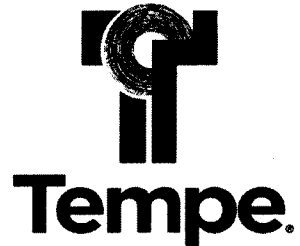


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City of Tempe
Contract No. C2016-142B
First Amendment to Development Agreement
with FDG Local Tempe Associates, LLC

When Recorded, Return To:
City of Tempe Basket

FIRST AMENDMENT TO DEVELOPMENT AGREEMENT

[C2016-142A]

C2016-142B

This First Amendment to Development Agreement ("First Amendment") is entered into this 1st day of January, 201~~8~~⁹, by and between the City of Tempe, an Arizona municipal corporation ("City") and FDG Local Tempe Associates, LLC, a Colorado limited liability company ("Developer"). The City and Developer are sometimes referred to as the "Parties" and individually as a "Party."

RECITALS

A. City and Developer are parties to that certain Development Agreement [C2016-142] dated as of July 25, 2016 and recorded on August 1, 2016 in the Official Records of Maricopa County Recorder of Arizona, as Instrument No. 2016-0544795 (the "Development Agreement"). Capitalized but undefined terms used herein shall be defined as set forth in the Development Agreement.

B. City and Developer now desire to amend the Development Agreement in certain respects, as more particularly set forth herein.

AGREEMENT

NOW, THEREFORE, in consideration of the above premises, the promises contained in this First Amendment and for good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows:

1. **RECITALS**. Recital E of the Development Agreement is hereby amended to clarify that the terms of any Government Property Lease executed pursuant to the Development Agreement will not avail itself of the Government Property Lease Excise Tax rate structure provided for under A.R.S. § 42-6203(A) and available to certain leases of government property improvements entered into before May 20, 2010 or authorized by development agreements, ordinances, or resolutions approved by the governing body of a government lessor before June 1, 2010. Accordingly, Recital E is replaced by the following:

E. City and Developer hereby acknowledge and agree that, notwithstanding Resolution 2010.76, the execution of any Government Property Lease pursuant to this Agreement is subject to rates of the Government Property Lease Excise Tax set forth under A.R.S. § 42-6203(B) in effect on the date that the Certificate of Occupancy (as hereinafter defined) is issued, which rates shall go into effect for two (2) years after the eight (8) year abatement period pursuant to A.R.S. § 42-6209 ends.

2. **PROPERTY TAX ABATEMENTS**. Section 3.7 of the Development Agreement is hereby amended to clarify that the reference to "statutorily-authorized property tax abatements

available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209, inclusive, as in effect on May 20, 2010 which were reserved in Resolution 2010.76” refers only to the eight-year abatement of Government Property Lease Excise Tax that City may provide for an government property improvement under A.R.S. § 42-6209, which term limitation existed both before and after May 20, 2010. Accordingly, the words “property tax abatements available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209, inclusive” are replaced with “eight-year property tax abatements available pursuant to the provisions of A.R.S. § 42-6209.”

3. **SECTION 3.5.1.** Section 3.5.1 of the Development Agreement is amended to remove the following words therefrom: “Construction of the gates must be completed prior to issuance of a Certificate of Occupancy for the Project”.

4. **SECTION 3.5.2.** The Development Agreement is amended to modify Developer’s responsibility regarding payment of all maintenance costs associated with the quad-gates for only one (1) year commencing on the date construction of the quad gates is completed and continuing until the 2nd anniversary of such date. The Development Agreement is further modified to require the City to pay all maintenance costs associated with the quad gates commencing on the 2nd anniversary of the date construction of the quad gates is completed and continuing thereafter. Notwithstanding any provision to the contrary in the Development Agreement, Developer shall have no responsibility to pay for maintenance of the quad gates (initially referenced in § 3.5.1 of the Development Agreement) except as set forth herein. City acknowledges that Developer has made the payment of \$518,107.00 to the City for the construction of the quad gates as required pursuant to § 3.5.1 of the Development Agreement. All provisions of § 3.5.2 not specifically modified remain in effect.

