

ADOPTED BY THE
MAYOR AND COUNCIL

RESOLUTION NO. 21049

RELATING TO DEVELOPMENT; APPROVING AND AUTHORIZING THE DEVELOPMENT AND REAL ESTATE PURCHASE AGREEMENT WITH THE GADSDEN COMPANY FOR THE WEST CONGRESS 14 ACRE PARCEL; AND DECLARING AN EMERGENCY.

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

SECTION 1. The Development and Real Estate Purchase Agreement for the West Congress 14 Acre Parcel, attached as Exhibit A, is approved.

SECTION 2. The Mayor is authorized and directed to execute the Development and Real Estate Purchase Agreement for and on behalf of the City of Tucson and the City Clerk is directed to attest to the same.

SECTION 3. The various City officers and employees are authorized and directed to perform all acts necessary or desirable to give effect to this resolution.

SECTION 4. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson that this resolution become immediately effective, an emergency is declared to exist and this resolution shall be effective immediately upon its passage and adoption.

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

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY

REVIEWED BY:



CITY MANAGER


8/1/2008 10:51 AM

**DEVELOPMENT
AND
REAL ESTATE PURCHASE
AGREEMENT**

West Congress 14-Acre Parcel

This Development and Real Estate Purchase Agreement (“Agreement”) is entered into by and between The Gadsden Company (“Gadsden”) and the City of Tucson, a municipal corporation (“City”) as of August ____, 2008.

RECITALS

The following Recitals are incorporated by reference into and constitute an integral part of this Agreement.

A. The purpose of this Agreement is to set forth the mutual and respective understandings and agreements of the parties with respect to the purchase and development by Gadsden of a mixed-use and transit oriented project (the “Project”) on an approximately 14 acre parcel of real property owned by the City located on West Congress Street adjacent to the west bank of the Santa Cruz River and more particularly described on an ALTA Land Survey to be provided by the City pursuant to Section 6.5.1, below and attached as Exhibit A (the “Property”).

B. Gadsden (itself or through related entities) intends to design and construct an integrated mixed-use project to include an approximately 125-room “boutique” hotel, approximately 400 market-rate residential units, workforce and affordable housing and retail, office, market, restaurant and other commercial uses. The unit mix of the Project intended is reflected on the Proposed Master Plan attached hereto as Exhibit B (the “Proposed Master Plan”). It is Gadsden’s intent to follow a schedule to develop the Project in a timely manner pursuant to the Proposed Development Schedule and Phasing Diagram (the “Development Schedule”), attached hereto as Exhibit “B2” and incorporated herein by this reference. The City acknowledges that Gadsden’s ability to meet the Development Schedule will be dependent, in part, upon factors over which Gadsden has no control such as adverse commercial and residential real estate market conditions, a general downturn in the economy, the availability of labor and materials and agrees that no adverse action will be taken against Gadsden if it is unable to meet the Development Schedule as a result of such factors. At least thirty-five percent (35%) of all residential housing in the Project will consist of “workforce” and/or “affordable” housing. Seventeen and one-half percent (17.5%) of the housing within the Project will be offered to low-income residents whose income does not exceed 80% of the area median income (“AMI”) for Tucson and Pima County as published by the U.S. Department of Housing and Urban Development (“Affordable Housing”) and Seventeen and One-half percent (17.5%) of the housing within the Project will be offered to residents whose income is at or below 125% of AMI (“Workforce Housing”).

C. Gadsden shall be responsible for the construction of all “Infrastructure Improvements” for the Project. For purposes of this Agreement, “Infrastructure Improvements”

shall mean and include all streets, sidewalks, water lines, sewer lines and other improvements that are customarily owned, operated or maintained by a municipal or other governmental body (including a linear promenade and water detention areas along the west bank of the Santa Cruz River) but shall not include street car tracks, catenary poles, cables, transformers or other improvements related to the street car line that will run along Cushing Street to the south and Avenida del Convento to the west of the Property.

D. The Property is located between the Menlo Park Neighborhood and the Santa Cruz River adjacent to and north of the City's proposed Cultural Plaza ("Plaza") as so identified on the Proposed Master Plan. The Plaza is expected to include the University of Arizona Science Museum, Arizona State Museum, the Arizona Historical Museum and other similar attractions that will generate pedestrian traffic and visitors to the area ("Plaza Attractions"). The ultimate success of the Project will depend in part upon the manner and progress of development of the Plaza Attractions.

E. The area encompassing the Plaza and the Project will be linked to and joined with the rest of Downtown Tucson by the Cushing Street Bridge (the "Bridge") and a street car line that will run across the Bridge, proceed along Cushing Street between the Plaza and the Project and then turn north along Avenida del Convento to West Congress Street.

F. The location of the street car line on Cushing Street and Avenida del Convento are material inducements to Gadsden's prospective tenants, property purchasers, consumers and other users of the Project to rent, purchase or use properties, facilities and attractions in the Project.

G. Gadsden will also be responsible for arranging for the financing and making of the "Street Car Track Improvements" subsequent to the Phase II Closing (as defined below) and reimbursing the City for its expenditures relating to the Street Car Track Improvements prior to the Phase II Closing. "Street Car Track Improvements" shall include the engineering and installation of the street car tracks and concrete guideways for that portion of the street car line running from the western terminus of the Bridge, westerly along Cushing Street to Avenida del Convento, northerly on Avenida del Convento, and then back to Cushing Street. The configuration of the street car line is shown on Exhibit C, attached hereto (the "Street Car Route"). The City will design the Street Car Track Improvements in coordination with Gadsden.

H. The Property will be purchased by Gadsden in four separate and sequential transactions (each, a "Transaction") identified as Phase I, Phase II, Phase III and Phase IV on Exhibit B. Phase I will consist of Block A; Phase II will consist of Blocks B, C, D, and E; Phase III will consist of Block F and G; and Phase IV will consist of Block H.

I. As provided in this Agreement, each Transaction will have its own closing ("Phase I Closing", "Phase II Closing", "Phase III Closing" and "Phase IV Closing", respectively and, together, the "Closings" or, individually, a "Closing") but each Transaction will be conditioned upon, among other things, the Closing of the previous Transaction.

