

REIMBURSEMENT AGREEMENT
for Flagstaff Airport Land Development at John Wesley Powell Blvd. and Pulliam Drive

THIS REIMBURSEMENT AGREEMENT (the "Agreement") is entered into _____, 2021, by and between the CITY OF FLAGSTAFF (the "City"), and GENTERRA ENTERPRISES, LLC, an Arizona limited liability company (the "Developer"), and collectively referred to as the "Parties."

RECITALS

A. The Parties have entered into a Pre-Development Engagement Agreement dated April 29, 2021 related to a proposed commercial development (the "Project") on a 31.45 acre City-owned property located at the northwest corner of John Wesley Powell Blvd. and South Pulliam Drive, Coconino County Tax Assessor parcel number 116-61-006A (the "Property"), adjacent to the City of Flagstaff Pulliam Airport.

B. The Pre-Development Engagement Agreement recitals and descriptions of the Transaction Documents for the Project as set forth in Section 3 of such agreement are hereby incorporated by reference;

C. The intention is for the Developer to incur the upfront costs of master development services, and to recover such costs through Project revenues. However, the Parties desire to enter into this Reimbursement Agreement, to provide for City reimbursement for specific master development services costs incurred by Developer when it would be equitable to do so, as further described herein.

WHEREFORE, in consideration for the mutual promises set forth herein, the City and the Developer agree as follows:

1. **Term.** The term of this Agreement will commence on the effective date of this Agreement and continue for a period of up to five (5) years, unless sooner terminated by mutual agreement of the parties or default. This Agreement will automatically terminate without further liability to either party, upon the execution of a Master Development Agreement or a Ground Lease including Master Development Services with Developer for development of the Project. A Reimbursement Commitment will survive termination or expiration of this Reimbursement Agreement, and this Agreement shall remain in effect with respect to such commitment(s).
2. **Contract Amount.** The total contract amount shall not exceed \$100,000, and is subject to approval of Reimbursement Commitment(s) as described further below.
3. **Reimbursable Costs.** Reimbursable Costs may include but are not limited to the following costs incurred after the effective date of this Agreement:
 - (a) Costs paid to third-party professionals to assist in creating the Development Plan,

which will include any studies, reports, or conceptual master development plans, land use and common area design plans, and any costs spent obtaining required regulatory or government approvals, if any.

- (b) Costs paid to third-party professional consultants to create a business plan, plans and financial pro formas for the Project.
- (c) Costs paid to third-party design professionals necessary for creating engineering, zoning, and architectural standards for the infrastructure and common area improvements for the Project, as well as any and all application fees spent in order for such plans or documents to be approved by relevant government entities.
- (d) Developer's overhead costs of up to ten percent (10%) (.1 x the reimbursed cost).

4. Reimbursement Conditions. Reimbursement conditions may include but are not limited to one or more of the following:

- (a) The City and Developer do not enter into a Master Development Agreement or Ground Lease including Master Development Services;
- (b) The Project or Project negotiations are cancelled by City because of a desire to pursue other use or development of the Property;

5. Not Grounds for Reimbursement. Developer shall not be eligible for reimbursement for costs in any of the following circumstances:

- (a) The insolvency of Developer or inability to pay debts as they come due;
- (b) Cost overruns for third-party contractors;
- (c) Work not yet performed;
- (d) Unsatisfactory work outside contract requirements or industry standards;
- (e) Unnecessary or unreasonable costs;
- (f) Use of third-party contractors lacking appropriate professional licensing or accreditations, or who are debarred or suspended from governmental work in any jurisdiction;
- (g) Third-party's work product would not be available for City use following reimbursement payment.
- (h) The parties are unable to secure financing for public infrastructure.
- (k) After City has entered into a Reimbursement Commitment, if the City and Developer mutually agree to cancel Project negotiations for a Master Development Agreement and/or Ground Lease including Master Development Services, then the City's Reimbursement Commitment shall be halved (reduced by 50%).

