

ADOPTED BY THE  
MAYOR AND COUNCIL

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RESOLUTION NO. 21047

RELATING TO DEVELOPMENT; APPROVING AND AUTHORIZING THE OPERATIONAL AGREEMENT FOR THE EL MIRADOR PARKING GARAGE; APPROVING THE FIRST AMENDMENT TO THE DEVELOPMENT AND SALE AGREEMENT WITH TOWN WEST DESIGN DEVELOPMENT, INC. FOR THE DEVELOPMENT OF THE EL MIRADOR DEVELOPMENT PROJECT; AND DECLARING AN EMERGENCY.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. The Operational Agreement for the El Mirador Parking Garage, attached hereto as Exhibit A, is approved.

SECTION 2. The First Amendment to the Development and Sale Agreement for the El Mirador Development Project with Town West Design Development, Inc., attached hereto as Exhibit B, is approved.

SECTION 3. The Mayor is authorized and directed to execute the Operational Agreement and the First Amendment to the Development and Sale Agreement for and on behalf of the City of Tucson and the City Clerk is directed to attest to the same.

SECTION 4. The various City officers and employees are authorized and directed to perform all acts necessary or desirable to give effect to this resolution.

SECTION 5. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson that this resolution become immediately effective, an emergency is declared to exist and this resolution shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona on \_\_\_\_\_.

\_\_\_\_\_  
MAYOR

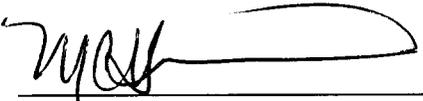
ATTEST:

\_\_\_\_\_  
CITY CLERK

APPROVED AS TO FORM:

  
\_\_\_\_\_  
CITY ATTORNEY

REVIEWED BY:

  
\_\_\_\_\_  
CITY MANAGER

MR/dc  
7/31/2008 9:28 AM

## **OPERATIONAL AGREEMENT FOR THE EL MIRADOR PARKING GARAGE**

This Operational Agreement for the El Mirador Parking Garage (the "Agreement") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2008, between the City of Tucson ParkWise Program (herein called "ParkWise"), the City of Tucson, a municipal corporation (the "City") and Town West Design Development, Inc., an Arizona corporation, and/or assigns (herein called "Developer"). ParkWise and Town West Design Development, Inc. are sometimes collectively referred to in this Agreement as the "Parties."

### ***RECITALS***

WHEREAS, the City and Developer executed a Development and Purchase Agreement for the El Mirador Project (the "Project") dated November 27, 2007 (the "Development Agreement"); and any properly executed amendments thereto, that will cause the construction of the El Mirador Parking Garage (the "Garage"); and

WHEREAS, this Agreement is intended to describe the rights and obligations of the Parties regarding the development, operation and maintenance of the Garage only; and

WHEREAS, ParkWise certifies that its staff has special knowledge, experience, personnel, and expertise to manage, operate, and maintain the Garage in an efficient and safe manner:

NOW, THEREFORE, based on the foregoing recitals, which are incorporated herein as the intention of the Parties in entering into this Agreement, and for good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the Parties hereto agree as follows:

### ***AGREEMENT***

1. *Defined Terms.* Unless provided otherwise herein, the defined terms used in the Development Agreement shall have the same meaning in this Agreement.

2. *El Mirador Garage Development.* The terms of the construction of the Garage are as follows:

- A. ParkWise shall construct, or cause to be constructed, the Garage unless Developer exercises its option to construct the Garage pursuant to the terms set forth below. Developer shall provide ParkWise with written notice of its intent at least Two Hundred Ten (210) days prior to the time that Developer plans to commence its construction activities at the Project. The notice of intent shall, at a minimum, include the amount of the guaranteed maximum price, a conceptual site design and development schedule as provided in the following paragraph. ParkWise may then elect, within Thirty (30) days of receipt of the notice, within its sole discretion, to preempt Developer's option and construct the Garage. In that event, ParkWise shall schedule construction to be complete at the same time that Developer completes its first component of the Project and that component is ready for occupancy.
- B. Subject to the provisions of the preceding paragraph, the Developer shall have the option to construct, or cause to be constructed, the Garage in accordance with the terms set forth below. In the event that the Developer exercises its option to construct, or cause to be constructed, the Garage, the following provisions shall apply:
1. The Developer shall construct, or cause to be constructed, the Garage in accordance with A.R.S. Title 34 (the "State Procurement Code").
  2. The Developer shall construct, or cause to be constructed, the Garage in accordance with all applicable City Codes, the Building Permit and the approved Concept Plan.
  3. The Concept Plan shall be approved when the following documents and approvals are accepted by the City:
    - a. A conceptual site design, including the size, scope and scale of the Garage.
    - b. A development schedule.
    - c. A final financing plan.