J. Each Closing will be conditioned upon the occurrence or satisfaction of certain obligations by Gadsden applicable to such Closing (the “Gadsden Phase I Closing Conditions”, the “Gadsden Phase II Closing Conditions”, the “Gadsden Phase III Closing Conditions” and the “Gadsden Phase IV Closing Conditions”, respectively) and upon the occurrence or satisfaction of certain obligations by the City (the “City Phase I Closing Conditions”, the “City Phase II Closing Conditions”, the “City Phase III Closing Conditions” and the “City Phase IV Closing Conditions”, respectively).

K. Gadsden and the City believe that current marketplace and other factors create a timely opportunity to proceed with the development of the Project. Consequently, time is of the essence with respect to the accomplishment of the goals and objectives of this Agreement and the performance of obligations and duties of the respective parties hereunder.

L. This Agreement is subject to the provisions of ARS §38-511.

M. This Agreement is entered into by authority of Arizona Revised Statutes §9-500.05, which authorizes the City to enter into an agreement with any person or entity having an interest in real property providing for the development of such property, establishing the permitted uses of the property and establishing certain development rights. The Project and the provisions of this Agreement are consistent with the objectives and intent of ARS §9-500.05. The City expressly finds and determines that the consideration and commitments herein outlined from and to Gadsden and the City in this Agreement are justified based on other consideration provided under this Agreement, including without limitation the economic development benefits to the community resulting from this Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged and in consideration of the mutual covenants, promises and agreements contained herein, the City and Gadsden agree as follows:

ARTICLE 1

Purchase and Sale of Property

1.1 **Purchase Price; Payment.** The aggregate purchase price for the Property shall be \$3,296,033 (the “Purchase Price”) allocated and payable as provided in this Section 1.1. \$250,000 of the Purchase Price (“Phase I Consideration”) shall be allocated to Phase I and shall be paid as provided in Section 2.2 below.

As provided in Section 8.1 below, as a condition to the closing of Phase II, Gadsden shall assume responsibility for constructing the Street Car Track Improvements and paying the “Street Car Track Costs”. The Street Car Track Costs shall be an amount equal to the agreed-upon aggregate costs of the engineering, financing and installation of the Street Car Track Improvements including interest charges at reasonably commercially-available rates and a 5% management fee for overseeing the construction of the Street Car Track Improvements. In addition, Gadsden shall reimburse the City for its actual costs of constructing the Street Car Track Improvements incurred prior to the Phase II Closing; which amount shall be deemed to be included in the Street Car Track Costs. The Street Car Track Improvements shall be made by

Gadsden pursuant to a Private Improvement Agreement with the City, the terms of which shall be mutually agreeable to Gadsden and the City and which will be executed at the Phase I Closing (as defined below).

1.2 Credit Against Purchase Price. Gadsden shall receive a credit against the payment of the Net Purchase Price in an amount not to exceed the Net Purchase Price or equal to the Street Car Track Costs, whichever is less. The Net Purchase Price is the Purchase Price less the Phase I Consideration. In the event that the Street Car Track Costs are less than the Net Purchase Price, Gadsden shall pay such difference to the City within thirty (30) days following the date ("Reconciliation Date") that each of the following has occurred: (i) the Street Car Track Improvements have been completed and conveyed by Gadsden to the City and (ii) the City and Gadsden have agreed on the amount of the Street Car Track Costs.

ARTICLE 2

Phase I

2.1 Phase I Purchase. The Phase I Closing shall take place upon the occurrence of the Gadsden Phase I Closing Conditions and the City Phase I Closing Conditions (together, the "Phase I Closing Conditions"). At the Phase I Closing, Gadsden shall purchase and the City shall sell Phase I for the Phase I Consideration. Phase I will include retail uses and approximately 125 residential units, as provided for in the Proposed Master Plan and the Development Schedule. Workforce and affordable housing shall be deed restricted to Workforce Housing and/or Affordable Housing in a form to be agreed upon by the parties.

2.2 Phase I Consideration. The consideration for the purchase and sale of Phase I ("Phase I Consideration") will consist of a contribution at the Phase I Closing in the amount of \$250,000 by Gadsden to the City of Tucson Housing Trust Fund to be used for down-payment assistance to eligible persons seeking to purchase a residential unit in Phase I.

2.3 Phase I Closing Date. The Phase I Closing shall occur on the business day ("Phase I Closing Date") that is 10 business days from the date that all of the Phase I Closing Conditions have been satisfied or such other date as the Parties may agree in writing but in no event later than March 31, 2009; subject to extension by either party giving written notice to the other if the Phase I Closing Conditions have not been satisfied by that date through no fault of the party giving notice.

2.4 Phase I Closing Conditions.

2.4.1 City Phase I Closing Conditions.

The obligation of Gadsden to purchase Phase I is subject to the occurrence or satisfaction of the City Phase I Closing Conditions on or before March 15, 2009 ("Phase I Contingency Date") or at the Phase I Closing. The City Phase I Closing Conditions consist of the following:

A. All of the covenants, promises and agreements of the City have been performed and the City is not in default in any of its obligations under this Agreement.

B. The Property has been included within the Rio Nuevo Multipurpose Facilities District, the Rio Nuevo and Downtown Zone, the Downtown Area Infill Incentive District, the Enterprise Zone Bond Program, the Downtown Housing Development Area, and all other then-current areas, zones or programs that provide incentives, waivers, benefits, or impact fee, sales tax, permitting fee or other similar waivers or discounts (e.g., Downtown Core, Pima County Sewer Credits and status as a Community Development Entity), in accordance with the stated program eligibility requirements as adopted by the relevant agency, unless otherwise specified herein. The Project and the Property may also qualify for waivers, discounts, credits, benefits or incentives that become available during the term of the Agreement, provided Gadsden is not in default thereof and all eligibility requirements are met. Incentives, waivers, benefits or discounts that are only available to a 501(c)(3) or other non-profit organization shall also be available to a Community Development Entity (“CDE”) that has been certified by the U.S. Internal Revenue Service. For purposes of this Agreement, reference to a “project” shall mean and include the aggregate development of any Block of the Property, Infrastructure Improvements, or Street Car Track Improvements, provided the project plans are reviewed by the City’s Development Services Department (“DSD”) and not a third party; unless DSD is unable to review such project plans within a time-frame that is comparable to that of a third-party reviewer in which case, such incentives, waivers and benefits will be available to Gadsden .