6. Reimbursement Commitment Request. City is willing to consider requests from Developer for reimbursement commitments. For such consideration to occur, Developer is requested to submit the following to the City in advance:

- (a) Scope of work for the services;
- (b) The third-party contract for the services that complies with the requirements of Section 8 herein;
- (c) Information related to why the services are necessary and appropriate, and any other options considered;

- (d) Proposed City reimbursement percentage of cost, and a maximum cap for reimbursement;
- (e) An allotment for Developer's overhead (up to .1 x reimbursed cost);
- (f) Proposed Reimbursement Conditions for when the City would be obligated to reimburse Developer;
- (g) Summary of any City or public funding being used to pay for third-party contract, and competitive procurement process.

Upon receipt of a request, City staff and Developer will promptly meet and discuss the request. If the Developer's request meets the conditions and requirements described herein, the City may issue a Reimbursement Commitment.

7. Reimbursement Commitments. A Reimbursement Commitment shall include:

- (a) Scope of work for the services;
- (b) A summary of the third-party contract for services, and any City conditions related to the third-party contract language;
- (c) A City finding that the services are necessary and appropriate;
- (d) A City commitment to pay a reimbursement percentage of the services costs and a maximum cap for reimbursement;
- (e) A City commitment to pay an allotment for Developer's overhead (up to .1 x the reimbursed cost);
- (f) The Reimbursement Conditions that will trigger the City obligation to reimburse the Developer.

The Reimbursement Commitment shall be executed by the parties, numbered, incorporated and attached as part of Exhibit 2 to this Agreement. The City Business Attraction Manager, in consultation with other City staff, is hereby delegated authority to approve any Reimbursement Commitment on behalf of the City.

8. Third-Party Contract Language. The parties will negotiate in good faith to agree upon appropriate provisions to be included in third-party contracts subject to a Reimbursement Commitment. Sample possible language is attached hereto as Exhibit 1. The parties agree that Developer has sole discretion to choose its third-party contractors whose work may be reimbursed, so long as the provisions included in Exhibit 1 are included in such third-party contractor agreements with Developer.

9. Invoicing for Reimbursement. Developer may invoice the City for reimbursement if the conditions of this Reimbursement Agreement and separate Reimbursement Commitment are met. Any invoice will include:

- (i) Invoice "pursuant to Reimbursement Agreement #_____, Reimbursement Commitment #_____";
- (ii) Invoice amount;
- (iii) Services rendered, and reasonable detail to support the invoice amount. (No detail is required related to Developer's overhead allotment.)

The invoice is to be remitted to the attention of: City Finance Director, 211 W. Aspen Avenue, Flagstaff, Arizona 86001

10. **Payment Due.** City payment is due within thirty (30) days from invoicing. In the event of a dispute, payment is due within thirty (30) days from resolution of the dispute.
11. **Disputes.** The City may dispute any amount or cost invoiced within fifteen (15) days of receipt of said invoice by notifying Developer in writing of the disputed amounts and the reasons such amounts are disputed. The parties will negotiate in good faith to resolve the dispute. If the parties are unable to resolve the dispute within sixty (60) days from the original invoice date, then commencing on the 61st day City will pay interest of 5% annually on the amount owed, as determined in a binding mediation, mutual agreement, or final decision of a court, until paid in full.
12. **Non-Assignment.** The City is entering into this Agreement on the basis of the unique experience, financial capacity, skills and capabilities of the Developer and its affiliates, Genterra Group, LLC, Kinney Construction, LLC, Kinney Construction Services, Inc., and any special purpose or holding entity created by Developer for the specific purpose of furthering the Project (collectively “Affiliates”). This Agreement may not be assigned without the prior written consent of City in its reasonable discretion, except that any requested assignment to an Affiliate as defined herein shall not be refused if prior written notice is given to the City within at least thirty (30) days of the requested assignment.
13. **Defaults.**
 - (a) **Notice and Opportunity to Cure.** If either Party fails to perform any of its other obligations under this Agreement, the other Party may give written notice thereof specifying in reasonable detail the basis for the determination of the default. If the defaulting Party does not cure the default within thirty (30) days after the date the notice of default was given or other reasonable time not to exceed sixty (60) days, then this Agreement may be terminated by the non-defaulting Party.
 - (b) **Developer’s Remedies upon City Default.** Upon City default, Developer’s sole remedy will be to recover its reimbursable costs pursuant to this Reimbursement Agreement and the applicable Reimbursement Commitment
 - (c) **City’s Remedies upon Developer Default.** Upon Developer default, City’s sole remedy will be relief from its obligation to reimburse Developer pursuant to the Reimbursement Agreement and the applicable Reimbursement Commitment.
 - (d) **Severability.** A party’s default with respect to one Approval, shall not be construed as a default with respect to the entire Reimbursement Agreement or other Reimbursement Commitment. Each Reimbursement Commitment shall be treated as a separate agreement.

