

When recorded return to:

City of El Mirage
City Clerk
10000 N. El Mirage Road
El Mirage, AZ 85335

**DEVELOPMENT AGREEMENT
CARMAX
EL MIRAGE, ARIZONA**

THIS DEVELOPMENT AGREEMENT (this “Agreement”) is entered into this 7th day of February, 2023 (“Effective Date”) by CARMAX AUTO SUPERSTORES, INC. a Virginia corporation (“Developer”) and the CITY OF EL MIRAGE, an Arizona municipal corporation (“City”).

RECITALS

WHEREAS, Developer has a real property interest in that certain property located in the City of El Mirage, Arizona, consisting of approximately 57 acres, legally described in Exhibit “A” attached hereto and incorporated herein by reference (the “Property”);

WHEREAS, Developer intends to develop the Property that will consist of various onsite improvements associated with a vehicle reconditioning and wholesale auction facility (the “Project”);

WHEREAS, the City requires that the Developer, as part of the Project, construct offsite improvements that include, but are not limited to, half street improvements along their frontage of Olive Avenue (the “Olive Avenue Improvements”);

WHEREAS, Arizona Public Service (APS) has a proposed regional project that will install 230kV transmission power lines/poles between State Route 303 and 111th Avenue and as part of that project would be removing the existing 69kV transmission lines/poles along Olive Avenue in front of the Project (the “APS Improvements”). The estimated completion year for this work is 2025;

WHEREAS, Developer and City desire to facilitate the development of the Property as a part of the City’s growth and development. In furtherance of this aim, Developer and City have cooperated in the preparation of this Agreement;

WHEREAS, Developer desires to defer the Olive Avenue Improvements (the “Deferred Improvements”) until the APS Improvements have been completed along the Project’s Olive Avenue frontage as the existing power poles would obstruct or hinder the installation of the roadway, sidewalk, landscaping, etc. along this corridor.

WHEREAS, Developer will likely request Certificate of Occupancy for the onsite building(s) and open for business prior to the completion of the Deferred Improvements;

WHEREAS, the City is agreeable to the deferment as more particularly described in this Agreement;

WHEREAS, Developer and City desire to enter into this Agreement in order to set forth the rights and obligations of each party with respect to the construction of the Deferred Improvements and timing for the same; and

WHEREAS, pursuant to the provisions of Arizona Revised Statutes Annotated (“A.R.S.”) §§ 9-500.05, et seq., Developer and City are authorized to enter into this Agreement;

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions, it is agreed as follows:

1. INCORPORATION OF DOCUMENTS AND RECITALS. All documents and exhibits referred to in this Agreement are hereby incorporated by this reference into this Agreement, and the Recitals stated above are hereby incorporated by reference into this Agreement and made a part hereof.

2. COMPLIANCE. The determinations of the City in this Agreement and the assurances provided to Developer in this Agreement are provided pursuant to and as contemplated by A.R.S. § 9-500.05 and other applicable law, bargained for and in consideration for the undertakings of Developer set forth herein and contemplated by this Agreement and are intended to be and have been relied upon by Developer in undertaking the obligations of development of the Property.

3. RIGHTS AND BURDENS RUN WITH THE LAND. The rights and obligations established under this Agreement are attached to and run with the Property. Upon the Effective Date of this Agreement, Developer and any successors or assigns are entitled to exercise the rights granted and perform the obligations required pursuant to this Agreement.

4. DESCRIPTION OF THE DEFERRED IMPROVEMENTS. The City agrees to accept Developer’s deferment of the improvements described in 4a below until the APS Improvements along the Project’s Olive Avenue frontage are completed.

a. Olive Avenue Improvements. The Project is responsible for completing the north half of Olive Avenue consisting of two through lanes, a bike lane and full median, an eight-foot-wide sidewalk, streetlights, signing/stripping and landscaping/irrigation along its frontage. The Project will also be responsible for any deceleration lanes.

