# Staff Summary Report

Tempe

**Council Meeting Date:** **5/1/08** **Agenda Item Number:** _____

**SUBJECT:** This is the **introduction and first public hearing** of an ordinance authorizing the Mayor to execute a Development and Disposition Agreement between the City of Tempe and Arizona Boathouse and Welcome Center LLC. **The second public hearing will be held on May, 15 2008.**

**DOCUMENT NAME:** 20080501cdnc02 **COMMUNITY DEVELOPMENT ADMIN. (0406)** Ordinance No. 2008.22

**SUPPORTING DOCS:** Boathouse Development and Disposition Agreement

**COMMENTS:** Request approval of Ordinance No. 2008.22 authorizing the Mayor to execute a Development and Disposition Agreement between the City of Tempe and Arizona Boathouse and Welcome Center LLC

**PREPARED BY:** Neil Calfee, Deputy Community Development Manager (350-2912)

**REVIEWED BY:** Chris Salomone, Community Development Manager (350-8294)

**LEGAL REVIEW BY:** Cynthia McCoy, Assistant City Attorney (350-2187)

**FISCAL NOTE:** All cost associated with the construction of the Boathouse and Welcome Center will be paid by Arizona Boathouse and Welcome Center LLC.

**RECOMMENDATION:** Approval of Ordinance 2008.22 as presented.

**ADDITIONAL INFO:** This agreement arises out of an RFP issued by the City on May 18, 2007, and calls for Arizona Boathouse and Welcome Center LLC to raise the needed funding and then construct a Boathouse and Welcome Center on a City-owned site west of the Town Lake Marina.

**ORDINANCE NO. 2008.22**

**AN ORDINANCE BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE A DEVELOPMENT AND DISPOSITION AGREEMENT BETWEEN THE CITY OF TEMPE, AND ARIZONA BOATHOUSE AND WELCOME CENTER LLC**

**WHEREAS,** the City issued a Request for Proposals for the lease of City-owned property and construction of a welcome center/boathouse on May 18, 2007 (the "**RFP**") for the City-owned real property depicted on ***Exhibit "A"*** attached hereto, containing approximately seven tenths of an acre of land (the "Property").

**WHEREAS,** the RFP required the Property be developed as a welcome center/boathouse. Developer responded to the RFP and the City selected Developer pursuant to the RFP for exclusive negotiation rights with respect to the development of the Property.

**WHEREAS,** on September 6, 2007 the City Council approved Resolution No. 2003.49 selecting Arizona Boathouse and Welcome Center LLC as prime developer of the Property; and

**WHEREAS,** the City and the Developer hereby acknowledge and agree that significant benefits will accrue to the City from the development of the Property by Developer, including, without limitation, the creation of a welcome center and boathouse that will serve as a focal point for water-based recreation on Tempe Town Lake, as well as other tangible and intangible, direct and indirect, benefits to the City and its citizenry; and

**WHEREAS**, the City desires to enter into a development and disposition agreement with the Developer to develop the Property; and

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA,** as follows:

Section 1: That the Mayor is authorized to execute the Development and Disposition Agreement, the documents referenced therein (including, without limitation, the Ground Lease and Memorandum of Ground Lease), copies of which are on file in the City Clerk's office.

Section 2: The Mayor is hereby authorized to execute any other documents that may be necessary to carry out the provisions of this Ordinance or the intent of the Development and Disposition Agreement.

Section 3: Pursuant to City Charter, Section 2.12, ordinances are effective thirty (30) days after adoption.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this _____ day of _____2008.

_____
Mayor

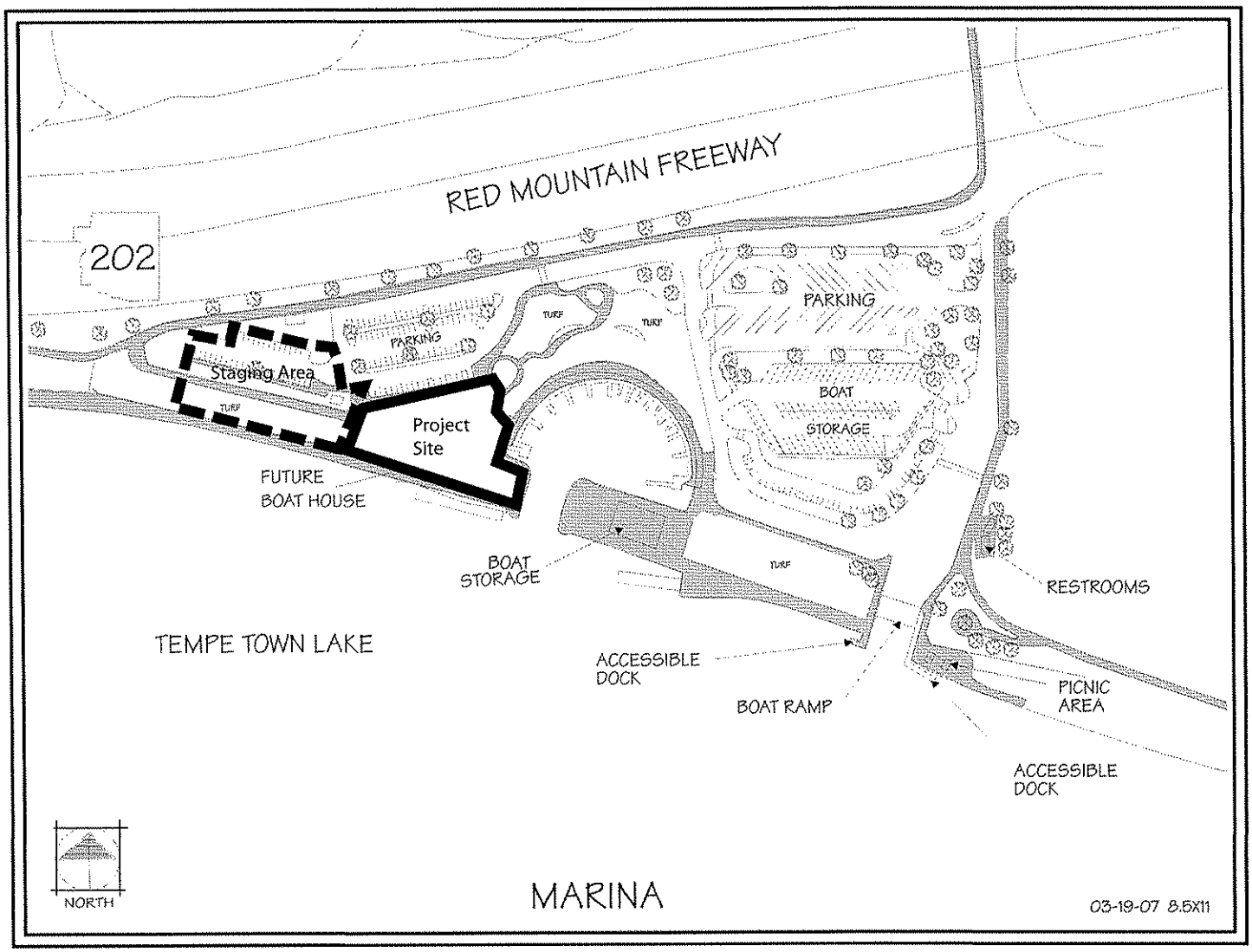
ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

# Exhibit A


RED MOUNTAIN FREEWAY
202
PARKING
TURF
TURF
PARKING
Staging Area
TURF
Project Site
FUTURE BOAT HOUSE
BOAT STORAGE
TURF
BOAT STORAGE
RESTROOMS
TEMPE TOWN LAKE
ACCESSIBLE DOCK
BOAT RAMP
PICNIC AREA
ACCESSIBLE DOCK
NORTH
MARINA
03-19-07 8.5X11

When recorded, return to:

City of Tempe Basket

# DEVELOPMENT AND DISPOSITION AGREEMENT

THIS DEVELOPMENT AND DISPOSITION AGREEMENT (the "**Agreement**") is made and entered into as of the ____ day of _____, 2007, by and among the CITY OF TEMPE, an Arizona municipal corporation (the "**City**"), and Arizona Boathouse and Welcome Center, LLC, an Arizona limited liability company (the "**Developer**").

