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City of Tempe Basket

**AMENDMENT TO DEVELOPMENT AGREEMENT**

[C2015-165A]

Ordinance No. \_\_\_\_\_

Resolution No. R2018.57

This First Amendment to Development Agreement (“First Amendment”) is entered into this 13 day of July, 2018, by and between the City of Tempe, an Arizona municipal corporation (“City”), Seventh Street Tempe AZ Owner, LLC, a Delaware limited liability company (“SSTAZ”) and 7<sup>th</sup> and University Tempe Owner, LLC, a Delaware limited liability company (“7UT” and together with SSTAZ, the “Developer”). The City and Developer are sometimes referred to as the “Parties” and individually as a “Party.”

**RECITALS**

A. City and Opus Development Company, L.L.C., a Delaware limited liability company (“Opus”) are parties to that certain Development Agreement [C2015-165] dated as of July 30, 2015 and recorded on September 14, 2005 in the Official Records of Maricopa County Recorder of Arizona, as Instrument No. 2015-0659645 (the “Original Development Agreement”). Opus’s interest under the Original Development Agreement was partially assigned (i) to SSTAZ pursuant to that certain Partial Assignment of Development Agreement and Assumption Agreement dated November 18, 2016 and recorded in the Official Records of Maricopa County, Arizona, as Instrument No. 20160868834 (the “First Development Agreement Assignment”) and (ii) to 7UT pursuant to that certain Partial Assignment of Development Agreement and Assumption Agreement dated March 1, 2018 and recorded in the Official Records of Maricopa County, Arizona, as Instrument No. 20180158024 (the “Second Development Agreement Assignment”). The Original Development Agreement, the First Development Agreement Assignment, the Second Development Agreement Assignment, and the letters referenced in Recital A of the First Development Agreement Assignment are referred to herein as 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 D 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 June 1, 2010 or authorized by development agreements, ordinances, or resolutions approved by the governing body of a government lessor before June 1, 2010. Accordingly, Recital D is replaced by the following:

D. City and Developer hereby acknowledge and agree that, notwithstanding Resolution 2010.76, the execution of any Government Property Lease pursuant to this Agreement on or before May 20, 2020 are subject to rates of the Government Property Lease Excise Tax set forth under A.R.S. § 42-6203(B).

The remaining Recitals set forth above are acknowledged by the Parties to be true and correct and are incorporated herein by this reference. Any terms that are capitalized in this First Amendment shall have the same meaning as set forth in the Development Agreement.

2. **PROPERTY TAX ABATEMENTS.** Section 3.8(a) 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 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. **PARKING SPACES.** Section 3.7 of the Development Agreement is hereby amended to replace the number “approximately 1,040” with “at least 767” as those numbers relate to vehicular parking spaces in the Parking Garage. Section 3.7 of the Development Agreement is further amended to add the following sentence to the end thereof: “In addition to the parking in the Parking Garage, Developer shall replace twenty (20) on street parking spaces as General Public Spaces.”

4. **MEETING SPACE.** Section 3.12 of the Development Agreement is hereby amended to revise the location and availability to the City of the Meeting Space. Accordingly, the words: “20<sup>th</sup> floor of ‘Residential Tower One’, which is planned to include approximately 2,400 square feet and a balcony of approximately 1,000 square feet (collectively the “**Meeting Space**”) for up to a total of thirty (30) hours per year.” are replaced by the following: “5<sup>th</sup> floor of ‘Residential Tower Two’, which is planned to include approximately 1,581 square feet and an outdoor deck space of approximately 2,525 square feet (collectively the “**Meeting Space**”) for up to a total of thirty (30) hours per year”. All references to “Residential Tower One” in this Section 3.12 are hereby replaced with “Residential Tower Two”.

5. **PAYMENT TO FOUNDATIONS.** Section 3.8(d) of the Development Agreement is hereby amended to clarify that the first payment to the Foundations by Developer

shall be due on the date that the first Certificate of Occupancy for the Project is issued which shall be the date the first Government Property Lease commences regardless of when actual signatures are obtained. Accordingly, the words: “commencing on the date of execution of the first Government Property Lease” are replaced by the following: “commencing on the date the first Certificate of Occupancy for the Project is issued”.