14. Attorneys Fees and Costs. The prevailing party in any action to enforce this Agreement shall be entitled to recover its reasonable attorneys fees and costs.

15. Notices. A notice or communication under this Agreement by either Party to the other shall be sufficiently given or delivered if dispatched by hand, national courier services, or by registered or certified mail, postage prepaid, addressed as follows:

(i) To the City:

City of Flagstaff
Attention: Economic Vitality Director
211 W. Aspen Avenue
Flagstaff, Arizona 86001

With a copy to:
Attention: Grants and Contracts Manager
211 W. Aspen Avenue
Flagstaff, Arizona 86001

(ii) To the Developer:

Genterra Enterprises, LLC
Attn: Tim Kinney
121 E. Birch Ave. Suite 503
Flagstaff, AZ 86001
928-779-2820
tk@kinneyconstructionservices.net

With a copy to:

Timothy Kinney PLLC
Timothy Kinney, Esq.
4957 E. Fort Lowell Rd.
Tucson, AZ 85712
520-477-7093
Tim@kinneylawaz.com

Notices sent by email shall not be deemed as legally effective notices. Any mailing address may be changed at any time by giving written notice of such change in the manner provided above at least ten (10) days prior to the effective date of the change. All notices under this Agreement shall be deemed given, received, made, or communicated on the date personal receipt actually occurs or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.

16. General Provisions.

- 16.1 Amendments.** This Agreement may be amended or modified only by a written instrument executed by the parties.
- 16.2 Severability.** If any term or provision of this Agreement is found by a court of competent jurisdiction to be illegal or unenforceable, then such term or provision is deemed deleted, and the remainder of this Agreement shall remain in full force and effect.
- 16.3 Non-Waiver.** Each Party has the right to insist upon strict performance of the Agreement, and the prior failure of a Party to insist upon strict performance, or a delay in any exercise of any right or remedy, or acceptance of materials or services, shall not be deemed a waiver of any right to insist upon strict performance.
- 16.4 Third Party Beneficiaries.** This Agreement is intended for the exclusive benefit of the Parties. Nothing herein is intended to create any rights or responsibilities to third parties.
- 16.5 Successors and Assigns.** This Agreement shall inure to the benefit of and bind the respective successors and assigns of the City and the Developer.
- 16.6 Applicable Laws.** The laws of the State of Arizona shall govern the validity, construction and effect of this Agreement.
- 16.7 Entire Agreement.** This Agreement contains all the representations and the entire agreement between the Parties with respect to the subject matter of this Agreement.
- 16.8 Time for Performance.** Time is of the essence with respect to each provision of this Agreement.
- 16.9 Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.
- 16.10 Real Estate Commissions.** The Developer and the City each represents to the other that it has engaged no broker, agent, or finder in connection with this Agreement or the transactions contemplated hereby. In the event any broker, agent or finder makes a claim, the Party through whom such claim is made agrees to indemnify the other Party from any losses arising out of such claim.
- 16.11 Confidentiality of Proprietary Information.** If the City requests Developer to provide proprietary or confidential information that is necessary for the City to verify financial, operational, or trade secret information relevant to the negotiation of the Transaction Documents, Developer will make such information available for City review or inspection, provided that procedures for confidentiality are first established to ensure such information the Developer provides in the course of the

negotiations remains protected. Developer may, for example, require inspection at Developer's place of business in Flagstaff, elect to not provide information electronically, and/or require return of hard copies of materials after a reasonable period of time. Developer understands that in general, electronically stored materials (including automatic computer "backup" of emails sent to the City) cannot be destroyed or returned to Developer.

