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City of Tempe Basket

DEVELOPMENT AND DISPOSITION AGREEMENT

(Fifth and Farmer)

Resolution No. 2007.42

C2007-98

THIS DEVELOPMENT AND DISPOSITION AGREEMENT (this “**Agreement**”) is made and entered into as of the 31st day of May, 2007, by and among the CITY OF TEMPE, an Arizona municipal corporation (the “**City**”), FARMER ARTS, LLC, an Arizona limited liability company (the “**Developer**”).

RECITALS

A. The City issued a Request for Proposals (RFP No. 06-130) (the “**RFP**”) for the disposition and development of that certain City-owned real property legally described in *Exhibit “A”* attached hereto and depicted on that Parcel Map attached hereto as *Exhibit “B”*, containing approximately seven and seven tenths (7.7) gross acres of land area (the “**Property**”).

B. Developer responded to the RFP with a proposal to redevelop the Property as a mixed-use project, including market-rate and affordable dwelling units, and retail and office components. The City selected Developer pursuant to the RFP for exclusive negotiation rights with respect to the redevelopment of the Property. The exclusive negotiation period has been subsequently extended and such exclusive negotiation period remains in effect.

C. The City recognizes that the Property has unique development constraints and challenges, including but not limited to the Property’s narrow, linear shape; the adjacent railroad tracks, rail spur and rail easement; the 230 kVA power lines and fiber optics easement running along the Property’s eastern boundary; 5th Street bisecting the Property and creating the two Parcels; the irrigation easement that bisects Parcel 2; the existing structures and the possible existence of historical substructures; and the on-going traffic and parking constraints associated with its urban location that may impact, impede or delay the constructions process.

D. City and Developer desire to redevelop the Property and acknowledge that development of the Property will result in significant benefits that will accrue to the City from the development of the Property by Developer, including, without limitation, the creation of new affordable and market rate residential dwellings, office and retail uses, the creation of neighborhood services, the stimulation of further economic development within the City, and 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. §9-500.05.

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:

A G R E E M E N T

1. **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 **“Business Day”** shall mean and refer to any day other than a Saturday or Sunday or legal holiday in the State of Arizona. Unless specifically referred to as a “business day”, all days contemplated by this Agreement shall mean calendar days.

1.2 **“Certificate of Completion”** for the purposes of this Agreement, Certificate of Completion shall mean and refer to a final written acceptance of a completed and inspected building, structure or improvement located within the Project issued by the City Development Services Department and/or the City Public Works Department. The City will issue a separate Certificate of Completion as Developer completes construction of each building, structure or improvement located within the Project, to be further defined or phased in the PAD, in conformance with this Agreement, the Schedule of Performance and inspection by the City.

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

1.4 **“Closing Date”** shall mean and refer to the date or dates set for conveyance of title by the City to Developer to Parcel 1 and Parcel 2 of the Property and the performance of all conditions (except those conditions expressly required to be performed earlier) relating thereto.

1.5 **“Developer”** shall mean and refer to Farmer Arts, LLC., an Arizona limited liability company, and its successors and assigns.

1.6 **“Development Parcel”** shall mean and refer to an individual parcel of real property within the Property, whether created by a separate PAD, by lot split, by condominium declaration or through other means of real property subdivision reasonably approved by the City.

1.7 **“Escrow Agent”** shall mean and refer to Lawyer’s Title of Arizona, Inc. Attention: Judy Sorenson.

1.8 **“Improvements”** shall mean and refer to all public and private improvements that may be constructed from time to time on the Property, including without limitation, all buildings, structures, libraries, road improvements, driveways, parking structures, parking facilities or surface parking lots, pedestrian parkways, enhanced streetscapes, walls, landscaping and other improvements of any type or kind, or any alteration of the natural terrain to be made or built by Developer pursuant to the terms of this Agreement.

1.9 **“Issuance Date”** shall mean and refer to the date on which a Certificate of Occupancy or a Certificate of Completion is issued by the City, whichever occurs first, for any building, structure or improvement, or portion or phase thereof, located within the Project.

1.10 **“PAD”** shall mean and refer to a planned area development approved by the City with respect to the development of a single building or structure or a group of buildings or structures within different parcels or phases of development of the Project, that sets forth the specific uses, densities, features or other development matters with respect to the Property, as set

forth in **Section 3** below. For the purposes of this agreement, an amended PAD which has been approved by the City shall supersede any previously approved PAD.

1.11 “**Parcel 1**” shall mean and refer to that certain parcel of land within the Property bounded by University Drive on the south, Farmer Avenue on the west, 5th Street on the north, and 35 feet west of the Union Pacific railroad tracks on the east as depicted in **Exhibit “B”**.

1.12 “**Parcel 2**” shall mean and refer to that certain parcel of land that within the Property bounded by 5th Street on the south, Farmer Avenue on the west, the south boundary line of Lot 31E, of "State Plat 12 Amended", a subdivision recorded in Book 69 of Maps, Page 38, Maricopa County Recorder and the easterly prolongation thereof to the east boundary on the north, and 35 feet west of the Union Pacific railroad tracks on the east as depicted in **Exhibit “B”**.

1.13 “**Parties**” and “**Party**” shall collectively mean and refer to the City and Developer as the parties to this Agreement or each of the parties individually, as the context may require.

1.14 “**Project**” shall mean and refer to the overall development of the Property or portions thereof for residential, commercial and public uses together with appurtenant parking. The Property is expected to host a number of Improvements that may be constructed as separate phases and be issued a separate Certificate of Completion pursuant to this Agreement, the PAD or any subsequent City entitlement and development process. Many of these Improvements will have multiple uses and may be additionally defined as separate phases in the PAD or any subsequent City entitlement and development processes.

1.15 “**Property**” shall mean that certain real property referred to herein in Recital A and legally described in **Exhibit “A”** and depicted on the Parcel Map attached as **Exhibit “B”** and which has been further divided and described herein as Parcel 1 and Parcel 2, collectively.

1.16 “**Public Amenities**” shall mean and refer to: (a) that certain building space to be used as a public library, (b) a pedestrian parkway for public use along the eastern boundary of the Property, and (c) an enhanced streetscape along the western side of the Property at Farmer Avenue as more conceptually depicted in **Exhibit F**.

1.17 “**Schedule of Performance**” shall mean and refer to that schedule of performance agreed to by the City and the Developer as set forth in **Exhibit “C”** attached hereto and incorporated herein by this reference.

1.18 “**Workforce Housing**” shall mean and refer to housing for those households with moderate incomes insufficient to afford market-rate housing in the communities where they work. For the purposes of this Agreement, Workforce Housing shall be defined as rental and for-sale housing targeted to households that are at or below 120% of the Average Median Income (AMI) for the Project site as defined by the US Department of Housing and Urban Development as adjusted annually. Workforce Housing will incorporate a plan for maintaining the sustainability for the targeted AMI levels stated above for a minimum period of fifteen (15) years.

2. **Conveyance of Property.** The Parties hereby acknowledge and agree that the following provisions shall apply with respect to the conveyances of the Property by the City to the Developer:

2.1 Escrow. The parties shall open escrow for the conveyance of the Property promptly after execution of this Agreement. The escrow shall be opened with Escrow Agent. The Escrow Agent shall be supplied with copies of this Agreement which shall serve 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 and further provided that the thirteen day cancellation rights and other inapplicable provisions are deleted. The costs and expenses of the escrow, shall be allocated in the typical and standard manner for transaction of this nature in Maricopa County, Arizona. City shall pay the cost of a standard owner's policy of title insurance. If Developer desires to obtain an extended coverage policy, it shall pay the difference in cost and also shall pay the cost of all endorsements to its policy.