6. **TRUE UP PAYMENT**. Section 3.13 of the Development Agreement is hereby amended to clarify that the first True Up Payment to the City by Developer shall be due on the first day of the first month following the third anniversary of the date the first Certificate of Occupancy for the Project is issued. Accordingly, the words: “first day of the first month following the third anniversary of the date of execution of the first Government Property Lease” are replaced by the following: “first day of the first month following the third anniversary of the date the first Certificate of Occupancy for the Project is issued”.

7. **STREETCAR CONTRIBUTION**. The Development Agreement is amended to include a new Section 5.21 as follows:

**5.21 Contribution to Streetcar.** In consideration of the promises set forth in Development Agreement, including, but not limited to the execution by the City of Government Property Leases for the Property and satisfaction of the requirements set forth therein, Developer, as the owner of that portion of the Property described on Exhibit A to the Streetcar Development Agreement attached hereto as Exhibit H (the “Streetcar Development Agreement”) agrees to make contributions to offset the City’s contribution to the Tempe streetcar project as stated in the Streetcar Development Agreement. In no event shall the owner of any portion of the Property other than that portion of the Property described on Exhibit A to the Streetcar Development Agreement be obligated to make any payments under the Streetcar Development Agreement.

8. **BOYCOTT OF ISRAEL**. The Development Agreement is amended to include a new Section 5.22 as follows:

**5.22 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.

9. **EXHIBIT C**. Exhibit C to the Development Agreement is hereby amended to replace the number “at least 440” with “at least 407” as those numbers relate to residential dwelling units. Exhibit C to the Development Agreement is further amended to replace the number “at least 1,040” with “at least 783” as those numbers relate to parking spaces and related parking facilities.

10. **GENERAL**

9.1 **Continued Effectiveness.** Except as amended hereby, the Development Agreement shall remain in full force and effect.

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

9.3 **Captions.** 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.

9.4 **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.

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

9.6 **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]**

**SIGNATURE PAGE TO  
FIRST AMENDMENT TO DEVELOPMENT AGREEMENT**

**City of Tempe,**  
an Arizona municipal corporation

By: Mark W. Mitchell  
Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper  
Brigitta M. Kuiper, City Clerk

Approved as to Form:

Judith R. Baumann  
Judith R. Baumann, City Attorney

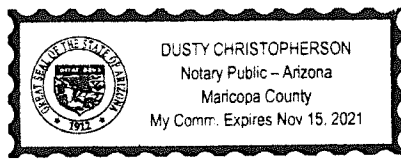
STATE OF ARIZONA        )  
                                          ) ss.  
COUNTY OF MARICOPA    )

On this 17 day of May, 2018, before me, personally appeared Mark W. Mitchell, who acknowledged himself to be the Mayor 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.

D. Christopherson  
Notary Public

[NOTARY SEAL]



C2015-165A

**SIGNATURE PAGE TO  
FIRST AMENDMENT TO DEVELOPMENT AGREEMENT**

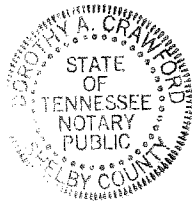
SEVENTH STREET TEMPE AZ  
OWNER, LLC, a Delaware limited  
liability company

By: Seventh Street Tempe AZ Manager  
LLC, a Delaware limited liability  
company,  
its manager

By: *Christine Richards*  
Name *Christine P Richards*  
Title *COO/EVP*

*TENNESSEE*  
STATE OF ARIZONA )  
*Shelby* ) ss  
COUNTY OF MARICOPA )

The foregoing instrument was acknowledged before me this *25* day of  
*June*, 2018 by *Christine P Richards* the *COO/EVP* of  
Seventh Street Tempe AZ Manager LLC, a Delaware limited liability company, the manager of  
**SEVENTH STREET TEMPE AZ OWNER, LLC**, a Delaware limited liability company,  
on behalf of the company.