C. The City has given final approval of all zoning and land-use entitlements necessary in order to develop Phase I in accordance with the Proposed Master Plan.

D. The City has issued building permits for all Phase I Infrastructure Improvements. For purposes of this Agreement, “Phase I Infrastructure Improvements” shall include all Infrastructure Improvements on Phase I including the intersection of Linda Avenue and Paseo de Los Zanjeros and both sides of Paseo de los Zanjeros from Avenida del Convento to Linda Avenue and on Linda Avenue from Paseo de los Zanjeros to Congress Street.

E. The City and Gadsden have agreed on the terms of a \$250,000 performance bond or other form of assurance (the “Performance Bond”) that Gadsden will commence and complete the Infrastructure Improvements and the Phase I through Phase IV Improvements in a timely manner in accordance with the terms of this Agreement and the Development Schedule. To the extent that the terms of the Performance Bond conflict with the development requirements of this Agreement, the terms requiring greater performance shall control. The Performance Bond shall be held by the City through the closing of Phase III, at which time it shall be released; except that upon written request of Gadsden, Mayor and Council may, in its discretion, authorize the earlier release of the Performance Bond.

2.4.2 Gadsden Phase I Closing Conditions.

The obligation of the City to sell Phase I is subject to the occurrence or satisfaction of the Gadsden Phase I Closing Conditions on or before the Phase I Contingency

Date or at the Phase I Closing. The Gadsden Phase I Closing Conditions consist of the following:

A. All of the covenants, promises and agreements of Gadsden have been performed and Gadsden is not in default in any of its obligations under this Agreement.

B. Gadsden has obtained building permits for all Phase I Infrastructure Improvements.

C. Gadsden has demonstrated, to the reasonable satisfaction of the City, that it has sufficient financing available for the completion of the Phase I Infrastructure Improvements.

D. Gadsden has provided (or provides at the Phase I Closing) the City with the Performance Bond.

E. The City and Gadsden have agreed on the terms of the Performance Bond.

2.5 Earnest Money. Within five (5) business days from the date of this Agreement, Gadsden shall deposit the sum of \$50,000 in cash or immediately available funds (“Earnest Money”) with the Escrow Agent (as defined below) as evidence of Gadsden’s good faith intent to perform its obligations herein. Upon the closing of Phase III, the Earnest Money will be released to the City and treated as an additional credit to the Purchase Price in conformance with Section 1.2 herein or paid to Gadsden if the full amount of the Purchase Price has been paid. In the event Phase III fails to close as a result of a default by Gadsden, the Earnest Money will be forfeited to the City.

ARTICLE 3

Phase II

3.1 Phase II Purchase. The Phase II Closing shall take place upon the occurrence or satisfaction of the Gadsden Phase II Closing Conditions and the City Phase II Closing Conditions (together the “Phase II Closing Conditions”) At the Phase II Closing, Gadsden shall purchase and the City shall sell Phase II on the terms set forth in this Article 3. Phase II shall include the improvements described in the Proposed Master Plan.

3.2 Phase II Closing Date. The Phase II Closing shall occur on the business day (“Phase II Closing Date”) that is 10 business days from the date that the Phase II Closing Conditions have occurred or been satisfied or such other date as the parties may agree in writing but in no event later than 24 months from the date of the Phase I Closing (“Projected Phase II Closing Date”), subject to extension by either party giving written notice to the other if the Phase II Closing Conditions have not been satisfied by that date through no fault of the party giving notice.

3.3 Phase II Closing Conditions.

3.3.1 City Phase II Closing Conditions. The obligation of Gadsden to purchase Phase II is subject to the occurrence or satisfaction of the City Phase II Closing Conditions on or before the Projected Phase II Closing Date. The City Phase II Closing Conditions consist of the following:

A. All of the covenants, promises and agreements of the City have been performed and the City is not in default in any of its obligations under this Agreement.

B. The City has given final approval of all zoning and land-use entitlements necessary in order to develop Phase II in accordance with the Master Plan.

C. The City has issued building permits for all Infrastructure Improvements on Phase II ("Phase II Infrastructure Improvements"), Phase III ("Phase III Infrastructure Improvements"), Phase IV ("Phase IV Infrastructure Improvements") and the Street Car Track Improvements.

D. The City has brought the grade of Phase II, Phase III and Phase IV to "Closing Grade" plus or minus one-tenth ($1/10^{\text{th}}$) of one foot, or as close thereto according to reasonably practical engineering standards for the purposes intended. "Closing Grade" is the natural elevation of the Property. The City has removed all earthen fill currently stored on the Property and the Property has been restored to its natural elevation.

E. The "pad" for the Plaza has been pre-developed and is at construction grade.

F. Methane gas mitigation efforts on the area west of the Plaza as shown on Exhibit B have been substantially completed and the process for removing the above ground methane gas mitigation system has begun. However, monitoring wells may be required by State and Local regulatory authorities to remain and, in such event; the City will make every effort reasonably practical to minimize impact on adjacent property.

3.3.2 Gadsden Phase II Closing Conditions. The obligation of the City to sell Phase II is subject to the occurrence of the Gadsden Phase II Closing Conditions on or before the Projected Phase II Closing Date. The Gadsden Phase II Closing Conditions consist of the following:

A. All of the covenants, promises and agreements of Gadsden have been performed and Gadsden is not in default in any of its obligations under this Agreement.

B. Gadsden has completed the Phase I Infrastructure Improvements and conveyed the Infrastructure Improvements located in Phase I to the City.

C. Gadsden has started construction of structural improvements to Phase I having a cost, when completed, of at least \$10 million.

D. Gadsden has closed or, simultaneous to the Phase II Closing, closes a construction loan in an amount sufficient to pay the estimated cost of the Phase II Infrastructure Improvements, Phase III Infrastructure Improvements, Phase IV Infrastructure Improvements and the Street Car Track Improvements.