- d. The selection through the State Procurement Process of the Contractors and Design professionals for the project.
  - e. Proof of Bonding and Insurance of the Contractor.
  - f. A guaranteed maximum price contract for the Garage.
  - g. All other documents and agreements requested by the City or ParkWise.
- C. In the event that the Developer does not exercise its option to build and ParkWise is to construct the Garage, Developer shall provide all information necessary to have the Concept Plan for the Garage approved by the City at least eight (8) months prior to the date that ParkWise is to commence construction.
- D. In the event that the Developer exercises its option to construct, or cause to be constructed, the Garage then, and in that event, upon issuance of a Temporary Certificate of Occupancy (“TCOO”) for both the Project and the Garage, ParkWise shall purchase, or arrange for purchase, the Garage for its construction cost and thereafter operate the Garage, or assign its operation, in accordance with this Agreement. The Closing of this purchase shall take place within ninety (90) days from the issuance of the TCOO and all costs of closing shall be divided between the Parties as is standard for a closing of a commercial project in Tucson, Arizona. The Developer acknowledges that ParkWise reserves the right to assign any and all its duties to another entity as long as that entity can fulfill all responsibilities of this Agreement.
- E. ParkWise, or its assigns, shall contract with the users of the Project (collectively, “The Developer, or its assigns”), including but not limited to, a Hotel Operator (“Hotel”), a Condo Home Owners Association (“HOA”), Office and Retail Businesses (“Tenants”), to provide:
- 1. If the Garage is completed within four years of the execution of this agreement, a lease, to the HOA for the benefit and use by the occupants of

the Residential Condo Units, for one (1) parking space per Residential Condo Unit at a rate of Fifty Eight Dollars (\$58.00) dollars a month, plus the ability of the HOA to lease a 2nd space for each Residential Condo Unit at a rate of Eighty Dollars (\$80.00) per month. The rental payments for those spaces shall be made monthly by the HOA and shall increase at a rate of 2% a year.

2. An agreement with the Hotel to provide parking spaces for its use through a monthly Lump Sum Lease providing that the Hotel will pay to the City the amount of Thirty Thousand Dollars (\$30,000.00) per month commencing at the time the Hotel opens for business to the general public in exchange for which the Hotel will receive Two Hundred Twenty (220) spaces reserved in the Garage for use by its employees and guests. The Lease shall also provide that in the event the Hotel needs more than the original Two Hundred Twenty (220) spaces at any given time it may lease spaces on a daily basis at the rate of Five Dollars (\$5.00) per day for use by its employees and guests. For any special events held at the Hotel the patrons/users shall be able to park at the Garage paying normal and customary rates as charged from time to time by ParkWise to the general public. The fees stated herein shall increase at a rate of two percent (2%) per year.

3. An agreement with the Tenants to lease parking spaces and create a Parking Validation System for its public users.

4. Transferable contracts covering the matters set out in Sections 2 E.1 and 2 above for a period of no shorter than 30 years with the HOA and Hotel each having the option to extend their respective contract for successive ten (10) year terms in the event of and upon terms determined by mutual agreement of the Parties.

F. If the completion date of the Garage is after four years from the execution of this Agreement, ParkWise or its assign shall charge the HOA a monthly fee for each parking space in the Garage leased by an occupant of a Residential

Condo Unit, based on the initial rate of Fifty Eight Dollars (\$58.00) per month for each 1<sup>st</sup> space and the initial rate of Eighty Dollars (\$80.00) per month for each 2<sup>nd</sup> space increased by the percentage that the current anticipated construction cost of Fifteen Thousand Dollars (\$15,000) per parking space for a traditional, non-automated parking space and the amount of Fifteen Thousand Dollars (\$15,000.00) per parking space for each automated space is exceeded by the actual cost at the time of construction.

