

## LEASE AGREEMENT

THIS LEASE AGREEMENT (the "Lease") is entered into by and between the City of Flagstaff, Arizona, an Arizona municipal corporation (the "City"), and CBAR 19 Flagstaff, LLC (the "Lessee") this 13 day of April, 2005.

RECITALS OF BACKGROUND AND PURPOSE

A. The City and Lessee, Inc. hereby enter into a Lease Agreement, with respect to the development of 1.27 acres of real property (the "Premises") situated within a portion of Tract 7B of the Pulliam Airport Airpark Unit 1, Amended Subdivision adjacent to the municipal airport in Flagstaff, Arizona, owned by the City (the "Property"), more particularly described on **Exhibit "A"** attached hereto.

B. The parties have entered into this Lease for the purpose of leasing the Premises as more specifically described in **Exhibit "B"** attached hereto to Lessee and setting forth other rights and obligations of the parties, including those rights and obligations concerning the Improvements described in **Exhibit "C"** to be constructed on the Premises.

C. These Recitals describe the current intentions of the parties with regard to the development of the Premises, and, except to the extent that certain terms defined in Section 1.2 are contained herein, are not intended to enlarge, limit or restrict the respective rights and obligations of the parties as set forth in this Lease.

LEASE AGREEMENT

NOW THEREFORE, in consideration of the foregoing and of the rents, covenants and agreements hereinafter set forth, and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the City and Lessee, for themselves, and their respective successors and assigns, do hereby covenant and agree as follows:

## ARTICLE I

Section 1.1. **Exhibits.** Attached to and forming a part of this Lease are the following Exhibits, which, for the purpose of identification, have been initialed by the parties to this Lease or their attorneys:

- EXHIBIT "A" General description of the Property as more particularly described and illustrated in the RFP and Master Plan for the development of a portion of Tract 7B of the Pulliam Airport Airpark Unit 1, Amended Subdivision
- EXHIBIT "B" Legal description of the Premises leased under this Lease
- EXHIBIT "C" Improvements on Premises

EXHIBIT "D" Federal Grant Assurances (Airport Assurances 9/99)  
EXHIBIT "E" Allowed Uses—(BPI) Business Park Intermediate Zoning

Section 1.2. **Defined Terms.** As used in this Lease the following terms have the following meanings:

**"Affiliate (d)"** means, with respect to Lessee, any individual, partnership, corporation, trust, unincorporated organization, association or other entity which, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, Lessee, including without limitation any general or limited partnership in which Lessee, or any such Affiliate is the controlling general partner or otherwise controls the affairs thereof.

**"City"** means the City of Flagstaff, Arizona, and its successors and assigns.

**"Default Rate"** has the meaning ascribed to it in Section 8.6.

**"Depository"** has the meaning ascribed to it in Section 12.5.

**"Environmental Laws, Rules, and Regulations"** means and includes those federal, state, county, or local requirements pertaining to protection of human health and the environment, including but not limited to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9601, et seq.; the Resource Conservation and Recovery Act, as amended ("RCRA"), including Subtitle I thereof, 42 U.S.C. §§ 6901, et seq.; and A.R.S. Title 49, including the Water Quality Assurance Revolving Fund ("WQARF") provisions thereof, A.R.S. §§ 49-281, et seq.

**"Hazardous Materials"** means and includes those substances regulated pursuant to Environmental Laws, Rules and Regulations, including but not limited to "hazardous substances" as defined under Section 101 of CERCLA, 42 U.S.C. § 9601(14); "hazardous waste" and "solid waste" as defined under Section 1004 of RCRA, 42 U.S.C. § 9603; and petroleum and its constituents.

**"Event of Lessee's Default"** has the meaning ascribed to it in Section 8.1.

**"Event of the City's Default"** has the meaning ascribed to it in Section 8.3.

**"Fair Market Value"** has the meaning ascribed to it in Section 12.2.

**"First Appraiser"** has the meaning ascribed to it in Section 12.2.

**"Improvements"** has the meaning ascribed to it in Recital B and more particularly described in Exhibit "C" hereto and in Section 2.1(c) of this Lease.

**"Institutional Lender"** means a bank, trust company, mutual savings bank, savings and loan association, savings association, insurance company, pension trust fund, college or university endowment fund, or real estate investment trust or an affiliate of any of the foregoing, other financial institution or entity commonly known as an "institutional lender."

**"Land Records"** means the official public records of Coconino County, Arizona, wherein mortgages and deeds are recorded.

**"Laws"** means all applicable present and future federal, state, municipal, governmental agency or quasi-governmental agency statutes, charters, laws, codes, rules, rulings, ordinances, orders, programs, guidelines and/or regulations.

**"Lease"** means this Lease Agreement, as the same may be modified or amended from time to time, and shall include any new Lease delivered to a Mortgagee of Lessee as provided in Section 7.3.

**"Lessee"** means an entity that is Lessor to the U.S. Government under Lease No. GS-09B-01531 as of the date of the execution of this Lease, including, however, any Mortgagee succeeding to the interest of Lessee under this Lease (but shall include any Mortgagee of Lessee only for so long as such Mortgagee holds or owns the interest of Lessee under this Lease). Should this Lease be transferred or assigned, the Lessee agrees to make a good faith effort to transfer or assign this Lease to another or other U.S. Government entities.

**"Lessee's First Mortgagee"** has the meaning ascribed to it in Section 12.5.

**"Mortgage"** means any one or more mortgages, deeds of trust, deeds to secure debt, loan deeds, trust indentures, owner's interest in a sale-leaseback, lessor's interest in a lease-subleaseback, security agreements, or any similar security or title retention device, including without limitation any leasehold mortgage, which shall, from time to time, create a lien or encumbrance upon the Property, interest or rights of any party in its respective property and which shall be security for one or more notes, bonds, or other evidences of indebtedness issued by a party to any Institutional Lender or held by an Institutional Lender. The term "Mortgage" shall also include, without limitation, any partnership agreement or joint venture agreement pursuant to which an Institutional Lender or equity participant acquires equity in the Improvements or contributes equity or capital to finance development of the Improvements.

**"Mortgagee"** means holder of a Mortgage or the lender in whose favor a Mortgage shall have been created (or if such Mortgage is a deed of trust or trust indenture, the holder of any note, bond or other evidence of indebtedness secured thereby), or any equity participant (other than Lessee) in a partnership agreement or joint venture agreement which constitutes a Mortgage, together with any successor, assignee or designee selected by the Mortgagee to take title to the property unencumbered by the Mortgage upon foreclosure or deed or assignment in lieu thereof,

or conveyance under any joint venture agreement or partnership agreement constituting a Mortgage.

**"Premises"** means and refers to that 1.27 acres of real property situated within a portion of Tract 7B of the Pulliam Airport Airpark Unit 1, Amended Subdivision that is provided to the Lessee for its exclusive use and enjoyment pursuant to the terms of this Lease as more fully set forth in the legal description attached to this Lease as **Exhibit "B."**

**"Property"** means that portion of Tract 7B of the Pulliam Airport Airpark Unit 1, Amended Subdivision within which the Premises are situated, as more particularly depicted in **Exhibit "A."**

**"Public Charges"** has the meaning ascribed to it in Section 2.3.

**"Rental"** means the Rental Rate.

**"Second Appraiser"** has the meaning ascribed to it in Section 12.2.

**"Section," "subsection," "paragraph," "subparagraph," "clause" or "subclause"** followed by a number or letter means the section, subsection, paragraph, subparagraph, clause or subclause of this Lease so designated.

**"Taking"** has the meaning ascribed to it in Section 12.1.

**"Term"** has the meaning ascribed to it in Section 2.1.

**"Third Appraiser"** has the meaning ascribed to it in Section 12.2.

**"Total Taking"** has the meaning ascribed to it in Section 12.1.

**"Transfer"** has the meaning ascribed to it in Section 6.1.

**"Transferee"** has the meaning ascribed to it in Section 6.1.

**"Unavoidable Delay"** has the meaning ascribed to it in Section 16.28.

## ARTICLE II

### GENERAL TERMS OF LEASE OF PROPERTY

Section 2.1. Lease of Premises to Lessee. Subject to the conditions set forth in this Lease, to the payment of Rental provided herein, and to the performance by the parties hereto of the duties and obligations on the part of each to be performed hereunder:

(a) **Premises.** The City hereby demises and leases to Lessee, and Lessee takes and hires from the City, the Premises consisting of that certain parcel of real property situated within the City described in **Exhibit "B"** attached hereto, together with and subject to the restrictions, conditions, covenants and easements hereinafter mentioned, reserved or granted. Lessee covenants and agrees that the initial use of the Premises shall be restricted to use for federal governmental purposes.

(b) **Term.** Lessee shall have and hold the above-described Premises for a term (the "Term") of forty (40) years commencing upon the date first set forth above and continuing for a period ending at midnight, April 15, 2045. Lessee shall have the option to renew this Lease for up to an additional ten (10) year term during the last year of the lease term by providing written notice to the City that Lessee desires to renew the Lease, specifying the desired term. Any Lease renewal shall be at the then current lease rates. The City and Lessee, upon the request of either party, shall execute one or more written memoranda, in such form as will enable them to be recorded in the Coconino County Recorder's Office, setting forth the beginning and termination date of the Term determined in accordance with this Lease.

(c) **Improvements.** The Improvements shall be constructed by Lessee on the Premises in accordance with and as provided by the terms of this Lease, and the same shall be owned by the Lessee for the duration of the Term. At the conclusion of the Term, Lessee's ownership interest in the Improvements shall vest in the City, at no cost to the City, free and clear of all liens, encumbrances, and restrictions, and Lessee shall tender a bill of sale to the City transferring title to said Improvements to the City within thirty (30) days following termination of this Lease. Any Transfer by Lessee of all or a portion of the Improvements to any entity or person other than the City shall be expressly subject to the City's right to vesting of the title of the Improvements in the City as stated in the preceding sentence.

If all or a portion of the Improvements are damaged or destroyed during the Term by any casualty which is required to be covered by a policy of insurance to be maintained pursuant to **Article XI**, Lessee shall repair and/or rebuild the same so that the repaired or rebuilt Improvements shall have at least the same values as such Improvements immediately prior to such damage or destruction, such construction to be undertaken and completed in accordance with the requirements of **Article III**. In no event whatsoever shall the City be required to repair, replace, or restore any Improvement as a result of any such damage or destruction. No damage to or destruction of Improvements shall effect an abatement or reduction of Rental, and Lessee waives any provisions of the law that may be to the contrary.

If the Improvements are damaged or destroyed and the cost of repairing or rebuilding such Improvements exceeds ten percent (10%) of the full replacement value thereof, Lessee, by giving written notice to the City within sixty (60) days after the occurrence of such damage or destruction and by removing, if requested by the City and approved by any permitted Mortgagee, any damaged or destroyed Improvements and leveling and grading that portion of the Premises underlying such removed Improvements, may elect to terminate this Lease. The Lessee shall

conduct any removal, leveling and grading activities associated with damaged or destroyed Improvements in accordance with all applicable federal, state and local rules and regulations. These activities shall include removal of all debris from the Premises. Notwithstanding anything contained in this Lease to the contrary, in the event of a termination of the Lease pursuant to this Section 2.1(c), the balance of any insurance proceeds payable to Lessee shall be divided between the City and Lessee equitably in a manner reflecting the respective values of (i) the City's interest in the Premises and the City's expectancy of the vesting of title to the Improvements in the City; and (ii) Lessee's leasehold interest (after paying the holder of any permitted encumbrance on Lessee's leasehold estate).

that: (d) Certain Representations of the City. The City represents and covenants

(i) the City owns the Premises in fee simple, free and clear of all claims, liens, encumbrances, covenants, restrictions, and defects or clouds on title, except those covenants, conditions, restrictions and easements described in this Lease or of record;

(ii) the City alone has the right, power and authority hereby to lease and demise to Lessee the Premises;

(iii) the City has full municipal power and authority to enter into this Lease, and the execution, delivery, and consummation of this Lease by the City have been duly authorized by all necessary municipal action;

(iv) the execution, delivery and consummation of this Lease by the City is not prohibited by and does not conflict with any other agreements or instruments to which the City is a party or is otherwise subject;

(v) the City has received no notice as of the date of this Lease asserting any noncompliance in any material respect by the City with applicable statutes, rules and regulations of the United States of America, the State of Arizona, the City, or of any other state or municipality or agency having jurisdiction over and with respect to the transactions contemplated in and by this Lease, and the City is not in default with respect to any judgment, order, injunction, or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated in and by this Lease;

(vi) to the best of the City's knowledge, the development, construction, use and operation of the Premises in accordance with this Lease are permitted by all and are not prohibited by any applicable laws, rules or regulations, including, without limitation, applicable BPI zoning (see **Exhibit E** attached hereto) and subdivision laws, rules and regulations, except that the City has made no inquiry

nor conducted any investigation relating to the compliance of the Premises with environmental laws, rules and regulations. Notwithstanding anything to the contrary contained herein, Tract 5B is not included within the platted "Pulliam Airport Airpark Unit 1, Amended" subdivision and, therefore, Tract 5B must be approved as a final plat prior to construction of the Improvements on the Premises;

that: (e) **Certain Representations of the Lessee.** Lessee represents and covenants

(i) Lessee is a Colorado limited liability company duly organized, validly existing, and registered to transact business in Colorado and in good standing under the laws of the State of Colorado, and has full power and authority to enter into this Lease, and the execution, delivery, and consummation of this Lease by Lessee have been duly authorized by all necessary company action;

(ii) The execution, delivery and consummation of this Lease by Lessee is not prohibited by and does not conflict with any other agreements or instruments to which Lessee is a party or is otherwise subject;

(iii) Lessee has received no notice as of the date of this Lease asserting any noncompliance in any material respect by Lessee with applicable statutes, rules and regulations of the United States of America, the State of Arizona, the City or of any other state or municipality or agency having jurisdiction over and with respect to the transactions contemplated in and by this Lease, and Lessee is not in default with respect to any judgment, order, injunction, or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated in and by this Lease;

(f) **Possession of the Premises.** Upon the execution of this Lease, the City has delivered to Lessee possession of the Premises, and Lessee has taken possession thereof.

