

A2007-06001.01

When recorded, mail to:

City Clerk
City of Flagstaff
211 West Aspen Avenue
Flagstaff, Arizona 86001

A2005-0401.1

DEVELOPMENT INCENTIVE AGREEMENT
(Aspen Place at the Sawmill)
[Ordinance No. 2007- 30]

THIS DEVELOPMENT INCENTIVE AGREEMENT ("Agreement") is made and entered into effective as of the 1st day of June, 2007, by and between the **CITY OF FLAGSTAFF**, an Arizona municipal corporation, with offices at 211 W. Aspen Avenue, Flagstaff, Arizona ("City"), and **BUTLER & LONE TREE, L.L.C.**, an Arizona limited liability company, with offices at 2415 East Camelback Road, Suite 900, Phoenix, Arizona 85016, and its permitted successors-in-interest as owners of the Property ("Landowner").

RECITALS

- A. The City and Landowner entered into that Second Amended and Restated Development Agreement dated as of February 20, 2007 (the "Development Agreement"), with respect to the development of that real property consisting of approximately 26.31 acres of land and located at the intersection of Butler Avenue and Lone Tree in the City of Flagstaff, which real property is legally described in *Exhibit "A"* attached hereto and incorporated herein by this reference (the "Property").
- B. Pursuant to the terms of the Development Agreement, the Landowner intends to plan the Property for development into a mixed-use development to be known as "Aspen Place at the Sawmill" (the "Project"), which development will consist of up to 155,000 square feet of retail uses and approximately 265 single-family residential and townhome dwelling units in accordance with the provisions of the Development Agreement, including, without limitation, City Ordinance No. 2006-13, as amended by City Ordinance 2006-31 and the "Aspen Park Revised Master Plan" described in the Development Agreement. In order for the Property to be developed for such purposes, the terms and conditions of the Development Agreement require the owner of the Property to construct and install certain improvements, consisting of streets, drainage retention facilities and public walkways, and including a raised landscaped median to be constructed within those portions of Butler Avenue adjacent to the Property (the "Public Infrastructure Improvements").
- C. In order to finance the costs of construction of the Public Infrastructure Improvements, an improvement district (the "ID") has been formed pursuant to the provisions of A.R.S. §48-571, *et seq.*, which ID encompasses all of the Property, except for that approximately 1.74-acre parcel within the Property legally described in *Exhibit "B"* attached

hereto which is to be conveyed by Landowner to the City for community workforce housing and related commercial uses (the "Contribution Parcel"), pursuant to *Section 5* below. Special assessment bonds may be issued by the City to finance a portion of the costs of the construction and acquisition of the Public Infrastructure Improvements, which shall be repaid from assessments imposed on the real property included within the ID.

- D. In order to reimburse the Landowner for a portion of the additional financial burdens of the development of the Property under the Development Agreement and this Agreement, to convey the Contribution Parcel to the City, to pay for construction of Public Infrastructure Improvements, and the additional costs and expenses that were incurred or will be incurred by the Landowner to remediate the soil conditions that affected, and currently affect, the Property, the City has agreed to rebate to the Landowner a portion of the transaction privilege taxes generated from the Property.
- E. The City believes that the development of the Property is appropriate, and that such development will generate substantial transaction privilege tax revenues for the City, which revenues would not be generated without such development. The City has also determined that the contemplated development of the Property will generate substantial nonmonetary benefits for the City and its citizenry, including, without limitation, the invigorization of an underutilized portion of the City, the redevelopment of a former industrial site, the creation of new jobs, the reconfiguration and improvement of inadequate public infrastructure, the development of new residential dwelling units, and otherwise promoting growth and commercial vitality within the City.
- F. The parties acknowledge that this Agreement is subject and subordinate to the terms and conditions of the Development Agreement in all respects, and that nothing contained in this Agreement shall be deemed to modify or amend any of the terms, covenants, conditions or provisions set forth in the Development Agreement, which shall continue to govern and control the rights, duties and obligations of the parties thereto as set forth therein.
- G. The parties acknowledge that this Agreement constitutes a "Development Agreement" within the meaning of Arizona Revised Statutes §9-500.05, and that, accordingly, it shall be recorded against the interest of Landowner in the Property in the Office of the Coconino County Recorder to give notice to all persons of its existence and of the parties' intent that the burdens and benefits contained herein be binding on and inure to the benefit of the parties and all their successors in interest and assigns.

NOW, THEREFORE, in consideration of the mutual promises and obligations set forth in this Agreement, and for good and valuable consideration, the parties agree as follows:

A G R E E M E N T

1. **Recitals.** The recitals set forth above are acknowledged by the parties to be true and correct and are incorporated in this Agreement by this reference.
2. **Performance of Obligations Under Development Agreement; Development of Project.** The rights of the Landowner to receive the benefits of this Agreement shall be conditioned upon and subject to performance by the Landowner or its permitted successors(s) in interest

as owners of the Property of all of its duties and obligations under the Development Agreement. In connection therewith, the Landowner hereby acknowledges, covenants and agrees that it shall develop the Project in accordance with the Development Agreement and that the right of the Landowner, or a subsequent owner of the Property that qualifies as a "Qualified Successor" (as described in *Section 4(ii)* below), to receive the Sales Tax Rebates described in *Section 4* below is expressly conditioned upon the development of the Project as described in the Development Agreement and required by City Ordinance No. 2006-13, as amended by City Ordinance No. 2006-31, and in accordance with the Aspen Park Revised Master Plan, as may be further refined in one or more preliminary site plans and final site plans to be submitted by the Landowner to the City for review and approval in accordance with the City's normal and customary review process.

