

16-A089

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
2016-0940133, 12/21/2016 12:03
ELECTRONIC RECORDING
4056-7-2-2--

WHEN RECORDED RETURN TO:

City of Mesa
Attn: City Clerk
20 E. Main Street
Mesa, Arizona 85211

4056-7-2-2--

**THIRD AMENDMENT TO
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT
(Mesa Proving Grounds)**

**CITY OF MESA, ARIZONA,
an Arizona municipal corporation**

AND

**DMB MESA PROVING GROUNDS LLC,
A Delaware limited Liability Company**

Dated: December 15, 2016

**THIRD AMENDMENT TO
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT
(MESA PROVING GROUNDS)**

THIS THIRD AMENDMENT TO PRE-ANNEXATION AND DEVELOPMENT AGREEMENT (MESA PROVING GROUNDS) (the “**Third Amendment**”) is entered into by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the “**City**”), and DMB MESA PROVING GROUNDS LLC, a Delaware limited liability company (the “**Developer**”) (collectively, “**Parties**”).

RECITALS

A. The Developer and the City are entering into this Third Amendment pursuant to the provisions of A.R.S. § 9-500.05, which authorizes the City to enter into and amend a development agreement with a landowner or any other person having an interest in real property located in the City.

B. The Developer and the City are parties to the Pre-Annexation and Development Agreement dated November 3, 2008, as recorded in the Official Records of Maricopa County as Document No. 2008-0974930, as amended by the First Amendment to Pre-Annexation and Development Agreement dated May 16, 2011, as recorded in the Official Records of Maricopa County as Document No. 2011-0456474 (the “**First Amendment**”) and the Second Amendment to the Pre-Annexation Development Agreement dated November 21, 2013, as recorded in the Official Records of Maricopa County as Document No. 2013-1005620 (the “**Second Amendment**”) (collectively, the “**MPG Development Agreement**”).

C. The Developer owns and/or is the Master Developer of that certain real property that was originally subject to the MPG Development Agreement. Such property is located in the City of Mesa, Arizona and originally consisted of approximately three thousand one hundred fifty-four (3,154) acres. Such property, excluding therefrom any portion thereof as to which a termination has occurred pursuant to said Section 9.6(c), being hereinafter referred to as the “**Property**”.

D. The Property is located within the study area included in the Mesa Gateway Strategic Development Plan, which was adopted by the City of Mesa on December 8, 2008 (the “**Strategic Plan**”). The Mesa Gateway area will be a place where a wide variety of businesses will find an economically efficient business climate and its workforce and residents will have access to the global resources desired of a knowledge-based economy. The Property is designated as “**Mixed-Use Community**” within the Strategic Plan and encouraging the expansion of non-residential and employment uses on the Property is consistent with the Strategic Plan.

E. In the MPG Development Agreement, the City agreed to expend up to \$6,500,000 in street and highway bond funds, if such bonds were issued (the “**2013 Bond Monies**”), on certain City public street improvements to support planned non-residential development within the Property, subject to certain terms and limitations. When the Parties agreed to the Second Amendment, they anticipated the City’s expenditure of bond funds from the November 5, 2013 bond election on improvements to Ellsworth Road in the vicinity of the Property.

F. The Parties now desire to identify the public street improvements referenced in Recital E above to mean the construction of Elliot Road as an arterial road, generally between Ellsworth and Signal Butte Roads (the "Elliot Road Improvements"). This portion of Elliot Road is adjacent to the Property and is part of the City's Elliot Road Technology Corridor.