[NOTARY SEAL]

*Dorothy A. Crawford*  
Notary Public

**MY COMMISSION EXPIRES  
NOVEMBER 8, 2021**

**SIGNATURE PAGE TO  
FIRST AMENDMENT TO DEVELOPMENT AGREEMENT**

7<sup>TH</sup> AND UNIVERSITY TEMPE  
OWNER, LLC, a Delaware limited  
liability company

By: [Signature]  
Name Carlos J. Rodriguez, Jr.  
Title Manager

STATE OF Florida )  
                                  ) ss  
COUNTY OF Miami- )  
                                  ) Dade

The foregoing instrument was acknowledged before me this 22nd day of June, 2018 by Carlos J. Rodriguez, Jr. the manager of **7<sup>TH</sup> AND UNIVERSITY TEMPE OWNER, LLC**, a Delaware limited liability company, on behalf of the company.

[Signature]  
Notary Public

[NOTARY SEAL]



## Exhibit H

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

**STREETCAR DEVELOPMENT AGREEMENT**

[c2018-XXX]

**THIS STREETCAR DEVELOPMENT AGREEMENT** (“**Agreement**”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2018 (the “**Effective Date**”), between the CITY OF TEMPE, an Arizona municipal corporation (“**City**”), and Seventh Street Tempe AZ Owner, LLC, a Delaware limited liability company (“**Property Owner**”). City and Property Owner may be referred to herein, collectively, as the “**Parties**” and, individually, as a “**Party**”, as the context may require.

**RECITALS**

A. Property Owner is the Owner of the fee title interest in a site within the City and legally described in *Exhibit A* (the “**Property**”).

B. City and Opus Development Company, L.L.C., a Delaware limited liability company (“**Opus**”) are parties to that certain Development Agreement, dated July 30, 2015 and recorded in the Official Records of Maricopa County, Arizona, as Instrument No. 2015069645 (the “**Original Development Agreement**”). Opus’s interest under the Original Development Agreement was partially assigned to Property Owner, as the owner of the Property, pursuant to that certain Partial Assignment of Development Agreement and Assumption Agreement dated November 18, 2016 and recorded in the Official Records of Maricopa County, Arizona, as Instrument No. 20160868835 (the “**Development Agreement Assignment**”). The Original Development Agreement, the Development Agreement Assignment, and the letters referenced in Recital A of the Development Agreement Assignment are referred to herein as the “**Development Agreement**.”

C. Valley Metro Rail, Inc., a nonprofit corporation duly organized and existing under the laws of the State of Arizona (“**Valley Metro**”), in conjunction with City and the Maricopa Association of Governments, is proceeding with the planning, design, financing and construction of a streetcar project, as generally described in *Exhibit B*.

D. City and Property Owner hereby acknowledge and agree that significant benefits will accrue from implementation of the Tempe Streetcar Project including, without limitation, for the City, the potential for increased tax revenues and opportunities for employment within the City and otherwise improving or enhancing the economic welfare of the inhabitants of the City, and, for the Property, facilitating the Property’s development, as contemplated in the



Development Agreement and certain other agreements and approvals in respect of the Property to which City is a party or has otherwise approved, together with the potential for increased property values.

E. This Agreement is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

## AGREEMENT

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

### **1. DEFINITIONS**

In addition to words and terms defined elsewhere herein, the following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

- 1.1. “**City**” means the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.
- 1.2. “**City Contribution as an Owner of Real Property**” means as defined in Section 3.2.
- 1.3. “**City Contribution to Tempe Streetcar Project**” means as defined in Section 3.1.
- 1.4. “**City Property**” means as defined in Section 3.2.
- 1.5. “**Condition Precedent**” means as defined in Section 3.3.1.
- 1.6. “**Contribution**” means as defined in Section 3.3.
- 1.7. “**Contribution Construction Account**” means as defined in Section 3.4.
- 1.8. “**Contribution Formula**” means as defined in Section 3.2.
- 1.9. “**Default Interest Rate**” means as defined in Section 3.3.3.
- 1.10. “**Effective Date**” means as defined in the preamble to this Agreement.
- 1.11. “**Owners**” means as defined in Section 3.1.
- 1.12. “**Parties**” means as defined in the preamble to this Agreement.
- 1.13. “**Party**” means as defined in the preamble to this Agreement.

**1.14. “Property Owner”** means as defined in the preamble to this Agreement and its successors and assigns.

**1.15. “Tempe Streetcar Project”** means the planning, financing, design and construction of the streetcar project described in Recital B and *Exhibit B*.

**1.16. “Valley Metro”** means Valley Metro Rail, Inc., a nonprofit corporation duly organized and existing under the laws of the State of Arizona as described in Recital B.

