

Return to:

City Clerk  
City of Flagstaff  
211 W. Aspen Ave.  
Flagstaff, AZ 86001

## DEVELOPMENT AGREEMENT

between

THE CITY OF FLAGSTAFF

and

MICM BUTLER LOFTS PROJECT LP/SIERRA VISTA NO 6 L.L.C./BROOKSTONE VENTURES L.C.

for

THE LOFTS ON BUTLER

THIS DEVELOPMENT AGREEMENT (“**Agreement**”) is entered into on this \_\_\_\_\_ day of \_\_\_\_\_, 2023, by and between the CITY OF FLAGSTAFF, an Arizona municipal corporation (“**City**”), and MICM BUTLER LOFTS PROJECT LP, a Delaware limited liability company (“**Developer**”) and SIERRA VISTA NO 6 L.L.C. and BROOKSTONE VENTURES L.C. (collectively “**Owner**”). City and Developer are referred to in this Agreement collectively as the “**Parties**” or individually as a “**Party**.”

### RECITALS

A. A.R.S. § 9-500.05 authorizes the City to enter into development agreements with landowners and persons having an interest in real property in order to facilitate development of property.

B. Owner is the owner of and Developer is in contract to acquire from Owner that certain real property located at 2950 E. Butler Avenue, in Flagstaff, Arizona, 86004, consisting of four undeveloped parcels, totaling approximately 17.2 acres. These parcels are identified as Coconino County Assessor Parcel Numbers 106-04-006B, 106-04-007C, 107-11-001B, and 107-44-062. Parcels 106-04-006B and 107-11-001B are currently zoned Rural Residential (RR), parcel 106-04-007C is currently zoned Highway Commercial (HC), and Parcel 107-44-062 is currently zoned Medium Density Residential (MR). All parcels currently have a Resource Protection Overlay (RPO) and are legally described in Exhibit A and depicted in Exhibit B (the “**Property**”).

B. Developer intends to construct a mixed-use development consisting of 172 multi-family residential units and approximately 2,154 square feet of commercial office space, and to set aside an approximately 1.09-acre area for future commercial development (the “**Project**”). Developer concurrently is requesting a zoning map amendment to change the City of Flagstaff’s RR and MR zoning designations on part of the Property to HC, with the RPO.

C. The Parties desire to enter into this Agreement in order, among other things, to facilitate the development of the Property by providing for and establishing the community character of the Property, the type of land uses and the location, density, and intensity of such land uses, as depicted in the site plan for the Project (the “**Site Plan**”), a copy of which is attached as Exhibit C, and as set forth in this Agreement and as conditioned by Ordinance No. 2023-06.

D This Agreement and the Project, described and conditioned as set forth in this Agreement, are consistent with the Flagstaff Regional Plan 2030 in effect on the Effective Date of this Agreement, as set forth below.

E. The Developer desires to comply with the strategies and goals of the City’s Carbon Neutrality Plan.

F. The Developer desires to respond to the City’s “Housing Crisis Emergency Declaration” (Resolution No. 2020-66) by providing 172 new housing units, 5 % of which will be affordable housing units, to create safe, decent, and affordable housing opportunities for all members of the City.

G. The City has an interest in ensuring that the development of the Property complies with City standards for development and engineering improvements, and the City believes that development of the Property pursuant to this Agreement will result in planning, safety, and other benefits to the City and its residents.

H. The Developer acknowledges that development of the Property pursuant to this Agreement will be beneficial and advantageous to the Developer because it provides assurances to the Developer that it will have the ability to develop the Property in accordance with the Site Plan as set forth herein.

I. The City believes that the development of the Property under this Agreement will result in planning, safety, and other benefits to the city of Flagstaff and its residents.

J. The City and Developer acknowledge that this Agreement is a development agreement pursuant to the provision of A.R.S. § 9-500.05.

## **AGREEMENT**

1. NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises and agreements set forth herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and in order to fulfill the foregoing objectives, the parties agree as follows:

### **2. Incorporation of Recitals and Exhibits.**

1.1 Recitals and Exhibits. The recitals above, and any exhibit referenced or attached hereto, are incorporated into this Agreement.

