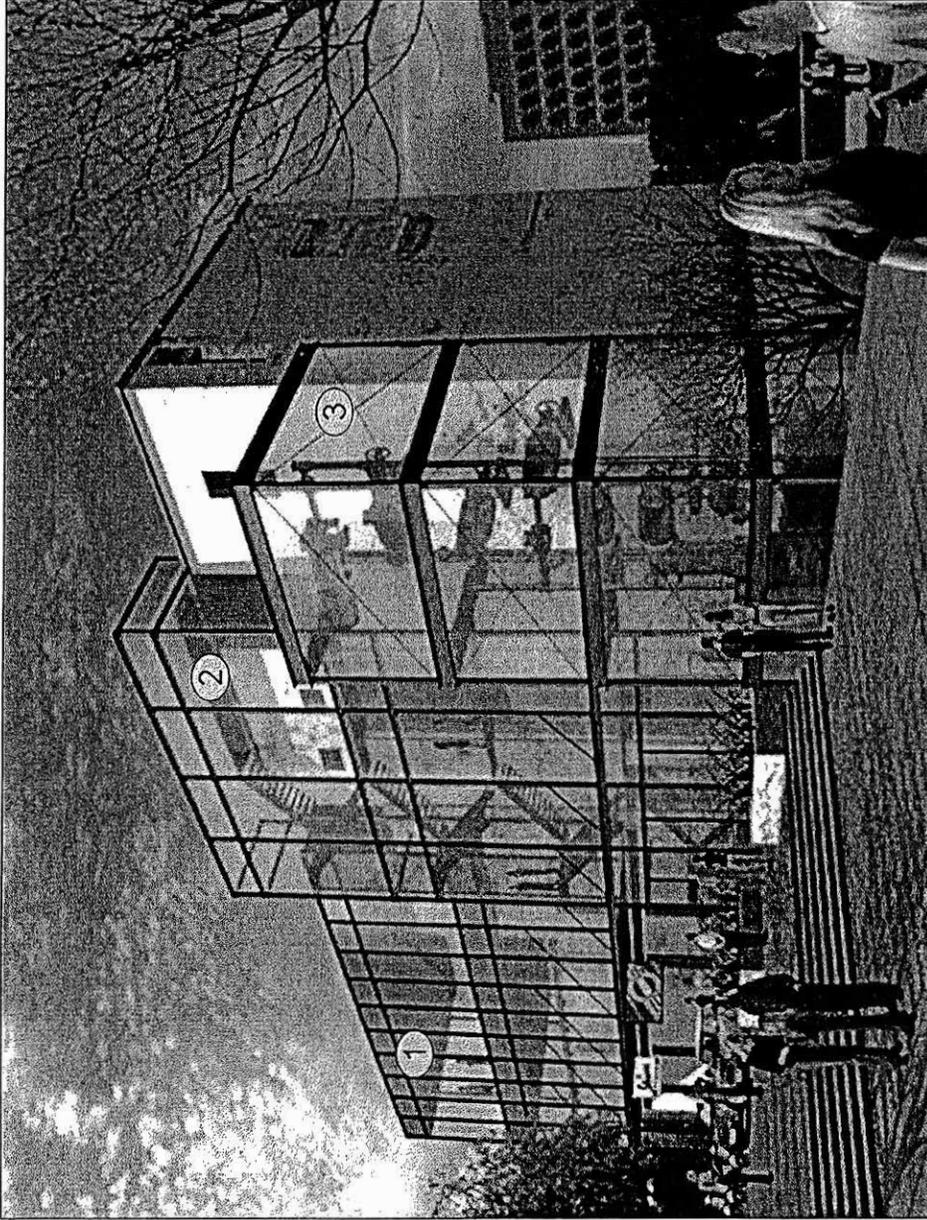


EXHIBIT 'B'  
PROJECT CONCEPT (PHASE ONE)



1

▪A glass structure has been used to make the building functional while still showing off the original structure

2

▪The elevator for the office will also be available for public use to demonstrate up close, the history and process of the mill. This will be a great educational tool for students of all ages including the general public.

3

▪A vertical museum & art exhibit will be created to celebrate the history of the Mill. The original equipment from inside the mill will be stacked vertically behind the glass to demonstrate operation while the mill was in use. This element will be enhanced by lighting both day and night to show the processing of the grains while also creating an outstanding plaza event.

## EXHIBIT "B1" PROJECT CONCEPT (PHASE ONE)

## *EXHIBIT C*

### **HAYDEN FERRY-SOUTH SCHEDULE OF PERFORMANCE**

- a. First Phase PAD Submittal by Developer to City – 120 days from execution of this Agreement
- b. Submit for First Phase building permit – 12 months from approval of the PAD for the First Phase of the project.
- c. Start Construction of the First Phase – 30 days from City’s issuance of First Phase building permit.

### **ADJUSTMENTS TO SCHEDULE**

1. Day-For-Day Extension of Schedule. The parties recognize that timely performance by the City of its obligations under this Third Agreement, including, but not limited to, review and processing of applications and approvals, archeological remediation, and other matters that are the responsibility of the City is essential to the Developer’s compliance with the Schedule of Performance. The parties acknowledge, intend and agree that any delays by the City, regardless of the reason or cause, shall not result in the Developer being out of compliance with the Schedule of Performance. In the event there are any delays of any kind due to, or caused by, the City, the foregoing Schedule of Performance shall be adjusted with a day-for-day extension of the Developer’s time periods so that the developer is afforded an additional day for performance for each day of delay due to, or caused by, the City.

***Exhibit D***  
***“Conservation Easement”***

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT (the “Easement”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2006, by and between MCW TEMPE MILL, LLC, an Arizona limited liability company (the “Developer”), and the City of Tempe, a municipal corporation organized and existing under the laws of the State of Arizona, (the “City”).

RECITALS

A. The City is authorized under Arizona’s Uniform Conservation Act, Arizona Revised Statutes, Sections 33-271 through 276, inclusive (collectively, as and if amended, the “Act”) to accept conservation easements for conservation purposes or to preserve the historical, architectural, archeological or cultural aspects of real property.

B. The City is a municipal corporation whose responsibilities include the protection of the public interest in preserving architecturally significant structures within the City of Tempe.

C. The Developer is the owner in fee simple of that certain property located at 119 S. Mill Avenue Avenue, Tempe, Maricopa County, Arizona, which is more particularly described in Exhibit “A” attached hereto and made a part hereof (the “Project Property”), particularly the Flour Mill Building, Silos, and permanent exhibits, open to the public, demonstrating the ancient and historic context of the site (the “Structures”).

D. The Developer and the City recognize the historical, cultural or architectural value and significance of the Structures and have the common purpose of conserving and preserving the aforesaid value and significance of the Structures on the Project Property. The Structures are commonly known as the Hayden Flour Mills. The terms Project Property and Hayden Flour Mills may be used interchangeably in this agreement.