5. CONDITIONS OF THE DEFERRED IMPROVEMENTS. The City agrees to accept Developer's deferment of the improvements with several conditions described in 5a through 5e below.

a. Design of Olive Avenue Improvements. The design of the Olive Avenue Improvements shall be completed by the Developer and approved by the City in 2023 to avoid delays in starting construction. A permit for these improvements will be provided at the APS Completion Date noted in 5c below.

b. Interim Olive Avenue Improvements. Interim improvements such as temporary turn lanes, alternative driveway locations, drainage features, etc. may be required to be installed prior to Certificate of Occupancy(ies) being released. The design of these interim improvements shall be included and permitted with the Onsite Improvement Plans.

c. Timing of Construction of Deferred Improvements. Once the APS Improvements are completed along the Project's Olive Avenue frontage, the City will provide the Developer with a letter memorializing the APS Completion Date and all Deferred Improvements shall be completed to the reasonable satisfaction of the City within one year of that date.

d. Advancement of Olive Avenue Improvements. If the lack of the installation of the Olive Avenue Improvements causes or threatens to cause safety issues within the City's right of way, the installation of a portion of the Deferred Improvements or alterations of the interim improvements will be required by the City. The Developer and City will cooperate to expedite the installation of these additional improvements.

e. Delay or Cancellation of APS Improvements. If the APS Improvements are canceled or delayed beyond 2026, the City will provide the Developer with a letter requiring APS to start the process of relocating the existing power poles along the Olive Avenue frontage immediately. All Deferred Improvements shall be completed to the reasonable satisfaction of the City within two years of the date of that letter.

6. ASSURANCE. The parties acknowledge and agree that the City, prior to issuing any permits, requires the Developer to provide appropriate and necessary assurances that the requirements set forth in this Agreement will be completed (the "Deferred Improvements Assurance") in an amount to be determined by the City. In such case, the Developer may elect, with the approval of City, which approval shall not be unreasonably withheld, any one of or a combination of the following methods of assurance. All such assurances provided by the Developer shall comply with the applicable provisions of the City's regulations relating to assurances:

- (a) Developer may file with the City a performance bond.
- (b) Developer may deliver to the City an irrevocable and unconditional stand-by letter of credit.
- (c) Other appropriate assurance allowed by the City Code.

The City agrees that within thirty (30) days from the City's approval of the completed Deferred Improvements for which the Developer has provided assurances, the City shall release such Deferred Improvement Assurances, in whole or in part, as may be appropriate under the circumstances, in the manner provided in the applicable regulations.

7. **TERM.** This Agreement is effective as of the date first set forth above and, except as otherwise set forth herein, shall remain effective until such time as Developer has completed and the City has accepted the Deferred Improvements. After Developer has completed and the City has accepted the Deferred Improvements, upon Developer's request, the City shall execute and record a release of this Agreement with the Recorder's Office of Maricopa County, Arizona.

8. **NOTICES.** All notices, filings, consents, approvals and other communications provided for herein or given in connection herewith shall be in writing and shall be given by personal delivery, overnight courier or facsimile transmission, or sent by registered or certified mail, postage prepaid, correctly addressed to the intended recipient at the address set forth below:

City: City of El Mirage
10000 N El Mirage Road
El Mirage, AZ 85335
Attn: City Manager

With a Copy to: City of El Mirage
10000 N El Mirage Road
El Mirage, AZ 85335
Attn: City Clerk

Developer: CarMax Auto Superstores, Inc.
12800 Tuckahoe Creek Parkway
Richmond, VA 23238
Attn: Vice President of Real Estate

9. **WAIVER.** No delay in exercising any right or remedy by either City or Developer shall constitute a waiver thereof. Waiver of any of the terms of this Agreement shall not be valid unless in writing and signed by all parties hereto. The failure of any party to enforce the provisions of this Agreement or require performance of any of the provisions, shall not be construed as a waiver of such provisions or affect the right of the party to enforce all of the provisions of this Agreement. Waiver of any breach of this Agreement shall not be held to be a waiver of any other or subsequent breach thereof.

10. **BINDING EFFECT.** The rights, benefits and obligations in this Agreement, shall be binding upon City and its successors and assigns. The rights, benefits and obligations in this Agreement shall be binding upon Developer and its successors and assigns.

11. **GOVERNING LAW.** This Agreement and all terms and conditions hereof, and any dispute, controversy, claim or cause of action arising out of or related to this Agreement is governed by the laws of the State of Arizona.

12. CHOICE OF FORUM. Notwithstanding A.R.S. § 12-406, any suit or action brought under this Agreement shall be commenced only in state or federal courts in the State of Arizona, Maricopa County. The parties hereto expressly covenant and agree that in the event of a dispute arising from this Agreement, each of the parties hereto waives any right to a trial by jury. In the event of litigation, the parties hereby agree to submit to a trial before the Court.

13. EXERCISE OF AUTHORITY. It is understood and agreed that Developer shall not in any way exercise any portion of the authority or sovereign powers of City and shall not make or contract or commit or in any way represent itself as an agent for City. Nor shall anything in this Agreement be construed to create any partnership, joint venture or principal agency relationship between the parties.