3. *Description of Parking Garage.* At the time of the signing of this Agreement, the Garage is not yet fully designed or constructed; therefore modifications to this Agreement may become necessary as the Project proceeds. In the Development Agreement, Section 3.10, the Garage is described as a multi-use structure containing approximately 500 parking spaces. The Parties now agree that the Garage shall contain approximately Six Hundred and Twenty Five (625) parking spaces, with the final number of spaces to be decided once Developer's final plans for the Project have been prepared and approved. At such time, the total number of necessary parking spaces will be determined and the Six Hundred Twenty Five (625) spaces will either be increased or decreased based upon the actual need as determined based on the final size of the components and parking needs of the Project. It is currently anticipated and agreed to that the Garage shall be designed with one (1) level at grade, two (2) levels above grade and the balance of levels below grade.

4. *Scope of Operational Agreement.* This Agreement is intended to govern the operations and maintenance of the Garage and development conditions.

5. *Parking Operation.* The parking operation for the Garage will be determined and approved in the Concept Plan and will include a manned, automated monthly and short-term parking facility, using pay-on-foot and Automated Vehicle Identification ("AVI") systems to control and monitor access to the Parking Garage 24 hours/day, 7 days/week and a traditional self and/or valet parking component. The parking operation for the general parking including hotel guests and retail patrons will be valet and/or traditional self-parked. The parking operation for the spaces rented by the occupants of the Residential Condos will be a traditional self and/or valet parking facility including a fully secured enclosure gate. There shall be at least 1.5 parking spaces built and available per each Residential Condo Unit constructed as part of the Garage . If,

as part of the Concept Plan prepared by Developer and approved by ParkWise, storage units for the residential condominium units are to be built as part of the Garage for the residential condominium spaces, an increased monthly fee shall be charged to each residential condominium unit owner who is a user of a storage unit calculated on the basis of \$5.80 per month for each \$1,500.00 of construction costs for building the storage units with the cost per unit determined after consultation between Parkwise and Developer by dividing the total construction cost of the storage units by the total number of storage units that are constructed and adding the additional cost per square foot of structure required to house the storage units.

6. *Security.* Security guards will not be provided in the Garage unless both Parties otherwise mutually agree at a future date through an amendment to this Agreement. Passive security measures will be designed and installed in the Garage, including, but not limited to, using Safe by Design principles and elevated lighting levels.

7. *Maintenance of Facility.* ParkWise, or its assigns, will provide all routine and preventive maintenance for the Garage.

A. *Routine maintenance.* Routine maintenance shall be provided by ParkWise as necessary to maintain the Garage in a clean, sanitary and safe condition. ParkWise, or its assigns will develop and provide a routine maintenance schedule as the Garage is designed and prior to completion with the review and approval of the Developer, which approval shall not be unreasonably withheld. The routine maintenance (“Routine Maintenance Schedule”) shall be made an Exhibit to this Agreement. ParkWise, or its assigns, reserves the right to sub-contract any or all tasks related to routine maintenance. ParkWise, or its assigns, will provide all necessary equipment and supplies to perform routine maintenance.

B. *Preventive maintenance.* ParkWise, or its assigns, will develop and provide a preventive maintenance program as the Garage is designed and prior to completion with the review and approval of the Developer, which approval shall not be unreasonably withheld. Preventive maintenance will include measures taken to assure the long and useful service life of the Garage and its structural and mechanical components. Preventive maintenance includes but is not limited to corrosion protection, structural protection and waterproofing, traffic membrane, joint sealant and expansion joints, and capital equipment replacement. A preventative

maintenance schedule (“Preventative Maintenance Schedule”) shall be made an Exhibit to this Agreement.

*C. Access administration.* ParkWise, or its assigns, will be responsible for access administration to all spaces in this Garage.

8. *Access Control.* All spaces in the Garage will be covered and/or underground and will utilize a nested gate system to limit and control access to each Party’s parking spaces. ParkWise, or its assigns, shall make every effort to ensure that no public parking users, whether monthly or hourly, shall park in the Garage’s private parking spaces.