## RECITALS

A. The City issued a Request for Proposals for the lease of City-owned property and construction of a welcome center/boathouse on May 18, 2007 (the "**RFP**") for the City-owned real property depicted on ***Exhibit "A"*** attached hereto, containing approximately seven tenths of an acre of land (the "Property").

B. The RFP required the Property be developed as a welcome center/boathouse. Developer responded to the RFP and the City selected Developer pursuant to the RFP for exclusive negotiation rights with respect to the development of the Property.

C. The City and the Developer hereby acknowledge and agree that significant benefits will accrue to the City from the development of the Property by Developer, including, without limitation, the creation of a welcome center and boathouse that will serve as a focal point for water-based recreation on Tempe Town Lake, as well as other tangible and intangible, direct and indirect, benefits to the City and its citizenry. This Agreement is a development agreement pursuant to the provisions of A.R.S. §900.05.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto state, confirm and agree as follows:

## ARTICLE I
## DEFINITIONS

The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

**1.1** **"Certificate of Completion"** means a document in the form of Schedule 1.1 hereto issued by the Community Development Department certifying that the construction of the Improvements have been substantially completed.

**1.2** "**City**" means the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

**1.3** **"Improvements"** means the Improvements, generally consisting of the furnishings and improvements described in the RFP and Developer's response to the RFP, as reiterated in Section 4.4 hereof and all other improvements to be constructed by Developer on the 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.

**1.4** "**Commencement Date**" means the date on which the term of the Ground Lease commences.

**1.5** "**Developer**" means Arizona Boathouse and Welcome Center, LLC, an Arizona limited liability company.

**1.6** "**Development Plan**" means the plan for development of the Property, as set forth in Developer's response to the RFP, as refined in accordance with this Agreement.

**1.7** "**FAA**" means the Federal Aviation Administration.

**1.8** "**Ground Lease**" means a lease in substantially the form of ***Exhibit "B"*** hereto, pursuant to which City will lease the Property to Developer.

**1.9** "**Property**" means the real property legally depicted on ***Exhibit A"*** attached hereto and incorporated herein by this reference.

**1.10** "**Schedule of Performance**" means the schedule of performance set forth in ***Exhibit "D"*** attached hereto and incorporated herein by this reference.

## ARTICLE II
## DEVELOPMENT PLAN

**2.1** **Duration of Development Agreement.** The term of this Agreement shall commence on the date it is executed and shall continue until the twentieth ($20^{th}$) anniversary of the date on which a Certificate of Completion is issued for the Improvements, unless sooner terminated in accordance with Sections 5.1 through 5.4 and 6.1.

**2.2** **Development Plan.**

2.2.1 Developer shall at its sole cost and expense, develop the Property in general conformance with the Development Plan and the Schedule of Performance. In general, the Property is to be designed, developed and furnished to serve as a welcome center

and boathouse that will support operational, recreational, educational and special event programs and activities at Tempe Town Lake, to include a public lobby or reception area, rowing/boating storage, work areas, administrative offices, fitness/training center, locker and shower rooms, meeting and conference rooms, kitchen, lounge, potential restaurant space, covered, shaded decks and aprons, docks, parking and landscaping. The Development Plan depicts the proposed location of the buildings, structures and other improvements, and a permissible range in the relative height, bulk, and size of those buildings and structures. In preparing the Development Plan, Developer shall work closely with the City Architect, the Parks and Recreation Manager and the Rio Salado Manager to design a facility that meets the needs of public users and is aesthetically and architecturally compatible with other public architecture along Tempe Town Lake, incorporates sustainable building principles, and meets the desired recreation and community programming for the facility and Town Lake. Developer intends to seek contributions and donations from third parties to defray construction costs. Developer shall comply with all applicable laws pertaining to its activities, including without limitation those applicable to charitable solicitations and accounting.

2.2.2 The City shall have the right to adopt any reasonable rules and regulations deemed appropriate by the City from time to time governing use of the Improvements, provided, however, that all such rules and regulations and the City's operation of the Improvements shall not discriminate between residents and non-residents of the City or between rowing programs sponsored by or located in the City and rowing programs not sponsored by or located in the City. All persons and organizations having boat storage in pre-existing boat storage areas operated by the City shall be offered comparable boat storage space in the Improvements. The City shall maintain a public list of those users waiting for a storage location within the Improvements. This list shall also show the order in which the individuals or rowing programs will be called upon as spaces become available. Boat storage will be granted on a first-come first-serve basis for each boat type without discrimination between residents and non-residents of the City or between rowing programs sponsored by or located in the City and rowing programs not sponsored by or located in the City.

**2.3** **PAD**. City acknowledges that Developer will not be required to prepare or submit a PAD for the Property.

**2.4** **City Approvals**. The City hereby acknowledges and agrees that, in connection with the development of the Property, the City will use its good faith efforts to timely review and respond to any requests for approvals of site plans, infrastructure plans, design plans and building plans, and the City further agrees that no unusual or extraordinary plan or review requirements, conditions or stipulations will be imposed on Developer in connection with the Development of the Property and construction of the Improvements. Among other things, development will require Development Review, with particular emphasis on the creation of a design of visual and functional architectural significance that must withstand possible flooding; Engineering Review to assess on-site retention, water and sewer and storm drainage connections, and traffic flow associated with development of the Property.

**2.5 Third Party Reviews and Approvals.** City and Developer acknowledge that the Property is located within close proximity to active runways at Phoenix Sky Harbor International Airport, which introduces noise impacts as well as potential impacts on navigational aids, and a required development plan approval process through the FAA. Such plan approval process will consider factors including physical constructions and the potential for wildlife hazards to aviation. The development of the Property also will require approval of the Maricopa County Flood Control District (the "MCFCD"). Developer is solely responsible for obtaining any necessary approvals from the FAA, MCFCD and other appropriate federal agencies. Developer acknowledges that receipt of such approvals is a condition precedent to the commencement of the term of the Ground Lease; however, the City will cooperate in good faith with the Developer to obtain all requisite consents.

**2.6 Operating Cost Estimates.** . To assist City in planning for the future expenses, during the planning process, Developer shall assist City with the preparation of operating cost estimates, including capital replacements. City will use these estimates to refine the programmatic elements of the Project and allow for their incorporation into the design of the Improvements.

**2.7 Non-Applicability of Procurement Rules and Regulations.** City and Developer acknowledge their mutual understanding that Developer's construction of the Improvements will not be subject to state and/or local statutes or ordinances governing expenditures of public monies.

**2.8 Acknowledgment of Affiliate Construction.** City acknowledges that Developer intends to enter into a construction management or other contractor agreement and possibly other agreements with an affiliate of Developer.