# *Exhibit D*

## *“Conservation Easement”*

E. In order to effectuate the obligations of the Developer under that certain Third Amended and Restated Development and Disposition Agreement dated as of \_\_\_\_\_, 2006, the Developer desires to sell, grant, convey, transfer and assign to the City and the City, pursuant to the Act, desires to accept a conservation easement on the Hayden Flour Mills.

### AGREEMENT

NOW, THEREFORE, in consideration of the City’s agreement to pay the Developer \$10 and other good and valuable consideration, the Developer and the City hereby agree as follows:

1. Grant of Easement: The Developer does hereby irrevocably grant, convey, transfer and assign unto the City a “conservation easement,” as defined under the Act, in perpetuity, in and to the Hayden Flour Mills Structures as depicted in Exhibit “B” and which covenants contained herein contribute to the public purpose of conserving and preserving the Hayden Flour Mills and accomplishing the other objectives set forth herein.

2. Developer’s Covenants: In furtherance of the conservation easement herein granted, the Developer hereby covenants and agrees with the City as follows:

2.1 Documentation of the Exterior Condition of the Hayden Flour Mills. For the purpose of this easement, the exterior facades shall be depicted in an original set of photographs dated thirty (30) days following the execution of this Easement, (collectively, the “Photographs”) and filed in the Office of the City of Tempe Historic Preservation Officer, or designated successor. The exterior condition and appearance of the Hayden Flour Mills as depicted in the Photographs (collective, the “Present Hayden Flour Mills”) is deemed to describe their external nature as of the date thereof.

2.2 Preservation and Maintenance of the Hayden Flour Mills. Effective immediately, the Developer will preserve the Hayden Flour Mills Structures in their current locations. The Developer will, at all times, maintain each of the Structures in a good and sound state of repair so as to prevent the deterioration of Hayden Flour Mills or any portion thereof. Subject to the casualty provisions of Paragraph 4 below, this obligation to maintain shall require replacement, repair and reconstruction within a reasonable time whenever necessary to have the external nature of the facades of the Hayden Flour Mills Structures at all times appear to be the same as the Present Hayden Flour Mills, or as redeveloped and reconstructed in the event Developer redevelops or reconstructs all or any portion of the Hayden Flour Mills Structures as contemplated by Section 2.3 below.

2.3 Redevelopment of Hayden Flour Mills. Notwithstanding the Developer’s immediate preservation and maintenance obligations as stated in Section 2.2

## *Exhibit D*

### *“Conservation Easement”*

above, Developer and the City acknowledge and agree that Developer may, in its sole and absolute discretion, and pursuant to properly approved Planned Area Development (“PAD”) Applications, redevelop or reconstruct for adaptive reuse, all or part of the Hayden Flour Mills Structures, and that such redevelopment or reconstruction may occur in one or more phases. Nothing contained in this Conservation Easement shall restrict or limit the Developer’s discretion or ability to redevelop or reconstruct the Hayden Flour Mills Structures for appropriate adaptive reuse. Such redevelopment or reconstruction may include multiple penetrations of building facades, including the installation of doors, windows and other openings or penetrations necessary to the redevelopment or reconstruction of the structures. Any such redevelopment or reconstruction shall be subject to the City’s standard review and approval procedures. In the event that Developer redevelops or reconstructs for appropriate reuse all or any portion of the Hayden Flour Mills Structures, then this Conservation Easement shall apply to the exterior facades of the redeveloped or reconstructed Hayden Flour Mills Structures following completion of redevelopment or reconstruction.

2.4 Maintenance of the Structural Elements. The Developer will maintain and repair the Structures as is required to ensure the structural soundness and the safety of the Structures.

2.5 Inspection. In order to periodically observe the Structures, representatives of the City shall have the right to enter the Property to inspect the exterior. This inspection will be made at a time mutually agreed upon by the Developer and the City.

2.6 Conveyance and Assignment. The City may convey, transfer and assign this Easement to a similar local, state or national organization whose purposes are to promote historic preservation, and which is a “qualified organization” under Section 170(h)(3) of the Internal Revenue Code of 1986, as amended, provided that any conveyance or assignment requires that the conservation purposes for which this Easement was granted will continue to be carried out. No such conveyance shall be deemed to impose any greater obligations on the Developer or any limitations on the Developer’s discretion and rights than is expressly stated in this Conservation Easement. In particular, the Developer shall not be required to maintain the Hayden Flour Mills Structure in their historic condition if the Developer elects to redevelop or reconstruct all or part of such structures for appropriate reuse as contemplated in Section 2.3 above.

2.7 Insurance. The Developer, at his sole cost and expense, shall at all times (a) keep the Structures insured at their replacement cost value on an “all risk” basis to ensure complete restoration of Hayden Flour Mills in the event of loss or physical damage. Said property coverage policy shall contain provisions which ensure that the face amount of the policy is periodically adjusted for inflation, and the Developer shall provide a Certificate of Insurance to the City which contains reference to such provision; and (b) carry and maintain liability insurance in an amount reasonably satisfactory to the City to protect against injury to visitors or other persons on the property, and to provide a

## *Exhibit D*

### **“Conservation Easement”**

Certificate of Insurance to the City evidencing such insurance, and naming the City as an additional insured on the policy.

2.8 Visual Access. The Developer agrees not to substantially obstruct the opportunity of the general public to view the exterior architectural/archaeological features and exhibits of the ancient and historic context of the Property from publicly accessible areas such as public streets or public use easements.

3. Warranties and Representations of the Developer. The Developer hereby represents and warrants to the City as follows:

3.1 Information Furnished, True and Correct. All information given to the City by the Developer in order to induce the City to accept this Easement, including all information contained in this Easement, is true, correct and complete to the best of Developer’s knowledge, information and belief.

3.2 Legal, Valid and Binding. This Easement is in all respects, legal, valid and binding upon the Developer and enforceable in accordance with its terms, and grants to the City a direct, valid and enforceable conservation easement upon the Hayden Flour Mills.

3.3 No Impairment of Conservation Easement. The Developer, for himself, his heirs, personal representatives, and assigns, has not reserved, and to his knowledge, no other person or entity has reserved, any rights, the exercise of which may impair the conservation easement granted herein.

4. Application of Insurance Proceeds. Subject to the insurance proceeds requirements of any recorded Deed of Trust or Mortgage applicable to the Property, in the event of damage or destruction of any of the Structures resulting from casualty, the Developer agrees to apply all available insurance proceeds and donations to the repair and reconstruction of the damaged Structures. In the event the City determines, in its reasonable discretion, after reviewing all bona fide cost estimates in light of all available insurance proceeds and other monies available for such repair and reconstruction, that the damage to the Structures is of such magnitude and extent that repair and reconstruction of the damage would not be possible or practical, then the Developer may elect not to repair or reconstruct the damaged Structures. Notwithstanding the foregoing, in the event the City notifies the Developer in writing that the City has determined that repair and reconstruction of the damaged Structures is impossible or impractical and that the damaged Structures presents an imminent hazard to public safety, the Developer will at his sole cost and expense raze the damaged Structures and remove all debris, slabs and any other portions and parts of the damaged structures within the time period required by the City to protect the health, safety and welfare of the public, unless the Developer has commenced and is diligently pursuing repair or reconstruction of the damaged Structures. Upon razing of the damaged portion of the Structures, the City shall release any interest it has in the insurance proceeds for the damaged Structures. Nothing in this paragraph is

## *Exhibit D*

### *“Conservation Easement”*

intended to supersede or impair the rights to insurance proceeds of a lienholder pursuant to a recorded Deed of Trust or Mortgage applicable to the Property.