## 2. GENERAL TERMS

**2.1. Incorporation of Recitals.** The Recitals are true and correct and are incorporated herein by reference.

**2.2. Duration of Development Agreement.** The term of this Agreement (the “Term”) shall commence on the Effective Date and continue until the date the Contribution (as hereinafter defined) is paid in full or, if applicable, such earlier date on which this Agreement terminates as hereinafter provided.

## 3. PROPERTY OWNER CONTRIBUTION

**3.1. City Contribution to Tempe Streetcar Project.** City anticipates that the construction phase of the Tempe Streetcar Project will commence in 2018 and consist of 3.0 miles of modern streetcar line, with the route and stops to be as generally described in *Exhibit B*. To City’s knowledge, as of the Effective Date, there is no proposed or pending change in the route or proposed or pending change to or deletion of any stop as reflected in *Exhibit B*. The funding required to construct the Tempe Streetcar Project is approximately one hundred eighty-six million, one hundred thousand dollars (\$186,100,000.00). The plan of finance for the Tempe Streetcar Project is anticipated to require payment by City of approximately thirteen million dollars (\$13,000,000.00) plus financing costs not to exceed five percent (5%) per annum during the Term (the “City Contribution to Tempe Streetcar Project”). City shall secure and advance the monies necessary to pay the City Contribution to Tempe Streetcar Project, initially, subject to reimbursement by certain owners of the fee title and/or leasehold interests in various parcels of real property located along or in the vicinity of the planned route for the Tempe Streetcar Project, including Property Owner (collectively, the “Owners”), who have agreed (or shall agree in the future) to make contributions to offset the City Contribution to Tempe Streetcar Project. Without limitation, City shall use commercially reasonable efforts to secure further contributions from Owners who develop projects located along or in the vicinity of the planned route for the Tempe Streetcar Project following the Effective Date.

**3.2. Contribution Formula.** The annual contribution for each participating Owner’s parcel shall be an amount equal to the product of \$0.10 and the gross square footage of the enclosed areas of the building(s) on such Owner’s Property intended for occupancy (provided, without limitation of the foregoing, the Parties acknowledge and agree such calculation shall exclude the gross square footage of any enclosed parking structures) and for which building permits or certificates of occupancy (as applicable) have been issued by City, payable in equal annual installments over a twenty (20) year period (“Contribution Formula”). Additionally,

City shall annually pay its proportionate share, pursuant to the Contribution Formula (“**City Contribution as an Owner of Real Property**”), for the real property owned by City located along or in the vicinity of the Tempe Streetcar Project route excluding the real property owned by City that is leased to other parties (“**City Property**”). City represents that as of the Effective Date of this Agreement the City Property is approximately 187,440 square feet, and that such square footage is not subject to adjustment regardless of whether portions of the City Property are hereafter leased or conveyed to other parties. The City Contribution as an Owner of Real Property is included within the City Contribution to Tempe Streetcar Project.

**3.3. Property Contribution.** City and Property Owner acknowledge and agree that (a) the gross square footage of the enclosed areas of the building(s) intended for occupancy and for which building permits or certificates of occupancy (as applicable) have been issued as of the Effective Date, as determined pursuant to Section 3.2, is 492,726, as reflected in City records, and (b) accordingly, the total annual contribution amount attributable to the Property pursuant to the Contribution Formula is Forty-Nine Thousand Two Hundred Seventy-Two and 60/100 Dollars (\$49,272.60), payable in twenty (20) equal annual installments, totaling Nine Hundred Eighty-Five Thousand Four Hundred Fifty-Two Dollars (\$985,452.00) (the “**Contribution**”).