## ARTICLE III
## EXECUTION OF LEASE

**3.1. Ground Lease.** Developer shall acquire the right to develop and use the Property pursuant to the Ground Lease. The Ground Lease shall be executed concurrently with this Agreement, but the term of the Ground Lease shall not commence until the Commencement Date, and the Developer shall have no right to possess or occupy the Property unless and until the Commencement Date occurs. The Commencement Date shall be the date : (a) the City approves the construction drawings for the Improvements, (b) City acknowledges receipt of final approval of construction drawings by the FAA and MCFCD, and (c) City acknowledges receipt of reasonably satisfactory evidence that sufficient funds are available to Developer to complete construction of the Improvements. City acknowledges that funds may be made available to Developer by donors and/or by lenders using donor commitments as collateral. City also acknowledges that neither Developer nor any member, manager or affiliate of Developer has any obligation to contribute or lend any money or property to construction of the Improvements. City acknowledges that Developer shall have no liability hereunder if Developer is unable to

raise sufficient funds for planning and construction of the Improvements. City shall lease the Property to Developer pursuant to the Ground Lease subject to the terms and conditions hereof and all liens and encumbrances of record. City and Developer shall execute and record in the Official Records of Maricopa County, Arizona, a memorandum of lease in substantially the form of Schedule 3.1 hereto.

**3.2** **Legal Description**. The Property consists of a large parcel of land owned by the City, which land has never been subdivided and for which no legal description presently exists. The parties also have not agreed on the exact location within the Property on which the Improvements will be constructed. Once agreement is reached on the location of the Improvements, but in any event, prior to the Commencement Date, City will cause the Property to be surveyed, and a legal description of that portion of the Property on which the Improvements are to be located, to be prepared. Once prepared, the legal description will replace the drawing of the Property attached hereto as Exhibit A and the legal description of the leased premises attached to the Ground Lease. City and Developer will then execute an amendment of the memorandum of lease to state the correct legal description. The parties acknowledge that the location of the Improvements cannot then be altered without the adoption of an amendment of the Ground Lease, which must be approved by an ordinance adopted by the City Council.

**3.3** **Condition of Property.** The City makes no warranty as to the condition of the Property, which is being leased to Developer in its "As Is" condition. By its lease of the Property, Developer shall not be deemed to have accepted any existing adverse environmental conditions that presently affect the Property, and if Developer encounters any environmental conditions that require testing, reporting, remediation or other action, whether or not such conditions preclude development of the Property in accordance with the Development Plan, (a) Developer shall have the right to terminate this Agreement and the Ground Lease, (b) Developer will notify the City immediately (and in any event within 48 hours after discovery) of said pre-existing environmental conditions found during development, (c) Developer and City will work in good faith to find an amicable solution and (d) City will indemnify, defend and hold Developer harmless from any claims, liabilities, obligations or damages arising from the existence of such pre-existing conditions to the extent not caused or exacerbated by Developer or its agents.

## ARTICLE IV
## SCHEDULE OF PERFORMANCE; COMPLETION OF IMPROVEMENTS; EXECUTION OF CITY LEASE

**4.1** **Schedule of Performance.** The City and the Developer intend that the planning and development of the Property shall be achieved pursuant to the Schedule of Performance attached hereto as ***Exhibit "C"***. From time to time following the date of this Agreement, however, the Developer and the City shall, by mutual written agreement, refine and revise the Schedule of Performance as may be necessary to accommodate any

unforeseen factors, events or unexpected occurrences which may necessitate such refinement or revision. All actions required to be taken by the City and the Developer pursuant to the terms of this Agreement shall be taken in accordance with the Schedule of Performance in existence at the time when such performance is required. The Developer and the City shall each use their good faith efforts to ensure that development of the Property occurs in accordance with the Schedule of Performance.

**4.2 Excused Delays in Performance as a Result of Force Majeure**. In addition to any specific provisions of this Agreement, the performance by either party hereunder shall not be deemed to be in default where there is a delay in performance caused by or resulting from war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, casualties, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargos, lack of transportation, governmental restrictions or priority, unusually severe weather, inability (when the party required to perform is faultless) of any contractor, subcontractor or supplier to perform acts for such party, or acts or the failure to act of any public or governmental agent or entity, litigation relating to the Property initiated by a third party other than Developer or the City (and where the party claiming the executed delay is without fault in connection with such litigation) or any other causes beyond the control or without the fault of the party claiming an extension of time to perform (a "*force majeure*"). In the event that any party to this Agreement is unable or fails to perform due to an event constituting a *force majeure* as provided above, and such excused delay 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 also be extended for a period of time equal to the period of the delay plus a reasonable start-up period. Any extension of time resulting from a *force majeure* shall only be for the period of the *force majeure*.

**4.3 Off-Site Improvements; Access; Easements.** Developer shall be responsible for construction and installation of any off-site improvements required for development of the Property in accordance with the Development Plan. Prior to the Commencement Date, City shall provide Developer with reasonable access to the Property. From time to time, as reasonably requested by Developer, City shall grant Developer temporary easements or license to use City property for construction staging in such locations and for such times as are mutually acceptable to City and Developer.

**4.4 Completion of Improvements; Execution of City Lease.** At a minimum, the Improvements shall contain those elements identified in the RFP and Developer's response to the RFP. Developer shall have no right to use any of the Improvements or commit to any third party that any of the Improvements will be available to such third party after expiration of the Ground Lease, except on the same terms that such facilities are available to the general public under the rules referenced in Section 2.2.2.

## ARTICLE V
## DEFAULT; REMEDIES

**5.1** **Default**. It shall be a default hereunder if either party fails to perform any of its obligations. Such default may be cured within thirty (30) days after receipt of written notice from the non-defaulting party specifying in reasonable detail the nature of the failure.

**5.2** **Dispute Resolution**. If the parties cannot resolve any dispute that arises out of this agreement between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by Developer and the City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) 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.

**5.3** **Developer's Remedies**. If the City is in default under this Agreement and the parties do not resolve the City's default pursuant to the nonbinding mediation described in ***Section 5.2*** Developer shall have the right to terminate this agreement upon written notice to the City. The Developer shall have the right to pursue all other legal and equitable remedies which the Developer may have at law or in equity, including, without limitation, the right to seek specific performance, the right to seek and obtain damages and the right to self-help.

**5.4** **City's Remedies**. If the Developer is in default under this Agreement and the parties do not resolve the Developer's default pursuant to the nonbinding mediation described in Section 5.2, then the City shall have the right to terminate this Agreement immediately upon written notice to Developer. Notwithstanding any other provision of this Agreement to the contrary, the City's sole and exclusive remedy for a default by Developer under this Agreement shall be termination of this Agreement and/or termination of the Ground Lease and/or the City Lease.

**5.5** **Return of Contributions**. If this Agreement is terminated prior to commencement of construction of the Improvements, unless the City requests otherwise within ten (10) business days after receipt of Developer's termination notice, Developer shall return any contributions it has received to the persons who made such contributions. If this Agreement is terminated after construction of the Improvements has commenced, Developer shall surrender all contributions or donations to City together with all books and records pertaining to such contributions and donations and the expenditure thereof. If this Agreement is terminated, Developer shall assign to City all reports, studies, and tests performed on Developer's behalf with regard to the Property, including without limitation all correspondence, reports, surveys, studies, documents, approvals, drawings, plats, plans, specifications, filings or similar writings pertaining to the Property or the development

thereof (the "Reports"), including but not limited to any Reports pertaining to drainage, soil, flood, hazardous or toxic substance or pollutants, archaeological or environmental conditions, or power or transmission lines on or adjacent to the Property, as well as all topographical surveys, "as-built" drawings, engineering drawings, plans and specifications for utilities or roadways, and approvals received from any governmental agency, and City shall be entitled to use them without any obligation or liability to Developer. Developer shall execute and deliver to City such documents and instruments, including bills of sale and assignments, as are necessary to fully vest title to the Reports in City.