3. **Improvement District; Assessments; Letter of Credit.**

- 3.1. Issuance of ID Bonds; Developer's Obligation for Funded Construction Shortfall. Special assessment bonds ("ID Bonds") may be issued by the City in a maximum amount not to exceed \$20,000,000.00 for the purpose of generating proceeds to pay for a portion of the costs of the construction of the Public Infrastructure Improvements. The Landowner hereby acknowledges that the maximum amount of the ID Bonds which may be issued by the City, after paying for incidental expenses and providing for capitalized interest, will not produce sufficient proceeds to pay for 100% of the costs and expenses of the Public Infrastructure Improvements and that all additional costs and expenses shall be the Landowner's sole responsibility, notwithstanding that the City will enter into the construction contract for the Public Infrastructure Improvements. In connection therewith and, contemporaneously with the original issuance and delivery of the ID Bonds, if issued, the Landowner shall remit to the City, to be held by the City in a special fund pursuant to A.R.S. §48-597(G) together with the proceeds available from the issuance of the ID Bonds (the "Available Bond Proceeds"), immediately available funds in an amount equal to the difference between (a) the Available Bond Proceeds, and (b) the amount of the costs of construction of the Public Infrastructure Improvements, incidental expenses of the ID and capitalized interest for the ID Bonds as assessed in connection with the issuance of the ID Bonds (the "Funded Construction Shortfall"). The City shall use the Funded Construction Shortfall solely for payment of the costs and expenses of the Public Infrastructure Improvements and prior to using the Available Bond Proceeds therefor. The City shall provide to the Landowner copies of all progress payment requests received by the City from the contractor that is awarded the construction contract for the Public Infrastructure Improvements. In the event that the final costs and expenses of the Public Infrastructure Improvements exceeds the amount of the Available Bond Proceeds and the Funded Construction Shortfall, whether as a result of change orders or otherwise, the Landowner shall be responsible for payment of all such additional costs and expenses, which amounts shall be paid by Developer to the City within thirty (30) days after the Landowner's receipt of a written invoice or statement therefor from the City, together with reasonable evidence of the incurrence of such additional costs and expenses. The City shall provide to the Landowner copies of any change order requests submitted by the contractor under the construction contract for the Public Infrastructure Improvements, and if any such

change order would require the Landowner to pay costs and expenses in excess of the Funded Construction Shortfall, then the Landowner shall have the right to approve such change order prior to the City's execution thereof, which approval shall not be unreasonably withheld, and which shall be deemed given if the Landowner does not object to such change order within ten (10) days after Landowner's receipt thereof. If the Landowner reasonably objects to any such change order request, then prior to executing such change order, the City shall meet with the Landowner and the contractor in an effort to resolve the Landowner's issues and concerns with respect to such change order; provided, however, that the City shall be the ultimate arbiter of whether or not any such change order submitted by the contractor is appropriate and should be approved for the proper and complete construction of the Public Infrastructure Improvements; and, provided further, that without the prior written consent of the Landowner, the City shall not authorize any change to the construction specifications for the Public Infrastructure Improvements that would effect a material change in the scope or nature of the Public Infrastructure Improvements.

- 3.2. Assessments Against Property. The Landowner acknowledges and agrees that the obligation for payment of the ID Bonds shall be secured by all of the Property (except for the Contribution Parcel), which shall be subject to the payment of assessments and, in connection therewith, the Landowner shall execute and deliver all such documentation which may be necessary to cause such assessments to be imposed against such portions of the Property as contemplated herein, including, without limitation, an Improvement District Development and Waiver Agreement in form and substance mutually acceptable to the City and Landowner.
- 3.3. ID Letter of Credit. Contemporaneously with the original issuance and delivery of the ID Bonds, the Landowner shall deliver to the City either of the following: (a) an unconditional, irrevocable, standby letter of credit (the "ID LOC"), in form and substance acceptable to the City, and issued to the City as the sole beneficiary thereof by an FDIC-insured financial institution or other financial institution acceptable to the City and maintaining a Moody's Investor Services rating of at least "Baa" (the "Minimum Rating Requirement"), in an amount equal to ten percent (10%) of the original principal amount of the ID Bonds, or (b) an unconditional and irrevocable written commitment (the "LOC Commitment"), in form and substance acceptable to the City, and executed by an FDIC-insured financial institution or other financial institution acceptable to the City and satisfying the Minimum Rating Requirement, committing to issue an ID LOC to the City, in a form acceptable to the City and to be attached to the LOC Commitment, and in the amount set forth above. If the Developer provides an LOC Commitment instead of the ID LOC, then the following additional terms and conditions shall apply:
 - (i) The LOC Commitment shall provide that the City is an intended third-party beneficiary thereof, and shall provide that the City shall have the express right to enforce the obligations of the financial institution providing the LOC Commitment to issue the ID LOC as contemplated herein;