5. **EXECUTION AND ESCROW OF GOVERNMENT PROPERTY LEASE; JOINT ESCROW INSTRUCTIONS.** Simultaneous with execution of this First Amendment, the Parties shall also execute two (2) undated versions of the approved form of the Government Property Lease and the related Memorandum of Land and Improvements Lease (“Memorandum”). Said originally executed versions of the Government Property Lease and Memorandum shall be deposited into escrow to be held by Stewart Title & Trust of Tucson (“**Escrow Agent**”) pursuant to the escrow instructions set forth in this paragraph. Upon issuance of the first Certificate of Occupancy for the Project, pursuant to Section 3.7 of the Development Agreement, Developer will convey the Property to the City pursuant to a special warranty deed which will be recorded in the Maricopa County real property records (as recorded, the “Recorded Deed”). Upon delivery by Developer to Escrow Agent of a copy of the Recorded Deed and confirmation of issuance of the first Certificate of Occupancy (including the date thereof), Escrow Agent shall request written approval of the City to release the originally executed copies of the Government Property Lease and record the Memorandum (which request may be delivered via email (subject to reasonable confirmation of receipt) and shall be addressed to the following email addresses: **Sonia_Blain@tempe.gov**). Subject to receipt by the Escrow Agent of written approval by the City manager, or other authorized official (which may be delivered via email), which approval shall not be unreasonably withheld, conditioned or delayed, and which shall be deemed given in the event the City fails to respond within five (5) business days of Escrow Agent’s request for approval, Escrow Agent shall: (A) insert as the Effective Date of the Government Property Lease and Memorandum the date of issuance of the first Certificate of Occupancy; (B) deliver one originally

executed and dated copy of the Government Property Lease to each of the Parties, at which time the Government Property Lease shall become immediately effective; and (C) record the Memorandum in the Maricopa County Real Property Records and deliver a recorded copy to each of the Parties. In connection with the services rendered hereunder, in addition to all applicable recording fees, Developer shall pay Escrow Agent an escrow fee not to exceed \$500.00.

6. **BOYCOTT OF ISRAEL.** The Development Agreement is amended to include a new Section 5.17 as follows:

5.17 Boycott of Israel. Developer certifies that it is not currently engaged in, and agrees for the duration of the Agreement to not engage in a boycott of Israel.

7. **GENERAL**

7.1 **Continued Effectiveness.** Except as amended hereby, the Development Agreement shall remain in full force and effect. Each party acknowledges that the other party has fully performed its obligations thereunder as of the date hereof.

7.2 **Arizona Law.** This First Amendment shall be governed by, and construed in accordance with, the laws of the State of Arizona.

7.3 **Captions and Capitalization.** The descriptive headings of the Articles and the Sections of this First Amendment are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof. Any terms that are capitalized in this First Amendment shall have the same meaning as set forth in the Development Agreement.

7.4 **No Agency Created.** Nothing contained in this First Amendment creates any partnership, joint venture, or agency relationship between the City and Developer. No term or provision of this First Amendment is intended to be for the benefit of any person, firm, organization, or corporation not a party hereto, and no other person, firm, organization, or corporation may have any right or cause of action hereunder.

7.5 **Additional Documents.** City and Developer each agree to execute and deliver all documents and take all actions reasonably necessary to implement this First Amendment.

7.6 **Counterparts.** This First Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same First Amendment.

IN WITNESS WHEREOF, the Parties have executed this First Amendment to the Development Agreement through their representatives duly authorized to execute this document and bind their respective entities to the terms and obligations herein contained on the day and year first written above.

[signature pages follow]

FIRST SIGNATURE PAGE TO
FIRST AMENDMENT TO DEVELOPMENT AGREEMENT
C2016-142B

City of Tempe,
an Arizona municipal corporation

By: Andrew B. Ching
Andrew B. Ching, City Manager

ATTEST:

Brigitta M. Kuiper
Brigitta M. Kuiper, City Clerk

Approved as to Form:

Judith R. Baumann
Judith R. Baumann, City Attorney

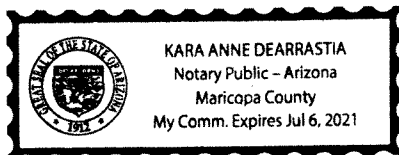
STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this 21st day of December, 2018, before me, personally appeared Andrew B. Ching, who acknowledged himself to be the City Manager of the **CITY OF TEMPE**, an Arizona municipal corporation, on behalf of the corporation.

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

Kara Anne DeArastia
Notary Public

[NOTARY SEAL]



ACCEPTANCE BY ESCROW AGENT

Stewart Title & Trust of Tucson, referred to in this Agreement as the "**Escrow Agent**" hereby acknowledges receipt of one fully executed counterpart of this First Amendment and two (2) fully executed counterparts of the Government Property Lease and Memorandum. Escrow Agent certifies that it has received and understands the instructions and obligations pursuant to Paragraph 5 of this First Amendment and hereby accepts the obligations of Escrow Agent as set forth herein.

ESCROW AGENT:**STEWART TITLE & TRUST OF TUCSON**

By: _____

Name: _____

Title: _____

Date: _____

M. Jolly
M. Jolly
Escrow Officer
2/22/19