(g) **Additional Assurances.** The City agrees to cooperate in good faith with Lessee in entering into such agreements as Lessee may reasonably request should it become necessary to do so in order to preserve, implement or effectuate Lessee's leasehold interest in the premises; however, the City's fee simple interest in the Premises cannot be mortgaged or otherwise encumbered other than as a result of the Lease.

(h) **No Merger.** The parties recognize and agree that there shall be no merger of the leasehold estate created by this Lease with the fee interest in the Premises by reason of the fact that one person or party may at the same time hold such leasehold estate created by this Lease and such fee interest. No such merger shall occur unless and until Lessee and all Mortgagees having any interest in the leasehold estate hereunder shall join in a written instrument effecting

such merger and cause the same to be recorded among the Land Records of Coconino County, Arizona.

(i) **Restriction on Adult Use.** The City has a vital interest in the types of businesses that may locate on the Premises to ensure that said businesses and tenants enhance the economic viability of the Airport. In this regard, Lessee agrees that no portion of the Premises inclusive of any structures or improvements developed thereon shall be utilized by any establishment that sells anything deemed obscene by community standards as determined by the City Council or conducts or operates any form of adult entertainment as defined in the City's Land Development Code. Any violation of this provision of the Lease shall be construed by the City as a material default and shall result in the immediate termination of this Lease.

(j) **Road Construction.** Lessee agrees to construct an access road adjacent to the Premises as approved by the City of Flagstaff Development Review Board. The City agrees to require future lessees or purchasers of property that abuts and access the proposed access road to reimburse Lessee for their proportionate shares of the road construction costs in accordance with an allocation mechanism to be determined between the City and Lessee.

Section 2.2. **Rental.**

(a) **Rental.** Lessee shall pay to the City prepaid rental for the initial lease Term (the "Rental") in the minimum amount of Three and 37/100 Dollars (\$3.37) per square foot of the Premises, for a total prepaid Rental of One Hundred Eighty-six Thousand Four Hundred Thirty-two and 44/100 Dollars (\$186,432.44) in cash or immediately negotiable funds.

(b) **Payment of Rental.** Rental shall be paid to the City of Flagstaff, Finance Director, 211 West Aspen Avenue, Flagstaff, Arizona 86001, or at such other place as the City shall designate by written notice to Lessee and shall be due and payable in full on or before ten (10) days following issuance of the grading permit from the City of Flagstaff.

(c) **No Set-Off.** Except as may be expressly consented to by the City in writing, Lessee shall pay the Rental and other charges payable to the City hereunder without set-off, demand or abatement whatsoever except as otherwise expressly set forth herein or unless Lessee shall have obtained a monetary judgment against the City as a result of an Event of City's Default hereunder (in which event Lessee shall have the right to set off against such Rental and other charges the amount of such judgment).

Section 2.3. **Payment of Public Charges.** Lessee shall pay or cause to be paid, before any fine, penalty, interest or cost may be added thereto, or become due or be imposed by operation of law for the nonpayment thereof, all real and personal property, public assessments (including, without limitation, assessments, franchises, excises, licenses, and permit fees) and other public charges (all such taxes, public assessments and other public charges being hereinafter

referred to as "Public Charges") levied, assessed or imposed by any public authority against the Improvements.

Section 2.4. **Title Insurance Premium.** Lessee shall pay the premium for any title insurance acquired by Lessee.

### ARTICLE III

#### CONSTRUCTION OF IMPROVEMENTS

Section 3.1. **Lessee's Construction.** Subject to Unavoidable Delay, Lessee shall use its reasonable efforts to commence construction of the Improvements upon the Premises within twelve (12) months following execution of this Lease and shall complete such construction on or before twenty-four (24) months following the commencement of construction. As used herein, "commencement of construction" shall be deemed to mean grading and site leveling in anticipation of either excavation or physical construction. To facilitate Lessee's commencement of construction, the City agrees to process Lessee's proposed site plan in conjunction with the platting process in order to reduce the time associated with the development review process.

Section 3.2. **Zoning; Permits; Compliance with Laws.** Subject to the limitations set forth in Section 2.1 (d)(vi), the City represents and covenants that, to the best of its knowledge, the development, construction, use and operation of the Improvements in accordance with this Lease are permitted under the BPI zoning for the Premises and not prohibited by all applicable laws, including, without limitation, all applicable zoning, subdivision and environmental laws, rules and regulations. Lessee shall obtain or require its subtenants to obtain all governmental approvals, consents, authorizations, permits, licenses and certificates which may be necessary to permit the performance of construction of the Improvements. Lessee agrees that its construction hereunder will comply with all laws applicable to such construction then in effect.

Section 3.3. **Alterations and Renovations.** After completion of construction of the Improvements, Lessee from time to time may make such alterations or renovations thereof as it shall deem desirable, subject to Lessee's obtaining applicable building and similar permits and provided, however, that no renovation or alteration which changes materially the commercial use or purpose of the Improvements shall be made without the approval of the City, which approval shall not be unreasonably withheld or delayed.

### ARTICLE IV

#### SUBLEASING

Section 4.1. **Lessee's Subleasing.** The subleasing, use and operation of the Improvements will be the privilege and responsibility of Lessee; provided, however, that any use

established by a sublessee constitutes a permitted use under the City's Land Development Code and is not prohibited by the provisions of this Lease.

## ARTICLE V

### LAND USE AND OPERATING COVENANTS

Section 5.1. **Lessee's Management and Operating Covenant.** Subject to the provisions of Section 2.1(c) regarding damage to or destruction of the Improvements, Section 3.3 respecting alterations and renovations to the Improvements and Article XII respecting condemnation, following the date on which the Improvements are open for business and continuing during the remainder of the Term, Lessee shall prudently manage and operate (or cause the management and operation of) the Improvements and will properly maintain the Improvements and keep the same in good repair, reasonable wear and tear excepted.

Lessee shall be responsible for the payment, as and when they become due and payable, of all charges for water, gas, light, heat, telephone, electricity, or other utility and communication services rendered or used on or about the Premises and the Improvements at all times during the Term of this Lease.

## ARTICLE VI

### ASSIGNMENT AND TRANSFER

Section 6.1. **Certain Defined Terms.** As used herein, the term:

(a) "Transfer" means:

(i) With respect to Lessee:

(1) any sale, assignment, transfer or conveyance (other than pursuant to a Taking, or by a Mortgage, or by foreclosure, deed or assignment in lieu thereof or resulting from the exercise of a Mortgagee's rights under a Mortgage or by sublease) of all or substantially all of Lessee's interest in this Lease, or the leasehold estate created hereby, other than to an Affiliate of Lessee (including, without limitation, a partnership in which Lessee or such Affiliate is a general partner), whether by operation of law, attachment or assignment for the benefit of creditors or otherwise;

(2) any merger, consolidation, sale or lease of all or substantially all of the assets of Lessee (except pursuant to a Mortgage or Sublease), other

than to or with an Affiliate of Lessee (including, without limitation, a partnership in which Lessee or such Affiliate is a general partner); and

(ii) With respect to the City, any sale, lease, assignment, transfer or conveyance other than a Taking (including, without limitation, any Mortgage) of all or any part of the City's interest in this Lease or the Premises, whether by operation of law, attachment or assignment for the benefit of creditors or otherwise.

(b) "Transferee" means the entity in whose favor or for whose benefit a Transfer is made.

Section 6.2. **Prohibited Transfers.** Neither Lessee nor the City shall make any Transfer, except as permitted in this Lease. Any attempted Transfer not permitted herein shall be void and shall confer no rights upon any third person. Nothing herein shall prohibit Lessee from making any Mortgage or transfer or assignment of its interest hereunder in favor of an Institutional Lender, or from making or suffering any transfer, assignment or conveyance pursuant thereto.

Section 6.3. **Permitted Transfers by Lessee.** Lessee shall notify the City in writing of any proposed or contemplated Transfer by Lessee. At any time following the Opening Date, Lessee may make a Transfer to a Transferee; provided, that if such Transferee shall expressly assume Lessee's obligations hereunder in writing Lessee shall be released from any liability arising hereunder from and after the date of such assumption and Transfer. Notwithstanding anything contained herein to the contrary, any Mortgagee of Lessee, at or following foreclosure or assignment in lieu thereof, may make any transfer without the consent of the City, but such transfer shall otherwise be subject to all of the applicable terms and provisions of this Lease.

## ARTICLE VII

### MORTGAGE FINANCING; RIGHTS OF MORTGAGEE

#### Section 7.1. **Lessee Mortgages.**

(a) Lessee shall have the right at any time during the Term of this Lease to encumber its leasehold estate under this Lease by way of Mortgage without the necessity of obtaining the consent of the City, provided that no such Mortgage shall encumber the City's fee interest in the Premises, but the foregoing shall not prevent Lessee's Mortgages from encumbering Lessee's entire interest in this Lease, and provided that Lessee notifies the City promptly of each such encumbrance.

(b) Whenever the City shall deliver or make any notice or demand to Lessee with respect to any breach or default by Lessee in its obligations or covenants under this Lease, the City shall at the same time deliver to each Mortgagee of Lessee of which it has received notice, a

copy of such notice or demand, and each such Mortgagee shall have the right, at its option, to cure or remedy such breach or default and to add the cost thereof to the Mortgage debt and the lien of its Mortgage.

**Section 7.2. Lessee Mortgagee Not Obligated to Construct Improvements.**

Notwithstanding any of the provisions of this Lease, including but not limited to any restrictive covenants running with the land, no Mortgagee of Lessee under any Mortgage permitted by this Lease, including any such Mortgagee who obtains Lessee's interest under this Lease as a result of foreclosure proceedings or action in lieu thereof or pursuant to its rights under any joint venture or partnership agreement, shall in any way be obligated by the provisions of this Lease to construct or complete the Improvements or to guarantee such construction or completion, but such Mortgagee shall have the right to construct or complete said Improvements in accordance with this Lease; nor shall any covenant or any other provision of this Lease or any document delivered in connection herewith be construed to so obligate such Mortgagee.

**Section 7.3. Rights of Mortgagees.**

(a) The City agrees to accept performance and compliance by any Mortgagee of Lessee with any term, covenant, agreement, provision or limitation on Lessee's part to be kept, observed or performed by Lessee under this Lease.

(b) Subject to the City's rights under its municipal police powers to take whatever actions may be reasonably necessary to safeguard the Premises for health and safety reasons, the City agrees that following an Event of Lessee's Default and the expiration of any period within which Lessee may cure such default, it will take no action to terminate the Term of this Lease nor to re-enter and take possession of the Premises unless it shall first give each Mortgagee of Lessee notice after the expiration of any such cure period specifying such Event of Lessee's Default and stating the City's intention either to terminate the Term of this Lease or to re-enter and take possession of the Premises on a date specified in such notice. Notwithstanding such notice, the Term of this Lease shall not be terminated nor shall the City re-enter and take possession of the Premises if:

(i) such Event of Lessee's Default can be cured by the payment of a fixed monetary amount and within thirty (30) days after the date such notice by the City to such Mortgagee is given any Mortgagee of Lessee shall make such payment, or

(ii) such Event of Default can be cured with the exercise of reasonable diligence by a Mortgagee of Lessee after obtaining possession of the Premises and the Improvements and a Mortgagee of Lessee, within thirty (30) days after the date such notice is given, commences such proceedings (including, without limitation, the filing of a petition for the appointment of a receiver) as it may deem necessary

to obtain such possession and thereafter diligently prosecutes such action and promptly upon obtaining such possession commences (and thereafter diligently pursues) the curing of such default, or

(iii) such Event of Default is not capable of being cured by a Mortgagee of Lessee, even if possession of the Premises and the Improvements were obtained, and a Mortgagee of Lessee, within sixty (60) days after the date such notice is given, institutes foreclosure proceedings and thereafter prosecutes the same with diligence or acquires Lessee's interest in this Lease (except that if such Mortgagee of Lessee is precluded from instituting or prosecuting such foreclosure proceedings by reason of a bankruptcy or insolvency proceeding filed by or against Lessee said sixty (60)-day period shall be extended by a period of time equal to the period during which said Mortgagee of Lessee is so precluded from instituting or prosecuting such foreclosure proceedings), and such event of default shall thereupon be deemed to have been waived, but such waiver shall not extend to any new default committed by said Mortgagee in carrying out Lessee's obligations hereunder.