2.2 Consideration. Developer shall pay City the sum of \$6,200,000 as the total purchase price for the Property (the "Purchase Price"); allocated \$3,100,000 to Parcel 1 and \$3,100,000 to Parcel 2. The relevant portion of the Purchase Price shall be paid in full in cash by Developer at each Closing, subject to the City's credit to the Developer of the purchase of Public Amenities as described in **Section 2.10** and the prorations and other adjustments as hereinafter set forth.

2.3 Condition of Title; Survey. The condition of title to the Property shall be subject to the review and approval of the City and Developer. The obligation of Developer to purchase each Parcel of Property from City is contingent upon Developer's approval (to be exercised in its sole and absolute discretion) of each of the following conditions (the "Investigation Contingencies") within the time periods provided.

2.3.1 Developer's Approval of the Title Report and Survey. Lawyer's Title (the "Title Company") shall deliver to Developer within ten (10) days after the Opening of Escrow a new or updated Preliminary Title Report showing the current condition of title for each Parcel of the Property prepared by Title Company (each such report, a "Preliminary Title Report") including a legal description of each Parcel of the Property. Within Twenty (20) Business Days after the Opening of Escrow (or as soon thereafter as possible), Developer (at Developer's expense) shall cause its Surveyor to deliver to City and Title Company a new ALTA/ACSM Land Title Survey of the Property (the "ALTA Survey"). The Title Company shall provide Developer and City with an amended Preliminary Title Report (the "Amended Preliminary Title Report") within five (5) days of receipt of the ALTA Survey for the Property, together with an amended legal description describing only the Property along with legible copies of all instruments of record referred to therein, if available, whether such items are referred to in the "Schedule B" or the "Requirements" sections thereof. The legal description of the Property shall be acceptable to Developer, City and the Title Company and lead to the issuance of an extended coverage owner's ALTA policy of title insurance in the amount of the Purchase Price covering Developer's interest in the Property. The title insurance shall be provided by Title Company. Developer shall have ten (10) Business Days after Developer's receipt of the Amended Preliminary Title Report and the Survey to give written notice to City reasonably disapproving any material items contained in the Amended Preliminary Title Report or Survey. Failure of Developer to object to any item within the Amended Preliminary Title Report within the ten (10) Business Days shall be deemed acceptance of those items. City shall have no obligation to cure or remove any title matter objected to by Developer. If Developer timely delivers its written objections

to City, City shall deliver a written response to Developer and Escrow Agent within five (5) Business Days after receipt of Developer's written objections, in which City shall state any actions which City intends to take and their anticipated effect on the matters to which Developer has objected. If City fails to deliver a response within such five-day period, City shall be deemed to have delivered a response indicating that it will not remove any of the items objected to by Developer. If City does not respond or if City's response does not state an intention to fully remove each item to which Developer has objected, then Developer shall deliver to City and Title Company within five (5) days after Developer receives City's response (or five (5) days after City has failed to respond), a written notice stating Developer's election either to (a) to terminate the Agreement, or (b) to waive Developer's objections and proceed with the transaction, subject to **Sections 2.8 and 2.9** herein. Failure by Developer to make a timely election shall constitute an election to waive Developer's objections and proceed with the transaction, subject to **Sections 2.8 and 2.9** herein. If City elects to cure or remove any title matter objected to by Developer, City shall promptly attempt to cure or remove all items it has agreed to attempt to cure or remove and City's cure or removal of such items will be a condition of Close of Escrow, waivable only by Developer.

2.3.2 Subsequent Title Matters. After execution of this Agreement, City shall not convey, lease, sell, assign, offer, pledge, encumber or otherwise transfer any part of the Property

2.4 Taxes, Assessments and Bonds. All taxes and assessments imposed against each Parcel shall be prorated and apportioned between the City and the Developer as of the Closing Date.

2.5 Ownership and Maintenance of Parcels Prior to Conveyances. Prior to the conveyance of the Property to the Developer, the City shall be entitled to receive all rents and other income from the Property and shall bear all costs of maintenance and ownership.

2.5.1 The City agrees to seek consent from Developer, which shall not be unreasonably withheld, prior to approving any temporary or permanent encumbrance on the Property including, but not limited to: access restrictions, construction staging, and utility easements. Developer shall have five (5) business days after receipt of a written request for consent from City in which to notify City in writing of any objection and the basis therefore; Developer's failure to respond to City's notice within the five-day period shall be deemed to constitute Developer's consent, and City may proceed with such action without further notice and without liability to Developer. City further agrees to grant Developer use of the property for construction staging, sales trailer, and construction access for temporary remediation or other predevelopment activities without additional fee, pursuant to a temporary right of entry agreement (in substantially the form of Exhibit G hereto). City further agrees to allow predevelopment and construction signage without additional fee, on construction trailer(s) and construction fencing, subject to customary approval and in conformance with the City's Zoning and Development Code.

2.6 As-Is - Where-Is. Except as specifically set forth in this Agreement, the Property and all improvements thereon, shall be conveyed in their existing "as is," "where is" condition. In that regard, Developer shall have the right to survey and examine the Property and any

improvements thereon, including, but not limited to, the physical condition of the improvements, the availability of access, water, sewer and other utilities and services to the Property and the costs of securing same, the existence of hazardous or toxic substances or pollutants, and the zoning and applicable governmental regulations, statutes and ordinances pertaining to the Property, at any time after the execution of this Agreement, with any persons whom it shall designate, including, without limitation of the foregoing, appraisers, contractors, engineers and soil testing personnel. City shall permit access to the Property to Developer and any persons designated by Developer, and City shall afford them the opportunity to conduct, prepare and perform any surveys, appraisals, and any hydrological, topographical, environmental, traffic, feasibility and other engineering tests, studies, and reports upon the Property that Developer deems necessary or appropriate to assist it in determining whether the Property is appropriate for the purposes contemplated by Developer. Upon completion of all such tests, studies and reports, Developer shall fill all holes produced by it and restore the Property to its condition existing prior to any tests or inspections. Developer shall indemnify, protect, defend and hold City harmless from all claims, costs, fees or liability of any kind arising out of the acts of Developer or Developer's agents pursuant to this Section, except that Developer shall have no liability for discovery of pre-existing conditions (e.g. Developer shall not be responsible for remediating environmental contamination discovered by Developer). In the event Developer in its sole and absolute discretion determines that the Property is not suitable for its purposes, Developer may, at any time on or before 5:00 P.M. on the one hundred twentieth (120th) day following the Opening of Escrow (the "Feasibility Date"), terminate this Agreement.

2.7 Close of Escrow. The Closing Date for Parcel 1 Property shall be ten (10) days after the earlier of (a) receipt by City of reasonably satisfactory evidence that Developer has obtained construction financing for an initial phase or Improvement on Parcel 1, or (b) City's issuance of permits for construction on Parcel 1, provided however, in no event shall the Closing occur prior to satisfaction of the Conditions Precedent set forth in **Section 2.8** and **Section 2.9**, respectively, unless expressly waived in writing by Developer, but in no event later than 36 months of the date of the execution of this 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 Parcel 1, or Parcel 2, as applicable, to Developer. On the Closing date the City shall execute and deliver a Special Warranty Deed for the appropriate Parcel, in substantially the form attached hereto as **Exhibit "D"**.