14. RECORDATION. In order to provide notice to third parties, the City shall record this Agreement in the official records of the Maricopa County Recorder within ten (10) days after the full execution of this Agreement.

15. CONFLICT OF INTEREST. This Agreement is subject to the provisions of A.R.S. § 38-511.

16. SEVERABILITY OF PROVISIONS. Each term and provision of this Agreement shall be considered severable and if, for any reason, any term or provision of this Agreement be declared or be determined to be illegal or invalid, the validity of the remaining terms and provisions shall not be affected thereby, and said illegal or invalid term or provision shall not be deemed a part of this Agreement, notwithstanding any other provision of this Agreement to the contrary.

17. ADDITIONAL ACTS AND DOCUMENTS. Each party hereto agrees to do all such things and take all such actions, and to make, execute and deliver such other documents and instruments, as shall be reasonably requested to carry out the provisions, intent and purpose of this Agreement. If any action or approval is required of any party in furtherance of the rights under this Agreement, such approval shall not be unreasonably withheld.

18. AMENDMENTS. No amendment shall be made to this Agreement except by written document executed by City and Developer. Within ten (10) days after the execution of any amendment by both parties, the amendment shall be recorded with the Maricopa County Recorder, Maricopa County, Arizona.

19. ENTIRE AGREEMENT. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject matter of the Agreement and contains all the covenants and agreements between the parties with respect to said matter.

20. HEADINGS. The headings for the paragraphs of this Agreement are for convenience and reference purposes only and in no way define, limit or describe the scope or intent of said paragraphs nor in any way affect this Agreement.

21. ATTORNEYS FEES. The parties hereto expressly covenant and agree that in the event of litigation arising from this Agreement, neither party shall be entitled to an award of attorney fees, either pursuant to the Agreement, pursuant to A.R.S. § 12-341.01(A) and (B), or pursuant to any other state or federal statute, court rule, case law or common law. As an alternative to filing a lawsuit to resolve the dispute, the parties may mutually agree to arbitrate the dispute.

22. ASSIGNMENT. Developer shall have the right to sell, transfer or assign part or all of the Property to any person or entity at any time during the duration of this Agreement.

23. COUNTERPARTS. This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall constitute one and the same instrument.

24. DEFAULT. Failure or unreasonable delay by either party to perform or otherwise act in accordance with any term or provision hereof shall constitute a breach of this Agreement and, if the breach is not cured within 15 business days after written notice thereof from the other party (the "Cure Period"), the breach constitutes a default under this Agreement; provided, however, that if the failure is such that more than 15 business days would reasonably be required to perform such action or comply with any term or provision thereof, then the party shall have such additional time as may be necessary to perform or comply so long as the party commences performance or compliance within said 15 business day period and diligently proceeds to complete such performance or fulfill such obligation. In the event a breach is not cured within the Cure Period, the non-defaulting party shall have all the rights and remedies that may be available at law or in equity.

25. REPRESENTATIONS AND WARRANTIES OF DEVELOPER. As of the Effective Date, Developer represents, warrants and covenants to City as follows:

a. Organization. Developer is a Virginia corporation and has the full right and authority to submit its interest in the Property to the provisions of this Agreement.

b. Authorization. Developer is in good standing and is qualified to do business in Arizona. The person signing this Agreement on Developer's behalf has the authority and right to enter into this Agreement on Developer's behalf, without any further act or authorization. Developer is not prohibited from executing this Agreement by any law, rule, regulation, instrument, agreement, order or judgment.

26. REPRESENTATIONS, WARRANTIES AND COVENANTS OF CITY. As of the Effective Date, City represents, warrants and covenants to Developer as follows, with the understanding that each of the following are material to Developer's willingness to enter in this Agreement, that Developer is relying on each of the following, and that Developer would not have agreed to enter into this Agreement but for each and every one of the following:

a. Approval. City has approved this Agreement at a duly held and noticed public meeting by its Mayor and City Council, at which a quorum was duly present, and has authorized the execution hereof.

b. Authorization. City is an Arizona municipal corporation, is in good standing and is qualified to do business in Arizona. The person signing this Agreement on City's behalf has the authority and right to enter into this Agreement on City's behalf, without any further act or authorization by City. City is not prohibited from executing this Agreement by any law, rule, regulation, instrument, agreement, order or judgment.