**3.3.1. Payment Schedule.** City is obligated to, and it shall be a condition precedent to the obligation of Property Owner to pay the Contribution that City shall have made payments to Valley Metro equal to seventy five percent (75%) of the City Contribution to Tempe Streetcar Project (collectively, the “**Condition Precedent**”) with the City thereafter remaining obligated to fund the balance of the City Contribution to Tempe Streetcar Project on or before January 31, 2020 (the “**Funding Deadline**”). Upon written notice by City to Property Owner, on or before the Funding Deadline, that City has satisfied the Condition Precedent, as provided for in the preceding sentence of this Section 3.3.1, and provided evidence of the same, then and in such event Property Owner shall pay the initial annual installment of the Contribution on or before the later of (i) July 1, 2020 or (ii) the date that is twenty four (24) months after the final certificate of occupancy is issued for all of the residential portions of the improvements currently under construction on the Property (the “**Payment Date**”). Thereafter Property Owner shall pay each subsequent annual installment on or before the Payment Date of each succeeding calendar year until the Contribution is paid in full; provided, however, that if City fails to timely pay the City Contribution as and when due pursuant to the first sentence of this Section 3.3.1, Property Owner shall have no obligation to pay any installment(s) following the failure until City has cured the same. If the Condition Precedent has not been satisfied and the written notice by City to Property Owner provided on or before the Funding Deadline, this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of City or Property Owner.

**3.3.2. Default Interest.** Any installment not timely paid hereunder shall bear interest, from the date of delinquency until paid in full, at a rate equal to the consensus prime rate of interest, as published in the Wall Street Journal from time to time (or, in the event such consensus prime rate is no longer published by the Wall Street Journal, a published consensus prime rate or equivalent measure selected by City in its reasonable discretion), plus five percent (5%) (“**Default Interest Rate**”).

**3.3.3. Prepayment.** Notwithstanding anything herein to the contrary, at any time, Property Owner may pay the unpaid balance of the Contribution amount, in full, to City, whereupon this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of City or Property Owner; provided, however, any reimbursement obligation to Property Owner thereafter arising pursuant to Section 3.4 hereof shall survive any such termination.

**3.4. Contribution Construction Account.** City shall cause all payments of the Contribution to be deposited in a separate account established for such purpose (the “**Contribution Construction Account**”).

**3.4.1. Administration of Contribution Construction Account.** All amounts deposited in the Contribution Construction Account and any earnings thereon shall be used exclusively to reimburse City for monies previously disbursed by City to pay the City Contribution to Tempe Streetcar Project, except as hereinafter provided:

**3.4.1.1. Tempe Streetcar Project Discontinued.** If construction of the Tempe Streetcar Project has not commenced on or before the Funding Deadline, City shall promptly notify Property Owner, in which case Property Owner shall have no further payment obligations hereunder, and, any portion of the Contribution previously paid by Property Owner shall be reimbursed within sixty (60) days, whereupon this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of City or Property Owner. For purposes of this Section, construction of the Tempe Streetcar Project shall be deemed to have commenced when (a) construction plans have been approved by all entities having jurisdiction over the design of the Tempe Streetcar Project, (b) a contract has been executed with the party who will construct the Tempe Streetcar Project, and (c) meaningful physical construction on the Tempe Streetcar Project has commenced.

**3.4.1.2. Funding Surplus.**

(a) If, upon completion of the construction of the Tempe Streetcar Project, it is determined that the City Contribution to Tempe Streetcar Project is less than the sum total of the Owners’ aggregate annual contribution obligations and the City Contribution as an Owner of Real Property (“**Funding Surplus**”), each Owner (including Property Owner) shall receive a credit against such Owners’ outstanding contribution obligations in an amount equal to such difference, which credit shall be allocated among the Owners in proportion to their respective contribution obligations, and applied against the last remaining installment and, if applicable, the next prior installment or installments payable by each such Owner until such credit is exhausted; provided, if any Owner has paid its contribution in full or otherwise receives a credit which is in excess of the aggregate amount of the remaining unpaid contribution of such Owner, such excess shall be reimbursed to such Owner (including Property Owner) from any excess funds then on hand or as and when received by City, in the future, upon payment of outstanding installments by other Owners (in excess of their respective credit amounts).

(b) If the Tempe Streetcar Project is discontinued prior to completion of the construction thereof and a Funding Surplus exists, then and in such event,

each Owner (including Property Owner) shall receive a credit against such Owners' outstanding contribution obligations in an amount equal to such Funding Surplus, which credit shall be allocated among the Owners in proportion to their respective contribution obligations, and applied against the last remaining installment and, if applicable, the next prior installment or installments payable by each such Owner until such credit is exhausted; provided, if any Owner has paid its contribution in full or is otherwise entitled to receive a credit which is in excess of the aggregate amount of the remaining unpaid contribution of such Owner, such excess shall be reimbursed to such Owner (including Property Owner) from any excess funds then on hand or as and when received by City in the future.