E. Gadsden has increased the amount of the Performance Bond to \$500,000.

ARTICLE 4

Phase III

4.1 Phase III Purchase. Upon the occurrence or satisfaction of the Gadsden Phase III Closing Conditions and the City Phase III Closing Conditions (together, the “Phase III Closing Conditions”), at the Phase III Closing, Gadsden agrees to purchase and the City agrees to sell Phase III.

4.2 Phase III Closing Date. The Phase III Closing shall occur on the business day (“Phase III Closing Date”) that is 10 business days from the date that all of the Phase III Closing Conditions have been satisfied or such other date as the parties may agree in writing but in no event later than thirty-six (36) months from the Phase I Closing (“Projected Phase III Closing Date”).

4.3 Phase III Closing Conditions.

4.3.1 City Phase III Closing Conditions. The obligation of Gadsden to purchase Phase III is subject to the occurrence or satisfaction of the City Phase III Closing Conditions on or before the Projected Phase III Closing Date. The City Phase III Closing Conditions consist of the following:

(1) All of the covenants, promises and agreements of the City have been performed and the City is not in default in any of its obligations under this Agreement.

(2) A “Letter of Map Revision - Fill” (“LOMR-F”) has been issued by Federal Emergency Management Agency (“FEMA”) removing Phase III and Phase IV from the FEMA Flood Plain Map.

(3) The remaining infrastructure for the street car line other than the Street Car Track Improvements has been completed, including catenary poles, overhead lines, etc.

4.3.2 Gadsden Phase III Closing Conditions. The obligation of the City to sell Phase III is subject to the occurrence or satisfaction of the Gadsden Phase III Closing

Conditions on or before the Projected Phase III Closing Date. The Gadsden Phase III Closing Conditions consist of the following:

(1) All of the covenants, promises and agreements of Gadsden have been performed and Gadsden is not in default in any of its obligations under this Agreement.

(2) Gadsden has completed the Infrastructure Improvements on Phase II Phase III and Phase IV and the Street Car Track Improvements.

(3) Gadsden has conveyed the Infrastructure Improvements located in Phase II, Phase III and Phase IV and the Street Car Track Improvements to the City.

(4) Gadsden has started construction of structural improvements to Phase II having a cost, when completed of at least \$15 Million.

ARTICLE 5

Phase IV

5.1 Phase IV Purchase. Upon the occurrence or satisfaction of the Gadsden Phase IV Closing Conditions and the City Phase IV Closing Conditions (together, the “Phase IV Closing Conditions”), Gadsden agrees to purchase and the City agrees to sell Phase IV at the Phase IV Closing.

5.2 Phase IV Closing Date. The Phase IV Closing shall occur on the business day (“Phase IV Closing Date”) that is 10 business days from the date that all of the Phase IV Closing Conditions have been satisfied or such other date as the parties may agree in writing, but in no event later than 48 months from the date of the Phase I Closing (“Projected Phase IV Closing Date”).

5.3 Phase IV Closing Conditions.

5.3.1 City Phase IV Closing Conditions. The obligation of Gadsden to purchase Phase IV is subject to the occurrence or satisfaction of the City Phase IV Closing Conditions on or before the Projected Phase IV Closing Date. The City Phase IV Closing Conditions consist of the following:

1. All of the covenants, promises and agreements of the City have been performed and the City is not in default in any of its obligations under this Agreement.
2. The construction of the Bridge has been completed.
3. The construction of the flood control related improvements contemplated in Section 4.3.1(2) is completed.
4. The Performance Bond has been released.

5.3.2 Gadsden Phase IV Closing Conditions. The obligation of the City to sell Phase IV is subject to the occurrence or satisfaction of the Gadsden Phase IV Closing Conditions on or before the Projected Phase IV Closing Date. The Gadsden Phase IV Closing Conditions consist of the following:

1. All of the covenants, promises and agreements of Gadsden have been performed and Gadsden is not in default in any of its obligations under this Agreement.

ARTICLE 6

Terms of Escrow

6.1 Establishment of Escrow Account. The parties shall establish an escrow account with Kathy Wright, Fidelity National Title ("Escrow Agent") who shall be responsible for managing the Closings. This Agreement shall constitute escrow instructions to the Escrow Agent and a fully executed copy or counterpart copies of this Agreement shall be deposited with the Escrow Agent for this purpose.

6.2. If a Transaction fails to close because of a default by the City, the City shall be liable for all customary escrow cancellation charges with respect to such Transaction. If a Transaction fails to close because of Gadsden's default, Gadsden shall be liable for all customary escrow cancellation charges with respect to such Transaction. If a Transaction fails to close for any other reason, City and Gadsden shall each be liable for one-half (1/2) of all customary escrow cancellation charges.

6.3 Closing Costs.

6.3.1. City's Closing Costs. Upon the closing of a Transaction, the City shall pay all recording costs, one-half (1/2) of the escrow charges and the cost of the title policy relating to such Transaction

6.3.2 Gadsden's Closing Costs. Upon the closing of a Transaction, Gadsden shall pay one-half (1/2) of the escrow charges and that portion of the cost of the owner's title policy which exceeds the cost of a standard coverage title policy in the full amount of the applicable Purchase Price, and the full cost of any additional endorsements that Gadsden may request relating to such transaction.

6.4 Deed. At a Closing, the City shall convey title to the real property included within the applicable Phase to Gadsden by special warranty deed in a form to be agreed upon by the parties.

6.5 Survey; Title.

6.5.1 Survey. Within 30 days following the execution of this Agreement, the City shall provide to Gadsden an ALTA Land Survey of the Property, which shall be conducted

by an Arizona registered land surveyor chosen by the City, shall be certified to Gadsden, its successors and assigns, their lenders and the title insurer, shall be dated no earlier than thirty (30) days prior to the date of delivery. The Survey shall show all matters of record and other existing improvements. Following final determination of the boundaries of the Property, the property lines will be finalized and the updated Survey will serve as the basis for the final legal description of the Property.

6.5.2 Title Report. Within ten (10) days from the date of this Agreement, Escrow Agent shall deliver a current Commitment for Title Insurance or a Preliminary Title Report (the "Title Report") on the entire Property from the Escrow Agent acting as title insurer ("Title Insurer") to Gadsden and the City. The Title Report shall show the status of title to the Property as of the date of the Title Report and shall be accompanied by legible copies of all documents referred to as Title Exceptions in the Title Report.