- (ii) The fee to be charged by the financial institution that provides the LOC Commitment in connection with the issuance of the ID LOC shall either be prepaid by the Landowner to such financial institution, or deposited in cash with the City for use by the City in connection with the issuance of the ID LOC as and when required hereunder;
- (iii) The LOC Commitment shall provide that the ID LOC shall be issued no later than thirty (30) days after the City provides notice to the Developer and the financial institution providing the LOC Commitment that all capitalized interest held by the City from the issuance of the ID Bonds will be exhausted within said 30-day period;
- (iv) The City shall be provided with evidence satisfactory to the City, which may include a legal opinion issued by legal counsel acceptable to the City, that the obligations of the financial institution issuing the LOC Commitment shall not be affected by any default by the Landowner under any loan agreements or other contracts or agreements entered into between such institution and the Landowner, including, without limitation, the bankruptcy of Landowner; and
- (v) If, for any reason, the financial institution providing the LOC Commitment fails to issue the ID LOC in the form and amount required pursuant hereto or the Landowner does not provide the City with immediately available funds in an amount equal to ten percent (10%) of the original principal amount of the ID Bonds within the 30-day period described in *clause (iii)* above, then in addition to all other rights and remedies available to the City against the financial institution providing the LOC Commitment for the failure of such party to honor the LOC Commitment, the Landowner's right to receive the Sales Tax Rebates hereinafter described in *Section 4* below shall be suspended until such time as the ID LOC has been issued in the form and amount required pursuant to the terms of the LOC Commitment, or the Landowner provides the City with immediately available funds in an amount equal to ten percent (10%) of the original principal amount of the ID Bonds.

3.4. Requirements of and Rights of City with Respect to Letter of Credit. The ID LOC provided by Landowner shall conform to the following requirements, and the City shall have the following rights with respect thereto:

- 3.4.1. The issuer of the ID LOC shall satisfy the Minimum Rating Requirement, and the Landowner shall be responsible for all costs and expenses incurred in connection with the issuance of the ID LOC, as well as all renewal fees.
- 3.4.2. The ID LOC shall be automatically renewable for additional consecutive one (1) year periods until construction of all retail components of the Project has been completed and eighty percent (80%) of the retail space within the Project has been leased to tenants, and such tenants are open and operating the entirety of their leased premises for business to the public in accordance with industry standards.

- 3.4.3. The ID LOC must require the issuer thereof to notify the City in writing at least sixty (60) days in advance of any nonrenewal of the ID LOC.
- 3.4.4. The City shall have the right to draw the entire amount of the ID LOC upon the occurrence of any one of the following events if and to the extent applicable:
- (a) The receipt by the City of notice from the issuer of the ID LOC that the ID LOC will not be renewed, and the City has not received, (a) at least thirty (30) days prior to the expiration of such ID LOC, a replacement ID LOC identical in all material respects to the ID LOC that is expiring and issued by an FDIC-insured bank or other financial institution reasonably acceptable to the City and satisfying the Minimum Rating Requirement, together with (i) evidence of the rating of the issuer thereof, and (ii) an opinion of counsel reasonably satisfactory to the City with respect to the validity and enforceability of the replacement ID LOC, which shall include an opinion to the effect that such replacement ID LOC will not cause interest on the ID Bonds to become includable in gross income for federal income tax purposes or (b) at least five (5) days prior to the expiration of the ID Letter of Credit, immediately available funds in amount equal to ten percent (10%) of the original principal amount of the ID Bonds to be held and applied by the City for the purpose of paying any assessments payable by the Landowner in connection with the ID Bonds which are not paid as and when due.
 - (b) Landowner's nonpayment, when due, of any amount required to be paid with respect to the assessments payable by the Landowner at the time the assessment is due in connection with the ID Bonds. If the City draws upon the ID LOC for the purpose of paying any assessments payable by the Landowner with respect to the ID Bonds, then, unless the Landowner has satisfied the requirements set forth in *Section 3.4.2* above, the Landowner shall provide to the City a replacement ID LOC, or in the alternative a cash deposit, in an amount equal to ten percent (10%) of the original principal amount of the ID Bonds, not later than thirty (30) days after the City provides written notice to the Landowner that the proceeds received by the City's draw on the ID LOC for payment of such assessments will be exhausted within said 30-day period.
 - (c) A reduction in the rating applicable to the issuer of the ID LOC below the Minimum Rating Requirement without the City having received within sixty (60) days after such reduction either (i) a replacement ID LOC identical in all material respects to the ID LOC originally provided by Landowner and issued by an FDIC-insured bank or other financial institution acceptable to the City and satisfying the Minimum Rating Requirement, or (ii) immediately available funds in an amount equal to ten percent (10%) of the original principal amount of the ID

Bonds. Concurrently with the delivery of a replacement ID LOC to the City, the Landowner shall provide the City with (A) evidence of the rating of the issuer thereof, and (B) an opinion of counsel reasonably satisfactory to the City with respect to the validity and enforceability of the replacement ID LOC, which shall include an opinion to the effect that such replacement ID LOC will not cause interest on the ID Bonds to become includable in gross income for federal income tax purposes.