AGREEMENT

NOW, THEREFORE, the Parties agree as follows:

1. **Public Improvements.** The Parties agree to intentionally delete Section 4.2 and the related subsections and replace it with the following:

4.2 **Construction of the Elliot Road Improvements.** The City agrees to allocate the 2013 Bond Monies to construct the Elliot Road Improvements subject to the following terms, limitations, and conditions:

a. The City may, in its sole and absolute discretion, allocate funds, in addition to the 2013 Bond Monies to construct the Elliot Road Improvements. If the City does allocate such additional funds, and if such allocation results in some part or portion of the 2013 Bond Monies being available for use on other City projects, then the City may use the remaining 2013 Bond Monies without restriction for any other City project.

b. The City may, in its sole and absolute discretion, construct the Elliot Road Improvements over time in one or more phases or segments.

c. The City will include Developer as a stakeholder in connection with the planning and design of the Elliot Road Improvements.

d. Developer shall, when requested by the City, dedicate right-of-way in accordance with the City's Engineering Standards and Details, in fee, and free of any charge or payment, to the City, in connection with the construction of the Elliot Road Improvements. Such dedication(s) shall be made when the City determines they are appropriate, and may be requested, in the City's sole and absolute discretion, before, after or during the development of the Property or other nearby parcels.

2. **General Provisions.**

2.1 **Counterparts.** This Third Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together 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.

2.2 **Headings.** The descriptive headings of the Paragraphs of this Third Amendment are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

2.3 Exhibits and Recitals. Any exhibit attached hereto shall be deemed to have been incorporated herein by this reference with the same force and effect as if fully set forth in the body hereof. The Recitals set forth at the beginning of this Third Amendment are hereby acknowledged and incorporated herein and the Parties hereby confirm the accuracy thereof.

2.4 Good Standing; Authority. Each of the Parties represents to the other (i) that it is duly formed and validly existing under the laws of Arizona, with respect to the Developer or a municipal corporation within the State of Arizona, with respect to the City, (ii) that it is a Delaware limited liability company or municipal corporation duly qualified to do business in the State of Arizona and is in good standing under applicable state laws, and (iii) that the individual(s) executing this Third Amendment on behalf of the respective parties are authorized and empowered to bind the party on whose behalf each such individual is signing.

2.5 Recordation. This Third Amendment shall be recorded in its entirety in the Official Records of Maricopa County, Arizona not later than ten (10) days after this Third Amendment is executed by the City and the Developer.

2.6 Mortgagee Rights. The parties hereto acknowledge and agree that all of Developer's rights and benefits under the MPG Development Agreement, as amended by this Third Amendment, shall inure to the benefit of any party acquiring title to the Property or any portion thereof under or pursuant to a mortgage foreclosure, trustee's sale or deed in lieu of foreclosure or trustee's sale, or otherwise.

2.7 No Pledge of General Credit. The City's obligations under this Third Amendment shall not constitute an indebtedness or pledge of the general credit of the City within the meaning of any constitutional, charter, or statutory provision relating to the incurring of indebtedness or a pledge of the full faith and credit of the City. Nothing contained in this Third Amendment shall be construed to require the City to levy a tax, issue bonds, or call an election.

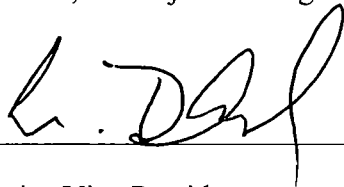
3. Effect of Third Amendment. This Third Amendment shall be deemed to amend and supersede the MPG Development Agreement with respect to all terms, provisions and changes set forth in this Third Amendment. To the extent of any conflict between the MPG Development Agreement and this Third Amendment, including all Exhibits, the Third Amendment shall control. Except as amended by this Third Amendment, all terms, provisions and conditions of the MPG Development Agreement shall remain in full force and effect. Any capitalized terms not defined in this Third Amendment shall have the meaning set forth in the MPG Development Agreement.

[Signatures on following pages]

IN WITNESS WHEREOF, the Parties have executed this Third Amendment to be effective on the date that this Third Amendment is approved by the City Council (the "Effective Date").