6.5.3 Title Review Period. Gadsden shall have fifteen (15) days after the receipt of the Title Report ("Title Review Period") to review the Title Report and to give the City and Escrow Agent notice of any title exception which is unacceptable to Gadsden. If Gadsden gives a notice of dissatisfaction as to any exception to title as shown in the Title Report, the City shall have five (5) business days of receipt of Gadsden's notice to notify Gadsden in writing of whether the City shall take reasonable steps to cure such objection on or prior to the Phase I Closing. If the City's intention is to not cure any such objection, Gadsden may, in its sole and absolute discretion, elect to cancel this Agreement and obtain a full refund of the Earnest Money or elect to waive objection to the title exception and proceed with the Phase I Closing. Failure by the City to notify Gadsden of its intention shall be deemed its intention to cure any objection. Gadsden's failure to timely approve or disapprove a title exception shall be deemed an approval of title as described in the Title Report and a waiver of its right to cancel this Agreement according to this Section.

6.5.4 Title Report Update. The Title Company shall update the Title Report after the Title Review Period at least 45 days prior to each Closing (a "Title Report Update") and if such Title Report Update discloses a new material title exception not previously disclosed in the Title Report which was not previously known to or created by Gadsden, Gadsden shall have 15 days after receipt of such Title Report Update to review such Title Report Update and to give the City and Escrow Agent notice of any exception included in the Title Report Update which is unacceptable to Gadsden. If Gadsden gives a notice of dissatisfaction as to any exception to title as shown in the Title Report Update, the City shall have 5 business days of receipt of Gadsden's notice to notify Gadsden in writing of whether the City shall take reasonable steps to cure such objection on or prior to next Closing. If the City's intention is to not cure any such objection, Gadsden may, in its sole and absolute discretion, elect to cancel this Agreement and obtain a full refund of the applicable Earnest Money and a release of the Performance Bond or elect to waive objection to the title exception and proceed with such Closing. Failure by the City to notify Gadsden of its intention shall be deemed its intention to cure any objection. Gadsden's failure to timely approve or disapprove a title exception shall be deemed an approval of title as described in the Title Report Update and a waiver of its right to cancel this Agreement according to this section.

6.5.5 Owner's Title Policies.

1. City shall cause Escrow Agent to provide Gadsden with an Owner's Policy of Title Insurance (the "Phase I Owner's Title Policy") at the Phase I Closing. The Phase I Owner's Title Policy shall be issued by the Escrow Agent in the amount of \$250,000, be effective as of the Phase I Closing Date and shall insure Gadsden that fee simple title to the Phase I Property is vested in Gadsden, subject only to (i) the usual printed exceptions and exclusions contained in such title insurance policies, (ii) the exceptions of title approved (or deemed approved) by Gadsden as provided for in Section 6.4, and (iii) any other matter approved in writing by Gadsden.

2. City shall cause Escrow Agent to provide Gadsden with an Owner's Policy of Title Insurance (the "Phase II Owner's Title Policy") at the Phase II Closing. The Phase II Owner's Title Policy shall be issued by the Escrow Agent in the amount of \$3,296,033, be effective as of the Phase II Closing Date and shall insure Gadsden that fee simple title to the Phase II Property is vested in Gadsden, subject only to (i) the usual printed exceptions and exclusions contained in such title insurance policies, (ii) the exceptions of title approved (or deemed approved) by Gadsden as provided for in Section 6.5.3, and (iii) any other matter approved in writing by Gadsden.

3. City shall cause Escrow Agent to provide Gadsden with an Owner's Policy of Title Insurance (the "Phase III Owner's Title Policy") at the Phase III Closing. The Phase III Owner's Title Policy shall be issued by the Escrow Agent in the amount of \$1,648,016.50, be effective as of the Phase III Closing Date and shall insure Gadsden that fee simple title to the Phase III Property is vested in Gadsden, subject only to (i) the usual printed exceptions and exclusions contained in such title insurance policies, (ii) the exceptions of title approved (or deemed approved) by Gadsden as provided for in Section 6.4, and (iii) any other matter approved in writing by Gadsden. Gadsden may not cause or create any encumbrance upon the Phase III Property prior to closing of Phase IV other than as a result of securing financing for the construction of Phase III Improvements or Infrastructure Improvements.

4. City shall cause Escrow Agent to provide Gadsden with an Owner's Policy of Title Insurance (the "Phase IV Owner's Title Policy") at the Phase IV Closing. The Phase IV Owner's Title Policy shall be issued by the Escrow Agent in the amount of \$1,648,016.50, be effective as of the Phase IV Closing Date and shall insure Gadsden that fee simple title to the Phase IV Property is vested in Gadsden, subject only to (i) the usual printed exceptions and exclusions contained in such title insurance policies, (ii) the exceptions of title approved (or deemed approved) by Gadsden as provided for in Section 6.4, and (iii) any other matter approved in writing by Gadsden.

6.6 Provisions Relating to Investment and Disbursement of Earnest Money. The Earnest Money shall be invested by the Escrow Agent in a federally-insured interest bearing account. In the event that the Phase I Closing or the Phase II Closing or the Phase III Closing does not occur because of a default by Gadsden, the Earnest Money shall be paid to the City as liquidated damages. In the event that the Phase I Closing or Phase II Closing or Phase III Closing does not occur because of a default of the City, the Earnest Money shall be paid to

Gadsden. If the Phase III Closing occurs, the Earnest Money will be released to the City and a credit given to Gadsden against the Purchase Price in conformance with Section 2.5 herein. All interest earned on the Earnest Money shall accrue to the benefit of the party entitled to receive such Earnest Money.

ARTICLE 7

Covenants, Promises and Agreements of City

7.1 Removal from FEMA Floodplain Map. Immediately upon execution of this Agreement, the City will initiate and actively pursue the process necessary and make the improvements necessary in order to obtain a LOMR-F from FEMA eliminating the “floodplain” designation for Phase III and Phase IV on the FEMA Floodplain Map.