9. *Parking: Public and Private; Location of Spaces* Assignment of public parking spaces and private parking spaces will be determined as the design of the Garage is finalized. In addition to the public parking area, it is understood by the Parties that there will be both private parking for residential units, as well as, the opportunity for retail/commercial tenants to negotiate with ParkWise for leased spaces. Upon finalization of the design of the Garage, the Parties shall execute an amendment to this Agreement setting forth and describing: (i) the location of the public and private spaces; and (ii) the work hours or other agreed upon time designation(s) which will be incorporated into and made a part of this Agreement. The Garage will be in operation Twenty Four (24) hours/day Seven (7) days/week. At all times hourly spaces in the Garage will be accessed on first come, first served basis, except as specified herein or in any supplemental agreement.

10. *AVIs.* ParkWise, or its assigns, shall provide the Developer, or its assigns, with automatic vehicular identification (“AVI”) emitters prior to the opening of the Garage on a direct cost per unit basis (currently approximately \$ 45 per unit). The Developer, or its assigns, will be responsible for administering the distribution of the AVIs to its tenants. The Developer, or its assigns, shall maintain a list of current authorized users of the private parking spaces as well as the assigned corresponding AVI identifier. The Developer, or its assigns, will provide the list to ParkWise, or its assigns, on the first business day of each month to update and maintain authorized access to the Garage. Additional AVIs will be provided to Developer, or its assigns, upon request on an as needed replacement basis.

11. *Hourly Parking.* The ParkWise, or its assigns, public portion of the Garage will accommodate hourly parking to serve customers, guests, and the general public. Validations may be provided to any party that chooses to enter into a separate agreement with ParkWise, or its assigns.

12. *Maintenance.* ParkWise, or its assigns, shall conduct all Routine Maintenance and Preventative Maintenance of the Garage. The monthly rental charge to be paid on behalf of the Residential Condo Units as set forth in Section 2 D. above as well as the rental rates to be established for the use by the Hotel and Tenants includes all contributions required from these users towards the Routine and Preventative Maintenance and there will be no additional charges billed to the users for such maintenance expenses.

13. *Term.* Upon the mutual written consent of the Parties, this Agreement may be reviewed and adjusted to provide clarification, and/or to change the terms. At a minimum, this Agreement will be reviewed every five-(5) years, but the term of the Lease Agreements with the HOA and Hotel shall be as set out in Section 2 E. 4 hereof and will not be subject to this review.

14. *Notices.* All notices, requests, demands, and other communications under this Agreement shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested; to the addresses and in the manner specified in the Development Agreement.

15. *Successors and Assigns.* All of the provisions of this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto. Notwithstanding the foregoing, Developer's rights and obligations hereunder may only be assigned by a written instrument, expressly assigning such rights and obligations. Developer may assign its rights and obligations under this Agreement to a person or entity that has acquired all of the Property or to an owners' association to be established by Developer, consistent with the provisions of Paragraph 5.4 of the Development Agreement. Any other event of assignment shall only be with the City's consent, not to be unreasonably withheld.

16. *Authority to Execute Agreement.* The individuals executing this Agreement hereby represent that they have full right, power, and authority to execute this Agreement on behalf of their respective Parties.

17. *Governing Law.* This Agreement shall be construed in accordance with the laws of the State of Arizona.

18. *Non-Severability.* The provisions of this Agreement shall not be given effect individually, and to this end, the provisions of this Agreement are not severable, but if a Court determines that any section of this Agreement is not enforceable the remaining sections shall remain in full force and effect.

19. *Headings.* The descriptive headings of the sections of this Agreement are inserted for convenience only and shall not control or affect the meaning or construction of any of the Agreement's provisions.

20. *Exhibits.* Any exhibit attached to this Agreement shall be deemed to have been incorporated in this Agreement by this reference with the same force and effect as if it were fully set forth in the body of the Agreement.