2.8 Conditions Precedent to Closing of Parcel 1. The Parties hereby acknowledge and agree that the obligations of the Parties to consummate and Close on the conveyance of Parcel 1 shall be subject to and conditioned upon the City exercising its reasonable best efforts to satisfy the following conditions precedent:

2.8.1 City's final approval of Developer's rezoning and PAD applications for Parcel 1 of the Project for uses and subject to such conditions and stipulations as are acceptable to Developer; and

2.8.2 Termination of any existing leases on the Property and the satisfaction of any conditions subsequent to those leases.

2.9 Conditions Precedent to Closing of Parcel 2. The Parties hereby acknowledge and agree that the obligations of the Parties to consummate the conveyance of Parcel 2 shall be subject to and conditioned upon the satisfaction of the following conditions precedent:

2.9.1 Developer shall not be in Default under this Agreement;

2.9.2 City's final approval of Developer's rezoning and PAD applications for Parcel 2 of the Project for uses and subject to such conditions and stipulations as are acceptable to Developer;

2.9.3 Termination of any existing leases on the Property and the satisfaction of any conditions subsequent to those leases;

2.9.4 The Developer shall have commenced construction of the initial phase or Improvement on Parcel 1 of the Property; and

2.9.5 Conveyance by the City to the Developer of Parcel 2 must be completed within sixty (60) months of the date of the execution of this Agreement, unless the time for conveyance is extended by mutual agreement.

2.10 City's Purchase of Public Amenities. The City and Developer hereby acknowledge and agree that, the City shall purchase the Public Amenities from Developer. The parties hereby agree that the Purchase Price to be paid by the City to Developer for the Public Amenities shall be equal to \$6,150,000 (the "Public Amenities Purchase Price"). The Public Amenities Purchase Price shall be paid by the City to the Developer at the Close of Escrow for Parcel 1 and Parcel 2 and shall be paid by the application of a Credit in the amount of \$3,075,000 against Developer's \$3,100,000 Purchase Price for Parcel 1, and by the application of a Credit in the amount of \$3,075,000 against Developer's \$3,100,000 Purchase Price for Parcel 2. The parties acknowledge and agree that these respective credits shall be applied against the Developer's obligation to pay the Purchase Price for Parcel 1 and Parcel 2 at the Close of Escrow of each Parcel. The City and Developer hereby also acknowledge and agree that Developer is not required to incur costs in excess of \$6,150,000 for the Public Amenities ("Costs"). A budget detailing the Costs shall be made available by Developer to the City for its review and approval. The Costs are defined as any direct costs of the Public Amenities, as well as allocable indirect costs, soft costs and any City charges for permits or taxes associated with the Public Amenities Project incurred by Developer.

3. Rezoning and Development of the Property.

3.1 Rezoning; PAD. In accordance with the Schedule of Performance, the Developer shall submit to the City for approval a rezoning application and PAD for the Project within 120 days of the execution of this Agreement. The City shall execute and deliver such authorizations and consents as may be required in connection therewith. Developer and City shall define the details and elements of the Public Amenities in the PAD process, which shall include not less than Sixteen Thousand (16,000) square feet of interior gross floor area for the library component (which shall be completed to the gray shell standards defined in Exhibit F), and the pedestrian parkway shall provide adequate width for an ADA accessible pathway and other features further

defined in Exhibit F and further defined in the PAD. Developer and City shall work together to better define the elements to be included within the Public Amenities as the Project proceeds.

3.2 City Approvals. The City hereby agrees not to impose any unusual or extraordinary plan or review requirements, conditions or stipulations on the Developer or on any building, structure, phase or Parcel of the Project.

3.3 Phasing of Development. The City hereby acknowledges that the development of the Property contemplates that the Project Improvements will be planned, constructed and completed in phases on separate Development Parcels, and that the Development Parcels and the initial phasing plans will be more specifically set forth in the PAD to be submitted to the City pursuant to the provisions of Section 3.1 above.

3.4 Parking. The City hereby agrees to waive the required public parking for the library component of the Project. The parties agree that it is in the best interests of the Project that the parking requirement for any Workforce Housing provided within the Project shall be equal to one space for each dwelling unit.

3.5 Railroad Quiet Zone. The City agrees to use its reasonable best efforts to establish a Quiet Zone area adjacent to Project.

3.6 Certificate of Completion. Promptly after substantial completion of the construction of any Improvements on a Development Parcel within the Property in accordance with the PAD for such Development Parcel, City shall furnish to Developer a Certificate of Completion in accordance with City's standard procedures. Upon issuance of the Certificate of Completion, Developer may record the Certificate of Completion in the Office of the Maricopa County Recorder.

3.7 General Cooperation. The City and Developer acknowledge and agree that they shall cooperate in good faith with each other and use their respective good-faith and commercially reasonable efforts to pursue development of the Project as contemplated by this Agreement. City agrees to use its reasonable best efforts to assist Developer with other State, Federal and County governmental agencies, as appropriate, and with the Union Pacific Railroad and any subsequent owners of the rail easement and railroad tracks. To further the commitment of the City and Developer to cooperate in the implementation of this Agreement, the City shall designate and appoint a representative to act as liaison between the City and its various departments and the Developer, and the Developer shall designate and appoint a representative to act on its behalf under this Agreement. The initial representative for the City ("City Representative") shall be Larry Schmalz, or his designee, and the initial representative for the Developer ("Developer Representative") shall be Todd Marshall, or his designee. Both the City Representative and the Developer Representative shall be available at all reasonable times to discuss and review the performance of the City and Developer under this Agreement and the development of the Project.

3.8 Termination. Notwithstanding anything contained herein to the contrary, if this Agreement is terminated, then the City and the Developer shall have no further rights, duties or obligations under the provisions of this **Section 3** with respect to the rezoning and development of the Project and any rezoning applications or applications for approval of a PAD shall be deemed withdrawn by Developer.

4. **Reimbursement Obligation of the City.** The City and Developer agree that because of the increased costs resulting from the physical constraints and challenges associated with the development of the Property, as set forth in more detail in ***Recital C***, development of the Property is economically feasible only by the commitment of the City to provide Developer with the benefit of a sales tax rebate of a portion the City's share of construction sales taxes ("Construction Sales Taxes") and excise sales taxes ("Sales Taxes") generated by the Project.

4.1 **Definitions.**

(a) "**Sales Tax Rebate Amount**" shall mean and refer to an amount equal to the product obtained by multiplying (a) the unrestricted Project Sales Tax Revenue generated by any sales activities on the Property and received by the City for any calendar quarter during the Reimbursement Period, by (b) seventy percent (70%).

(b) "**Project Sales Tax Revenue**" shall mean and refer to City revenues derived from those certain unrestricted privilege (sales) taxes levied, imposed and received by the City for any calendar quarter during the Reimbursement Period pursuant to (a) Chapter 16 of the Tempe City Code on construction of the Project, the retail sale of condominium units within the Project and on all other taxable transactions that occur within the Project, or (b) 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 under Sec. 16-415 Construction Contracting - Construction Contractors, Sec. 16-416 Construction Contracting - Speculative Builder, and Sec. 16-417 Construction Contracting - Owner-builders who are not speculative builders with respect to the initial sale of all residential and commercial condominium units developed, constructed and sold within the Project. As of the date of this Agreement, the City imposes a 1.2% unrestricted privilege tax rate, but it is the intent of the parties that when and if the City adjusts the unrestricted privilege tax rate on a City-wide basis, the rate shall also change for the purposes of this Agreement.

(c) "**Tax Rebate Period**" shall mean and refer to the City schedule for paying Developer the Sales Tax Rebate Amount during the Reimbursement Period, which for the purposes of this Agreement shall be every calendar quarter, commencing not later than 90 days after the end of the first calendar quarter following the Issuance Date and continuing within 90 days after the end of each calendar quarter thereafter until the end of the Reimbursement Period.