### **3. Entitlements**

3.1 Requested Zoning. Developer intends to develop the Property as a mixed-use development consisting of a multifamily residential community with a maximum of 172 dwelling units and approximately 2,154 square feet of commercial office space, and an approximately 1.09-acre area for future development. The Property is currently zoned HC, MR, and RR with the RPO. Concurrent with this Agreement, Developer is requesting to rezone the Property to HC with the RPO through direct to ordinance zoning map amendment application No. PZ-21-00284-03.

3.2 Conditions of Zoning Map Amendment. Developer agrees to be subject to all the terms, conditions, and stipulations of the rezoning ordinance for PZ-21-00283-03 (Ordinance No. 2023-06) and approved Site Plan (PZ-21-00284-02), including any approved development standards, engineering, or other modification(s). In addition to the provisions for reversion outlined in Ordinance No. 2023-06 and the Flagstaff City Code, the Developer’s failure to obtain a building permit for the entirety of the Project within five (5) years of the effective

date of the rezoning ordinance shall entitle City, in its sole discretion, to conduct a public hearing to revert zoning on the Property to its former zoning classifications, by Arizona Revised Statutes § 9-462.01.

3.3 Development Standards. For a period of five (5) years from the Effective Date, the development of the mixed-use (residential and office) portion of the Property, as well as the requirements for Improvements, will be governed by the Flagstaff Zoning Code, ordinances, regulations, rules, guidelines, and standards in effect on the Effective Date. For any development application(s) made after five years from the Effective Date, the codes, ordinances, regulations, rules, guidelines, and standards in effect at the time of application shall apply. Regardless of the time of development, current City Engineering Standards, Building Code, Fire Code, and other Code provisions, regulations, rules, and guidelines shall apply to the Project. The commercial development on the Property will be evaluated using current codes at the time of site plan application completeness.

#### **4. Development Plan.**

4.1 Scope of Development. The City and Developer hereby acknowledge that the City of Flagstaff Inter-Division Staff (IDS) approved on February 2, 2023, subject to conditions, the Site Plan attached hereto as **Exhibit C** (City of Flagstaff project number PZ-21-00284-02) depicting a mixed-use development consisting of a maximum of 172 multi-family residential dwelling units (10.88 dwelling units per acre), a clubhouse, and approximately 2,154 square feet of commercial office space. Minor modifications to the Site Plan, as determined by the City Planning Director, will be permitted.

4.1.1 Residential Unit Mix. There will be 43 residential buildings, with four units per building. The Project will include 26 one-bedroom units, 120 two-bedroom units, and 26 three-bedroom units. Two-bedroom/two-bedroom combination units may be replaced with a three-bedroom/one-bedroom combination and not affect minimum parking requirements. Nine of the rental units will be permanently affordable for thirty years, in accordance with Division 10-30.20 of the Flagstaff Zoning Code, and subject to the Affordability Plan, described in **Section 5.4** and in **Exhibit D**. Developer may modify the unit mix within the Project.

4.1.2 Commercial Office Space. The commercial office located on the second floor of the residential clubhouse building must be constructed as part of Phase 1 of this development as shown on the approved Site Plan.

4.2 Conceptual Commercial Site Plan Requirements. The approximately 1.09-acre commercial phase of this project, as shown in **Exhibit C** as a future separate parcel, is conceptual in nature but must meet the following requirements in order to comply with the Urban Activity Center as defined in the Regional Plan. Allowed primary uses shall be all uses allowed in the HC zone with the following exceptions: Industrial, Manufacturing, Processing and Wholesaling uses, Residential Uses, Equipment Rental Yard use, Cemeteries, Telecommunication Facilities, Transportation and Infrastructure, and Vehicle Sales and Services. The minimum height of buildings on the commercial parcel shall be two stories or have appearance of a two-story building, which may be accomplished through taller architectural feature(s). No more than one building may have a drive-through lane. No more than two drive-through lanes are allowed for the building.

#### 4.3 Other Project Requirements.

4.3.1 Project Amenities: Ramadas, pedestrian pathways, and benches will be installed in the civic space and open space areas throughout the development site for residents to enjoy. The Project will provide a clubhouse for the residents which will include a meeting/recreation area, kitchen, and fitness center.

4.3.2 Open Space/Civic Space. The Project shall provide approximately 3.87 acres of Common Open Space, and 0.91 acres of Civic Space. Zoning Code Table 10-40.30.040.C. requires a minimum of 2.39 acres of Common Open Space for the Project. Zoning Code section 10-30.60.090 requires a minimum of 0.80 acres Civic Space for the Project.