(c) In the event of the termination of this Lease prior to its stated expiration date, the City shall give all Mortgagees of Lessee notice of such termination and the City shall enter into a new lease of the Premises with a Mortgagee of Lessee or, at the request of such Mortgagee, with an assignee, designee or nominee of such Mortgagee for the remainder of the Term and/or option period of this Lease effective as of the date of such termination, at the rent and upon the same covenants, agreements, terms, provisions and limitations as are herein contained, provided:

(i) such Mortgagee makes written request upon the City for such new lease within sixty (60) days after the giving of such notice of termination and such written request is accompanied by payment to the City of all amounts then due to the City of which the City shall have given the Mortgagee notice (other than any payments which would not be due had the Mortgagee obtained Lessee's interest in the Premises pursuant to foreclosure or action in lieu thereof),

(ii) such Mortgagee pays or causes to be paid to the City at the time of the execution and delivery of such new lease any and all additional sums which would at the time of the execution and delivery thereof be due under this Lease but for such termination (other than payments which would not be due had the Mortgagee obtained Lessee's interest in the Premises pursuant to foreclosure or action in lieu thereof) and pays or causes to be paid any and all expenses including reasonable counsel fees, court costs and costs and disbursements incurred by the City in connection with any such termination or in connection with the execution and delivery of such new lease, and

(iii) such Mortgagee agrees to cure, within sixty (60) days after the execution and delivery of such new lease, all uncured Events of Lessee's Default of which the City shall have given the Mortgagee notice (except any Event of Lessee's Default which is not capable of being cured by a Mortgagee, even if possession of the Premises and the Improvements were obtained, which Event of Lessee's Default, if any, shall be deemed to have been waived only as to such Mortgagee), or if any such Event of Lessee's Default cannot be cured within such period, such Mortgagee agrees to commence, within such period, to cure such Event of Lessee's Default and thereafter pursues the same with due diligence.

If the City receives written requests in accordance with the provisions of this Section 7.3(c) from more than one Mortgagee, the City shall only be required to deliver the new lease to the Mortgagee who is, among those Mortgagees requesting a new lease, the holder of the most senior Mortgage. Both parties agree that in the event the Property is divided into Premises and those Premises are mortgaged separately, then the City upon receiving written requests in accordance with provisions of this section shall be required to deliver a new lease to each mortgagee which is the holder of the most senior mortgage on that particular Premises. It is the intent of the parties that the aggregate rental payments under these leases shall be equal to the rent then being paid by Lessee. Any new lease made pursuant to this Section 7.3(c) shall be prior to any other mortgage or other lien, charge or encumbrance on Lessee's interest in the Premises (other than those created pursuant to this Lease) and shall have the same relative priority in time and in right as this Lease and shall have the benefit of all of the right, title, powers and privileges of Lessee hereunder in and to the Premises.

(d) If Lessee or any Mortgagee of Lessee shall furnish the City with a written notice setting forth the name and address of such Mortgagee, the City shall thereafter send to said Mortgagee a copy of any notice given to Lessee under this Lease and no such notice shall be deemed to have been properly given unless and until a copy thereof shall have been sent to such Mortgagee at the address specified in such notice.

(e) No Mortgagee of Lessee shall have any liability for the performance of any of the covenants, conditions or obligations of Lessee under this Lease unless and until such time as such Mortgagee either acquires the leasehold estate created by this Lease by assignment in lieu of foreclosure or purchases the same at a sale in foreclosure of its Mortgage, or unless such Mortgagee obtains a new lease pursuant to this Section 7.3(c).

(f) In connection with the origination of any original Mortgages, for Lessee's interim, construction and permanent financing, the City shall consent to any reasonable modification or amendment to this Lease requested by any Mortgagee of Lessee, provided the same does not alter the economic terms of this Lease, increase the City's risk or adversely affect the City's property. In any event, if for any other reason the City refuses to consent to any modification or amendment requested by any such proposed Mortgagee, the effect of which is to

cause Lessee to lose its financing, Lessee may terminate this Lease in accordance with the provisions of Section 9.1(d).

Section 7.4. **Foreclosure.** If the City pledges, sells, or otherwise encumbers its interest in the Property, the City agrees to obtain from its mortgagee or lienholder a written statement, wherein the mortgagee or lienholder or assignee agrees that if it forecloses upon its mortgage or lien, it shall honor and abide by the terms and conditions of this Lease and Lessee's interest in the Lease shall not be terminated or extinguished by the mortgage or lienholder, except as may be provided herein.

## ARTICLE VIII

### DEFAULTS AND REMEDIES

Section 8.1. **Events of Lessee's Default.** Each of the following events is hereby defined as an "Event of Lessee's Default":

(a) failure of Lessee to pay any Rental or any other payments of money as herein provided or required within seven (7) days after the same shall become due and payable and the continuance of such failure for a period of seven (7) days after notice thereof in writing from the City to Lessee; or

(b) failure of Lessee to perform any of the other covenants, conditions and agreements of this Lease which are to be performed by Lessee, and the continuance of such failure for a period of sixty (60) days after notice thereof in writing from the City to Lessee (which notice shall specify the respects in which the City contends that Lessee has failed to perform any such covenants, conditions and agreements), unless such default be one which cannot be cured within sixty (60) days with reasonable diligence, and Lessee within said sixty (60)-day period shall have commenced and thereafter shall have continued diligently to prosecute all actions necessary to cure such default; or

(c) the filing of a petition in bankruptcy by Lessee or against Lessee, or the commencement by Lessee of a case for relief from creditors under state or federal bankruptcy law or the entry of an order for relief with respect to Lessee under federal or state bankruptcy law, or the making by Lessee of a general assignment for the benefit of creditors, or the appointment of a receiver of substantially all of the property of Lessee including, in any event, this Lease, in a proceeding based upon Lessee's insolvency which shall not be discharged within ninety (90) days after such appointment; but neither bankruptcy nor the filing of a petition in bankruptcy, nor the commencement of a case for relief from creditors, nor entry of an order for relief, nor insolvency, nor an assignment for the benefit of creditors nor the appointment of a receiver shall affect this Lease or constitute an Event of Lessee's Default hereunder so long as the covenants and obligations on the part of Lessee to be performed hereunder are being performed by Lessee or someone claiming under Lessee.

(d) the divestiture of Lessee's estate herein by other operation of law; and

(e) the abandonment by Lessee of its conduct of business on the Premises.

Lessee shall be deemed to have abandoned the Premises if the Rental is due and payable beyond the time provided for payment in Section 8.1.

In the event that any installment of Rental is not paid to the City within seven (7) days following the date the same becomes due and payable, Lessee covenants and agrees to pay to the City interest on the amount thereof at the Default Rate from the date such installment became due and payable to the date of payment thereof.

Section 8.2. **The City's Remedies.**

(a) Upon the occurrence of any Event of Lessee's Default, subject to the provisions of Section 7.3, the City lawfully may immediately, or at any time thereafter, without any further notice or demand, without waiving its rights to rents accrued and owing, enter into and upon the Premises and hold the same as if this Lease had not been made, without being taken or deemed to be guilty in any manner of trespass, and upon such entry, the Term and this Lease shall terminate.

(b) Without limiting its rights pursuant to subsection (a) of this Section 8.2, upon the occurrence of any Event of Lessee's Default, subject to the provisions of Section 7.3, the City may immediately and without further notice or demand send written notice to Lessee of the termination of the Term and of this Lease, whereupon the Term and this Lease shall terminate. If the City shall terminate this Lease as provided in this Section 8.2, Lessee shall pay to the City the Rental and all other amounts due the City hereunder up to the time of Lessee's vacation of the Premises following the City's termination of this Lease, and, thereafter Lessee shall have no further liability to the City under this Lease with respect to Rentals and other amounts certain due at such time. The City agrees not to seek acceleration of Rentals if the City terminates this Lease as provided in this Section 8.2.

(c) The City's rights and remedies pursuant to this Section 8.2 shall be in addition to any other remedies it may have at law or in equity (including, but not limited to, specific performance and consequential damages), or elsewhere in this Lease.

Section 8.3. **Event of the City's Default.** The failure of the City to perform any of the covenants, conditions and agreements of this Lease which are to be performed by the City and the continuance of such failure for a period of sixty (60) days after notice thereof in writing from Lessee to the City (which notice shall specify the respects in which Lessee contends that the City has failed to perform any of such covenants, conditions and agreements), shall constitute an "Event of the City's Default" unless such default be one which cannot be cured within sixty (60) days and the City within such sixty (60)-day period shall have commenced and thereafter shall continue diligently to prosecute all actions necessary to cure such default.

Section 8.4. **Lessee's Remedies.** If an Event of the City's Default shall occur, Lessee, to the fullest extent permitted by law, shall have, in addition to any other remedies it may have in law or in equity (including, but not limited to, specific performance) or elsewhere in this Lease, the right to pursue any or all of the following remedies:

(a) the right and option, upon the consent of each Lessee Mortgagee, to terminate this Lease and all of its obligations hereunder by giving notice of such election to the City, whereupon this Lease shall terminate as of the date of such notice and the Lessee shall quit and surrender the Premises to the City;

(b) the right to a special action in the nature of mandamus, injunction or other similar relief, available to it under Arizona law, against the City (including any or all of the members of its governing body, and its officers, agents or representatives, but in their official capacities only); or

(c) any other relief at law or in equity, including consequential damages as permitted under Arizona law.

Section 8.5. **Obligations, Rights and Remedies Cumulative.** The rights and remedies of the City and Lessee, whether provided by law or by this Lease, shall be cumulative, and the exercise by either the City or Lessee of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or breach, or of any of its remedies for any other default or breach by any party to this Lease. No waiver made by either the City or Lessee with respect to the performance, or manner or time thereof, of any obligation of any other party or any condition to its own obligation under this Lease shall be considered a waiver of any rights of the party making the waiver with respect to the particular obligation of any other party or condition to its own obligation beyond those expressly waived and to the extent thereof, or a waiver in any respect in regard to any other rights of the party making the waiver or in regard to any obligation of any other party.

Section 8.6. **Self-help.** If an Event of Lessee's Default or an Event of the City's Default shall occur and be continuing then, in addition to any other remedies at law or in equity or as otherwise provided in this Lease, the nondefaulting party may cure or prosecute the curing of such default and all reasonable expense incurred in connection therewith shall promptly be paid by the defaulting party to the party effecting such cure. Except to the extent such amounts may be reduced to judgment, nothing herein shall be construed as creating a debt of the City and any amounts due and payable by the City pursuant to this Section shall be an obligation only to the extent they are payable out of the budget for the then-current fiscal year. The term "Default Rate" means an annual rate of interest equal to the lesser of (a) the prime rate of interest charged from time to time by Bank One, Arizona, N.A. (or some other bank agreed upon by the parties), or (b) the highest rate of interest allowed by Law. As used herein, the "Bank One Prime Rate" or "prime rate of interest charged from time to time by Bank One, Arizona, N.A.," shall mean that

rate of interest announced from time to time by Bank One, Arizona, N.A. for loans to its commercial customers with the highest credit rating.

## ARTICLE IX

### EARLIER TERMINATION OF LEASE

Section 9.1. **Termination by Lessee.** In the event that:

(a) during the Term, because of zoning ordinances or any other governmental restriction or for any reason other than the default of Lessee under this Lease or under any notes, Mortgages or other documents relating to Lessee's financing, Lessee shall not have the right to occupy the Premises in accordance with the provisions of this Lease, or

(b) all or a substantial portion of the Improvements shall be damaged or destroyed and not repaired or restored as contemplated herein (due to lack of adequate insurance proceeds or otherwise), or if a substantial portion of the Improvements shall otherwise be rendered untenable for a period in excess of one (1) year, or

(c) the City fails to consent to a modification or amendment of this Lease as requested by a Lessee Mortgagee in accordance with Section 7.3(f), or

(d) upon the occurrence of any other event or failure of the City to perform its undertakings under this Lease, which, by the express provisions of this Lease, gives rise to Lessee's right to terminate this Lease (other than an Event of the City's Default as to which event Lessee shall have the rights set forth in Article VIII);

Then, and in any of such events, Lessee may, with the consent of each of Lessee's Mortgagees and upon sixty (60) days written notice to the City, terminate this Lease in its entirety. Upon such termination, the Term of this Lease and all rights of the parties hereunder shall automatically cease, terminate and expire as of the date specified by Lessee in said written notice, with the same force and effect as if such date were the date herein definitely fixed for the expiration of the Term, and Lessee shall quit and surrender the Premises to the City. All Rental and other amounts payable hereunder, if any, shall be prorated as of such termination date, and no party shall have any further rights against or obligations to the other party with respect to this Lease, other than any rights or obligations that shall have accrued prior to such termination.

Section 9.2. **Termination by City.** In the event Lessee fails to secure commitments for financing sufficient for Lessee to commence construction of the Improvements within twenty-four (24) months following execution of this Lease, then the City, at its election, may terminate this Lease in its entirety. Upon such termination, the Term of this Lease and all rights of the parties hereunder shall automatically cease and neither party shall have any further

rights against or obligations to the other party with respect to this Lease, other than any rights or obligations that shall have accrued prior to such termination.

## ARTICLE X

### PROTECTION AGAINST MECHANICS' LIENS AND OTHER CLAIMS

#### Section 10.1. Discharge of Mechanic's, Laborer's or Materialman's Liens.

(a) If, in connection with any work done or claimed to have been done by or on behalf of Lessee or any tenant or subtenant of Lessee, or in connection with any materials supplied to Lessee or any tenant or subtenant of Lessee, any mechanic's, laborer's or materialman's lien shall be filed against the Premises or any part thereof, Lessee shall promptly (and in any event within thirty (30) days following notice from the other party demanding such discharge) cause the same to be discharged of record, by payment, deposit, bond, order of a court of competent jurisdiction or otherwise, or insured over to the satisfaction of the City. If Lessee shall fail to cause such lien to be discharged within such thirty (30)-day notice period, then, in addition to any other right or remedy, the City may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by deposit or bonding. Any amount so paid by the City, with all costs and expenses (including, but not limited to, attorneys' fees) incurred by the City in connection therewith, together with interest thereon at the Default Rate from the dates of the City making of the payment of incurring of such costs and expenses, shall be paid by Lessee to the City on demand.

(b) The City shall not be liable for any work performed respecting the Improvements, related facilities or any portion thereof by or for Lessee or any tenant or subtenant of Lessee or for any materials furnished at the Premises, related facilities or any portion thereof to or for Lessee or any tenant or subtenant of Lessee.