## ARTICLE VI
## TERMINATION

**6.1 Termination of Development Rights.** If City terminates this Agreement as provided in Article V, Developer shall have no further rights to develop the Property pursuant to this Development Agreement or the Ground Lease.

## ARTICLE VII
## CONFLICT OF INTEREST; REPRESENTATIVES NOT INDIVIDUALLY LIABLE

**7.1 Conflict of Interest.** Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested.

**7.2 No Personal Liability.** No member, official or employee of the City shall be personally liable to Developer, or any successor or assignee, (a) in the event of any default or breach by the City, (b) for any amount which may become due to the Developer or its successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

No member, manager or employee of Developer shall be personally liable to City, or any successor or assignee, (a) in the event of any default or breach of this Agreement by the Developer, (b) for any amount which may become due to the City or its successor or assign, or (c) pursuant to any obligation of the Developer under the terms of this Agreement.

**7.3 Liability and Indemnification.** The Developer shall indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense

arising, directly or indirectly, in whole or in part, out of the performance of this Agreement by the Developer.

## ARTICLE VIII
## NOTICES

All Notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by hand delivery, overnight delivery service, or registered or certified mail, return receipt requested, addressed as follows:

| | |
|---|---|
| To Developer: | Arizona Boathouse and Welcome Center, LLC<br>c/o Chanen Construction<br>3300 N. Third Avenue<br>Phoenix, Arizona 85013<br>Attn: Steven R. Chanen |
| With a copy to: | Brier, Irish, Hubbard & Erhart, PLC<br>2400 East Arizona Biltmore Circle, Suite 1300<br>Phoenix, Arizona 85016<br>Attn: Jeffrey Erhart |
| To the City: | City Manager<br>City of Tempe<br>31 East Fifth Street<br>Tempe, Arizona 85281 |
| With a copy to: | City Attorney<br>City of Tempe<br>21 East Sixth Street, Suite 201<br>Tempe, Arizona 85281 |

Either party may designate any other address for this purpose by written notice to the other party in the manner described herein.

## ARTICLE IX
## GENERAL PROVISIONS

**9.1** **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 Property as contemplated by this Agreement. To further the commitment of the parties to cooperate in the implementation of this Agreement, the City and the

Developer shall each designate and appoint a representative to act as liaison between the City and its various departments and the Developer. The representatives shall be available at all reasonable times to discuss and review the performance of the parties to this Agreement and the progress of the development.

**9.2** **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona.

**9.3** **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.

**9.4** **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.

**9.5** **Attorneys' Fees**. In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

**9.6** **Severability**. In the event that 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, provided the intent of the parties is not materially vitiated thereby.

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

**9.8** **Entire Agreement**. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

**9.9** **Recordation of Agreement**. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

**9.10** **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 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 amendment or modification of this Agreement.

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and the Developer has executed and sealed the same on or as of the day and year first above written.

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

***"CITY"***

THE CITY OF TEMPE, an Arizona municipal corporation

By_____
Hugh Hallman, Mayor

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared Hugh L. Hallman, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation, whom I know personally to be the person whose name is subscribed to this instrument, 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

***"DEVELOPER"***

Arizona Boathouse and Welcome Center, LLC,
an Arizona limited liability company

By_____
Name_____
Title_____

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared _____ who acknowledged him/herself to be the _____ of Arizona Boathouse and Welcome Center, LLC, an Arizona limited liability company, whom I know personally/whose identity was proven to me on the oath of _____, a credible witness by me duly sworn/whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument/whose identity I verified on the basis of his/her _____, and s/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

LIST OF EXHIBITS AND SCHEDULES

| | | |
|---|---|---|
| ***Exhibit "A"*** | - | Location Map |
| ***Exhibit "B"*** | - | Ground Lease |
| ***Exhibit "C"*** | - | Schedule of Performance |

| | | |
|---|---|---|
| Schedule 1.1 | - | Certificate of Completion |
| Schedule 3.2 | - | Memorandum of Ground Lease |

**Exhibit "A"**
Location Map

**Exhibit "B"**
Ground Lease

# GROUND LEASE AND AGREEMENT FOR CONSTRUCTION OF IMPROVEMENTS

This Ground Lease and Agreement for Construction of Improvements is entered this _____ of _____, 2008, between the City of Tempe ("Landlord" or "City"), a municipal corporation, and Arizona Boathouse and Welcome Center, LLC, an Arizona limited liability company ("Tenant").

## RECITALS

A. Landlord owns that parcel of land described in ***Exhibit "A"*** hereto, together with all rights and privileges appurtenant thereto and all future additions thereto or alterations thereof (collectively, the "Leased Premises").

B. Landlord and Tenant are parties to that certain Development and Disposition Agreement [Ordinance No. ____] dated _____, 2008, and recorded as Instrument No. 2008-_____in the Official Records of Maricopa County, Arizona (the "Development Agreement"), pursuant to which, subject to the satisfaction of the conditions described therein, the Landlord agreed to lease to Tenant, and the Tenant agreed to lease from Landlord, the Leased Premises.

C. The Premises are "Government Property Improvements" under A.R.S. §42-6201(2), Landlord is a "Government Lessor" under A.R.S. §42-6201(1), and Tenant is a "Prime Lessee" under A.R.S. §42-6201(4).

## AGREEMENT

NOW THEREFORE, the parties hereby agree as follows:

1. CONSTRUCTION OF BOATHOUSE FACILITIES.

A. Plans. Tenant shall diligently undertake to develop plans and specifications ("Plans") for the construction of the Improvements.

B. Construction. Tenant shall, at its own expense, commence and complete construction of the Improvements described in the Plans. Commencement of construction shall mean the obtaining of required and necessary permits from the City, and the actual on-site continuous construction of the Improvements. If not previously provided, prior to commencement of construction, Tenant shall furnish to Landlord reasonably satisfactory evidence that Tenant has available sufficient funds to complete the construction.

All construction shall be performed pursuant to, and consistent with, all applicable federal, state and local laws and regulation. In addition to any other access rights granted to Landlord in this Lease, Landlord shall have the right to enter the Leased Premises during construction to verify compliance with all applicable laws and the provisions of this Lease. Tenant shall provide security for the construction site at its own expense, and shall be responsible for any vandalism, theft or criminal damage during construction. Subject to delays resulting from *force majeure* (as described in the Development Agreement), Tenant agrees to use its best efforts to complete construction within twenty-four (24)_months after commencement, unless Landlord consents to an extension of time, which consent shall not be withheld unreasonably so long as Tenant has commenced and is diligently pursuing completion of construction.

2. LEASED PREMISES.

The Leased Premises consist of the real property described on Exhibit A attached hereto and incorporated herein by reference, and references herein to the Leased Premises shall include the Improvements and all improvements to the real property constructed pursuant to this Lease, whether or not Landlord has obtained title to the Improvements and other improvements.

As stated in Section 4.3 of the Development Agreement, Landlord, in its capacity as the owner of property surrounding the Leased Premises, shall from time to time, as reasonably requested by Tenant, grant Tenant temporary easements or licenses to use Landlord's adjacent property for construction staging in such locations and for such times as are mutually acceptable to Landlord and Tenant.