## **5. Developer Obligations**

5.1 Construction of Public, Private, and Other Related Improvements. Prior to issuance of public improvement permits for any phase or component of the Project, Developer shall provide security, in a form satisfactory to the City as outlined in the City's Zoning Code, that public and other related improvements will be constructed in accordance with approved plans. Developer shall, at its own expense, construct or cause to be constructed all public and private improvements as required by City's code or ordinances and this Agreement, and in accordance with approved specifications. Following construction of the described public improvements, and dedication of the same to City, City shall assume, at its expense, and in accordance with City policies, the maintenance, and repair of all public improvements to be constructed. Developer agrees that the construction of the public and other related improvements will coincide with the development of the Project, and be completed and accepted by the City prior to certificate of occupancy.

Specifically, the scope and nature of the on-site and off-site improvements to be constructed in connection with the Project are as follows:

5.1.1 Traffic and Street Frontage Improvements. In accordance with the Project's Transportation Impact Analysis (TIA) prepared by Y2K on November 21, 2022 and approved by the City of Flagstaff on January 5, 2023, and the City of Flagstaff Zoning Code 10-30.50, traffic mitigation from the completed project is necessary. The parties agree that the Developer's traffic mitigation shall be accomplished through the following combination of construction and cash-in-lieu contributions: 1) Developer shall be solely responsible for the design and construction of one (1) new left turn lane on Butler Avenue to access the western driveway on the Property per City of Flagstaff Engineering and Design and Construction Standards as shown in **Exhibit E**, 2) Developer shall make a cash-in-lieu contribution of \$14,995.50 prior to the issuance of any permit (including at-risk permits) commensurate with the Project's proportional share for a future traffic signal or roundabout at the intersection of Butler Avenue and Fourth Street, and 3) Developer will make a cash-in-lieu contribution of two hundred ninety-one thousand six-hundred thirty-six dollars and seventy five cents (\$291,636.75) as set forth in **Exhibit E** prior to the issuance of any permit (including any at-risk permit) or by September 30, 2023, whichever is earlier, to the City for the Butler Avenue frontage improvements. In the event that Developer does not timely remit payment for the in-lieu payment for the frontage improvements, the City will construct typical edge improvements and Developer will be solely responsible for constructing all edge improvements required for the development of the Project when development of the Project moves forward. Developer shall dedicate public right of way for the right turn lane, match-up pavement, and roundabout as generally shown on **Exhibit E**, however, Developer acknowledges that additional dedications may be required as the design of the Butler-Fourth Improvements Project is completed. Developer shall also dedicate any easements necessary for the City of Flagstaff construction of the Butler-Fourth Improvements Project, to the City of Flagstaff. All dedications of right-of-way and easements must be dedicated prior to the issuance of certificate of occupancy, or when the City of Flagstaff Butler-Fourth Improvements project reaches 60% design, whichever comes first, to accommodate required traffic and street frontage improvements. Due to the complexity of timing the development of this Project and the City's Butler Avenue-Fourth Avenue improvement project, the City Engineer has the authority to modify the timing of these requirements and to accept construction of improvements in place of cash in lieu payments and vice versa as appropriate. Prior to dedication of public right of way, all Phase 1 Environmental Site Assessments ("ESA") and Phase 2 ESA recommendations, if any, must be completed by the Developer and accepted by the City. If the development has not received construction permits within two (2) years of the Effective Date of this

Agreement, a revised TIA may be required. Additional off-site improvements may be required as part of the review and approval of the new TIA.

5.1.2 On-Site Water and Sewer Improvements. Developer shall construct all water and sewer improvements required to support the project as shown in the Water and Sewer Impact Analysis for the Project dated August 31, 2022 (the “WSIA”). Developer shall design and install water and sewer mains and services within the project site per City of Flagstaff Engineering and Design and Construction Standards and Arizona Department of Environmental Quality (“ADEQ”) requirements. The water and sewer improvements must be completed and accepted by the City prior to the issuance of the first Certificate of Occupancy for the Project. In accordance with the approved WSIA, if the development has not received construction permits within two (2) years for the approval date of the WSIA, a revised WSIA may be required. Additional off-site improvements may be required as part of the review and approval of the new WSIA.