Lessee agrees to hold City free and harmless, and to indemnify City against all claims, liabilities, costs and expenses, for labor and materials in connection with all construction, repairs or alterations made by or through Lessee, its tenants and/or subtenants on the Premises and the cost of defending against such claims, including reasonable attorneys' fees.

The foregoing provisions of this Section shall be applicable to construction, repairs or alterations to the Improvements at all times during the Lease Term. During periods of construction, City shall have the right to post and maintain on the Premises and Improvements any notices of nonresponsibility provided for under applicable law.

(c) Lessee shall make, or cause to be made, prompt payment of all money due and legally owing to all persons doing any work or contractors or subcontractors and suppliers in connection with the development, construction, equipment, repair or reconstruction of any of the

Improvements required by this Lease to be constructed by Lessee. Nothing in this Section 10.1 shall limit the right of Lessee to contest, in good faith, by legal proceedings or otherwise, whether any amount claimed or alleged to be due and owing to any such person is legally due and owing and to withhold payment of such amounts pending resolution of such dispute.

## ARTICLE XI

### INDEMNITY AND INSURANCE

Section 11.1. **Indemnification.** The Lessee agrees to indemnify, defend, save and hold harmless the City of Flagstaff, and its, officers, officials, agents, employees and volunteers (hereinafter referred to as "Indemnitee") from and against any and all claims, demands, actions, liabilities, damages, losses, or expenses (including court costs, reasonable attorney's fees, and costs of claim processing, investigation and litigation) (hereinafter collectively referred to as "Claims") for personal injury (including death) or property damage caused, in whole or in part, by the acts, errors, omissions, negligence, or alleged negligence of Lessee or any of Lessee's directors, officers, agents, employees, volunteers or subcontractors. This indemnity includes any claim or amount arising or recovered under the Workers' Compensation Law or arising out of the failure of Lessee to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the parties that the Indemnitee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the Indemnitee, be indemnified by Lessee from and against any and all Claims. It is agreed that Lessee will be responsible for primary loss investigation, defense, and judgement costs where this indemnification is applicable. The foregoing indemnity by the Lessee shall extend, but not be limited, to:

(a) construction by or through the Lessee of the Improvements or any other work or thing done in, on or about the Premises or any part thereof;

(b) any use, nonuse, possession, occupation, alteration, repair, condition, operation, maintenance or management of the Premises and Improvements, areas adjacent thereto or improvements thereon by or through the Lessee, or any nuisance made or suffered thereon or any failure by the Lessee to keep the Premises or any street, alley, parking area or facility, sidewalk, curb, vault, passageway, gutter, tunnel, bridge or space comprising a part thereof in a safe condition;

(c) any fire, accident, injury (including death) or damage to any person or property occurring in, on or about the Premises and Improvements, areas adjacent thereto or improvements thereon or any part thereof or in, on or about any street, alley, parking area or facility, sidewalk, curb, vault, passageway, gutter, tunnel, bridge or space comprising a part thereof;

(d) any lien or claim which may be alleged to have arisen against or on the Premises or Improvements thereon or any part thereof or any of the assets of, or funds appropriated to, the City or any liability which may be asserted against the City with respect thereto;

(e) any acts of the Lessee or any subtenant or any of its or their respective agents, contractors, servants, employees, licensees or invitees;

(f) any failure on the part of Lessee to pay rental or to perform or comply with any of the covenants, agreements, terms or conditions contained in this Lease on its part to be performed or complied with and the exercise by the City of any remedy provided in this Lease with respect thereto;

(g) any failure on the part of Lessee to keep, observe, comply with and perform any of the terms, covenants, agreements, provisions, conditions or limitations contained in the subleases or other contracts and agreements affecting the Improvements or any part thereof, on Lessee's part to be kept, observed or performed;

(h) any tax which Lessee is obligated to pay or cause to be paid, including any tax attributable to the execution, delivery or recording of this Lease.

The foregoing provisions shall survive the expiration or earlier termination of this Lease to the extent the act, error, omission, negligence or alleged negligence arose prior to such expiration or termination.

The Lessee will hold all goods, materials, furniture, fixtures, equipment, and machinery and other property whatsoever on the Premises at the sole risk of Lessee, and, to the extent set forth above, save the City harmless from any loss or damage thereto by any cause whatsoever.

The obligations of Lessee under this Section shall not in any way be affected by the absence in any case of covering insurance or by the failure or refusal of any insurance carrier to perform any obligation on its part to be performed under insurance policies affecting the project.

If any claim, action or proceeding is made or brought against the City by reason of any event, specified or unspecified, which is the subject of the Lessee's foregoing indemnity, then, upon demand by the City, the Lessee, at its sole cost and expense, shall resist or defend such claim, action or proceeding in the City's name. Notwithstanding the foregoing, the City may engage its own attorneys to defend it or to assist in its defense and Lessee shall pay the reasonable fees and disbursements of such attorneys.

Section 11.2. Environmental Indemnification of City by Lessee. Lessee shall defend, indemnify, and hold harmless the City from and against any future claims, demands,

complaints and/or actions made or brought against the City pertaining to the Premises beginning with the building phase, and arising under any Environmental Law, Rule, Regulation or otherwise based upon any Hazardous Materials condition. This defense and indemnity includes, without limitation, any claims, demands, complaints, and/or action, asserted under CERCLA, WQARF, RCRA, and federal and state common law pertaining to Hazardous Materials, including any such claim based upon the City's alleged liability as an owner or operator of the Premises under CERCLA or WQARF.

Section 11.3. **Insurance.** The Lessee shall procure and maintain for the duration of the Lease insurance against claims for injury to persons or damage to property, which may arise from or in connection with this Lease by the Lessee, Lessee's agents, representatives, employees or contractors and commercial property insurance. The insurance requirements herein are minimum requirements for this Lease and in no way limit the indemnity covenants contained herein. The City does not represent or warrant that the minimum limits set forth herein are sufficient to protect the Lessee from liabilities that might arise out of this Lease, and Lessee is free to purchase such additional insurance as Lessee may determine is necessary.

(a) **Minimum Scope and Limits of Insurance.** Lessee shall provide coverage at least as broad and with limits not less than those stated below.

(i) Commercial General Liability - Occurrence Form  
(Form CG 0001, ed. 10/93 or any replacement thereof)  
General Aggregate -- \$2,000,000  
Personal and Advertising Injury -- \$1,000,000  
Each Occurrence -- \$1,000,000  
Fire Damage (any one fire) -- \$50,000  
Medical Expense (any one person) -- Optional

(ii) Automobile Liability - Any Automobile or Owned, Hired and Non-owned Vehicles (Form CA 0001, ed. 12/93 or any replacement thereof)  
Combined Single Limit Per Accident for Bodily Injury and Property Damage -- \$1,000,000

(iii) Workers' Compensation and Employer's Liability  
Workers' Compensation -- Statutory  
Employer's Liability: Each Accident -- \$500,000  
Disease - Each Employee -- \$500,000  
Disease - Policy Limit -- \$500,000

(iv) Commercial Property Insurance  
Building -- Replacement Cost  
Loss of Rents -- Per Lease

(Broad Form, 90% coinsurance -- to be placed in force upon completion of building prior to occupancy)

(b) **Self-insured Retention/Deductibles.** Any self-insured retentions and deductibles must be declared to and approved by the City.

(c) **Other Insurance Requirements.** The policies shall contain, or be endorsed to contain, the following provisions:

(i) **Commercial General Liability and Automobile Liability Coverages.**

(1) The City of Flagstaff, its officers, officials, agents, employees and volunteers shall be named as additional insureds with respect to liability arising out of the use and/or occupancy of the Premises subject to this Lease and activities performed by or on behalf of the Lessee, including products and completed operations of the Lessee; and automobiles owned, leased, hired or borrowed by the Lessee.

(2) The Lessee's insurance shall contain broad form contractual liability coverage.

(3) The City of Flagstaff, its officers, officials, agents, employees and volunteers shall be named as additional insureds to the full limits of liability purchased by the Lessee even if those limits of liability are in excess of those required by this Lease.

(4) The Lessee's insurance coverage shall be primary insurance with respect to the City, its officers, officials, agents, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, agents, employees or volunteers, shall be in excess to the coverage of the Lessee's insurance and shall not contribute to it.

(5) The Lessee's insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

(6) Coverage provided by the Lessee shall not be limited to the liability assumed under the indemnification provisions of this Lease.

(7) The policies shall contain a waiver of subrogation against the City, its officers, officials, agents, employees and volunteers for losses arising from Lessee's operations, occupancy and use of the Premises subject to this Lease.

(ii) Workers' Compensation and Employee's Liability Coverage. The insurer agrees to waive all rights of subrogation against the City, its officials, officers, agents, employees and volunteers for losses arising from the Lessee's operations, occupancy and use of the Premises subject to this Lease.

(d) Notice of Cancellation. Each insurance policy required by the insurance provisions of this Lease shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City. Such notice shall be sent directly to the Airport Manager and the City Manager as provided in Article XIV herein.

(e) Acceptability of Insurers. Lessee shall place insurance hereunder with insurers duly licensed or approved unlicensed companies in the State of Arizona and with a "Best's" rating of not less than A-: VII. The City does not represent or warrant that the above required minimum insurer rating is sufficient to provide the Lessee from potential insurer insolvency.

(f) Verification of Coverage. The Lessee shall furnish the City with certificates of insurance (*ACORD form*) as required by this Lease. The certificates for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. Any policy endorsements that restrict or limit coverage shall be clearly noted on the certificate of insurance.

Section 11.4. Policy Review and Adjustment. Such policies of insurance shall be subject to review and adjustment on the fifth (5<sup>th</sup>) anniversary of the effective date of this Lease and on each subsequent fifth (5<sup>th</sup>) anniversary during the term hereof in order to determine the adequacy of the insurance amounts in light of the then existing circumstances.

Section 11.5. Failure to Maintain Insurance. If the Lessee fails or refuses to provide copies of the renewal insurance policies, together with evidence of payment of premiums therefor, or otherwise fails or refuses to procure or maintain insurance as required by this Lease, the City shall have the right, at the City's election, and upon five (5) days' notice to the Lessee, to procure and maintain such insurance. Any premiums paid by the City hereunder shall be due and payable by the Lessee to the City on the first day of the month following the date on which the premiums were paid. The City shall give prompt notice of the payment of such premiums, stating the amounts paid and the name(s) of the insured(s).

## ARTICLE XII

### CONDEMNATION

Section 12.1. **Total Taking.** In the event that the whole of the Premises and Improvements (including the City's interest therein, but not including a taking for temporary use or of only the leasehold estate hereunder) shall be taken for any public use or purpose by the exercise of the power of eminent domain, or shall be conveyed by the City and Lessee acting jointly to avoid proceedings of such taking ("Taking"), the Rental and any money to be treated as additional rental pursuant to this Lease and the Public Charges shall be prorated and paid by Lessee to the date of such Taking or conveyance, and this Lease shall terminate and become null and void as of the date of such Taking or conveyance, provided that such termination shall in no manner limit Lessee's right to an award or to recover from the condemning authority on account of such Taking, and if termination of this Lease would limit or impair Lessee's right to such recovery or award, this Lease shall not be terminated until immediately following such recovery or award. In case of a Taking (other than for temporary use or of only the leasehold estate hereunder) of such substantial part of the Premises and Improvements as shall result, in the good faith judgment of Lessee, in the Improvements remaining after such Taking (even if restoration were made and regardless of whether all or any part of the Improvements is the subject of such Taking) being unsuitable for the use being made of the Improvements at the time of such Taking, Lessee, at its option, may terminate this Lease by written notice given to the City within sixty (60) days after such Taking. Any Taking of the character referred to in this Section 12.1 which results in the termination of this Lease is referred to as a "Total Taking." Subject to the rights of Lessee's Mortgagees, the City and Lessee shall be paid those portions of the award or awards of damages on account of a Total Taking which are allocable to and represented by the value of their respective interests in the property which is the subject of the Taking, determined as follows:

First: There shall be paid all expenses, if any, including reasonable attorneys' fees, incurred by the City and Lessee in connection with such Taking (except that nothing contained in this Article shall require payment to the City of costs and expenses it may incur as the condemning authority);

Second: The balance of said award or awards shall be divided between the City and Lessee in the same proportion as the then Fair Market Value of each party's respective interest or estate in the property which is the subject of the Taking bears to the total Fair Market Value of the interests and estates of both parties in such property. In the event that the parties cannot agree upon the Fair Market Value of their respective interests and estates in the property subject to the Taking, the same shall be determined by Appraisal as hereinafter provided.

Third: In the event of any Taking, the requirements that the Lessee construct a certain acreage as defined earlier shall be cancelled. The parties will then mutually agree to new construction requirements.

Section 12.2. **Partial Taking.**

(a) In the event of a Taking of a portion of the Premises and Improvements which does not result in a Total Taking, then this Lease and all the covenants, conditions and

provisions hereunder shall be and remain in full force and effect as to all of the Premises not so taken or conveyed and without reduction or abatement of Rental or any other sum payable hereunder; provided, however, that said Taking does not reduce the square footage of the Building(s) or otherwise affect Lessee's ability to comply with City Codes. Lessee shall remodel, repair and restore the remaining portions of the Improvements as nearly as possible to their condition and character immediately prior to the Taking, except for any reduction in area caused thereby; provided, however, that in so doing, Lessee shall not be required to expend more than the amount of any such award actually received by Lessee, less all costs and expenses (including reasonable attorneys' fees) incurred in the collection of same and less any amounts withheld or retained by Lessee's Mortgagees, and in the case of a Taking for temporary use, neither party shall be required to effect such restoration until such Taking is terminated. In the event of any Taking, the requirement that Lessee construct a certain amount of acreage as defined earlier shall be cancelled. The parties will then mutually agree to new construction requirements.

