

Staff Summary Report



Council Meeting Date: 09/18/08

Agenda Item Number: 13a

SUBJECT: Request authorization for the Mayor to execute the Modification Agreement to the Payment Agreement dated as of November 21, 2006, and Development and Disposition Agreement dated as of March 1, 2007, between the City and GDG Partners, L.L.C.

DOCUMENT NAME: 20080918cdnr01 RIO SALADO MASTER PLAN (0112-07-03)

SUPPORTING DOCS: No

COMMENTS: The agreement covers a letter of credit reduction, temporary use of cash collateral to secure the Payment Agreement, establishes criteria for substituting real property collateral, and grants a GPLET abatement on the Transit Parcel at Apache and McClintock. The Modification Agreement would authorize the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, such as an amendment or modification of the Agreement.

PREPARED BY: Nancy Ryan, Rio Salado Project Manger (x 8096)

REVIEWED BY: Chris Salomone, Community Development Manager (x 8294)

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney (x 2187)

FISCAL NOTE: The substitution of collateral (whether cash or other real property) will not alter or affect the Town Lake Payments. The developer will be required to make an annual in-lieu payment to the City during the term of the GPLET abatement.

RECOMMENDATION: Approve the Modification Agreement as submitted.

ADDITIONAL INFO: The Payment Agreement is secured by a second deed of trust on the Mondrian Project. GDG is in the process of refinancing the Mondrian Project and must remove the second deed of trust. Until substitute real property collateral can be agreed upon, GDG will secure the Payment Agreement with a cash deposit into escrow up to \$13,976,744.68 from the loan proceeds at the closing of the refinancing. The escrow agent will retain the Cash Collateral subject to City authorizing its release. The Payment Agreement is being amended to allow the temporary use of cash collateral, and to better define the criteria applicable to substitute real property as a second position lien behind a loan with a 75% loan to value ratio, as reasonably determined by the Manager. The Modification Agreement also amends the DDA to reduce the amount of the letter of credit that secures GDG's obligation to construct the parking facility on the Transit Parcel, and gives GDG the right to an 8-year GPLET abatement, if (a) construction of the improvements is completed before January 1, 2011, and (b) City and Developer reach agreement on a resolution of outstanding payment requests by November 1, 2008, and (c) Developer has otherwise satisfied its obligations under this Agreement and the DDA and related documents

MODIFICATION AGREEMENT
(Amending C2006-301)

This Modification Agreement ("Agreement") is entered into as of September ____, 2008, by and between the City of Tempe, an Arizona municipal corporation ("Tempe"), Tempe Transit, L.L.C., an Arizona limited liability company ("TTL") and GDG Partners, L.L.C., an Arizona limited liability company ("Gray") (TTL and Gray are collectively the "Gray Parties". The Gray Parties and City are collectively (the "Parties").

R E C I T A L S :

A. Tempe and the Gray Parties are parties to various agreements, including without limitation a Settlement Agreement and Release dated as of June 15, 2006 (the "Settlement Agreement"), a Payment Agreement dated as of November 21 2007 (the "Payment Agreement"), and a Development and Disposition Agreement dated as of March 1, 2007 (the "DDA"). The Payment Agreement and the DDA are sometimes collectively referred to as the "Agreements".

B. The parties desire to amend the Agreements in certain respects as more fully set forth below.

A G R E E M E N T :

NOW THEREFORE, in consideration of the premises and promises hereinafter set forth, the parties hereto agree as follows:

1. Recitals. The Parties hereby acknowledge that the Recitals are true and accurate in every respect.

2. Cash Collateral. Gray represents and warrants to Tempe that it is in the process of refinancing the Mondrian Project (the "Refinancing"). If the security for the repayment of the Performance Advance has not previously been substituted in accordance with the provisions of Section 7 of the Payment Agreement, then concurrently with the closing of the Refinancing (the "Closing"), Gray may cause the escrow agent for the Refinancing to retain from the loan proceeds, an amount equal to the present value of the Town Lake Payments determined by applying a discount rate of 5% to the unpaid balance of the Town Lake Payments (the "Cash Collateral"). Concurrent with the deposit of the Cash Collateral, the City shall cause the security for the repayment of the Performance Advance to be released of record against the Mondrian Project. The escrow agent shall hold the Cash Collateral subject to an instruction letter in substantially the form of Exhibit A hereto, until the City issues a further instruction letter authorizing its release.

3. Modification of Payment Agreement. Capitalized terms used in this Section 3 without definition shall have the meanings given such terms in the Payment Agreement.

a. Section 7 of the Payment Agreement is hereby amended in its entirety to read as follows:

7. Gray and/or Mondrian Owner may substitute from time to time other collateral as security for the repayment of the Performance Advance so long as: (i) Gray has provided Tempe with at least 20 days prior written notice of its desire to substitute collateral, and if the substitute collateral is real property the notice shall be accompanied by a written appraisal report from an MAI appraiser (the "Appraisal") attesting to the value of the proposed substitute real property collateral and dated no later than 180 days prior to the date of Gray's request; and (ii) the substitute collateral is a cash amount equal to present value of the unpaid balance of the Town Lake Payments determined by applying a discount rate of 5% to the unpaid balance of the Town Lake Payments or is real estate that, in the commercially reasonable discretion of the City Manager or his designee, is of equal or better security than the Mondrian Project, meaning that the loan to value ratio of the first position secured debt that encumbers the proposed substitute real property collateral and the value of the proposed substitute real property collateral as set forth in the Appraisal is equal to or less than 75% as reasonably determined by the first position lender and confirmed in writing by such lender to Tempe; and (iii) the Trust Deed Security on the proposed substitute real property collateral is at least a second lien position priority. The substitution of collateral shall not alter or affect the Town Lake Payments. In connection with any substitution of collateral, the Parties shall execute such documents as may be necessary to document the release and subjection to a security interest of the substitute real property collateral, including without limitation, deeds of release and reconveyance, deeds of trust, collateral assignments, intercreditor agreements, subordination agreements, any documents required by Section 11 hereof, and such other documents as may reasonably be requested by either party.

b. A new Section 21 is hereby added to the Payment Agreement, as follows:

21. Manager's Power to Consent. The City hereby hereby authorizes and empowers the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

c. Except for the amendments embodied in subparagraphs (a) and (b), the Payment Agreement shall remain in full force and effect.