5.1.3. Off-Site Water and Sewer Improvements. The Project has previously been identified to need a secondary water source to meet city code requirements outlined in sections 5-02-001-0005 and 13-09-003-0002 that require a secondary source of water for dead end mains over 1000’ or any main with over 3 fire hydrants. Prior to the issuance of any Building or Engineering permit on the subject property, Developer will satisfy its obligation for a proportional share of the secondary water source through payment of a cash in lieu of construction payment to the City in the amount of \$132,736.28 as set forth in **Exhibit F**. The City will design, permit, construct and maintain the secondary water source infrastructure. As long as the required cash in lieu of construction payment is made, the Lofts at Butler project will have no restriction on Building or Engineering permits due to secondary water source existence or connections.

In order to accommodate the construction of the City’s Butler-Fourth Improvements project. Developer shall construct water and sewer stub outs as shown in the WSIA prior to September 30, 2023, unless an extension of time is approved by the City Engineer. If Developer does not timely construct the water and sewer stub outs, then the City will construct them as part of the Butler-Fourth Improvements project and Developer will be responsible for reimbursing the City for the actual cost of the design (if Developer has not provided designs to the City) and construction of the water and sewer stub outs prior to the issuance of any permit (including any at-risk permit).

5.1.4 Stormwater Improvements. Developer shall meet all pre versus post retention requirements per the Drainage Impact Analysis & Preliminary Drainage Report for Lofts on Butler dated October 13, 2022, the Site Plan, and the requirements of the City of Flagstaff Stormwater Management Design Manual, including but not limited to peak flow mitigation, Low Impact Development, and rainwater harvesting requirements. A Drainage Maintenance Easement (DME) will be provided for areas of Rural Floodplain within the property. Boundaries of the DME will be finalized and dedicated prior to Civil Plan approval.

5.2. Adjacent Right-of-Way Landscaping Maintenance. In accordance with City Code, all landscaping and irrigation in adjacent right-of-way areas, including parkways, shall be maintained by the Developer or assignee(s) in perpetuity. Developer shall request and pay for the water meter and set up the water account associated with irrigation for required right-of-way landscaping.

5.3 Dedication of Public Easements. Water, sewer, drainage, public utility, and other easements necessary to accommodate required infrastructure improvements must be identified on the construction plans and dedicated before the approval of civil plans. Dimensions for these easements must be in accordance with City requirements.

5.4 Affordable Housing. The Developer shall provide 5% of the overall unit count (based on the Site Plan, 9 of 172 units) (the “**Affordable Units**”) as income-restricted rental units for households earning, on average, up to 80% of the Area Median Income (“**AMI**”), as defined by the United States Department of Housing and Urban

Development (“HUD”), or its successors. Additional eligibility criteria and other requirements for this affordability program are outlined in the Affordability Plan attached as **Exhibit D**. The Affordability Plan may be modified by and between the City’s Housing Director and Owner without further City Council action or need to formally amend this Agreement. Affordable Units must remain affordable as described above and subject to the Affordability Plan for thirty years following the Project’s Certificate of Occupancy.

5.5 Recycling. The Developer will provide recycling collection facilities at all solid waste enclosures within the Project, which will include signage on City approved recycling materials. The recycling and solid waste collection facilities will be made available for all tenants including the residents and the tenants of the commercial office space. All residential units will include double heavy-duty hidden waste baskets in the kitchen cabinets to promote recycling. Property managers for the residential units and the commercial office space will provide educational materials to tenants on what is recyclable in the city of Flagstaff and allowed in the receptacles. Tenants will also be provided with information on local valet services for recycling and composting and how they can learn more about ways to recycle by contacting the City of Flagstaff Sustainability Program at 928-213-2152 or [sustainability@flagstaffaz.gov](mailto:sustainability@flagstaffaz.gov). The future commercial parcel will include recycling and solid waste collection facilities with signage on City approved recycling materials.

5.6 Bicycle Storage and Amenities. The Developer will provide bicycle parking facilities for 40 bicycles, 16 uncovered and 24 covered. Zoning Code section 10-50.80.050 requires a minimum of 18 bicycle parking spaces for this Project.