(b) Subject to the rights of Lessee's Mortgagees, the City and Lessee shall be paid those portions of the award or awards of damages on account of a partial Taking pursuant to this Section as follows:

First: There shall be paid all expenses, if any, including reasonable attorneys' fees, incurred by City and Lessee in connection with such Taking (other than any costs or expenses incurred by the City as the condemning authority).

Second. The balance shall be divided between the City and Lessee in the manner set forth in clause Second of Section 12.1.

The term "Fair Market Value" means the value, as of the date in question, of the property interest in question, based upon generally accepted appraisal practices. Fair Market Value shall be determined by the City and Lessee or, if they are unable to agree thereon, by Appraisal. The Fair Market Value of the Premises and Improvements, or any other property interest, whether determined by agreement of the City and Lessee or Appraisal, shall be determined and calculated without regard to any termination of this Lease.

The term "Appraisal" refers to the determination of the Fair Market Value of a property interest as of the date in question by the following procedure: Whenever the City and Lessee are unable to agree, within one hundred twenty (120) days of the date in question, as to the Fair Market Value of the property interest in question, either party may give written notice of such disagreement to the other party and in such notice shall designate the first appraiser (the "First Appraiser"). Within fifteen (15) days after the service of such notice, the party to whom such notice is given shall give written notice to the party giving the first notice, which notice shall designate the second appraiser (the "Second Appraiser"). If the Second Appraiser is not so designated, then the party designating the First Appraiser may request the appointment of the Second Appraiser by the Presiding Judge of the Coconino County Superior Court. The First and Second Appraisers so designated or appointed shall meet within ten (10) days after the Second

Appraiser is appointed and, within thirty (30) days after the Second Appraiser is appointed, they shall appoint a third appraiser (the "Third Appraiser") who shall be a competent and impartial person; and if they shall be unable to agree upon such appointment within ten (10) days after the time aforesaid, the Third Appraiser shall be selected by the City and Lessee themselves, if they can agree thereon within a further period of fifteen (15) days. If the parties do not so agree, then either party, on behalf of both, may request that such appointment be made by the Presiding Judge of the Coconino County Superior Court. In the event of the failure, refusal or inability of any appraiser to act, a new appraiser shall be appointed in his stead, which appointment shall be made in the same manner as hereinbefore provided for the appointment of such appraiser so failing, refusing or being unable to act. Each of the City and Lessee shall pay the fees and expenses of the appraiser appointed by such party, or in whose stead, as above provided, such appraiser was appointed, and the fees and expenses of the Third Appraiser, and all other expenses, if any, shall be borne equally by both parties. Any appraiser designated to serve as above provided shall be disinterested, and shall be familiar with the property values in Flagstaff, Arizona.

The appraisers shall determine the Fair Market Value of the property interest in question as of the date in question. A decision joined in by two of the three appraisers shall be the decision of all the appraisers. If two appraisers shall fail to concur in a decision within ninety (90) days after the appointment of the Third Appraiser, then the Fair Market Value of the property interest in question shall be the average of the determinations made by the two appraisers which are closest together. After reaching a decision, the appraisers shall give written notice thereof to the City and Lessee, which notice shall state the Fair Market Value of the property interest in question and the Fair Market Value so stated shall be considered Fair Market Value for the purposes of such Taking. If no decision shall be reached within one-hundred-eighty (180) days after the appointment of the Third Appraiser, either party may make application to any court of competent jurisdiction for a determination by such court of the Fair Market Value of the property interest in question as of the date in question.

Section 12.3. **Taking for Temporary Use or of Leasehold Estate.** If, by the exercise of the power of eminent domain, or under threat thereof, the whole or any part of the Premises or Improvements shall be taken for temporary use or the whole or any part of the leasehold estate created by this Lease shall be taken for temporary use, all awards or other payments shall be paid to Lessee alone, except that, if any portion of any such award or payment on account of a Taking for temporary use is made by reason of any damage to or destruction of any portion of the Improvements, such portion shall be applied to pay the cost of restoration.

Section 12.4. **Notices; Prosecution of Claims.** In case of a Taking of all or any part of the Premises or Improvements or the commencement of any proceedings or negotiations which might result in such Taking, the party having notice of such Taking or of the commencement of any such proceedings or negotiations shall promptly give written notice thereof to the other party.

Section 12.5. **Depository.** All awards or other payments received on account of a Partial Taking and to be applied to restoration of the remaining property pursuant to Section 12.2 shall, after deduction of the costs of collection, be paid, in trust, to Lessee's First Mortgagee, if any, and if there shall be none, then to a bank or trust company selected by the City and approved by Lessee (which approval shall not be unreasonably withheld). Such Lessee's First Mortgagee, bank or trust company is referred to herein as the "Depository." All such awards or other payments made by reason of any Taking shall be held in trust by the Depository, as a fiduciary for the purposes herein expressed, until payable pursuant to the provisions hereof. Any such awards or other payments which may be held in trust for restoration of the property not subject to the Taking shall be disbursed by the Depository as such work progresses, for work in place, free of liens and with adequate retainage. "Lessee's First Mortgagee" means any Institutional Lender which is unrelated to Lessee and which holds a senior security interest in Lessee's interest in the Improvements.

### ARTICLE XIII

#### DISPUTE RESOLUTION

Section 13.1. **Mediation.** If a dispute arises out of or relates to this Lease and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to resolve the dispute by mediation before resorting to litigation or some other dispute resolution procedure. Mediation will be self-administered and conducted under the CPR Mediation Procedures established by the CPR Institute for Dispute Resolution, 366 Madison Avenue, New York, New York 10017, (212) 949-6490, [www.cpradr.org](http://www.cpradr.org), with the exception of the mediator selection provisions, unless other procedures are agreed upon by the parties. Unless the parties agree otherwise, the mediator(s) shall be selected from panels of mediators trained under the Alternative Dispute Resolution Program of the Coconino County Superior Court. Each party agrees to bear its own costs in 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 the parties' right to arbitrate or initiate legal action if a dispute is not resolved through good faith negotiation or mediation, or if provisional relief is required under the Arizona Rules of Civil Procedure.

Section 13.2. **Litigation and Attorneys' Fees.** Except as otherwise agreed by the parties, any litigation brought by either party against the other to enforce the provisions of this Lease must be filed in the Coconino County Superior Court. In the event any action at law or in equity is instituted between the parties in connection with this Lease, the prevailing party in the action will be entitled to its costs including reasonable attorneys' fees and court costs from the non-prevailing party.

ARTICLE XIV

NOTICES

Section 14.1. **Notice Addresses.** Except as otherwise specifically provided herein, every notice, demand, consent, approval or other communication which any party is required or desires to give or make or communicate upon or to any other party shall be in writing and shall be sent by mailing the same by registered mail or certified mail, postage prepaid, return receipt requested, as follows:

If to the City:           The City of Flagstaff  
                                  Airport Manager  
                                  211 West Aspen Avenue  
                                  Flagstaff, Arizona 86001

The City of Flagstaff  
City Manager  
211 West Aspen Avenue  
Flagstaff, Arizona 86001

or to such other address or addresses as the City shall from time to time and at any time designate by notice to Lessee.

If to Lessee:            CBAR 19 Flagstaff, LLC  
                                  Attn: Stephen M. Biagiotti  
                                  5655 South Yosemite Street, Suite 301  
                                  Greenwood Village, Colorado 80111

With a copy to:        Senn Visciano Kirschenbaum  
                                  Attn: Mark Senn  
                                  1801 California Street, Suite 4300  
                                  Denver, Colorado 80202

Any Mortgagee of Lessee whose  
address has been provided to the  
City in writing in accordance with this Section 14.1

or to such other address or addresses as Lessee shall from time to time and at any time designate by notice to the City.

Section 14.2. **Mailing.** Every notice, demand, request, or other communication sent in the manner aforesaid shall be deemed to have been given, made or communicated, as the

case may be, on the third business day after the same has been deposited, registered or certified, properly addressed as aforesaid, postage prepaid, in the United States mail, except that any notice, demand, request, or other communication to the City or Lessee (but not to any Mortgagee of Lessee) may be personally delivered, and in such event shall be deemed to have been given on the date the same shall have been personally delivered to the party to whom such notice, demand, request or other communication is addressed, or to an officer of such party, if such party is a corporation, and with a copy to the City's Office of the City Attorney (in the case of any notice, demand, request or other communication to the City).

Section 14.3. **Copies.** Any party may require, at any time, that up to three (3) additional copies of any notice be sent to such person(s) as shall be designated from time to time in any notice from such party.

## ARTICLE XV

### RULES AND REGULATIONS

Section 15.1. **Compliance with All Laws.** The Lessee shall observe and comply with all laws, ordinances, rules and regulations of the United States Government, the State of Arizona, the County of Coconino, and the City and all agencies thereof which may be applicable to its operations or to the operation, management, maintenance or administration of the Airport now in effect or hereafter promulgated. The Lessee further agrees to display any and all permits, licenses or other evidence of compliance with all laws upon request of the City. Lessee acknowledges that it shall obtain any and all licenses and/or permits required in connection with operating the business conducted by Lessee or Sublessees on the Premises at Lessee's sole expense.

Section 15.2. **Compliance with FAA Regulations.** Lessee agrees to comply with the notification and review requirements adopted by the Federal Aviation Administration (the "FAA") in the event any future structure or building is planned for the Premises, or in the event of any planned modifications or alterations of any present or future building or structure situated on the Premises.

Section 15.3. **Non-discriminatory Pricing.** Lessee shall furnish its accommodations and/or services on a fair, equal and non-discriminatory basis to all users thereof and it shall charge fair, reasonable and non-discriminatory prices or rates for its accommodations or service; provided, however, that the Lessee may offer reasonable and non-discriminatory discounts, rebates or other similar type of price reductions to volume users.

Section 15.4. **Limitation on Height of Structures.** The Lessee expressly agrees for itself, its successors and assigns that it will not erect or permit the erection of any structure or object or permit the growth of any tree on the Premises above a mean sea level elevation not approved by the FAA and the City. In the event the aforesaid covenant is breached, the City

reserves the right to enter upon the Premises and to remove the offending structure or object at the expense of the Lessee.

Section 15.5. **Noncompliance.** Noncompliance with provisions 15.1 through 15.14 of this Lease shall constitute a material breach, upon which the City shall have the right to terminate this Lease without liability therefor, or at the election of the City or the United States, either or both said governments shall have the right to judicially enforce the aforementioned provisions.

Section 15.6. **No Discrimination.** Lessee agrees that with regard to the operations conducted on the Premises pursuant to the provisions of this Lease and otherwise in the use of the Airport, Lessee will not discriminate or permit discrimination against any person or class of persons by reason of race, color, creed, or national origin in any manner prohibited by any federal law or any amendments thereto. Lessee further agrees to make its accommodations and/or services available to the public on fair and reasonable terms without unjust discrimination on the basis of race, creed, color, or national origin.

Section 15.7. **No Exclusive Right.** It is understood and agreed by Lessee that nothing in this Lease shall be construed to grant or authorize the granting of an exclusive right within the meaning of Section 308 of the Federal Aviation Act.

Section 15.8. **No Interference with Airport Operations.** Lessee expressly agrees for itself, its successors and assigns that it will not utilize the Premises in any manner that might interfere with the landing and taking off of aircraft from the Airport or otherwise constitute a hazard which may affect the safety of the aforementioned activities. In the event the aforesaid covenant is breached, the City reserves the right, but not the obligation, to enter upon the Premises and effect the abatement of such interference at the expense of Lessee.

Section 15.9. **Provisions Applicable to Sublease Tenants.** Lessee agrees that it shall insert the relevant provisions contained in Article XV of this Agreement in any lease, agreement or contract by which said Lessee grants a right or privilege to any person, firm, corporation or entity to render accommodations and/or services to the public on the Premises.

Section 15.10. **Reservation of Airspace.** City hereby reserves for itself, its successors and assigns, for the use and benefit of the public, a right of flight for the passage of aircraft in the airspace above the surface of the Premises, together with the right to conduct all flight operations that are reasonable and necessary within the airspace above the Premises. Said right shall include, but not be limited to, emitting light, noise, discharge of dust, exhaust, fuel and lubricant particles as may be inherent in the operations of aircraft, now know or hereafter used for navigation of or flight in the air, using said airspace for landing at, taking off from, or operation on or at the Airport.

Section 15.11. **Right to Improve Landing Area.** City reserves the right to further develop or improve the landing, takeoff and taxiing areas of the Airport as it deems appropriate, regardless of the desires or view of Lessee, and without interference or hindrance of Lessee; provided, however, that the additional development or improvement does not substantially interfere with Lessee's operations.

Section 15.12. **Subordination.** This Lease shall be subordinate to the provisions and requirements of any existing or future agreement between City and the United States relative to the development, operation or maintenance of the Airport.

Section 15.13. **War or National Emergency.** This Lease shall be subject to any right the United States now has or in the future may have or acquire, affecting the control, operation, regulation, and taking over of the Airport or the exclusive use or nonexclusive use of the Airport by the United States during time of war or national emergency.

Section 15.14. **Federal Grant Assurances.** This Lease shall be subject to all federal requirements set forth in the document entitled "Airport Assurances (9/99)" attached hereto as **Exhibit "D,"** and any amendments or revisions thereof.

## ARTICLE XVI

### GENERAL PROVISIONS

Section 16.1. **Amendment.** This Lease may be amended at any time by written amendment executed by both parties, which written amendment shall be recorded in the official records of Coconino County, Arizona, within ten (10) days following any such amendment.