7.2 Inclusion of Property in Incentive Zones. The City staff will take and support all administrative action necessary and appropriate to include the Property within the Rio Nuevo Multipurpose Facilities District, the Central Benefit District, the Rio Nuevo and Downtown overlay zone (already included), the Downtown Infill Incentive District (already included), the Enterprise Zone Bond Program, and all other current and future areas, zones or programs that provide incentives, benefits, or impact fee, sales tax, permitting fee or other similar waivers or discounts. Provided, however, any legislative action to be undertaken by the City in these regards shall not be impaired. Incentives, waivers, benefits or discounts that are only available to a 501(c)(3) or other non-profit organization shall also be available to a CD E that has been certified by the U.S. Internal Revenue Service.

7.3 Restrictive Uses. The City will impose restrictions on the uses of the land owned by the City west of the Plaza to activities that are not directly competitive with the principal uses of the Property. Directly competitive uses may include a hotel, a public market and other uses to be determined by mutual agreement of Gadsden and the City, provided such restrictions do not unreasonably impair the City’s ability to market the land for other appropriate development sought by the community.

7.4 Expedited Processing of Applications. The City, in cooperation with Gadsden, will establish processes and procedures to ensure that Gadsden’s plans, permits and other applications are reviewed and approved as expeditiously as possible. The City will, to the fullest extent possible, facilitate and expedite the necessary processes in order to obtain rezoning of the Project to allow the uses and purposes described above and to obtain permits and approvals necessary to develop and build the Project and the Infrastructure Improvements.

7.5 Use of Phase III and Phase IV by Gadsden. Prior to the Phase III Closing and the Phase IV Closing and so long as it is not in default of this Agreement, Gadsden shall have a temporary revocable easement to go upon and use Phase III and Phase IV for parking, storage and other temporary uses and for purposes of installing Infrastructure Improvements; provided such uses do not unreasonably interfere with City’s conditions to re-grade and obtain a LOMR-F and subject to prior approval by the City; which approval shall not be unreasonably withheld.

7.6 Project Manager. The City shall designate a city employee to serve as the Project Manager for the Project. The Project Manager's duties shall include: (a) coordination of the City's efforts and responsibilities with those of Gadsden; (b) establishment and management of effective communication between and among the parties to this Agreement; (c) ongoing communication with the Mayor and City Council, City Manager and other City officials as required or necessary to consummate the transactions contemplated herein; (d) communication with neighborhood or community interest groups and stakeholders regarding the progress of the project and key decisions related thereto; (e) assistance to Gadsden in its efforts to timely obtain all necessary governmental approvals related to the position of the property under this Agreement; and (f) generally, to serve as an ombudsman for the City in connection with the City's involvement with the Project. The City shall notify Gadsden in writing of the person designated as Project Manager.

7.7 Signs. Prior to the Closing, Gadsden may place signs on the Property with City's prior written consent to design, size and location, said consent to be provided or denied by City within no more than ten (10) business days of request by Gadsden.

7.8 Sewer Credits. Gadsden shall be entitled to the benefit of any sewer credits associated with the Property. The City and Gadsden shall execute such documents as may reasonably be required to evidence and implement the foregoing.

7.9 Right of Entry. Promptly following execution of this Agreement, the City shall grant Gadsden a "Right of Entry" in a form to be mutually agreed by Gadsden and the City that allows Gadsden the right to enter upon the Property at any time during the term of this Agreement and prior to each of the Closings for the purposes of effecting investigation, testing, due diligence, design and planning for construction of the Project in the standard form used by the City for such purposes. The City shall also grant Gadsden such right of entry and other rights as may be necessary in order for Gadsden to plan for, engineer and construct the Phase III Infrastructure Improvements.

7.10 Reimbursement for Infrastructure Improvement Costs. If either the Phase III Closing or the Phase IV does not occur and Gadsden is not in default, the City shall reimburse Gadsden for the cost of the Infrastructure Improvements included within such Phase or Phases ("Infrastructure Costs"). The Infrastructure Costs will include all amounts expended by Gadsden for the construction of the Infrastructure Improvements within such Phase or Phases including interest charges at reasonable commercially-available rates and a 5% management fee applicable to such amount. Gadsden shall convey the Phase III Infrastructure Improvements or Phase IV Infrastructure Improvements, as the case may be, to the City upon tender by the City of the Infrastructure Costs for such Phase.

ARTICLE 8

Covenants, Promises and Agreements of Gadsden

8.1 Construction of Infrastructure Improvements; Street Car Track Improvements.

8.1.1 Subject to the occurrence of the Phase II Closing, Gadsden shall provide for the construction of and pay for all Infrastructure Improvements on the Property (subject to possible reimbursement as provided in Section 7.10) and, to the extent but not to exceed the amount of the Net Purchase Price, provide for the construction of and pay or reimburse the City for the Street Car Track Improvements., Gadsden shall not be required to provide any assurances or post any surety bond (other than the Performance Bond) in connection with the construction of the Infrastructure Improvements and Street Car Track Improvements, except as may be reasonably required and agreed on in the PIA.

8.1.2 Construction of all improvements which are funded or repaid all or in part with public funds, including the Street Car Track Improvements, shall be accomplished in conformance with the requirements of A.R.S. Title 34. These provisions generally require publicly funded construction projects to be put out to bid and awarded to the lowest qualified bidder.

8.2 Standards for Construction of Property.

8.2.1 Gadsden shall use and employ only licensed and qualified contractors.

8.2.2 All improvements shall be constructed in a good and workmanlike manner, and constructed and maintained in compliance with all applicable laws, rules, ordinances and regulations.

8.2.3 Gadsden shall construct all improvements in accordance with the City's zoning requirements and all Federal and State regulations.

8.3 Development Review and Approval. In order to facilitate expeditious City processing of development approvals, Gadsden shall submit thorough and complete plans, permit applications and other applications, including all construction and building permit applications, to City's reasonable satisfaction.

8.4 Government Approvals. Gadsden shall obtain all necessary government approvals, permits or licenses that are necessary to Gadsden's construction, operation, use or improvement of the Property. If any certificate, permit, license or approval issued to Gadsden is cancelled, expires, lapses or is otherwise withdrawn by any such governmental authority, Gadsden shall make every effort to obtain replacement permits for the governmental approval to the satisfaction of City. Failure to do so shall constitute a default under this Agreement.