5. Indemnification. The Developer covenants that he shall pay, protect, indemnify, hold harmless and defend the City at the Developer’s sole cost and expense from any and all liabilities, claims, attorneys’ fees, judgments or expenses asserted against the City, its mayor, city council members, employees, agents or independent contractors, resulting from actions or claims of any nature arising out of the conveyance, possession, administration or exercise of rights under this Easement, except in such matters arising solely from the gross negligence of the City, its mayor, city council members, employees and agents.

5.1 Survival of Indemnification. For purposes of explanation of Paragraph 5 only, and without in any manner limiting the extent of the foregoing indemnification, the Developer and the City agree that the purpose of Paragraph 5 is to require the Developer to bear the expense of any claim made by any third party against the City, which arises because the City has an interest in the Property as a result of this Easement. The Developer will have no obligation to the City for any claims which may be asserted against the City as a direct result of the City’s intentional misconduct or gross negligence.

6. Default/Remedy. In the event the Developer (a) fails to perform any obligation of the Developer set forth herein, or otherwise comply with any stipulation or restriction set forth herein, or (b) any representation or warranty of the Developer set forth herein, is determined by the City to have been materially untrue when made, in addition to any remedies now or hereafter provided by law and in equity, the City or its designee, following prior written notice to the Developer, may (aa) institute suit(s) to enjoin such violation by ex parte, temporary, preliminary or permanent injunction, including prohibitory and or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance required under this Easement or (bb) enter upon the Property, correct any such violation, and hold the Developer responsible for the cost thereof, and such cost until repaid shall constitute a lien on the Property, or (cc) revoke the City’s acceptance of this Easement by seeking judicial extinguishment in a court of competent jurisdiction on the grounds that the Developer’s default renders impossible or impractical the continued use of the Property for conservation purposes as defined under the Act. In the event the Developer violates any of its obligations under this Easement, the Developer shall reimburse all reasonable court costs and attorneys’ fees.

7. Waiver. The exercise by the City or its designee of any remedy hereunder shall not have the effect of waiving or limiting any other remedy and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

## *Exhibit D*

### *“Conservation Easement”*

8. Effect and Interpretation. The following provisions shall govern the effectiveness and duration of this Easement:

8.1 Interpretation. Any rule of strict construction designed to limit the breadth of restriction on alienation or use of property shall not apply in the construction or interpretation of this Easement, and this Easement shall be interpreted broadly to affect the transfer of rights and restrictions on use herein contained.

8.2 Invalidity of the Act. This Easement is made pursuant to the Act as the same now exists or may hereafter be amended, but the invalidity of such Act or any part thereof, or the passage of any subsequent amendment thereto, shall not affect the validity and enforceability of this Easement according to its terms, it being the intent of the parties hereto to agree and to bind themselves, their successors, heirs and assigns, as applicable, during the Term hereof, whether this Easement be enforceable by reason of any statute, common law or private agreement either in existence now or at any time subsequent thereto.

8.3 Violation of Law. Nothing contained herein shall be interpreted to authorize or permit the Developer to violate any ordinance or regulation relating to building materials, construction methods or use, and the Developer agrees to comply with all applicable laws, including, without limitation, all building codes, zoning laws and all other laws related to the maintenance and demolition of historic property. In the event of any conflict between any such laws and the terms hereof, the Developer promptly shall notify the City of such conflict and shall cooperate with the City and the appropriate authorities to accommodate the purposes of both this Easement and such ordinance or regulation.

8.4 Amendments and Modifications. For purposes of furthering the preservation of the Hayden Flour Mills, the Structures and the other Property and the other purposes of this Easement, and to meet changing conditions, the Developer and the City are free to amend jointly the terms of this Easement in writing without notice to any party; provided, however, that no such amendment shall limit the terms or interfere with the conservation purposes of this Easement. Such amendment shall become effective upon recording the same among the land records of Maricopa County, Arizona, in the office of the County Recorder.

8.5 Recitals. The above Recitals are incorporated herein by this reference.

8.6 Time of the Essence. Time is of the essence in the performance of each and every term and condition of this Easement by the Developer.

8.7 Feminine and Masculine. For purposes of this Easement, the feminine shall include the masculine and the masculine shall include the feminine.

***Exhibit D***  
***“Conservation Easement”***

*{Signature pages follow}*

***Exhibit D***  
***“Conservation Easement”***

IN WITNESS WHEREOF, the Developer and the City executed this Easement on the date first above written, which Easement shall be effective immediately upon such execution.

***“Developer”***

MCW TEMPE MILL, LLC, an  
Arizona limited liability corporation

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

STATE OF ARIZONA            )  
  ) ss  
County of Maricopa         )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2006 by \_\_\_\_\_ the \_\_\_\_\_ of \_\_\_\_\_

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

My Commission Expires:  
\_\_\_\_\_

***Exhibit D***  
***“Conservation Easement”***

***ATTEST:***

CITY OF TEMPE, an Arizona  
municipal corporation

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

By \_\_\_\_\_  
Hugh Hallman, Mayor

***APPROVED AS TO FORM:***

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

STATE OF ARIZONA        )  
  ) ss  
County of Maricopa        )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2006 by \_\_\_\_\_ the \_\_\_\_\_ of \_\_\_\_\_

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

My Commission Expires:

\_\_\_\_\_

*Exhibit D*  
*“Conservation Easement”*

Exhibit A  
Project Property

*Exhibit D*  
*“Conservation Easement”*

Exhibit B  
Hayden Flour Mills Structures

(This exhibit will be created after the rehabilitation of the Hayden Flour Mills and Silos and the creation of permanent exhibits open to the public, demonstrating the ancient and historic context of the site.)

***Exhibit E***  
***“Improvements Lease”***

**IMPROVEMENTS LEASE**

THIS IMPROVEMENTS LEASE (“Lease”) is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2006 by and between **THE CITY OF TEMPE**, a municipal corporation (“Landlord”), and **MCW TEMPE MILL, LLC**, (“Tenant”).

**RECITALS**

A. Landlord has title of record to the building which comprises the improvements constructed on land described in Exhibit A hereto (the “Land”), together with all rights and privileges appurtenant thereto and all future additions thereto or alterations thereof (collectively, the “Premises”).

B. The Premises are located in a redevelopment area established pursuant to Title 36, Chapter 12, Article 3 of Arizona Revised Statutes (A.R.S. §§36-1471 et seq.).

C. The Premises will be subject to the Government Property Lease Excise Tax as provided for under ARS §42-1902 (the “Tax”). By resolution No.\_\_\_\_, dated \_\_\_\_\_, Landlord abated the Tax for the period beginning upon the issuance of the certificate of occupancy for the Premises and ending eight years thereafter, all as provided in A.R.S. §42-1962(A). But for the abatement, Tenant would not have caused the Premises to be constructed.