- 16.12 Public Records Laws.** This Agreement is subject to Arizona's Public Records statutes, and any related materials are a matter of public record and subject to disclosure pursuant to Arizona Public Records Law, A.R.S. § 39-121 et seq. If Developer has clearly marked its information as "confidential", the City will endeavor to notify Developer prior to release of such information.
- 16.13 Relationship of the Parties.** This Agreement shall not be construed to establish a joint venture or joint enterprise between the parties.
- 16.14 Compliance with Laws.** Each Party shall comply with applicable laws, rules, regulations in performance of this Agreement.
- 16.15 Conflict of Interest.** This Contract is subject to cancellation pursuant to A.R.S. § 38-511.
- 16.16 Competitive Procurement.** When City or public funding is being used in whole or part for purchase of services or materials for the Master Development Services for the Project, the purchase must be competitively procured in compliance with the City Procurement Code Manual or other applicable public procurement standards.
- 16.17 Payment of Reimbursement Commitment.** The parties consider payment of a Reimbursement Commitment to Developer as partial consideration for the Developer's master development services pursuant to the competitively procured Request for Statement of Qualifications (RSOQ) for Master Development Services.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date first written above. The Parties further acknowledge and represent they have the authority to enter into this Agreement and bind themselves respectively to the terms included herein.

CITY OF FLAGSTAFF

By: _____
Greg Clifton, City Manager

Attest:

By: _____

Stacy Saltzburg, City Clerk

Approved as to form:

By: _____
City Attorney's Office

GENTERRA ENTERPRISES, LLC, an Arizona limited liability company

By: _____
Tim Kinney

Its: Managing member

EXHIBIT 1
SAMPLE CLAUSES

Sample Clauses which may be included as part of a Third-Party Contract that is subject to a Reimbursement Commitment. See also other City Standard Terms and Conditions.

- (a) Compliance with Laws. Contractor shall comply with all applicable City of Flagstaff ordinances, resolutions, regulations, and all other laws and regulations in all aspects of preparing to develop the Property.
- (b) Third-Party Beneficiary. City of Flagstaff shall be a third-party beneficiary of this Contract. There are no other third-party beneficiaries of this contract.
- (c) Public Improvements. Standard City of Flagstaff engineering and construction standards and warranties for design and/or construction of public improvements shall apply [INSERT].
- (d) Records. Contractor shall retain all records related to performance of this Contract for a period of at least five (5) years after completion of the Contract. Upon request, Contractor will make these available for inspection during regular business hours.
- (e) Ownership of Materials: Any original documents prepared or collected by Contractor in performance of this Contract including but not limited to models, samples, reports, test plans, survey results, graphics, tables, charts, plans, maps, specifications, surveys, computations and other data ("collectively "the Materials") shall be the property of Developer and City, with the following exceptions: (1) the parties have otherwise agreed in writing that certain Materials shall not belong to Developer and/or City, or (2) the Developer or third party has created or acquired Materials, including but not limited to proprietary business models, financial pro-

formas, intellectual property, or confidential information for purposes other than this Project (and the use of the materials during this Project shall not alter their separate character). Contractor agrees that all materials prepared under this Contract are “works for hire” within the meaning of the copyright laws of the United States and hereby assigns to the Developer and City all rights and interests Contractor may have in the materials it prepares under this Contract, including any right to derivative use of the material.

- (f) City Re-Use. City may use the Materials without further compensation to Developer or Contractor; provided, however, City’s re-use for purposes other than pursuant to a Ground Lease or Master Development Agreement with Developer for the Project (“Non-Project Use”) is at City’s sole risk and without liability to Developer and Contractor. City shall release and indemnify Developer and Contractor from and against any and all claims, liabilities and costs arising out of or in any way related to use of the Materials, excluding claims for the Contractor’s negligence or intentional misconduct.
- (g) Delivery of Materials. Upon termination of this Contract in whole or part, or upon expiration if not previously terminated, Contractor shall immediately deliver to City copies all of Materials accumulated by Contractor in performance of this Contract, whether complete or in process.
- (h) Intellectual Property Rights. Contractor warrants that all work completed pursuant to this Agreement is original and/or does not infringe upon any other person’s intellectual property rights.

EXHIBIT 2
REIMBURSEMENT COMMITMENTS

S:\Legal\Civil Matters\2020\2020-178_EV Airport RSOQ Master Developer for 31.45 Acres\Reimbursement Agreement 5-11-21.docx