8.5 Taxes, Fees and Other Gadsden Payables.

8.5.1 After a Closing of a Transaction, Gadsden shall bear, pay and discharge all of the following (which are collectively referred to in this Agreement as "Impositions") as they apply to the Phase involved in such Closing at least fifteen (15) days before the last day when payment may be made without penalty or interest and before the nonpayment constitutes a default under the provisions of any mortgage on such Phase after such Closing.

8.5.2 All taxes, assessments, water rates and charges, sewer charges, license and permit fees, and all other governmental impositions and charges of every kind and nature whatsoever, general and special, ordinary and extraordinary, foreseen and unforeseen, of any kind or nature whatsoever and each and every installment thereof, which shall prior to and during the term of this Agreement be charged, laid, levied, assessed, imposed, become due and payable, or arise.

8.5.3 All taxes charged, laid, levied, assessed or imposed in lieu of or in addition to the foregoing under or by virtue of all present or future laws, ordinances, requirements, orders, directions, rules or regulations of the federal, state, county and municipal governments and of all other governmental authorities whatsoever and in connection with the use, occupancy or possession of or grow due or payable out of or for the applicable Phase or any part of it or any building, appurtenances or equipment on or in the applicable Phase or any part of it or the sidewalks or streets in front of or adjoining the applicable Phase or any rents or additional rents payable under this Agreement.

8.5.4 To the extent permitted by law and by any mortgage, Gadsden shall have the right to apply for the conversion of any special assessment for local improvements to cause the same to be payable in installments and upon such conversion Gadsden shall be obligated to pay and discharge punctually only such of said installments (with interest and charges thereon) as shall become due and payable during the term of this Agreement.

8.6 Point of Sale Contribution for Affordable Housing. Gadsden will through deed restrictions or other means, in forms approved by the City, establish a mechanism that will require that one-percent (1%) of the sales price of residential properties located within the Project, including resales, will be paid to the City of Tucson Housing Trust Fund. Any residential units designated as Affordable Housing in Phase I are exempted from this contribution for the FIRST sale ONLY. The proceeds from this contribution for the FIRST sale ONLY of all Workforce Housing and market rate residential units (unrestricted) in Phase I shall be made available for down payment assistance to households that qualify to purchase affordable housing in the Project.

8.7 Parking Garage. Gadsden shall, at its own expense, construct a 550 space parking garage on the Property as part of Phase III. Gadsden shall, to the extent reasonably practical, reserve an agreed upon number of parking spaces to the City for public use in exchange for credits on a per-space basis to offset the discount in value of Block E conveyed to Gadsden.

8.8 LEED Certification. Gadsden shall design and construct all buildings in the Project to LEED certification.

8.9 Conveyance Infrastructure Improvements. Gadsden shall convey the Infrastructure Improvements to the City pursuant to Section 4.3.2(3), at the Phase III Closing or pursuant to Section 7.10.

ARTICLE 9
Rezoning; PAD and Other Approvals

9.1 Plan Review. Gadsden may use third-party review of all plans for the Property at Gadsden's sole cost and the City shall cooperate with Gadsden and the third-party reviewers to ensure that Gadsden realizes the greatest possible reduction of the time required for the review of such plan. Provided however, should Gadsden seek permit fee waivers available to it under Section 2.4.1.B of this Agreement, the plan review shall be conducted by the City's DSD; unless DSD cannot complete such plan review within a time frame that is comparable to the third-party reviewer. The City shall, consistent with its adopted policies, expeditiously review and, if appropriate, approve all Gadsden's plans, permits and other applications, including all construction and building approvals (collectively, the "Development Approval or Approvals").

9.2 Overlapping Development Review. City will cooperate with Gadsden to identify opportunities for "overlapping" development review so as to reduce the overall time required for plan review and Project construction. For example, the City agrees that it may be possible to accelerate the submittal of certain construction plans, and grading/excavation plans, underground site utility plans and foundation plans, before approval of a final plat or development plan. As a further example, Gadsden may expedite development of Block A by electing to proceed under its existing zoning or by exercising its option to include Block A in a Planned Area Development ("PAD") for the Project. Subject to Gadsden's assumption of risk in the event of design changes, the City and Gadsden will cooperate to allow the submittal of such construction plans following the second review of the development plan.

9.3 Rezoning. The City shall, to the fullest extent practicable, facilitate and expedite the process of the rezoning of the Property in accordance with the terms of the LUC and City development guidelines.

9.4 Plan Check Review. City shall, to the fullest extent practicable, expedite all plan check review for the Project in accordance with the terms of the LUC and City development guidelines.

ARTICLE 10
General Provisions

10.1 Successors and Assigns. Subject to the provisions of this section, all of the provisions of this Agreement shall inure to the benefit of and be binding upon successors and assigns of the parties to this Agreement pursuant to A.R.S. §9-500.05(D). Gadsden may assign all or a portion of its rights and obligations under this Agreement as follows:

A. The assignment may not be to any person or entity not managed by Gadsden and through which Gadsden does not retain development control of the Project. Gadsden shall provide the City with copies of entity documents that demonstrate that Gadsden will manage the assignee entity and retain control of the development of the Project.

B. The assignment is by written instrument, expressly assigning such rights and obligations.

C. Gadsden has provided prior written notice of the assignment to the City and the City has approved the assignment.

D. The rights and obligations of Gadsden shall be assignable only if expressly stated in writing with the prior approval of the City.

E. The City shall not unreasonably withhold or delay providing consent to any assignment requested by Gadsden as provided in this section.

10.2 Notices. All notices, requests, demands and other communications under this Agreement shall be sufficiently given if personally delivered or mailed, certified mail, return receipt requested, or express delivery service with a delivery receipt to the office of the parties shown as follows; or such other address as the parties may designate in writing from time to time:

City	City of Tucson Project Manager _____ _____ _____
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With copies to:	Mike Rankin City Attorney 255 West Alameda P.O. Box 27210 Tucson, AZ 85726 - 7210
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Gadsden:	The Gadsden Company Attn: Adam Weinstein 127 West Franklin Street Tucson, AZ 85701
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With copies to:	Lawrence M. Hecker Hecker & Muehlebach, PLLC 405 W. Franklin Street Tucson, AZ 85701
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10.3 Recordation. This Agreement shall be recorded in its entirety in the official records of Pima County, Arizona, not later than ten (10) days after this Agreement is executed by the parties.