DMB MESA PROVING GROUNDS LLC, a Delaware limited liability company

By: DMB Associates, Inc., an Arizona corporation, its Project Manager


By 

Its Senior Vice President

CITY OF MESA, ARIZONA, an Arizona municipal corporation

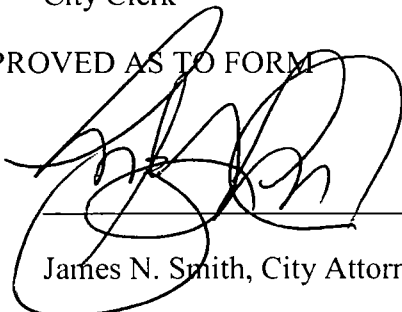
By: 
Its: City Manager

ATTEST:

By: 

City Clerk

APPROVED AS TO FORM

By: 
James N. Smith, City Attorney



STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this 15th day of December, 2016, by W. Dea McDonald the Fr. Vice President of DMB Mesa Proving Grounds LLC, a Delaware limited liability company.

Cass Kershner

Notary Public



My commission expires:

March 22, 2019

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this 15 day of December, 2016, by Christopher Brady, City Manager of the City of Mesa, Arizona, an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument on behalf of the City.



Kathryn M Broehm
Notary Public
Kathryn M Mayer

My commission expires:

8/26/18

EXISTING LENDER CONSENT

The undersigned, as Beneficiary ("Existing Lender") under that certain DEED OF TRUST, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING recorded on December 9, 2016, as Document No. 20160910174, in the Official Records of Maricopa County, Arizona (the "Deed of Trust"), by and among Existing Lender, DMB MESA PROVING GROUNDS, LLC, a Delaware limited liability company ("Developer"), as Trustor, and FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, as Trustee, in respect of certain real property, which includes the Property that is the subject of this Third Amendment to Pre-Annexation and Development Agreement, dated Dec. 15, 2016, by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation, and Developer (the "Amendment"), but not as a party, hereby: (i) consents to this Third Amendment; (ii) acknowledges that this Third Amendment shall bind that portion of the Property that is subject to the Deed of Trust, as modified, and subject to the Amendment; (iii) approves the recordation of this Third Amendment; (iv) agrees that this Third Amendment shall continue in full force and effect, at Existing Lender's option, in the event of foreclosure or trustee's sale pursuant to such Deed of Trust or any other acquisition of title by the undersigned, its successors, or assigns, of all or any portion of the Property covered by such Deed of Trust; (v) represents and warrants that the undersigned has the requisite right, power and authorization to enter into, execute, and deliver this Existing Lender Consent on behalf of Beneficiary; and (vi) the execution and delivery of this Existing Lender Consent by Beneficiary is not prohibited by, and does not conflict with any other agreements or instruments to which Beneficiary is a party.

DATED this 16th day of December, 2016.

WELLS FARGO BANK, NATIONAL ASSOCIATION

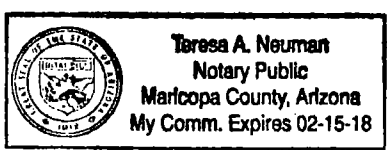
By: [Signature]
Name: DEVIN PALTENGI
Its: VICE PRESIDENT

STATE OF ARIZONA)
) .ss
County of Maricopa)

The foregoing was acknowledged before me this 16th day of December, 2016, by Devin Paltengi, ~~the~~ Vice President of WELLS FARGO BANK, NATIONAL ASSOCIATION, for and on behalf thereof.

[Signature]
My Notary Public

My Commission Expires:
12/15/18





Office of the City Attorney

To: Sonia Eckler, Engineering
From: Avie Monroy, City Attorney
Date: December 21, 2016
Subject: Third Amendment to Pre-Annexation and Development Agreement
between Mesa & DMB

Can you please record the enclosed Development Agreement, and then e-mail a recorded copy to me and Mary Grace McNear (marygrace.mcnear@mesaaz.gov).

Mary Grace McNear requested that the DA be recorded, today, if at all possible.

If you have any questions, please contact me at x5524.

Thank you!

*552
12-21-16*