3. TERM.

The term of this Lease shall be for a period commencing on the Commencement Date (as defined in the Development Agreement) and continuing until the date City issues the Certificate of Completion (as defined in the Development Agreement).

4. RENT.

Tenant shall pay to Landlord as rent for the Leased Premises the sum of One Dollar ($1.00) per year, payable in full in advance upon execution of this Lease.

5. USE OF PREMISES.

Tenant shall use the Leased Premises only for the purposes of (a) constructing and furnishing the Improvements and construction staging, and (b) holding fundraising activities at the Leased Premises during the Lease term in accordance with and to the extent permitted by applicable laws, rules and regulations (including without limitation those pertaining to special event permits). All operations and activities on the Leased Premises shall comply with applicable laws, and be consistent with the public nature of the Leased Premises, with an emphasis on public safety. The Leased Premises shall not be used for any purposes in violation of any zoning or other laws or of any regulation of any governmental body having jurisdiction

over the Leased Premises. Tenant shall not discriminate against any individual in any way on account of such individual's race, color, religion, sex, age, handicap, national origin, or sexual orientation. The Leased Premises shall not be used for any regularly organized/scheduled activity having, as its primary purpose, religious instruction.

6. UTILITIES.

A. Tenant shall be responsible for constructing all utility connections (such as sewer, power, water, etc.) required for connection to the Improvements pursuant to the Plans, and shall pay the cost of all utilities associated with operating the Leased Premises and the Improvements, including without limitation, water, sewer, refuse collection, electric, gas, and telecommunications. Tenant shall keep the Leased Premises free of any liens created by the Tenant's failure to make such utility payments. When this Lease terminates, the Tenant shall no longer have any responsibility hereunder.

B. Landlord Nonresponsibility. Except as otherwise set forth in the Development Agreement, as may be amended, 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 Leased Premises;

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

(c) maintenance, repair or restoration of the Leased Premises, other than as a result of damage or destruction caused by Landlord or its employees, agents, or contractors;

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

C. Tenant's Responsibility. Tenant shall have the responsibility, obligation, and liability for any and all expenses set forth in this ***Section 6***. In addition, Tenant shall pay to the same extent as Landlord is required to pay all charges related to any improvement district liens together with any interest or late charges connected therewith which exist against the Leased Premises or which are imposed upon the Leased Premises during the existence of this Lease. If, during the term of this Lease, Landlord is required to pay any costs or expenses in connection with the ownership of the Leased Premises other than as a result of the fault or act of the City (for which City shall be responsible and shall indemnify, defend and hold Tenant harmless), Tenant shall indemnify, hold harmless, and immediately reimburse Landlord for any costs or expenses. Landlord during the term of this Lease shall not encumber or cause any lien to be imposed upon the Leased Premises except for any cost or expense that is imposed upon the Leased Premises during the normal course of government actions or is imposed by law.

D. Tax Abatement. During the first eight (8) years of the term of this Lease, all general and special real estate taxes and assessments levied or assessed against or with respect to the Premises, including the government property lease excise tax as described in A.R.S. §§ 42-

6201 through 42-6209, inclusive are abated in full. 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."

7. INDEMNIFICATION.

Subject to the limitation on Landlord's remedies under Section 21, Tenant shall indemnify and hold Landlord, its officers, directors, employees, and representatives harmless from and against any and all actions, claims, demands, judgments, reasonable attorneys' fees, costs, damages to persons or property, penalties, obligations, expenses or liabilities of any kind that may be asserted against Landlord arising from any use, nonuse, or condition of the Leased Premises created by or attributable to Tenant or its employees, customers, agents, invitees, licensees, or guests unless due to Landlord's negligence or intentional misconduct. In the event that any action or proceeding shall be brought against Landlord by reason of any claim referred to in this Paragraph, Tenant, upon written notice from Landlord, shall at Tenant's sole cost and expense, resist or defend the same through counsel selected by Tenant and reasonably approved by Landlord.

Landlord shall indemnify and hold Tenant, its officers, directors, employees, and representatives harmless from and against any and all actions, claims, demands, judgments, reasonable attorneys' fees, costs, damages to persons or property, penalties, obligations, expenses or liabilities of any kind that may be asserted against Tenant arising from any use, nonuse, or condition of the Leased Premises created by or attributable to Landlord or its employees, customers, agents, invitees, licensees, or guests unless due to Tenant's act, omission, negligence or intentional misconduct. In the event that any action or proceeding shall be brought against Tenant by reason of any claim referred to in this Paragraph, Landlord, upon written notice from Tenant, shall at Landlord's sole cost and expense, resist or defend the same through counsel selected by Landlord and reasonably approved by Tenant.

8. INSURANCE

A. Tenant shall not take possession of the Leased Premises or commence construction activities until Tenant has obtained all of the insurance required herein from a company or companies licensed to do business in the State of Arizona, and acceptable to Landlord, not to be unreasonably withheld or delayed, and subject to subparagraph C, Tenant shall continue to maintain all such insurance in full force and effect from the commencement of construction activities until termination or expiration of this Lease.

B. Tenant shall obtain and maintain the insurance coverage specified in ***"Exhibit B"*** attached hereto and incorporated herein; provided that (a) Tenant need not obtain Worker's Compensation coverage until the first day that Tenant has engaged any person as an employee, (b) Tenant need not obtain Fire and Casualty Coverage until Tenant has completed construction of the Improvements.

C. Insurance limits shall be periodically reviewed by Landlord to ensure coverage based on market and risk requirements throughout the effective term of this Lease. 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 the Lease for occurrences during the effective term of this Lease.

D. On or prior to the Commencement Date, Tenant shall furnish Landlord with original certificates (or certified copies) of the aforementioned insurance policies, in form and with insurers acceptable to the City's Risk Manager (or designee). Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, and/or cancelled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City's Risk Manager.

E. Tenant shall include all contractors and subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each contractor and subcontractor. All insurance coverage for contractors and subcontractors shall be subject to all of the requirements stated herein for Tenant.

9. FIRE AND OTHER CASUALTY.

A. Obligation to Rebuild. If some or all of the Leased Premises (including the Improvements and any other improvements) are damaged or destroyed, partially or totally from any cause whatsoever prior to execution of the City Lease, whether or not such damage or destruction is covered by insurance, then Tenant shall repair, restore and rebuild the Leased Premises to its condition existing immediately prior to such damage or destruction, the completion deadline in Section 1(b) of this Lease shall be extended to allow for such repair, restoration and/or rebuilding, and this Lease shall remain in full force and effect. Such repair, restoration and rebuilding (all of which are herein called "repair") shall be commenced within a reasonable time after such damage or destruction has occurred and Tenant has received payment of any applicable insurance proceeds (which Tenant shall use diligent efforts to obtain as soon as possible) and shall be diligently pursued to completion. If some or all of the Leased Premises (including the Improvements and any other improvements) are damaged or destroyed, partially or totally from any cause whatsoever after execution of the City Lease, the obligations of Landlord and Tenant regarding such damage or destruction shall be governed by the City Lease. Notwithstanding any other provision of this Section 9, Tenant shall have no liability for repair or restoration of the Leased Premises in excess of the insurance proceeds actually received by Tenant; if such proceeds are insufficient to repair or restore the Leased Premises to their previous condition and Landlord is unwilling or unable to provide the additional funds needed, Tenant shall have the right to modify the Leased Premises so that the insurance proceeds are sufficient for restoration, as determined in good faith by Tenant.