4. **Sales Tax Rebate.** Subject to the terms, conditions and limitations set forth in this Agreement, the City hereby acknowledges and agrees that it shall rebate to the Landowner fifty percent (50%) of all unrestricted transaction privilege ("sales") taxes imposed by the City (currently in the amount of 1.266%) and generated from all taxable activity within the Property (herein, the "Sales Tax Rebate") until the first to occur of the following dates or events:

- (a) The Landowner has received aggregate Sales Tax Rebates in an amount equal to \$9,000,000.00; or
- (b) The tenth (10th) anniversary of the date of this Agreement if development of the Project has not been substantially completed as of the tenth (10th) anniversary of the date of this Agreement (substantial completion meaning that at least eighty percent (80%) of the retail improvements contemplated to be developed pursuant to the Aspen Park Revised Master Plan as described in the Development Agreement have been completed and the City has issued a final certificate of occupancy for the retail portion of the Project); or
- (c) The twentieth (20th) anniversary of the date of this Agreement.

The Landowner hereby acknowledges that the transaction privilege taxes which are subject to the Sales Tax Rebate shall be limited to the "unrestricted" transaction privilege taxes which may be imposed by the City, which excludes the following restricted components of the "transportation" sales tax of the City:

"Transit Improvements" (0.175%); and

"Fourth Street Improvements" (0.16%).

In addition, the transaction privilege taxes imposed by the City and subject to the Sales Tax Rebate shall not include any additional restricted transaction privilege taxes which may be imposed by the City after the date of this Agreement.

The Sales Tax Rebate payable to Landowner shall be calculated and paid to the Landowner on a semiannual basis during the term of this Agreement, commencing with that date that is six (6) full calendar months following the end of the month when construction starts within the Property; provided, however, that as a condition precedent to the receipt of each semiannual installment of Sales Tax Rebate, semiannual assessments payable with respect to the ID Bonds shall have been paid in full, which semiannual assessment must be paid in its entirety regardless of whether or not any Sales Tax Rebate is then payable to Landowner under this Agreement and regardless of the amount of such Sales Tax Rebate. In the event

that any such semiannual assessment is not paid in full when due, then, in addition to all other rights and remedies available to the City under this Agreement or otherwise, including, without limitation, the right of the City to draw upon the ID LOC to be provided by Landowner to the City pursuant to *Section 3.3* above, the City shall retain the Sales Tax Rebate applicable to such semiannual period and shall not be obligated to remit such Sales Tax Rebate to the Landowner until such time as the applicable semiannual assessment has been paid in full; at that time the amount withheld must be remitted to the Landowner. Nothing in this Agreement shall be construed as requiring the City to remit any Sales Tax Rebate to the Landowner until such time as transaction privilege tax revenues are actually generated and received by the City from taxable activities occurring within the Property.

Notwithstanding anything contained in the foregoing or elsewhere in this Agreement to the contrary, the Sales Tax Rebate payable to Landowner shall be subject to the following conditions and limitations:

- (i) Sales Taxes Realized from Relocated Businesses. In the event that any commercial business currently operating within the City and paying transaction privilege taxes to the City is relocated from its existing location to the Property, then the Sales Tax Rebate applicable with respect to the transaction privilege taxes payable by such relocated business shall be limited to fifty percent (50%) of the increase, if any, in the unrestricted transaction privilege taxes paid by such relocated business from its operations within the Property as compared to its current location within the City. In order to determine whether or not any such relocated business is paying more transaction privilege taxes from its operations within the Property than from its current location within the City, the monthly average transaction privilege taxes paid by such relocated business (based upon its last twenty-four (24) calendar months of operation in its current location) shall be used (such monthly average for each calendar month to be compared with the current calendar month shall hereinafter be referred to as the "Monthly Base Tax Amount"). During the term of this Agreement, the transaction privilege taxes paid by each relocated business from its operations within the Property shall be compared, for each calendar month, to its Monthly Base Tax Amount for purposes of determining whether or not such relocated business has paid more transaction privilege taxes for such calendar month from its operations within the Property as compared to its current location. For example, the average of the transaction privilege taxes paid for the last two Decembers the relocated business was in its former location within the City will be compared to the transaction privilege taxes paid during the current December.
- (ii) Assignability. The Sales Tax Rebate provided by the City to the Landowner pursuant to this Agreement may not be assigned by the Landowner to any other party, including any successor owner of the Property or any portion thereof, without the City's approval of such successor owner (and the manager or operator of the portion of the Project being sold if the successor owner will not manage or operate the portion of the Project being sold), which approval shall not be unreasonably withheld. The Landowner shall provide the City notice as provided in *Section 12.1* of any such proposed assignment and the identity of the successor (and manager or operator, if applicable), together with information regarding the successor, including such successor's experience in developing, leasing, operating and maintaining mixed-use

commercial and residential projects. If the City does not notify the Landowner within thirty (30) days after the City's receipt of notice of any such assignment that the successor and manager is not approved, then the successor and manager shall be deemed approved. Any successor (and manager or operator) approved or deemed approved by the City shall herein be referred to as a "Qualified Successor." If the right of the Landowner to receive the Sales Tax Rebate will not be assigned by the Landowner to a successor-in-interest, the City's approval of the Landowner's successor (and manager or operator) shall not be required; provided, however, that until such time as eighty percent (80%) of the retail space within the Project is leased to tenants and such tenants are open and operating their premises for business to the public, no conveyance or transfer of the Landowner's fee simple title in and to the Project or any portion thereof, other than conveyances or transfers of the residential portion(s) of the Project and retail pads to end-users, shall be permitted without the City's prior approval of the Landowner's successor (and manager or operator).