**AGREEMENT**

For and in consideration of the rental and of the covenants and agreements hereinafter set forth to be kept and performed by Tenant, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord the Premises for the term, at the rental and subject to and upon all of the terms, covenants and agreements hereinafter set forth.

1. Quiet Enjoyment.

Landlord covenants and agrees with Tenant that conditioned upon Tenant's paying the Total Rent herein provided and performing and fulfilling all the covenants, agreements, conditions and provisions herein to be kept, observed or performed by Tenant, Tenant may at all times during the term hereof peaceably, quietly and exclusively have, hold and enjoy the Premises.

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2. Term.

The term of this Lease shall be for eight years, commencing on the date of issuance of a final Certificate of Occupancy for the Premises (the “Commencement Date”) and ending at midnight on the eighth anniversary of the Commencement Date, subject to earlier termination at Tenant’s option, as provided herein.

3. Rental. Tenant covenants to pay to Landlord as rental for the Premises the sum of 10 dollar(s) per year on the Commencement Date and every anniversary thereof. The consideration for this Lease includes, without limitation: Tenant’s payment of the entire cost of construction of the improvements constituting the Premises, Tenant’s performance of all of the covenants and obligations under this Lease and under the Ground Lease, and Tenant’s contribution toward fulfillment of Landlord’s policy and desire to promote development within a redevelopment area, to encourage the creation of jobs within the City of Tempe, and to enhance tax revenues resulting from the operation of businesses on the Premises, including transaction privilege taxes and the government property lease excise tax. Tenant, at its option and without prejudice to its right to terminate this Lease as provided herein, may prepay the rental for the entire lease term, but upon any early termination of this Lease, Landlord shall not be obligated to refund any portion of the prepaid rental.

4. Leasehold Mortgage of Premises.

(a) Subject to the applicable provisions of the Ground Lease, Tenant is hereby given the absolute right without the Landlord's consent to create a security interest in Tenant's leasehold interest under this Lease (and in any subleases and the rents, income and profits therefrom) by mortgage, deed of trust or collateral assignment or otherwise. Any such security interest shall be referred to herein as a “Leasehold Mortgage,” and the holder of a Leasehold Mortgage shall be referred to herein as a “Leasehold Mortgagee.”

(b) No liability for the performance of Tenant's covenants and agreements hereunder shall attach to or be imposed upon any Leasehold Mortgagee, unless such Leasehold Mortgagee forecloses its interest and becomes the Tenant hereunder, following which the liability shall attach only during the term of ownership of the leasehold estate by said Leasehold Mortgagee.

5. Taxes; Ground Lease Obligations.

(a) Payment. Tenant shall pay and discharge all general and special real estate and/or personal property taxes and assessments levied or assessed against or with respect to the Premises during the term hereof and all charges, assessments or other fees payable with respect to or arising out of the Ground Lease and all recorded deed restrictions affecting or relating to the Premises. Any sales, use, excise or transaction privilege tax consequence incurred by Landlord because of this Lease or in relation to the Premises or improvements included therein may be passed on to the Tenant either directly if applicable or as “additional rent.”

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(b) Protest. Tenant may, at its own cost and expense protest and contest, by legal proceedings or otherwise, the validity or amount of any such tax or assessment herein agreed to be paid by Tenant and shall first pay said tax or assessment under protest if legally required as a condition to such protest and contest, and the Tenant shall not in the event of and during the bona fide prosecution of such protest or proceedings be considered as in default with respect to the payment of such taxes or assessments in accordance with the terms of this Lease.

(c) Procedure. Landlord agrees that any proceedings contesting the amount or validity of taxes or assessments levied against the Premises or against the rentals payable hereunder may be filed or instituted in the name of Landlord or Tenant, as the case may require or permit, and the Landlord does hereby appoint the Tenant as its agent and attorney-in-fact, during the term of this Lease, to execute and deliver in the name of the Landlord any document, instrument or pleading as may be reasonably necessary or required in order to carry on any contest, protest or proceeding contemplated in this section. Tenant shall hold the Landlord harmless from any liability, damage or expense incurred or suffered in connection with such proceedings.

(d) Allocation. All payments contemplated by this Section 5 shall be prorated for partial years at the Commencement Date and at the end of the Lease term.

#### 6. Use.

Subject to the applicable provisions of the Ground Lease and A.R.S. §42-1901(2), the Premises may be used and occupied by Tenant for any lawful purpose.

#### 7. Landlord Non-Responsibility.

Landlord shall have no responsibility, obligation or liability under this Lease whatsoever with respect to any of the following:

(a) utilities, including gas, heat, water, light, power, telephone, sewage, and any other utilities supplied to the Premises;

(b) disruption in the supply of services or utilities to the Premises;

(c) maintenance, repair or restoration of the Premises;

(d) any other cost, expense, duty, obligation, service or function related to the Premises.

#### 8. Entry by Landlord.

Landlord and Landlord's agents shall have the right at reasonable times and upon reasonable notice to enter upon the Premises for inspection, except that Landlord shall have no right to enter portions of any building on the Premises without consent of the occupant or as provided by law.

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9. Alterations.

Subject to the applicable provisions of the Ground Lease, Tenant shall have the right to construct additional improvements and to make subsequent alterations, additions or other changes to any improvements or fixtures existing from time to time, and the Premises shall constitute all such improvements as they exist from time to time. In connection with any action which Tenant may take with respect to Tenant's rights pursuant hereto, Landlord shall not be responsible for and Tenant shall pay all costs, expenses and liabilities arising out of or in any way connected with such improvements, alterations, additions or other changes made by Tenant, including without limitation materialmen's and mechanic's liens. Tenant covenants and agrees that Landlord shall not be called upon or be obligated to make any improvements, alterations or repairs whatsoever in or about the Premises, and Landlord shall not be liable or accountable for any damages to the Premises or any property located thereon. Tenant shall have the right at any time to demolish or substantially demolish improvements located upon the Premises. In making improvements and alterations, Tenant shall not be deemed Landlord's agent and shall hold Landlord harmless from any expense or damage Landlord may incur or suffer. Title to all improvements shall at all times be vested in Landlord.

10. Easements, Dedications and Other Matters.

At the request of Tenant, when not in default hereunder, Landlord shall dedicate or initiate a request for dedication to public use of the improvements owned by Landlord within any roads, alleys or easements and convey any portion so dedicated to the appropriate governmental authority, execute (or participate in a request for initiation by the appropriate commission or department of) petitions seeking annexation or change in zoning for all or a portion of the Premises, consent to the making and recording, or either, of any map, plat, condominium documents, or declaration of covenants, conditions and restrictions of or relating to the Premises or any part thereof, join in granting any easements on the Premises, and execute and deliver (in recordable form where appropriate) all other instruments and perform all other acts reasonably necessary or appropriate to the development, construction, razing, redevelopment or reconstruction of the Premises.