B. Insurance Proceeds. The proceeds of any insurance maintained by Tenant under this Lease shall be used by Tenant for payment of costs and expense of repair or restoration required to be performed by Tenant under this Lease, provided however, that such proceeds may be made available to Tenant subject to reasonable conditions, including, but not limited to contractor's certification of cost, retention of a percentage of such proceeds pending, recordation

of a notice of completion and a lien and completion bond to insure against mechanic's or materialmen's liens, all at the expense of Tenant. If the insurance proceeds are insufficient to cover the cost of repair, then any amounts required over the amount of the insurance proceeds received that are required to complete said repair shall be paid by Tenant. If the insurance proceeds are not made available to Tenant within 120 days after such damage or destruction, unless the amount of insurance coverage is in dispute with the insurance carrier, Tenant shall have the option for 30 days, commencing on the expiration of such 120-day period, to cancel this Lease. If Tenant exercises such option, Tenant shall have no further obligation hereunder and shall have no claim against Landlord. To exercise said option, Tenant shall give written notice to Landlord within said 30-day period, time being of the essence.

C. Damage Near End of Term. If the Leased Premises are partially destroyed or damaged during the last six months of the term of this Lease and Landlord reasonably estimates the cost of damage or repair to exceed twenty five percent (25%) of the fair market value of the Leased Premises, Landlord may at its option, cancel and terminate this Lease as of the date of occurrence of such damage by giving written notice to Tenant within 30 days after the date of occurrence of such damage.

D. Abatement of Rent. Notwithstanding the partial or total destruction of the Leased Premises and any part thereof, and notwithstanding whether the casualty is insured or not, there shall be no abatement of rent or of any other obligation of Tenant hereunder by reason of such damage or destruction unless the Lease is terminated by virtue of other express terms of this Lease.

E. Termination - Advance Payments. Upon termination of this Lease pursuant to this Section 9, an equitable adjustment shall be made concerning advance rent and any advance payments made by Tenant to Landlord.

F. Waiver. Tenant waives any provision of Arizona Revised Statutes which relate to termination of leases when the thing leased is destroyed and agrees that such event shall be governed by the terms of this Lease.

10. LIENS.

Tenant shall not permit any liens to be placed on the Leased Premises, but if the Leased Premises or any part thereof, or Tenant's leasehold interest therein, shall at any time during the term of this Lease become subject to any vendor's, mechanic's, laborer's, or materialmen's lien based upon the furnishing of material or labor to Tenant, Tenant shall cause the same, at Tenant's expense, to be discharged or bonded over within forty-five (45) days after notice thereof from Landlord.

11. MAINTENANCE AND REPAIRS.

Tenant shall at all times, at its sole cost and expense, keep and maintain in good condition and in substantial repair the Leased Premises, including the Improvements and all other improvements of any kind erected, installed or made on or within the Leased Premises and

including landscaping. Tenant shall at all times in the maintenance and use of the Leased Premises and the buildings, structures, facilities, improvements and equipment thereon, comply with all laws, ordinances and regulations pertaining thereto, and all conditions and restrictions set forth herein. Tenant shall no longer have any right to use the Leased Premises once this Lease terminates, and shall no longer have any responsibility to assure that the premises are used or maintained in any particular way.

12. IMPROVEMENTS.

Other than the Improvements, Tenant shall not make any material alternation, improvement, addition or other installation at the Leased Premises without Landlord's prior written consent. If Tenant desires to make any such material alteration, improvement, addition or utility installation, Tenant shall submit a written request to Landlord, together with plans of the proposed alteration, improvement, addition or installation, and Tenant shall not commence such work unless and until the Landlord has granted its approval thereto in writing, which approval shall not be unreasonably withheld or delayed. Landlord may require that the work will be completed free and clear of liens and in a manner satisfactory to Landlord. Any alteration or improvement made by Tenant shall be completed expeditiously, subject to any delays beyond the control of Tenant, and in compliance with all laws and ordinances and all rules and regulations of any and all governmental authorities having jurisdiction of or over the Leased Premises.

Landlord acknowledges that the Improvements may not be constructed in exact accordance with the Plans. Landlord agrees that alterations that are not material and do not negatively affect the quality of construction may be made by Tenant to the Plans provided (a) any such alterations requiring approvals by Landlord in its governmental capacity (as opposed to Landlord capacity) have received such approvals and (b) either (i) the alterations have no material adverse impact on the value, usability or appearance of the Improvements or (ii) the alterations have been approved by Landlord, which approval shall not be unreasonably withheld or delayed and shall be deemed given if Landlord does not give notice of objection thereto within ten (10) days following request for approval. Any objection by Landlord shall specify the basis of Landlord's objection in sufficient detail to allow potential cure thereof in a subsequent submission.

13. NUISANCE.

Notwithstanding anything in this Lease to the contrary, Tenant shall not commit or permit any nuisance or other act, whether noise, odor, smoke, sewage, chemical wastes, or otherwise, which may disturb the quiet enjoyment of any owners of property in the area. Tenant shall not obstruct or cause to be obstructed any public or private roadways.

14. ASSIGNMENT.

A. Assignment, Subletting Prohibited. Tenant covenants not to assign this Lease nor to sublet the Leased Premises or any portion thereof, without the prior written consent of Landlord. No such assignment or subletting nor any written consent of Landlord to such

assignment or subletting shall release or discharge Tenant from liability for full and complete performance of its obligation under this Lease, provided, however, that Tenant shall be deemed released and discharged from any liability or obligation assigned and/or delegated by Tenant to Landlord pursuant to the City Lease.

B. Actions Constituting Assignment. Each of the following actions (whether voluntary, involuntary, by operation of law, or otherwise) shall constitute a prohibited assignment: (a) any change in the persons who are the members of Tenant, excluding any change between or among the persons who are the owners as of the date of this Lease and excluding any change in membership that does not affect fifty percent or more of the membership interests in Tenant, and (b) any reorganization, dissolution or liquidation of Tenant.

C. Adjustment to Rental. If any approved sublease provides for a rent greater than the Rent payable hereunder and such greater rent is not used to pay for or reimburse for costs of constructing the Improvements, including without limitation payment of any loan incurred for construction of the Improvements, Landlord shall be entitled to such excess and the Rent shall be deemed increased to the amount payable under the sublease. In no event shall the Rent after any such assignment or subletting be less than the Basic Rent specified in Article 4 above, as adjusted.

## 15. MORTGAGE OF LEASED PREMISES.

Tenant shall not without the Landlord's prior written consent create a security interest in Tenant's leasehold interest under this Lease (or in any subleases and the rents, income and profits therefrom) by mortgage, deed of trust, collateral assignment or otherwise.

## 18. QUIET ENJOYMENT.

Landlord covenants that, so long as Tenant shall faithfully perform the agreements and terms of this Lease, Tenant shall and may peaceably and quietly have, hold and enjoy the Leased Premises for the term hereby granted along with any extensions as provided hereunder.

## 19. TITLE TO BUILDINGS AND IMPROVEMENTS.

Title to the Improvements and other improvements constructed by Tenant, and all renewals and replacements thereof, when made, erected, constructed, installed or placed upon the premises by Tenant, shall be and remain in Tenant until the expiration of the term of this Lease. Upon the termination of this Lease, title to all such property, together with all documents, instruments and warranties relating to construction of the Improvements and the furnishings therein shall automatically pass to, vest in and belong to Landlord without further action on the part of either party, without cost or charge to Landlord, and without further conveyance or transfer to Landlord; provided, however, that Tenant shall, if requested by Landlord, execute any instruments or documents reasonably required by Landlord to evidence the vesting of title to such property in Landlord, including without limitation bills of sale and assignments. While this Lease remains in effect, Tenant alone shall be entitled to claim depreciation on the buildings,

improvements, additions and alterations therein and all renewals and replacements thereof, for all taxation purposes.