- (iii) Effect of Expiration of Transaction Privilege Tax. Landowner hereby acknowledges that the unrestricted transaction privilege taxes currently imposed by the City will automatically expire on November 4, 2014 (except that the "safe-to-school improvements" and "street improvements" components of the transportation sales tax of the City expire on June 30, 2020), unless such unrestricted transaction privilege taxes are reauthorized pursuant to a public election held prior to their applicable termination date. In the event that any such unrestricted transaction privilege taxes are not reauthorized, then the Landowner's right to receive the Sales Tax Rebate to the extent based on any such unrestricted transaction privilege taxes which have expired shall automatically terminate on the applicable termination date; provided, however, that the Landowner shall be entitled to receive any Sales Tax Rebates which have accrued but not yet been paid to Landowner with respect to all taxable activities occurring within the Property prior to such termination date and, provided further, if any unrestricted privilege taxes not reauthorized are subsequently reauthorized and imposed by the City the Landowner shall again be entitled to receive the Sales Tax Rebate for that tax.

5. **Conveyance of Contribution Parcel.** As a material part of the consideration to the City for the agreement of the City to form the ID and to provide the Sales Tax Rebates to Landowner as provided in this Agreement, and as a condition to the Landowner's right to receive the Sales Tax Rebates as provided herein, Landowner hereby acknowledges and agrees that it shall convey fee simple title to the Contribution Parcel to the City, by special warranty deed, free and clear of all liens and encumbrances. Such conveyance shall occur not later than that date that is the first to occur of (a) the commencement of construction of any Public Infrastructure Improvements, or (b) that date that is six (6) months after the date of this Agreement. Except to the extent that the Landowner shall convey fee simple title to the Contribution Parcel to the City free and clear of all liens and encumbrances, the City hereby agrees that it shall accept the Contribution Parcel in its existing "as is," "where is" condition without representation or warranty from the Landowner.
6. **Infrastructure Plans.** As a material part of the consideration to the City under this Agreement, Landowner shall assign to the City, on a nonexclusive basis, the infrastructure plans and specifications prepared for the Landowner by Carter Burgess for the Public

Infrastructure Improvements described in the Development Agreement; provided, however, that such assignment shall be subject to the payment to the Landowner of its costs and expenses incurred in connection with the preparation of such plans and specifications from the proceeds of the ID Bonds, not to exceed \$500,000.00. Upon receipt of such payment, the Landowner shall assign to the City all of its right, title and interest in and to such plans and specifications, and shall provide an acknowledgment executed by Carter Burgess to the effect that the City shall be entitled to rely thereon in all respects, and shall be the beneficiary of all representations, warranties, guaranties, indemnities and other agreements made by Carter Burgess with respect thereto.

7. **Ongoing Maintenance of Improvements Constructed Within Public Right-of-Way.** The Landowner hereby acknowledges and agrees that if the Landowner desires to construct any improvements within, or which may encroach into, any public rights-of-way within the Project (such as signage, awnings, overhangs, colonnades, outdoor seating areas and the like), then the Landowner shall be required to obtain appropriate encroachment permits and easements from the City, the issuance of which shall be subject to such reasonable conditions as may be imposed by the City in order to protect and preserve all public improvements constructed within such public rights-of-way. In addition, and as shall be more specifically set forth in any such encroachment permit and/or easement, the Landowner shall be responsible, at its sole cost and expense, for all maintenance, repair and replacement of all such improvements constructed within, or which encroach into, all public rights-of-way within the Project, and shall indemnify, defend and hold harmless the City and its council members, employees, agents and contractors, for, from and against any and all losses, costs, damages, injuries and liabilities arising directly or indirectly from the use of such rights-of-way by the Landowner for any purposes permitted by such encroachment permit and/or easement.
8. **Mutual Benefits.** The City and Landowner agree that in making the promises contained in this Agreement certain benefits and advantages will accrue to both parties as a result of the performance of this Agreement and that, therefore, this Agreement is being entered into in reliance upon the mutual benefits afforded each of the parties.
9. **Dispute Resolution**
 - 9.1. Dispute Resolution. If a dispute arises out of or relates to this Agreement 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. The Landowner and the City agree that **Section 9** is a dispute resolution process as described in Ariz. Rev. Stat. Ann. §12-821.01.C.
 - 9.2. Mediation Procedure. Mediation will take place in Flagstaff, Arizona, be self-administered and be 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, with the exception of the mediator selection provisions, unless other procedures are agreed upon by the parties.