11. Insurance.

During the term of this Lease, the Tenant shall, at Tenant's expense, maintain general public liability insurance against claims for personal injury, death or property damage occurring in, upon or about the Premises. The limitation of liability of such insurance during the first five years of the term shall not be less than \$5,000,000.00 combined single limit. The minimum policy limits shall be increased as of the fifth anniversary of the Commencement Date to an amount equal to \$5,000,000.00 multiplied by a fraction, the numerator of which is the Consumer Price Index--All Items--All Consumers--U.S. Cities Average--(1982 - 1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics (the "CPI") for the month three months prior to such fifth anniversary and the denominator of which is the CPI for \_\_\_\_\_, 200?. In the event the CPI is discontinued or substantially modified, Tenant shall substitute such alternative price index, published by the United States Government or other

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generally accepted source for such information, reconciled to the Commencement Date. All of Tenant's policies of liability insurance shall name Landlord and all Leasehold Mortgagees as additional insureds, and, at the written request of Landlord, certificates with respect to all policies of insurance or copies thereof required to be carried by Tenant under this Section 11 shall be delivered to Landlord. Each policy shall contain an endorsement prohibiting cancellation or non-renewal without at least thirty (30) days prior notice to Landlord (ten (10) days for nonpayment). Tenant may self-insure the coverages required by this section with the prior approval of Landlord, which will not be unreasonably withheld, and may maintain such reasonable deductibles and retention amounts as Tenant may determine.

#### 12. Liability; Indemnity.

Tenant covenants and agrees that Landlord is to be free from liability and claim for damages by reason of any injury to any person or persons, including Tenant, or property of any kind whatsoever and to whomsoever while in, upon or in any way connected with the Premises during the term of this Lease or any extension hereof, or any occupancy hereunder, Tenant hereby covenanting and agreeing to indemnify and save harmless Landlord from all liability, loss, costs and obligations on account of or arising out of any such injuries or losses, however occurring, unless caused by the sole and gross negligence or willful misconduct of Landlord, its agents, employees, or invitees. Landlord agrees that Tenant shall have the right to contest the validity of any and all such claims and defend, settle and compromise any and all such claims of any kind or character and by whomsoever claimed, in the name of Landlord, as Tenant may deem necessary, provided that the expenses thereof shall be paid by Tenant. The provisions of this section shall survive the expiration or other termination of this Lease.

#### 13. Fire and Other Casualty.

In the event that all or any improvements or fixtures within the Premises shall be totally or partially destroyed or damaged by fire or other insurable casualty, this Lease shall continue in full force and effect, and, subject to the applicable provisions of the Ground Lease, Tenant, at Tenant's sole cost and expense, may, but shall not be obligated to, rebuild or repair the same. Landlord and Tenant agree that the provisions of A.R.S. § 33-343 shall not apply to this Lease. In the event that, subject to the applicable provisions of the Ground Lease, Tenant elects to repair or rebuild the improvements, any such repair or rebuilding shall be performed at the sole cost and expense of Tenant. If there are insurance proceeds resulting from such damage or destruction, Tenant shall be entitled to such proceeds, whether or not Tenant rebuilds or repairs the improvements or fixtures, subject to the applicable provisions of the Ground Lease.

#### 14. Condemnation.

(a) Entire or Partial Condemnation. If the whole or any part of the Premises shall be taken or condemned by any competent authority for any public use or purposes during the term of the Lease, this Lease shall terminate with respect to the part of the Premises so taken, and, subject to the applicable provisions of the Ground Lease, Tenant reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or

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### *“Improvements Lease”*

damages based upon loss, damage or injury to its leasehold interest (as well as relocation and moving costs). In consideration of Tenant’s payment for all of the cost of construction of the improvements constituting the Premises, Landlord hereby assigns to Tenant all claims, awards and entitlements relating to the Premises arising from the exercise of the power of condemnation or eminent domain.

(b) Continuation of Lease. In the event of a taking of less than all of the Premises, this Lease shall continue in effect with respect to the portion of the Premises not so taken.

(c) Temporary Taking. If the temporary use of the whole or any part of the Premises or the appurtenances thereto shall be taken, the term of this Lease shall not be reduced or affected in any way. The entire award of such taking (whether paid by way of damages, rent, or otherwise) shall be payable to Tenant, subject to the applicable provisions of the Ground Lease and of any Leasehold Mortgage.

(d) Notice of Condemnation. In the event any action is filed to condemn the Premises or Tenant's leasehold estate or any part thereof by any public or quasi-public authority under the power of eminent domain or in the event that an action is filed to acquire the temporary use of the Premises or Tenant's leasehold estate or any part thereto, or in the event that action is threatened or any public or quasi-public authority communicates to Landlord or Tenant its desire to acquire the temporary use thereof, by a voluntary conveyance or transfer in lieu of condemnation, either Landlord or Tenant shall give prompt notice thereof to the other and to any Leasehold Mortgagee. Landlord, Tenant and each Leasehold Mortgagee shall each have the right, at its own cost and expense, to represent its respective interest in each proceeding, negotiation or settlement with respect to any taking or threatened taking. No agreement, settlement, conveyance or transfer to or with the condemning authority affecting Tenant's leasehold interest shall be made without the consent of Tenant and each Leasehold Mortgagee.

#### 15. Termination Option.

(a) Grant of Option. In the event changes in applicable law nullify, remove, or vitiate the economic benefit to Tenant provided by this Lease or if any person or entity succeeds to Tenant’s interest hereunder by foreclosure sale, trustee’s sale, or deed in lieu of foreclosure (collectively, “Foreclosure”), Tenant or Tenant’s successor by Foreclosure shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective sixty days after the date of the notice. Upon default under the Leasehold Mortgage, Tenant or Leasehold Mortgagee shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective sixty days after the date of the notice. Simultaneously with, and effective as of such termination, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant and Landlord shall comply with the obligations under Article 20.

(b) Leasehold Mortgagees and Ground Tenant. If there are any Leasehold Mortgagees as defined in Section 4(a), Tenant may not terminate, modify or waive its Option

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under this section without the approval of the Leasehold Mortgagees, and Landlord will not recognize or consent thereto without such approval.

16. Assignment; Subletting.

(a) Transfer by Tenant; Termination of Ground Lease. Tenant shall not assign this Lease and Tenant's leasehold interest, without the prior consent of Landlord, which shall not be unreasonably withheld or delayed; provided, however, that notwithstanding the foregoing, Tenant shall have the right to assign or transfer this Lease or Tenant's leasehold interest, to any entity without Landlord's consent so long as\*\*\*\*\*, its subsidiary or affiliate, or its successor by merger or consolidation shall be the principal occupant of the Premises. In the event Tenant seeks Landlord's consent to an assignment of this Lease of all or any part of the Premises and such consent is denied by Landlord, Tenant shall have the right to terminate this Lease in the manner provided in Article 15(a) above. Additionally, upon any termination of the Ground Lease, without necessity for any further action or consent by Tenant or Landlord hereunder, the then holder of the lessor's interest under the Ground Lease (the "Ground Lessor") thereupon shall be deemed to be the "Tenant" hereunder and the assignee of all of previous Tenant's interests and rights hereunder (but shall be responsible only for those obligations and liabilities hereunder that arise after the date of termination of the Ground Lease), unless Tenant buys the fee interest in the Land, thereby terminating the Ground Lease, in which case this Lease shall continue in effect as between Landlord and Tenant. Upon any termination of the Ground Lease where, pursuant to the foregoing, the Ground Lessor becomes the "Tenant" hereunder, and any provision contained in this Lease to the contrary notwithstanding, the Ground Lessor may, at any time thereafter terminate this Lease by giving written notice to that effect to Landlord (in which event the provisions of Article 20 below shall apply).