(c) For the avoidance of doubt, a Funding Surplus triggering City's obligation to make the reimbursement payments required pursuant to this Section 3.4.1.2 would only occur if and when all Owners' contributions that have and/or should have been made (including the City Contribution as an Owner of Real Property) are greater than the City Contribution to Tempe Streetcar Project.

3.4.1.3. **City Payment and Collection Obligations.** City is responsible for payment of the City Contribution to Tempe Streetcar Project if any of the Owners do not make their payments. City will exercise commercially reasonable best efforts to obtain payments from all Owners who now or hereafter are parties to agreements with City in respect of the Tempe Streetcar Project and to enter into such agreements, on substantially the same terms contained in this Agreement, with current and future commercial Owners, as and when applicable. Without limitation of the foregoing, City shall not enter into any agreement in respect of the Tempe Streetcar Project on terms which are more favorable to another Owner, in any material respect, without first offering in writing and with reasonable notice the opportunity to Property Owner to amend this Agreement to include such terms and, in the event City, now or hereafter, enters into an agreement with an Owner on terms which are more favorable to such Owner in any material respect than the terms of this Agreement without first offering such opportunity to Property Owner, then, at the election of Property Owner, this Agreement shall be deemed amended in applicable part to extend to Property Owner the full benefit of such terms (including, as applicable, Property Owner shall be entitled to a credit or other adjustment to account for and reconcile any prior payment or performance by Property Owner pursuant to less favorable terms).

#### **4. DEFAULT; REMEDIES**

**4.1. Default.** It shall be a default hereunder if a Party fails to perform any of its obligations hereunder and: (a) if such failure to perform is the failure to pay any amount payable hereunder as and when due, such failure continues for a period of ten (10) business days after written notice from the non-defaulting Party, provided, in the event there have been two or more prior failures to timely pay, immediately upon such failure to pay, or (b) if such failure to perform is the failure to perform a non-monetary obligation, such failure continues for a period of thirty (30) days after written notice from the non-defaulting Party specifying in reasonable detail the nature of the failure, provided, if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting Party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion within ninety (90) days.

**4.2. Property Owner Defaults.** In addition to the foregoing, it shall be a default hereunder if: (a) Property Owner makes an assignment for the benefit of creditors; (b) a receiver takes possession of the Property; or (c) the dissolution or termination of existence of Property Owner occurs unless its successor by transfer or operation of law is continuing the business of operating the Property.

**4.3. Remedies.** If a Party is in default under this Agreement, the non-defaulting Party shall have the right to pursue all legal and equitable remedies which such Party may have at law or in equity, including, without limitation, the right to seek specific performance and, in the case of City, to collect interest at the Default Interest Rate (if applicable); provided, in no event shall any Party be liable for incidental, consequential, punitive, special, speculative or similar damages or any monetary damages other than actual damages (and each Party hereby waives the right to pursue an award of damages other than actual damages).

## **5. GENERAL PROVISIONS**

**5.1. No Partnership.** Nothing in this Agreement is intended or shall be construed to create a joint venture, partnership, agency, or fiduciary relationship between City and Property Owner.

**5.2. No Third Party Beneficiary.** This Agreement is intended solely for the benefit of City and Property Owner and their respective successors and assigns, and no other party shall have any rights or interest in this Agreement or, except Valley Metro, the Contribution Construction Account.

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

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

**5.5. Conflict of Interest.** Pursuant to Arizona law, rules and regulations, no member, official or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to A.R.S. § 38-511.

**5.6. Notice.** All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by registered or certified mail, return receipt requested, addressed as follows:

To Property Owner:

With a copy to:

To City: City Manager  
City of Tempe  
31 East Fifth Street  
Tempe, Arizona 85281

With a copy to: City Attorney  
City of Tempe  
21 East Sixth Street, Suite 201  
Tempe, Arizona 85281

Either Party may designate additional notice parties (e.g., owners association) or any other address for this purpose by written notice to the other Party in the manner described herein.

**5.6 Governing Law.** This Agreement shall be governed by and construed in accordance with the internal substantive laws of the State of Arizona (without reference to conflict of laws principles). This Agreement has been made and entered into in Maricopa County, Arizona.