Section 16.2. **Authorization.** The parties to this Lease represent and warrant that the persons executing this Lease on their behalves have full authority to bind the respective parties.

Section 16.3. **Captions.** The captions used herein are for convenience only and are not a part of this Lease and do not in any way limit or amplify the terms and provisions hereof.

Section 16.4. **City Manager's Power to Consent.** The City hereby authorizes and empowers the City Manager to consent to any and all requests of Lessee requiring consent of the City hereunder without further action of the City Council except for any actions requiring City Council approval as a matter of law.

Section 16.5. **Conflicts of Interests.**

(a) Each member, official, representative, or employee of the City shall at all times be bound by all applicable laws respecting conflicts of interest, and, to the extent prohibited by such applicable laws, none of the same shall have any personal interest, direct or indirect, in

this Lease, nor, to the extent prohibited by such applicable laws, shall any such member, official, representative or employee participate in any decision relating to this Lease which affects his personal interests or the interests of any corporation, partnership or association in which he is, directly or indirectly, interested. No member, official, representative or employee of the City shall be personally liable to Lessee or any successor in interest in the event of any default or breach by the City for any amount which may become due to Lessee or its successor, or on any obligations under the terms of this Lease.

(b) A.R.S. § 38-511 provides political subdivisions a right to cancel contracts under certain circumstances. The City and Lessee acknowledge that the provisions of A.R.S. § 38-511, which are incorporated herein by reference, may create a situation where the City may have a right to cancel this Lease pursuant to the rights given the City under A.R.S. § 38-511. Lessee agrees not to knowingly take any action which would create any right of cancellation pursuant to the provisions of A.R.S. § 38-511, to the extent they may be applicable to this Lease or any amendment to this Lease.

Section 16.6. **Consistent with General Plan.** This Lease ensures that all development on the Premises shall be consistent with the City's General Plan recommendation for the Property as required by A.R.S. § 9-500.05(B) and the Flagstaff Area Regional Land Use and Transportation Plan.

Section 16.7. **Construction of Lease.** This Lease has been arrived at by negotiation between the City and Lessee and has been reviewed by their respective counsel. As such, any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Lease. Further, the language in all parts of this Lease shall in all cases be construed as a whole and in accordance with its fair meaning.

Section 16.8. **Counterparts.** This Lease may be executed in multiple counterparts, each of which shall constitute an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.

Section 16.9. **Effective Date of Lease.** This Lease shall be effective upon the execution of the parties hereto, and upon expiration of thirty (30) days following the City Council's approval hereof; provided, however, that in the event this Lease is delayed in its effect by judicial challenge, or by referendum or injunction, the effective date of this Lease shall be delayed until resolution or termination of such judicial challenge, referendum or injunction. In the event of judicial challenge, referendum or injunction resulting in delay in the effect of the Lease which extends for a period of more than one hundred eighty (180) days following its approval by the City Council, then this Lease shall be terminable by the Lessee upon written notice to the City in accordance with this Lease at any time within an additional one hundred eighty (180) days. Upon termination, this Lease shall be of no further force or effect, and neither party shall have any

further obligation hereunder. Any delay relative to the effective date of this Lease by judicial challenge, referendum or injunction filed by parties acting independently of and not under the control of the City shall not be deemed a default hereunder by the City.

Section 16.10. **Entire Agreement.** This Lease, and all the Exhibits attached hereto, and together with such other agreements and instruments pertaining to the Premises as are referenced herein, contains the entire agreement of the parties with respect to the matters addressed herein, and no representations or agreements, oral or otherwise, between the parties not embodied herein, attached hereto or hereinabove referenced shall be of any force and effect. Any additions or amendments to this Lease subsequent hereto shall be of no force and effect unless in writing and signed by the parties hereto.

Section 16.11. **Estoppel Certificates.** The City and Lessee shall at any time and from time to time, within thirty (30) days after written request by the other, execute, acknowledge and deliver to the party which has requested the same or to any Lessee, Mortgagee or prospective lessee, mortgagee, assignee, subtenant or other party designated by Lessee a certificate stating:

- (a) that this Lease is in full force and effect and has not been modified, supplemented or amended in any way, or, if there have been modifications, this Lease is in full force and effect as modified, identifying such modification agreement, and if this Lease is not in force and effect, the certificate shall so state;
- (b) that this Lease as modified represents the entire agreement between the parties as to this leasing, or, if it does not, the certificate shall so state;
- (c) the dates on which the term of this Lease commenced and will terminate;
- (d) that all conditions under this Lease to be performed by the City or Lessee, as the case may be, have been satisfied and, as of the date of such certificate, there are no existing defenses or offsets, which the City or Lessee, as the case may be, has against the enforcement of this Lease by the other party, or, if such conditions have not been satisfied or if there are any defenses or offsets, the certificate shall so state; and
- (e) that the rental due and payable for the year in which such certificate is delivered has been paid in full, or, if it has not been paid, the certificate shall so state.

The party to whom any such certificate shall be issued may rely on the matters therein set forth and thereafter the party issuing the same shall be estopped from denying the veracity or accuracy of the same. No such certificate shall be binding upon any Lessee Mortgagee unless such Mortgagee shall, in its absolute discretion, execute such certificate.

Section 16.12. **Exhibits.** All exhibits attached hereto are incorporated herein by reference as though fully set forth herein.

Section 16.13. **Expense of Obligations.** Where this Lease imposes obligations or responsibilities upon any party hereto, such obligations and responsibilities shall be performed at the expense of such party responsible therefor and without cost to or assessment against the property of any other party, except where otherwise specifically provided.

Section 16.14. **Further Acts.** Each of the parties hereto shall execute and deliver all such documents and perform all such acts as reasonably necessary, from time to time, to carry out the matters contemplated by this Lease. Without limiting the generality of the foregoing, the City shall cooperate in good faith and process promptly any request and applications for permit approvals or other necessary approvals relating to the development of the Premises by the Lessee and its successors.

Section 16.15. **Gender and Number.** In this Lease (unless the context requires otherwise), the masculine, feminine and neuter genders and the singular and the plural include one another.

Section 16.16. **Governing Law.** This Lease shall be governed by and construed under the laws of the State of Arizona. This Lease shall be deemed made and entered into in Coconino County.

Section 16.17. **Modification.** No modification of this Lease shall be deemed effective unless in writing and signed by the parties hereto, and any waiver granted shall not be deemed effective except for the instance and in the circumstances particularly specified therein and unless in writing, executed by the party against whom enforcement of the waiver is sought.

Section 16.18. **Negation of Partnership.** The parties specifically acknowledge that the Premises will be developed as private property, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Lease. None of the terms or provisions of this Lease shall be deemed to create a partnership between or among the parties nor shall it cause them to be considered joint venturers or members of any joint enterprise.

Section 16.19. **No Obligation to Develop Premises.** Except as specifically set forth herein, nothing contained herein shall be deemed to obligate the City to complete any part or all of the development of the Premises.

Section 16.20. **No Third Party Beneficiaries.** The City and Lessee acknowledge and agree that the terms, provisions and conditions hereof are for the sole benefit of, and may be enforceable solely by, the City and Lessee, and none of such terms, provisions, conditions, and obligations are for the benefit of or may be enforced by any third party.

Section 16.21. **Quiet Possession.** City agrees that Lessee, upon observing and keeping the covenants, agreements and conditions of this Lease on its part to be kept and

performed, shall lawfully and quietly hold, occupy and enjoy the Premises during the term in accordance with and subject to the terms of this Lease.

Section 16.22. **Real Estate Commissions.** Each of the parties represents and warrants unto the other that there are no commissions, charges or other compensation due any broker, agent or finder with respect to this Lease or the negotiations thereof, and each of the parties covenants and agrees with the other that if any party hereto utilizes an agent, broker, or finder, the party so using an agent, broker or finder or incurring such commissions, charges, fees or similar expenses will pay, hold harmless and indemnify the other from and against all claims, costs, expenses or liability (including, without limitation, the cost of reasonable counsel fees in connection therewith) for any such compensation, commissions, charges, or other compensation claimed by any such broker, agent or finder.

Section 16.23. **Recitals.** The Recitals set forth at the beginning of this Lease are acknowledged by the parties to be true and correct and incorporated herein by this reference.

Section 16.24. **Rights Cumulative.** All rights, powers and privileges conferred herein upon the parties shall be cumulative but not restrictive of those given by law.

Section 16.25. **Severability.** In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Lease shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Lease shall not be affected thereby and shall remain in force and effect to the fullest extent permissible by law.

Section 16.26. **Successors and Assigns.** All of the covenants and conditions set forth herein shall inure to the benefit of and shall be binding upon the successors in interest of each of the parties hereto.

Section 16.27. **Time of the Essence.** For purposes of enforcing the provisions of this Lease, time is of the essence.

Section 16.28. **Unavoidable Delay.** Each party hereto shall be excused from performing any of its obligations or undertakings provided in this Lease (except any of its obligations to pay any sums of money under the applicable provisions hereof) for so long as the performance of such obligation is prevented or delayed by any cause which is beyond the control of such party, including but not limited to such of the following as may be beyond the control of such party: Act of God; fire; earthquake; flood; explosion; action of the elements; war; invasion; insurrection; riot; mob violence; sabotage; malicious mischief; inability to procure because of general shortage or rationing or regulation of labor, equipment, facilities, sources of energy (including, without limitation, electricity, gas, gasoline or steam), materials or supplies in the open market; failure of transportation; strikes; lockouts; action of labor unions; condemnation; requisition; order of government or civil or military or naval authorities; bankruptcy proceedings;

litigation involving a party or others relating to zoning, subdivisions, or other governmental action or inaction pertaining to the Premises or Improvements or any portion thereof; inability to obtain government permits or approvals; or any other cause, whether similar or dissimilar to the foregoing, not within the control of such party; provided, however, that no party shall be entitled to relief under this Section by reason of any event unless such party shall have given the other party notice of such event and the nature of such event within a reasonable time and in any event no later than thirty (30) days following such party's knowledge of the occurrence of such event. Any delay or cause excusing performance pursuant to the terms of this Section 16.28 is referred to herein as an "Unavoidable Delay."

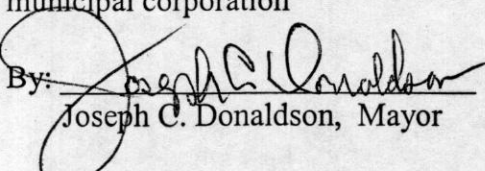
Section 16.29. **Waiver.** No waiver by either party of a breach of any of the terms, covenants or conditions of this Lease shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, covenant or condition herein contained. One or more waivers of any covenant, term or condition of this Lease by any party shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by any party to or of any act by any other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act.

Section 16.30. **Airport Users.** The City warrants and represents that, to the best of its knowledge, the Premises are all within the airport; and the owners, tenants and subtenants of said lands are within the definition of airport users as that term is used in the "Airport Assurances (9/99)," which document is designated **Exhibit "D"** and made a part of this Lease.

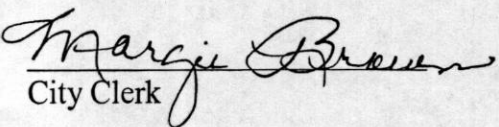
IN WITNESS WHEREOF, the City has caused this Lease to be duly executed in its name and on its behalf by its Mayor and its seal to be hereunder duly affixed and attested by its City Clerk, and the Lessee has signed the same as of the date first set forth above.

CITY OF FLAGSTAFF, an Arizona  
municipal corporation

By:

  
Joseph C. Donaldson, Mayor

Attest:

  
City Clerk

Approved as to Form:

[Signature]  
City Attorney

LESSEE: CBAR 19 Flagstaff, LLC  
a Colorado limited liability company  
By: SDA Inc., Member  
By: [Signature]  
Mark D. Canto, CEO

STATE OF ARIZONA            }  
                                          } ss.  
County of Coconino         }

ACKNOWLEDGMENT. On this 13 day of April, 2005, before me, a Notary Public, personally appeared Joseph C. Donaldson, Mayor of the City Flagstaff, known to be or satisfactorily proven to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same on behalf of the City of Flagstaff, for the purposes therein contained.

Laura Matthews  
Notary Public

My Commission Expires:

April 24, 2008



STATE OF COLORADO        }  
                                          } ss.  
County of Arapahoe        }

ACKNOWLEDGMENT. On this 6<sup>TH</sup> day of APRIL, 2005, before me, a Notary Public, personally appeared Mark D. Canto, known to be or satisfactorily proven to be the person

whose name is subscribed to the foregoing instrument and acknowledged that he executed the same on behalf of CBAR 19 Flagstaff, LLC, a Colorado limited liability company, for the purposes therein contained.

*Kalli L. Koerner*  
Notary Public



My Commission Expires:

2/18/2008

Kalli L. Koerner  
Notary Public, State of Colorado  
5655 South Yosemite Street, #301  
Greenwood Village, Colorado 80111  
Commission Expires February 18, 2008

Exhibit A

Tract 7C  
See Sheet 6

29

Joint Use Access Easement  
Tract 7B = 0.6038 Acres  
Tract 7C = 0.1853 Acres

139.06' 335.27' (0.5)  
N89°33'46"E  
203.31'  
Delta = 48°33'32"  
R = 270.00'  
AL = 228.83'

Tract 7B

Base Site Area = 4.1775 Acres  
Zoning = BP  
Gross Forest Area = 3.903 Acres  
Forest Resource Protection = 1.951 Acres  
Maximum Floor Area for Tract = 2.172 Acres

Pulliam Drive  
S48°59'46"E

35' Building Setback Line  
Delta = 11°21'09"  
R = 773.50'  
AL = 153.26'

Delta = 17°42'42"  
R = 773.50'  
AL = 239.11'

8' Public U  
Delta = 29°0'  
R = 342.50'  
AL = 173.74'

Tract 1A  
See Sheet 3

35' Building Setback Line

N41°00'14"E  
105.57' (0.1)  
S47°59'W

S78°03'36"E  
128.03'

MEMORANDUM OF LEASE

File No. 271-4390397 (mas)

This Memorandum of Lease entered into this 07/22/2005 by and between City of Flagstaff, a municipal corporation, (herein called "Landlord") and CBAR 19 Flagstaff, LLC, a Colorado Limited Liability Company (herein after called "Tenant").