4. Capitalized terms used in this Section 4 shall have the meanings given such terms in the DDA.

a. Section 3.1.3 of the DDA is hereby amended in its entirety to read as follows:

3.1.3 Letter of Credit for Construction Costs; Additional Security. On the Closing Date, Developer shall deposit with City an irrevocable direct pay letter of credit that meets the following requirements (the "Letter of Credit"). The Letter of Credit shall be

substantially in the form attached to this Agreement as **Exhibit E** (or such other form as may be reasonably acceptable to City). The face amount of the Letter of Credit shall be equal to \$1,000,000 plus the contract amount (the "Maximum Price") specified in the guaranteed maximum price construction contract referenced in Section 3.2.4 of the Joint Development Agreement; provided, however, that if the maximum price construction contract has not been executed as of the Closing Date the face amount of the Letter of Credit shall be \$7,000,000. Developer shall deliver a revised Letter of Credit reflecting the new face amount to City within ten (10) days after it awards the guaranteed maximum price construction contract.

Developer shall have the right, from time to time, to deliver to the City a document ("**Cost Certification**") executed by Developer and its architect and contractor certifying to the City the total funds ("**Expended Funds**") that have been expended by Developer and incorporated into the Parking Facility through the date of the Cost Certification, and the balance remaining unpaid under the guaranteed maximum price construction contract for the Parking Facility (the "Unpaid Balance"). Upon the City's approval of a Cost Certification, Developer shall be entitled to a reduction in the face amount of the Letter of Credit in an amount equal to (i) the Unpaid Balance, plus (ii) \$308,000, plus (iii) \$1,000,000 multiplied by a fraction the numerator of which is the Unpaid Balance and the denominator of which is the Maximum Price.

Upon the issuance of a certificate of occupancy with regard to all improvements to be constructed pursuant to the Development Plan, and City's receipt of evidence that Developer has satisfied its obligations under the JDA (including without limitation the obligations set forth in Section 3.3), Developer shall be entitled to terminate the Letter of Credit.

The Letter of Credit shall be issued by a financial institution that is a member of the New York Clearing House or a financial institution that is a commercial bank or trust company having a net worth (including affiliates) of at least One Billion and No/100 Dollars (\$1,000,000,000.00). Such institution or an affiliate shall have offices in Phoenix, Arizona, but the parties acknowledge that the Letter of Credit may still require presentation at an office outside the State of Arizona but within the continental United States. The Letter of Credit shall be governed by the International Standby Practices established by the International Chamber of Commerce. At least thirty (30) days prior to the expiration date of such Letter of Credit, Developer shall deliver to City a renewal Letter of Credit in substitution of the existing Letter of Credit, failing which, City shall be authorized to draw upon the Letter of Credit in full.

City may draw on the Letter of Credit in full upon the occurrence of an event of default hereunder and shall apply the proceeds as provided herein. City agrees to make a portion of the funds drawn under the Letter of Credit available to the Transit Authorities to complete construction of the Parking Facility in the event Developer fails to do so or otherwise fails to perform in accordance with the Schedule of Performance, this Agreement, the Joint Development Agreement and the other documents executed in connection herewith. Developer shall be and remain liable to City and the Transit Authorities for all damages, costs, expenses, fees and other liabilities associated with its breach of this

Agreement and the other Documents in excess of the amount of the Letter of Credit. If City shall at any time in good faith determine that the funds available under the Letter of Credit are less than the amount required to pay all costs and expenses of any kind which reasonably may be anticipated in connection with the completion of the Parking Facility, City may send written notice thereof to Developer specifying the amount Developer must deposit with City to provide sufficient funds to pay those amounts, and Developer agrees that it shall, within ten (10) calendar days of receipt of any such notice, deposit with City the amount of funds specified in the City's notice in cash or through an increase in the face amount of the Letter of Credit.

b. A new Section 3.6 is hereby added to the DDA as follows:

3.6 Government Property Lease Excise Tax Abatement. The City hereby acknowledges and agrees that if (a) construction of the improvements identified in the City-approved PAD for the Property are completed before January 1, 2011, and (b) City and Developer reach agreement on a mutually satisfactory resolution of outstanding payment requests by November 1, 2008, and (c) Developer has otherwise satisfied its obligations under this Agreement and the JDA, then Developer shall be entitled to all statutorily-authorized property tax abatements, including, without limitation, all such abatements currently available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209, inclusive, however, the Developer shall, and hereby agrees to, make an annual in-lieu payment to the City in an amount equal to the GPLET rate otherwise applicable pursuant to A.R.S. § 42-6201. Any conveyance of land and conveyances of Improvements shall be formalized in a separate Improvements Lease substantially in the form attached hereto as *Exhibit "G"*, or a form otherwise mutually acceptable to the City and the Developer. Developer shall cooperate with City, and shall execute, deliver and record such documents and instruments as City may reasonably request, to ensure that the conveyance of the Property to the City does not impair or effect a merger of the Restrictive Covenant into fee title to the Property.

c. Except for the amendments embodied in subparagraphs (a) and (b), the DDA shall remain in full force and effect.

5. Each of the parties hereto represents and warrants that it has properly granted authority to the persons or entities reflected on the signature pages to execute this Agreement on its behalf. Each signatory below personally represents and warrants that such authority has been properly granted to such signatory.

6. This Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns.

7. This Agreement together with all documents referred to or described in this Agreement are collectively an integration of the total agreement of the parties, embody and encompass all agreements between the parties and supersede all negotiations, prior discussions or preliminary agreements between the parties and there are no other agreements between the

parties with respect to the same subject matter. No modification of the terms of this Agreement shall be valid unless made in writing and signed by all the parties hereto.

8. The Parties hereto acknowledge and agree that this Agreement is the product of negotiation and that the Agreement shall not be construed against the principal drafter.

9. In the event that any portion of this Agreement is found to be unenforceable for any reason, the unenforceable provision(s) shall be considered to be severable. The remainder of this Agreement shall continue in full force and effect as fully as though such invalid, illegal, or unenforceable portion had never been part of this Agreement. Further, any Court considering any term alleged to be invalid, illegal, or unenforceable shall modify any challenged provision to the extent required to make it valid, legal, and enforceable and thereby give as much effect as possible to the intentions of the Parties to this Agreement.

10. This Agreement may be executed by the parties in one or more counterparts, and any number of counterparts signed in the aggregate by the parties shall constitute a single instrument.

11. This Agreement is subject to A.R.S. § 538-511.

12. This Agreement shall become effective once it is signed by all parties. The effective date of this Agreement shall be the date it is executed by the last person to sign it.