- 9.2.1. Commencement of Mediation. Either party may refer the dispute to mediation by sending by U.S. mail, certified and return receipt requested, to the other party or parties a written notice (the "Mediation Notice") calling on the other party or parties to proceed to mediation. The party or parties who have received a Mediation Notice shall contact the party calling for mediation seven (7) days from receipt of the Notice to confirm receipt of the Mediation Notice and to begin the mediator selection process.
- 9.2.2. Mediator Selection. Unless the parties agree otherwise, the parties shall select the mediator(s) from the roster of attorney mediators trained under the Alternative Dispute Resolution Program of the Coconino County Superior Court. If the parties are unable to agree upon a mediator within fourteen (14) days of the confirmation of receipt of Mediation Notice, each party shall independently inform the Director of the Alternative Dispute Resolution Program of the Coconino County Superior Court (the "Director") of three attorney mediators from that roster that are acceptable to the party, and further, inform the Director of any preference as to matters such as whether co-mediation is preferable, mediation style, subject matter expertise, or other factors pertinent to the case. The Director shall then select one or more attorney mediators from the parties' lists or such other attorney mediator(s) from the above noted roster as the Director may deem, in the Director's sole discretion, appropriate under the circumstances.
- 9.2.3. Fees and Costs. Each party agrees to bear its own fees and costs in mediation. The parties shall enter into a written agreement with the mediator(s) regarding the mediator(s)' fees and expenses before the first mediation session. The parties shall share equally the mediators' fees and mediation expenses.
- 9.2.4. Subsequent or Contemporaneous Contracts. The parties shall include this provision in all subsequent or contemporaneous contracts relative to this matter, absent specific written agreement of the parties otherwise.
- 9.3. Participation in Mediation. The parties agree to encourage participation in mediation by all relevant parties. The parties will not be obligated to mediate if an indispensable party is unwilling to join the mediation.
- 9.4. Waiver. This section does not constitute a waiver of the parties' rights 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.
- 9.5. Litigation and Attorneys' Fees. Except as otherwise agreed by the parties or required by law, any litigation brought by either party against the other to enforce the provisions of this Agreement must be filed in the Coconino County Superior Court or in the Federal District Court in the District of Arizona. In any legal action, the prevailing party in such action will be entitled to reimbursement by the other party for all costs and expenses of such action, including reasonable attorneys' fees as may be fixed by the Court.

10. **Applicable Law.** The laws of the State of Arizona will govern the interpretation and enforcement of this Agreement.
11. **Rights and Remedies Are Cumulative.** Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by any party of one or more of such rights or remedies will not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by such defaulting party.
12. **Notices, Demands and Communications Between Parties.**
- 12.1. All notices, demands or other writings in this Agreement provided to be given, made or sent by any party to other parties will be deemed to have been fully given, made or sent when made in writing and personally delivered or deposited in the United States mail postpaid registered or certified and addressed as follows:
- | | |
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| <p>If to the City:</p> <p>City Manager
City of Flagstaff
211 West Aspen Avenue
Flagstaff, Arizona 86001</p> | <p>If to Landowner:</p> <p>Butler & Lone Tree, L.L.C.
2415 East Camelback Road, Suite 900
Phoenix, Arizona 85016
Attention: Donald L. Meyers</p> |
|---|--|
- 12.2. The address to which any notice, demand or other writing may be given, made or sent to any party may be changed by written notice as provided above.
13. **Conflicts of Interest.** No member, official or employee of the City may have any direct or indirect interest in this Agreement, nor participate in any decision relating to the Agreement which is prohibited by law. All parties acknowledge that this Agreement is subject to cancellation pursuant to the provisions of Arizona Revised Statutes § 38-511 to the extent provided therein.
14. **Warranty Against Payment of Consideration for Agreement.** Landowner warrants that it has not paid or given, and will not pay or give, any third person any money or other consideration for obtaining this Agreement, other than normal costs of conducting business and costs of professional services such as architects, consultants, engineers and attorneys.
15. **Nonliability of Officials, Partners and Employees.** No member, official or employee of the City will be personally liable to Landowner, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to Landowner or successor, or on any obligation under the terms of this Agreement.
16. **No Waiver.** Except as otherwise expressly provided in this Agreement, any failure or delay by any party in asserting any of its rights or remedies as to any default, will not operate as a waiver of any default, or of any such rights or remedies, or deprive any such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

17. **Severability.** If any provision of this Agreement shall be found invalid or unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement will not be affected thereby and shall be valid and enforceable to the fullest extent permitted by law, provided that the fundamental purposes of this Agreement are not defeated by such severability.
18. **Captions.** The captions contained in this Agreement are merely a reference and are not to be used to construe or limit the text.
19. **Entire Agreement, Waivers and Amendments.**
 - 19.1. Entire Agreement. This Agreement may be executed in up to three (3) duplicate originals, each of which is deemed to be an original. This Agreement constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof.
 - 19.2. Integration. This Agreement integrates all of the terms and conditions mentioned in or incidental to this Agreement, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter of this Agreement.
 - 19.3. Waivers and Amendments. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City or Landowner, and all amendments must be in writing and signed by the appropriate authorities of the parties.
20. **No Agency Created.** Nothing contained in this Agreement creates any partnership, joint venture or agency relationship between the City and Landowner. No term or provision of this Agreement is intended to be for the benefit of any person, firm, organization or corporation not a party, and no other person, firm, organization or corporation may have any right or cause of action under this Agreement.
21. **Additional Documents.** City and Landowner each agree to execute and deliver all documents and take all actions reasonably necessary to implement and enforce this Agreement.
22. **Default.** In the event of default under any provision of this Agreement, the nondefaulting party shall have all remedies available to it at law or in equity, subject to the provisions of *Section 9* of this Agreement.
23. **Governing Statutes.** References are made in this Agreement to specific sections of the Arizona Revised Statutes. Any such references mean the statute in effect on the date of the execution of this Agreement and any subsequent renumbering or reordering of those provisions.
24. **Equal Employment Opportunity.**
 - 24.1. In connection with its performance under this Agreement, Landowner shall not discriminate against any worker, employee or applicant, or any member of the public,

because of race, color, religion, gender, national origin, age or disability nor otherwise commit an unfair employment practice. Landowner will also take affirmative action to ensure that applicants are employed, and employees dealt with during employment without regard to their race, color, religion, gender or national origin, age or disability. Such action may include but is not limited to the following: employment, promotion, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training; including apprenticeship as well as all labor organizations furnishing skilled, unskilled and union labor, or who may perform any such labor or services in connection with this contract.