5.7 Sustainable Construction. The development will be all electric, including all electric appliances; natural gas will not be used in this development. Low- VOC and formaldehyde-free materials will be used for the carpet, cabinets, and paint. The HVAC unit and all appliances installed in the residential units will be Energy Star Certified. Developer prepared a compliance certificate dated 3/15/2023 using Rescheck-Web Software, included herein as Exhibit G. The U-factor of the buildings was compared using the Energy Code 2018 IECC. The US Department of Energy defines U-factor as “the rate at which a window, door, or skylight transmits non-solar heat flow. For windows, skylights, and glass doors, a U-factor may refer to just the glass or glazing alone. The lower the U-factor, the more energy-efficient the window, door, or skylight.” energy.gov. The Rescheck performs a simple U-factor x Area (UA) calculation for each building assembly to determine the overall UA of a building. Based on this Rescheck, the UA is 19.2% better than the Energy Code 2018 IECC. Developer will build in conformance with Exhibit G. In addition, Developer will provide one dual-port electric vehicle charging station. This development is not using the Sustainable Residential Building Incentives.

5.8 Materials Management. The Developer agrees to incorporate infrastructure to support recycling activities on-site, including the provision of adequate space to locate recycling receptacles next to receptacles dedicated for trash and double heavy-duty hidden waste baskets in the kitchen cabinets in all residential units to promote recycling. During construction for the multi-family development and future commercial development, the Developer will have a written solid waste program approved by the City of Flagstaff Sustainability Section that includes a plan for recycling or reuse of paper, cardboard, plastics, and metals; recycling or reuse of lumber scraps; and diversion of masonry, cementitious, and possibly gypsum material from the landfill. To the extent feasible, the Developer will reuse native materials on-site. To ensure compliance with this section the Developer agrees to work with the City and allow the City access to the Project site as needed (including during construction).

5.9 Rental and Management Policies. Developer will adhere to the following policies in the rental and management of the rental units:

- No lease or rental agreement, direct or indirect sublease, assignment, or transfer of obligations of a tenant shall be for a period of fewer than 60 days.

- All lease or rental agreements shall include an eviction addendum prohibiting illegal, nuisance, and dangerous conditions and activity.
- Property owner agrees to accept emergency rental assistance funds intended to prevent eviction for qualifying households. Such funds may be provided to property management through state or non-profit agencies, or by tenants.
- Developer agrees to participate in the City of Flagstaff Crime-Free Multi-Housing Program and agrees that a final safety plan that addresses events, parties, general safety requirements, staff, operations.
- Developer will provide annual training to property management for managing, operating, and maintaining the Project by the provisions of this Section.

5.10 Permits and Building Fees. Developer agrees and understands that upon the submittal date of any application or permit, the current fees in effect at the time of submittal shall apply to the Project.

## **6. Default and Remedies.**

6.1 Events Constituting Default. A Party is in default if such Party breaches an obligation required of the Party under this Agreement and such breach continues for a period of thirty days after written notice thereof from the Party not in default; provided, however, that if the nature of the default is such that it cannot reasonably be cured within the 30 days following written notice, then, in that case, the default may be cured if the Party failing to perform commences a cure within the such 30-day period and thereafter diligently and expeditiously pursues such cure to completion within 60 days of the written notice.

6.2 Developer's Remedies. In the event that City is in default under this Agreement and fails to cure any such default within the period required therefore as outlined in **Section 6.1**, then, in that event, in addition to all other legal and equitable remedies which Developer may have, Developer may terminate this Agreement by written notice delivered to City.

6.3 City's Remedies. In the event that Developer is in default under this Agreement, and Developer thereafter fails to cure any such default within the period described in this **Section 6.1**, then, in that event, in addition to all other legal and equitable remedies which City may have, City may terminate this Agreement by written notice delivered to Developer.

6.4 Dispute Resolution. In the event there is a dispute hereunder that the Parties cannot resolve between themselves, the Parties agree that there shall be a forty-five-day moratorium on litigation during which time the Parties agree to attempt to settle the dispute by nonbinding mediation before the commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The mediator selected shall have at least five years' experience in mediating or arbitrating disputes relating to commercial property development. Each Party agrees to bear its own costs in the mediation. The Parties will not be obligated to mediate if an indispensable party is unwilling to join the mediation. This section does not constitute a waiver of a Party's right to initiate legal action if a dispute is not resolved through good faith negotiation or mediation, or if provisional relief is sought under the Arizona Rules of Civil Procedure.