(d) "**Reimbursement Period**" shall mean and refer to that period of time beginning on the date the first certificate of occupancy is issued by the City for all or any portion of an Improvement constructed on the Project and ending on the earlier of (a) the 15th anniversary of such date, or (b) the date the Reimbursement Amount has been paid in full to Developer.

4.2 **Reimbursement Amount.** The City agrees to pay to Developer an aggregate amount equal to the net present value of \$3,200,000, from the Construction Sales Taxes and the Sales Taxes generated and received by the City from the Project, valued as of the date of the execution of this Agreement, and calculated at a discount rate of eight percent (8%) per annum (the "Reimbursement Amount"), and in accordance with the terms of this ***Section 4***. The City's obligation to make the payments described in this ***Section 4*** shall terminate upon payment of the full Reimbursement Amount.

4.3 Construction Sales Tax Rebate. The City shall pay to Developer a rebate of any privilege (sales) taxes levied and imposed by the City pursuant to Chapter 16 of the Tempe City Code on construction of the Project in the amount of 100% of all Construction Sales Taxes (currently 1.2%, exclusive of the .1% for the Arts, and .5% for transit) generated and paid by the Developer, and/or any contractor engaged by the Developer, and received by the City in relation to the construction of the Project, including, but not limited to, building construction, site work and tenant improvements, constructed in accordance with this Agreement (the "Construction Sales Tax Rebate Amount"). The City shall pay the Construction Sales Tax rebate to the Developer semi-annually commencing 180 days after the Issuance Date for a particular Improvement and every 180 days thereafter until the earlier of: (a) the date the Reimbursement Amount has been paid in full to Developer, or (b) construction of all Improvements of the Project has been completed, the City has received and processed all the privilege (sales) taxes levied and imposed by the City on the Developer and any contractors working on the Project, and the final Construction Sales Tax rebate has been paid to Developer by the City. Developer shall not be entitled to any rebate for tenant improvements constructed for any tenant other than the initial tenant of that particular Improvement.

4.4 Sales Tax Rebate. The City shall pay to Developer the Sales Tax Rebate Amount that accrues during each Tax Rebate Period during the Reimbursement Period; provided however, that nothing in this **Section 4** requires the City to include within its payment to Developer of any quarterly Sales Tax Rebate Amount any Project Sales Tax Revenues levied but not received by the City during the Tax Rebate Period. If the City does not receive payment of certain Project Sales Tax Revenues by the end of the calendar quarter to which the payment relates, the corresponding sum shall be included in the City's payment to Developer for the next calendar quarter.

5. **Fee, Basis and Deferral.**

5.1 Fee Basis. All fees and permits to be paid in association with the Project, including, but not limited to, planning and building plan check fees, excavating and grading fees, engineering fees, and building permit fees, including, without limitation, mechanical, electrical and plumbing permit fees, shall be capped at the rates or charges in effect as of the date of this Agreement unless otherwise waived, abated or reduced (herein, the "Capped Rate"). In the case of a reduced fee or deferred fee as defined herein, the basis for the reduction shall be based on the Capped Rate.

5.2 Deferral of Sewer, Water and Residential Unit Development Fees. In addition to the foregoing fee waivers, the City hereby agrees to defer payment of all potable water, sanitary sewer, and residential development fees (herein, the "Deferred Development Fees"), on commercial and landscape meters until such time as a Certificate of Completion is issued relative to the Improvement or phase that is served by such meter. In the case of individual for-sale residential units, the deferred sewer and water fees shall be paid to the City out of escrow at the closing of the sale of each individual unit to a third party purchaser.

6. Contribution of HOME Funds. If Developer is successful in securing an allocation of Low Income Housing Tax Credits (LIHTC) for this Project through the Arizona Department of Housing, the City hereby agrees to contribute \$300,000 in U.S. Department of Housing and Urban Development HOME funds (the "HOME Funds") to the Project for the purpose of contributing toward the financing

of affordable housing pursuant to the Developer's successful application for LIHTC. Should Developer be awarded LIHTC for the 2007/2008 program year the City will commit the HOME Funds by October 1, 2007, and remit payment to the Developer on or before July 1, 2008. Further, if Developer is unsuccessful in procuring HOME Funds in the 2007/2008 program year but elects to apply for LIHTC for the 2008/2009 program year, and is successful in that effort, the City will commit the HOME Funds by October 1, 2008 and remit payment to the Developer by July 1, 2009. The availability of LIHTC or HOME Funds is not a condition to performance of the balance of this Agreement.

6.1 **Alternate Workforce Housing.** In the event that Developer is not awarded the LIHTC funds, the Developer shall provide alternate Workforce Housing in the Project. The number of alternate Workforce Housing units shall be not less than 60 providing that the total number of residential units approved in the Parcel 1 PAD is not less than 210. Should the Parcel 1 PAD be less than 210, but more than 195, the number of alternate Workforce Housing units shall be not less than 50.

7. **Government Property Lease Excise Tax Abatement.** The City hereby acknowledges and agrees that because of the increased costs associated with the unique development constraints and challenges associated with this Property, as set forth in greater detail in *Recital C*, development of the Property is economically feasible only by the commitment and obligation of the City to provide Developer with the benefit of 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 ("Government Property Lease Excise Tax Abatement" or "GPLET"). Notwithstanding the foregoing, 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. The City hereby covenants and agrees that it will accept, from time to time, reconveyances of all or portions or phases of the Property and conveyances of Improvements and will lease-back each such parcel of Property and Improvements to the Developer ("Land and Improvements Lease"). Each such reconveyance of land and conveyances of Improvements shall be formalized in a separate Land and Improvements Lease substantially in the form attached hereto as *Exhibit "E"*, or a form otherwise mutually acceptable to the City and the Developer. The parties hereby acknowledge that each such lease is intended to be a "Government Property Lease" as defined and contemplated by the provisions of A.R.S. §§ 42-6201, et seq., which shall contain all the provisions required thereby, in addition to other terms and conditions set forth therein. Upon expiration or termination of any such Land and Improvements Lease, the Improvements and the real property upon which such Improvements are situated and which are subject to the Land and Improvements Lease shall be immediately reconveyed by quit-claim deed by the City to the Developer or such party or entity as Developer may designate. The Workforce Housing component described in Section 6 and 6.1 shall continue as a government Property Lease for a period of seven (7) years after the expiration of the abatement period. Upon expiration or termination of the Land and Improvements Lease for the Workforce Housing, the Improvements and the real property upon which such Improvements are situated and which are subject to the Land Improvements Lease shall be immediately reconveyed by quit-claim deed by the City to the Developer or such party or entity as Developer may designate.

8. **Successor or Replacement Financing Programs.** The City acknowledges that development of the Property is considered economically feasible only as a result of the availability of

tax abatements provided by currently available tax abatement programs, as set forth in this Agreement. In the event, 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 Agreement are no longer in effect, then, in that event, the City will use its reasonable 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 and the Property as are currently provided under existing law and this Agreement. 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. **Developer's Indemnification of City.** 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 clean-up actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense, arising directly or indirectly, in whole or in part, out of the performance of this Agreement by the Developer, except to the extent resulting from the negligence or intentional misconduct of the City or any of its employees, contractors or agents.

10. **City's Indemnification of Developer.** City shall assume all incidents of ownership of the Public Amenities when title or easement to same is transferred to City of record, and will thereafter indemnify and hold Developer harmless for any liability arising out of the public's use of the Public Amenities after the date of transfer and not caused by the negligence or willful misconduct of Developer, its agents, invitees, employees or other persons for whose acts, errors, mistakes, omissions, work, services or professional services Developer may be legally liable. The foregoing indemnity shall not extend to any warranty claim or any claim relating to the design and/or construction of the Public Amenities or their operation prior to conveyance to City.