21. *Further Acts.* Each of the Parties to this Agreement shall promptly and expeditiously 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 Agreement. The Parties agree that at the time of conveyance of the property upon which the Project shall be constructed from the City to Developer appropriate Easements shall be executed providing ParkWise access to the area upon which the Garage will be constructed for ingress and egress for all of its uses as required under this Agreement and likewise ParkWise and/or the City shall grant the Developer Easements for ingress and egress, utilities, and any of the structural components of the Project to be located on the land upon which the Garage shall be constructed and/or the airspace above such land.

22. *Recordation.* This Agreement shall be recorded in its entirety in the official records of Pima County, Arizona not later than ten days after its execution by all Parties and after any necessary resolutions or ordinances are adopted by Tucson's Mayor and Council adopting this Agreement.

23. *Amendments.* No change or addition is to be made to this Agreement except by a written amendment executed by the Parties.

24. *Time of Essence.* Time is of the essence of this Agreement.

25. *Force Majeure.* Notwithstanding any other term, condition or provision of this Agreement to the contrary, if any Party to this Agreement is precluded from satisfying or fulfilling any duty or obligation imposed upon it due to labor strikes, material shortages, war, civil disturbances, weather conditions, natural disasters, acts of God, or other events beyond the control of such Party, the time period provided herein for the performance by such Party of such duty or obligation shall be extended for a period equal to the delay occasioned by such events.

26. *Attorneys' Fees.* If any Party brings a civil action against another Party to enforce or terminate this Agreement or to recover damages for the breach of any of the provisions, covenants or terms of this Agreement, the prevailing Party shall be entitled to recover, in addition to any relief to which such prevailing Party may be entitled, all costs, expenses and reasonable attorneys' fees incurred in connection with the civil action.

27. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed 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.

28. *Effective Date and Duration.* This Agreement is effective when it has been executed on behalf of all of the Parties, and shall terminate when mutually agreed upon by both parties.

29. *Obligations While Agreement is Effective.* Unless otherwise provided, each and every obligation set forth in this Agreement shall apply at all times while this Agreement is in effect.

30. *Procedure upon Default.* In the event of material breach of either party's obligations under this Agreement, the other party shall give sixty days written notice of default, identifying the facts and circumstances constituting default and providing a reasonable time, not less than sixty

days after the date of the notice, for the defaulting party to begin to cure the default. The notified party shall thereafter diligently pursue the cure to completion.

Executed this \_\_\_ day of \_\_\_\_\_, 2008.

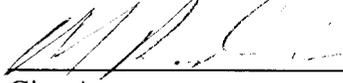
CITY OF TUCSON

By: \_\_\_\_\_  
Mayor  
Dated: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
City Attorney

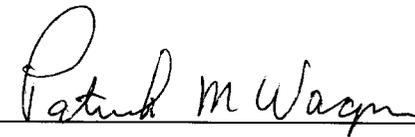
Dated: 07/30/08

ATTEST:

By: See above  
City Clerk

Dated: \_\_\_\_\_

TOWN WEST DESIGN DEVELOPMENT, INC.,  
AN ARIZONA CORPORATION

By:   
\_\_\_\_\_

Its: Treasurer

Dated: \_\_\_\_\_

**FIRST AMENDMENT TO  
DEVELOPMENT AND SALE AGREEMENT  
for  
Town West Design Development, Inc.**

This First Amendment to the Development and Sale Agreement is entered into by and between the CITY OF TUCSON ("City"), a municipal corporation, and TOWN WEST DESIGN DEVELOPMENT, INC., an Arizona corporation ("Developer"). City and Developer are sometimes referred to in this First Amendment to the Development and Sale Agreement individually as "the Party" or collectively as "the Parties."

***RECITALS***

- A. City is a municipal corporation. Developer is an Arizona corporation.
- B. On or about November 27, 2007, the City, through the Mayor and City Council, approved the Development and Sale Agreement. As per Section 3.10 of that Agreement, the Parties have negotiated the terms of a Parking Garage Agreement that provides for the development, construction, operation and maintenance of a parking garage for the Project.
- C. As part of the negotiations relating to the terms of the Parking Garage Agreement, the Parties have negotiated certain amendments to the Development and Sale Agreement, and those amendments are incorporated within this First Amendment to the Development and Sale Agreement.
- D. This First Amendment to the Development and Sale Agreement amends specific sections of the Development and Sale Agreement as set forth below, and all provisions of the Development and Sale Agreement not specifically amended herein remain in full force and effect.
- E. This First Amendment to the Development and Sale Agreement is subject to the provisions of A.R.S. § 38-511.