- 24.2. Landowner further agrees that this clause will be incorporated in all subcontracts of this Agreement not yet entered into by Landowner in furtherance of this Agreement.
25. **Changes in Ownership, Management and Control of Landowner.** Landowner represents and agrees that its undertakings pursuant to this Agreement are, and will be, for the purpose of development of the Property and not for speculation in landholding. No voluntary or involuntary successor in interest to may acquire any rights under this Agreement except as expressly set forth in this Agreement.
26. **Duration of Agreement.** The term of this Agreement will commence on the date first set forth above and, subject to all other terms and conditions of this Agreement, will terminate in accordance with the provisions set forth in *Section 4* above.
27. **Compliance with All Laws.** Landowner will comply with all applicable Federal, State, County and City laws, regulations and policies.

SIGNATURE PAGES FOLLOW

IN WITNESS WHEREOF, the parties have executed this Development Incentive Agreement through their representatives duly authorized to execute this document and bind their respective entities to the terms and obligations contained in this Agreement on the day and year first written above.

Attest:

CITY OF FLAGSTAFF, an Arizona municipal corporation

Margie Brown
City Clerk

By Joseph C. Donaldson
Joseph C. Donaldson, Mayor

Approved as to form:

Jana H. Kjellgren for
City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF COCONINO)

On this 15th day of June, 2007, before me, the undersigned officer, personally appeared Joseph C. Donaldson, who acknowledged himself to be the Mayor of the CITY OF FLAGSTAFF, an Arizona municipal corporation:

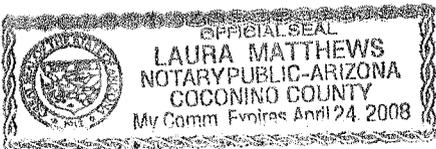
X whom I know personally;
_____ whose identity was proven to me on the oath of _____, a credible witness by me duly sworn;
_____ whose identity I verified on the basis of his _____,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

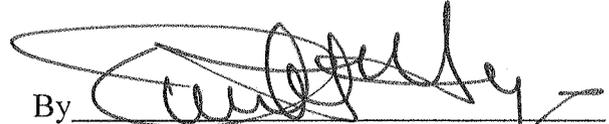
Laura Matthews
Notary Public



BUTLER & LONE TREE, L.L.C., an Arizona limited liability company

By: ASPEN ENTERPRISES, LLC, an Arizona limited liability company, its Managing Member

By: D.L. MEYERS, INC., an Arizona corporation, its Manager

By 
Donald L. Meyers, President

STATE OF ARIZONA)
) ss.
COUNTY OF Maricopa)

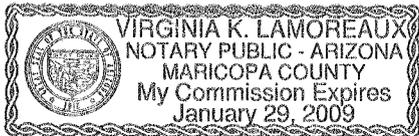
On this 13th day of June, 2007, before me, the undersigned officer, personally appeared Donald L. Meyers, who acknowledged himself to be the President of D.L. MEYERS, INC., an Arizona corporation, the Manager of ASPEN ENTERPRISES, LLC, an Arizona limited liability company, the Managing Member of BUTLER & LONE TREE, L.L.C., an Arizona limited liability company:

X whom I know personally;
_____ whose identity was proven to me on the oath of _____,
a credible witness by me duly sworn;
_____ whose identity I verified on the basis of his _____,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:



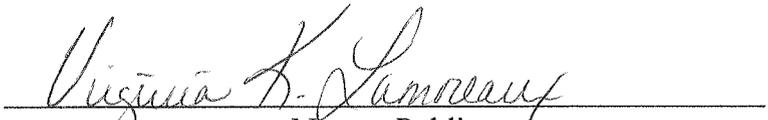

Notary Public

EXHIBIT "A"

LEGAL DESCRIPTION OF REAL PROPERTY
IN THE IMPROVEMENT DISTRICT

A portion of the Northwest quarter of Sections 22, Township 21 North, Range 7 East, Gila and Salt River Base and Meridian, City of Flagstaff, Coconino County, Arizona further described as follows:

BEGINNING at the intersection of the centerlines of Butler Avenue and Elden Street;

Thence southerly along the centerline of Elden Street to a point on the westerly prolongation of the southerly right of way line of Butler Avenue;

Thence easterly along the westerly prolongation of the southerly right of way line of said Butler Avenue and the southerly right of way line of said Butler Avenue to the northeast corner of Coconino County Assessor Parcel No. 104-01-013A;

Thence southerly along the easterly line of said Parcel No. 104-01-013A to the southeast corner of said Parcel;

Thence westerly along the southerly line of said Parcel No. 104-01-013A and the westerly prolongation thereof to a point on the centerline of said Elden Street;

Thence southerly along the centerline of said Elden Street and the centerline of Lone Tree Road to the point of intersection of the westerly prolongation of the southerly right of way line of Sawmill Road;

Thence easterly along the westerly prolongation of the southerly right of way line of Sawmill Road and the southerly right of way line of said Sawmill Road to a point lying southerly of the intersection of Sawmill Road and Granite Lane (now Savile Lane);

Thence continuing along the southerly right of way line of said Sawmill Road along a curve to the northeast said line being the southeasterly right of way line of said Sawmill Road and along the easterly right of way line of said Sawmill Road to a point on the southerly right of way line of said Butler Avenue;

Thence continuing northerly along the northerly prolongation of the easterly right of way line of said Sawmill Road to a point on the northerly right of way line of said Butler Avenue;

Thence westerly along the northerly right of way line of said Butler Avenue and the westerly prolongation across any street or alley to a point on the centerline said Elden Street;

Thence southerly along the said centerline of said Elden Street to the TRUE POINT OF BEGINNING;

EXCEPTING THEREFROM any portion dedicated as public right of ways.