[SIGNATURE PAGE FOLLOWS]

“Gray Group”

GDG PARTNERS, L.L.C., an Arizona limited liability company

By: _____

Its: _____
Dated: _____

“Tempe”

CITY OF Tempe, an Arizona municipal corporation

By: _____
Hugh Hallman, Mayor
Dated: _____

Tempe Transit L.L.C., an Arizona limited liability company

By: GDG Enterprises L.L.C., an Arizona limited liability company, its Manager

By: _____
Its: _____
Dated: _____

ATTEST:

City Clerk
Dated: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: _____ By _____
Kutak Rock LLP Tempe City Attorney’s Office
Attorneys for Gray Parties Attorneys for City of Tempe

Dated _____ Dated: _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this ____ day of _____, 2008, before me, the undersigned officer, personally appeared Hugh L. Hallman, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation, whom I know personally to be the person whose name is subscribed to this instrument, 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

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this ____ day of _____, 2008, before me, the undersigned officer, personally appeared _____, who acknowledged himself to be the _____, of GDG Partners, LLC, an Arizona limited liability company, whom I know personally to be the person whose name is subscribed to this instrument, 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

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this ____ day of _____, 2008, before me, the undersigned officer, personally appeared _____, who acknowledged himself to be the _____, of Tempe Transit, LLC, an Arizona limited liability company, whom I know personally

to be the person whose name is subscribed to this instrument, 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: Instruction Letter

_____, 2008

LandAmerica Lawyers Title of Arizona
2425 East Camelback
Suite 700
Phoenix, AZ 85016
Attn: Judy Sorensen

City of Tempe/Mondrian TTL, L.L.C.
Lawyers Title Escrow No. 01550480-003-P63

Ladies and Gentlemen:

LandAmerica Lawyers Title of Arizona has been retained to act as escrow agent and title insurer (the "Title Insurer"), with respect to the restructuring of a loan (the "Senior Loan") from Key Bank to Mondrian TTL L.L.C., a Delaware limited liability company ("Mondrian"). The Senior Loan is secured by the real property located in Maricopa County, Arizona (the "Mondrian Project") and described in your Commitment for Title Insurance dated July 3, 2006 (the "Commitment"). As part of the restructuring of the Senior Loan, Mondrian is required to obtain the release of the second deed of trust in favor of the City of Tempe (the "Tempe Deed of Trust").

GDG Partners L.L.C. ("Gray") and the City of Tempe ("Tempe") are parties to that certain Settlement Agreement and Release, dated June _____, 2006 (the "Settlement Agreement").

1. DOCUMENTS. Any documents required in connection with the Refinancing will be delivered to you by Gray.

2. FUNDING. At the Closing, Gray will cause to be delivered to you the sum of \$_____ representing the amount required to be deposited under the Payment Agreement (the "Cash Collateral"). You are hereby instructed to hold the Cash Collateral until the conditions set forth below have been satisfied and you have received a written authorization from the undersigned or other representative of the City of Tempe. The Cash Collateral may be invested at Gray's instruction, and any investment proceeds may be released to Gray unless the City otherwise notifies you in writing. The Cash Collateral must be invested in FDIC-insured accounts or direct obligations of the United States of America.

3. RELEASE OF TEMPE DEED OF TRUST. You are hereby

authorized to record a deed of release and reconveyance of the Tempe Deed of Trust upon receipt of the Cash Collateral.

4. CLOSING. Mondrian Owner and/or Gray will deposit with you sufficient funds to enable you: (i) to pay all recording and/or filing fees; and (ii) to pay your fees and all other costs, expenses and fees associated with the Refinancing and release of the Tempe Deed of Trust, and any fees due you in connection with the cancellation of this transaction.

As soon as you have received the Cash Collateral, please notify the undersigned at 480-350-2817.

Please indicate your acceptance of the foregoing instructions by signing the enclosed copy hereof where indicated below and returning the signed copy to the undersigned.

Please feel free to call should you have any questions or if we may be of further assistance.

Very truly yours,

Cynthia Y. McCoy

Accepted and agreed to by
LandAmerica Lawyers Title of Arizona

By: _____
Its: _____

Exhibit G to DDA

LAND AND IMPROVEMENTS LEASE

THIS LAND AND IMPROVEMENTS LEASE ("Lease") is made and entered into as of the _____ day of _____, 2008 by and between the CITY OF TEMPE, a municipal corporation ("Landlord"), and Mondrian TTL L.L.C., a Delaware limited liability company ("Tenant").

RECITALS

Landlord has title of record to the land and building(s) which comprises the improvements constructed on land described in Exhibit A hereto (the "Land"), together with all rights and privileges appurtenant thereto and all future additions thereto or alterations thereof (collectively, the "Premises").

The Premises are located in a single central business district in a redevelopment area established pursuant to Title 36, Chapter 12, Article 3 of Arizona Revised Statutes (A.R.S. §§36-1471 et seq.). The construction of the Premises resulted in an increase in property value of at least one hundred percent.

C. The Premises will be subject to the Government Property Lease Excise Tax as provided for under ARS §42-1902 (the "Tax"). By Resolution No.____, dated _____, Landlord abated the Tax for the period beginning upon the issuance of the certificate of occupancy for the Premises and ending eight years thereafter, all as provided in A.R.S. §42-1962(A). But for the abatement, Tenant would not have caused the Premises to be constructed.

AGREEMENT

For and in consideration of the rental and of the covenants and agreements hereinafter set forth to be kept and performed by Tenant, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord the Premises for the term, at the rental and subject to and upon all of the terms, covenants and agreements hereinafter set forth.

1. Quiet Enjoyment. Landlord covenants and agrees with Tenant that conditioned upon Tenant's paying the Total Rent herein provided and performing and fulfilling all the covenants, agreements, conditions and provisions herein to be kept, observed or performed by Tenant, Tenant may at all times during the term hereof peaceably, quietly and exclusively have, hold and enjoy the Premises.
2. Term. The term of this Lease shall be for thirty-five years, commencing on the date of issuance of a final Certificate of Occupancy for the Premises (the "Commencement Date") and ending at midnight on the eighth anniversary of the Commencement Date, subject to earlier termination at Tenant's option, as provided herein.
3. Rental. Tenant covenants to pay to Landlord as rental for the Premises the sum of \$10.00 per year on the Commencement Date and every anniversary thereof. The consideration for this Lease includes, without limitation: the in lieu payments referenced in Section 7.1 of that certain Development Agreement between Landlord and Tenant, dated June 23, 2004 (C2004-130). and Tenant's payment of the entire cost of construction of the improvements constituting the Premises, Tenant's performance of all of the covenants and obligations under this Lease and Tenant's contribution toward fulfillment of Landlord's policy and desire to promote development within a redevelopment area, to encourage the creation of jobs within the City of Tempe, and to enhance tax revenues resulting from the operation of businesses on the Premises, including transaction privilege taxes and the government property lease excise tax. Tenant, at its option and without prejudice to its right to terminate this Lease as provided herein, may prepay the rental for the entire lease term, but upon any early termination of this Lease, Landlord shall not be obligated to refund any portion of the prepaid rental.
4. Leasehold Mortgage of Premises.