WHEREAS, Landlord and Tenant have entered into a Lease Agreement dated April 13, 2005 for the property legally described as:

Legal description attached hereto and made a part hereof

Commonly known as Flagstaff Building Pullium Airport, Flagstaff, AZ 86001

The Lease is for a term of maximum of forty (40) years.

The Landlord and Tenant should be contracted for further details concerning the Lease.

LANDLORD:

TENANT:

City of Flagstaff, a Municipal Corporation

CBAR 19 Flagstaff, LLC, a Colorado Limited Liability Company

By: Al White, its Vice-Mayor

By: SDA, Inc., a Colorado Corporation

By: Mark D. Canto, CEO

STATE OF COLORADO )
County of ARAPAHOE )ss.

On July 25, 2005, before me, the undersigned Notary Public, personally appeared Mark D. Canto, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that his/her/their signature(s) on the instrument is/are that of the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

My Commission Expires: 2/18/2008



Kalli L. Koerner, Notary Public

Kalli L. Koerner, Notary Public, State of Colorado, 5655 South Yosemite Street, #301, Greenwood Village, Colorado 80111, Commission Expires February 18, 2008

A.P.N.: 116-61-010

Memorandum of Lease - continued

File No.: 271-4390397 (mas)  
Date: July 22, 2005

STATE OF AZ )  
County of Coconino )ss.

On July 27, 2005; before me, the undersigned Notary Public, personally appeared AL White, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within Instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

My Commission Expires:

Laura Matthews  
Notary Public



Attest:

*Margie Brown*  
City Clerk

Approved as to Form:

*H. Lane Jr*  
City Attorney



## EXHIBIT B

### Description of FBI Lease Area

A portion of Pulliam Airpark Unit 1, Amended, Tract 7B, per plat recorded at Case 6 map 44, Coconino County Recorders office (r1), being a portion of Section 5, Township 20 North, Range 7 East, Gila and Salt River Meridian, Coconino County, Arizona, being more particularly described as follows:

**BEGINNING** at the southwesterly corner of Tract 7B, a found ½" rebar/cap LS18548;

thence N 40d 59m 40s E (N 41d 00m 14s E) (Basis of Bearings), along the northwesterly line of Tract 7B, a distance of 258.20', to a set ½" rebar/cap LS18548;

thence S 49d 00m 26s E, a distance of 175.80', to a set ½" rebar/cap -LS18548, to a non-tangent curve;

thence southerly and southeasterly along said curve, a distance of 117.09', said curve having an initial radial bearing of N 27d 04m 38s W, a radius of 60.00', a delta of 11d 48m 52s, and a chord of S 00d 07m 56s W 99.38', to a set ½" rebar/cap - LS18548;

thence S 41d 06m 30s W, a distance of 169.15', to the southwesterly line of (r1), to a set ½" rebar/cap - LS18548, to a non-tangent curve;

thence northwesterly along said curve, a distance of 102.11', said curve having an initial radial bearing of S 33d 26m 07s W, a radius of 773.50' (r1), a delta of 07d 33m 49s, and a chord of N 52d 46m 59s W, to a found ½" rebar/cap - LS18548;

thence N 48d 58m 09s W (N 48d 58m 46s W) (non-tangent), along the southwesterly line of (r1), a distance of 129.19' (129.18'), to the **POINT OF BEGINNING**.

Subject to existing easements and encumbrances.

# EXHIBIT D

## ASSURANCES Airport Sponsors

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### A. General.

1. These assurances shall be complied with in the performance of grant agreements for airport development, airport planning, and noise compatibility program grants for airport sponsors.
2. These assurances are required to be submitted as part of the project application by sponsors requesting funds under the provisions of Title 49, U.S.C., subtitle VII, as amended. As used herein, the term "public agency sponsor" means a public agency with control of a public-use airport; the term "private sponsor" means a private owner of a public-use airport; and the term "sponsor" includes both public agency sponsors and private sponsors.
3. Upon acceptance of the grant offer by the sponsor, these assurances are incorporated in and become part of the grant agreement.

### B. Duration and Applicability.

1. **Airport development or Noise Compatibility Program Projects Undertaken by a Public Agency Sponsor.** The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer of Federal funds for the project. However, there shall be no limit on the duration of the assurances regarding Exclusive Rights and Airport Revenue so long as the airport is used as an airport. There shall be no limit on the duration of the terms, conditions, and assurances with respect to real property acquired with federal funds. Furthermore, the duration of the Civil Rights assurance shall be specified in the assurances.
2. **Airport Development or Noise Compatibility Projects Undertaken by a Private Sponsor.** The preceding paragraph 1 also applies to a private sponsor except that the useful life of project items installed within a facility or the useful life of the facilities developed or equipment acquired under an airport development or noise compatibility program project shall be no less than ten (10) years from the date of acceptance of Federal aid for the project.
3. **Airport Planning Undertaken by a Sponsor.** Unless otherwise specified in the grant agreement, only Assurances 1, 2, 3, 5, 6, 13, 18, 30, 32, 33, and 34 in section C apply to planning projects. The terms, conditions, and assurances of the grant agreement shall remain in full force and effect during the life of the project.

### C. Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:

1. **General Federal Requirements.** It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following:

#### Federal Legislation

- a. Title 49, U.S.C., subtitle VII, as amended.
- b. Davis-Bacon Act - 40 U.S.C. 276(a), et seq.<sup>1</sup>
- c. Federal Fair Labor Standards Act - 29 U.S.C. 201, et seq.

- d. Hatch Act - 5 U.S.C. 1501, et seq.<sup>2</sup>
- e. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 Title 42 U.S.C. 4601, et seq.<sup>1,2</sup>
- f. National Historic Preservation Act of 1966 - Section 106 - 16 U.S.C. 470(f).<sup>1</sup>
- g. Archeological and Historic Preservation Act of 1974 - 16 U.S.C. 469 through 469c.<sup>1</sup>
- h. Native Americans Grave Repatriation Act - 25 U.S.C. Section 3001, et seq.
- i. Clean Air Act, P.L. 90-148, as amended.
- j. Coastal Zone Management Act, P.L. 93-205, as amended.
- k. Flood Disaster Protection Act of 1973 - Section 102(a) - 42 U.S.C. 4012a.<sup>1</sup>
- l. Title 49 ,U.S.C., Section 303, (formerly known as Section 4(f))
- m. Rehabilitation Act of 1973 - 29 U.S.C. 794.
- n. Civil Rights Act of 1964 - Title VI - 42 U.S.C. 2000d through d-4.
- o. Age Discrimination Act of 1975 - 42 U.S.C. 6101, et seq.
- p. American Indian Religious Freedom Act, P.L. 95-341, as amended.
- q. Architectural Barriers Act of 1968 -42 U.S.C. 4151, et seq.<sup>1</sup>
- r. Power plant and Industrial Fuel Use Act of 1978 - Section 403- 2 U.S.C. 8373.<sup>1</sup>
- s. Contract Work Hours and Safety Standards Act - 40 U.S.C. 327, et seq.<sup>1</sup>
- t. Copeland Antikickback Act - 18 U.S.C. 874.<sup>1</sup>
- u. National Environmental Policy Act of 1969 - 42 U.S.C. 4321, et seq.<sup>1</sup>
- v. Wild and Scenic Rivers Act, P.L. 90-542, as amended.
- w. Single Audit Act of 1984 - 31 U.S.C. 7501, et seq.<sup>2</sup>
- x. Drug-Free Workplace Act of 1988 - 41 U.S.C. 702 through 706.

#### Executive Orders

- Executive Order 11246 - Equal Employment Opportunity<sup>1</sup>
- Executive Order 11990 - Protection of Wetlands
- Executive Order 11998 - Flood Plain Management
- Executive Order 12372 - Intergovernmental Review of Federal Programs.
- Executive Order 12699 - Seismic Safety of Federal and Federally Assisted New Building Construction<sup>1</sup>
- Executive Order 12898 - Environmental Justice

#### Federal Regulations

- a. 14 CFR Part 13 - Investigative and Enforcement Procedures.
- b. 14 CFR Part 16 - Rules of Practice For Federally Assisted Airport Enforcement Proceedings.
- c. 14 CFR Part 150 - Airport noise compatibility planning.
- d. 29 CFR Part 1 - Procedures for predetermination of wage rates.<sup>1</sup>
- e. 29 CFR Part 3 - Contractors and subcontractors on public building or public work financed in whole or part by loans or grants from the United States.<sup>1</sup>
- f. 29 CFR Part 5 - Labor standards provisions applicable to contracts covering federally financed and assisted construction (also labor standards provisions applicable to non-construction contracts subject to the Contract Work Hours and Safety Standards Act).<sup>1</sup>
- g. 41 CFR Part 60 - Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and federally assisted contracting requirements).<sup>1</sup>
- h. 49 CFR Part 18 - Uniform administrative requirements for grants and cooperative agreements to state and local governments.<sup>3</sup>

- i. 49 CFR Part 20 - New restrictions on lobbying.
- j. 49 CFR Part 21 - Nondiscrimination in federally-assisted programs of the Department of Transportation - effectuation of Title VI of the Civil Rights Act of 1964.
- k. 49 CFR Part 23 - Participation by Disadvantage Business Enterprise in Airport Concessions.
- l. 49 CFR Part 24 - Uniform relocation assistance and real property acquisition for Federal and federally assisted programs.<sup>1 2</sup>
- m. 49 CFR Part 26 - Participation By Disadvantaged Business Enterprises in Department of Transportation Programs.
- n. 49 CFR Part 27 - Nondiscrimination on the basis of handicap in programs and activities receiving or benefitting from Federal financial assistance.<sup>1</sup>
- o. 49 CFR Part 29 - Government wide debarment and suspension (non-procurement) and government wide requirements for drug-free workplace (grants).
- p. 49 CFR Part 30 - Denial of public works contracts to suppliers of goods and services of countries that deny procurement market access to U.S. contractors.
- q. 49 CFR Part 41 - Seismic safety of Federal and federally assisted or regulated new building construction.<sup>1</sup>

**Office of Management and Budget Circulars**

- a. A-87 - Cost Principles Applicable to Grants and Contracts with State and Local Governments.
- b. A-133 - Audits of States, Local Governments, and Non-Profit Organizations

<sup>1</sup> These laws do not apply to airport planning sponsors.

<sup>2</sup> These laws do not apply to private sponsors.

<sup>3</sup> 49 CFR Part 18 and OMB Circular A-87 contain requirements for State and Local Governments receiving Federal assistance. Any requirement levied upon State and Local Governments by this regulation and circular shall also be applicable to private sponsors receiving Federal assistance under Title 49, United States Code.

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated by reference in the grant agreement.

**2. Responsibility and Authority of the Sponsor.**

- a. **Public Agency Sponsor:** It has legal authority to apply for the grant, and to finance and carry out the proposed project; that a resolution, motion or similar action has been duly adopted or passed as an official act of the applicant's governing body authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.
- b. **Private Sponsor:** It has legal authority to apply for the grant and to finance and carry out the proposed project and comply with all terms, conditions, and assurances of this grant agreement. It shall designate an official representative and shall in writing direct and authorize that person to file this application, including all understandings and assurances contained therein; to act in connection with this application; and to provide such additional information as may be required.

3. **Sponsor Fund Availability.** It has sufficient funds available for that portion of the project costs which are not to be paid by the United States. It has sufficient funds available to assure operation and maintenance of items funded under the grant agreement which it will own or control.

4. **Good Title.**

- a. It, a public agency or the Federal government, holds good title, satisfactory to the Secretary, to the landing area of the airport or site thereof, or will give assurance satisfactory to the Secretary that good title will be acquired.
- b. For noise compatibility program projects to be carried out on the property of the sponsor, it holds good title satisfactory to the Secretary to that portion of the property upon which Federal funds will be expended or will give assurance to the Secretary that good title will be obtained.

5. **Preserving Rights and Powers.**

- a. It will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.
- b. It will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.
- c. For all noise compatibility program projects which are to be carried out by another unit of local government or are on property owned by a unit of local government other than the sponsor, it will enter into an agreement with that government. Except as otherwise specified by the Secretary, that agreement shall obligate that government to the same terms, conditions, and assurances that would be applicable to it if it applied directly to the FAA for a grant to undertake the noise compatibility program project. That agreement and changes thereto must be satisfactory to the Secretary. It will take steps to enforce this agreement against the local government if there is substantial non-compliance with the terms of the agreement.
- d. For noise compatibility program projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary. It will take steps to enforce this agreement against the property owner whenever there is substantial non-compliance with the terms of the agreement.