**5.7 Successors and Assigns.** This Agreement shall run with the Property. Upon any conveyance of the Property, the succeeding owner shall be deemed to have assumed, and shall be responsible for paying, accrued and unaccrued liabilities and obligations of Property Owner under this Agreement (or in the event of the conveyance of a portion of the Property, the prorata share thereof based on the square footage of the improvements conveyed to the transferee). The transferee shall provide City with the name, address and designated representative of such successor transferee. Upon any such transfer, the transferor shall be released from all accrued and unaccrued obligations or liabilities arising under this Agreement with respect to the portion of the Property conveyed. This Agreement shall be binding upon and accrue to the benefit of the Parties and Property Owner's successors and assigns.

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

**5.9 Severability.** In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

**5.10 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.

**5.11 Further Instruments.** Each of the Parties hereto shall execute and deliver such documents or instruments as the other Party shall reasonably request in order to consummate the transactions contemplated by this Agreement.

**5.12 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 and be included in the decision, order or judgment, as applicable. If both Parties are awarded relief, then the award for attorneys' fees shall be apportioned in the discretion of the court.

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

**5.14 Counterparts.** This Agreement may be executed in counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same agreement.

**5.15 Recordation of Agreement.** This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after execution of this Agreement by City. At the request of Property Owner, City shall provide a recordable release or termination of this Agreement upon the expiration of the Term or prior termination of the Agreement in form reasonably acceptable to Property Owner.

**5.16 City Manager's Power to Consent.** City authorizes and empowers the City Manager to consent to any and all requests of the Property Owner requiring the consent of City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

**5.17 Estoppel Certificate.** Within thirty (30) days after receipt of written request therefor from the other Party, City or Property Owner, as the case may be, shall execute, acknowledge and deliver to the requesting Party and/or its lender a statement certifying that this Agreement is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Agreement, as so modified, is in full force and effect), and acknowledging that there are not, to the certifying Party's knowledge, any uncured defaults on the part of the other Party hereunder, or specifying such defaults if any are claimed. Any such statement may be conclusively relied on by any auditor of either Party, or by any prospective purchaser of the Property.

[NO FURTHER TEXT ON THIS PAGE]



**IN WITNESS WHEREOF**, the parties have caused this Agreement to be duly executed on or as of the day and year first above written.

ATTEST:

***"CITY"***

THE CITY OF TEMPE, an Arizona municipal corporation

\_\_\_\_\_  
Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

By \_\_\_\_\_  
Mark W. Mitchell, Mayor

\_\_\_\_\_  
Judith R. Baumann, City Attorney

STATE OF ARIZONA        )  
                                          )  
COUNTY OF MARICOPA    )        ss

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2018, by Mark W. Mitchell, who acknowledged himself to be the Mayor of the **CITY OF TEMPE**, an Arizona municipal corporation, on behalf of the corporation.

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

[NOTARY SEAL]

**“PROPERTY OWNER”**

SEVENTH STREET TEMPE AZ  
OWNER, LLC, a Delaware limited  
liability company

By: Seventh Street Tempe AZ Manager  
LLC, a Delaware limited liability  
company,  
its manager

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

STATE OF ARIZONA        )  
                                          )  
                                          )        ss  
COUNTY OF MARICOPA    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2018 by \_\_\_\_\_ the \_\_\_\_\_ of Seventh Street Tempe AZ Manager LLC, a Delaware limited liability company, the manager of **SEVENTH STREET TEMPE AZ OWNER, LLC**, a Delaware limited liability company, on behalf of the company.

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

[NOTARY SEAL]

LIST OF EXHIBITS AND SCHEDULES

- Exhibit "A" - Legal Description of Property
- Exhibit "B" - Description of Tempe Streetcar Project

**EXHIBIT A**

**LEGAL DESCRIPTION OF PROPERTY**

LOT 1 OF 7TH STREET MIXED USE, ACCORDING TO THE PLAT OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF MARICOPA COUNTY, ARIZONA, RECORDED IN BOOK 1288 OF MAPS, PAGE 23.

**Exhibit B**

Exhibit B, entitled "Description of Tempe Streetcar Project", has been removed for recording. A true and correct copy is on file with, and can be obtained from, the Tempe City Clerk, 31 East Fifth Street, Tempe, AZ 85281.