***AGREEMENT***

Now, therefore, based on the foregoing recitals, which are incorporated here as the intention of the Parties in entering into this First Amendment to the Development and Sale Agreement and for good and valuable consideration the sufficiency of which is hereby acknowledged, the Parties agree as follows:

**1. Paragraph 1.1.2 of the Development and Sale Agreement is amended to read as follows:**

1.1.2. Closing. The "Closing" shall occur upon City's issuance of the first foundation building permit to Developer or its agents or assigns for the Project, and after the Developer provides an assurance bond or letter of credit to the City in the amount of Three Hundred Thousand Dollars (\$300,000.00) (the "Closing Bond"). The Closing shall occur on or before September 1, 2010, with four "Contingency Periods" including an initial contingency period from the Effective Date until September 1, 2009, followed by three 4-month periods. As provided herein, for each Contingency Period, Developer

**EX. B TO RESOLUTION NO. 21047**

shall provide an assurance bond or a letter of credit in lieu of cash to City, the total of which, together with the Closing Bond, shall be referred to as the "Bond." The Bond shall be held by City until Substantial Completion of the Project. "Substantial Completion" shall be established by the issuance of a temporary certificate of occupancy for either a commercial or residential unit, at which time the Bond will be released. If Substantial Completion does not occur within the time frame set out in Section 2.8 hereof, the City may proceed against the Bond. Developer shall be allowed two six month extensions for the Closing; however, each extension if exercised by Developer shall be accompanied by a \$15,000 increase in the amount of the Bond, as security for the faithful performance by Developer of the provisions of this agreement.

**2. Paragraph 1.1.4 of the Development and Sale Agreement is amended to read as follows:**

1.1.4. Initial Contingency Period. During this Contingency Period, which begins upon the complete execution of this Agreement ( "Effective Date") and expires on September 1, 2009, the following shall occur:

\* \* \*

**3. Paragraph 1.1.8.2 of the Development and Sale Agreement is amended to read as follows:**

1.1.8.2. Remediation. The Assessment recommended that additional environmental investigation of the Property be conducted to define and characterize the extent of contaminants and that a health risk assessment be conducted for the site. It is agreed that the City shall conduct such studies as recommended in the Assessment within the Initial Contingency Period. Thereafter the City shall, at its sole cost and expense, agree to carry out any and all remediation of the Property as is called for in the Assessment and as a consequence of the further investigations and as is necessary to obtain clearance of the Property to develop the Project, from all local, state and federal agencies having jurisdiction over environmental matters (the "Remediation"). The City must complete the Remediation in a good faith and timely manner but no later than thirty (30) days prior to Closing. If the Remediation is not completed within the date established herein, the Closing shall be postponed day for day that the Remediation is not completed. If the Remediation is not completed within sixty (60) days of the date established herein, City may request that Developer grant City additional time, which request Developer shall not unreasonably deny, in which case the Closing shall be postponed day for day as set out above. If City does not request additional time, or if such a request is reasonably denied, Developer may declare a breach on the part of the City and proceed to enforce its rights consistent with the terms hereof.

**4. Paragraph 2.12.1 of the Development and Sale Agreement is amended to read as follows:**

*2.12 Improvements to the Steinfeld Warehouse.*

2.12.1. Subject to the requirements of paragraph 2.15 of this Agreement, Developer shall coordinate the design, planning and construction of the improvements of the Steinfeld Warehouse pursuant to plans approved by the City. The planning for the renovation shall commence at the time that the rezoning, as provided for herein, is granted by the City with the commencement of the actual construction to coincide with the commencement of construction activities at the Project by Developer. Developer shall complete the renovation of the Steinfeld Warehouse on a date not later than December 1, 2012. If the renovation has not been completed on or before December 1, 2012 Developer shall pay to the City within ten (10) days of written demand by the City the amount of \$350,000 as liquidated damages for its failure to complete the renovation. In the event that the alignment of the Downtown Links project results in the need for initial stabilization of the Steinfeld Warehouse prior to the construction of the improvements required under this paragraph, the City shall be responsible for that initial stabilization; and this initial stabilization shall be carried out on or before December 1, 2009. The Developer shall pay for any costs associated in the renovation which are not funded by other sources with a maximum Developer cost of \$1,700,000.00. The total value of the Developer's contribution including architectural and engineering fees, supervision expenses, and the actual costs of construction, including all amounts paid to selected contractors, shall be repaid by the City to the Developer as set forth in Section 2.14 hereof. Notwithstanding the above, in the event that the Developer has not obtained legal title to the Franklin & 9<sup>th</sup> Avenue Property pursuant to the provisions of Section 6 below, on or before June 1, 2011 then the liquidated damage provision set forth herein shall be reduced from \$350,000 to \$100,000.