20. EASEMENTS.

Landlord reserves the right to ingress and egress on the Leased Premises for the placement underground public utility lines, as may from time to time be needed by Landlord, provided however, that Landlord shall conduct all of its maintenance and construction operations in a manner which will not unreasonably interfere with the conduct of the activities of the Tenant or the use and enjoyment of the Leased Premises by the Tenant. In no event shall Landlord reduce access to the Leased Premises. Landlord shall promptly repair and/or rebuild any improvements on the Leased Premises damaged or destroyed as a result of the acts of Landlord or its agents, employees or contractors.

21. DEFAULT.

A. Default. The occurrence of any one or more of the following events and the continuance of such event beyond any applicable Grace Period, shall constitute a Default on the part of Tenant:

(a) Tenant fails to pay Rent or any other sum required to be paid by Tenant hereunder; or

(b) Tenant fails to perform any covenant, condition, or agreement to be performed by Tenant pursuant to this Lease or breaches any representation or warranty made by Tenant in this Lease or otherwise in connection with the transaction of which this Lease is a part; or

(c) Tenant abandons or evidences an intention to abandon the Premises, including without limitation the failure to commence reconstruction of the Improvements within a reasonable time after a casualty; or

(d) Garnishment, attachment, levy or execution is issued against any of Tenant's property or effects; or

(e) A receiver, custodian or other similar officer is appointed to or does take charge of any part of the property of, or wind up the affairs of Tenant; or

(f) Any petition or application for a custodian or for any form of relief under any provision of federal, state or local law pertaining to reorganization, insolvency or readjustment of debts is filed by or against Tenant and it is not discharged within 30 days; or

(g) Tenant makes an assignment for the benefit of creditors, is not paying debts as they become due, or is granted an order for relief under any provision of federal, state or local law pertaining to reorganization, insolvency or readjustment of debts; or

(h) Tenant is dissolved, liquidated or its existence is terminated voluntarily or by operation of law.

B. Grace Periods. "Grace Period" means the number of calendar days after Landlord gives notice in accordance with Section 26. If a Default involves Tenant's obligation to pay money, the applicable Grace Period shall be 10 days. If a Default involves the performance or non-performance of an act, or the occurrence or non-occurrence of an event or circumstance, the Grace Period shall be 90 days; provided that if the nature of the Default is such that it cannot reasonably be cured within 90 days, then no Default shall exist if Tenant commences the cure within 30 days and diligently pursues the same to completion. Notwithstanding the foregoing, there shall be no Grace Period applicable to a Default based upon a breach of a representation or warranty of Tenant, or in the breach of Tenant's covenant to maintain insurance.

C. Landlord's Remedies. Landlord shall have as its sole and exclusive remedies for breach of this Lease by Tenant the right to terminate this Lease, the Development Agreement, and pursue any claims against payment and performance bonds, insurance policies and proceeds and warranties, if and to the extent available. Landlord may exercise any such remedy without court action, or by one or more court actions, and in exercising any remedy may obtain partial relief without waiving its right to further relief. The exercise of any permitted remedy by Landlord shall not waive Landlord's right to exercise any other permitted remedy. The foregoing limitation on remedies shall control over any other provision of this Lease.

D. Landlord Default. If Landlord fails to perform any of its obligations under this Lease, and such failure continues for thirty (30) days after written notice of default (or if more than thirty (30) days shall be required because of the nature of the default, if Landlord shall fail to commence the curing of such default within such thirty (30) day period and proceed diligently thereafter), then Landlord shall be responsible to Tenant for any actual damages sustained by Tenant as a result of Landlord's breach, but not special or consequential damages.

22. INTEGRATION AND CONSTRUCTION.

This Lease and the Development Agreement represent the entire understanding of Landlord and Tenant as to those matters contained herein, and no prior oral or written understanding shall be of any force or effect with respect to those matters covered thereby. This Lease shall be governed by the laws of the State of Arizona and construed as if drafted by both Landlord and Tenant. This Lease is the product of an arms-length negotiation, and should not be construed against either party. Capitalized terms used in this Lease without definition shall have the meaning stated in the Development Agreement.

23. AMENDMENT.

Any changes to this Lease must be approved by the Tempe City Council and the Tenant or its designee, unless said changes are to clarify and explain portions of this Lease and which will not effect the basic structure thereof. Any amendment hereto shall be in writing.

24. ATTORNEYS' FEES.

In the event that either party brings legal action to enforce any terms of this Lease, the prevailing party in said litigation shall be entitled to attorneys' fees in a reasonable amount.

25. TIME OF ESSENCE.

Time shall be of the essence in the performance of every term, covenant, and condition of this Lease.

26. HEADINGS.

The Paragraph Headings contained herein are inserted only for convenience of reference and are in no way to be construed as a part of this Lease or as a limitation of the scope of the particular paragraph to which they refer.

27. BENEFIT.

This Lease shall insure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrator, legal representatives, successors, and assigns.

28. RIGHT OF ENTRY.

Landlord or any of its agents shall have the right upon reasonable notice to enter upon the Leased Premises at any time during the term of this Lease to examine same for any purpose whatsoever.

29. NOTICES.

Notices as provided by this Lease shall be sent to the respective parties at the addresses set forth below.

Landlord: City of Tempe
City Manager's Office
31 East 5th Street
Tempe, AZ 85281

With a copy to: City of Tempe
City Attorney's Office
21 East Sixth Street, Suite 201
Tempe, AZ 85281

Tenant: Arizona Boathouse and Welcome Center, LLC
Steven R. Chanen
Chanen Development
3300 N Third Avenue
Phoenix, AZ 85013

With a copy to: Brier, Irish, Hubbard & Erhart, PLC
2400 East Arizona Biltmore Circle, Suite 1300
Phoenix, Arizona 85016
Attn: Jeffrey Erhart

30. ESTOPPEL CERTIFICATE.

Within ten (10) business days following request by either party, the other party shall execute and deliver to the requesting party a certificate stating that this Lease is in full force and effect and has not been modified (or stating the modifications), that to the knowledge of the certifying party neither party is in breach of its obligations under this Lease (or specifying any breaches), and any other factual statements reasonably requested by the requesting party.

IN WITNESS WHEREOF, the parties hereto have executed this Lease this ___ day of _____ 2008.

Landlord:

CITY OF TEMPE, a municipal corporation

By:_____
Hugh Hallman, Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

Tenant:

Arizona Boathouse and Welcome Center, LLC,
An Arizona limited liability company

By:_____
Title:_____

Exhibit A
Leased Premises

Exhibit B
(Insurance Requirements)

Minimum levels of insurance:

A. Commercial General Liability: $5,000,000 ($2,000,000 for contractors and subcontractors) combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products and completed operations. The general aggregate limit shall apply separately to the activities contemplated by this Agreement or the general aggregate shall be twice the required occurrence limit.

B. Liquor Liability: $5,000,000 single limit (only if alcoholic beverages are sold on the Leased Premises).

C. Automobile Liability: $2,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.

D. Workers' Compensation and Employers' Liability: Workers' Compensation and Employers' Liability statutory limits as required by the State of Arizona.