11. **Default; Alternative Dispute Resolution.**

11.1 **Default; Nonbinding Mediation.** In the event any party hereto fails to comply with any terms, conditions, provisions and obligations under this Agreement which are applicable to such party within thirty (30) days after receipt of written notice from any other party (an "Event of Default"), such party shall be deemed to be in default under this Agreement. After the occurrence of such Event of Default, the parties hereby agree that there shall be a ninety (90) day moratorium on litigation during which time the parties shall 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 the parties involved in the dispute. In the event the parties involved in the dispute cannot agree upon the selection of a mediator within ten (10) days, then, within five (5) days thereafter, such parties shall request the presiding judge of the Superior Court of Maricopa County, Arizona to appoint the mediator. The mediator selected shall have at least ten (10) years experience in mediating or arbitrating disputes relating to commercial property. The cost of any such mediation shall be divided equally between the parties involved in the dispute. The mediator shall not have the right to award punitive damages. The results of the mediation shall be nonbinding and any party involved in the dispute shall have the right to initiate litigation to enforce the terms and conditions of this

12.3 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, terrorist attack, 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, sudden and unexpected shortages of construction materials 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"), and the party affected by the force majeure event gives notice to the other party within five (5) business days after the occurrence of such event. In the event that any party to this Agreement is unable or fails to perform due to an event constituting a force majeure and such party has given the notice 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.

12.4 Moratoria. The parties hereby acknowledge and agree that, upon the City's approval of a PAD with respect to the Property or any parcel or phase thereof, 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 the Property or any parcel or phase thereof, shall apply to or govern the development of the Property or any parcel or phase thereof, whether affecting the Developer's rights under this Agreement, any subdivision map, building permit, occupancy permit or any other approvals or entitlements with respect to the Property or any parcel or phase thereof, 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 the Property or any parcel or phase thereof, in accordance with the approved PAD therefore in accordance with the rules, regulations, ordinances and official policies applicable to and governing the development of the Property or any parcel or phase thereof which are existing and in force as of the date of the approval of the PAD

12.5 Captions. The captions used herein are for convenience only and do not in any way limit or amplify the terms or provisions hereof.

12.6 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.

12.7 Compliance with Executive Order. The parties all agree to comply with Arizona Executive Order 99-4 on non-discrimination.

12.8 Waiver. No waiver by any 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.

12.9 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.

12.10 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, unless the material terms of this Agreement are vitiated.

12.11 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference is if fully set forth herein.

12.12 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.

12.13 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

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

12.15 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, real estate brokers and attorneys). To the best knowledge of Developer, no member, official or employee of City shall have any direct or indirect interest in this Agreement, nor participate in any agreement relating to the Agreement which is prohibited by law. This Agreement is subject to A.R.S. §38-511.

12.16 No Personal Liability. No current or former member, official or employee of any Party shall be personally liable (a) in the event of any default or breach by such party, (b) for any amount which may become due to any nonbreaching party or its successor or assign, or (c) pursuant to any obligation of the breaching party under the terms of this Agreement.

12.17 No Partnership; Third Parties. It is not intended by this Agreement to, and nothing contained in this Agreement shall create any partnership, joint venture or other arrangement between the parties hereto. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization or corporation not a party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

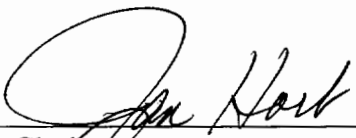
12.18 Authority. Each of the parties hereto represents and warrants to the other that the individual executing this Agreement on behalf of the respective parties are authorized and empowered to bind the party on whose behalf such individual is signing and that this Agreement shall be binding upon such parties.

SIGNATURE PAGE FOLLOWS


IN WITNESS WHEREOF, the undersigned have caused this Development, Disposition and Intergovernmental Agreement to be executed as of the day and year first above written.

ATTEST:

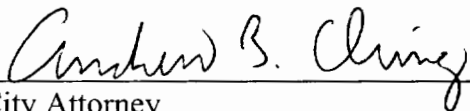
CITY OF TEMPE, an Arizona municipal corporation



City Clerk


By 
_____, Mayor

APPROVED AS TO FORM:



City Attorney

FARMER ARTS, LLC, an Arizona limited liability company

By 
Name Todd Maxwell
Title Managing Member

List of Exhibits

Exhibit "A"	Legal description of the Property
Exhibit "B"	Map of Parcel 1 and Parcel 2
Exhibit "C"	Schedule of Performance
Exhibit "D"	Form of Special Warranty Deed
Exhibit "E"	Land and Improvements Lease
Exhibit "F"	Map or Depiction of Public Amenities
Exhibit "G"	Temporary License Agreement

Exhibit "A"
Legal Description Parcel 1

That portion of the Southeast quarter of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Commencing at the Southeast corner of said Section 16;

thence North 00° 17' 11" West (recorded = North 00° 16' 40" West), along the East line of the Southeast quarter of said Section 16, also being the centerline of the Union Pacific Railroad Main Track, a distance of 33.00 feet to the Point of Beginning, said point being on the Northerly right-of-way of University Drive, as shown on the subdivision plat of State Plat No. 12 Amended, recorded in Book 69 of Maps, Page 38, Maricopa County Records;

thence South 89° 57' 13" West (recorded = South 90° 00' 00" West), along said Northerly right-of-way line, 199.97 feet to the Easterly right-of-way line of Farmer Avenue;

thence North 00° 17' 01" West (recorded = North 00° 16' 40" West), along said Easterly right-of-way line, 1271.84 feet to the centerline of 5th Street as recorded in Docket 7324, Page 437, Maricopa County Records;

thence North 89° 04' 18" East, along the said centerline, 199.93 feet to the East line of the Southeast quarter of said Section 16;

thence South 00° 17' 11" East, along said East line and the centerline of said Union Pacific Railroad Main Track, 1274.91 feet to the Point of Beginning;

EXCEPT the East 35.00 feet thereof;

AND subject to right-of-way over the North 49.50 feet thereof;

AND subject to additional right-of-way over the Southerly portion of the property.

Exhibit "A"
Legal Description Parcel 2

That portion of the Southeast quarter of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Commencing at the Southeast corner of said Section 16;

thence North 000 17' 11" West (recorded = North 000 16' 40" West), along the East line of the Southeast quarter of said Section 16, also being the centerline of the Union Pacific Railroad Main Track, a distance of 1307.91 feet to the centerline of 5th Street, as recorded in Docket 7324, Page 437, Maricopa County Records, and the Point of Beginning;

thence South 890 04' 18" West, along said centerline 199.93 feet to the Easterly right-of-way of Farmers Avenue, as shown on the subdivision plat of State Plat No. 12 Amended, recorded in Book 69 of Maps, Page 38, Maricopa County Records;

thence North 000 16' 23" West (recorded = North 000 16' 40" West), along said East right-of-way line, 927.18 feet to the South line of Patent No. 6898;

thence North 890 27' 33" East, along the South line of said Patent No. 6898, a distance of 199.70 feet to the East line of the Southeast quarter of said Section 16;

thence South 000 17' 11" East (recorded = South 000 16' 40" East), along said East line and the centerline of the Union Pacific Railroad Main Track, 925.82 feet to the Point of Beginning;

EXCEPT the East 35.00 feet thereof;

AND subject to right-of-way over and across the South 49.50 feet thereof.