- e. If the sponsor is a private sponsor, it will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with these assurances for the duration of these assurances.
  - f. If an arrangement is made for management and operation of the airport by any agency or person other than the sponsor or an employee of the sponsor, the sponsor will reserve sufficient rights and authority to insure that the airport will be operated and maintained in accordance Title 49, United States Code, the regulations and the terms, conditions and assurances in the grant agreement and shall insure that such arrangement also requires compliance therewith.
6. **Consistency with Local Plans.** The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport.
  7. **Consideration of Local Interest.** It has given fair consideration to the interest of communities in or near where the project may be located.
  8. **Consultation with Users.** In making a decision to undertake any airport development project under Title 49, United States Code, it has undertaken reasonable consultations with affected parties using the airport at which project is proposed.
  9. **Public Hearings.** In projects involving the location of an airport, an airport runway, or a major runway extension, it has afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport or runway location and its consistency with goals and objectives of such planning as has been carried out by the community and it shall, when requested by the Secretary, submit a copy of the transcript of such hearings to the Secretary. Further, for such projects, it has on its management board either voting representation from the communities where the project is located or has advised the communities that they have the right to petition the Secretary concerning a proposed project.
  10. **Air and Water Quality Standards.** In projects involving airport location, a major runway extension, or runway location it will provide for the Governor of the state in which the project is located to certify in writing to the Secretary that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved and where applicable air and water quality standards have been promulgated by the Administrator of the Environmental Protection Agency, certification shall be obtained from such Administrator. Notice of certification or refusal to certify shall be provided within sixty days after the project application has been received by the Secretary.
  11. **Pavement Preventive Maintenance.** With respect to a project approved after January 1, 1995, for the replacement or reconstruction of pavement at the airport, it assures or certifies that it has implemented an effective airport pavement maintenance-management program and it assures that it will use such program for the useful life of any pavement constructed, reconstructed or repaired with Federal financial assistance at the airport. It will provide such reports on pavement condition and pavement management programs as the Secretary determines may be useful.
  12. **Terminal Development Prerequisites.** For projects which include terminal development at a public use airport, as defined in Title 49, it has, on the date of submittal of the project

grant application, all the safety equipment required for certification of such airport under section 44706 of Title 49, United States Code, and all the security equipment required by rule or regulation, and has provided for access to the passenger enplaning and deplaning area of such airport to passengers enplaning and deplaning from aircraft other than air carrier aircraft.

13. **Accounting System, Audit, and Record Keeping Requirements.**
- a. It shall keep all project accounts and records which fully disclose the amount and disposition by the recipient of the proceeds of the grant, the total cost of the project in connection with which the grant is given or used, and the amount or nature of that portion of the cost of the project supplied by other sources, and such other financial records pertinent to the project. The accounts and records shall be kept in accordance with an accounting system that will facilitate an effective audit in accordance with the Single Audit Act of 1984.
  - b. It shall make available to the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, for the purpose of audit and examination, any books, documents, papers, and records of the recipient that are pertinent to the grant. The Secretary may require that an appropriate audit be conducted by a recipient. In any case in which an independent audit is made of the accounts of a sponsor relating to the disposition of the proceeds of a grant or relating to the project in connection with which the grant was given or used, it shall file a certified copy of such audit with the Comptroller General of the United States not later than six (6) months following the close of the fiscal year for which the audit was made.
14. **Minimum Wage Rates.** It shall include, in all contracts in excess of \$2,000 for work on any projects funded under the grant agreement which involve labor, provisions establishing minimum rates of wages, to be predetermined by the Secretary of Labor, in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5), which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work.
15. **Veteran's Preference.** It shall include in all contracts for work on any project funded under the grant agreement which involve labor, such provisions as are necessary to insure that, in the employment of labor (except in executive, administrative, and supervisory positions), preference shall be given to Veterans of the Vietnam era and disabled veterans as defined in Section 47112 of Title 49, United States Code. However, this preference shall apply only where the individuals are available and qualified to perform the work to which the employment relates.
16. **Conformity to Plans and Specifications.** It will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval of the Secretary, shall be incorporated into this grant agreement. Any modification to the approved plans, specifications, and schedules shall also be subject to approval of the Secretary, and incorporated into the grant agreement.
17. **Construction Inspection and Approval.** It will provide and maintain competent technical supervision at the construction site throughout the project to assure that the work conforms to the plans, specifications, and schedules approved by the Secretary for the project. It shall subject the construction work on any project contained in an approved project application to inspection and approval by the Secretary and such work shall be in

accordance with regulations and procedures prescribed by the Secretary. Such regulations and procedures shall require such cost and progress reporting by the sponsor or sponsors of such project as the Secretary shall deem necessary.

**18. Planning Projects.** In carrying out planning projects:

- a. It will execute the project in accordance with the approved program narrative contained in the project application or with the modifications similarly approved.
- b. It will furnish the Secretary with such periodic reports as required pertaining to the planning project and planning work activities.
- c. It will include in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.
- d. It will make such material available for examination by the public, and agrees that no material prepared with funds under this project shall be subject to copyright in the United States or any other country.
- e. It will give the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with this grant.
- f. It will grant the Secretary the right to disapprove the sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.
- g. It will grant the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.
- h. It understands and agrees that the Secretary's approval of this project grant or the Secretary's approval of any planning material developed as part of this grant does not constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a Federal airport grant.

**19. Operation and Maintenance.**

- a. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for-
  - (1) Operating the airport's aeronautical facilities whenever required;
  - (2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and

(3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

b. It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

20. **Hazard Removal and Mitigation.** It will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

21. **Compatible Land Use.** It will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended.

## 22. Economic Nondiscrimination.

a. It will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

b. In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to-

- (1) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
- (2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities.

d. Each air carrier using such airport shall have the right to service itself or to use any fixed-based operator that is authorized or permitted by the airport to serve any air carrier at such airport.

e. Each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations,

conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or nontenants and signatory carriers and nonsignatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status.

- f. It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform.
- g. In the event the sponsor itself exercises any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions.
- h. The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.
- i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

23. **Exclusive Rights.** It will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:
- a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and
  - b. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.

24. **Fee and Rental Structure.** It will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the

Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.

**25. Airport Revenues.**

- a. All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport. Provided, however, that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.
- b. As part of the annual audit required under the Single Audit Act of 1984, the sponsor will direct that the audit will review, and the resulting audit report will provide an opinion concerning, the use of airport revenue and taxes in paragraph (a), and indicating whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, United States Code and any other applicable provision of law, including any regulation promulgated by the Secretary or Administrator.
- c. Any civil penalties or other sanctions will be imposed for violation of this assurance in accordance with the provisions of Section 47107 of Title 49, United States Code.

**26. Reports and Inspections. It will:**

- a. submit to the Secretary such annual or special financial and operations reports as the Secretary may reasonably request and make such reports available to the public; make available to the public at reasonable times and places a report of the airport budget in a format prescribed by the Secretary;
- b. for airport development projects, make the airport and all airport records and documents affecting the airport, including deeds, leases, operation and use agreements, regulations and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request;
- c. for noise compatibility program projects, make records and documents relating to the project and continued compliance with the terms, conditions, and assurances of the grant agreement including deeds, leases, agreements, regulations, and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request; and
- d. in a format and time prescribed by the Secretary, provide to the Secretary and make available to the public following each of its fiscal years, an annual report listing in detail:
  - (i) all amounts paid by the airport to any other unit of government and the purposes for which each such payment was made; and

- (ii) all services and property provided by the airport to other units of government and the amount of compensation received for provision of each such service and property.

27. **Use by Government Aircraft.** It will make available all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, charge may be made for a reasonable share, proportional to such use, for the cost of operating and maintaining the facilities used. Unless otherwise determined by the Secretary, or otherwise agreed to by the sponsor and the using agency, substantial use of an airport by Government aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the Secretary, would unduly interfere with use of the landing areas by other authorized aircraft, or during any calendar month that-
- a. Five (5) or more Government aircraft are regularly based at the airport or on land adjacent thereto; or
  - b. The total number of movements (counting each landing as a movement) of Government aircraft is 300 or more, or the gross accumulative weight of Government aircraft using the airport (the total movement of Government aircraft multiplied by gross weights of such aircraft) is in excess of five million pounds.
28. **Land for Federal Facilities.** It will furnish without cost to the Federal Government for use in connection with any air traffic control or air navigation activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction, operation, and maintenance at Federal expense of space or facilities for such purposes. Such areas or any portion thereof will be made available as provided herein within four months after receipt of a written request from the Secretary.
29. **Airport Layout Plan.**
- a. It will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plans and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility or efficiency of the airport.
  - b. If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the airport layout plan as approved by the Secretary, the owner or operator will, if requested, by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property

(or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.

30. **Civil Rights.** It will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where Federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or structures or improvements thereon in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits, or (b) the period during which the sponsor retains ownership or possession of the property.

31. **Disposal of Land.**

a. For land purchased under a grant for airport noise compatibility purposes, it will dispose of the land, when the land is no longer needed for such purposes, at fair market value, at the earliest practicable time. That portion of the proceeds of such disposition which is proportionate to the United States' share of acquisition of such land will, at the discretion of the Secretary, 1) be paid to the Secretary for deposit in the Trust Fund, or 2) be reinvested in an approved noise compatibility project as prescribed by the Secretary.

b. (1) For land purchased under a grant for airport development purposes (other than noise compatibility), it will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary an amount equal to the United States' proportionate share of the fair market value of the land. That portion of the proceeds of such disposition which is proportionate to the United States' share of the cost of acquisition of such land will, (a) upon application to the Secretary, be reinvested in another eligible airport improvement project or projects approved by the Secretary at that airport or within the national airport system, or (b) be paid to the Secretary for deposit in the Trust Fund if no eligible project exists.

(2) Land shall be considered to be needed for airport purposes under this assurance if (a) it may be needed for aeronautical purposes (including runway protection zones) or serve as noise buffer land, and (b) the revenue from interim uses of such land contributes to the financial self-sufficiency of the airport. Further, land purchased with a grant received by an airport operator or owner before December 31, 1987, will be considered to be needed for airport purposes if the Secretary or Federal agency making such grant before December 31, 1987, was notified by the operator or owner of the uses of such land, did not object to such use, and the land continues to be used for that purpose, such use having commenced no later than December 15, 1989.

c. Disposition of such land under (a) or (b) will be subject to the retention or reservation of any interest or right therein necessary to ensure that such land will only be used for purposes which are compatible with noise levels associated with operation of the airport.

32. **Engineering and Design Services.** It will award each contract, or sub-contract for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, engineering, surveying, mapping or

related services with respect to the project in the same manner as a contract for architectural and engineering services is negotiated under Title IX of the Federal Property and Administrative Services Act of 1949 or an equivalent qualifications-based requirement prescribed for or by the sponsor of the airport.

33. **Foreign Market Restrictions.** It will not allow funds provided under this grant to be used to fund any project which uses any product or service of a foreign country during the period in which such foreign country is listed by the United States Trade Representative as denying fair and equitable market opportunities for products and suppliers of the United States in procurement and construction.
34. **Policies, Standards, and Specifications.** It will carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to the advisory circulars listed in the Current FAA Advisory Circulars for AIP projects, dated \_\_\_\_\_ and included in this grant, and in accordance with applicable state policies, standards, and specifications approved by the Secretary.
35. **Relocation and Real Property Acquisition.** (1) It will be guided in acquiring real property, to the greatest extent practicable under State law, by the land acquisition policies in Subpart B of 49 CFR Part 24 and will pay or reimburse property owners for necessary expenses as specified in Subpart B. (2) It will provide a relocation assistance program offering the services described in Subpart C and fair and reasonable relocation payments and assistance to displaced persons as required in Subpart D and E of 49 CFR Part 24. (3) It will make available within a reasonable period of time prior to displacement, comparable replacement dwellings to displaced persons in accordance with Subpart E of 49 CFR Part 24.
36. **Access By Intercity Buses.** The airport owner or operator will permit, to the maximum extent practicable, intercity buses or other modes of transportation to have access to the airport, however, it has no obligation to fund special facilities for intercity buses or for other modes of transportation.
37. **Disadvantaged Business Enterprises.** The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The Recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure non discrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801).

**Exhibit E**

**Allowed Uses**

**BUSINESS PARK USES.** This category includes research and production, certain light industry and office uses:

- Apparel and other finished products made from fabrics and similar materials (SIC 23)
- Furniture and fixtures (SIC 25)
- Printing, publishing and allied industries (SIC 27)
- Drugs (SIC 283)
- Leather and leather products (except tanning and finishing) (SIC 36)
- Computer and office equipment (SIC 357)
- Electronic and other electrical engineering and components (SIC 36)
- Measuring, analyzing and controlling instruments; photographic; medical and optical goods, watches and clocks (SIC 38)
- Musical instruments and sporting/athletic goods manufacturing (SIC 393 & 394)
- United State Postal Service ((SIC 43)
- Transportation by air (SIC 45)
- Arrangement of passenger transportation (SIC 472)
- Arrangement of transportation of freight and cargo (SIC 473)
- Communications (SIC 48)
- Office Uses (See Section 10-03-002-0005)
- Passenger car rental (SIC 7514)
- Passenger car leasing (SIC 7515)
- Motion picture production and allied services (SIC 781)
- Research, development and testing services (SIC 873)
- Space research and technology (SIC 966)
- Auxiliary establishments (SIC Auxiliary Code numbers 1 & 2) (Ord. 1741, 3-17-92)

**BUSINESS PARK INTERMEDIATE USES.** This use category includes research and production, most light industrial uses and office uses.

**All Business Park Uses**

- Food products including liquor distribution (SIC 20, SIC 5921) (except meat products SIC 201, 2077, 2082-2085)
- Textiles and apparel (SIC 22 & 23)
- Lumber and wood products (SIC 24)
- Paper products (SIC 26) (except mills 261, 262,263)
- Fabricated metal (SIC 34)
- Electric and electronic equipment (SIC 36) (except electronic distribution and electrical industrial SIC 361 & 362)
- Instruments and related products (SIC 38)
- Miscellaneous manufacturing industries (SIC 39)
- Local and interurban passenger transit (SIC 41)
- Transportation services (SIC 47)