E. Fire and Casualty Insurance: Fire and casualty insurance within an "Extended Coverage" endorsement, including an installation floater, on an all-risk form, including earthquake and flood, for 100% of the replacement value, with any deductible, not to exceed $5,000 (2% earthquake and flood). Such policy shall include the Tempe as a named insured as its interest may appear.

F. Course of Construction Coverage. Tenant shall obtain and carry course-of-construction insurance while Tenant is constructing the Improvements at 100% of their replacement cost.

## II. Deductibles and Self-Insured Retentions

A. Any deductibles or self-insured retentions must be declared and approved by the Tempe. At the option of Tempe, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects Tempe, its officials, employees, and volunteers or Tenant shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

## III. Other Insurance Provisions

The policies or self insurance certifications are to contain, or be endorsed to contain, the following provisions:

A. Commercial General Liability and Automobile Liability Coverage

1. Tempe, its officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of Tenant including the insured's general supervision of Tenant; products and completed operations of Tenant;

premises owned, occupied or used by Tenant, or automobiles owned, leased, hired or borrowed by Tenant. The coverage shall contain no special limitations on the scope of protection afforded to Tempe, its officials, employees, or volunteers related to Tenant's, its employees', agents', subcontractors', or sub-subcontractors' activities pursuant to this Agreement.

2. Tenant's insurance coverage shall be primary as respects the Tempe, its officials, employees, and volunteers. Any insurance or self-insurance maintained by Tempe, its officials, employees, or volunteers shall be excess of Tenant's insurance and shall not contribute to it.
3. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to Tempe, its officials, employees, or volunteers.
4. Coverage shall state that Tenant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

B. Workers' Compensation and Employers' Liability Coverage

1. The insurer shall agree to waive all rights of subrogation against Tempe, its officials, employees and volunteers for losses arising from the activities performed by Tenant for Tempe pursuant to this Agreement.

C. All Coverages

1. Each insurance policy required by this Agreement shall be endorsed to state the coverage shall not be suspended, voided, and/or canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to Tempe.

**IV. Other Insurance Requirements:**

Tenant shall:

A. Prior to commencement of services, furnish Tempe with certificates of insurance, in form and with insurers acceptable to Tempe's Risk Manager (or designee) which shall clearly evidence all insurance required in this Agreement and provide that such insurance shall not be canceled, allowed to expire or be materially reduced in coverage except on thirty (30) days prior written notice to and approval by Tempe, and in accord with the stated insurance requirements of this Exhibit. Tempe shall not be obligated, however, to review same or to advise Tenant of any deficiencies in such policies and endorsements, and such receipt shall not relieve Tenant from, or be deemed a waiver of the Tempe's right to insist on, strict fulfillment of Tenant's obligations under this Agreement.

B. Provide certified copies of endorsements and policies if requested by Tempe in lieu of or in addition to certificates of insurance.

C. Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.

D. Maintain such insurance from the time services commence until services are completed. Should any required insurance lapse during this Agreement term, requests for payments originating after such lapse shall not be processed until

Tempe receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date.

E. Place such insurance with insurers and agents licensed and authorized to do business in Arizona and having a "Best's" rating of no less than A-VII.

F. Maintain such coverage continuously throughout the term of this Agreement and without lapse, should any of the required insurance be provided under a claims-made form, to the extent that should occurrences during the Agreement term give rise to the claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies. Such extension of coverage shall be evidenced by annual certificates of insurance.

**V. Subcontractors and Sub-Subcontractors**

Tenant shall include all subcontractors and sub-subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor and sub-subcontractor. All coverage for subcontractors and sub-subcontractors shall be subject to all of the requirements stated herein for Tenant.

**VI. Safety**

Tenant shall be solely and completely responsible for conditions of the sites used pursuant to this Agreement, including the safety of all persons (including employees) and property at the sites, including any set-up at the sites and any take-down at the sites. This requirement shall apply continuously and not be limited to normal hours of the sites. Safety provisions shall conform to all applicable federal (including OSHA), state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. Tenant's failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve it from compliance with the obligations set forth therein. Notwithstanding the foregoing, Landlord (and not Tenant) shall be responsible for any damages or liabilities arising from the negligence of Landlord or its agents, employees or contractors on the Leased Premises.

## Exhibit "C"

Schedule of Performance

1. Fund raising commitments received by Developer equal to the amount needed to complete the Improvements per this Agreement – 36 Months from Execution of this Agreement.

2. Formal Submittal to the City for Building Permits - 12 Months from completion of fund raising.

3. Commence Construction of Improvements – 90 Days from issuance of building permit.

Schedule 1.1
Certificate of Completion

TO WHOM IT MAY CONCERN:

In accordance with the terms of the Development and Disposition Agreement dated , 2008, by and between the CITY OF TEMPE (CITY) and Arizona Boathouse and Welcome Center, LLC, this Certificate of Completion is issued for the Improvements on the following described parcel of land:

(LEGAL DESCRIPTION)

Construction of improvements were initiated on or about _____and were completed on or about _____.

Respectfully,

_____
Community Development Manager
City of Tempe, Arizona

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

On this _____ day of _____, 2009 before me, the undersigned officer, personally appeared _____, who acknowledged him/herself to be _____ of the City of Tempe, an Arizona municipal corporation, and he/she, 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

Schedule 3.1

Recording Requested By and
When Recorded Mail To:

City of Tempe Basket

## MEMORANDUM OF GROUND LEASE

**This Memorandum of Ground Lease is made as of _____ _____, 2008, by the City of Tempe, an Arizona municipal corporation ("Landlord") and Arizona Boathouse and Welcome Center, LLC, an Arizona limited liability company ("Tenant").**

1. Landlord and Tenant have executed a Ground Lease and Agreement for Construction of Improvements (the "Ground Lease") dated _____, 2008 by which Landlord leases to Tenant, and Tenant leases from Landlord, the real property (the "Premises") located in Maricopa County, Arizona and more particularly described on the attached Exhibit A, incorporated by reference.

2. The term of the Ground Lease will commence on satisfaction of certain conditions specified in that certain Development and Disposition Agreement dated as of _____, 2008 and runs not longer than 64 months.

3. The Ground Lease contains many provisions relating to the respective rights of Landlord and Tenant. For further information relating to the Ground Lease, reference is made to the Ground Lease itself. In the event of any inconsistency between the Ground Lease and this Memorandum of Ground Lease, the Ground Lease shall control. Nothing contained herein shall be deemed to amend or modify in any way the terms or provisions of the Ground Lease. This Memorandum of Ground Lease is being recorded for notice purposes only.

4. All provisions of the Ground Lease are incorporated by reference herein.

The parties have executed this Memorandum of Ground Lease as of the date set forth in the first paragraph above.

*[Signature Page and Notary Acknowledgments Follow]*

**"Landlord"**

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

***"CITY"***

THE CITY OF TEMPE, an Arizona municipal corporation

By_____
Hugh Hallman, Mayor

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared Hugh L. Hallman, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation, whom I know personally to be the person whose name is subscribed to this instrument, 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

**"Tenant"**

Arizona Boathouse and Welcome Center, LLC,
an Arizona limited liability company

By_____
Name_____
Title_____

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared _____ who acknowledged him/herself to be the _____ of Arizona Boathouse and Welcome Center, LLC, an Arizona limited liability company, whom I know personally/whose identity was proven to me on the oath of _____, a credible witness by me duly sworn/whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument/whose identity I verified on the basis of his/her _____, and s/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