Exhibit "B"
Map of Parcel 1 & 2

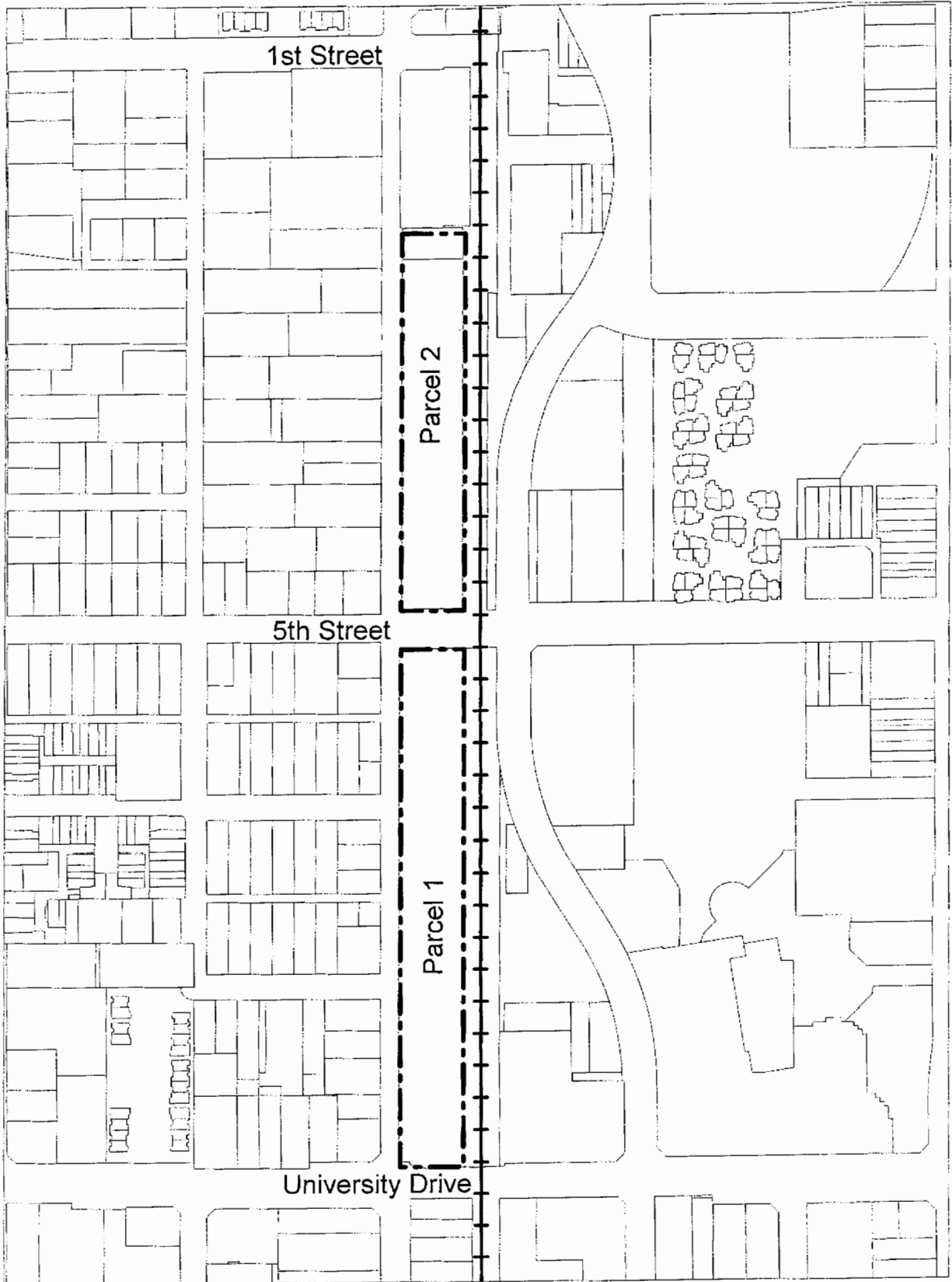


Exhibit "C"
Schedule of Performance

- 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 - 90 days from City's issuance of First Phase building permit.**

ADJUSTMENTS TO SCHEDULE

I. 180 Day Extension. Developer will have the right to request a one time 180 day extension of any of the foregoing time periods in exchange for a payment to the City of \$50,000, which extension may be granted in the City's sole and absolute discretion.

Exhibit "D"
Form of Special Warranty Deed

SPECIAL WARRANTY DEED

The CITY OF TEMPE, an Arizona municipal corporation, as grantor, hereby conveys to _____, an Arizona limited liability corporation, as grantee, by this Special Warranty Deed dated _____, 200_, pursuant and subject to the terms, conditions and reservations contained in that Agreement entitled Development and Disposition Agreement (Fifth and Farmer) dated _____, 200_, title in fee simple to _____ the following legally described property:

LEGAL DESCRIPTION
(for lot to be conveyed)

The City of Tempe further covenants that at and until execution and delivery of this Deed, that it is lawfully seized of a good, absolute and indefeasible estate in fee simple in the described property and has the proper lawful right and authority to convey such property.

The City of Tempe further covenants that the described property is free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, of whatever nature or kind except those appearing of record, and;

1. Development and Disposition Agreement (Fifth and Farmer)
2. Any dedications or easements retained by the City of Tempe or required prior to approval of plans or issuance of any necessary permits.

The City of Tempe covenants that it is properly obligated and bound by the terms, conditions and covenants contained in the Development and Disposition Agreement (Fifth and Farmer) dated _____, 200_.

CITY OF TEMPE,
an Arizona municipal corporation

By: _____
Hugh Hallman, Mayor

Exhibit "E"
Land and Improvements Lease

WHEN RECORDED, RETURN TO:

City of Tempe Basket

LAND AND IMPROVEMENTS LEASE

THIS LAND AND IMPROVEMENTS LEASE ("**Lease**") is made and entered into as of the _____ day of _____, 2004 by and between the **CITY OF TEMPE**, a municipal corporation ("**Landlord**"), and _____, ("**Tenant**").

RECITALS

- A. Landlord has title of record to the real property as described in *Exhibit A* hereto (the "**Land**"), together with all rights and privileges appurtenant thereto and all improvements and future additions thereto or alterations thereof (collectively, the "**Premises**").
- B. The Premises are located in a single central business district in a redevelopment area established pursuant to Title 36, Chapter 12, Article 3 of Arizona Revised Statutes (A.R.S. §§36-1471 et seq.). Tenant's construction of the Premises resulted in an increase in property value of at least one hundred percent.
- C. The Premises will be subject to the Government Property Lease Excise Tax as provided for under ARS §42-6201 et seq. (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. §42-6209 (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.

2. Term. The term of this Lease shall be for eight (8) 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 (8th) 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 \$10.00 per year on the Commencement Date and every anniversary thereof. Tenant shall have the right to prepay the \$350.00 total rent for the entire term of this Lease. 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 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.

4.1 Subject to the applicable provisions of this 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.**"

4.2 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; Lease Obligations.

5.1 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 this 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." Notwithstanding anything herein, the Tenant shall be responsible for all Town Lake assessments and payments.

5.2 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

file 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.

5.3 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.

5.4 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 this Lease and A.R.S. §42-6201(2), the Premises may be used and occupied by Tenant for any lawful purpose, including without limitation the sale of alcoholic beverages, subject to Tenant obtaining all required permits, licenses, and approvals from the Arizona Department of Liquor Licenses and Control.

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

7.1 Utilities, including gas, heat, water, light, power, telephone, sewage, and any other utilities supplied to the Premises;

- a. disruption in the supply of services or utilities to the Premises;
- b. maintenance, repair or restoration of the Premises;
- c. 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.