27. FORCE MAJEURE. If the Developer's completion of the Deferred Improvements contemplated in this Agreement is prevented or delayed, despite the Developer's commercially reasonable efforts to perform, by causes beyond the Developer's reasonable control, including strikes, riots, fires, floods, lightning, rain, earthquake, extraordinary wind or other weather events, war, invasion, insurrection, civil commotion, unavailability of resources due to national defense priorities or natural disaster recovery, supply chain disruptions, shortages or unavailability of material or labor, any act of God, binding orders, actions or inactions of any court or governmental authority, legislative, executive, administrative, judicial agency or body, state or federal laws, regulations or ordinances, technological impossibility, changes in law or applicable regulations subsequent to the date hereof or any other similar or dissimilar cause beyond its reasonable control and not attributable to its neglect (each, a "Force Majeure Event"), upon the Developer providing written notice in reasonable detail to the City the requirement of completion of such Deferred Improvements shall be postponed by a period equal to the period of time such party's performance under this Agreement is prevented or delayed by such Force Majeure Event. Notwithstanding the foregoing, no Developer act, undertaking, action or inaction shall constitute a Force Majeure Event.

28. INDEMNIFICATION.

a. Developer, or Developer's successors and assigns, agrees to defend, indemnify and hold harmless City, its officers, officials and employees from and against claims, damages, losses and expenses of any nature whatsoever by any third-party (including but not limited to reasonable attorney fees, court costs, the costs of appellate proceedings, and all claim adjusting and handling expense) (collectively, "Claims"), relating to or arising out of Developer's, its agents, officers, employees, officials, representatives or contractors or their successors' and assigns' negligence or intentional misconduct arising in connection with this Agreement; provided, however, the foregoing indemnity does not apply to any Claims to the extent caused by the City's or City's officers, officials, employees, agents, representatives or contractors negligence or intentional misconduct. The indemnity provisions of this Agreement shall survive the termination of this Agreement.

b. The City agrees to defend, indemnify and hold harmless Developer, its directors, officers, employees, agents and representatives from and against any Claims relating to or arising out of any negligence or intentional misconduct by the City, its officers, agents, employee, officials, representatives or contractors arising out of or in connection with this Agreement provided, however, the foregoing indemnity does not apply to any Claims to the extent caused by Developer's or Developers' directors, officers or employees negligence or intentional misconduct. The indemnity provisions of this Agreement shall survive the termination of this Agreement.

29. ISRAEL BOYCOTT AND FORCED LABOR OF ETHNIC UYGHURS. As applicable pursuant to Arizona Revised Statutes Title 35, Articles 9 and 10, 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. Additionally, Developer agrees and certifies that it does not currently, and agrees for the duration of this Agreement that Developer will not, use: (1) the forced labor of ethnic Uyghurs in the People's Republic of China; (2) any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China; or (3) any contractors, subcontractors or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China. If Developer becomes aware during the term of the contract that it is not in compliance with this written certification, the company shall notify the City within five business days after becoming aware of the noncompliance. If Developer does not provide the City with a written certification that Developer has remedied the noncompliance within 180 days after notifying the City of the noncompliance, this Contract terminates, except that if the contract termination date occurs before the end of the remedy period, the Contract terminates on the Contract termination date. Developer also agrees to indemnify and hold harmless the City, its officials, employees, and agents from any claims or causes of action relating to the City's action based upon reliance upon this representation, including the payment of all costs and attorney fees incurred by the City in defending such an action.

[Signature pages follow]

DEVELOPER:

CARMAX AUTO SUPERSTORES, INC.
a Virginia corporation

By: _____

Name: K. Douglass Moyers

Title: Vice President of Real Estate

Commonwealth of Virginia

City/County of _____

The foregoing Development Agreement was acknowledged before me this ____ day of _____, 2023, by K. Douglass Moyers, the Vice President of CarMax Auto Superstores, Inc., a Virginia corporation, and who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the and acknowledged to me that he being authorized to do so, executed the foregoing instrument for the purposes therein contained on behalf of CarMax Auto Superstores, Inc., a Virginia corporation.

Notary Public

My Commission Expires: _____

Registration No.: _____

EXHIBIT A
Legal Description

The land referred to herein below is situated in the County of Maricopa, State of Arizona, and is described as follows:

Lots 3 and 13, of Replat of Lot 3 Centerpoint Logistic Park – P/D West and Minor Land Division – Northwest Corner of Dysart Road & Joe R. Ramirez Road, Record of Maricopa, according to the Plat of Record in the Office of the County Recorder of Maricopa County, Arizona, recorded in Book 1642 of Maps, Page 30.

Lot 3 contains 2,022,278 square feet or 46.425 acres more or less.

Lot 13 contains 447,639 square feet, or 10.276 acres more or less.

Combined total area contains 2,469,917 square feet, or 56.701 acres more or less.