EXHIBIT "B"

DESCRIPTION OF PROPOSED IMPROVEMENTS

The Improvements will include the furnishing of all labor, materials, transportation, services and equipment necessary to grade the site and construct asphaltic concrete pavement, concrete curbs, gutters, ribbon curbs, median improvements, driveways, sidewalks, sidewalk ramps, valley gutters and aprons, alley entrances, trail improvements, storm drain facilities, water facilities, reclaimed water facilities, sanitary sewer facilities, landscaping and irrigation improvements, signing and striping improvements, dry utility improvements, and street lighting and traffic signals together with all necessary adjuncts and appurtenances with respect to the following streets:

- Elden Street from Butler Avenue to Lone Tree Road
- Lone Tree Road from Butler Avenue to Sawmill Road
- Butler Avenue from Elden Street to Sawmill Road
- Sawmill Road from Butler Avenue to Lone Tree Road
- Churchill Drive from Lone Tree Road to Windsor Lane
- Kensington Drive from Buckingham Lane to Savile Lane
- Alley from Buckingham Lane to Windsor Lane between Kensington Drive and Franklin Avenue
- Buckingham Lane from Kensington Drive to Sawmill Road
- Alley from Buckingham Lane to Windsor Lane between Kensington Drive and Franklin Avenue
- Franklin Avenue from Lone Tree Road to Windsor Lane
- Alley from Buckingham Lane to Windsor Lane between Franklin Avenue and Jackson Drive
- Jackson Drive from Buckingham Lane to Savile Lane
- Alley between Buckingham Lane to Savile Lane between Jackson Drive and Sawmill Road
- Windsor Lane from Butler Avenue to Sawmill Road
- Carridge Lane from Jackson Drive to Sawmill Road
- Savile Lane from Kensington Drive to Sawmill Road
- Regent Street between Butler Avenue and Piccadilly Drive
- Cambridge Lane between Butler Avenue and Barrow Avenue
- Piccadilly Drive between Windsor Lane and Cambridge Lane
- Kensington Drive between Cambridge Lane and Sawmill Road
- Alley between Cambridge Lane and Sawmill Road between Kensington Drive and Barrow Avenue
- Barrow Avenue between Savile Lane and Sawmill Road

CONSENT

A-2005-0401.1

The City of Flagstaff, an Arizona municipal corporation (the "City"), hereby consents to the Assignment of the rights of Aspen Place North, L.L.C. ("Borrower") to National Bank of Arizona ("Lender") to certain financial incentives arising under that Development Incentive Agreement dated as of June 1, 2007, between Butler & Lone Tree, L.L.C. and the City of Flagstaff (the "Development Incentive Agreement"), and subsequently assigned to Borrower. The City agrees to perform its obligations under the Development Incentive Agreement to and for the benefit of Lender in the event Lender succeeds to the interest of Borrower under the Development Incentive Agreement.

In the event Lender shall ever become the owner of the rights and interests of Borrower in and to the real property owned by Borrower and subject to the Development Incentive Agreement (the "Property") and the Development Incentive Agreement by reason of judicial foreclosure, nonjudicial trustee's sale or other proceedings brought by Lender to enforce its rights under the Loan Documents, or through any other means or manner in connection with the Loan, then so long as Lender engages a manager or operator of the Property approved by the City for the purpose of managing and operating the Property while it is owned by the Lender, Lender shall be deemed to be a Qualified Successor under the Development Incentive Agreement shall be entitled and subject to all rights, benefits, privileges, and obligations of Borrower under the Development Incentive Agreement to the same extent as Borrower is then entitled and obligated, so long as Lender cures any existing uncured defaults by Borrower thereunder; and the City shall be bound to Lender under all of the terms, covenants and conditions of the Development Incentive Agreement, all without the need to execute any further instruments on the part of the City, Borrower or Lender to make such succession and assignment effective and binding upon the City. Notwithstanding anything contained herein, if Lender acquires title to the Property, Lender will not transfer any of the Property without the City's prior approval of the successor owner as provided in the Development Incentive Agreement.

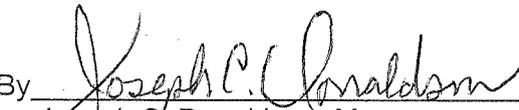
Dated: June 29, 2007

Attest:

CITY OF FLAGSTAFF, an Arizona municipal corporation



City Clerk

By 

Joseph C. Donaldson, Mayor

Approved as to form:



City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF COCONINO)

On this 29 day of June, 2007, before me, the undersigned officer, personally appeared Joseph C. Donaldson, who acknowledged himself to be the Mayor of the CITY OF FLAGSTAFF, an Arizona municipal corporation:

X whom I know personally;
_____ whose identity was proven to me on the oath of _____, a credible witness by me duly sworn;
_____ whose identity I verified on the basis of his _____,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Laura Matthews
Notary Public