**5. Paragraph 2.14.1 of the Development and Sale Agreement is amended to read as follows:**

*2.14 Repayment of Developer Advances by the City.*

2.14.1. City shall repay Developer for Developer's authorized and lawful expenditures for the public improvements as described in paragraphs 2.12, 2.13 and 3.2.4 of this Agreement. The first payment by the City shall occur 365 days after the date of issuance of the first Certificate of Occupancy for a commercial use on the Property. City shall make to Developer one (1) annual payment. Each annual payment shall be equal to the amount of transaction privilege tax and construction sales tax reported for the Property during the 12 months immediately preceding the payment. The total amount repaid to Developer under this paragraph shall not exceed the authorized amount expended by Developer for the improvements described in paragraphs 2.12, 2.13 and 3.2.4 of this Agreement plus a yearly factor equivalent to the interest rate that Developer is charged on the Project's primary construction loan calculated for each individual year until the repayment is complete. Interest shall accrue on all of Developer's expenditures for public

improvements as described in paragraphs 2.12, 2.13 and 3.2.4 of this Agreement from the date of the expenditure. Regardless of the preceding sentence in the event that Developer completes the renovation of the Steinfeld Warehouse within the time provisions set forth in Section 2.12.1 hereof but fails to start the construction of the Project on or before December 1, 2012, Developer shall not be entitled to any interest on the money it has spent for the renovation of the Steinfeld Warehouse until such time as construction on the Project has commenced.

**6. Paragraph 3.1.1 of the Development and Sale Agreement is amended to read as follows:**

*3.1 Survey, Environmental, and Archeology Review.*

3.1.1. The City shall prepare and deliver to Developer a final archeological survey of the Property. The City shall provide any required archeology clearance for the Project within the Initial Contingency Period. The City shall also provide to Developer any information the City has in its possession concerning any environmental tests or surveys done on the Property. The City shall also deliver the Assessment to the Developer. If during the construction of the Project any archeological condition is discovered that requires remediation the City shall be responsible for the cost of any such remediation.

**7. Paragraph 3.10 of the Development and Sale Agreement is amended to read as follows:**

3.10 *Parking Garage.* The City shall own, finance and operate a garage of no less than 500 spaces that shall be constructed in accordance with the project schedule and as provided in a separately executed Parking Garage Agreement. The Developer will work with the City to assure that design, function and garage delivery are in accordance with the Project's development schedule.

Developer shall be entitled to purchase or lease spaces in the Parking Garage through a nominee either being a Home Owners Association established to control the residential condominium units or directly by owners of the condominiums. The exact terms of the Parking Agreement shall be as agreed to by the City and Developer in that agreement.

The Hotel component of the Project shall be able to lease spaces in the Parking Garage based on a lump sum monthly payment for a minimum number of spaces with additional spaces as needed being able to be leased at the same cost per space used as the

calculation of the lump sum payment, as specifically provided in the separately executed  
Parking Garage Agreement.

Executed this \_\_\_ day of \_\_\_\_\_, 2008.

TOWN WEST DESIGN DEVELOPMENT, INC.,  
an Arizona corporation

Patrick M. Wagner

By: \_\_\_\_\_

Its: Treasurer

CITY OF TUCSON an Arizona municipal corporation

By: \_\_\_\_\_  
Mayor

Dated: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
City Clerk

Dated: \_\_\_\_\_

APPROVED AS TO FORM:

By: [Signature]  
City Attorney

Dated: 07/30/08