9. Alterations. Subject to the applicable provisions of this 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. During the term of this Lease, title to all improvements shall at all times be vested in Landlord.

10. Easements, Dedications and Other Matters. At the request of Tenant, and provided that no Event of Default shall have then occurred and be continuing, 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 June, 2005. 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 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, then, at Tenant's election, either: (i) this Lease shall continue in full force and effect, and, subject to the applicable provisions of this Lease, Tenant, at Tenant's sole cost and expense, may, but shall not be obligated to, rebuild or repair the same; or (ii) this Lease shall terminate with respect to all of the Premises or to such portions of the Premises as Tenant may elect. 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 this 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 this Lease.

14. **Condemnation.**

14.1 **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 any other portion of the Premises as may be specified by Tenant, and, subject to the applicable provisions of this Lease, Tenant reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or 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.

14.2 **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 or specified by Tenant to be removed from this Lease.

14.3 **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 this Lease and of any Leasehold Mortgage.

14.4 **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.

15.1 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**"), or if Tenant, in its sole and absolute discretion, so elects, Tenant or Tenant's successor by Foreclosure shall have the "Option", exercisable by written notice to Landlord, to terminate this Lease as to the entire Premises or as to such portions of the Premises as Tenant may specify effective sixty days after the date of the notice. Upon default under the Leasehold Mortgage (after giving effect to all applicable notice and cure rights), 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.

15.2 Leasehold Mortgagees and Tenant. If there are any Leasehold Mortgagees as defined in Section 4(a), Tenant may not terminate, modify or waive its Option under this section without the written approval of the Leasehold Mortgagees, and Landlord will not recognize or consent thereto without such approval.

16. Assignment; Subletting.

16.1 Transfer by Tenant. At any time and from time to time Tenant shall have the right to assign the Lease and Tenant's leasehold interest or to sublease all of or any part of the Premises to any person or persons for any use permitted under this Lease, without the consent of the Landlord.

16.2 Liability. Each assignee, other than any residential subtenant, 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.

17.1 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 an "**Event of Default**"; 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, no Event of Default shall be deemed to have occurred if Tenant shall within such period commence such cure and thereafter diligently prosecute the same to completion.

17.2 Remedies. Upon the occurrence of an Event of Default, 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. §42-6206(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.

17.3 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.

18. 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.

19. 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.

20. 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 Event of 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.

21. In case of an Event of Default by Tenant in the performance or observance of any nonmonetary term, covenant or condition to be performed by it hereunder, if such 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 17.2, if and so long as:

(i) 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 Events of Default 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

(ii) 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).

22. 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 Event of 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, an Event of Default that is not reasonably susceptible to cure by the person succeeding to the leasehold interest shall no longer be deemed an Event of Default hereunder.

23. 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.

24. 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.

24.1 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 landlord under the sublease, and (iv) shall be bound by the provisions of the sublease, including all options, and shall execute documents as may be reasonably required by such subtenants to evidence these agreements. 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.

25. New Lease.

25.1 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:

- a. 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;
- b. 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;
- c. 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

25.2 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.

25.3 Notwithstanding anything to the contrary expressed or implied in this Lease, any new lease made pursuant to this Section 25 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.

26. No Obligation. Nothing herein contained shall require any Leasehold Mortgagee to enter into a new lease pursuant to this Section 25 or to cure any default of Tenant referred to above.

27. Possession. If any Leasehold Mortgagee shall demand a new lease as provided in this Section 27, 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.

28. 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 28, or until the period therefore 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.

29. 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.

30. 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.

31. Surrender, Reconveyance.

31.1 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 at no cost or expense to Tenant other than as set forth in Section 33 below.

31.2 Reconveyance Documents. Without limiting the foregoing, Landlord upon request shall execute and deliver: (i) a special warranty deed 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 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 all respects in Tenant.

32. 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 written consent of Tenant. The Premises shall be conveyed "AS IS" without representation or warranty whatsoever. Notwithstanding the prohibition on the creation of any liens by or through Landlord set forth in this Section, upon any reconveyance, Landlord shall satisfy all liens and monetary encumbrances on the Premises created by Landlord.

33. 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.

34. 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.

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

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; (ii) that there are no uncured defaults in Tenant's performance; and (iii) the accuracy of such other matters relating to this Lease as Tenant as may have been set forth in the request.

36. General Provisions.

36.1 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.

36.2 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.

36.3 Captions; Attachments; Defined Terms.

- a. 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.
- b. 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.
- c. 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.

36.4. 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.

36.5 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.

36.6 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.

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

36.8 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
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.

36.9 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.

36.10 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.

36.11 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.

36.12 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.

37. 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:

LANDLORD:

By: _____
City Clerk

CITY OF TEMPE, a municipal corporation

APPROVED AS TO FORM:

By: _____
Name: _____
Title: _____

City Attorney

TENANT:

By: _____
Name: _____
Title: _____

***Exhibit A
to Land and Improvements Lease***

Property Description

EXHIBIT B
to Land and Improvements Lease

Memorandum of Land and Improvements Lease

WHEN RECORDED, RETURN TO:

MEMORANDUM OF LAND AND IMPROVEMENTS LEASE

THIS MEMORANDUM OF LAND AND IMPROVEMENTS LEASE (the "Memorandum") is made and entered into this _____ day of _____, 200__ by and between **THE CITY OF TEMPE**, an Arizona municipal corporation ("Landlord"), and _____, a _____ ("Tenant"). Landlord and Tenant are sometimes referred to in this Agreement collectively as the "Parties", or individually as a "Party". The Parties hereby agree as follows:

1. The Parties have entered into and executed that certain Land and Improvements Lease of even date with this Memorandum (the "Lease") whereby Landlord has leased to Tenant, and Tenant has leased from Landlord, that certain real property described in Exhibit A (the "Land"), together with all rights and privileges appurtenant to, and all present and future improvements on, the Land (collectively the "Premises"), for a thirty (30) year term commencing on the Commencement Date as defined in the Lease. The Lease sets forth all terms and provisions relative to the lease of the Premises by Landlord to Tenant. Without limiting the generality of the foregoing, Tenant has the right to mortgage its leasehold interest as described in Section 0 of the Lease and there are restrictions on the right of Landlord to transfer or encumber its interest in the Premises or the Lease as described in Section 00(0) of the Lease.

2. The Parties consider the Lease to be a binding agreement between them creating vested rights in and for Tenant superior to the right, title and interest of any third party later acquiring any interest in the Premises, including but not limited to purchasers of the Premises or lienholders acquiring any lien or encumbrance interest against the Premises. Further, the purchase option rights of Tenant are prior and superior to the right, title and interest of any third party and enable and entitle Tenant to acquire title to the Premises free and clear of the liens or encumbrances of any other third party. All persons dealing with the Premises are advised to contact Tenant and Landlord to ascertain the current status of the Lease and Tenant's tenancy rights and leasehold interests in the Premises. The Parties are executing and recording this Memorandum, as authorized by the Lease, to provide constructive notice to all persons dealing with the Premises of the binding and vested rights of Tenant and the leasehold interests of Tenant created by the Lease.

IN WITNESS WHEREOF, the Parties have executed this Memorandum to be effective on the date first written above.

By: _____
Name: _____
Its: _____

CITY OF TEMPE, an
Arizona municipal corporation

By: _____
Its: _____

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Clerk

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, _____, an Arizona limited liability company, for and on behalf of such limited liability company.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 20__
by _____, the _____ of The City of Tempe,
an Arizona municipal corporation, for and on behalf of such corporation.