6.5 Development Rights in the Event of Termination. Upon the termination of this Agreement as provided herein, the Developer shall have no further rights to develop the Property under this Agreement.

6.6 No Personal Liability. No current or former member, manager, officer, director, agent, representative, official, employee, or another natural person of City or Developer when acting within the scope of their official capacity shall be personally liable (a) in the event of any default or breach by City or Developer, as applicable; (b) for any amount which may become due to the non-breaching party or its successor or assign; or (c) under any obligation of City or Developer, as applicable, under the terms of this Agreement.

6.7 Liability and Indemnification. The Developer shall indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents for, from, and against any claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of this Agreement by City or Developer, or nonperformance of this Agreement by Developer.

## **7. General Provisions.**

7.1 Effective Date and Term. This Agreement shall be effective (the "**Effective Date**") upon execution by the Parties hereto and recordation by A.R.S. § 9-500.05 (as amended). The term of this Agreement shall extend from the Effective Date of this Agreement and shall automatically terminate thirty years from such date. The affordable housing provisions in Section 5.4 survive the termination of this Agreement.

7.2 Amendments. This Agreement may be amended or canceled in whole or in part at any time by a written amendment executed by the Parties or by their successors in interest. All amendments to this Agreement must be recorded in the Official Records of Coconino County, Arizona, within ten days following execution, as required by A.R.S. § 9- 500.05(D).

7.3 Assignment and Successors. The provisions of this Agreement shall inure to the benefit and be binding upon any successors and assigns of the Parties hereto. Notwithstanding anything contained in the foregoing to the contrary, until completion of construction of the Project, the right of the Developer to assign its rights, duties, and obligations under this Agreement shall be limited to the following:

a) Assignment by the Developer in connection with obtaining financing and the exercise of lender remedies with respect thereto;

b) Assignment of all rights and obligations of the Developer under this Agreement to a real estate developer reasonably acceptable to and approved by City; however, if the Developer or a current principal of the Developer retains an ownership interest and management control in such real estate developer, then, in that event, City's prior approval shall not be required; or

c) Assignment by the Developer of its rights under this Agreement to a corporation, partnership, joint venture, limited liability company, trust, or other legal entity, which is controlled by, under common control with, or which controls the Developer, or which is owned or controlled by a principal of the Developer.

With the exceptions noted above, the Developer shall not transfer or assign any part of its rights and/or obligations arising under this Agreement without the prior written approval of the City, which approval shall not be unreasonably withheld, conditioned, or delayed. After the completion of construction of the Project, the Developer may assign this Agreement to any purchaser without the City's consent (provided that the City is timely notified of such assignment). Notwithstanding anything contained in the foregoing to the contrary, no assignment of this Agreement or any specific rights, obligation, or duties of the Developer under this Agreement shall release the Developer, its successors, or assigns, from its obligations hereunder, unless specifically agreed to by City.

7.4 Attorney's Fees and Costs. If legal action by any Party is brought because of a breach of this Agreement or to enforce a provision of this Agreement, the prevailing Party shall be entitled to reasonable attorneys' fees and court costs.

7.5 Authority to Sign. The person executing this Agreement on behalf of the Developer warrants and represents that they have the authority to execute this Agreement on behalf of the Developer, that the execution of this Agreement has been approved by all required actions on the part of such Parties, and that this Agreement is fully binding on such Parties.

7.6 Choice of Law. This Agreement shall be construed under and by the laws of the State of Arizona.

7.7 Compliance with All Laws. The Developer will comply with all applicable Federal, State, County, and City laws, ordinances, and regulations.

7.8 Conflict of Interest. Under Arizona law, rules, and regulations, no member, official, or employee of the City shall have a 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 the cancellation provisions of A.R.S. § 38-511.

7.9 Counterparts. This Agreement may be executed in any number of counterparts, each of which will constitute an original, but all of which will constitute the same agreement.

7.10 Covenants Run with the Land. The covenants and agreements contained in this Agreement are mutual covenants and also constitute conditions to the subsequent or concurrent performance of the Party benefitted thereby. All covenants shall be covenants running with the land and shall bind and inure to the benefit of the Parties and their respective successors and permitted assigns.