(b) Liability. Each assignee hereby assumes all of the obligations of the Tenant under the Lease (but not for liabilities or obligations arising prior to such assignment becoming effective). Each assignment shall automatically release the assignor from any personal liability in respect of any obligations or liabilities arising under the Lease from and after the date of assignment, and Landlord shall not seek recourse for any such liability against any assignor or its personal assets. Landlord agrees that performance by a subtenant or assignee of Tenant's obligations under this Lease shall satisfy Tenant's obligations hereunder and Landlord shall accept performance by any such subtenant.

17. Default Remedies; Protection of Leasehold Mortgagee and Subtenants.

(a) Default. The failure by Tenant to observe and perform any material provision of this Lease to be observed or performed by Tenant or a failure to pay the Tax when due, where such failure continues for one hundred eighty days after written notice thereof by Landlord to Tenant shall constitute a default and breach of this Lease by Tenant; provided, however, that if the nature of such default is such that the same cannot reasonably be cured within such one hundred eighty day period, Tenant shall not be deemed to be in default if Tenant shall within such period commence such cure and thereafter diligently prosecute the same to completion.

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(b) Remedies. In the event of any such material default or breach by Tenant, Landlord may at any time thereafter, by written notice to Tenant terminate this Lease, in which case Tenant shall immediately surrender possession of the Premises to Landlord. This section constitutes the provision required under A.R.S. §42-1931(2) that failure by the prime lessee to pay the Tax after notice and an opportunity to cure is an event of default that could result in divesting the prime lessee of any interest or right or occupancy of the government property improvement.

(c) Leasehold Mortgagee Default Protections. If any Leasehold Mortgagee shall give written notice to Landlord of its Leasehold Mortgage, together with the name and address of the Leasehold Mortgagee, then, notwithstanding anything to the contrary in this Lease, until the time, if any, that the Leasehold Mortgage shall be satisfied and released of record or the Leasehold Mortgagee shall give to Landlord written notice that said Leasehold Mortgage has been satisfied:

(i) No act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender, amend, or modify this Lease or Tenant's right to possession shall be binding upon or effective as against the Leasehold Mortgagee without its prior written consent.

(ii) If Landlord shall give any notice, demand, election or other communication required hereunder (hereafter collectively “Notices”) to Tenant hereunder, Landlord shall concurrently give a copy of each such Notice to the Leasehold Mortgagee at the address designated by the Leasehold Mortgagee. Such copies of Notices shall be sent by registered or certified mail, return receipt requested, and shall be deemed given seventy-two hours after the time such copy is deposited in a United States Post Office with postage charges prepaid, addressed to the Leasehold Mortgagee. No Notice given by Landlord to Tenant shall be binding upon or affect Tenant or the Leasehold Mortgagee unless a copy of the Notice shall be given to the Leasehold Mortgagee pursuant to this subsection. In the case of an assignment of the Leasehold Mortgage or change in address of the Leasehold Mortgagee, the assignee or Leasehold Mortgagee, by written notice to Landlord, may change the address to which such copies of Notices are to be sent.

(iii) The Leasehold Mortgagee shall have the right for a period of sixty days after the expiration of any grace period afforded Tenant to perform any term, covenant, or condition and to remedy any default by Tenant hereunder or such longer period as the Leasehold Mortgagee may reasonably require to affect a cure, and Landlord shall accept such performance with the same force and effect as if furnished by Tenant, and the Leasehold Mortgagee shall thereby and hereby be subrogated to the rights of Landlord. The Leasehold Mortgagee shall have the right to enter upon the Premises to give such performance.

(iv) In case of a default by Tenant in the performance or observance of any nonmonetary term, covenant or condition to be performed by it hereunder, if such

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default cannot practicably be cured by the Leasehold Mortgagee without taking possession of the Premises, in such Leasehold Mortgagee's reasonable opinion, or if such default is not susceptible of being cured by the Leasehold Mortgagee, then Landlord shall not serve a notice of lease termination pursuant to Section 17((b)), if and so long as:

(1) the Leasehold Mortgagee shall proceed diligently to obtain possession of the Premises as mortgagee (including possession by a receiver), and, upon obtaining such possession, shall proceed diligently to cure such defaults as are reasonably susceptible of cure (subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession); or

(2) the Leasehold Mortgagee shall institute foreclosure proceedings and diligently prosecute the same to completion (unless in the meantime it shall acquire Tenant's estate hereunder, either in its own name or through a nominee, by assignment in lieu of foreclosure and subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession).

The Leasehold Mortgagee shall not be required to obtain possession or to continue in possession as mortgagee of the Premises pursuant to Clause (1) above, or to continue to prosecute foreclosure proceedings pursuant to Clause (2) above, if and when such default shall be cured. If a Leasehold Mortgagee, its nominee, or a purchaser at a foreclosure sale shall acquire title to Tenant's leasehold estate hereunder, a default that is not reasonably susceptible to cure by the person succeeding to the leasehold interest shall no longer be deemed a default hereunder.

(v) If any Leasehold Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof by any process or injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Tenant, the times specified in subparagraphs (iv) (1) and (2) above, for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition.

(vi) No option of Tenant hereunder may be exercised, and no consent of Tenant allowed or required hereunder shall be effective without the prior written consent of any Leasehold Mortgagee.

(d) Protection of Subtenant. Landlord covenants that notwithstanding any default under or termination of this Lease or of Tenant's possessory rights, Landlord: (i) so long as a subtenant within the Premises complies with the terms and conditions of its sublease, shall not disturb the peaceful possession of the subtenant under its sublease, and in the event of a default by a subtenant, Landlord may only disturb the possession or other rights of the subtenant as provided in the tenant's sublease, (ii) shall recognize the continued existence of the sublease, (iii) shall accept the subtenant's attornment, as subtenant under the sublease, to Landlord, as

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landlord under the sublease, and (iv) shall be bound by the provisions of the sublease, including all options. Notwithstanding anything to the contrary in this Lease, no act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender or modify this Lease or Tenant's right to possession shall be binding upon or effective as against any subtenant without its prior written consent.