Notary Public

My Commission Expires:

Exhibit “F”
1 of 2
Depiction of Public Amenities

Library

The Library at Farmer Arts District is physically and programmatically integrated into the proposed residential building at the NEC of Farmer Avenue and University Drive. This location serves four distinct neighborhoods that meet at this intersection. The library promotes life-long learning to serve knowledge seekers of all ages. The development program is +/-16,000 sf of interior gross floor area including a mezzanine overlook creating a compact yet dramatic urban learning space. The design and development of the library includes a Gray Shell, as defined below and a public plaza. The Furniture, Fixture and Equipment package is not assumed or provided.

The term “Gray Shell” shall mean and include the building structure, envelope, circulation, public spaces, physical plant support spaces, and site improvements associated with the Library. Specifically:

- Site improvements adequate to comply with life safety, and zoning including: ground cover, planting, irrigation systems, sidewalks, lighting, signage, fences, screens, and buffer zones.
- Building structure including; foundation, beams, columns, floor slabs, and roof structure.
- Building envelope including; insulated exterior walls, exterior glazing, and roof.
- Building standard finished ceiling and ambient lighting.
- Common corridor stud walls, if any, including gypsum wall board on public sides.
- Common areas including; entrance vestibule, lobby, fire egress stairways and corridors, mechanical, electrical switchgear and communication equipment rooms, and elevator shafts and equipment room.
- Public toilets.
- Electrical and mechanical systems including; heating, ventilation and air conditioning systems, building automation system, and emergency generator.
- Combination fire standpipe/sprinkler system and central alarm system.
- Building utility distribution system including; potable domestic water, sanitary and storm drain systems, sanitary vent, electrical power distribution panels and circuit breakers in an electrical closet, designated connection point to the central fire alarm system, and a distribution backboard within a wire closet. All services provide for connections to the tenant functions.

Pedestrian Pathway

Providing the dedicated north/south public access way of 15 to 20 feet on average. The linear park serves as a boardwalk connecting the four neighborhoods to important City amenities and resources. The design provides for an accessible path compliant with ADA standards, shade, park furnishings and appropriate lighting. Upon completion, an access easement or dedication will be provided to the City ensuring continued enjoyment for future generations.

Streetscape

The current industrial streetscape that is Farmer Avenue has been redefined to include an integrated pedestrian oriented sidewalk and a design that establishing the vision for tree lined streets, appropriate lighting and vibrant urban neighborhood uses.

Exhibit "F"
2 of 2
Map of Public Amenities

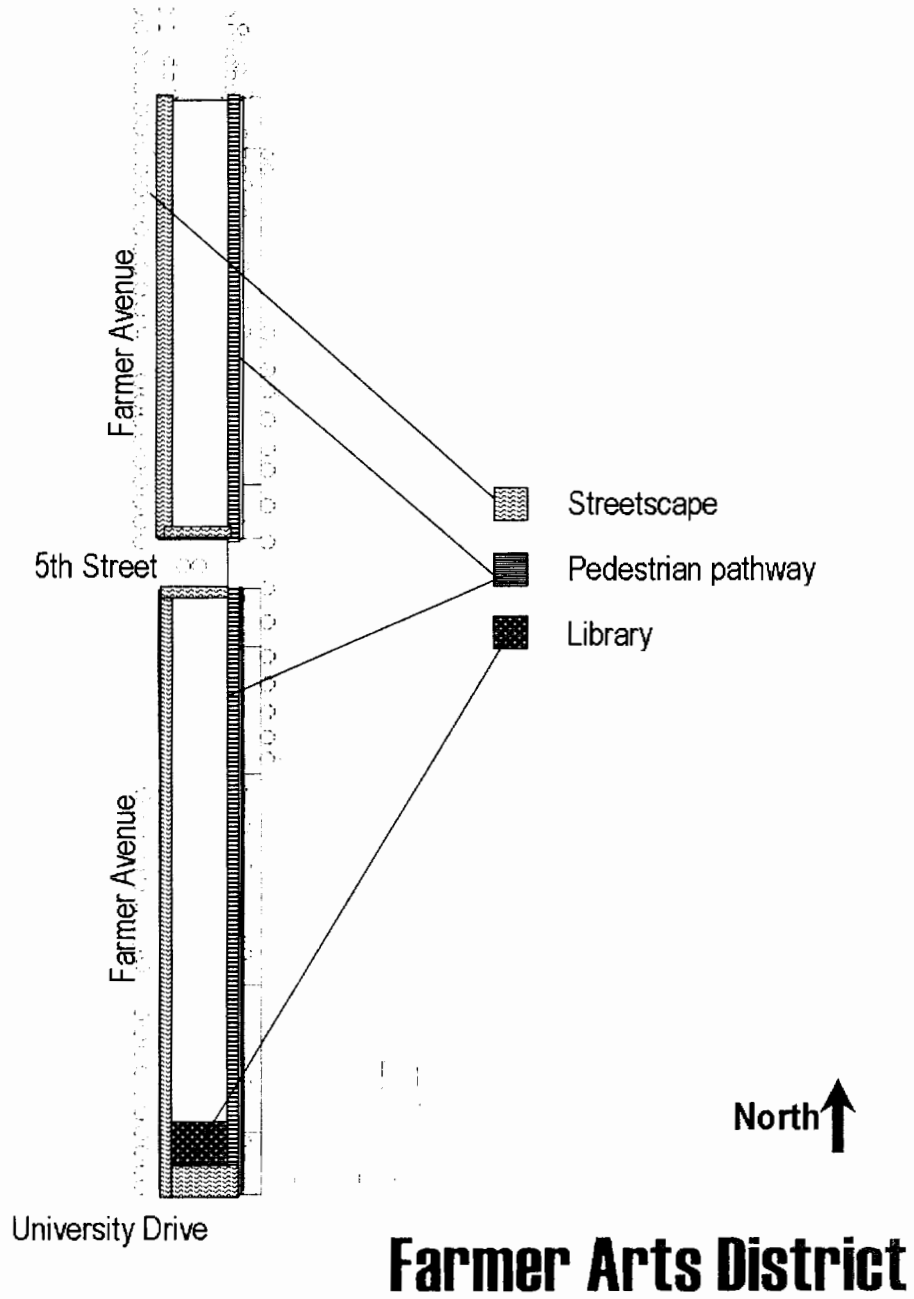


Exhibit "G"

**CITY OF TEMPE
TEMPORARY RIGHT OF ENTRY AGREEMENT**

This Temporary Right of Entry Agreement is made this _____ day of _____, 2007, by and between the City of Tempe, Arizona, hereinafter termed "City" and the Farmer Arts LLC termed "Grantee".

For valuable consideration and upon execution of this agreement, the City hereby grants to the grantee temporary non-exclusive permission to enter upon property of the City lying within:

An area described as:

Said permission is granted for the express purpose of :

The Grantee covenants and agrees that the City is to be free from liability and claim for damages by reason of any injury to any person or persons, including Grantee, or property of any kind whatsoever and to whomsoever while in, upon, or in any way connected with the property during the term of this agreement or any extension hereof, or any occupancy hereunder, Grantee hereby covenanting and agreeing to indemnify and save harmless the City 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 the City, its agents or employees. The City agrees that Grantee 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 the City, as Grantee may deem necessary, provided that the expenses thereof shall be paid by Grantee. The provisions of this section shall survive the expiration or other termination of this agreement.

Grantee hereby agrees that they shall leave the property in a neat, clean and orderly condition; as near possible to the condition that existed prior to their entry on to the property.

This agreement shall expire 90 days from the date of this agreement.

City of Tempe

AGREED:

Principal Planner

Farmer Arts LLC.