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**CITY OF TEMPE  
HISTORIC PRESERVATION COMMISSION**

**Meeting Date: 04/13/2022  
Agenda Item: 6**

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## **Memorandum**

**To:** Historic Preservation Commission

**From:** Zachary J. Lechner, Historic Preservation Officer

**Date:** April 8, 2022

**Subject:** Agenda Item #6, Butler (Gray) House Update

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**ATTACHMENT:** Draft Facade Conservation Easement

Ryan Levesque, Deputy Director of Planning in Tempe's Community Development Department, will provide an update on ongoing discussions with the current owner of the Butler (Gray) House to devise an alternative to demolition.

## Exhibit "C"

### DEED OF FAÇADE CONSERVATION EASEMENT

THIS DEED OF FAÇADE CONSERVATION EASEMENT (the "Easement") is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2022, by and between Mushet Revocable Trust (the "Property Owner"), whose principal address is \_\_\_\_\_ and the City of Tempe, a municipal corporation organized and existing under the laws of the State of Arizona, (the "City").

### RECITALS

A. The City is authorized under Arizona's Uniform Conservation Act, Arizona Revised Statutes, Sections 33-271 through 276, inclusive (collectively, as and if amended, the "Act") to accept conservation easements to protect property significant in Arizona history and culture for the education of the general public.

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

C. The Property Owner is the owner in fee simple of that certain property located at 1220 South Mill Avenue, Tempe, Maricopa County, Arizona, which is more particularly described in Exhibit "A" attached hereto and made a part hereof (the "Property"), including all improvements, fixtures and buildings thereon (the "Structures"). (Any reference to the "Property" hereinafter shall be deemed to include each of the "Structures".)

D. The Property is listed on the Tempe Historic Property Register; and the Property Owner and the City recognize the historical or architectural value and significance of the Property and have the common purpose of conserving and preserving the aforesaid value and significance of the Property. The Property is also commonly known as the Butler (Gray) House ("Butler House"). The terms Property and Butler House may be used interchangeably in this agreement.

E. In order to effectuate the obligations of the Property Owner under the Program agreement, the Property Owner desires to sell, grant, convey, transfer and assign to the City and the City, pursuant to the Act, desires to accept a façade conservation easement on the Butler House.

### AGREEMENT

NOW, THEREFORE, in consideration of the City's agreement to pay the Property Owner the sum of \$10, subject to the terms and conditions of the Program Agreement, the Property owner and the City hereby agree as follows:

1. Grant of Easement: The Property Owner does hereby voluntarily grant, convey, transfer and assign unto the City a “façade conservation easement,” as defined under the Act, for a term of five (5) years from the date of this recorded agreement, in and to Butler House and which covenants contained herein contribute to the public purpose of conserving and preserving the exterior structure of Butler House and accomplishing the other objectives set forth herein.

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

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

2.2 Maintenance of Butler House. The Property Owner will, at all times, maintain each of the Structures in a good and sound state of repair in accordance with the City’s existing guidelines for the historic district in which the Property is located (the “Standards”) so as to prevent the deterioration of Butler House or any portion thereof. Subject to the casualty provisions of Paragraph 4 below, this obligation to maintain shall require replacement, repair and reconstruction according to the Standards within a reasonable time whenever necessary to have the external nature of the Structure at all times appear to be the same as Present.

2.3 Maintenance of the Structural Elements. The Property Owner will maintain and repair each of the Structures as is required to ensure the structural soundness and the safety of the Structures.

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

2.5 Conveyance and Assignment. The City may convey, transfer and assign this Easement to a similar local, state or national organization whose purposes are to promote historic preservation, and which is a “qualified organization” under Section 170(h)(3) of the Internal Revenue Code of 1986, as amended, provided that any conveyance or assignment requires that the conservation purposes for which this Easement was granted will continue to be carried out.

2.6 Insurance. The Property Owner, at their sole cost and expense, shall at all times (a) keep the Structures insured at their replacement cost value on an “all risk” basis to ensure complete restoration of Butler House in the event of loss or physical

damage. Said property coverage policy shall contain provisions which ensure that the face amount of the policy is periodically adjusted for inflation, and the Property Owner shall provide a Certificate of Insurance to the City which contains reference to such provision; and (b) carry and maintain liability insurance in an amount satisfactory to the City to protect against injury to visitors or other persons on the property, and to provide a Certificate of Insurance to the City evidencing such insurance, and naming the City as an additional insured on the policy.

2.7 Visual Access. The Property Owner agrees not to substantially obstruct the opportunity of the general public to view the exterior architectural features of the Property from adjacent publicly accessible areas such as public streets. If the Structures are not visible from a public area, then the Property Owner agrees that the general public shall be given the opportunity on a periodic basis to view the characteristics and features of Butler House which are preserved by this Easement to the extent consistent with the nature and conditions of the Property.

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

3.1 Information Furnished, True and Correct. All information give to the City by the Property Owner in order to induce the City to accept this Easement, including all information contained in this Easement, is true, correct and complete.

3.2 Legal, Valid and Binding. This Easement is in all respects, legal, valid and binding upon the Property Owner and enforceable in accordance with its terms, and grants to the City a direct, valid and enforceable conservation easement upon Farmer Goodwin.

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

4. Application of Insurance Proceeds. Subject to the insurance proceeds requirements of any recorded Deed of Trust or Mortgage applicable to the Property, in the event of damage or destruction of any of the Structures resulting from casualty, the Property Owner agrees to apply all available insurance proceeds and donations to the repair and reconstruction or each or the damaged Structures. In the event the City determines, in its reasonable discretion, after reviewing all bona fide cost estimates in light of all available insurance proceeds and other monies available for such repair and reconstruction, that the damage to the Structures is of such magnitude and extent that repair and reconstruction of the damage would not be possible or practical, then the Property Owner may elect not to repair or reconstruct the damaged Structures. Notwithstanding the foregoing, in the event the City notifies the Property Owner in writing that the City has determined that repair and reconstruction of the damaged Structures is impossible or impractical and that the damaged Structures presents an

imminent hazard to public safety, the Property Owner will at his sole cost and expense raze the damaged Structures and remove all debris, slabs and any other portions and parts of the damaged structure within the time period required by the City to protect the health, safety and welfare of the public, unless the Property Owner has commenced and is diligently pursuing repair or reconstruction of the damaged Structures. Upon razing of the damaged portion of the Structures, the City shall release any interest it has in the insurance proceeds for the damaged Structures. Nothing in this paragraph is intended to supersede or impair the rights to insurance proceeds of a lienholder pursuant to a recorded Deed of Trust or Mortgage applicable to the Property.

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

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

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

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

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

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

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

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

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

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

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

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