10.4 Amendments. No change or addition may be made to this Agreement except by a written amendment executed by the parties. Within ten (10) days after any amendment to this Agreement, such amendment shall be recorded in the official records of Pima County, Arizona.

10.5 Waiver. Except as otherwise specifically provided herein, no delay in exercising any right to remedy shall constitute a waiver thereof and no waiver by the City or Gadsden of the breach of any covenant of this Agreement shall be construed as a waiver of any proceeding or succeeding breach of the same or any other covenant or condition of this Agreement.

10.6 No Waiver of Strict Performance. The failure of any party to insist upon a strict performance of any of the agreements, terms, covenants and conditions of this Agreement shall not be deemed a waiver of any rights or remedies that such party may have and shall not be deemed a waiver of any subsequent breach or default in any of such agreements, terms, covenants and conditions.

10.7 Governing Law. This Agreement is entered into in Arizona and shall be construed and interpreted under the laws of Arizona. In particular, this Agreement is subject to the provisions of A.R.S. §38-511. This Agreement shall not be construed to require the City to perform any act that is prohibited by said laws, the City's charter, laws and regulations and all other applicable laws nor require Gadsden to perform any act whose performance is reasonably dependant upon the performance of any act by the City that the City cannot be required to perform.

10.8 Cooperation in the Event of Legal Challenge. In the event of any legal action or proceeding instituted by a third party challenging the validity of any provision of this Agreement, the parties shall cooperate in diligently defending such action or proceeding.

10.9 Dispute Resolution. In the event there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a 45-day moratorium on litigation, during which time the parties agree to attempt to settle the dispute by non-binding mediation before commencement of litigation. The matter in dispute shall be submitted to a mediator mutually selected by Gadsden and the City. In the event that the parties cannot agree upon the selection of a mediator within seven days, then within three days thereafter, Gadsden and the City shall request the presiding settlement judge of the Superior Court of Pima County, Arizona, to appoint an independent mediator. The mediator selected shall have at least five years experience in mediating or arbitrating disputes relating to land and property development. The cost of any such mediation shall be divided equally between Gadsden and the City. The conduct and results of the mediation shall be non-binding on the parties, shall not be admissible in any subsequent litigation and shall not limit any party's right to initiate litigation. This Section 10.9 shall not apply to any right of the parties that must be exercised within a certain number of days that is less than 45.

10.10 Severability. If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect, provided that the overall intent of the parties is not vitiated by such severability.

10.11 No Partnership; Third Parties. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other

arrangement between Gadsden and the City. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization or corporation not a party to this Agreement, and no such other person, firm, organization or corporation shall have any right or cause of action under this Agreement.

10.12 Time of Essence. Time is of the essence of this Agreement.

10.13 Force Majeure. Notwithstanding any other term, condition or provision of this Agreement to the contrary, if any party to this Agreement is precluded from timely satisfying or fulfilling any duty or obligation imposed upon it due to labor strikes, material shortages, war, civil disturbances, weather conditions, natural disasters, acts of God, an order of a court enjoining either party from performing the tasks required under this Agreement, work stoppages due to archeological or environmental findings, or other events beyond the reasonable control of such party, the time period provided herein for the performance by such party of such duty or obligation shall be extended for a period equal to the delay occasioned by such event.

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

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

10.16 Effective Date. This Agreement is effective upon execution by all of the parties and shall be referred to as the Effective Date.

10.17 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement. Delivery of original, facsimile or PDF signatures transmitted by email shall be effective to bind the parties hereto.

10.18 Entire Agreement. This Agreement constitutes the entire agreement and understanding of the parties pertaining to the subject matter of the Agreement and supersedes all offers, negotiations and other agreements of any kind. All prior and contemporaneous agreements, representations and understandings of the parties, oral or written, are superseded and merged in this Agreement. There are no representations or understandings of any kind not set forth herein.

10.19 Anti-Moratorium. No moratorium, as that term is defined in A.R.S. §9-463.06, shall be imposed on the Property unless it is imposed pursuant to an ordinance that complies with A.R.S. §9-463.06, as it may be amended.

10.20 Insurance. Prior to entry upon the Project Site pursuant to a right of entry and continuing until the termination of this Agreement, Gadsden shall (or shall cause its contractors and consultants to) maintain and keep in force insurance, naming City as an additional insured, if applicable, of the following types, said insurance policy to be provided to the City prior to the execution of this Agreement.

10.20.1. "All Risk" insurance against loss or damage by fire, flood, and such other risks and matters including, without limitation, business interruption, rental loss, public liability, and boiler damage and liability. The amount of such insurance will not be less than 100% of the full replacement value of the Project, including the cost of debris removal, without deduction for depreciation.

10.20.2. General liability insurance with a combined single limit of not less than \$5,000,000 for injury to or death of any one person, for injury to or death of any number of persons in one occurrence, and for damage to property insuring against any and all liability of City and Gadsden including, without limitation, coverage for contractual liability and broad form property damage.

10.20.3. Workers' Compensation insurance in accordance with the laws of Arizona.

10.21 Modifications to Phases. In order to take advantage of market opportunities with respect to the development of the Property and accommodate the needs and schedule of potential users of the Project that will provide an economic stimulus to downtown Tucson, the City Manager, at his discretion, may alter and vary the composition of the respective Phases and advance the sale of one or more Blocks within a particular Phase.

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IN WITNESS WHEREOF, the parties have executed this Development and Real Estate Purchase Agreement as of the dates written below.

Dated: _____

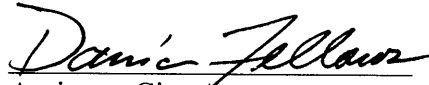
CITY OF TUCSON,
a municipal corporation

By: _____
Mayor

ATTEST:

CITY CLERK

APPROVED AS TO FORM:


Assistant City Attorney

THE GADSDEN COMPANY,
an Arizona corporation

By: _____
Print name: _____
Date: _____