4.1 Subject to the applicable provisions of this Lease, Tenant is hereby given the absolute right without the Landlord's consent to create a security interest in Tenant's leasehold interest under this Lease (and in any subleases and the rents, income and profits therefrom) by mortgage, deed of trust or collateral assignment or otherwise. Any such security interest shall be referred to herein as a "Leasehold Mortgage," and the holder of a Leasehold Mortgage shall be referred to herein as a "Leasehold Mortgagee."

4.2 No liability for the performance of Tenant's covenants and agreements hereunder shall attach to or be imposed upon any Leasehold Mortgagee, unless such Leasehold Mortgagee forecloses its interest and becomes the Tenant hereunder, following which the liability shall attach only during the term of ownership of the leasehold estate by said Leasehold Mortgagee.

5. Taxes; Lease Obligations.

5.1 Payment. Tenant shall pay and discharge all general and special real estate and/or personal property taxes and assessments levied or assessed against or with respect to the Premises during the term hereof and all charges, assessments or other fees payable with respect to or arising out of this Lease and all recorded deed restrictions affecting or relating to the Premises, including without limitation the in lieu payments referenced in Section 7.1 of that certain Development Agreement between Landlord and Tenant, dated June 23, 2004 (C2004-130). Any sales, use, excise or transaction privilege tax consequence incurred by Landlord because of this Lease or in relation to the Premises or improvements included therein may be passed on to the Tenant either directly if applicable or as "additional rent."

5.2 Protest. Tenant may, at its own cost and expense protest and contest, by legal proceedings or otherwise, the validity or amount of any such tax or assessment herein agreed to be paid by Tenant and shall first pay said tax or assessment under protest if legally required as a condition to such protest and contest, and the Tenant shall not in the event of and during the bona fide prosecution of such protest or proceedings be considered as in default with respect to the payment of such taxes or assessments in accordance with the terms of this Lease.

5.3 Procedure. Landlord agrees that any proceedings contesting the amount or validity of taxes or assessments levied against the Premises or against the rentals payable hereunder may be filed or instituted in the name of Landlord or Tenant, as the case may require or permit, and the Landlord does hereby appoint the Tenant as its agent and attorney-in-fact, during the term of this Lease, to execute and deliver in the name of the Landlord any document, instrument or pleading as may be reasonably necessary or required in order to carry on any contest, protest or proceeding contemplated in this Section. Tenant shall hold the Landlord harmless from any liability, damage or expense incurred or suffered in connection with such proceedings.

5.4 Allocation. All payments contemplated by this Section 5 shall be prorated for partial years at the Commencement Date and at the end of the Lease term.

6. Use. Subject to the applicable provisions of this Lease and A.R.S. §42-1901(2), the Premises may be used and occupied by Tenant for any lawful purpose.

7. Landlord Non-Responsibility. Landlord shall have no responsibility, obligation or liability under this Lease whatsoever with respect to any of the following:

7.1 utilities, including gas, heat, water, light, power, telephone, sewage, and any other utilities supplied to the Premises;

7.2. disruption in the supply of services or utilities to the Premises;

7.3. maintenance, repair or restoration of the Premises; or

7.4. any other cost, expense, duty, obligation, assessment, service or function related to the Premises.

8. Entry by Landlord. Landlord and Landlord's agents shall have the right at reasonable times and upon

reasonable notice to enter upon the Premises for inspection, except that Landlord shall have no right to enter portions of any building on the Premises without consent of the occupant or as provided by law.

9. **Alterations.** Subject to the applicable provisions of this Lease, Tenant shall have the right without the requirement of Landlord's consent to construct additional improvements and to make subsequent alterations, additions or other changes to any improvements or fixtures existing from time to time, and the Premises shall constitute all such improvements as they exist from time to time. In connection with any action which Tenant may take with respect to Tenant's rights pursuant hereto, Landlord shall not be responsible for and Tenant shall pay all costs, expenses and liabilities arising out of or in any way connected with such improvements, alterations, additions or other changes made by Tenant, including without limitation materialmen's and mechanic's liens. Tenant covenants and agrees that Landlord shall not be called upon or be obligated to make any improvements, alterations or repairs whatsoever in or about the Premises, and Landlord shall not be liable or accountable for any damages to the Premises or any property located thereon. Tenant shall have the right at any time to demolish or substantially demolish improvements located upon the Premises. In making improvements and alterations, Tenant shall not be deemed Landlord's agent and shall hold Landlord harmless from any expense or damage Landlord may incur or suffer. Title to all improvements shall at all times be vested in Landlord.
10. **Easements, Dedications and Other Matters.** At the request of Tenant, when not in default hereunder, Landlord shall dedicate or initiate a request for dedication to public use of the improvements owned by Landlord within any roads, alleys or easements and convey any portion so dedicated to the appropriate governmental authority, execute (or participate in a request for initiation by the appropriate commission or department of) petitions seeking annexation or change in zoning for all or a portion of the Premises, consent to the making and recording, or either, of any map, plat, condominium documents, or declaration of covenants, conditions and restrictions of or relating to the Premises or any part thereof, join in granting any easements on the Premises, and execute and deliver (in recordable form where appropriate) all other instruments and perform all other acts reasonably necessary or appropriate to the development, construction, razing, redevelopment or reconstruction of the Premises.
11. **Insurance.** During the term of this Lease, the Tenant shall, at Tenant's expense, maintain general public liability insurance against claims for personal injury, death or property damage occurring in, upon or about the Premises. The limitation of liability of such insurance during the first five years of the term shall not be less than \$5,000,000.00 combined single limit. The minimum policy limits shall be increased as of the fifth anniversary of the Commencement Date to an amount equal to \$5,000,000.00 multiplied by a fraction, the numerator of which is the Consumer Price Index--All Items--All Consumers--U.S. Cities Average--(1982 - 1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics (the "CPI") for the month three months prior to such fifth anniversary and the denominator of which is the CPI for the month in which the Commencement Date occurred. In the event the CPI is discontinued or substantially modified, Tenant shall substitute such alternative price index, published by the United States Government or other generally accepted source for such information, reconciled to the Commencement Date. All of Tenant's policies of liability insurance shall name Landlord and all Leasehold Mortgagees as additional insureds, and, at the written request of Landlord, certificates with respect to all policies of insurance or copies thereof required to be carried by Tenant under this Section 11 shall be delivered to Landlord. Each policy shall contain an endorsement prohibiting cancellation or non-renewal without at least thirty (30) days prior notice to Landlord (ten (10) days for nonpayment). Tenant may self-insure the coverages required by this Section with the prior approval of Landlord, which will not be unreasonably withheld, and may maintain such reasonable deductibles and retention amounts as Tenant may determine.
12. **Liability; Indemnity.** Tenant covenants and agrees that Landlord is to be free from liability and claim for damages by reason of any injury to any person or persons, including Tenant, or property of any kind whatsoever and to whomsoever while in, upon or in any way connected

with the Premises during the term of this Lease or any extension hereof, or any occupancy hereunder, Tenant hereby covenanting and agreeing to indemnify and save harmless Landlord from all liability, loss, costs and obligations on account of or arising out of any such injuries or losses, however occurring, unless caused by the sole and gross negligence or willful misconduct of Landlord, its agents, employees, or invitees. Landlord agrees that Tenant shall have the right to contest the validity of any and all such claims and defend, settle and compromise any and all such claims of any kind or character and by whomsoever claimed, in the name of Landlord, as Tenant may deem necessary, provided that the expenses thereof shall be paid by Tenant. The provisions of this Section shall survive the expiration or other termination of this Lease.

13. **Fire and Other Casualty.** In the event that all or any improvements or fixtures within the Premises shall be totally or partially destroyed or damaged by fire or other insurable casualty, this Lease shall continue in full force and effect, and, subject to the applicable provisions of this Lease, Tenant, at Tenant's sole cost and expense (subject only to the provisions of any Leasehold Mortgage), may, but shall not be obligated to, rebuild or repair the same. Landlord and Tenant agree that the provisions of A.R.S. § 33-343 shall not apply to this Lease. In the event that, subject to the applicable provisions of this Lease, Tenant elects to repair or rebuild the improvements, any such repair or rebuilding shall be performed at the sole cost and expense of Tenant. If there are insurance proceeds resulting from such damage or destruction, Tenant shall be entitled to such proceeds (subject only to the provisions of any Leasehold Mortgage), whether or not Tenant rebuilds or repairs the improvements or fixtures, subject to the applicable provisions of this Lease.

14. **Condemnation.**

- 14.1 *Entire or Partial Condemnation.* *If the whole or any part of the Premises shall be taken or condemned by any competent authority for any public use or purposes during the term of the Lease, this Lease shall terminate with respect to the part of the Premises so taken, and, subject to the applicable provisions of this Lease and the provisions of any Leasehold Mortgage, Tenant reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or damages based upon loss, damage or injury to its leasehold interest (as well as relocation and moving costs). In consideration of Tenant's payment for all of the cost of construction of the improvements constituting the Premises, Landlord hereby assigns to Tenant (subject only to the provisions of any Leasehold Mortgage) all claims, awards and entitlements relating to the Premises arising from the exercise of the power of condemnation or eminent domain.*

- 14.2 Continuation of Lease. In the event of a taking of less than all of the Premises, this Lease shall continue in effect with respect to the portion of the Premises not so taken.

- 14.3 Temporary Taking. If the temporary use of the whole or any part of the Premises or the appurtenances thereto shall be taken, the term of this Lease shall not be reduced or affected in any way. The entire award of such taking (whether paid by way of damages, rent, or otherwise) shall be payable to Tenant, subject to the applicable provisions of this Lease and of any Leasehold Mortgage.

- 14.4 Notice of Condemnation. In the event any action is filed to condemn the Premises or Tenant's leasehold estate or any part thereof by any public or quasi-public authority under the power of eminent domain or in the event that an action is filed to acquire the temporary use of the Premises or Tenant's leasehold estate or any part thereto, or in the event that action is threatened or any public or quasi-public authority communicates to Landlord or Tenant its desire to acquire the temporary use thereof, by a voluntary conveyance or transfer in lieu of condemnation, either Landlord or Tenant shall give prompt notice thereof to the other and to any Leasehold Mortgagee. Landlord, Tenant and each Leasehold Mortgagee shall each have the right, at its own cost and expense, to represent its respective interest in each proceeding, negotiation or settlement with respect to any taking or threatened taking. No agreement, settlement,

conveyance or transfer to or with the condemning authority affecting Tenant's leasehold interest shall be made without the consent of Tenant and each Leasehold Mortgagee.

15. Termination Option.

- 15.1 Grant of Option. In the event changes in applicable law nullify, remove, or vitiate the economic benefit to Tenant provided by this Lease or if any person or entity succeeds to Tenant's interest hereunder by foreclosure sale, trustee's sale, or deed in lieu of foreclosure (collectively, "Foreclosure"), Tenant or Tenant's successor by Foreclosure shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective sixty days after the date of the notice. Upon default under the Leasehold Mortgage, Tenant or Leasehold Mortgagee shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective sixty days after the date of the notice. Simultaneously with, and effective as of such termination, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant and Landlord shall comply with the obligations under Article 20.
- 15.2 Leasehold Mortgagees and Tenant. If there are any Leasehold Mortgagees as defined in Section 4(a), Tenant may not exercise, terminate, modify or waive its Option under this section without the prior written approval of the Leasehold Mortgagees, and Landlord will not recognize or consent thereto without such approval.

16. Assignment; Subletting.

- 16.1 Transfer by Tenant. At any time and from time to time Tenant shall have the right to assign the Lease and Tenant's leasehold interest or to sublease all of or any part of the Premises to any person or persons, without the consent of the Landlord.
- 16.2 Liability. Each assignee hereby assumes all of the obligations of the Tenant under the Lease (but not for liabilities or obligations arising prior to such assignment becoming effective). Each assignment shall automatically release the assignor from any personal liability in respect of any obligations or liabilities arising under the Lease from and after the date of assignment, and Landlord shall not seek recourse for any such liability against any assignor or its personal assets. Landlord agrees that performance by a subtenant or assignee of Tenant's obligations under this Lease shall satisfy Tenant's obligations hereunder and Landlord shall accept performance by any such subtenant.

17. Default Remedies; Protection of Leasehold Mortgagee and Subtenants.

- 17.1 Default. The failure by Tenant to observe and perform any material provision of this Lease to be observed or performed by Tenant or a failure to pay the Tax when due, where such failure continues for one hundred eighty days after written notice thereof by Landlord to Tenant shall constitute a default and breach of this Lease by Tenant; provided, however, that if the nature of such default is such that the same cannot reasonably be cured within such one hundred eighty day period, Tenant shall not be deemed to be in default if Tenant shall within such period commence such cure and thereafter diligently prosecute the same to completion.
- 17.2 Remedies. In the event of any such material default or breach by Tenant, Landlord may at any time thereafter, by written notice to Tenant terminate this Lease, in which case Tenant shall immediately surrender possession of the Premises to Landlord. This section constitutes the provision required under A.R.S. §42-1931(2) that failure by the prime lessee to pay the Tax after notice and an opportunity to cure is an event of default that could result in divesting the prime lessee of any interest or right or occupancy of the government property improvement.
- 17.3 Leasehold Mortgagee Default Protections. If any Leasehold Mortgagee shall give written notice to Landlord of its Leasehold Mortgage, together with the name and address of the Leasehold Mortgagee, then, notwithstanding anything to the contrary in this Lease, until the time, if any,

that the Leasehold Mortgage shall be satisfied and released of record or the Leasehold Mortgagee shall give to Landlord written notice that said Leasehold Mortgage has been satisfied.

- 17.3.1. No act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender, amend, or modify this Lease or Tenant's right to possession shall be binding upon or effective as against the Leasehold Mortgagee without its prior written consent.
- 17.3.2. If Landlord shall give any notice, demand, election or other communication required hereunder (hereafter collectively "Notices") to Tenant hereunder, Landlord shall concurrently give a copy of each such Notice to the Leasehold Mortgagee at the address set forth in Section 23.8 or as otherwise designated by the Leasehold Mortgagee. Such copies of Notices shall be sent by registered or certified mail, return receipt requested, and shall be deemed given seventy-two hours after the time such copy is deposited in a United States Post Office with postage charges prepaid, addressed to the Leasehold Mortgagee. No Notice given by Landlord to Tenant shall be binding upon or affect Tenant or the Leasehold Mortgagee unless a copy of the Notice shall be given to the Leasehold Mortgagee pursuant to this subsection. In the case of an assignment of the Leasehold Mortgage or change in address of the Leasehold Mortgagee, the assignee or Leasehold Mortgagee, by written notice to Landlord, may change the address to which such copies of Notices are to be sent.
- 17.3.3. The Leasehold Mortgagee shall have the right for a period of sixty days after the expiration of any grace period afforded Tenant to perform any term, covenant, or condition and to remedy any default by Tenant hereunder or such longer period as the Leasehold Mortgagee may reasonably require to affect a cure, and Landlord shall accept such performance with the same force and effect as if furnished by Tenant, and the Leasehold Mortgagee shall thereby and hereby be subrogated to the rights of Landlord. The Leasehold Mortgagee shall have the right to enter upon the Premises to give such performance.
- 17.3.4. In case of a default by Tenant in the performance or observance of any nonmonetary term, covenant or condition to be performed by it hereunder, if such default cannot practicably be cured by the Leasehold Mortgagee without taking possession of the Premises, in such Leasehold Mortgagee's reasonable opinion, or if such default is not susceptible of being cured by the Leasehold Mortgagee, then Landlord shall not serve a notice of lease termination pursuant to Section 23.8, if and so long as:
 - (i) **the Leasehold Mortgagee shall proceed diligently to obtain possession of the Premises as mortgagee (including possession by a receiver), and, upon obtaining such possession, shall proceed diligently to cure such defaults as are reasonably susceptible of cure (subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession); or**
 - (ii) the Leasehold Mortgagee shall institute foreclosure proceedings and diligently prosecute the same to completion (unless in the meantime it shall acquire Tenant's estate hereunder, either in its own name or through a nominee, by assignment in lieu of foreclosure and subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession).

The Leasehold Mortgagee shall not be required to obtain possession or to continue in possession as mortgagee of the Premises pursuant to Clause (i) above, or to continue to prosecute foreclosure proceedings pursuant to Clause (ii) above, if and when such default shall be cured. If a Leasehold Mortgagee, its nominee, or a

purchaser at a foreclosure sale shall acquire title to Tenant's leasehold estate hereunder, a default that is not reasonably susceptible to cure by the person succeeding to the leasehold interest shall no longer be deemed a default hereunder.

17.3.5. If any Leasehold Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof by any process or injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Tenant, the times specified in subparagraphs 17.3.4(i) and (ii) above, for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition.

17.3.6. No option of Tenant hereunder may be exercised, and no consent of Tenant allowed or required hereunder shall be effective without the prior written consent of any Leasehold Mortgagee.

17.4 Protection of Subtenant. Landlord covenants that notwithstanding any default under or termination of this Lease or of Tenant's possessory rights, Landlord: (i) so long as a subtenant within the Premises complies with the terms and conditions of its sublease, shall not disturb the peaceful possession of the subtenant under its sublease, and in the event of a default by a subtenant, Landlord may only disturb the possession or other rights of the subtenant as provided in the tenant's sublease, (ii) shall recognize the continued existence of the sublease, (iii) shall accept the subtenant's attornment, as subtenant under the sublease, to Landlord, as landlord under the sublease, and (iv) shall be bound by the provisions of the sublease, including all options. Notwithstanding anything to the contrary in this Lease, no act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender or modify this Lease or Tenant's right to possession shall be binding upon or effective as against any subtenant without its prior written consent.

18. New Lease.

18.1 Right to Lease. Landlord agrees that, in the event of termination of this Lease for any reason (including but not limited to any default by Tenant), Landlord, if requested by any Leasehold Mortgagee, will enter into a new lease of the Premises with the most senior Leasehold Mortgagee requesting a new lease, which new lease shall commence as of the date of termination of this Lease and shall run for the remainder of the original term of this Lease, at the rent and upon the terms, covenants and conditions herein contained, provided:

- a. **Such Leasehold Mortgagee shall make written request upon Landlord for the new lease within sixty days after the date such Leasehold Mortgagee receives written notice from Landlord that the Lease has been terminated;**
- b. **Such Leasehold Mortgagee shall pay to Landlord at the time of the execution and delivery of the new lease any and all sums which would, at that time, be due and unpaid pursuant to this Lease but for its termination, and in addition thereto all reasonable expenses, including reasonable attorneys fees, which Landlord shall have incurred by reason of such termination;**
- c. **Such Leasehold Mortgagee shall perform and observe all covenants in this Lease to be performed and observed by Tenant, and shall further remedy any other conditions which Tenant under the Lease was obligated to perform under its terms, to the extent the same are reasonably susceptible of being cured by the Leasehold Mortgagee; and**
- d. **The Tenant under the new lease shall have the same right of occupancy to the buildings and improvements on the Premises as Tenant had under the Lease immediately prior to its termination.**
- e. Notwithstanding anything to the contrary expressed or implied in this Lease, any new lease made pursuant to this Section shall have the same priority as this Lease with respect to any mortgage, deed of trust, or other lien, charge, or encumbrance on the fee of the Premises, and any sublease under this Lease shall be a sublease under the new Lease and shall not be

deemed to have been terminated by their termination of this Lease.

- 18.2. No Obligation. Nothing herein contained shall require any Leasehold Mortgagee to enter into a new lease pursuant to this Section or to cure any default of Tenant referred to above.
 - 18.3. Possession. If any Leasehold Mortgagee shall demand a new lease as provided in this Section, Landlord agrees, at the request of, on behalf of and at the expense of the Leasehold Mortgagee, upon a guaranty from it reasonably satisfactory to Landlord, to institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove the original Tenant from the Premises, but not any subtenants actually occupying the Premises or any part thereof.
 - 18.4. Grace Period. Unless and until Landlord has received notice from each Leasehold Mortgagee that the Leasehold Mortgagee elects not to demand a new lease as provided in this Section, or until the period therefore has expired, Landlord shall not cancel or agree to the termination or surrender of any existing subleases nor enter into any new leases or subleases with respect to the Premises without the prior written consent of each Leasehold Mortgagee.
 - 18.5. Effect of Transfer. Neither the foreclosure of any Leasehold Mortgage (whether by judicial proceedings or by virtue of any power of sale contained in the Leasehold Mortgage), nor any conveyance of the leasehold estate created by this Lease by Tenant to any Leasehold Mortgagee or its designee by an assignment or by a deed in lieu of foreclosure or other similar instrument shall require the consent of Landlord under, or constitute a default under, this Lease, and upon such foreclosure, sale or conveyance, Landlord shall recognize the purchaser or other transferee in connection therewith as the Tenant under this Lease.
19. No Merger. In no event shall the leasehold interest, estate or rights of Tenant hereunder, or of any Leasehold Mortgagee, merge with any interest, estate or rights of Landlord in or to the premises. Such leasehold interest, estate and rights of Tenant hereunder, and of any Leasehold Mortgagee, shall be deemed to be separate and distinct from Landlord's interest, estate and rights in or to the Premises, notwithstanding that any such interests, estates or rights shall at any time be held by or vested in the same person, corporation or other entity.
 20. Surrender, Reconveyance.
 - 20.1 Reconveyance on Termination or Expiration. On the last day of the term of this Lease or upon any termination of this Lease, whether under Article 15 above or otherwise, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant.
 - 20.2 Reconveyance Documents. Without limiting the foregoing, Landlord upon request shall execute and deliver: (i) a deed or bill of sale reconveying all of Landlord's right title and interest in the improvements to Tenant; (ii) a memorandum in recordable form reflecting the termination of this Lease; (iii) an assignment of Landlord's right, title and interest in and to all licenses, permits, guaranties and warranties relating to the ownership or operation of the Premises to which Landlord is a party and which are assignable by Landlord, and (iv) such other reasonable and customary documents as may be required by Tenant or its title insurer including, without limitation, FIRPTA and mechanic's lien affidavits, to confirm the termination of this Lease and the revesting of title to the Premises in Tenant.
 - 20.3. Title and Warranties. Notwithstanding anything to the contrary in this section, Landlord shall convey the Premises subject only to: (i) matters affecting title as of the date of this Lease, and (ii) matters created by or with the consent of Tenant. The Premises shall be conveyed "AS IS" without representation or warranty whatsoever. Upon any reconveyance, Landlord shall satisfy all liens and monetary encumbrances on the Premises created by Landlord.
 - 20.4. Expenses. All costs of title insurance, escrow fees, recording fees and other expenses of the reconveyance, except Landlord's own attorneys' fees and any commissions payable to any

broker retained by Landlord, shall be paid by Tenant.

21. Trade Fixtures, Machinery and Equipment. Landlord agrees that all trade fixtures, machinery, equipment, furniture or other personal property of whatever kind and nature kept or installed on the Premises by Tenant or Tenant's subtenants may be removed by Tenant or Tenant's subtenants, or their agents and employees, in their discretion, at any time and from time to time during the entire term or upon the expiration of this Lease. Tenant agrees that in the event of damage to the Premises due to such removal it will repair or restore the same. Upon request of Tenant or Tenant's assignees or any subtenant, Landlord shall execute and deliver any consent or waiver forms submitted by any vendors, Landlords, chattel mortgagees or holders or owners of any trade fixtures, machinery, equipment, furniture or other personal property of any kind and description kept or installed on the Premises by any subtenant setting forth the fact that Landlord waives, in favor of such vendor, Landlord, chattel mortgagee or any holder or owner, any lien, claim, interest or other right therein superior to that of such vendor, Landlord, chattel mortgagee, owner or holder. Landlord shall further acknowledge that property covered by such consent or waiver forms is personal property and is not to become a part of the realty no matter how affixed thereto and that such property may be removed from the Premises by the vendor, Landlord, chattel mortgagee, owner or holder at any time upon default by the Tenant or the subtenant in the terms of such chattel mortgage or other similar documents, free and clear of any claim or lien of Landlord.
22. Estoppel Certificate. Landlord shall at any time and from time to time upon not less than ten (10) days' prior written notice from Tenant or any Leasehold Mortgagee execute, acknowledge and deliver to Tenant or the Leasehold Mortgagee a statement in writing (i) certifying that this Lease is unmodified and in full force and effect (or if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the dates to which the rental and other charges are paid in advance, if any; (ii) acknowledging that there are not, to Landlord's knowledge, any uncured defaults on the part of Tenant hereunder, or specifying such defaults if they are claimed; and (iii) certifying such other matters relating to this Lease as Tenant or the Leasehold Mortgagee may reasonably request. Any such statement may be relied upon by any prospective purchaser or encumbrancer of all or any portion of the leasehold estate and/or the improvements.

Landlord's failure to deliver a statement within the time prescribed shall be conclusive upon Landlord (i) that this Lease is in full force and effect, without modification except as may be represented by Tenant; and (ii) that there are no uncured defaults in Tenant's performance.

23. General Provisions.

- 23.1 Attorneys' Fees. In the event of any suit instituted by either party against the other in any way connected with this Lease or for the recovery of possession of the Premises, the parties respectively agree that the successful party to any such action shall recover from the other party a reasonable sum for its attorneys' fees and costs in connection with said suit, such attorneys' fees and costs to be fixed by the court.
- 23.2 Transfer or Encumbrance of Landlord's Interest. Landlord may not transfer or convey its interest in this Lease or in the Premises during the term of this Lease without the prior written consent of Tenant, which consent may be given or withheld in Tenant's sole and absolute discretion. In the event of permitted sale or conveyance by Landlord of Landlord's interest in the Premises, other than a transfer for security purposes only, Landlord shall be relieved, from and after the date specified in such notice of transfer, of all obligations and liabilities accruing thereafter on the part of the Landlord, provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest, shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee provided all of Landlord's obligations hereunder are assumed in writing by the transferee. Landlord shall not grant or create mortgages, deeds of trust or other encumbrances of any kind against the Premises or rights of Landlord hereunder, and, without limiting the generality of the foregoing, Landlord shall have no right or power to grant or create mortgages,

deeds of trust or other encumbrances superior to this Lease without the consent of Tenant in its sole and absolute discretion. Any mortgage, deed of trust or other encumbrance granted or created by Landlord shall be subject to this Lease, all subleases and all their respective provisions including, without limitations, the options under this Lease and any subleases with respect to the purchase of the Premises.

23.3 Captions; Attachments; Defined Terms.

- a. The captions of the sections of the Lease are for convenience only and shall not be deemed to be relevant in resolving any question of interpretation or construction of any section of this Lease.
- b. Exhibits attached hereto, and addendums and schedules initialed by the parties, are deemed by attachment to constitute part of this Lease and are incorporated herein.
- c. The words "Landlord" and "Tenant", as used herein, shall include the plural as well as the singular. The obligations contained in this Lease to be performed by Tenant and Landlord shall be binding on Tenant's and Landlord's successors and assigns only during their respective periods of ownership.

23.4. Entire Agreement. This Lease along with any addenda, exhibits and attachments hereto constitutes the entire agreement between Landlord and Tenant relative to the Premises and this Lease and the addenda, exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by the party to be bound thereby. Landlord and Tenant agree hereby that all prior or contemporaneous oral agreements between and among themselves and their agents or representatives relative to the leasing of the Premises are merged in or revoked by this Lease, except as set forth in any addenda hereto.

23.5 Severability. If any term or provision of this Lease shall, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law.

23.6 Binding Effect; Choice of Law. The parties hereto agree that all the provisions hereof are to be construed as both covenants and conditions as though the words importing such covenants and conditions were used in each separate paragraph hereof. All of the provisions hereof shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Arizona.

23.7 Memorandum of Land and Improvements Lease. The parties shall, concurrently with the execution of this Lease, complete, execute, acknowledge and record (at Tenant's expense) a Memorandum of Land and Improvements lease, a form of which is attached hereto as Exhibit B.

23.8 Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered or if mailed by United States certified or registered mail, return receipt requested, postage prepaid, as follows:

If to Landlord:

City of Tempe
City Manager' s Office
31 E. 5th Street
Tempe, Arizona 85281

With a copy to:
City of Tempe
City Attorney's Office
31 East 5th Street
Tempe, Arizona 85281

If to Tenant:

Mondrian TTL, L.L.C
c/o Gray Development Group
2555 East Camelback Road
Suite 1010
Phoenix, AZ 85016
Attn: Mr. Daniel Tilton

With a copy to:
Brian J. Jordan
Kutak Rock LLP
8601 N. Scottsdale Road, Third Floor
Scottsdale, AZ 85253-2742

or at such other place or to such other persons as any party shall from time to time notify the other in writing as provided herein. The date of service of any communication hereunder shall be the date of personal delivery or seventy-two hours after the postmark on the certified or registered mail, as the case may be.

Unless and until Landlord is notified otherwise in writing by the then-current Leasehold Mortgagee or its servicer, the notice address for the Leasehold Mortgagee shall be:

Fannie Mae
c/o Keycorp Real Estate Capital Markets, Inc.
127 Public Square
Cleveland, Ohio 44114

With a copy to:
Sameer Uphadya, Esq.
Krooth & Altman LLP
1850 M Street, NW
Washington, DC 20036

- 23.9 ***Waiver. No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver or the breach of any covenant, term or condition shall not be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant, term or condition.***
- 23.10 **Negation of Partnership.** Landlord shall not become or be deemed a partner or a joint venturer with Tenant by reason of the provisions of this Lease.
- 23.11 **Hold Over.** If Tenant shall continue to occupy the Leased Premises after the expiration of the term hereof without the consent of Landlord, such tenancy shall be from month to month on the same terms and conditions as are set forth herein.
- 23.12 **Leasehold Mortgagee Further Assurances.** Landlord and Tenant shall cooperate in including in this Lease by suitable amendment from time to time any provision which may be reasonably requested by any proposed Leasehold Mortgagee for the purpose of implementing the mortgagee-protection provisions contained in this Lease, of allowing that Leasehold Mortgagee reasonable means to protect or preserve the lien of its Leasehold Mortgage upon the occurrence of a default under the terms of this Lease and of confirming the elimination of the ability of Tenant to modify, terminate or waive this Lease or any of its provisions without the prior written approval of the Leasehold Mortgagee. Landlord and Tenant each agree to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effect any such amendment; provided, however, that any such amendment shall not in any way affect the term or rent under this Lease nor otherwise in any material respect adversely affect any rights of Landlord under this Lease.

This Lease shall be subordinate in all respects to any Leasehold Mortgage, regardless of the date either such document shall be executed, made effective or recorded (including without limitation the execution, effective date and/or recordation of any memorandum of this Lease). No further documentation shall be required to subordinate this Lease to any Leasehold Mortgage; however, if requested by any title insurer for the Leasehold Mortgage, the parties shall execute a subordination agreement to evidence such subordination.

Landlord shall not mortgage Landlord's fee estate without the prior written consent of the Leasehold Mortgagee, which consent shall be given, withheld or conditioned in Leasehold Mortgagee's sole discretion.

In the event Leasehold Mortgagee exercises its remedy of foreclosure or takes title to Tenant's leasehold estate in the Premises through deed-in-lieu of foreclosure or any other means, Leasehold Mortgagee shall have the right to do so without consent of Landlord and, from and after the time Leasehold Mortgagee takes such title, Landlord shall recognize Leasehold Mortgagee (and/or its successors and/or assigns) as the Tenant under this Lease.

24. Nonrecourse. Landlord's sole recourse for collection or enforcement of any judgment as against Tenant shall be solely against the leasehold interest under this Lease and the Buildings and other improvements on the Premises and may not be enforced against or collected out of any other assets of Tenant nor of its beneficiaries, joint venturers, owners, partners, shareholders, members or other related parties.

IN WITNESS WHEREOF, the parties hereto have executed this Lease on the date and year first written above.

ATTEST:
By: _____
City Clerk

APPROVED AS TO FORM:

City Attorney

LANDLORD:

CITY OF TEMPE, a municipal corporation
By: _____
Name: _____
Title: _____

TENANT:

Mondrian TTL L.L.C., a Delaware limited liability company
By: Mondrian Manager L.L.C., an Arizona limited liability company, its Manager
By: GDG Enterprises L.L.C., an Arizona limited liability company, its sole Member and Manager

By: _____
Name: _____
Title: _____