#### 18. New Lease.

(a) Right to Lease. Landlord agrees that, in the event of termination of this Lease for any reason (including but not limited to any default by Tenant), Landlord, if requested by any Leasehold Mortgagee, will enter into a new lease of the Premises with the most senior Leasehold Mortgagee requesting a new lease, which new lease shall commence as of the date of termination of this Lease and shall run for the remainder of the original term of this Lease, at the rent and upon the terms, covenants and conditions herein contained, provided:

(i) Such Leasehold Mortgagee shall make written request upon Landlord for the new lease within sixty days after the date such Leasehold Mortgagee receives written notice from Landlord that the Lease has been terminated;

(ii) Such Leasehold Mortgagee shall pay to Landlord at the time of the execution and delivery of the new lease any and all sums which would, at that time, be due and unpaid pursuant to this Lease but for its termination, and in addition thereto all reasonable expenses, including reasonable attorneys fees, which Landlord shall have incurred by reason of such termination;

(iii) Such Leasehold Mortgagee shall perform and observe all covenants in this Lease to be performed and observed by Tenant, and shall further remedy any other conditions which Tenant under the Lease was obligated to perform under its terms, to the extent the same are reasonably susceptible of being cured by the Leasehold Mortgagee; and

(iv) The Tenant under the new lease shall have the same right of occupancy to the buildings and improvements on the Premises as Tenant had under the Lease immediately prior to its termination.

Notwithstanding anything to the contrary expressed or implied in this Lease, any new lease made pursuant to this Section 18 shall have the same priority as this Lease with respect to any mortgage, deed of trust, or other lien, charge, or encumbrance on the fee of the Premises, and any sublease under this Lease shall be a sublease under the new Lease and shall not be deemed to have been terminated by their termination of this Lease.

(b) No Obligation. Nothing herein contained shall require any Leasehold Mortgagee to enter into a new lease pursuant to this Section 18 or to cure any default of Tenant referred to above.

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(c) Possession. If any Leasehold Mortgagee shall demand a new lease as provided in this Section 18, Landlord agrees, at the request of, on behalf of and at the expense of the Leasehold Mortgagee, upon a guaranty from it reasonably satisfactory to Landlord, to institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove the original Tenant from the Premises, but not any subtenants actually occupying the Premises or any part thereof.

(d) Grace Period. Unless and until Landlord has received notice from each Leasehold Mortgagee that the Leasehold Mortgagee elects not to demand a new lease as provided in this Section 18, or until the period therefor has expired, Landlord shall not cancel or agree to the termination or surrender of any existing subleases nor enter into any new leases or subleases with respect to the Premises without the prior written consent of each Leasehold Mortgagee.

(e) Effect of Transfer. Neither the foreclosure of any Leasehold Mortgage (whether by judicial proceedings or by virtue of any power of sale contained in the Leasehold Mortgage), nor any conveyance of the leasehold estate created by this Lease by Tenant to any Leasehold Mortgagee or its designee by an assignment or by a deed in lieu of foreclosure or other similar instrument shall require the consent of Landlord under, or constitute a default under, this Lease, and upon such foreclosure, sale or conveyance, Landlord shall recognize the purchaser or other transferee in connection therewith as the Tenant under this Lease.

#### 19. No Merger.

In no event shall the leasehold interest, estate or rights of Tenant hereunder, or of any Leasehold Mortgagee, merge with any interest, estate or rights of Landlord in or to the premises. Such leasehold interest, estate and rights of Tenant hereunder, and of any Leasehold Mortgagee, shall be deemed to be separate and distinct from Landlord's interest, estate and rights in or to the Premises, notwithstanding that any such interests, estates or rights shall at any time be held by or vested in the same person, corporation or other entity.

#### 20. Surrender, Reconveyance.

(a) Reconveyance Upon Termination or Expiration. On the last day of the term of this Lease or upon any termination of this Lease, whether under Article 15 above or otherwise, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant.

(b) Reconveyance Documents. Without limiting the foregoing, Landlord upon request shall execute and deliver: (i) a deed or bill of sale reconveying all of Landlord's right title and interest in the improvements to Tenant; (ii) a memorandum in recordable form reflecting the termination of this Lease; (iii) an assignment of Landlord's right, title and interest in and to all licenses, permits, guaranties and warranties relating to the ownership or operation of the Premises to which Landlord is a party and which are assignable by Landlord, and (iv) such other reasonable and customary documents as may be required by Tenant or its title insurer

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including, without limitation, FIRPTA and mechanic's lien affidavits, to confirm the termination of this Lease and the revesting of title to the Premises in Tenant.

(c) Title and Warranties. Notwithstanding anything to the contrary in this section, Landlord shall convey the Premises subject only to: (i) matters affecting title as of the date of this Lease, and (ii) matters created by or with the consent of Tenant. The Premises shall be conveyed “AS IS” without representation or warranty whatsoever. Upon any reconveyance, Landlord shall satisfy all liens and monetary encumbrances on the Premises created by Landlord.

(d) Expenses. All costs of title insurance, escrow fees, recording fees and other expenses of the reconveyance, except Landlord's own attorneys' fees and any commissions payable to any broker retained by Landlord, shall be paid by Tenant.

#### 21. Trade Fixtures, Machinery and Equipment.

Landlord agrees that all trade fixtures, machinery, equipment, furniture or other personal property of whatever kind and nature kept or installed on the Premises by Tenant or Tenant's subtenants may be removed by Tenant or Tenant's subtenants, or their agents and employees, in their discretion, at any time and from time to time during the entire term or upon the expiration of this Lease. Tenant agrees that in the event of damage to the Premises due to such removal it will repair or restore the same. Upon request of Tenant or Tenant's assignees or any subtenant, Landlord shall execute and deliver any consent or waiver forms submitted by any vendors, Landlords, chattel mortgagees or holders or owners of any trade fixtures, machinery, equipment, furniture or other personal property of any kind and description kept or installed on the Premises by any subtenant setting forth the fact that Landlord waives, in favor of such vendor, Landlord, chattel mortgagee or any holder or owner, any lien, claim, interest or other right therein superior to that of such vendor, Landlord, chattel mortgagee, owner or holder. Landlord shall further acknowledge that property covered by such consent or waiver forms is personal property and is not to become a part of the realty no matter how affixed thereto and that such property may be removed from the Premises by the vendor, Landlord, chattel mortgagee, owner or holder at any time upon default by the Tenant or the subtenant in the terms of such chattel mortgage or other similar documents, free and clear of any claim or lien of Landlord.

#### 22. Estoppel Certificate.

(a) Landlord shall at any time and from time to time upon not less than ten (10) days' prior written notice from Tenant or any Leasehold Mortgagee execute, acknowledge and deliver to Tenant or the Leasehold Mortgagee a statement in writing (i) certifying that this Lease is unmodified and in full force and effect (or if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the dates to which the rental and other charges are paid in advance, if any; (ii) acknowledging that there are not, to Landlord's knowledge, any uncured defaults on the part of Tenant hereunder, or specifying such defaults if they are claimed; and (iii) certifying such other matters relating to this Lease as Tenant or the Leasehold Mortgagee may reasonably request. Any such statement may

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be relied upon by any prospective purchaser or encumbrancer of all or any portion of the leasehold estate and/or the improvements.

(b) Landlord's failure to deliver a statement within the time prescribed shall be conclusive upon Landlord (i) that this Lease is in full force and effect, without modification except as may be represented by Tenant; and (ii) that there are no uncured defaults in Tenant's performance.