7.11 Entire Agreement. This Agreement, including the following exhibits which are incorporated in this Agreement by reference, constitutes the entire agreement between the parties and supersedes any prior written or oral understandings or agreements between the parties. This provision applies only to the entirety of this Agreement; additional and separate zoning stipulations and agreements with the City may apply to the Property, and this provision does not affect them.

Exhibit A- Legal Description of the Property

Exhibit B- ALTA Survey Map

Exhibit C- Site Plan

Exhibit D- Affordability Plan

Exhibit E- Offsite Traffic and Street Frontage Improvements and Cash in Lieu

Exhibit F- Offsite Water Improvements Cash in Lieu

Exhibit G – REScheck Analysis

7.12 No Obligation to Develop. Except as specifically outlined in this Agreement, there shall be no obligation for the Developer to construct the Project.

7.13 No Partnership, No Agency. It is specifically understood and agreed by and among the Parties that the development of the Project on the Property is a private development, that no Party is acting as the agent of any other Party in any respect, and that each Party is an independent contracting entity concerning the terms, covenants, and conditions contained in this Agreement. The Parties acknowledge and agree that this Agreement does not create a partnership, joint venture, or similar entity and that no such partnership, joint venture, or similar entity has been created by City and Developer.

7.14 No Third-Party Beneficiaries. No person or entity other than a Party to this Agreement or legal representative, successor in interest, or assign of such party shall be entitled to rely on this Agreement or the performance of any Party. This Agreement is not made for the benefit of any person or entity, not a Party.

7.15 Notices. All notices and communications provided for herein, or given in connection herewith, shall be validly made if in writing and delivered personally or sent by registered or certified United States Postal Service mail, return receipt requested, postage prepaid to:

To City:

City Manager  
City of Flagstaff  
211 W. Aspen Avenue  
Flagstaff, AZ 86001

To Developer:

MICM BUTLER LOFTS PROJECT LP  
2502 E. River Road  
Tucson, AZ. 85718

Copy to:

City Attorney  
City of Flagstaff  
211 W. Aspen Avenue  
Flagstaff, AZ 86001

Aspey, Watkins & Diesel, PLLC  
Whitney Cunningham  
123 N. San Francisco St., Suite 300  
Flagstaff, AZ 86001

or to such other addresses as either party may from time to time designate in writing and deliver in a like manner. Any such change of address notice shall be given at least ten (10) days before the date on which the change is to become effective. Notices given by mail shall be deemed delivered 72 hours following deposit in the United States Postal Service in the manner set forth above.

7.16 Recording of Agreement. By A.R.S. § 9-500.05(D), this Agreement shall be recorded in its entirety in the Official Records of Coconino County no later than ten days from the date of its execution.

7.17 Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect the construction or interpretation of this Agreement.

7.18 Severability. If any provision of this Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect.

7.19 Time is of the Essence. To enforce the provisions of this Agreement, time is of the essence.

7.20 Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by the parties of the breach of any provision of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or of any other provision of this Agreement.

## **8. Waiver of Claim for Diminution in Value.**

The Developer hereby waives and fully releases any financial loss, injury, claims, and causes of action that the Developer may have, now or in the future, for any “diminution in value” and for any “just compensation” under the Private Property Rights Protection Act, codified in A.R.S §§ 12-1131 through 12-1138 (the “Act”), in connection with the application of City’s existing land use laws and including Ordinance No. 2023-06 regarding the Property. This waiver constitutes a complete release of any claims and causes of action that may arise or may be asserted under

the Act about the subject Property. The Developer agrees to indemnify, hold harmless, and defend the City, its officers, employees, and agents, from any claims, causes of actions, demands, losses, and expenses, including attorney's fees and litigation costs, that may be asserted by or may result from any of the present or future owners of any interest in the Property seeking potential compensation, damages, attorney's fees, or costs under the Act that they may have, as a result of the application of City's existing land use laws, including Ordinance No. 2023-06, upon the Property.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]





On this \_\_\_\_ day of \_\_\_\_\_, 2023, before me, the undersigned Notary Public, personally appeared \_\_\_\_\_, personally known to me or shown by satisfactory evidence to be the person whose signature appears above and acknowledged to me that he signed the foregoing document for the purposes therein contained. IN WITNESS WHEREOF, I have set my hand and official seal.

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

Seal:

