

AGREEMENT

THIS AGREEMENT ("Agreement") is made and entered into as of this ___ day of _____, 2013 by and between: (i) the CITY OF FLAGSTAFF, an Arizona municipal corporation ("City"); and (ii) TLC PC INFRASTRUCTURE, L.L.C., an Arizona limited liability company ("TLC Infrastructure"), and TLC PC DEVELOPERS, LLC, an Arizona limited liability company ("TLC Developers"). TLC Infrastructure and TLC Developers are referred to collectively in this Agreement as "TLC," and the City and TLC are referred to collectively in this Agreement as the "Parties."

RECITALS

A. On June 5, 2000, the City Council of the City ("Council") adopted Ordinance No. 2000-11 ("Ordinance"), rezoning that certain real property then known as "Fairway Peaks," and now known as "Pine Canyon" ("Pine Canyon"), subject to the conditions set forth in the Ordinance. General Condition 8 of the Ordinance ("GC 8") provided that "all private roads within the Development remain open to the public and never be gated." The Ordinance was recorded on July 17, 2000, as Instrument No. 3056859 in the Official Records of Coconino County, Arizona ("County").

B. The City, Vanderbilt Farms, L.L.C., an Arizona limited liability company ("Original Developer"), and San Francisco Peaks Associates, LP, an Arizona limited partnership ("Original Owner"), then entered into the Development Agreement for Fairway Peaks dated September 5, 2000, and recorded on September 8, 2000, as Instrument No. 3063582 in the Official Records of the County, as amended by the Amendment to Development Agreement dated January 30, 2007, and recorded on January 31, 2007 as Instrument No. 3423547 in the Official Records of Coconino County (collectively, "Development Agreement").

C. On November 18, 2002, Lone Tree Investment Holdings, LLC, an Arizona limited liability company ("Original Beneficiary") established Trust No. B178 under the governing Trust Agreement dated as of November 18, 2002, as amended, administered by Fidelity National Title Insurance Company, as Trustee ("Trust").

D. Section 9(m) of the Development Agreement provided, among other things, for the collection and disbursement of Original Developer's "fair share contribution" to the construction of the Lone Tree and I-40 Interchange or, in the alternative, to the completion of a revised traffic impact analysis and mitigation of all measurable impacts, if any, created by the Pine Canyon development. Section 9(k) of the Development Agreement provided, among other things, for the collection and disbursement of Original Developer's regional park contributions. The Trust, among other things, provided for the collection and disbursement of Original Developer's obligations under Sections 9(k) and 9(m) of the Development Agreement.

E. The Development Agreement expired by its terms on or about September 8, 2010.

F. TLC Infrastructure is the successor in interest to Original Developer and Original Owner with respect to all existing and future roadways and associated access, utility and drainage easements and tracts located within Pine Canyon. TLC Developers is the successor to Original Beneficiary as “Beneficiary” under the Trust.

G. TLC and the City have entered into this Agreement in order to: (i) establish a mechanism that replaces Section 9(m) of the Development Agreement in order to provide for the collection and disbursement of Pine Canyon’s “fair share contribution” to current or future transportation infrastructure improvements associated with Pine Canyon’s impact on the regional transportation system; (ii) amend GC 8 in order to allow for the placement and operation of access control gates, with an associated keypad security; and (iii) evidence certain other related agreements between TLC and the City.

IN CONSIDERATION OF the mutual representations, warranties, covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. **Recitals.** The Recitals are true and correct and are incorporated in this Agreement.

2. **Amendment to Ordinance No. 2000-11.** City Staff agrees to support TLC’s application to amend GC 8 (“GC 8 Amendment”) for the limited purpose of permitting TLC Infrastructure to install, operate and maintain access control gates between the hours of 11:00 p.m. and 6:00 a.m., with associated keypad security, at all points of public vehicular entry into Pine Canyon (collectively, “Access Gates”). TLC Infrastructure acknowledges the City desires to solicit public input regarding the Access Gates and will process the GC 8 Amendment as if it constituted a rezoning of the property upon which the Access Gates will be located and that the City will require, among other things, advertisement and notification of affected property owners otherwise consistent with the rezoning requirements set forth in the City’s 2011 Zoning Code (“2011 Zoning Code”). TLC Infrastructure further acknowledges the GC 8 Amendment will be subject to Council approval. The GC 8 Amendment will require that: (i) the Access Gates be located outside of the public rights-of-way and at the minimum setback distance required by the applicable zoning designation; (ii) TLC Infrastructure shall be responsible for the installation and maintenance of the Access Gates; and (iii) the Access Gates will not impair pedestrian passage. TLC Infrastructure will work with affected landowners to determine appropriate locations for the Access Gates. In connection with submitting the GC 8 Amendment for Council approval, TLC Infrastructure will pay all applicable fees and otherwise comply with the City’s municipal requirements; provided, however: (y) neither TLC Infrastructure nor any affiliate of TLC Infrastructure will be required to obtain any resource reports or impact studies as result of the GC 8 Amendment; and (z) other than the limited amendment to GC 8 permitting the

installation, operation and maintenance of the Access Gates, no aspect of Pine Canyon's current zoning or entitlement will be impacted, amended or modified.

3. **Signage.** The City shall erect and maintain a directional sign within the City's right-of-way at the intersection of Lake Mary Road and John Wesley Powell Boulevard ("Directional Sign"). The Directional Sign shall indicate to the travelling public the entrance to Pine Canyon and shall conform to the standards for location, size, shape, material, color and design set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways. The City agrees that it shall be its sole responsibility to obtain all required governmental approvals, if any, in connection with the erection of the Directional Sign.

4. **Transportation Infrastructure Improvement Funds.**

a. ***Existing Escrow Funds.*** Within five (5) business days following the Effective Date, TLC Developers will cause all funds currently held in the Escrow Account pursuant to Section 9(m) of the Development Agreement, together with any accrued interest (collectively, "Existing Transportation Funds"), to be transferred from the Escrow Account to the City for the funding of current or future transportation infrastructure improvements associated with Pine Canyon's impact on the regional transportation system. For purposes of this Agreement, "Escrow Account" shall have the same meaning and definition as set forth in Section 9(k) of the Development Agreement.

b. ***Future Payment Obligation.*** TLC Developers further agrees, for a period of ten years from the Effective Date of this Agreement, to pay the City the sum of \$1855.55 per Lot in Pine Canyon, with each payment being made on a Lot-by-Lot basis, as a condition precedent to the issuance of a final certificate of occupancy (collectively, "Future Transportation Funds"). The Future Transportation Funds shall constitute a lien in the amount of \$1855.55 against each respective Lot until paid. These funds will be used solely for the funding of current or future transportation infrastructure improvements associated with Pine Canyon's impact on the regional transportation system. For purposes of this Agreement, "Pine Canyon" shall have the same meaning as "Project" in the Development Agreement, and "Lot" shall have the same meaning as in the Development Agreement.

c. ***Obligations Fully Satisfied.*** The City acknowledges and agrees that TLC (and its affiliates) are released from and are no longer obligated to perform or fulfill those duties and acts set forth in the Development Agreement (including, without limitation, Sections 9(k) and 9(m) of the Development Agreement). The City further acknowledges and agrees that payment of the Existing Transportation Funds and the Future Transportation Funds satisfies, in full, any obligation relating to current or future transportation infrastructure improvements arising from Pine Canyon's impact on the regional transportation system. Upon payment of the Existing Transportation Funds to the City, the City waives and relinquishes any claim to, or rights in or under, either the Escrow Account or the Trust.

5. **Regional Park Funds.** All funds currently held in the Escrow Account pursuant to Section 9(k) of the Development Agreement, together with any accrued interest, shall be transferred from the Escrow Account to TLC Developers.

6. **Notices.** Any notice, demand, request, consent, approval or communication under this Agreement shall be in writing and either served personally or sent by prepaid, first-class mail to the address set forth below. Either party may change its address by notifying the other party of the change of address in writing. Notice shall be deemed given (a) upon personal delivery or (b) forty-eight (48) hours from deposit of such notice in the United States mail, postage prepaid.

To City:

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

To TLC:

AVG Service Corporation
8777 N. Gainey Center Dr. #191
Scottsdale, Arizona 85258

and

Russ Schaeffer
Chief Operating Officer
The TLC Companies
2555 E. Camelback Rd. #770
Phoenix, Arizona 85016

7. **Representation and Warranties by the City.**

a. The City has the full right, power, and authorization from its City Council to enter into and perform this Agreement and each of the City's obligations, representations, covenants and undertakings under this Agreement. The City's execution, delivery and performance of this Agreement has been duly authorized and agreed to in compliance with the requirements of the Flagstaff City Charter, the Flagstaff City Code and all applicable State and Federal law.

b. All consents and approval necessary to the execution, delivery and performance of this Agreement have been obtained, and the City will execute all documents and take all actions necessary to implement, evidence and enforce this Agreement.

c. The City knows of no litigation, proceeding, initiative, referendum, investigation or threat of any of the same contesting the powers of the City or its officials with respect to this Agreement.

8. **Representations and Warranties by TLC.**

a. TLC has the full right, power and authorization to enter into and perform this Agreement, and TLC's execution, delivery and performance of this Agreement has been duly authorized and agreed to in accordance with its organization documents, and upon this Agreement's Effective Date, it shall be binding and enforceable against TLC.

b. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and TLC will execute all documents and take all actions necessary to implement, evidence and enforce this Agreement.

c. TLC knows of no litigation, proceedings, investigation or threat of any of the same contesting the powers of TLC or its officials with respect to this Agreement.

d. The execution, delivery and performance of this Agreement by TLC is not prohibited by, and does not conflict with, any other agreements, laws, instruments or judgments to which TLC is a party or is otherwise subject.

e. TLC has been assisted by counsel of its own choosing, and has had the opportunity to discuss this Agreement and its consequences with its chosen legal counsel.

9. **General Provisions.**

a. This Agreement shall not be altered, modified or amended except by written agreement signed by the Parties.

b. This Agreement shall be governed, construed and enforced in accordance with the laws of the State of Arizona.

c. The City and TLC have had an opportunity to participate in the drafting of this Agreement, and no term or provision of this Agreement shall be construed against either party by virtue of its drafting the Agreement.

d. This Agreement is subject to, and may be terminated by, the City in accordance with the provisions of A.R.S. § 38-511, Arizona's conflict of interest statute.

e. This Agreement constitutes the entire agreement between the Parties. The City and TLC each acknowledge that they have not executed this Agreement in reliance on any promise, representation or warranty not contained herein.

f. Should any litigation be commenced between the Parties concerning the terms of this Agreement, or the rights and duties of TLC or the City under this Agreement, the prevailing party or parties in such proceeding or litigation shall be entitled, in addition to such other relief as may be granted, to payment of all of its costs, expenses (including, but not limited to, expert fees), and reasonable attorneys' fees incurred in connection with the dispute.

10. **Future Cooperation.** Each Party to this Agreement will reasonably cooperate and in good faith and diligently perform any further acts, deeds and things and execute and deliver any documents that may from time to time be reasonably necessary or otherwise reasonably required to consummate, evidence, confirm and/or carry out the intent and provisions of this Agreement, all without undue delay or expense and without further consideration.

12. **Effective Date.** This Agreement shall be deemed to be effective and fully enforceable as of the date of its approval by the Flagstaff City Council (the "Effective Date").

EXECUTED as of the Effective Date, by:

TLC PC INFRASTRUCTURE, L.L.C
an Arizona limited liability company

CITY OF FLAGSTAFF, an
Arizona municipal corporation

By: _____
Its: _____

Mayor

TLC PC DEVELOPERS, LLC, an Arizona
limited liability company

ATTEST:

By: _____
Its: _____

City Clerk

APPROVED AS TO FORM:

City Attorney