#### 23. General Provisions.

(a) Attorneys' Fees. In the event of any suit instituted by either party against the other in any way connected with this Lease or for the recovery of possession of the Premises, the parties respectively agree that the successful party to any such action shall recover from the other party a reasonable sum for its attorneys' fees and costs in connection with said suit, such attorneys' fees and costs to be fixed by the court.

(b) Transfer or Encumbrance of Landlord's Interest. Landlord may not transfer or convey its interest in this Lease or in the Premises during the term of this Lease without the prior written consent of Tenant, which consent may be given or withheld in Tenant's sole and absolute discretion. In the event of permitted sale or conveyance by Landlord of Landlord's interest in the Premises, other than a transfer for security purposes only, Landlord shall be relieved, from and after the date specified in such notice of transfer, of all obligations and liabilities accruing thereafter on the part of the Landlord, provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest, shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee provided all of Landlord's obligations hereunder are assumed in writing by the transferee. Landlord shall not grant or create mortgages, deeds of trust or other encumbrances of any kind against the Premises or rights of Landlord hereunder, and, without limiting the generality of the foregoing, Landlord shall have no right or power to grant or create mortgages, deeds of trust or other encumbrances superior to this Lease without the consent of Tenant in its sole and absolute discretion. Any mortgage, deed of trust or other encumbrance granted or created by Landlord shall be subject to this Lease, all subleases and all their respective provisions including, without limitations, the options under this Lease and any subleases with respect to the purchase of the Premises.

#### (c) Captions; Attachments; Defined Terms.

(i) The captions of the sections of the Lease are for convenience only and shall not be deemed to be relevant in resolving any question of interpretation or construction of any section of this Lease.

(ii) Exhibits attached hereto, and addendums and schedules initialed by the parties, are deemed by attachment to constitute part of this Lease and are incorporated herein.

## *Exhibit E*

### *“Improvements Lease”*

(iii) The words “Landlord” and “Tenant”, as used herein, shall include the plural as well as the singular. The obligations contained in this Lease to be performed by Tenant and Landlord shall be binding on Tenant's and Landlord's successors and assigns only during their respective periods of ownership.

(d) Entire Agreement. This Lease along with any addenda, exhibits and attachments hereto constitutes the entire agreement between Landlord and Tenant relative to the Premises and this Lease and the addenda, exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by the party to be bound thereby. Landlord and Tenant agree hereby that all prior or contemporaneous oral agreements between and among themselves and their agents or representatives relative to the leasing of the Premises are merged in or revoked by this Lease, except as set forth in any addenda hereto.

(e) Severability. If any term or provision of this Lease shall, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law.

(f) Binding Effect; Choice of Law. The parties hereto agree that all the provisions hereof are to be construed as both covenants and conditions as though the words importing such covenants and conditions were used in each separate paragraph hereof. All of the provisions hereof shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Arizona.

(g) Memorandum of Improvements Lease. The parties shall, concurrently with the execution of this Lease, complete, execute, acknowledge and record (at Tenant's expense) a Memorandum of Improvements lease, a form of which is attached hereto as Exhibit B.

(h) Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered or if mailed by United States certified or registered mail, return receipt requested, postage prepaid, as follows:

If to Landlord:

City of Tempe  
City Manager's Office  
31 E; 5th Street  
Tempe, Arizona 85281

With a copy to:

City of Tempe  
City Attorney's Office

***Exhibit E***  
***“Improvements Lease”***

31 East 5th Street  
Tempe, Arizona 85281

If to Tenant:

With a copy to:

or at such other place or to such other persons as any party shall from time to time notify the other in writing as provided herein. The date of service of any communication hereunder shall be the date of personal delivery or seventy-two hours after the postmark on the certified or registered mail, as the case may be.

(i) Waiver. No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver or the breach of any covenant, term or condition shall not be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant, term or condition.

(j) Negation of partnership. Landlord shall not become or be deemed a partner or a joint venturer with Tenant by reason of the provisions of this Lease.

(k) Hold Over. If Tenant shall continue to occupy the Leased Premises after the expiration of the term hereof without the consent of Landlord, such tenancy shall be from month to month on the same terms and conditions as are set forth herein.

(l) Leasehold Mortgagee Further Assurances. Landlord and Tenant shall cooperate in including in this Lease by suitable amendment from time to time any provision which may be reasonably requested by any proposed Leasehold Mortgagee for the purpose of implementing the mortgagee-protection provisions contained in this Lease, of allowing that Leasehold Mortgagee reasonable means to protect or preserve the lien of its Leasehold Mortgage upon the occurrence of a default under the terms of this Lease and of confirming the elimination of the ability of Tenant to modify, terminate or waive this Lease or any of its provisions without the prior written approval of the Leasehold Mortgagee. Landlord and Tenant each agree to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effect any such amendment; provided, however, that any such amendment shall not in any way affect the term or rent under this Lease nor otherwise in any material respect adversely affect any rights of Landlord under this Lease.

(m) Ground Lessor Protection. Any provision contained in this Lease to the contrary notwithstanding, upon any expiration or termination of this Lease (including a termination pursuant to Section 17(b) above) where: (i) Tenant has not theretofore acquired fee title to the Premises from the Ground Lessor; and (ii) a new lease is not entered into with a Leasehold Mortgagee pursuant to Section 18 above, and (iii) the Ground Lease has terminated,

***Exhibit E***  
***“Improvements Lease”***

then Landlord shall, at any time upon request of the Ground Lessor convey title to the Premises (including all improvements constituting a part thereof) to the Ground Lessor for the consideration of Ten Dollars. Such conveyance shall be made in the same manner set forth in Section 20(b)-(d) above except that the term “Tenant” as used in such Section 20(b)-(d) shall be deemed to be a reference to the Ground Lessor. Without the prior written consent of the Ground Lessor (which shall not be unreasonably withheld), this Lease shall not be amended or modified in any manner that will affect the rights or benefits hereunder of the Ground Lessor. Any purported amendment or modification hereof in violation of the foregoing shall be void. The Ground Lessor shall be deemed to be a third party beneficiary of the foregoing provisions and any other provisions hereof that create rights or benefits in favor of the Ground Lessor. Any rights or benefits under this Lease in favor of the Ground Lessor or any Leasehold Mortgagee shall survive any expiration or termination (including a termination pursuant to Section 17(b) above) of this Lease and may be enforced by the Ground Lessor or Leasehold Mortgagee, as the case may be, notwithstanding such expiration or termination.

24. Nonrecourse Landlord’s sole recourse for collection or enforcement of any judgment as against Tenant shall be solely against the leasehold interest under this Lease and the Buildings and other improvements on the Premises and may not be enforced against or collected out of any other assets of Tenant nor of its beneficiaries, joint venturers, owners, partners, shareholders, members or other related parties.

IN WITNESS WHEREOF, the parties hereto have executed this Lease on the date and year first written above.

ATTEST:

By: \_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

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

LANDLORD:

**CITY OF TEMPE**, a municipal corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

TENANT:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_